Matter of Miller v New York State Div. of Human Rights
2015 NY Slip Op 30185(U)
January 15, 2015
Supreme Court, Bronx County
Docket Number: 250226/2014
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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In the Matter of the Application of JERALD MILLER,

Petitioner,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent.

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

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DECISION AND ORDER

Index No. 250226/2014

PRESENT: Hon. Lucindo Suarez

Upon the notice of petition dated March 1, 2014 and the verified petition and exhibits submitted in support thereof; respondent's answer dated March 28, 2014 and the affirmation, exhibits and memorandum of law submitted therewith; petitioner's affidavit sworn to April 3, 2014 and the exhibits annexed thereto; the interim decision and order of the undersigned dated April 14, 2014 holding the matter in abeyance pending the resolution of an appeal before the Appellate Division, First Department, in *Matter of Miller v. New York State Division of Human Rights*, Supreme Court, Bronx County, Index No. 251040/2012; the decision and order of the undersigned dated December 8, 2014 vacating the stay imposed and setting January 9, 2015 as a submission date for responsive papers, if any; respondent's supplemental memorandum of law dated December 26, 2014; petitioner's affidavit in reply dated January 9, 2015 and the exhibit annexed thereto; and due deliberation; the court finds:

Petitioner appearing *pro se* commenced this Article 78 proceeding to challenge the denial of an administrative appeal concerning his request for documents under the New York Freedom of Information Law ("FOIL"), *see* Public Officers Law § 84 *et seq.*, from respondent New York State Division of Human Rights ("respondent" or "agency"). By e-mail dated August 30, 2013, petitioner

requested "[a]ny listing or sublistings of any type or kind, table of contents or content listings, subject or subject listings, and descriptions of all general counsel advisory opinions which were created from 1975 and the present maintained for use by staff or the general counsels office, and are currently considered active and valid which may have been created before the before mentioned time frames." On October 22, 2013, respondent's FOIL officer provided petitioner with a list of General Counsel Legal Opinions ("Legal Opinions") identified by number and year but not the substantive descriptions of their contents, stating that such descriptions were exempt from disclosure as attorney work product under CPLR 3101(c) and as predecisional, intra-agency material under Public Officers Law § 87(2)(g). Respondent denied petitioner's appeal on November 6, 2013, and petitioner commenced this proceeding on March 5, 2014. Petitioner argued that (1) the response was deficient as untimely; (2) the records consisted of statistical or factual data; (3) the attorney-client and attorney work product privileges were inapplicable; and (4) a blanket exemption was improper. Respondent has answered the petition.

The instant proceeding was stayed at petitioner's request pending the resolution of his appeal in *Matter of Miller v. New York State Division of Human Rights*, Supreme Court, Bronx County, Index No. 251040/2012 (Danziger, J.). In that proceeding, the court denied petitioner access to four Legal Opinions, and petitioner acknowledged that the earlier proceeding raised similar issues. The Appellate Division, First Department upheld the denial of the petition, finding that the Legal Opinions were intra-agency materials exempt from disclosure under FOIL. *See Matter of Miller v. New York State Division of Human Rights*, 122 A.D.3d 431, 996 N.Y.S.2d 30 (1st Dep't 2014). Executive Law § 297(8) also prohibited disclosure of three of the four Legal Opinions. *Id.*

The parties were then given an opportunity to submit additional papers in this proceeding. Respondent stated in a supplemental memorandum that the court is bound by the doctrine of law of the case and that the findings in *Matter of Miller*, *supra*, extend to the descriptions of all Legal Opinions. However, "[t]he doctrine of law of the case applies only to legal determinations resolved on the merits."

Thompson v. Cooper, 24 A.D.3d 203, 205, 806 N.Y.S.2d 32, 35 (1st Dep't 2005) (citations omitted). Since the Appellate Court declined to address the attorney work product argument, the court must do so here. Disclosure of the Legal Opinions, though, has been decided. *See Matter of Miller, supra.*

Petitioner's reply consisted of language lifted directly from an advisory opinion issued by the State of New York Department of State Committee on Open Government ("Committee") dated April 9, 2014 pertaining to petitioner's FOIL request.[1] The Committee stated that a request for subject listings and descriptions for all Legal Opinion was distinguishable from a request for the opinions themselves. It disagreed with respondent's denial based on Executive Law § 297(8) and attorney-client and attorney work product privileges, stating that respondent waived claims for privacy and confidentiality by publishing case information online. The Committee recommended that the records could have been redacted. An advisory opinion from the Committee may be persuasive based on the strength of its reasoning and analysis, *see Matter of Thomas v. New York City Dept. of Educ.*, 103 A.D.3d 495, 962 N.Y.S.2d 29 (1st Dep't 2013), but it is "neither binding upon the agency nor entitled to greater deference in an N.Y. C.P.L.R. 78 proceeding than is the construction of the agency." *Matter of John P. v. Whalen*, 54 N.Y.2d 89, 96, 429 N.E.2d 117, 121, 444 N.Y.S.2d 598, 602 (1981). Here, the advisory opinion expressly stated that it was "based solely upon the facts present in [petitioner's] correspondence." It is not known what materials were provided.

