

**Matter of New York Committee for Occupational  
Safety v Bloomberg**

2008 NY Slip Op 30537(U)

February 25, 2008

Supreme Court, New York County

Docket Number: 0113393/2007

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**EILEEN A. RAKOWER**

PRESENT: J.S.C.

PART Part 5

Index Number : 113393/2007

NEW YORK COMMITTEE

INDEX NO. \_\_\_\_\_

vs

BLOOMBERG, MICHAEL

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

ARTICLE 78

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**  
FEB 28 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: February 25, 2008

  
**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of  
NEW YORK COMMITTEE for OCCUPATIONAL  
SAFETY and HEALTH

Petitioners,

Index No.  
113393/07

- against -

MICHAEL BLOOMBERG, as Mayor of the City of New York, ANTHONY CROWELL, as Records Access Officer of the Office of the Mayor of the City of New York, CAROL ROBLES-ROMAN, as Records Appeal Officer of the Office of the Mayor of the City of New York, MICHAEL A. CARDOZO, as Corporation Counsel of the City of New York, SUSAN FORSYTH, as Records Access Officer of the New York City Law Department and JEFFREY FRIEDLANDER, as Records Appeals Officer of the New York City Department of Law,

**FILED**  
FEB 28 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

DECISION  
and ORDER

Respondents.

-----X  
HON. EILEEN A. RAKOWER:

Petitioner New York Committee for Occupational Safety and Health, Inc. (NYCOSH), is a not-for-profit organization comprised of various labor unions and their members. By letter dated May 7, 2007, NYCOSH requested that Michael Bloomberg, as Mayor of the City of New York, along with those who respond to Freedom of Information Law (FOIL) inquiries for the Mayor's office (the Mayor's office) send a complete set of records to NYCOSH pursuant to the Administrative Code of the City of New York, Section 12-127(c)(1) and (c)(2), regarding details of claims and injuries sustained by workers during the course of their employment at various City agencies and including all information listed in Administrative Code §12-127(c)(1). By letter dated May 21, 2007, the Mayor's Office sent NYCOSH a CD containing "documents responsive to your FOIL (Freedom of Information Law) request." The letter also advised NYCOSH how it could appeal the decision. NYCOSH states that the CD did not contain all of the information that it requested and, by letter dated May 23, 2007, it appealed. By letter dated June 5, 2007, the

Mayor's office wrote to NYCOSH stating that, pursuant to NYCOSH's appeal, it had reviewed the request and procedure associated with the original decision and determined that the decision was correct. The letter stated, "The Office of the Mayor is not in possession of any documents responsive to your request beyond those records already disclosed to you. The New York City Law Department (the Law Department) maintains records of workers' compensation claims filed by City employees on behalf of the Mayor and should be contacted directly if you require additional information."

By letter dated June 14, 2007, NYCOSH requested that the Law Department provide it with documents kept pursuant to the Administrative Code Sections 12-127 (c)(1),(2), stating that "the Mayor's Office informed us . . . that it was not in possession of any further documents, and that all other documents were in the possession of the New York City Law Department." By letter dated June 22, 2007, the Law Department informed NYCOSH that it could not grant its request because the "Law Department does not maintain a comprehensive data base of the information described by the section of the Administrative Code cited in your letter nor is this agency otherwise in possession of such a record." NYCOSH was advised that it could appeal the decision and, by letter dated July 6, 2007, it did so.

By letter dated July 31, 2007, the Law Department sustained its earlier decision and denied NYCOSH's appeal noting that, in responding to a FOIL request, a government agency is not required to create documents that do not already exist. The letter further explains that the Law Department may receive from City agencies up to sixteen thousand workers' compensation claims each year. The letter notes that Administrative Code Section 12-127(c)(3) requires the Mayor's office to issue an annual report regarding workers' compensation claims which is available to the public both in hard copy and on the New York City Department of Records and Information website. The court notes that the CD which accompanied the May 21, 2007 letter from the Mayor's office contained this annual report. By letter dated September 19, 2007, petitioner wrote to both the Mayor's office and the Law Department demanding "that the City of New York immediately take steps to ensure compliance with its obligations under Local Law 41 of 2004, codified at Section 127(c) of Title 12 of the New York City Administrative Code." By letter dated October 5, 2007, the Law Department responded to petitioner's letter stating that the City is in compliance with Section 127(c) of Title 12 of the New York City Administrative Code.

Meanwhile, petitioner filed this Article 78 proceeding seeking an order from the court directing respondents to produce all records requested by it, ordering

[\* 4 ]

respondent Bloomberg to take all steps to comply with Administrative Code Section 12-127, ordering respondent Bloomberg to take all steps necessary to ensure that records with the information set forth in Administrative Code Sections 12-127 ( c)(1) are transmitted to the Mayor's office and then produced for petitioner and awarding attorney's fees and costs. Respondents oppose the petition and cross move to dismiss.

New York City Administrative Code Section 127( c)(1) states,

c.(1) Each agency shall keep a record of any workers' compensation claim filed by an employee, the subject of which concerns an injury sustained in the course of duty while such employee was employed at such agency. Such record shall include, but not be limited to, the following data:

- (i) the name of the agency where such employee worked;
- (ii) such employee's title;
- (iii) the date such employee or the city filed such claim with the appropriate office of the State of New York, if any;
- (iv) the date the city began to make payment for such claim, or the date such claim was established by the appropriate state office and the date the city began to make payment for such claim pursuant to such establishment, if any;
- (v) the date such injury occurred;
- (vi) the location at which such injury occurred;
- (vii) the nature of such injury, including, but not limited to, the circumstances of such injury, the type or diagnosis of such injury and a description of how such injury occurred;
- (viii) the length of time such employee is unable to work due to such injury, if any, and
- (ix) a list of any expenses paid as a result of such claim, including, but not limited to, expenses related to wage replacement, medical costs, administrative costs and any penalties.

