Miller v New York State Dept. of Fin. Serv.
2015 NY Slip Op 30443(U)
March 27, 2015
Sup Ct, New York County
Docket Number: 101118/2014
Judge: Joan B. Lobis
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This opinion is uncorrected and not selected for official publication.

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EA 3/30/15 E

C-1

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101118/2014

MILLER, HILARY B.

vs

NYS DEPARTMENT OF FINANCIAL

Sequence Number : 001

ARTICLE 78

PART 6

INDEX NO. ______

MOTION DATE 12/15/14

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). 1

Answering Affidavits — Exhibits ______ | No(s). 2, 3, 4

Replying Affidavits ______ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

FILED
MAR 30 2015
NEW YORK
COUNTY CLERKS OFFICE

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

INTERIUM

RECEIVED
MAR 30 2015
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NYS SUPREME COURT - CIVIL

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

Dated: 3/27/15

______, J.S.C.
JOAN B. LOBIS

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .... CROSS-MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

--X

HILARY B. MILLER,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and BENJAMIN M. LAWSKY, in his official capacity as Superintendent of the New York State Department of Financial Services,

Respondents,

--X

Index No. 101118/2014
Interim
Decision and Order

FILED

MAR 30 2015

NEW YORK
COUNTY CLERK'S OFFICE

JOAN B. LOBIS, J.S.C.:

In this Article 78 proceeding, petitioner Hilary B. Miller asks the Court for an order directing respondents New York State Department of Financial Services ("DFS") and Benjamin M. Lawsky, as superintendent of the department, to comply with a June 17, 2014, request to release documents pursuant to New York's Freedom of Information Law, New York Public Officers Law § 84 et. seq. ("FOIL") or, in the alternative, directing respondents to submit the records to the Court for an in camera review. In addition, petitioner seeks an award of attorney's fees. Respondents cross-move to dismiss the petition. For the reasons below, the Court denies the petition and cross-motion and directs respondents to file their answer.

The parties' dispute centers on respondents' obligation to release information related to DFS' enforcement of the ban against payday loans. Payday loans are short-term, small-dollar loans typically structured as an advance against future paychecks or other income. In a payday loan situation, the lender deposits the loan into the borrower's account through the Automated Clearing House network ("ACH"), which transacts electronic payments, and then

automatically debits funds from the borrower's account on loan payment due dates. The lenders charge significantly higher than the sixteen percent interest rate allowable under the State's usury laws, sometimes several hundred percent over the limit. A similar problem can arise in the context of debit card networks, and according to respondents some payday lenders operate through debit cards as well.

The Financial Frauds and Consumer Protection Division ("FFCP"), the enforcement arm of DFS, launched an investigation into payday loans and on August 5, 2013, sent 35 cease-and-desist letters to lenders that allegedly have engaged in usurious lending practices. Around August 6, 2013, DFS issued a press release which it additionally sent to 117 banks. The document listed the 35 lenders and instructed the banks to cut off their and other payday lenders' access to the banking system. On April 29, 2014, DFS sent cease-and-desist letters to an additional 20 online payday lenders, and issued a press release to this effect on April 30, 2014. Subsequently, on June 16, 2014, DFS issued a press release which announced the creation of "a database of companies that have been subject to actions by DFS based on evidence of illegal payday lending" ("the Database"). It stated that the Database, accessible to financial institutions participating in the ACH and electronic payments networks, "will be a powerful due diligence tool for financial institutions to protect consumers and help ensure that electronic payment and debit networks are not used to transmit or collect on illegal, online payday loans to New Yorkers."

Petitioner, an attorney, states that he "has long been engaged in ongoing scholarship concerning consumer lending." Petitioner founded and is president of the Payday Loan Bar Association. He asserts that DFS' broad mandate to end payday loans in New York impacts

licensed payday lenders which operate in accordance with all applicable laws. On June 17, 2014, therefore, he submitted a FOIL request to DFS in which he sought: 1) the list of illegal lenders and/or additional information available through the Database; 2) a working copy of the Database tool; 3) documents "relating or referring to" the process by which DFS determined the lenders it would include in the Database, "including all correspondence and memoranda describing the criteria for inclusion of lenders in the [D]atabase"; 4) documents including forms, manuals, flowcharts, source code materials that relate to the Database tool; 5) information concerning all policies and procedures relating to the Database and to procedures for updating it; 6) all agreements between DFS and banks or other third parties that relate to the Database and/or the Database tool; 7) any contracts and orders between DFS and third parties relating to the Database tool's development; and 8) all documents that identify the DFS employees who helped develop the Database tool and/or compiled the Database.

