



OFFICE OF THE DISTRICT ATTORNEY, Bronx County

DARCEL D. CLARK
District Attorney

198 East 161st Street
Bronx, New York 10451

(718) 838-7090
Fax (718) 590-6523
Email: coddingtonp@bronxda.nyc.gov

PETER D. CODDINGTON
Chief Appellate Attorney
FOIL Appeals Officer

February 14, 2022

Via Electronic Mail to jjcphd67@gmail.com



Re: Appeal; Freedom of Information Law Request
David Berkowitz

Dear ,

In response to your appeal dated January 22, 2022, asserting the denial of your request dated January 21, 2022, I affirm the denial and find that our FOIL Unit acted in accordance with the Freedom of Information Law.

As stated in her January 21, 2022 letter, the Record Access Officer's ("RAO's") denial is based on the certification of a diligent search by Benigno Burgos, Trial Preparation Assistant. Your contention that this Office must retain records for a minimum length of time is mistaken. The Bronx County District Attorney's Office is exempt from the provisions stated in the New York State Archives, State Education Department, Section 57.25 of the Arts and Cultural Affairs Law, as well as, Part 185, Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

New York State Archives, State Education Department, Section 57.33 states that provisions of this article shall not apply to:

1. The records of any court, except as provided in section 57.35 of this article;
2. The records of any city with a population of one million or more, and the records of any county contained therein, so long as the destruction of the records of such city or county shall be carried out in accordance with the procedure prescribed by any existing law exclusively applicable to the destruction of the records of such city or county, provided that section 57.35 of this article shall apply to grants for local government records management for supreme court records in the custody of the counties of New York, Kings, Queens, Richmond and Bronx, and records under the jurisdiction of the department of records and information services of the city of New York or its successor agency, and records under the jurisdiction of the city clerk of the city of New York. If any such law shall be amended by local law after the first day of July, nineteen hundred fifty-one, the provisions of this section shall not apply to the destruction of such records if the procedures therefor established by such law, as amended by local law, shall be acceptable to the commissioner of education;
3. The records of any state department, division, board, bureau, commission, or other agency.

Furthermore, Part 185, 8NYCRR (Regulations of the Commissioner of Education) does not apply to this Office. Pursuant to Section 185.2(5), "Bronx, Kings, New York, Queens and Richmond counties shall not be required to designate a records management officer pursuant to this section."

As to your question regarding this Office making a special application to the Commissioner of Education to dispose of such records, pursuant to Part 185, 8NYCRR (Regulation of the Commissioner of Education), this Office did not make a special application to dispose of our investigative records, as it was not required to do so under this regulation. Therefore, there is no copy of the required application or the required consent from the Commissioner.

This Office did, however, file a petition with the Appellate Division, First Department pursuant to Judiciary Law §89 to destroy identified appellate case files, records or papers generated from 1973 through 1978. Mr. David Berkowitz is one of the identified cases listed on the petition and destruction order. Copies of the petition and destruction order are attached.

Accordingly, I affirm the RAO's denial of your request.

Very truly yours,

/s/

Peter D. Coddington
FOIL APPEALS OFFICER

Enclosure

cc: coog@dos.ny.gov
NYS Committee on Open Government
Department of State
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, NY 12231



OFFICE OF THE BRONX DISTRICT ATTORNEY

DARCEL D. CLARK
District Attorney

198 East 161 Street
Bronx, New York 10451

(718) 590-2000
(718) 590-6419 - Fax
<http://bronxda.nyc.gov>

January 21, 2022

Via Electronic Mail to [REDACTED]

[REDACTED]

Re: Determination Letter
Freedom of Information Law Request
People v. David Berkowitz

Dear [REDACTED]:

I am writing to inform you that your request for documents, received on or about October 1, 2021 pursuant to New York Public Officers Law, Article 6, §§84, et seq., also known as the Freedom of Information Law ("FOIL"), has been denied. Pursuant to Public Officers Law §89(3), I am enclosing a certificate of diligent search to support our determination of this request.

DENIED:

Your request for court records in the possession of the Bronx County District Attorney's Office ("Bronx DA") relating to criminal charges brought against David Berkowitz is denied because we could not locate the requested record(s) after a diligent search. An agency is not required to furnish documents which it does not possess, nor is an agency required to create new records or compile data from documents in its possession. Rivette v. District Attorney of Rensselaer County, 272 A.D.2d 648, 649 (3d Dept. 2000); In re Brown v. New York City Police Department, 264 A.D.2d 558, 561-62 (1st Dept. 1999); Matter of Adams v. Hirsch, 182 A.D.2d 583, 583 (1st Dept. 1992). Moreover, Public Officers Law §89(3) does not require an agency to create records in order to respond to a FOIL request. See Matter of Reubens v. Murray, 194 A.D.2d 492, 492 (1st Dept. 1993); Adams, 182 A.D.2d at 583.

