Matter of Wagenheim v Office of the Gen. Counsel, City Univ. of N.Y.
2024 NY Slip Op 31320(U)
March 5, 2024
Supreme Court, New York County
Docket Number: Index No. 100756/2023
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

---X

In the Matter of

MICHAEL S. WAGENHEIM,

Petitioner,

- v -

OFFICE OF THE GENERAL COUNSEL, CITY UNIVERSITY OF NEW YORK,

Respondent.

---X

INDEX NO. 100756/2023

MOTION DATE 11/08/2023

MOTION SEQ. NO. 001

DECISION, ORDER, AND JUDGMENT

The following papers, numbered 1 - 14 , were read on this application to/for Art 78/X-Mot dism

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits .... No(s)	1-7
Not of X-Mot/Affs/Exhs .... No(s)	8-14
Replying .... No(s)	

In this CPLR article 78 proceeding, the petitioner seeks judicial review of the respondent's August 10, 2023 determination denying his administrative appeal of a July 17, 2023 decision that had denied, in part, his request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL). The respondent cross-moves pursuant to CPLR 7804(f) and 3211(a) to dismiss the petition for failure to state a cause of action (CPLR 3211[a][7]). Although the cross motion is denied, the court reaches the merits of the petition, and thereupon denies the petition and dismisses the proceeding.

On May 22, 2023, the petitioner submitted a FOIL request to the Craig Newmark Graduate School of Journalism of the City University of New York (CUNY Journalism School), seeking agency records, dated January 3, 2023 through May 22, 2023, that contained the names "Kopel," "Koppel," or "Beinart." The request apparently sought records referable to

CUNY's investigation of an ethics complaint filed by David Kopel against Professor Peter Beinart. On July 11, 2023, CUNY responded to the petitioner's FOIL request by producing 214 pages of documents, with numerous pages and portions of pages redacted. On July 17, 2013, Richard White, the general counsel for both the CUNY Journalism School and the School of Labor and Urban Studies, wrote to the petitioner, explaining that the redacted portions involved attorney-client communications and attorney work product. That same day, the petitioner appealed White's determination to Derek Davis, CUNY's general counsel and senior vice chancellor for legal affairs. In a determination dated August 10, 2023, Davis denied the administrative appeal, relying on the statutory exemption applicable to the production of documents that "are specifically exempted from disclosure by state or federal statute" (*see* Public Officers Law § 87[2][a]). This proceeding ensued.

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference" (*Matter of Eastern Oaks Dev., LLC v Town of Clinton*, 76 AD3d 676, 678 [2d Dept 2010]; *see Leon v Martinez*, 84 NY2d 83 [1994]; *Matter of Gilbert v Planning Bd. of Town of Irondequoit,* 148 AD3d 1587 [4th Dept 2017]; *Matter of Schlemme v Planning Bd. of City of Poughkeepsie*, 118 AD3d 893 [2d Dept 2014]; *Matter of Ferran v City of Albany*, 116 AD3d 1194 [3d Dept 2014]; *Matter of Marlow v Tully*, 79 AD2d 546 [1st Dept 1980]). "In determining motions to dismiss in the context of [a CPLR] article 78 proceeding, a court may not look beyond the petition . . . where, as here, no answer or return has been filed" (*Matter of Scott v Commissioner of Correctional Servs.*, 194 AD2d 1042, 1043 [3d Dept 1993]; *see Matter of Ball v City of Syracuse*, 60 AD3d 1312 [4th Dept 2009]). "Whether a plaintiff [or petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, as long as the petition alleges specific facts "giving rise to a fair inference" (*Matter of Vyas v City of New York*, 133 AD3d 505, 505 [1st Dept 2015]) that the respondent's

determination was affected by an error of law, dismissal for failure to state a cause of action is not warranted. Contrary to the respondent's contention, the petition states a cause of action for judicial review of its August 10, 2023 determination.

While a respondent in a CPLR article 78 proceeding is generally required to answer the petition after its motion to dismiss is denied (*see Matter of Kickertz v New York Univ.*, 25 NY3d 942 [2015]), where "it is clear that no dispute as to the facts exists and no prejudice will result," a court, upon denial of the motion, may nonetheless decide the petition on the merits (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d 100, 102 [1984]; *see Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs*, 148 AD3d 1137, 1138 [2d Dept 2017]; *Chestnut Ridge Assoc, LLC v 30 Sephar Lane, Inc.*, 129 AD3d 885, 887-888 [2d Dept. 2015]; *Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 AD3d 427, 428 [1st Dept 2014]; *Matter of Kuzma v City of Buffalo*, 45 AD3d 1308, 1310-1311 [4th Dept 2007]). Under the circumstances presented here, there is no need for the respondent to answer, as the facts have been fully presented in the parties' papers, no factual dispute remains, and the respondent will not be prejudiced if it doesn't file an answer (*see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d at 102; *Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 AD3d at 428; *cf. Matter of Camacho v Kelly*, 57 AD3d 297, 298-299 [1st Dept 2008] [court required answer]). Thus, upon denying the respondents cross motion, the court will consider the merits of the petition.