The records of a public agency are presumptively available for inspection and copying unless they are exempt from disclosure. *See Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 675 N.E.2d 808, 653 N.Y.S.2d 54 (1996). The burden of demonstrating that an exemption applies rests with the agency. *Id.* Public Officers Law § 87(a)(2) creates an exception for records "specifically

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[1] Petitioner also alluded to a "concealment" of facts by respondent that undermined respondent's claim of confidentiality under Executive Law § 297(8) in the earlier proceeding. No such argument was made in the instant petition, and the court declines to address this issue.

exempted from disclosure by state or federal statute," and CPLR 3101(c) provides that "[t]he work product of an attorney shall not be obtainable." Generally, "an attorney's work product encompasses materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy" and may include "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible things." *Acwoo Int'l Steel Corp. v. Frenkel & Co.*, 165 A.D.2d 752, 752, 564 N.Y.S.2d 40, 41 (1st Dep't 1990). The claim of privilege must be supported by a description of the material sought, the purpose for which it was gathered, and other similar considerations. *See Cirale v. 80 Pine Street Corp.*, 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1 (1974). Respondent has demonstrated that the records constitute attorney work product. General Counsel Caroline Downey, Esq. affirmed that each attorney generated unedited notes to assist agency staff conducting research to locate the relevant opinions, and each description consisted of the attorney's legal analysis in the underlying Legal Opinion. Moreover, the material included information exempt from disclosure under Executive Law § 297(8).

Documents consisting of opinions, advice, deliberations, conclusions are exempt in order to protect the deliberative process. *See Rothenberg v. City Univ. of N.Y.*, 191 A.D.2d 195, 594 N.Y.S.2d 219 (1st Dep't 1993); *see also Matter of Xerox Corp. v. Webster*, 65 N.Y.2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1988). Since the substantive descriptions were drafted by agency attorneys for internal use and contained their legal reasoning, they constitute intra-agency materials as well. *See Kheel v. Ravitch*, 93 A.D.2d 422, 462 N.Y.S.2d 182 (1st Dep't 1983), *affirmed*, 62 N.Y.2d 1, 464 N.E.2d 118, 475 N.Y.S.2d 814 (1984); *see also Matter of Miller, supra.*

Factual data is defined as "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Matter of Gould*, 89 N.Y.2d at 277, 675 N.E.2d at 812, 653 N.Y.S.2d at 58. Legal opinions are not considered

statistical or factual data as suggested in the petition.

Petitioner also argued that the records could be accessed electronically with simple "key strokes," although he was advised that the records were not maintained by subject matter. The issue, though, is not the manner by which the records may be accessed, *see e.g. Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 880 N.E.2d 10, 849 N.Y.S.2d 489 (2007), but access to their content.

As to the timeliness of the agency's response, the court finds that Public Officers Law § 89(4)(a) controls. Where an agency regulation is out of harmony with a statute, the statute prevails. *See Weiss v. City of New York*, 95 N.Y.2d 1, 731 N.E.2d 594, 709 N.Y.S.2d 878 (2001). Although 9 NYCRR § 466.7(e) requires the agency to provide a written response within seven business days, Public Officers Law § 89(4)(a) permits an agency ten business days to respond to an appeal. Respondent's November 6, 2013 denial of petitioner's appeal was timely.

Respondent's determination, therefore, was not made in error of law. *See Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y.*, 87 A.D.3d 506, 928 N.Y.S.2d 701 (1st Dep't 2011), *lv denied*, 18 N.Y.3d 806, 963 N.E.2d 792, 940 N.Y.S.2d 215 (2012).

Accordingly, it is

ORDERED, that the petition is denied and the proceeding dismissed; and it is further

ORDERED, that clerk of the court is directed to mark this proceeding disposed.

This constitutes the decision and order of the court.

Dated: January 15, 2015

Lucindo Suarez, J.S.C.