

**Visiting Nurse Serv. of N.Y. Home Care v New York
State Dept. of Health**

2013 NY Slip Op 31755(U)

July 1, 2013

Supreme Court, Albany County

Docket Number: 1689-12

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
VISITING NURSE SERVICE OF NEW YORK HOME
CARE,
Petitioner,

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

-against-

NEW YORK STATE DEPARTMENT OF HEALTH;
NIRAV R. SHAH, M.D. M.P.H., in his official capacity as
Commissioner of the New York State Department of Health;
ROBERT LOCICERO, in his official capacity as Records
Access Officer, New York State Department of Health; and
JONATHAN KARMEL, in his official capacity as Records
Access Appeals Officer, New York State Department of
Health,
Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-12-ST3519 Index No. 1689-12

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DECISION/ORDER

George B. Ceresia, Jr., Justice

By Decision/Order dated November 28, 2012, the Court (1) denied and dismissed the petition of Visiting Nurse Service of New York Home Care, a home health agency providing services to Medicaid beneficiaries that was the subject of an audit by New York State Office of the Medicaid Inspector General (“OMIG”), an independent office within respondent New York State Department of Health (“DOH”), for release of certain of respondents’ intra-agency documents pursuant to the Freedom of Information Law (FOIL), (2) ordered OMIG to prepare and file its defense of its 2011 refusal to release the actual audit samples utilized in OMIG’s audits of other Medicaid providers (“OMIG audit samples”), and (3) deferred consideration of petitioner’s application for attorneys fees.

The Court’s order that OMIG prepare and file its defense of its 2011 refusal to release the OMIG audit samples followed some unusual circumstances. As noted in the prior decision/order, petitioner requested a convoluted list of 20 types of information and

documentation. OMIG initially treated petitioner's complex request as though it was a FOIL request and interpreted it as including the OMIG audit samples and withheld the OMIG audit samples pursuant to FOIL's "law enforcement investigations" exemption (Public Officers Law § 87[2][e]).

When petitioner subsequently challenged that part of the administrative determination in this Article 78 proceeding, OMIG urged that the OMIG audit samples had not actually been requested by petitioner and therefore OMIG's failure to release the OMIG audit samples was beyond the scope of this proceeding. Notwithstanding the complexity of petitioner's request, given OMIG's initial interpretation of petitioner's request as including the OMIG audit samples, the Court accepted petitioner's argument that petitioner's FOIL demands could be interpreted so as to include the OMIG audit samples. The Court then ordered OMIG to prepare and file its defense of its 2011 refusal to release the actual audit samples utilized in OMIG's audits of other Medicaid providers.

The question of whether the OMIG audit samples may be withheld pursuant to the law enforcement investigations exemption is now moot because OMIG has released the OMIG audit samples. OMIG explains its original refusal to disclose the OMIG audit samples of the other Medicaid providers by alleging that in 2011, when OMIG initially invoked the law enforcement investigations exemption as a basis for withholding the OMIG audit samples, the audits in question were in the early stages and OMIG could not determine whether those audits would result in referrals of the cases to a law enforcement agency for further investigation. OMIG declares that those investigations have now progressed to the point

where OMIG has determined that those audit samples need not be withheld pursuant to the law enforcement investigations exemption. Consequently, OMIG has removed the names, dates of birth, and Medicaid recipient's identification numbers from the OMIG audit samples, pursuant to Public Officers Law § 87[2][a] and [b], and provided petitioner with a compact disc containing the samples.

As regards petitioner's request for attorneys fees, Public Officers Law § 89[4][c] authorizes a court to award attorneys fees when the party seeking disclosure has "substantially prevailed" in the proceeding and the agency did not have a "reasonable basis for denying access" to the records in question (Public Officers Law § 89[4][c]; Matter of Mazzone v New York State Dept. of Transp., 95 AD3d 1423, 1426 [3d Dept., 2012]; Matter of Capital Newspapers Div. of Hearst Corp. v City of Albany, 63 AD3d 1336, 1339 [3d Dept., 2009]). However, even when both statutory prerequisites are met, an award of attorneys fees is not mandatory; the decision to grant or deny counsel fees remains within the discretion of the court (Matter of Hayes v Chestertown Volunteer Fire Co., Inc., 93 AD3d 1117, 1119 [3d Dept., 2012]; Matter of Maddux v New York State Police, 64 AD3d 1069, [3d Dept., 2009]; Henry Schein, Inc. v Eristoff, 35 AD3d 1124, 1126 [3d Dept., 2006]; Grace v Chenango Co., 256 AD2d 890 [3d Dept., 1998]).

Although petitioner's demand for intra-agency records was previously denied by the Court and petitioner is clearly not entitled to any attorney fees for time spent seeking those intra-agency records, the Court finds that petitioner has prevailed substantially regarding its request for the OMIG audit samples. Turning to the question of whether respondents had a

“reasonable basis” for denying access to the OMIG audit samples, the question of whether a respondent had a “reasonable basis” for denying access to the documents is not answered in the negative simply because it was ultimately required to disclose documents (Matter of New York State Defenders Assn. v New York State Police, 87 AD3d 193, 195 [3d Dept., 2011]; Matter of Norton v Town of Islip, 17 AD3d 468, 469 [2d Dept., 2005]; Matter of Hopkins v City of Buffalo, 107 AD2d 1028, 1029 [4th Dept., 1985]) or, as in this case, determines to voluntarily disclose the documents.

