

Regenhard v City of New York

2011 NY Slip Op 32844(U)

October 25, 2011

Supreme Court, New York County

Docket Number: 109548/2011

Judge: Cynthia S. Kern

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

PRESENT: Kern
CYNTHIA S. KERN Justice
J.S.C.

PART 52

Regenhard Catherine

INDEX NO. 109548/11

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

City of N.Y

The following papers, numbered 1 to _____ were read on this motion to/for Art 78

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the annexed decision.

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/25/11

CK
CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 52

-----X
CATHERINE and AL REGENHARD, JAMES and
RITA RICHES, MAUREEN AND ALEXANDER
SANTORA, EILEEN and ROSALEEN TALLON,
ROSEMARY CAIN, RUSSEL and JOYCE
MERCER, JIM McCAFFREY, EILEEN and
MATHEW C. WALSH, THERESA MULLAN, and
JOHN and MARGARET CAWLEY,

Petitioners,

Index No. 109548/2011

-against-

THE CITY OF NEW YORK, OFFICE OF THE
MAYOR, CITY OF NEW YORK and
OFFICE OF THE CHIEF MEDICAL EXAMINER
OF THE CITY OF NEW YORK,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and
for Declaratory Relief Pursuant to CPLR 3001

FILED

OCT 25 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioners seek an order directing respondents to release to petitioners a list of the names
and addresses of the family members, next of kin and/or authorized representatives of the 2,749
people who were killed at and in the surrounding area of the World Trade Center on September

11, 2001, for the sole purpose of notifying those people of the proposed location of the unidentified remains found at the site and seeking their input regarding that proposed location. A hearing was held before this court on Wednesday, September 14, 2011. Subsequently, via correspondence described below and in their Amended Answer, respondents have stated that they will notify the family members of the location of the unidentified remains. Based on the fact that the family members will be informed of these facts, the release of the families' names and addresses is an unwarranted invasion of privacy. Accordingly, the petition is denied.

The relevant facts are as follows. On September 11, 2011, terrorists attacked the World Trade Center. 2,749 people were killed in those attacks. The former World Trade Center site, also known as Ground Zero, is currently the site of a memorial which opened on the tenth anniversary of the attacks. A museum is to follow. Petitioners allege that the current plans would place unidentified human remains in the museum portion of the site and that this information has not been disseminated to all family members. Petitioners further allege that this current plan differs from previously disseminated information, some of which stated that the repository for unidentified human remains was to be "distinct from other memorial structures like a museum or visitors center." Petitioners wish to inform other family members of this alleged change in order to seek their input. If enough other families object to the proposed location of the human remains, they plan to take action in the hopes of changing the ultimate location of the remains. However, petitioners agree that should the majority of family members not object to the current plan, they would abide by those wishes.

Accordingly, they, through their attorney, sent a letter to Mayor Michael Bloomberg on April 5, 2011, proposing that they draft a letter to send to the family members with the above

information. The petitioners agreed to bear the expense of mailing the letters but suggested that the City mail the letters since the City was in possession of the necessary names and addresses. In that way, petitioners would not have access to those names and addresses. The City did not agree to petitioners' proposal.

Subsequently, on June 1, 2011, petitioner submitted Freedom of Information law ("FOIL") requests to the Office of the Mayor and the Office of the Chief Medical Examiner ("OCME"). Petitioners had not received any response by June 17, 2011. Because an agency's failure to respond to a FOIL request within 5 business days constitutes a denial of the request (*see* 21 NYCRR 1401.5(e)), petitioners appealed by letters date June 17, 2011 to both the Office of the Mayor and the OCME. By letter dated June 20, 2011, the Office of the Mayor and the OCME both denied petitioners' original FOIL request. By letters dated June 22, 2011 and June 24, 2011, respectively, petitioners appealed those denials, citing the reasons in their June 17th letters. By letters date July 14, 2011 and July 22, 2011, both those appeals were denied. This proceeding followed.

By letter dated September 20, 2011, respondents informed the court and petitioners that they planned to send a letter on or about September 23, 2011 to all the 9/11 families informing them of where the unidentified human remains will be placed. Respondents attached the letter, which stated that these remains will be located in a repository "between the two footprints of the Twin Towers, underground at bedrock level." The letter went on to explain that the repository "will be within the structure of the museum" and will include an adjacent laboratory for the OCME, and a private seating and viewing area for family members only.

By letter dated the next day, petitioners responded with several objections to respondents' proposed letter. Petitioners objected to the fact that the letter only notifies the families of the plan for the remains but does not seek the families' input. Petitioners also objected to the fact that the letter did not explicitly tell the families that entry to the repository would require entering the museum. Finally, petitioners claimed that the fact that the letter addresses other issues as well is problematic.

This court held a conference on October 5, 2011 to discuss petitioners' objections to the proposed letter. Subsequently, respondents revised the letter and provided the revised letter to the court along with a cover letter dated October 12, 2011. The revised letter discusses the sole issue of where the remains will be located. The revised letter also informs the family members of exactly where the remains will be located, stating "[t]he repository will be within the structure of the Museum" and that "the private family viewing area will be accessed through the Museum" at "bedrock level" and that despite having to enter the museum to get to the repository, the family members "will not be charged any admissions fees." Petitioners responded by letter dated October 14, 2011, stating that the revised letter "is an improvement upon the original letter... but does not adequately address [our] concerns." Petitioners complain again that the letter does not solicit input from the victims' families. Petitioners further state that the revised letter still "does not adequately convey what the family members' 'true experience' of visiting the remains will be" because it does not explicitly state that they will have to enter the museum and pass a gift shop, among other things.

