

**Robbins Geller Rudman & Dowd LLP v New York
City Dept. of Investigation**

2014 NY Slip Op 31057(U)

April 25, 2014

Sup Ct, New York County

Docket Number: 101025/13

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

CAROL E. HUFF

Index Number : 101025/2013
ROBBINS GELLER RUDMAN & DOWD
vs
NYC DEPT. OF INVESTIGATION
Sequence Number : 001
ARTICLE 78

PART 32

INDEX NO. _____
MOTION DATE _____
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~~

motion is decided in accordance
with accompanying memorandum decision

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

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
1418).

Dated: APR 25 2014


CAROL E. HUFF J.S.C.

- 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
COUNTY OF NEW YORK: PART 32

-----X

ROBBINS GELLER RUDMAN & DOWD LLP, : Index No. 101025/13

Petitioner, :

- against - :

NEW YORK CITY DEPARTMENT OF :
INVESTIGATION, ROSE GILL HEARN, in her official :
capacity as Commissioner of the New York City :
Department of Investigation, NEW YORK CITY OFFICE :
OF PAYROLL ADMINISTRATION, ROBERT W. :
TOWNSEND, in his official capacity as Interim :
Executive Director of the New York City Office of :
Payroll Administration, THE OFFICE OF THE MAYOR :
OF THE CITY OF NEW YORK, and MICHAEL R. :
BLOOMBERG, in his official capacity as the Mayor :
of the City of New York, :

Respondents. :

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

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).

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks a judgment annulling respondents' alleged wrongful rejection of certain Freedom of Information Law ("FOIL") requests, and directing them to produce the documents.

The requests relate to a fraudulent scheme perpetrated against New York City in connection with "CityTime," a project intended to modernize the timekeeping systems used by the City's numerous agencies. Scientific Applications International Corporation ("SAIC") was the lead contractor for the original project, begun in 2003, and Technodyne LLC was SAIC's

primary subcontractor. By 2011 a massive fraud involving hundreds of millions of dollars of overbilling had been discovered. SAIC agreed to pay more than \$500 million in restitution and penalties, and a number of individual SAIC and Technodyne employees were criminally charged. The final proceedings against these individuals concluded in November 2013.

On February 5 and 6, 2013, petitioner submitted identical FOIL requests, seeking documents concerning the CityTime project and investigations into the fraud, to respondents New York City Department of Investigation (“DOI”), New York City Office of Payroll Administration (“OPA”), and the Office of the Mayor of the City of New York (“Mayor’s Office”).

At the outset, OPA and the Mayor’s Office contend that petitioner failed to exhaust its administrative remedies with respect to the requests filed with them. Public Officer’s Law (“POL”) § 89(3)(a) provides:

[W]ithin five business days of the receipt of a written request for a record reasonably described, [the respondent] shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstances relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances.

OPA acknowledged petitioner’s FOIL request by email on February 12, 2013, and responded by letter dated March 12, 2013, stating that it would need five months to review potentially responsive documents. The Mayor’s Office acknowledged receipt of the FOIL request on March 6, 2013, saying that it would provide an “update” on processing the request in ninety days. In a May 9, 2013, letter the Mayor’s Office restated that it would provide an update

in another ninety days.

Petitioner interpreted these responses to be constructive denials of its FOIL requests. An advisory opinion of the State of New York Department of State Committee on Open Government states that where a respondent “acknowledged receipt of the request, [but] failed to provide access to the requested records, indicating only that it ‘would provide’ the information” beyond the reasonable time given by the POL to respond, it constitutes constructive denial. FOIL-AO-18706. It is incumbent on a respondent to make readily obtainable documents available immediately. FOIL-AO-8407. OPA and the Mayor’s Office failed to make any documents available within a reasonable time, and petitioner was correct in viewing their responses as constructive denials.

Petitioner appealed the denials on June 17, 2013. Accordingly, within ten business days, OPA and the Mayor’s Office were required to “fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. . . . Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.” POL § 89(4)(a). OPA repeated its need to take five months while not forwarding any readily obtainable documents (many of which had already been provided to DOI pursuant to its investigations), and the Mayor’s Office failed to respond at all.

Thus petitioner’s appeals were also constructively denied and it has met its burden to establish that it had exhausted its administrative remedies before commencing this proceeding on July 19, 2013. OPA’s partial production of documents on August 21, 2013, does not alter this analysis. See Coleman v New York City Police Dept., 282 AD2d 390, 392 (1st Dept 2001) (“[R]espondents’ laxity in addressing petitioner’s request until legal action had been commenced

5] warrants that he be permitted to appeal the partial production of the documents,” quoting Newton v Police Dept., 183 AD2d 621, 624 [1st Dept 1992]). Accordingly, petitioner’s Article 78 claims against OPA and the Mayor’s Office are not precluded for failure to exhaust administrative remedies.

DOI does not make the same exhaustion argument, and it appears that DOI is in possession of most if not all relevant documents requested of the OPA and Mayor’s Office, pursuant to DOI’s investigation of the fraud. In this proceeding, all respondents have responded as one to the requests.