With respect to the merits, "[w]hile the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential" (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). "All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records" (*Matter of Hanig v State of N.Y. Dept of Motor Vehs.*, 79 NY2d 106,

108 [1992] [citations omitted]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (Public Officers Law § 89[4][b])" (*id.*). When denying a FOIL request, a state or municipal agency must "state, in writing, the reason for the denial of access" (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 884 [2009]). Thus, "to invoke one of the exemptions of section § 87(2), the agency must articulate particularized and specific justification for not disclosing requested documents" (*Matter of Gould v New York City Police Dept*, 89 NY2d 267, 275 [1996]). If the requesting party administratively appeals the denial, the agency's appeals officer must also provide written reasoning for upholding the denial (*see id.*).

> "[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable"

(*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 94 [3rd Dept 1985], *affd* 67 NY2d 562 [1986]; *see Matter of Prall v New York City Dept. of Corrections*, 129 AD3d 734, 735 [2d Dept 2015]; *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 [1st Dept 2010]). Rather, upon judicial review of an agency's determination to deny a FOIL request, the court must assess whether "the requested material falls squarely within a FOIL exemption" and whether the agency, upon denying such access, "articulat[ed] a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566). In other words, the court may only review an agency's FOIL determination to ascertain whether the determination to invoke a particular statutory exemption was affected by an error of law (*see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 246 & n 2 [2018], *affg* 140 AD3d 419, 420-421 [1st Dept 2016]; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 531 [1st Dept 2015]; CPLR 7803[3]).

Under Public Officers Law § 87(2)(a), records must be withheld that "are specifically exempted from disclosure by state or federal statute." Written confidential communications between an attorney or attorneys and their client or clients are documents that are, by state statute, "specifically exempted from disclosure." Particularly, pursuant to CPLR 4503, such confidential communications are considered privileged and, therefore, exempt from disclosure. Many of the redacted portions of the respondent's disclosure contain communications between clients and their attorneys in which the attorney-client privilege was not waived. These documents are thus exempt from disclosure by virtue of Public Officers Law § 87(2)(a).

Moreover, CPLR 3101(c) prohibits the disclosure of an attorney's work product. The respondent has established that other portions of the redacted material constituted attorney work product that were exempt from disclosure under FOIL (*see Matter of Woods v Kings County Dist. Attys. Off.*, 234 AD2d 554, 556 [2d Dept 1996]). The United States Supreme Court has held that the phrase "'work product' embraces such items as 'interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs' conducted, prepared or held by the attorney" (*Kenford Co. v County of Erie*, 55 AD2d 466, 470 [4th Dept 1977], quoting *Hickman v Taylor*, 329 US 495, 511 [1947]; *see Central Buffalo Project Corp. v Rainbow Salads*, 140 AD2d 943 [4th Dept 1988]). Nonetheless,

> "[n]ot every manifestation of a lawyer's labors enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his [or her] legal research, analysis, conclusions, legal theory or strategy"

(*Hoffman v Ro-San Manor*, 73 AD2d 207, 211 [1st Dept 1980]). While the privilege

> "extends to experts retained as consultants to assist in analyzing or preparing the case . . . that doctrine affords protection only to facts and observations disclosed by the attorney. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure"

(*Beach v Touradji Capital Mgt., L.P.*, 99 AD3d 167, 170 [1st Dept 2012] [citations and internal quotation marks omitted]).

Thus, "the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement work product," particularly where a lay person could have transcribed the statement (*People v Kozlowski*, 11 NY3d 223, 245 [2008]; *see People v Consolazio*, 40 NY2d 446 [1976]). Similarly,

> "an investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer"

(*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 379 (1991]; *see People v Belge*, 59 AD2d 307 [4th Dept 1977]). Nor are an investigator's notes protected by the work-product privilege where there is no evidence that the investigator conducted any interviews with persons in anticipation of litigation (*see* CPLR 3101[d]; *State of N.Y. ex rel. Murray v Baumslag*, 134 AD3d 451 [1st Dept 2015]). Although information received by an attorney from third persons may not itself be privileged,

> "a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client"

(*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d at 379).

Here, however, the attorneys' written impressions and strategy statements that the respondent seeks to prevent from disclosure are clearly attorney work product. Hence, the respondent properly exempted them from disclosure pursuant to Public Officers Law § 87(2)(a).

In light of the foregoing, it is,

ORDERED that the respondent's cross motion to dismiss the petition is denied; and it is further,

ORDERED that, upon the court's denial of the cross motion and its consideration of the merits of the petition, the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

3/5/2024
DATE

JOHN J. KELLEY, J.S.C.

MOTION:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**	
		GRANTED	X	**DENIED**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	**REFERENCE**
CROSS MOTION:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**	
		GRANTED	X	**DENIED**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	**REFERENCE**