On October 17, 2011, respondents amended their answer, including the statement that the revised letter will be mailed to the victims' families by October 21, 2011. Respondents attached

that letter, identical to the one provided to the court on October 12, 2011, to their Amended Answer.

The only issue before the court in this Article 78 proceeding is whether respondents' decision to withhold the names and addresses of family members was an error of law. The burden of proving that the requested material is exempt from disclosure falls on the agency seeking to withhold that material. *See Capital Newspapers Div. of Hearst Corp. v Burns*, 67 N.Y.2d 562 (1986).

FOIL mandates the disclosure of agency records unless they are subject to a specific exemption. See NY Public Officers Law ("POL") §87(2) ("Each agency *shall*... make available for public inspection and copying all records, except...") (emphasis added). While an agency *must* release records to which no exemption applies, it is within the agency's discretion whether to withhold records to which an exemption applies ("such agency *may* deny access to records or portion thereof that... [exceptions listed]") (emphasis added). POL §87(2). The City argues that the names and addresses of the family members should not be disclosed because it would constitute an unwarranted invasion of personal privacy. The relevant section of the statute provides that an unwarranted invasion of personal privacy "includes, but shall not be limited to" six specific kinds of disclosure. The Court of Appeals has held that the proper test to determine whether the release of records which do not fall into any of the six listed categories constitute an "unwarranted" invasion of personal privacy is a balancing test in which the "privacy interests at stake" are balanced against the "public interest in disclosure of the information." *The New York Times Co. v City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005). "What constitutes an

unwarranted invasion of personal privacy is measured by what would be offensive to a reasonable [person] of ordinary sensibilities.” *James, Hoyer, Newcomer, Smiljanich and Yachunis, P.A. v State of New York*, 27 Misc.3d 1223(A) at *13 (Sup. Ct. New York Cty 2010) (citing *Matter of Humane Society of U.S. v Fanslau*, 54 A.D.3d 537 (3rd Dept 2008)); *Physicians Committee for Responsible Medicine v Hogan*, 2010 WL 4536802 at *7 (Sup. Ct. Albany Cty 2010) (citing *same*). Courts have found that the disclosure of home addresses can, in certain circumstances, constitute an unwarranted invasion of privacy. See *Pasik v State Board of Law Examiners*, 114 Misc.2d 397 (Sup Ct., Special Term, NY Cty, 1982) (disclosure of home addresses, educational and employment backgrounds and ages of those people who grade bar examinations would constitute an unwarranted invasion of personal privacy); *Goyer v NYS Dept of Environmental Conservation*, 12 Misc.3d 1261 (Sup. Ct., Albany Cty, 2005) (privacy of personal information, including home address, of people in possession of recreational hunting licenses outweighed public interest in disclosure).

In the instant case, the court finds that the disclosure of the names and addresses of the family members would constitute an unwarranted invasion of personal privacy. The court is required to balance the “privacy interests at stake” against the “public interest in disclosure of the information.” See *The New York Times Co.* at 485. The family members clearly have a privacy interest in their personal information, including their names and home addresses, not being disclosed for any purposes to the public without their explicit consent. On the other hand, there clearly is a public interest in keeping the family members informed as to what will happen with the unidentified human remains and where those remains will be located. The court finds however that the public interest in keeping the family members informed as to what will happen

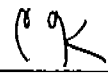
with the remains and where the remains will be located has already been satisfied by the revised letter prepared and sent out by respondents. The revised letter clearly and explicitly informs the family members where the unidentified remains of their loved ones will be kept and how they can visit those remains. Therefore, the privacy interest that these family members have in not having their names and addresses disclosed is not outweighed by their interest in having the information as to the human remains as that information has already been disclosed to them by the respondents in the letter attached to their papers. Based on the respondents sending the letter providing this information directly to the family, it is not an error of law for the respondents not to disclose the names and addresses of the family members to the petitioners in this action.

Petitioner's argument that the letter sent by respondents is insufficient to satisfy the public's interest in disclosure of the information because it does not seek the families' input is without basis. The respondents have no obligation to seek the families' input as to where the unidentified human remains will be located—they are only required to disclose the information as to where the remains will be located. Once the family members have this information, they will be free to respond and react to the information in the letter however they please, including expressing any displeasure they have with the plan for locating the unidentified remains. The court finds the remaining objections to the letter to be without basis. The revised letter adequately and clearly informs the family members of exactly where the remains will be located, stating “[t]he repository will be within the structure of the Museum” and that “the private family viewing area will be accessed through the Museum” and that despite having to enter the museum to get to the repository, the family members “will not be charged any admissions fees.” The revised letter as written satisfies the public interest in disclosure. Finally, respondents have no

obligation to write this letter in exactly the way petitioners would.

Accordingly, the petition is denied. This constitutes the decision, order and judgment of the court.

Dated: 10/25/11



J.S.C.
CYNTHIA S. KERN
J.S.C.

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