New York City Administrative Code Section 127( c)(2) states that "[e]ach agency shall transmit records gathered pursuant to paragraph (1) of subsection c of this section, as soon as practicable, to the Mayor of the City of New York."

New York City Administrative Code Section 127( c)(3) states, in pertinent part, that:

[t]he mayor of the city of New York shall ensure that an annual report is prepared utilizing the records received from each agency pursuant to paragraph (2) of subdivision c of this section. Such report shall be transmitted to the mayor, the comptroller, the public advocate and the speaker of the council of the city of New York . . .

The section continues with a non-exhaustive list of information that the Mayor's office shall include in its annual report.

The "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1<sup>st</sup> Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1<sup>st</sup> Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Petitioner argues that the documents it seeks are within the control of the Mayor's office and/or the Law Department. It argues that the failure to provide it with the requested records impairs its ability to serve as a watchdog for its clients. It states that without the requested information it cannot target worksites that have an unacceptably high incidence of injury. It argues that without this information the unions which are its clients cannot learn about potentially hazardous conditions and pursue grievances on behalf of their members. Petitioner states that there is no reasonable basis for denying petitioner's request and the failure to produce the records is arbitrary and capricious and an error of law.

Respondents cross move to dismiss arguing that petitioner fails to state a claim upon which relief may be granted because all responsive, non-exempt records have been provided to petitioner. Respondents state that certain information sought by petitioner is specifically exempted from disclosure by the FOIL statute, Public Officers' Law §87(2), and Workers' Compensation Law § 110-a. Respondents argue

that they have complied with the Administrative Code and provide an affirmation from counsel to the Mayor, Anthony Crowell (Crowell) and a notarized affidavit from the Director of Administration for the New York City Law Department's Workers' Compensation Division (WCD), Youssef Sidhom (Sidhom) to support their contention.

Crowell's affirmation states that he personally and, at his direction, members of the Mayor's staff conducted a diligent, agency-wide search for any papers or electronic records in their possession which are responsive to petitioner's FOIL request. Crowell affirms that the Mayor's office is not in possession of such records, as described in New York City Administrative Code Section 127( c)(1), (2). The affirmation further states that the Mayor has delegated the responsibility of collecting the requested information to the New York City Law Department.

Sidhom's affidavit states that as director of the WCD, he has personal knowledge of the records maintained by his office. He states that the information sought by petitioner is partially stored in an electronic database and partially in individual case files. Sidhom explains that the workers' compensation computer system, which is comprised of ten separate units, interfaces with certain city-wide computer systems, using special programs in order to extract information from each of the ten units and consolidate it into the Mayor's report. Additionally, about 40% of the workers' compensation claims are submitted to the Law Department through various paper forms. Thereafter, certain data is entered into the WCD computer system and the paper documents are then placed in individual case files. Sidhom's affidavit states that in order to compile the information that petitioner seeks, the Law Department would be required to design a new computer program to extract the information from the ten units which store it and then sort, compile and create special reports from electronic and paper sources.

An agency has complied with Public Officers' Law §89(3) when it provides an affirmation from a person in the agency who states that, after a diligent search, the agency has provided all non-exempt responsive records that it possesses. (*Rattley v. New York City Police Department*, 96 NY2d 873[2001]). Moreover, FOIL does not require any agency to create a document or record that it does not otherwise maintain. (*Adam v. Hirsh, et al.*, 182 AD2d 583 [1<sup>st</sup> Dept. 1992]; Public Officers' Law §89(3)). Additionally, an agency may not divulge information that would constitute "an unwarranted invasion of personal privacy" such as "information of a personal nature contained in a workers' compensation record, except as provided by section one

hundred ten-a of the workers' compensation law." ( Public Officers' Law §89(2)(b)(vi)). Workers Compensation Law §110-a prohibits the disclosure of any workers' compensation record except upon court order or a subpoena from an authorized agency.


New York City Administrative Code Section 127( c)(1) does not require the Mayor's office to maintain the records that petitioner seeks and the affirmation from counsel to the Mayor Anthony Crowell stating that it has provided all non-exempt responsive records in its possession satisfies the requirements of FOIL. ( *Rattley v. New York City Police Department, supra*). The Mayor's office has delegated to the Law Department the task of compiling the information that various agencies are required to maintain into the Mayor's annual report pursuant to Administrative Code Section 127( c)(3). To the extent that the Law Department has records that permit it to compile the Mayor's annual report regarding workers' compensation claims, large portions of those records are exempt from disclosure pursuant to Public Officers' Law §89(3)and Workers' Compensation Law §110-a. The Law Department is not required to create disclosable records from the approximately 16,000 claims it processes each year. (*Adam v. Hirsh, et al., supra*). Respondents have met their burden by articulating specific justification that the material sought by petitioner is either not maintained by the Mayor's office or exempt from disclosure by the Law Department. (*Brown v. The New York City Police Department, 264 AD2d 558 [1<sup>st</sup> Dept. 1999]*). A rational basis exists for respondents' decision and those decisions are neither arbitrary or capricious. Accordingly, the petition must be denied. Wherefore, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed.

All other relief requested is denied.

This constitutes that decision and order of the court.

Dated: February 25, 2008

**FILED**  
FEB 28 2008  
NEW YORK  
COUNTY CLERKS OFFICE  
  
EILEEN A. RAKOWER, J.S.C.