

Rankin v Metropolitan Transp. Auth.

2010 NY Slip Op 32161(U)

August 10, 2010

Supreme Court, New York County

Docket Number: 101127/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

DAVID B. RANKIN,

Petitioner,

-against-

METROPOLITAN TRANSPORTATION
AUTHORITY,
Respondent.

INDEX NO. 101127/10

MOTION DATE April 14, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 99

The following papers, numbered 1 to ___ were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-10</u>
Replying Affidavits _____	<u>11-12</u>
Sur-Reply Affidavits _____	<u>13-14</u>

Cross-Motion: Yes No

Upon the foregoing papers, the petition for an order, *inter alia*, compelling respondent to furnish petitioner with certain documents pursuant to his FOIL request is decided in accordance with the accompanying decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated: 8/10/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
DAVID B. RANKIN,

Petitioner,

-against-

METROPOLITAN TRANSPORTATION
AUTHORITY,

Respondent

DECISION, ORDER
AND JUDGMENT

Index No. 101127/2010

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 415).

-----X
O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding, petitioner David B. Rankin ("petitioner") *pro se* seeks an order compelling respondent Metropolitan Transportation Authority (the "MTA" or "respondent") to furnish him with certain records in compliance with New York's Freedom of Information Law ("FOIL") (*see*, Public Officers Law §§ 87, *et seq.*) and awarding him costs and reasonable attorneys' fees. Respondent cross moves to dismiss the petition on the ground that the matter is moot and the petition fails to state a cause of action and denying the request for an award of attorney's fees as the *pro se* petitioner is acting as his own attorney.

Petitioner, a duly admitted New York attorney who is a member of the law firm Rankin and Taylor, is appearing *pro se*. By letter dated March 17, 2009, petitioner requested that the MTA provide him with records pertaining to "[t]he location of fare vending machines and attendant booths inside all MTA subway stations, specifically relative to the stairways, elevators, etc." (Petition ¶ 5, Ex. "1"). He submitted a map for the Bergen Street F and G station as an example of the type of records he was seeking.

The MTA responded by letter dated March 24, 2009, advising petitioner that the expected response should be completed by August 23, 2009 (*id.* ¶ 6, Ex. "2"). When the MTA did not provide a response by the designated date, petitioner, by letter dated September 23, 2009 directed to MTA's Records Access Appeals Officer, advised that he was treating his FOIL request as having been constructively denied and was appealing the constructive denial (*id.* ¶ 7, Ex. "3").

The MTA's Deputy Foil Officer, Gail Rogers, responded in a letter dated October 8, 2009 (*id.* ¶ 8, Ex. "4"). She advised petitioner that the map for the Bergen Street F and G station he included with his initial FOIL request had been created for a public hearing and was not for public

distribution. Ms. Rogers further stated that such maps did not exist for other subway stations and would have to be created, which is not required under FOIL. Lastly, she advised that "NYCTA has implemented a policy that restricts the release of NYCTA safety sensitive documents through FOIL on the grounds that the release may pose a risk to public safety (Public Officers Law § 87 (2)(f)). NYCTA considers that drawings, plans and maps fall under this exemption."

By letter dated October 23, 2009, petitioner appealed the MTA's denial of his FOIL request (*id.* ¶ 10, Ex. "5"). He challenged the MTA's position that maps of the type previously provided as an example did not exist. Rather, he claimed that similar maps did exist for other stations and should be furnished to him. He contended that the MTA's denial was an improper invocation of the public safety exemption, particularly since such information was readily available to the general public at any time and the MTA failed to articulate in what way the release of such information would endanger public safety. The MTA's General Counsel replied that he was having petitioner's FOIL request reviewed and expected to respond to petitioner's administrative appeal within three weeks (*id.* ¶ 11, Ex. "6"). Petitioner immediately protested MTA's response contending that the MTA had extended its time to answer his appeal of the denial of his FOIL request. He claimed, without citing a particular provision, that the FOIL statute required that a denial of an administrative appeal must be issued within ten (10) days (*id.* ¶ 12, Ex. "7").

In a letter dated November 24, 2009, the MTA responded to petitioner's appeal without addressing the timeliness issue, and advised that the appeal was being granted in part and denied in part (*id.* 13, Ex. "8"). The MTA provided maps of proposed station changes that were publicly available, but denied access to other existing subway maps that contain "safety sensitive information." The MTA contended that disclosure of those subway maps "would be a threat to public safety."

Petitioner thereafter commenced the instant proceeding pursuant to CPLR Article 78 seeking to have the Court annul respondent's determination and compel respondent to provide the requested documents pursuant to FOIL. He also requests an award of litigation costs and attorneys' fees pursuant to Public Officers Law § 89 (4) (c). Petitioner argues that the maps the MTA provided are not responsive to his FOIL request as they: (1) show proposed station changes, rather than "[t]he location of fare vending machines and attendant booths inside all MTA subway stations, specifically relative to the stairways, elevators, etc; and (2) the maps are not in electronic form as requested. Petitioner demands that MTA furnish him with the other maps that are in their possession, with any

policing information redacted, provided in a log, and that such maps be provided in electronic form. Alternatively, petitioner requests that the MTA provide the court with such maps for an *in camera* review.