In their latest submissions regarding the requests, respondents reference petitioner’s January 15, 2014, letter (the “January Letter”), which, at the direction of the court, was produced in an effort to clarify what documents petitioner considered still to be produced. The requests are summarized below. It is to be remembered that “blanket exemptions for particular types of documents are inimical to FOIL's policy of open government. . . . [T]o invoke one of the exemptions of section 87(2), the agency must articulate ‘particularized and specific justification’ for not disclosing requested documents.” Gould v New York City Police Dept., 89 NY2d 267, 275 (1996).

Request No. 1: Contract documents regarding CityTime that involves the City, SAIC or Technodyne. Respondents contend that the January Letter’s explanatory inclusion of contracts involving “Spherion” and “other contractors other than SAIC (or its predecessors) that worked on the project” constitutes a new request. It also argues that “all Technodyne contract documents relating to the project” is vague and requires clarification.

The January Letter’s clarifications are encompassed within the original request.

Contracts with other contractors relating to the project are encompassed if they “involve[] the City, SAIC or Technodyne.” “[A]ll Technodyne contract documents relating to the project” is simply a restatement of the request. Accordingly, respondents are directed to comply with Request No. 1

Request No. 2: Documents evidencing negotiations of any CityTime-related contracts. Respondents contend that all documents responsive to this request are exempt from production pursuant to POL § 87(2)(e) (the “Law Enforcement Exemption”: records “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 § 87(2)(g) (the “Intra/Inter Agency Exemption”: records which “are inter-agency or intra-agency materials which are not: I. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; iv. external audits, including but not limited to audits performed by the comptroller and the federal government”); and POL § 87(2)(l) (the “Information Technology Security Exemption”: records which, “if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures”).

The Law Enforcement exemption does not apply here because all of the requested documents by definition pre-date any investigation into the fraudulent activity.

The Intra/Inter Agency Exemption does apply to documents relating to “opinions, advice, valuations, deliberations, proposals, policy formulations, conclusions or recommendations” (Rothenberg v City Univ. of New York, 191AD2d 195 (1st Dept 1993), app. denied 81 NY2d 710 (1993). However, “the exemption does not apply when the requested material consists of ‘statistical or factual tabulations or data. . . .’ Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making. Gould, supra, at 276. To the extent such records consist of factual statements or instructions affecting the public, they should redacted to eliminate nonfactual material – i.e., opinions and recommendations. New York Times Co. v City of New York Fire Dept., 4 NY3d 477 (2005).

The Information Technology Security Exemption applies to records that would expose an agency to “risks of electronic attack, including damage to the assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency’s electronic data.” TJS of New York, Inc. v New York State Dept. of Taxation and Finance, 89 AD3d 239, 246-47 (3d Dept 2011). Such specific, sensitive information would constitute a small percentage of the records responsive to Request No. 2, and can be redacted.

Request No. 3: Budgets and schedules of the CityTime project, including those referencing staffing. Respondents represent that, now that the criminal proceedings relating to the CityTime matter has ended, they are reviewing documents and intend to produce “hundreds” that were used as evidence at trial. With respect to their broad invocation of the three exemptions discussed under Request No. 2, respondents are reminded to apply the standards stated above and to specify the reasons for withholding particular records.

* 8]

Request No. 4: Documents evidencing any delays in completing the CityTime project, including letters involving Richard Valcich, Executive Director of OPA, and SAIC personnel.

Request No. 5: Documents evidencing complaints regarding the work of SAIC and/or Technodyne.

Request No. 7: Documents concerning any request or demand by the City for reimbursement or payment from SAIC or Technodyne concerning the CityTime project.

Respondents contend that they have produced all responsive documents for Requests Nos. 4, 5 and 7, subject to the three exemptions discussed above. Respondents, however, must be more specific in identifying documents and the reasons for withholding them. For example, the Law Enforcement Exemption would not apply to records possessed by OPA and the Mayor's Office, since they are not law enforcement agencies and have not conducted law enforcement investigations.

[T]his does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption.

Leshner v Hynes, 19 NY3d 57, 67 (2012).

Request No. 6 (in its entirety): "All documents, including correspondence, concerning any investigation conducted by or on behalf of your office or any other government or regulatory entity (state or federal) regarding the CityTime project. This request includes documents sufficient to evidence the scope, findings and outcome of any investigation, including, but not limited to, any subpoenas served in connection with such investigation."

Respondents contend that petitioner improperly expanded this request to include "court filings, motions, witness affidavits, and other materials concerning any prosecution" of the criminal defendants, and documents and correspondence produced for, or in connection with" the prosecution. Respondents are correct that the original request is limited in scope to investigations as opposed to prosecutions or trials. This does not warrant, however, a blanket refusal to produce documents because of the Law Enforcement Exemption or the Intra/Inter Agency Exemption. The criminal prosecutions have ended and any remaining appeals are limited to the existing records. Respondents must articulate factual bases for withholding responsive records pursuant to these exemptions.

Request No. 8: Documents produced by respondents in response to other FOIL requests regarding the CityTime project, as well as any FOIL requests or written responses thereto.

Respondents have indicated that they will produce any responsive documents in their possession.

Because substantial production of documents or explanations for non-production remain, petitioner is given leave to renew the petition if necessary.

Accordingly, it is

ADJUDGED that the petition is granted to the extent indicated in this judgment, and respondents are directed to comply with petitioner's document requests as indicated above, within thirty days of service of notice of entry of this judgment; and it is further

ORDERED that leave is given to petitioner to renew the petition if necessary.

Dated: APR 25 2014


CAROL E. HUFF
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 1410).