An agency may also deny a FOIL request if it cannot locate a record after a diligent search. See In re Lugo v. Galperin, 269 A.D.2d 338, 338 (1st Dept. 2000) (ADA's statement "that he



conducted a diligent search of the DA's file and did not find the requested documents . . . suffices to satisfy respondent's FOIL obligations"), lv. denied, 95 N.Y.2d 755 (2000). Accordingly, the agency must certify that "such record cannot be found after [a] diligent search." Public Officers Law §89(3).

If you wish to appeal any portion of this FOIL determination, you must do so within 30 days of the date of this letter. Your appeal should be mailed to: Peter Coddington, Records Access Appeals Officer, Bronx County District Attorney's Office, 198 East 161st Street, 10th Floor, Bronx, NY 10451.

Sincerely,

Mabel Jimenez
Assistant District Attorney
Civil Litigation Bureau, FOIL Unit
Bronx County District Attorney's Office

Enclosure



OFFICE OF THE BRONX DISTRICT ATTORNEY

DARCEL D. CLARK
District Attorney

198 East 161 Street
Bronx, New York 10451

(718) 590-2000
(718) 590-6419 - Fax
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January 21, 2022

Via Electronic Mail to [REDACTED]

[REDACTED]

Re: Determination Letter
Freedom of Information Law Request
People v. David Berkowitz

Dear [REDACTED]:

I am writing to inform you that your request for documents, received on or about October 1, 2021 pursuant to New York Public Officers Law, Article 6, §§84, et seq., also known as the Freedom of Information Law ("FOIL"), has been denied. Pursuant to Public Officers Law §89(3), I am enclosing a certificate of diligent search to support our determination of this request.

DENIED:

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Sincerely,

Mabel Jimenez
Assistant District Attorney
Civil Litigation Bureau, FOIL Unit
Bronx County District Attorney's Office

Enclosure



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District Attorney

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Bronx, New York 10451

(718) 590-2000
(718) 590-6419 - Fax
<http://bronxda.nyc.gov>

RECORDS CERTIFICATION

State of New York)
)
County of the Bronx) ss.:

I, Benigno Burgos, hereby certify as follows, pursuant to New York Public Officers Law Article 6, §89(3), also known as the Freedom of Information Law (“FOIL”):

1. I am employed as a Trial Preparation Assistant in the Office of Darcel D. Clark, the District Attorney of Bronx County. My primary responsibility is to assist with locating records responsive to FOIL requests received by this Office.

2. On October 1, 2021, this Office received a FOIL request from [REDACTED] asking for any and all records pertaining to David Berkowitz. On November 29, 2021, I emailed Juan Sanchez, our Records Manager of Operations, requesting that he search for files in our possession pertaining to David Berkowitz.

3. The files in closed criminal matters are stored on site in our office buildings, as well as in several offsite file storage facilities. Mr. Sanchez’s search covered all locations in which our office files could have been stored. On November 29th 2021, Mr. Sanchez responded by return email that he was unable to locate records pertaining to this defendant.

4. Despite our collective efforts, I could not locate any case documents regarding David Berkowitz.

5. Accordingly, I hereby certify that such records could not be found after a diligent search.

Dated: January 21, 2022

Benigno Burgos

Benigno Burgos
Trial Preparation Assistant
Office of Darcel D. Clark
Bronx County District Attorney

Present - Hon. John T. Buckley, Presiding Justice
Peter Tom
Angela M. Mazzarelli
Richard T. Andrias
David B. Saxe, Justices.

-----x
In the Matter of the Application of

Robert T. Johnson
District Attorney of Bronx County
Petitioner,

For an order pursuant to Section 89 of the
Judiciary Law directing that the District
Attorney be permitted to destroy or otherwise
dispose of certain files, records or papers.