While the Court declines to render a determination on the merits of the now academic issue of whether OMIG was originally entitled to withhold the OMIG audit samples based on the law enforcement investigations exemption, the Court concludes that OMIG did not lack a reasonable basis either in initially withholding the documents or in failing to release the documents previously in this proceeding. The law enforcement exemption is not so well defined that respondents can be said to have acted unreasonably in initially claiming that samples of the documents that OMIG created in the preliminary stages of determining whether to prosecute were protected by the law enforcement investigations exemption. Thus, it was sufficiently reasonable for respondents to withhold the OMIG audit samples at a time that OMIG was evaluating the samples and determining whether or not those other providers should be referred for prosecution. Petitioner has cited no case that requires disclosure of the OMIG audit samples during the preliminary stages of evaluation.

Petitioner is mistaken both when it claims that the OMIG audit samples were not compiled for law enforcement purposes and that respondents’ assertion of the law

enforcement investigations exemption “would permit the shielding from disclosure under FOIL of virtually any agency records through the simple assertion that some possible *future* law enforcement investigation *might conceivably* be interfered with by the production of responsive records.” The records that were initially filed by the other providers were not filed for law enforcement purposes, but OMIG’s audit samples of those records were arguably compiled for law enforcement purposes and their premature release could arguably interfere with that process.

Turning to the question of whether respondents acted reasonably in refusing to release the OMIG audit samples during the initial part of this proceeding while respondents were asserting that petitioner had not actually requested the OMIG audit samples, the Court again concludes that respondents acted reasonably. Although the Court ultimately agreed with petitioners that the OMIG audit samples were included within petitioner’s requests, petitioner’s requests were very complicated and open to numerous interpretations. The Court finds that respondents were not acting unreasonably in asserting that the OMIG audit samples were outside of petitioner’s FOIL request.

As petitioner did not substantially prevail in its efforts to obtain disclosure of the intra-agency documents and respondents did not arbitrarily arrive at the initial decisions not to disclose the OMIG audit samples of the providers’ records, the Court concludes that it may not award attorneys fees to petitioner (Matter of Mazzone v New York State Dept. of Transp., 95 AD3d 1423, 1426 [3d Dept., 2012]). Even assuming for the purposes of the argument that respondents were found not to have a reasonable legal basis for withholding

the OMIG audit samples pursuant to the law enforcement investigations exemption, the Court would exercise its discretion in respondents' favor by denying petitioner's application for attorneys fees. Respondents have repeatedly shown their good faith during the administrative and judicial process, beginning with their determination to treat petitioner's request as a FOIL request and extending to the final decision to release the OMIG audit samples. As noted in the prior decision/order, petitioner did not submit a FOIL request. Petitioner's counsel submitted a six-page "letter" to OMIG on April 19, 2011 stating that petitioner intended to challenge the sample OMIG used in its audit of petitioner and requested that OMIG provide petitioner with information and documents. The requested material was described in a complexly detailed list of 20 types of information and documentation. OMIG treated the letter as a FOIL request, gave petitioner much of what was requested, and has been upheld regarding one of the two groups of records that were withheld.

Finally, the Court notes petitioner's counsel's complaint that respondents' additional production is incomplete and request that the Court direct respondents to conduct a further search, comply with FOIL's certification requirements. This request appears to be an unacknowledged reargument of matters that were not specifically raised in petitioner's petition. The Court does not entertain requests for reargument and/or renewal contained in correspondence.

Accordingly it is

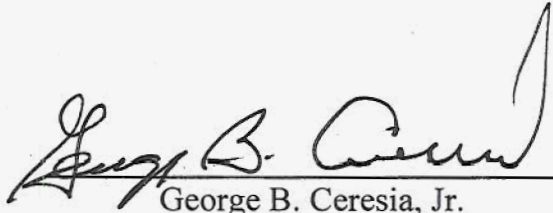
ORDERED, that petitioner's application disclosure of the OMIG audit samples is dismissed as moot and it is further

ORDERED, petitioner's application for attorneys fees is denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Rec'd
Dated: ~~June~~ ^{July} 1, 2013
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Amended Notice of Petition dated January 12, 2012;
2. Notice of Petition dated January 11, 2012;
3. Petition dated January 10, 2012, with exhibits annexed;
4. Memorandum of Law dated January 11, 2012;
5. Answer dated April 24, 2012;
6. Affidavit of Sarah Dasenbrock dated February 13, 2012, with exhibits annexed;
7. Memorandum of Law dated April 24, 2012;
8. Affidavit of Roy W. Breitenbach dated May 2, 2012;
9. Correspondence of William J. McCarthy dated December 27, 2012;
10. Affidavit of Sarah Dasenbrock dated December 21, 2012;
11. Correspondence of Roy W. Breitenbach dated January 10, 2013.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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SEALING ORDER

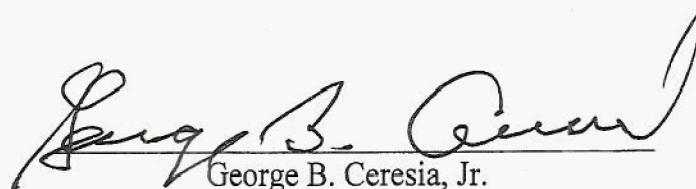
The following documents were filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, Material Submitted to the Court for In Camera Review, consisting of copies of emails which the Court, by decision-order-judgment dated November 28, 2012, has found are intra-agency material, and therefore not subject to disclosure under the Freedom of Information Law.

For good cause shown, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: July 1, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice