

**Prinzivalli v Farley**

2014 NY Slip Op 30658(U)

March 13, 2014

Sup Ct, New York County

Docket Number: 114372/09

Judge: Joan A. Madden

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

**PRESENT:** How Jacob A. Widdow  
Justice

**PART** 11

Index Number : 114372/2009  
PRINZIVALLI JOANN  
vs.  
FARLEY, THOMAS  
SEQUENCE NUMBER : 006  
COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/6/14  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision Order

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**FILED**

MAR 18 2014

COUNTY CLERK'S OFFICE  
NEW YORK  
\_\_\_\_\_, J.S.C.

Dated: March 13 2014

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 11

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JOANN MARIE PRINZIVALLI,  
SAM BERKLEY, and  
PATRICIA HARRINGTON,

Index No.: 114372/09

Petitioners,

- against -

THOMAS FARLEY in his official  
capacity as HEALTH COMMISSIONER  
OF THE CITY OF NEW YORK,  
NEW YORK CITY BUREAU OF VITAL  
STATISTICS, NEW YORK CITY OFFICE  
OF VITAL RECORDS, NEW YORK CITY  
BOARD OF HEALTH, NEW YORK CITY  
DEPARTMENT OF HEALTH AND MENTAL  
HYGIENE, and THE CITY OF NEW YORK,

Respondents.

**FILED**

MAR 18 2014

COUNTY CLERK'S OFFICE  
NEW YORK

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**MADDEN, JOAN A., J.:**

Petitioners move to compel discovery and for leave to take additional discovery. Respondents oppose the motion.

Background

In this Article 78 proceeding, petitioners Joann Marie Prinzivalli (Prinzivalli), Sam Berkley (Berkley), and Patricia Harrington (Harrington), who are transgender individuals, challenge respondents' denial of their applications to amend their birth certificates to change the designated "sex."

Petitioners also seek a declaration that the New York City Board of Health regulation requiring transgender applicants to submit proof of "convertive surgery" in order to obtain an amended birth certificate, and respondents' implementation of the regulation, are arbitrary, capricious, and unlawfully

discriminatory.

In this regard, petitioners challenge the validity of section 207.05 (a) (5) of the New York City Health Code (24 RCNY 207.05 [a] [5]), requiring proof of genital surgery, the absence of which was the primary reason for denying petitioners' applications. At issue is whether respondents' reasons for retaining the convertive surgery prerequisite, and for interpreting that requirement to mean genital surgery, have a rational basis, and whether the regulation and the implementation of it are the result of discriminatory animus against transgender and disabled persons.

By decision and order dated July 23, 2012, this court permitted certain discovery in this proceeding, finding "[i]n view of the nature of the proceeding, and the issues it raises, ... petitioners have demonstrated sufficient need for discovery with respect to the rationality of requiring convertive surgery, as defined by respondents, and with respect to whether discriminatory animus has played any part in addressing requests of transgender or disabled individuals."

The court required respondents to respond to petitioners' requests for document discovery numbered 1, 2, 4, 5, and to provided a response to request number 10, which sought the names, titles, and addresses of the current and former members of the Board of Health, only with respect to the members at the time

that the 2006 amendment was being considered.<sup>1</sup> The court denied

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<sup>1</sup> Request numbers (1), (2), (4), (5) and (10), respectively seek:

(1) All policies, procedures, rules, or regulations relating to correcting, altering, amending, deleting or omitting the sex designation on a birth certificate, including policies, if any, for amending, altering, changing, correcting, deleting, or omitting the sex designation on birth certificates for transgender individuals who do not submit proof of "convertive surgery," as used in Section 207.05 (a) (5) of the New York City Health Code, for applicants correcting the sex designation pursuant to 207.01 of the New York City Health Code, and for applicants with intersex conditions or disorders of sex development; and