Respondent's cross motion to dismiss the petition is supported by the affirmations of Mary Fisher Bernet, the MTA's Associate Counsel in the Office of the General Counsel, and Denise Fraser, Deputy Executive Assistant General Counsel for the New York City Transit Authority ("NYCTA") and affidavits of Gricelda Cespedes, Group General Manager of the NYCTA's IRT Line West responsible for the 1,2,3 and 7 lines, Lieutenant David Kelly of the New York City Police Department ("NYPD"), assigned to supervise NYPD's Counterterrorism Division's Threat Reduction Infrastructure Protection Section, and Stephen E. Schwimmer, Director of Security, Standards and Procedures in NYCTA's Department of Security.

Ms. Bernet advises that in the course of preparing MTA's response to the petition, two additional sets of subway maps relative to subway station booth closures in February 2003 and October 2004 were located and have been provided to petitioner in electronic form on a CD-R disc together with the January 2009 station diagrams that were previously provided in hard copy under cover of letter dated March 3, 2010. In her letter to petitioner, Ms. Bernet indicated that blueprints of the NYCTA subway system existed but they contained safety-sensitive information which would pose a threat to public safety and which could not be redacted "without such extensive, costly, and time-consuming work that it would constitute creation of new documents" (Bernet Affirmation ¶¶ 8-9, Ex. "A"). Petitioner responded that the documents produced were not responsive to his FOIL request and that the blueprints of the subway system were covered and should be produced (Bernet Affirm. ¶ 10).

Ms. Cespedes in her affidavit attests that between 2001 and 2004, she either created or oversaw the creation of the station diagrams that have been provided to petitioner (Cespedes Affidavit ¶ 4). The diagrams were created for the sole purpose of advising the public and the MTA Board of the closure or partial closure of subway station booth closures. The information used to prepare the diagrams was taken from NYCTA subway station blueprints which contain highly-sensitive security information including every detail of the layout and every piece of equipment in each station necessary to operate the subway and also show the entrances, exits, stairs, escalators, service booths, MetroCard vending machines, turnstiles, platforms, tracks, etc. Ms. Cespedes also challenges petitioner's contention that such blueprints should be released because the information

contained therein is viewable to anyone walking through a subway station. She avers that while some doors in subway stations are marked, others are unmarked, and a casual observer would not be able to readily ascertain that such doors lead to rooms with electrical, computer or other vulnerable equipment, nor would such individual know how large any room behind the door is, what shape it is, and whether it is staffed. Nor would a casual observer know the relationship between any hidden rooms and the rooms' relationship to the structure of the station. If such information was made available to the public, the potential for a terrorist attack would be greatly enhanced as such information would allow anyone to compare stations without having to visit them and to determine where to attack. Moreover, Ms. Cespedes contends that knowing where communications systems, station structural details and the like, are located, which information is available from the NYCTA station blueprints, someone could knock out communications, place explosives in concealed areas and/or know which structural supports to bomb for maximum damage to human life and infrastructure (Cespedes Aff. ¶¶ 15-18). In addition, Ms. Cespedes contends that the effort to redact all security-sensitive information from the NYCTA station blueprints would be extensive as it would require her staff to essentially replicate the process which was entailed in creating the blueprints. She estimates that at least 12-months of full-time work by herself, or someone else with Civil Engineering or Graphics Engineering training, and three assistants would be required to remove the highly security-sensitive information for 468 NYCTA subway stations (*id.* ¶¶ 25-28).

In his affidavit, Detective Kelly, a 19 year veteran of the NYPD who has served in the Counterterrorism Division for 6 ½ years and is responsible for overseeing the planning and development of detailed threat assessments and security planning for both privately and publicly owned buildings and spaces in New York City, states that in the course of his work he has acquired personal knowledge of NYCTA's subway stations (Kelly Affidavit ¶¶ 1-2). He is aware that NYCTA has maps or blueprints of the subway stations which are stored in a computer database. Based upon his knowledge and review of such blueprints, he is of the opinion that making such records available to petitioner "would seriously jeopardize the safety and security of the New York City subway system and could endanger the lives of our citizens and visitors" (*id.* ¶ 4). He contends further that knowledge of the highly security-sensitive information contained in the NYCTA station blueprints would enable a potential terrorist to plan a more effective surreptitious attack on the NTCTA subway system, its employees and its riders (*id.* ¶¶ 4, 8). Moreover, Det. Kelly avers that the likelihood of the NYCTA subway system being targeted as a target of a terrorist threat is

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highlighted by the recent guilty plea of Najibullah Zazi in the United States District Court for the Eastern District of New York in connection with conspiracy charges arising from a planned attack on the NYCTA subway system (*id.* ¶ 6). Det. Kelly strongly urges the court to deny petitioner's FOIL application insofar as it seeks release of the NYCTA's subway station blueprints as such release would "severely undermine NYPD's and NYCT's efforts to secure the safety of the NYCT's subway system and its riders" (*id.* ¶ 15).

