

Matter of East 51st St. Dev. Co., LLC v New York City Dept. of Investigation
2012 NY Slip Op 33944(U)
February 2, 2012
Supreme Court, New York County
Docket Number: 112666/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of
EAST 51ST STREET DEVELOPMENT COMPANY,
LLC,

Petitioner,

Index No. 112666/2011

DECISION/ORDER

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF
INVESTIGATION, ROSE GILL HEARNS and
MARJORIE LANDA,

Respondents.

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HON. CAROL R. EDMOND, J.S.C.

MEMORANDUM DECISION

This Article 78 petition against the New York City Department of Investigation, its Commissioner Rose Gill Hearn and its Counsel Marjorie Landa (collectively, the "DOI") arises from the tragic crane collapse accident on March 15, 2008 during the construction of a high-rise building at East 51st Street (the "Site"), which caused seven fatalities, serious injuries to many individuals, and multi-million dollars in property damage (the "accident"). As a result of the accident, numerous actions sounding in tort, products, and Labor Law liability were filed against the companies and individuals involved in the construction.¹

Factual Background

After the accident, the New York City Department of Buildings (the "DOB") conducted

¹ The Court notes although petitioner also seeks costs, disbursements, and reasonable attorneys' fees, petitioner failed to present any arguments or facts in support of this relief.

² The Factual Background is taken in large part from the Petition.

an investigation into the cause of the accident. Thereafter, the DOI conducted investigations related to the accident (the "investigations").

On March 22, 2011, East 51st Street Development Company, LLC ("East 51st Street"), one of the defendants in the commenced actions, sent a request to the DOI (the "Request") pursuant to New York's Freedom of Information Law ("FOIL"). The Request sought, *inter alia*, all documents, reports, videos, photographs, and recordings concerning the accident and the investigations.

On May 24, 2011, the DOI denied East 51st Street's Request, claiming that any materials responsive to the request would be exempt from disclosure pursuant to Public Officers Law ("POL") §87 (2)(b), on the ground that disclosure would constitute an unwarranted invasion of personal privacy; and POL §87 (2)(e), on the ground that the materials were compiled for "law enforcement purposes and disclosure would interfere with law enforcement investigations or judicial proceedings, deprive a person of a right to a fair trial or impartial adjudication, or identify a confidential source or reveal confidential information relating to a criminal investigation."

On June 22, 2011, East 51st Street appealed the DOI's determination (the "Appeal"), contending that the invasion of personal privacy exemption was inapplicable in that (1) the DOI failed to substantiate this claim; (2) the public's interest in seeing the materials outweighed any alleged privacy concerns that may result from disclosing the materials sought; and (3) such materials can be produced with any *bona fide* personal information redacted. Additionally, East 51st Street argued that the law enforcement exemption did not apply because (1) there is not "a present intent on the part of the [DOI] to commence some future law enforcement action in

which the records would be needed” as the City's law-enforcement investigation has already concluded, and (2) the Court rejected the City's previous attempt to withhold accident-related materials on the basis of the law-enforcement privilege.³

DOI denied East 51st Street's Appeal, stating that the records are protected under POL § 87(2)(b) because they would reveal, *inter alia*, the identities of witnesses and confidential information those witnesses provided. “[I]nformation imparted in confidence to the police, and in reliance on the expectation that such confidentiality will be respected, should be exempt from FOIL.” Further, POL § 87(2)(e) also applied because the records were compiled for a law enforcement purpose and their disclosure would interfere with a judicial proceeding. The DOI has been held to be an agency whose investigative files are “compiled for law enforcement purposes” within the meaning of the FOIL law enforcement exemption and, therefore, their investigative files are exempt from disclosure to the extent such disclosure is protected pursuant to POL § 87(2)(e). There is also one pending criminal prosecution involving Edward Marquette (the “*Marquette* proceeding”). And, to the extent the records also relate to the investigation that led to *People v. Rapetti*, the fact of a closed investigation does not in and of itself preclude the applicability of POL § 87(2)(e). If “an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered.” Finally, the order in *In re East 51st Street Crane Collapse Litigation* is not applicable to the instant FOIL request, as it relates to a specific limited set of documents, and stems from discovery in a litigation and not a FOIL request. Production pursuant

³ See Amended Order, *In re East 51st Street Crane Case Collapse Litigation*, Index No. 769000108 (Sup. Ct. N.Y. Co. July 28, 2010).

to FOIL and litigation discovery remain subject to different rules because they serve different purposes.