(2) The definition, construction, interpretation, or application of the term "convertive surgery" as used in Section 207.05 (a) (5) of the New York City Health Code, including the specific documentation required for the Bureau of Vital Statistics or the Office of Vital Records to issue a birth certificate with a changed, altered, corrected, or amended sex designation, including whether any exceptions to these requirements are made and, if so, under what circumstances, and including the application of the term to female-to-male transgender individuals who have undergone phalloplasty or metoidioplasty but not vaginectomy; and

(4) The number of applications to correct, alter, or amend a birth certificate that include a request to correct, alter, amend, delete, or omit the sex designation that were processed or received by the Department of Health and Mental Hygiene of the City of New York, or any department, division, or unit thereof, on an annual basis from 2001 to the present, including, if available, the numbers or percentages of those applications granted and denied; and

(5) Any changes, amendments, proposed changes, or proposed amendments to Section 207.05 (a) (5) of the New York City Health Code, including but not limited to a proposed amendment to the Health Code, proposed on or about September 26, 2006, addressing amending, altering, changing, correcting, deleting, or omitting the sex designation on a birth certificate; this request includes records regarding any votes made or taken in connection with such changes, amendments, proposed changes, or proposed amendments as well

the other document requests as either irrelevant, unnecessary or overbroad.

In addition to document discovery, petitioners sought leave to serve interrogatories and take oral depositions of respondents, or their current or former officers and employees, and current members of the Board of Health and the Commissioner, as well as those serving in 2006, and members of the 2006 Committee. The court held that:

Petitioners will be permitted to question persons with knowledge of the decision-making process engaged in during the time that the 2006 amendment was being considered, and of the reasons for the Board of Health's decision to reject the amendment, and of the decisions made to grant or deny applications of transgender persons; but petitioners need to more carefully tailor their request for interrogatories and depositions to identify individuals that they seek to depose or otherwise question.

As information about persons involved in such decision making is in the control of respondents, this branch of the motion will be granted to the extent of directing respondents to provide an affidavit from an individual or individuals with personal knowledge of the 2006 amendment process, of the decision to reject the 2006 committee's recommendations, and of other persons

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as comments received from all sources including but not limited to the public and other New York City agencies and officials;

(10) The names, titles, and addresses of the current members of the Board of Health and the members or former members of the Board of Health who served at any point from 2002 to the present.

involved in such decision making; and with knowledge of the reasons for granting or denying transgender applications to amend the sex on birth certificates, including petitioners' applications. This branch of the motion is otherwise denied, with leave to renew the application upon the completion of document discovery, and with legal and factual support for each deposition requested.

On February 28, 2013, respondents responded to petitioners' document requests by producing 95 pages of documents which included redactions based on, *inter alia*, the deliberate process privilege, and on the grounds that the information was non-responsive. Respondents also provided a privilege log indicating that certain documents were withheld based on, *inter alia*, the deliberative process privilege.

Motion to Compel Production of Redacted/Withheld Documents

Petitioners move to compel discovery of the documents redacted and/or withheld by respondents on the ground of the deliberate process privilege, asserting that New York does not recognize such privilege outside the context of a request New York's Freedom of Information Law. Petitioners also assert that the redacted information is relevant and material to its claims and falls within the document requests.

Respondents oppose the motion, asserting that the privilege applies as the material withheld from disclosure reflects and relates to the decision making process within the respondent New York City Department of Health and Mental Hygiene (DOHMH).

Moreover, even if the court finds that the deliberative process privilege is not applicable, respondents argue that the public interest privilege applies so as to encourage candor in decision making affecting the public interest and seeks to amend their privilege log accordingly. Respondents also argue that the documents were properly redacted based for non-responsiveness and/or to protect or contains personal information.

New York does not recognized a deliberative process privilege other than in connection with a FOIL request. Grossman v. Schwarz, 125 FRD 376, 381 (SD NY 1989); Cubas v. Martinez, 2006 WL 6598052 (Sup Ct NY Co. 2006); In the Matter of Xerox Corp v. Town of Webster, 65 NY2d 131 (1985) (where the court applied the deliberative process privilege noting that "[o]pinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as predecisional material, prepared to assist the agency decision maker ... such material is exempt to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers") [internal citations and quotations omitted]).