M - 4113

-----x
Upon reading and filing the petition of Robert T. Johnson, District Attorney of
Bronx County, dated September 16, 2004 seeking permission pursuant to Judiciary Law §89 to
destroy **appellate case files**, records or papers generated from 1973 through 1978, with certain
specified exceptions, and the affidavits of Lawrence Young, Deputy Administrative Chief in the
Office of the Bronx District Attorney and Grace Ievoli, Principal Administrative Associate in the
Appeals Bureau of the Office of the Bronx District Attorney, each dated September 16, 2004,
in support of the petition; and,

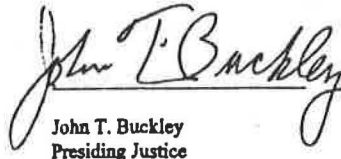
The New York City Department of Records and Information Services (DORIS) and the
Office of the Corporation Counsel of the City of New York by letter dated May 18, 2005 having
approved the request to destroy or otherwise dispose of these files, records or papers; and,

It appearing that, with the exception of the documents set forth in the annexed copy of
paragraph 6 of the affidavit of Grace Ievoli, the identified appellate case files, records or papers
are more than twenty-five years old and are no longer in current use; it is


ORDERED, that the identified **appellate case files**, records or papers, with the exception
of the documents relating to the actions listed in paragraph 6 of the affidavit of Grace Ievoli, be
destroyed pursuant to the provision of Judiciary Law §89; and it is further

ORDERED, that the petitioner is authorized and empowered to take all necessary and
appropriate measures required for the destruction of the subject documents.

ENTER


John T. Buckley
Presiding Justice

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT
STATE OF NEW YORK

I, CATHERINE O'HAGAN WOLFE, Clerk of the Appellate Division of the Supreme
Court First Judicial Department, do hereby certify that I have compared this copy with
the original thereof filed in said office on September 6, 2005 and that the same is
a correct transcript thereof, and of the whole of said original.
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court
on September 6, 2005

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----X
In The Matter of the Application Of,

ROBERT T. JOHNSON

District Attorney of Bronx County,
pursuant to Section 89 of the Judiciary Law,
for an Order directing that the District Attorney
be permitted to destroy or otherwise dispose of
or cause to be destroyed or otherwise dispose of
certain **appellate files**, records, or papers which
are more than twenty-five years old and are no
longer in current use,

Affidavit in Support of Petition

Petitioner.
-----X

State of New York)
):SS
County of Bronx)

I, Grace Ievoli, being duly sworn, affirm the following:

1. I am employed as the Principal Administrative Associate in the Appeals Bureau of the District Attorney, Bronx County.

2. On June 24, 2004, I contacted Mr. Paul Korotkin, Assistant Director MIS/Research, New York State Department of Corrections, and requested a list of defendants from Bronx County sentenced to 25 years to life imprisonment prior to 1980.

3. On June 25, 2004, I received a list of 43 inmates sentenced to 25 years to life prior to 1980 (see Exhibit 1).

4. From that list of 43, according to records maintained by the Office of the District Attorney, which I believe to be true and accurate, the following 13 cases were not appealed:

[REDACTED]
[REDACTED]
[REDACTED]
Berkowitz, David
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
Ind. 1546/77
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
Murder 2°
[REDACTED]
[REDACTED]
[REDACTED]

5. From that list of 43, according to Yelena Lipovetsky, a Clerical Associate in the Bronx District Attorney's Office, in charge of ordering archive records, the following 14 appeals files could not be located:

[REDACTED]

6. From that list of 43, the following 16 appeals folders were located, and they are currently stored in the file room of the Appeals Bureau of the Bronx County District Attorney's Office:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

NYC - Dept. of Records & Information Services
RECORDS DISPOSAL APPLICATION - PROJECT 04-0601
 ELIGIBLE DATE RANGE: 1/ 1/1970 - 12/31/2003

902 DISTRICT ATTORNEY - BRONX COUNTY
 04-002 215 E. 161st ST. BRONX, NY 10451 / Supreme Court

MATERIALS HELD BY DORIS
 PROJECT DATE: 5/ 4/2004

03423 SUPREME COURT CASES

Records of completed felony prosecutions. Includes all materials generated during preparation for trial, prosecution, and sentencing. Also contains Grand Jury minutes, transcriptions, memoranda, subpoenas, affidavits, statements of accused, and motions made by the people. Arranged by indictment number.
 Inventory Person : RS

Retention Periods

Office Rec.Center Total
 CL+ 5 20 CL+ 25Y

Approval Initials...