East 51st Street now argues that the DOI's denials lack merit, and are based upon an improper interpretation of FOIL, conclusory, without factual support, and without the particularity required by the FOIL exemptions upon which the DOI relies. The Request focuses on materials that were related to investigations most likely of DOB employees, such as inspectors, who were connected to the worksite. Such public employees enjoy a lesser degree of privacy than others. Therefore, disclosure of records relating to such employees' official duties would result in a permissible, rather than unwarranted invasion of privacy. Also, given that some or all of the DOI's investigations related to potential criminal wrongdoing by DOB employees, anyone providing confidential information was likely aware that their statements would later be used in a public court. The Request does not seek "personal" information, but material related to the accident. And, having failed to describe the type of documents it is withholding, the DOI failed to meet its burden of articulating a particularized and specific justification for withholding the records.

DOI's conclusory assertion of the law enforcement exemption, in the absence of any description of the material DOI is withholding, is insufficient. It is inconceivable that all of the materials requested were compiled for law enforcement purposes. Further, the mere fact that the *Marquette* proceeding is ongoing is an insufficient basis for withholding materials, and there is no evidence that the withheld materials would have any effect on the *Marquette* proceeding. Nor is there any showing that any witness was promised anonymity in exchange for their cooperation in DOI's investigations.

In any event, the DOI can redact the information exempted from disclosure.

In opposition, the DOI contends that after the instant petition was filed, the DOI produced discovery *via* the City of New as part of a related ongoing tort proceeding, the full contents of DOI's investigative file.⁴ The City of New York also produced all of its other files concerning the accident, including the NYPD files, the DOB investigation file on Ed Marquette, and the materials it received from Ove Arup & Partners Consulting Engineers PC for the investigation it performed on behalf of the DOB, consisting of more than 100,000 pages.

The only documents DOI withheld were two emails dated May 9, 2008 between the City's attorney John Kantor and the DOB's Cranes and Derricks Division Director Ashraf Omran concerning the accident. The DOI withheld these documents based on the attorney-client and attorney work product privileges. Public records that are exempt from Federal and State law are exempt under FOIL, and documents subject to the attorney-client and attorney work product privileges are exempt under CPLR 4503 and 3101(c), respectively.

Further, petitioner requested the investigative file for James DeLayo, a former DOB Assistant Chief Inspector. The DOI asserts that DeLayo was investigated for taking cash payments between 2002 and 2007 in exchange for falsifying paperwork related to mobile crane inspections and certifying crane operator exams not involving the crane at issue (which was a tower crane). This information was uncovered as part of a review following a separate crane collapse at East 91st Street. DeLayo subsequently pled guilty to Bribe Receiving in the Second Degree. The information in the DOI's investigative file for DeLayo is pertinent to the pending

⁴ The DOI is still reviewing four cassette tapes and 15 discs with sound recordings, video recordings, or still images, which were located after the petition was filed to determine whether they are related to the accident or ancillary thereto.

criminal trial of James Lomma. In that proceeding, Lomma claims that certain City inspectors (possibly DeLayo) may have been to blame for the crane collapse accident on East 91st Street.

First, the DeLayo file does not fall within the scope of East 51st Street's FOIL Request. The DeLayo file which resulted from an investigation into the 91st Street crane collapse does not fall within the Request for records resulting from the accident at East 51st Street. In any event, the DeLayo file falls under POL 87(2)(e)(i) as it was compiled for law enforcement purposes, and the DOI need not furnish a specific, factually based explanation to invoke this exemption. The release of the DeLayo file would interfere with the process of disclosure under Criminal Law Procedure in the Lomma proceeding, in which Lomma is accused of involuntary manslaughter. Further, disclosing the DeLayo file with a protective order would improperly turn FOIL into a discovery tool rather than a method of disclosure to the public. It would be incongruous to deny the applicability of a FOIL exemption through the use of protective order.

In reply, East 51st Street contends that its Request seeks "all materials concerning or otherwise relating to" the March 15, 2008 accident, and was not limited to any individual investigation or specific documents. Thus, "all materials" that relate to the accident are responsive to this request, including the DOI's investigation file of DeLayo. DeLayo was directly connected to the Site and he signed off on multiple inspection reports of the tower crane that collapsed on March 15, 2008. As acting chief inspector, he supervised DOB employees, including crane inspectors, who visited the Site regularly. He oversaw the DOB division responsible for inspecting and certifying the safety of the tower crane at the Site. In light of DeLayo's direct connection to the Site and the DOB's inspections of the tower crane, DeLayo's work at the DOB was related to the accident, and any investigation into his alleged professional

misconduct at the DOB is relevant to the accident and thus responsive to the FOIL Request.