However, New York recognizes a public interest privilege "which inheres to certain official confidential information." World Trade Center Bombing Litigation v. Port Authority of New York and New Jersey, 93 NY2d 1, 8 (1999) "The privilege envelops

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'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged.'" Id., quoting Cirale v. 80 Pine Street Corp., 35 NY2d 113, 117 (1974) (internal citations omitted).

The determination of whether the public interest privilege is applicable requires a balancing of the various interests involved. Id. Specifically, as the Court of Appeals has written:

Public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure. While the need of a litigant for the information would present a strong argument for disclosure, the court should balance such need against the government's duty to inquire into and ascertain the facts of a serious accident for the purposes of taking steps to prevent similar occurrences in the future.

Id., at 118.

As the inquiry as to whether the public interest privilege applies is "fact-specific" an in-camera inspection is necessary to determine if disclosure of the documents at issue is appropriate. World Trade Center Bombing Litigation v. Port

Authority of New York and New Jersey, 93 NY2d at 10.

Here, the decision making process with respect to the regulations at issue is at the heart of plaintiff's case. Cubas v. Martinez, supra. However, the question of whether these documents are protected under the public interest privilege must be determined after in-camera inspection. World Trade Center Bombing Litigation v. Port Authority of New York and New Jersey, 93 NY2d at 10.

Accordingly, petitioners' motion is granted to the extent of directing that respondents provide a revised privilege log identifying those documents/redactions subject to the public interest privilege, together with the documents at issue for in-camera inspection as indicated below. The court shall also review the documents to determine if they were properly redacted based on their alleged non-responsiveness and respondents shall produce the documents for those purposes as well. Respondents shall also provide to the court redacted versions of the documents, which include the basis for the redactions.

Request for Further Discovery

Petitioners move for leave to serve further document requests and interrogatories, and to conduct depositions of three officials at DOHMH. Respondent opposes the motion.

As noted by the court in its July 23, 2013 decision, under CPLR 408, discovery in special proceedings is permitted only with

leave of court. Discovery will be allowed in such proceedings when there is a demonstrated need for it, and when the discovery sought is "material and necessary" to the prosecution or defense of the proceeding. See Matter of Allocca v Kelly, 44 AD3d 308, 309 (1<sup>st</sup> Dept 2007); Matter of Town of Wallkill v New York State Bd. of Real Prop. Servs., 274 AD2d 856, 859 (3d Dept 2000).

The court will consider the additional requests under this standard. As for petitioners' request for discovery regarding the classification system used at City owned correctional facilities, hospitals and schools (document requests 1 and 2 and proposed interrogatories 1 through 8), the court finds that petitioners are entitled to this information to the extent they seek documents relating to the policies and practices of the various agencies with respect to the classification system. This information is relevant as it is clear from their Verified Answer that the classification of system at these facilities is related to respondents' asserted rational basis for corrective surgery requirement.<sup>2</sup>

Petitioners next seek discovery regarding the type of surgeries required and the use of discretion in granting or denying applications to change sex designation on birth

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<sup>2</sup>While respondents argue that these documents are irrelevant as it was too late to address the concerns of the Department of Corrections and other agencies before it withdrew the amendment, the record shows that the agencies objected the amendment and respondents were aware of the objections.

certificates (document requests nos 3 and 4 and proposed interrogatories 9 through 14).

Discovery of this information is denied at this time based on the affidavit of Steven Schwartz, New York City Registrar of Vital Statistics of DOHMH, who indicates that there is no discretion as the type of corrective surgery required. Moreover, the apparent exception made for one applicant, which is discussed in a September 22, 2009, email chain, involved a medical issue where genital surgery could not be performed due to chronic illness, and the file relating to this case has been sealed. In any event, as indicated below, as the court is directing the deposition of Mr. Schwartz, petitioners can inquire at this deposition as to whether there is discretion as to the nature of corrective surgery required and seek any documents relevant to this testimony.

