

**Matter of Shooter's Comm. on Political Educ. v  
Cuomo**

2015 NY Slip Op 32681(U)

July 10, 2015

Supreme Court, Albany County

Docket Number: 6602-14

Judge: Michael H. Melkonian

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of SHOOTER'S  
COMMITTEE ON POLITICAL EDUCATION &  
STEPHEN J. ALDSTADT,

Petitioners,

**DECISION**  
**AND**  
**ORDER**

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

-against-

ANDREW CUOMO, as Governor of the State of New  
York, the NEW YORK STATE POLICE, the NEW  
YORK STATE OFFICE OF GENERAL SERVICES,  
Respondents.

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(Supreme Court, Albany County, Motion Term, April 15, 2015  
Index No. 6602-14  
(RJI No. 01-14-ST6356)

(Acting Justice Michael H. Melkonian, Presiding)

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MELKONIAN, J.:

Albany County Clerk  
Document Number 11873563  
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Petitioners Shooter's Committee on Political Education ("SCOPE") and its President, Stephen J. Albstadt (collectively referred to herein as "petitioners"), challenge the respondents'<sup>1</sup> August 28, 2014, November 12, 2014 and November 13, 2014 partial denial of petitioners' May 22, 2014 Freedom of Information Law (see, Public Officers Law art. 6 [hereinafter "FOIL"]) request. Petitioners also seek an award of reasonable attorney's fees and litigation costs pursuant to Public Officers Law § 89(4)(c).

SCOPE is a statewide social welfare organization whose stated purpose is to preserve and protect the right of firearms ownership as guaranteed by the Second Amendment to the United States Constitution for the residents of New York State. On May 22, 2014, petitioners submitted a FOIL request seeking access to certain documents related to a rally held at the Empire State Plaza on April 1, 2014 protesting the New York Secure Ammunition and Firearms Enforcement Act of 2013 (the "SAFE Act"). Specifically, petitioners sought:

- 1) Any and all documents including email and phone records (produced between January 15, 2014 and today) concerning an anti-SAFE Act rally held at the Empire State Plaza on April 1, 2014.

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<sup>1</sup>Respondents are Andrew [M.] Cuomo, in his official capacity as Governor of the State of New York (hereinafter referred to as the "Executive Chamber"), the New York State Police (hereinafter referred to as the "State Police") and the New York State Office of General Services (hereinafter referred to as "OGS").

- 2) Any and all records concerning items of property taken or seized at the rally including but not limited to guns/firearms, toy guns, imitation guns, gun replicas or signs in the shape of a gun.
- 3) Any and all regulations or written policies concerning possession of firearms or imitation firearms or replicas of firearms at Empire State Plaza there [sic] were in effect on April 1, 2014.
- 4) Any and all documents concerning preparation for the rally by any State agency.
- 5) Any and all documents produced after the event that discussed the event including any after-action report by the State Police.
- 6) Records showing any and all State employees on duty at the rally or elsewhere than the rally but who were supervising or overseeing the State employees at the rally.
- 7) Any audio or videotapes or photographs of the rally.
- 8) Any and all documents concerning the drafting, ordering, printing and placement and removal of a sign that states:

## ATTENTION

ANYTHING THAT APPEARS TO BE A WEAPON,  
INCLUDING TOY GUNS AND OTHER REPLICAS, ARE  
STRICTLY PROHIBITED TODAY AT EMPIRE STATE  
PLAZA

EXCEPT FOR ON-DUTY POLICE OFFICERS ONLY

Petitioners in this matter are “specially concerned about the seizure at the rally of replica guns that conveyed political messages and were clearly not firearms.” Petitioners are “further concerned about a sign and regulation that appeared to be specifically targeted at 2<sup>nd</sup> Amendment supporters at the rally.”