The DOI investigated DeLayo's conduct in his capacity as a DOB employee. Any investigation into the possibly corrupt conduct of the acting chief inspector who signed off on the DOB's inspection reports of the East 51st Street tower crane is relevant to the accident. To the extent the investigation examined DeLayo's work, his interactions with subordinates and other colleagues, and his general responsibilities, these are all matters that relate to DeLayo's involvement with the Site. Furthermore, in the East 51st Street crane collapse litigation, East 51st Street and other parties have claimed that certain City inspectors, including possibly DeLayo, may have been to blame in whole or in part for the accident. In a criminal action against Lomma arising from a crane collapse at East 91st Street, Lomma has made nearly identical claims about City inspectors.

Further, since the DOI has never presented the argument that the release of the DeLayo file would interfere with the Lomma proceeding, the Court should disregard it entirely, as the DOI cannot present new facts or arguments in an Article 78 proceeding. In any event, the law enforcement exemption only applies when the subject of an investigation is a party to an ongoing criminal proceeding, and the criminal prosecution of DeLayo is closed. This exemption is limited to prosecutions stemming from or otherwise directly related to the withheld documents, and the DeLayo investigation did not lead to or otherwise supported the prosecution of Lomma. And, there is no case where the law enforcement exemption applied to documents related to an individual whose criminal proceedings were no longer pending. Therefore, the law enforcement exemption no longer applies to the DeLayo investigation file.

Discussion

As recently articulated by the First Department in *New York Committee for Occupational Safety and Health v Michael Bloomberg, as Mayor of the City of New York, et al.* (892 NYS2d 377 [1st Dept 2010]):

While typically an agency action is reviewed under an “arbitrary and capricious” standard, Supreme Court's application of that standard to the City's refusal to disclose the subject records was incorrect. When reviewing the denial of a FOIL request, a court must apply a far different rule.... (*internal citations omitted*).

And, as explained in *New York State Rifle & Pistol Assn, Inc. v Kelly* (55 AD3d 222 [1st Dept 2008]), “the burden at all times rests with the agency to justify any denial of access to requested records” (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462, 849 NYS2d 489, 494, 880 NE2d 10, 15 [2007]). 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’” (*Id.* at 462-463, 849 NYS2d at 494, 880 NE2d 10, quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578, 496 NE2d 665, 667 [1986]).

FOIL

The Court of Appeals aptly explained the purpose of FOIL in *Matter of Buffalo News v Buffalo Enter. Dev. Corp.* (84 NY2d 488, 491-492 [1994]):

The Legislature declared “that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government.” . . . FOIL was enacted to provide the People with the means to access governmental records, to assure accountability and to thwart secrecy (*see Matter of Weston v Sloan*, 84 NY2d 462, 466 [. . .]). *All records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that “ ‘FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is*

granted maximum access to the records of government” (internal citations omitted) (emphasis added).

However, the Court of Appeals has also recognized that although agency records are presumptively open to public inspection without regard to need or purpose of the applicant, the public’s right to obtain information and access the inner workings of the State government is not unfettered (*Matter of Fink v Lefkowitz*, 47 NY2d 567 [1979]). As stated in *Matter of Fink*,

... while 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. To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered. . . . Thus, the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection, to exempt its records from disclosure Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.

Id. at 571; see also *Matter of Encore College Bookstores v Auxiliary Serv.*, 87 NY2d 410, 417, 639 NYS2d 990, 663 NE2d 302 [1995]; *Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109, 580 NYS2d 715, 588 NE2d 750 [1992]; *Matter of Legal Aid Society of Northeastern N.Y. v New York State Dept. of Social Servs.*, 195 AD2d 150, 152, 605 NYS2d 785 [3d Dept 1993]). Blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government (see *Matter of Capital Newspapers Div. of Hearst Corp.*, 67 NY2d at 569; *Gould v NYC Police Dept.* 89 NY2d 267, 653 NYS2d 54, 675 NE2d 808 [1996]). Thus, the exemptions available are to be narrowly construed (*Matter of Legal Aid Society of Northeastern N.Y. v New York State Dept. of Social Servs.*, *supra*, at 153, 605 NYS2d 785; see, POL § 89(4)(b); see *Matter of Hanig v State of New York Dept. of Motor Vehicles*, *supra*, at 109, 580 NYS2d 715, 588 NE2d 750; see also, *Daily Gazette v Schenectady*, 93 N.Y.2d

145, 158-159, 688 NYS2d 472, 710 NE2d 1072 [1999]). And, the agency at issue must “articulat[e] a particularized and specific justification for denying access” to the requested documents (*Matter of Capital Newspapers Div. of Hearst Corp. supra*, at 566; *Matter of Fink v Lefkowitz*, 47 N.Y.2d 567, 571, 419 NYS2d 467, 393 NE2d 463; *Gould supra*, at 275).