Petitioners next request discovery regarding New York City Health Code § 207.01, which is used by individuals "to correct the sex designation on their birth certificate so as to have it reflect the sex they were born because their sex was incorrectly recorded on their birth certificate due to a clerical error" (document request no. 5). As § 207.01 addresses ministerial errors in birth certificates, this request is denied.

Petitioners' request for discovery regarding New York City Department of Health and Mental Hygiene (DOHMH) memo dated

December 5, 2006, which discusses "societal concerns/ramifications" behind its policy re: birth certificate amendment (document request no. 6), is also denied. Respondents have already produce affidavits and documents discussing the societal concerns/ramifications in response to prior FOIL and discovery requests.

The next category of discovery seeks documents as to respondents' awareness of, and communications regarding, the risks of corrective surgery (document request no. 7). As corrective surgery is required prior to amendment of a birth certification under New York City Health Code § 207.05, such discovery is relevant to the rationality of the requirement and its potential disparate impact. Accordingly, respondents are directed to produce this discovery.

Petitioners also seek discovery regarding number of applications to change sex designation on birth certificates and the identity of those involved in 2006 Board of Health Proposal Process (interrogatories 15 and 16). Respondents have produced information as to the number of applications approved under § 207.05 from 2001 to September 2012. However, petitioners argue that the information is incomplete as they are seeking the overall number of applications or, in the alternative, the number of applications rejected. While respondents assert that they do not have these statistics, they are directed to provide an affidavit delineating their efforts to obtain the information,

including how the information regarding an application is maintained and/or to provide any information they may have regarding these statistics.

Petitioners next seek discovery regarding term "actual sex" as stated in respondents verified answer (interrogatories 17 and 18). In response, counsel for respondents acknowledges that the term was used for the first time in her verified answer, and that the term refers to the individual's external genitalia. However, petitioners also seek information as to whether the term "actual sex" appears in any of the respondents' policies and procedures, and petitioners are entitled to obtain discovery in this regard.

Petitioners also seek the depositions of Mr. Schwartz, the New York City Registrar of Vital Statistics of DOHMH, Lorna Thorpe, the Deputy Commissioner of the Division of Epidemiology of DOHMH from 2004 to November 2009, and Edna Timbers, Deputy Director of Corrections unit of DOHMH.

Mr. Schwartz has submitted affidavits in this matter and co-authored the DOHMH memo dated December 5, 2006, which discusses "societal concerns/ramifications" behind its policy regarding birth certificate amendment. Accordingly, Mr. Schwartz's testimony shall be permitted with respect to the areas of discovery permitted in the July 23, 2013 decision and order and by this decision and order. As for the request for the deposition of Ms. Thorpe, the court shall permit her testimony with respect the matters addressed in her affidavit. However, petitioners' request to depose Ms. Timbers is denied at this

time. Although Ms. Timbers, who reported to Mr. Schwartz, may have been involved in the granting and denying of applications to amend or change birth certificates, her testimony is potentially duplicative of that of Mr. Schwartz. Accordingly, petitioners' request for her deposition is denied without prejudice to renewal after the deposition of Mr. Schwartz.

In view of the above, it is

ORDERED that petitioners' motion to compel is granted to the extent of directing that on April 10, 2014, respondents provide to the court for in-camera inspection a revised privilege log identifying those documents/redactions subject to the public interest privilege, together with the documents at issue and the redacted versions of the documents, which include the basis for the redactions; and it is further

ORDERED that on or before April 10, 2014, respondents shall respond to the additional discovery requests in accordance with this decision and order; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street, on May 8, 2014 at 9:30 am, and the depositions of Mr. Schwartz and Ms. Thorpe shall be scheduled at the conference.

DATED: March 13 2014



FILED

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