

Schindlinger v Cuomo
2015 NY Slip Op 32043(U)
October 6, 2015
Supreme Court, New York County
Docket Number: 100811/2014
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JOAN B. LOBIS, J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 100811/2014
SCHINDLINGER, JEROME
vs
CUOMO, ANDREW
Sequence Number : 004
OTHER _____

FILED

OCT 14 2015

COUNTY CLERK'S OFFICE
NEW YORK

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). 1

Answering Affidavits — Exhibits _____ No(s). 2-5

Replying Affidavits _____ No(s). 6

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

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

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

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Dated: 10/6/15

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Joan B. Lobis, J.S.C.
JOAN B. LOBIS, 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
NEW YORK COUNTY: IAS PART 6**

-----X

JEROME SCHINDLINGER,

Petitioner,

Index No. 100811/2014

Decision and Order

-against-

ANDREW CUOMO,
GOVERNOR OF THE STATE OF NEW YORK,

HOWARD A. ZUCKER, M.D., J.D.,
ACTING COMMISSIONER OF
THE NEW YORK STATE
DEPARTMENT OF HEALTH,

-and-

JONATHAN KARMEL,
DEPARTMENT OF HEALTH
RECORDS APPEAL OFFICER,

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Respondents.

-----X

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

In this special proceeding, Jerome Schindlinger petitioned for an order pursuant to the Freedom of Information Law ("FOIL"), directing the New York State Department of Health to release raw survey data collected from pharmacies. Respondents Andrew Cuomo, Governor of the State of New York; Howard A. Zucker, Acting Commissioner of the New York State Department of Health; and Jonathan Karmel, Department of Health Records Appeal Officer (collectively "DOH") answered and opposed the petition. In December 2014 the Court granted the petition to the limited extent of referring a discrete issue to a referee. JHO Gammerman held a hearing and issued his recommendation that the documents not be provided. Currently, petitioner moves for a rehearing and respondent cross-moves for an order confirming the report.

The Court's December 2014 decision described in detail the underlying facts of this matter. In general, petitioner, a retired pharmacist, requested redacted data for two surveys conducted by DOH that are "used...to propose and/or promulgate regulations pertaining to prescription drug reimbursement under the New York State MEDICAID fee for service program....This includes cost-of-goods-sold surveys and the cost-of-dispensing surveys that all pharmacies are required to complete [.]" DOH ultimately responded to his FOIL request with an excel sheet that listed pharmacy names, addresses, telephone numbers, number of employees, but did not include any of the information he requested. In response to petitioner's challenge to the production, a July 25, 2014, letter from the DOH states that "The spreadsheet that was sent to you was redacted to remove trade secrets and/or material submitted by pharmacies, or derived from information obtained from pharmacies, and, which if disclosed, would cause substantial injury to the competitive position of the pharmacies. Such information was properly withheld under [Public Officers Law Section 87(2)(d)]." DOH also asserted that the material was redacted to prevent disclosure that would constitute an unwarranted invasion of personal privacy.

Petitioner commenced this Article 78 proceeding on August 5, 2014, arguing that Respondents' denial of his Freedom of Information Law request was arbitrary and capricious and requesting, among other things, "number and/or columns identifiable as to what they represent, including, but not limited to, rent, insurance, computer costs, drug names, strengths and prices [.]" In its answer, and opposition, DOH argued that the petition should be dismissed because the documents contain trade secrets and the amount of data made it impracticable for DOH to demand that each pharmacy explain why the information constituted a trade secret. It noted that the majority of the approximately 2,800 pharmacies providing information indicated that at least some

of the material they provided included trade secrets. Respondent contended that redaction of identifying information in the textfiles would not be effective because a skilled competitor could deduce the identity of a pharmacy based on the information collected.

The Court rejected DOH's arguments that redacted copies of the requested information would be damaging, finding DOH's allegations conclusory and unsupported. The Court stated that if the two workbooks were available, they had to be released as redacted. As for the remaining three documents – the textfiles – the Court noted that when electronic records are retrievable with reasonable effort, disclosure is required. Data Tree, LLC v. Romaine, 9 N.Y.3d 454 (2007). It rejected respondents' argument that it would be too burdensome to redact a computer file and concluded that "if a format is available that is not PDF, or, if a document can be manipulated to remove data without significant time or expense, then it must be disclosed." Because the Court could not determine whether such a production was possible, however, it referred this matter to a referee for a hearing

to determine what means are available to redact the three textfiles, whether the original Excel Workbooks used for the surveys are still available, the time and cost required to redact them without modifying their format, the possibility of dividing the textfiles further so as to allow for PDF conversion, and whether it is feasible to redact the documents in a different format that is not PDF.