The only remaining issues in this petition relate to the DOI’s file concerning the investigation of DeLayo, which the DOI argues is (1) outside the scope of the Request and (2) subject to the law enforcement exemption. Each is addressed in turn.

In light of the view that all documents are presumptively available for review *without regard to need or purpose of the applicant*, unless they fall under one of the exemptions pursuant to Public Officers Law § 87(2), East 51st Street’s broad Request for “all materials concerning or otherwise relating to” the crane collapse on March 15, 2008 include the DeLayo file.

East 51st Street’s Request for documents is limited to records and information generated from and about “the Accident.” However, East 51st Street need not demonstrate a need or purpose for the DeLayo file. In any event, it is noted that DeLayo supervised the crane inspectors who visited the accident site and signed several crane inspection reports for the tower crane at issue herein. DeLayo also visited the site after the accident. Thus, the manner in which DeLayo performed his duties as a DOB employee in general may be revealed from the investigation by the DOI, albeit arising from a different crane collapse, and is to some degree relevant to the claims and defenses raised in the multi-party litigation.

As to whether the DeLayo file is exempted from disclosure, POL § 87(2), this section reads in relevant part as follows:

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

* * * * *

(e) are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures.

POL § 89(2)(b) provides:

An unwarranted invasion of personal privacy includes, but shall not be limited to:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
- vi. 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.

The DOI failed to sufficiently establish that the DeLayo file falls within any of the narrow exemptions noted above.

First, nothing in the DOI's papers indicate that disclosure of the DeLayo file would reveal information "personal" in nature or related to employment, medical or credit histories to anyone. Nor is there any indication that disclosure would result in economic or personal hardship to any party. In fact, DOI's opposition papers appear to abandon this exemption as a basis to withhold

records. In any event, it appears that the investigation of DeLayo involved his role as an employee for the DOB, and consisted of records generated from DOB-based sources. Therefore, the personal privacy exemption is inapplicable to the records sought.

Second, the DOI failed to meet its heavy burden of establishing the applicability of the law enforcement purpose exemption.

That the DOI's Appeal Determination references the "pending criminal proceeding" of Marquette, and does not specifically reference the *DeLayo* proceeding is a distinction without a difference, since the DOI likewise argues herein that disclosure will impact the criminal proceeding of DeLayo (See Page 2 of 3 of the Appeal Determination).

DOI failed to present any caselaw shielding records from the public based on POL § 87(2) under the circumstances herein, where the subject of the investigation, *i.e.*, DeLayo is no longer the subject of any criminal or other proceeding by any agency. The investigation and criminal proceeding against DeLayo are concluded (*see Raguso v New York State Dept. of Law*, 152 Misc. 2d 602, 578 N.Y.S.2d 959 [Sup. Ct., New York County 1991] (finding that as to FOIL request by petitioner who commenced private action against manufacturer resulting from improper price fixing, documents in the possession of the Attorney General related to its action against manufacturer for anti-trust violations were not protected by law enforcement exemption as the Attorney General's action resulted in a judgment and "the investigation was over"))).

Further, DOI's arguments that disclosure the DeLayo file would interfere with the discovery in the Lomma criminal proceeding, is misplaced. That criminal proceeding is *not* against DeLayo, and there is no indication that any other proceeding is contemplated. The claim that disclosure would turn FOIL into a discovery tool rather than a method of disclosure to the

public is no basis to withhold these records from the public, which is entitled to "discover" the information (*see Raguso, supra*, at 152 Misc. 2d 605-606 (a litigant may have the benefits, as any other citizen, of FOIL, in addition to the discovery devices of Article 31 of the CPLR)).

Finally, the DOI failed to establish what information, if any, should be redacted.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED and ADJUDGED that the branch of the Article 78 petition by East 51st Street Development Company, LLC seeking an order ordering the respondents New York City Department of Investigation, its Commissioner Rose Gill Hearn and its Counsel Marjorie Landa to produce all materials requested on March 22, 2011 by East 51st Street, pursuant to the FOIL, is granted to the extent that said respondents shall produce the DeLayo file within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of the petition for cost and disbursements is granted in the amount of \$ _____ as taxed by the Clerk, upon a presentation of an appropriate bill of costs; and it is further

ORDERED that the branch of the petitioner for reasonable attorneys' fees is denied; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 2, 2012



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMOAD