

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANDRES J. WASHINGTON,
Fingerprint Geometric Analysis,

Plaintiff,

against

POLICE DEPARTMENT, CITY OF NEW YORK,

Defendant.
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MEMORANDUM OPINION
AND ORDER
93 Civ. 5962 (JFK)

JOHN F. KEENAN, United States District Judge:

BACKGROUND

By Summons and Complaint dated August 22, 1993, plaintiff brought this action under the Administrative Procedure Act, 5 U.S.C. section 552(a)(4)(B) (1977 & Supp. 1993) ("Freedom of Information Act" or "FOIA"), seeking disclosure of the fingerprint records of John Lennon and Malcolm X that plaintiff maintains are in the possession of the Police Department of the City of New York.

DISCUSSION

Defendant has filed a motion to dismiss this action for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Defendant argues, and this Court agrees, that the Complaint fails to state a cognizable claim under FOIA.

I. Standards for a Motion to Dismiss

In deciding a motion to dismiss, it is necessary for the Court to view the complaint in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 237 (1974);

Yoder v. Orthomolecular Nutrition Inst., Inc., 751 F.2d 555, 562 (2d Cir. 1985). The Court must accept the factual allegations stated in the complaint as true. See Cooper v. Pate, 378 U.S. 546 (1964). A motion to dismiss for failure to state a claim may therefore only be granted if it appears, beyond doubt, that the plaintiff can prove no facts in support of its claim that entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. Freedom of Information Act

In order to state a claim under section 552(a)(4)(b) of FOIA, defendant must fit the meaning of "agency" as defined by FOIA. FOIA defines an agency as "each authority of the Government of the United States . . ." See FOIA, 5 U.S.C. § 551(1). The Police Department of the City of New York is not an agency of the federal government and accordingly is not subject to the provisions of FOIA. FOIA does not apply to municipal agencies. See FOIA, 5 U.S.C. § 551(1); Rankel v. Town of Greenburgh, 117 F.R.D. 50, 54 (S.D.N.Y. 1987). Therefore, plaintiff has failed to state a claim upon which relief can be granted and his Complaint must be dismissed.

Had plaintiff stated his claim under the comparable state statute, the New York Public Officers Law section 84 et seq. (McKinney 1988 & Supp. 1993) ("Freedom of Information Law" or "FOIL"), defendant would fit the definition of agency. See FOIL, N.Y. Public Officers Law § 86(3). However, an action under FOIL must be brought pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") section 7801 et seq. See FOIL §

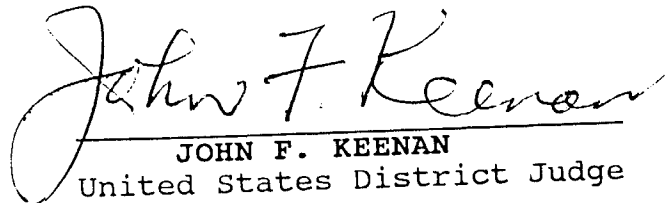
89(4)(b). The appropriate venue for an Article 78 proceeding lies in the New York supreme court. See CPLR § 506(b). Venue is not appropriate in this Court. Moreover, as plaintiff is a New York resident who is attempting to sue a New York defendant, and as FOIL does not establish federal question jurisdiction, there is no basis for jurisdiction in this Court.

CONCLUSION

Defendant's motion to dismiss plaintiff's Complaint is granted. Defendant's request for costs, fees and disbursements is denied. The Court orders this case closed and directs the Clerk to remove it from the active docket.

SO ORDERED.

Dated: New York, New York
August 22, 1994


JOHN F. KEENAN
United States District Judge