DFS acknowledged its receipt of petitioner's FOIL request on June 18, 2014 and stated it would respond within approximately 20 days. By August 4, 2014, DFS had not responded. Petitioner deemed his request denied, and he administratively appealed the denial.

DFS responded to the appeal on August 22, 2014. It reiterated that the database helps banks identify and stop illegal payday lending. It stated that DFS uses the database for its ongoing investigation into payday lending, which is illegal in this State. It denied the request for items 1-6 in petitioner's FOIL demand under New York Public Officers Law § 87(2)(e), on the ground that the disclosure of these records would interfere with its ongoing investigations. It indicated there were no responsive documents for items 7 and 8.

Petitioner commenced this Article 78 proceeding on October 9, 2014. He states that DFS did not sufficiently particularize its justification for the denial. He states that, "stunningly," although DFS "blacklists" certain lending institutions without explanation, DFS felt it should not be required to reveal the materials upon which it based its so-called blacklist. He also argues that DFS did not explain why disclosure of its algorithm will interfere with its investigation. He contends that he and lenders, along with the public at large, have a substantial interest in knowing how DFS created its list of banned lenders.

Respondents oppose the petition and cross-move to dismiss it. They explain that they prepared the list and the database by first reviewing consumer complaints, contracts between consumers and payday lenders, and lender websites, among other sources. In connection with FFCP's investigation into payday loans, respondents assert, the Database "is, and will continue to be, populated with new information that DFS gathers in its ongoing investigation," including internal deliberations to determine what financial information and lenders to place in the Database. They assert that the Database includes information that DFS "has discovered and/or developed to help identify illegal lenders and transactions" and reveal what information and data they use to identify payday lenders. Respondents state that, were they required to make public the means by which they track the lenders, it would damage the effectiveness of the Database by enabling payday lenders to study DFS' methods and then change their practices in order to avoid detection.

Further, they indicate that they share access to the Database with various institutions for particular purposes. They note that the originating depository financial institution

("originating bank") and debit card networks are responsible for making sure their customers, including the payday lenders, engage in legal transactions compliant with all governing rules – but that, simultaneously, financial institutions lack the necessary information to detect and prevent the processing of payday loans because ACH does not provide them with interest rate information. Respondents suggest that for this reason they allow the institutions with limited access to the Database, and state that those financial institutions using the Database sign confidentiality agreements that additionally govern the scope of their access. Respondents indicate that various law enforcement agencies also use the Database to facilitate their investigations.

In opposition to the cross-motion and in further support of his application, petitioner challenges respondents' justifications for the refusal of his FOIL request. He notes that FOIL exemptions are narrowly construed due to the strong public policies in favor of disclosure. Therefore, to rely on an exemption, he continues, the agency must provide a particularized, specific justification for the refusal. He contends that the agency's justifications fail to satisfy this standard.

In addition, stating that respondents rely on both the law enforcement exemption and the intra-agency exemption, and he argues that these exceptions are inapplicable to the situation at hand. For the law-enforcement purpose exception, is not sufficient for the request to be compiled for a law-enforcement purpose, and he argues that respondents have not done more than set forth a conclusory, self-serving justification for its applicability. Moreover, the records at issue, he argues, "do not reveal non-standard investigative techniques" and are unlikely to interfere with any investigations.

He further asserts that, to the extent respondents rely on the facts that these materials are shared with other agencies and are part of the deliberative process, the Court must reject these arguments because respondents did not raise them in the administrative proceedings. Alternatively, he claims, the deliberative exemption does not apply to the type of deliberations at issue here because he seeks what respondents characterize as a database, not an artificial intelligence device or algorithm that must be protected. By itself, he contends, a database cannot fall within the intra-agency exemption because it is a mere compilation of facts. Citing Gould v. New York City Police Dep't, 89 N.Y.2d 267, 276 (1996), he states that to the extent that the Database here contains statistical or factual tabulations or data, it is disclosable. Finally, he contends that respondents impermissibly are attempting to keep secret those records which show how businesses are selected for the Database, and this is tantamount to refusing to disclose a final agency policy or determination that has the effect of law.

"[G]overnment records are presumptively available to the public unless" a statutory exemption applies. Thomas v. New York City Dep't of Educ., 103 A.D.3d 495, 496 (1st Dep't 2013). Moreover, these exemptions are construed narrowly. Hanig v. State Dep't of Motor Vehicles, 79 N.Y.2d 106, 109 (1992). When a court reviews the denial of a FOIL request under Article 78, the arbitrary and capricious standard does not apply. New York Committee for Occupational Safety and Health v. Bloomberg, 72 A.D.3d 153, 158 (1st Dep't 2010). Instead, the court presumes that the requested agency records "are open to public inspection," and the agency "bear[s] the burden of showing that the records fall squarely within an exemption to disclosure." Id. To satisfy this burden, the agency must "articulat[e] a particularized and specific justification for denying access." Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462-63 (2007).

Despite this general interest in disclosure, "[e]ffective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information." Fink v. Lefkowitz, 47 N.Y.2d 567, 572 (1979). Therefore, the Public Officers Law recognizes a law enforcement/investigatory exemption. Public Officers Law § 87(2)(e). Exemption is applicable if disclosure "would identify . . . confidential information relating to criminal investigations, and nonroutine investigative techniques or procedures." Asian American Legal Defense and Educ. Fund v. New York City Police Dep't, 125 A.D.3d 531, -- (1st Dep't 2015). The exemption is applicable if it is likely that violators can avoid detection by tailoring their conduct once they know the avenues of inquiry the agency pursues. Bellamy v. New York City Police Dep't, 59 A.D.3d 353, 355 (1st Dep't 2009). The agency's burden is not to explain why each document or file is exempted but to "identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents." Lesher v. Hynes, 19 N.Y.3d 57, 67 (2012). A mere articulation that the risk exists is insufficient. See Law Offices of Adam D. Perlmutter, P.C. v. New York City Police Dep't, 123 A.D.3d 500, 500 (1st Dep't 2014). However, if the agency satisfies its burden the exemption will be upheld. See Whitely v. New York County Dist. Atty's Office, 101 A.D.3d 455, 455 (1st Dep't 2012).

In support of his application and in opposition to the cross-motion, petitioner has not shown that he has the right to complete relief. Petitioner's argument that respondents have merely stated in conclusory fashion that disclosure of their methods of investigation and of their database would harm their ongoing investigation is not persuasive. If they detailed their

development of the mechanisms or the creation of the algorithm with more specificity, they would risk revealing the information they seek to exempt from disclosure. To the extent that petitioner relies on Gould, 89 N.Y.2d at 267, to state that computer-generated records and tabulations are disclosable, this reliance is misplaced, as Gould related to tabulations of complaint follow-up reports and not to the development of a protocol or creation of an algorithm used to detect illegal activity. Petitioner provides no support or rationale for his request for an in camera review of the materials, and this alternative request is moot at any rate because the material is protected by the exemption.

At the same time, the Court denies the cross-motion. The petition challenges the denial of eight very broad FOIL requests, which themselves include multiple requests. In support, respondents explain the nature of the risk to their ongoing investigation. In particular, they state that the release of information regarding the formation of the Database and the tools the Database uses to detect payday lenders would compromise their ongoing investigation. Although in their cross-motion and supporting brief respondents articulate an objection under the law enforcement exemption, they do not explain why the argument applies to each of the numerous requested items. Instead, they apply the argument to the entire demand without particularization. Thus, respondents have not satisfied their burden of showing that dismissal of the entire petition is appropriate.

The Court notes that petitioner objects to respondents' statement that other civil and criminal law enforcement agencies would have access to the information in the Database. The Court does not conclude that, as petitioner suggests, this statement comprises an attempt to assert the intra-agency exemption. The cross-motion only cites the law enforcement/investigatory

exemption, and it includes the challenged statements in connection with this argument. The statements apparently seek to underscore the importance and scope of the investigation into payday loans and the nature of the access respondents provide to the materials. The Court has considered the parties' other arguments and they do not alter the Court's determination. Accordingly, it is

ORDERED that the petition is denied; and it is further

ORDERED that the cross-motion to dismiss is denied; and it is further

ORDERED that respondents are directed to serve and file an answer with Part 6 in Room 345, 60 Centre Street, New York, New York, within thirty days of petitioner's service of a copy of this order with notice of entry; any reply shall be served and filed in Part 6 within fifteen days of service of Respondents' answer.

FILED

MAR 30 2015

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 27, 2015

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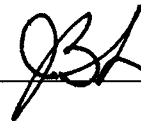

JOAN B. LOBIS, J.S.C.