Agency Head _____
 D.O.R.I.S _____
 CORP.COUNSEL _____

<u>Years</u>	<u>Volume</u>	<u>Place On Hold</u>	<u>Year(s)</u>	<u>Volume</u>	<u>Place On Hold</u>
1972	230	<input type="checkbox"/>	1973	239	<input type="checkbox"/>
1974	262	<input type="checkbox"/>	1975	266	<input type="checkbox"/>
1976	250	<input type="checkbox"/>	1977	290	<input type="checkbox"/>
1978	324	<input type="checkbox"/>			<input type="checkbox"/>

Mobile: [REDACTED]

Email: [REDACTED]

December 29, 2021

Office of the Bronx District Attorney
Ms. Beverly Ma
Deputy Chief of Staff
198 East 161st Street
Bronx, NY 10451

Re: FOIL APPEAL – THIRD NOTICE

Dear Ms. Ma:

I have twice spoken to Peter Coddington, FOIL appeals officer for the Bronx DA's Office, and he has suggested that I contact you regarding my information request.

This letter constitutes a **THIRD NOTIFICATION** of an administrative **appeal** under the Freedom of Information Act.

Original appeal mailed on November 17, 2021 - NO RESPONSE FROM BRONX DA'S OFFICE.

Second notification of appeal mailed on December 3, 2021 - NO RESPONSE FROM BRONX DA'S OFFICE.

On **September 30, 2021**, I filed a request with your office under the Freedom of Information Act for records relating to the following (request attached):

"I request a copy of all records in the possession, custody or control of the Bronx District Attorney's Office, (including but not limited to the Bronx District Attorney's Office, its investigatory units, and past or present officials of the Bronx District Attorney's Office) of all investigative activities and reports regarding murders committed by David Berkowitz (a/k/a Son of Sam), as well as investigative activities of any possible co-conspirators for murder. This request includes, but is not limited to, correspondence with law enforcement agencies and/or district attorneys' offices outside the borough of The Bronx and New York City (including Westchester County, and the City of Yonkers), regarding the investigation, arrest and prosecution of David Berkowitz or possible coconspirators."

The Office of the Bronx District Attorney indicated in an automated email response to my request that I could expect a determination or update in approximately 60 business days. However, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(a) of the Freedom of Information Law states in part that:

"... if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty (20) business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, even though the Office of the Bronx District Attorney has acknowledged the receipt of my request within five (5) business days of receipt of the request, the Office has not included an approximate date **within twenty (20) business days** indicating when it can be anticipated that a request will be granted or denied.

However, if it is known that circumstances prevent the agency from granting access within twenty (20) business days, or if the agency cannot grant access by the approximate date given and needs more than twenty (20) business days to grant access, it **must provide a written explanation of its inability to do so and a specific date by which it will grant access**. That date must be reasonable in consideration of the circumstances of the request.

As an aside, should the further inaction of the Office of the Bronx District Attorney force me to take this matter to court, Section 89(4)(c) deals with the award of attorney's fees. If a lawsuit is initiated and the court finds that my denied access "substantially prevails", the court may award attorney's fees if the Office of the Bronx District Attorney failed to respond within the proper time. If the court finds that the Office of the Bronx District Attorney had no reasonable basis for denying access, it must award attorney's fees payable by the agency.

Thank you.

[REDACTED]

[REDACTED]

[REDACTED]

Attachments: [REDACTED] FOIL Request (September 30, 2021)
Bronx DA Automated Electronic FOIL Response (September 30, 2021)
Original appeal (November 17, 2021)
Second notification of appeal (December 3, 2021)

From: [REDACTED]
To: FOILREQUEST@bronxda.nyc.gov
Subject: FOIL Request - David Berkowitz (Son of Sam)
Date: Thursday, September 30, 2021 7:59:36 PM

This email constitutes a request under the Freedom of Information Act.

I request a copy of all records in the possession, custody or control of the Bronx District Attorney's Office, (including but not limited to the Bronx District Attorney's Office, its investigatory units, and past or present officials of the Bronx District Attorney's Office) of all investigative activities and reports regarding murders committed by David Berkowitz (a/k/a Son of Sam), as well as investigative activities of any possible co-conspirators for murder. This request includes, but is not limited to, correspondence with law enforcement agencies and/or district attorneys' offices outside the borough of The Bronx and New York City (including Westchester County, and the City of Yonkers), regarding the investigation, arrest and prosecution of David Berkowitz or possible co-conspirators.

Thank you.

[REDACTED]

[REDACTED]

From: [FOILREQUEST \(BronxDA\)](#)
To: [REDACTED]
Subject: FOIL Request
Date: Thursday, September 30, 2021 7:59:50 PM

The Bronx District Attorney's Office has received your request for records pursuant to New York Public Officers Law, Article 6, sections 84 et seq., the Freedom of Information Law ("FOIL").