Stephen Schwimmer states that prior to his present position as Director of Security for the NYCTA, he was the Commanding Officer of the NYPD's Transit Bureau's Operations Unit (Schwimmer Affidavit ¶ 1). He confirms that release of the NYCTA's subway station blueprints would jeopardize the safety and security of NYCTA's transit system (*id.* ¶ 6) and lists the interrupted plots upon the transit system from 1997 (a plan to bomb the Atlantic Avenue subway station) to 2009 (the subway bombing plot of Najibullah Zazi) (*id.* ¶ 7) to support the position that both New York City and the NYCTA are major terrorist targets.

In reply, petitioner contends that respondent's arguments amount to "fear mongering" and an obvious attempt to circumvent its obligation under FOIL. In any event, petitioner claims that the same arguments were raised and rejected by Justice Marilyn Shafer of this court in *Rankin v City of New York Dept. of Information Technology & Telecommunications (DoITT)*, Index No. 109626/08. Petitioner also contends that respondent's argument is undermined by the fact that it has provided maps to 100 of 487 subway stations. In addition, petitioner avers that respondent's argument that complying with his request would amount to creating a new document should be rejected. The fact that complying with his FOIL request might be burdensome is not sufficient reason for respondent's denial.

Respondent challenges petitioner's reliance upon the unpublished decision of Justice Shafer and states that it is distinguishable from the instant proceeding because the redacted record sought in *Rankin v DoITT* was of above-ground entrances and exits to various transportation systems including the NYCTA subway stations and that such document was already available on the internet and, thus, in the public domain. In contrast, the NYCTA subway station blueprints at issue here are not in the public domain and respondent is seeking to protect them from such release into the public domain due to the highly security-sensitive material such documents contain.

It is well settled that all records of a public agency are presumptively open for public inspection and copying, and that the burden rests at all times on the government agency to justify any

denial of access to records requested under FOIL (*see, New York State Rifle and Pistol Assoc. v Kelly*, 55 AD3d 222, 224 [1st Dept. 2008]; *New York Civil Liberties Union v. New York Police Department*, 20 Misc.3d 1108(A) [2008]). In order to ensure that the public has maximum access to government documents, the exemptions to FOIL must be narrowly construed (*see, Matter of John H. v Goord*, 27 AD3d 798 [3d Dept 2006]; *Matter of Beyah v Goord*, 309 AD2d 1049 [3d Dept 2003]). “If a FOIL request is denied, the agency ‘must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access [citation omitted]’” (*Kelly*, 55 AD3d at 224 - 225; *see, Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-463 [2007]). The exemption at issue here permits an agency to deny access to records which, “if disclosed could endanger the life or safety of any person” (Public Officers Law § 89 [2][f]).

The Court finds that respondent has satisfied its burden of demonstrating that the release of the records sought falls squarely within an exemption and that respondent has articulated particularized and specific justification to exempt the NYCTA’s subway station blueprints from disclosure under the public safety exemption. The affidavits and affirmations submitted by respondent in support of its cross motion to dismiss are sufficiently detailed to support respondent’s denial of petitioner’s FOIL request. As noted in such supporting documents, the NYCTA subway system is highly vulnerable to terrorist attack and the extent of such vulnerability has been accentuated by a number of failed plots in New York City in recent years. Respondent has set forth the kind of information that would be available if the NYCTA subway station blueprints were made available to petitioner or other members of the public and how such disclosure could have potentially devastating effect by making available to potential terrorists highly sensitive material concerning structural details of the stations, the location of electrical, computer and other equipment and other information which would enhance the ability of such terrorist to maximize the damage to the NYCTA subway system and increase the loss of lives. Moreover, respondent has made clear that the danger posed to the life and safety of riders and NYCTA employees by the disclosure of the materials sought is more than just speculative, but rather, based upon the number of terrorist attacks that have targeted transit systems around the world in recent years, is a very real and potential danger that far outweighs petitioner’s right to access. Respondent has also addressed the issue of whether such records could be produced in redacted form. The court is convinced that the effort entailed in redacting the security-sensitive information from NYCTA’s subway station blueprints would, as

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respondent argues, be the equivalent of requiring respondent to create documents that do not presently exist. Hence, respondent should not be required to shoulder the substantial burden required in producing such documents in redacted form. Rather than undermining respondent's arguments, the documents already provided to petitioner in response to his FOIL request actually militate in favor of denying disclosure. The maps of the 100 subway stations furnished to petitioner are already in existence and were created for the public for a particular purpose. As indicated by Ms Cespedes, the information used in the creation of such diagrams was derived from the NYCTA subway station blueprints and contain much less information than is detailed on the blueprints. No such diagrams have been created for the remaining subway stations and respondent should not be required to create such additional diagrams.

In view of this disposition, the court finds it unnecessary to consider the parties' remaining contentions.

Accordingly, it is hereby

ORDERED that respondent's cross motion is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed

This constitutes the decision, order and judgment of the Court.

DATED:

8/10/10

ENTER,



O. PETER SHERWOOD

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).