A hearing took place around May 12, 2015, before Judicial Hearing Officer ("JHO") Ira Gammerman. JHO Gammerman stated that he was to hear and report "on the issue of redacting certain documents." In the course of the hearing, and upon questioning by JHO Gammerman, petitioner informed the JHO that the Pharmacists' Society of the State of New York

had challenged the legislation, which “passed a law making it illegal for them to use the results of the survey.” Though JHO Gammerman then opined that the information was irrelevant and need not be provided, petitioner explained that he still sought the information because every year respondent DOH relied on something similar, and he hoped to go through it and ultimately try to find out whether DOH was relying on a faulty methodology. The JHO then asked respondents why they refused to provide redacted information. Respondents explained that because they already had provided the names of the pharmacies when they gave petitioner information about the costs of the medications, petitioner could put the names and numbers together and figure out which pharmacies were implicated, thus violating their privacy. The JHO found this argument persuasive. Petitioner objected, stating that respondents could not prevent him from obtaining the material now because of their earlier failure to redact the names of the pharmacists. Petitioner stated that he did not have the capacity to figure out the identities of the pharmacies, but JHO Gammerman indicated that, unfortunately, that didn’t change the situation. He concluded it “seems to me that at this point, there is a substantial risk of breach of confidentiality” and recommended that the survey not be produced.

In his motion for a rehearing, petitioner alleges that JHO Gammerman disregarded this Court’s direction as to the scope of the hearing. According to petitioner the issue was not, as JHO Gammerman construed it, to determine whether the files should be released but whether they feasibly could be released in redacted form. Petitioner states that the judge did not allow him to speak first or to present his arguments as to feasibility. The hearing, he stated, “became essentially, the testimony of [respondents’ counsel].” He states that the judge’s continued references to the Pharmacist’s Society shows that he “use[d] their non-party status . . . as a disqualifying factor to

me.” He acknowledges that the earlier production, which included the names of the pharmacists, might enable a computer savvy individual to figure out which pharmacists were implicated, he “[has] no intention of trying to match up the two files.” He states that he is willing to sign a consent order to this effect, including penalties if he violates the order.

Respondents cross-move to confirm the referee’s report. They note that this Court directed the referee to determine the feasibility of the production. JHO Gammerman found that a production with redactions that adequately protects the privacy rights of the pharmacies is impossible given the information supplied in the earlier production, they state. This determination appropriately follows the guidelines in the interim order. They further raise an additional problem with the electronic disclosure of additional information – in particular, that most pharmacies submitted the data petitioner seeks with a “Declaration of Proprietary Information,” and if they provide the data regardless of the declaration it may well “injure the relationship between DOH and the pharmacies.” They additionally argue that petitioner is incorrect that the JHO’s decision only relates to one of the three files, as the others have not been provided in unredacted format. Instead, they state, though the pharmacies are not named in the other files there is sufficient identifying information to enable someone to identify them through that information. For all these reasons, they state the recommendation of the JHO should be confirmed. In the alternative, if this Court does not adopt the JHO’s report, they request that the pharmacies – whose privacy rights are at issue – receive notice of this petition and the opportunity to intervene.

In reply, petitioner argues that the Court already decided the pharmacists would suffer no substantial injury “if identifying information is redacted and the requested documents

released” and that JHO Gammerman’s recommendation ignores this holding. He reiterates the purported failures and errors of the JHO. He reject respondents’ explanation as to how the pharmacies might be identified from the other textfiles as “absurd.” He states that the materials should be provided even if it is possible to determine the identities of the pharmacies, because he only has access to the pharmacies’ names because respondents improperly did not redact the names when they provided their original production.

After careful consideration the Court grants the motion and denies the cross-motion. Although JHO Gammerman’s questions were incisive and elicited clarifying information, the hearing went beyond the scope of the Court’s order of reference. His decision that it was impossible to redact additional documents in a manner that would preserve the privacy rights of the pharmacists is at odds with the Court’s earlier determination that respondents did not sufficiently articulate their breach of privacy arguments. Moreover, he opined that the documents were irrelevant and need not be disclosed, and this contradicts the Court’s determination that petitioner has a right to the documents. The only question before the JHO was the feasibility of redacting certain information from the three textfiles at issue, and the hearing did not address feasibility. For the sake of judicial efficiency, the hearing will take place in Part 6 before me.

Therefore, it is

ORDERED that motion sequence number 4 is granted, the cross-motion in sequence number 4 is denied, and the petition, which is motion sequence number 1, is held in

abeyance pending a new hearing before this Court which addresses the issue at hand; and it is further

ORDERED that the parties are directed to appear in Part 6, room 345, 60 Centre Street, on November 10, 2015 at 9:30 a.m. to schedule a hearing date before the Court as to the feasibility of redacting each of the three textfiles in their current formats or formats besides PDF, whether the original Excel Workbooks used for the surveys are still available, the possibility of dividing the text files further so as to allow for PDF conversion, and the time and cost requirements of redacting these documents.

Dated: Oct. 6, 2015

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