If you have provided us with all of the necessary information needed to process a request, our Office will initiate the process within five business days. You can expect a determination or update in approximately 60 business days. If we fail to render a determination or provide you with an update by then, please do not hesitate to contact us. Alternatively, you may appeal a "constructive denial" upon the expiration of 60 business days by writing to: FOIL Appeals Officer Peter Coddington, Bronx District Attorney's Office, 198 East 161st Street, Bronx, NY 10451.

If you have not provided sufficient information, our Office will inform you as soon as possible and let you know what additional information we require to process your request.

Please be advised that each page of documents under FOIL has a \$0.25 per-page; \$0.50 per color copy; \$5.00 per audio cd; and \$15.00 per video DVD copying fee. There is no provision in the Public Officers Law for a waiver of this fee. See Whitehead v. Morgenthau, 146 Misc.2d 806, 807-808 (Sup. Ct., N.Y. Co. 1990).

Please note that if you are requesting files for purposes of civil litigation, your request will nevertheless be processed in the order in which it was received. If time is of the essence, it may behoove you to obtain a subpoena signed by the judge presiding over your civil matter.

Thank you for your request and we hope to be of service to you.

[REDACTED]

January 22, 2022

Office of the Bronx District Attorney
Mr. Peter Coddington
FOIL Appeals Officer
198 East 161st Street
Bronx, NY 10451

Re: FOIL APPEAL - People v. David Berkowitz

Mr. Coddington:

This letter constitutes an administrative **appeal** under the Freedom of Information Act.

On **September 30, 2021**, I filed an appeal to your office under the Freedom of Information Act for records relating to the following (request attached):

“I request a copy of all records in the possession, custody or control of the Bronx District Attorney’s Office, (including but not limited to the Bronx District Attorney’s Office, its investigatory units, and past or present officials of the Bronx District Attorney’s Office) of all investigative activities and reports regarding murders committed by David Berkowitz (a/k/a Son of Sam), as well as investigative activities of any possible co-conspirators for murder. This request includes, but is not limited to, correspondence with law enforcement agencies and/or district attorneys’ offices outside the borough of The Bronx and New York City (including Westchester County, and the City of Yonkers), regarding the investigation, arrest and prosecution of David Berkowitz or possible coconspirators.”

On **January 21, 2022** I received a written response from Mabel Jimenez, Assistant District Attorney, Civil Litigation Bureau, FOIL Unit, Bronx County District Attorney’s Office, wherein my request for court records in the possession of the Bronx County District Attorney’s Office (“Bronx DA”) relating to criminal charges brought against David Berkowitz was **denied** because the requested record(s) could not be located after a diligent search.

The New York State Archives, State Education Department, pursuant to Section 57.25 of the Arts and Cultural Affairs Law, AND Part 185, Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York, specifies the minimum length of time that local government officials must retain their records before they may be disposed of legally. Under the Retention and Disposition Schedule for New York Local Government Records (LGS-1), for Law Enforcement (General), Case Investigation Records (a) For homicides, suicides, arson (first, second or third degree), missing persons (until located), aggravated sexual assault (first degree), course of sexual conduct against a child (first degree), active warrants, and stolen or missing firearms (until recovered or destroyed), **MUST BE PERMANENTLY RETAINED**.

Please note, three of the six homicides associated with the David Berkowitz (Son of Sam) case occurred in Bronx County: (1) Donna Lauria, age 18 (July, 29, 1976), (2) Valentina Suriani, age 18, (April 17, 1977), Alexander Esau, age 20 (April 17, 1977). **By law (cited above), case investigation records associated with these victims, as well as, case investigation records associated with David Berkowitz, must have been retained by the Bronx DA's Office.**

I dispute the adequacy of the search in response to my FOIA request, as well as, the non-compliance with Rules and Regulations of the State of New York governing record retainment, specifically, case investigation records relating to homicides.

If, however, pursuant to Part 185, 8NYCRR (Regulations of the Commissioner of Education), the Bronx DA's Office made a special application to the Commissioner of Education to dispose of such records, I hereby request a copy of that application, as well as, the required consent of the Commissioner of Education.

As an aside, should the further inaction of the Office of the Bronx District Attorney force me to take this matter to court, Section 89(4)(c) deals with the award of attorney's fees. If a lawsuit is initiated and the court finds that my denied access "substantially prevails", the court may award attorney's fees if the Office of the Bronx District Attorney failed to respond within the proper time. If the court finds that the Office of the Bronx District Attorney had no reasonable basis for denying access, it must award attorney's fees payable by the agency.

Thank you.

[REDACTED]

[REDACTED]

Attachments: [REDACTED] FOIL Request (September 30, 2021)
Bronx DA FOIL Response, Mabel Jimenez (January 21, 2022)