FOIL, which is codified at Public Officers Law § 84 et seq, was enacted to foster the public’s “inherent right to know” the workings of government (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]). FOIL promotes openness with respect to government operations (Matter of Capital Newspapers v Whalen, 69 NY2d 246, 252 [1987]). Records in the possession of a public agency are presumed to be available for public inspection and copying under FOIL unless they fall within one of the exceptions established in Public Officers Law § 87(2) (Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of NY at Farmingdale, 87 NY2d 410, 417 - 418 [1995]; Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]; Troy Sand and Gravel Co. Inc. v New York State Dept. of Transp. 277 AD2d 782, 784 [3<sup>rd</sup> Dept. 2000]).

FOIL is to be liberally construed in favor of the public and its exemptions narrowly interpreted to effectuate maximum public access to government records (Matter of Washington Post Co. v New York State Ins. Dept., 61 NY2d 557 [1984]; Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]). Where a governmental agency seeks to avoid disclosure, it bears the burden of demonstrating the applicability of a specific statutory exemption (Matter of Daily Gazette Co. v City of Schenectady, 93 NY2d 145, 159 [1999]; Matter of Farbman & Sons, Inc. v New York City Health & Hosps. Corp., 62 NY2d 75, 83 [1984]) and must articulate a particularized and specific justification for denying access to its records (Matter of New York Times Co. v New York State Dept. of Health, 243 AD2d 157, 159 [3<sup>rd</sup> Dept. 1988]; Johnson v New York City Police Dept., 257 AD2d 343, 346 [1<sup>st</sup> Dept. 1999]). As the Court of Appeals has stated, “[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld” (Matter of Fink v Lefkowitz, 47 NY2d, 567, 571 [1979]).

The Court has conducted an *in camera* review of responsive documents withheld or redacted by respondents. After *in camera* review, the Court directs that the documents, or parts thereof, listed on the attached logs must be disclosed for the reasons that follow.

#### OGS Documents

OGS asserts that the inter or intra-agency exemption applies to most of the documents submitted. OGS also asserts that to disclose some documents would violate the personal privacy of certain individuals pursuant to Public Officers Law § 87(2)(b).

The inter-agency and intra-agency exemption applies to records that are deliberative, “i.e., communications exchanged for discussion purposes not constituting final policy decisions” (Matter of Russo v Nassau County Community Coll., 81 NY2d 690, 699 [1993]; see, Public Officers Law § 87[2][g]; Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 132 [1985]). The purpose of this exemption is to “permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure” (Matter of New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477, 488 [2005]; see, Matter of Gould v New York City Police Dept., 89 NY2d 267, 276 [1996]; Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 132 [1985]; Matter of Morgan v New York State Dept. of Env'tl. Conservation, 9 AD3d 586, 587 [3<sup>rd</sup> Dept. 2004]).

There are four exceptions to the rule exempting inter-agency or intra-agency materials from disclosure (see, Public Officers Law § 87[2][g] [i]-[iv]; see, also, Matter of Gould v New York City Police Dept., 89 NY2d 267, 276 [1996]). As relevant here, one exception applies to statistical or factual tabulations or data (see, Public Officers Law § 87[2][g][i]), consisting of “objective information,” rather than “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (Matter of Gould v New York City Police Dept., 89 NY2d 267, 277 [1996]; see, Matter of New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477, 487–488 [2005]).

Public Officers Law § 87(2)(b) permits an agency to deny access to a document, or portion of a document, if disclosure “would constitute an unwarranted invasion of personal

privacy.” “What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities.” Matter of Beyah v Goord, 309 AD2d 1049, 1050 (3<sup>rd</sup> Dept. 2003) [internal quotation marks omitted].

Bearing these principles in mind, the log entitled “Log of Withheld or Redacted Record for OGS Foil No. 5314” (respondents’ “Exhibit J”) consists of 123 separate documents which will be explained below.

Document Nos. 1 and 12 consist of an April 15, 2014 “invoice.” The Court has conducted an *in camera* inspection of these documents in unredacted form. Upon review, the Court found that the documents are not exempt and should be disclosed in their entirety. Document Nos. 2, 3, 5, 6, 13, 14, and 17 consist of a March 31, 2014 “permit to demonstrate” and “applications for permit to demonstrate,” respectively. The Court has conducted an *in camera* inspection of these document in unredacted form. Upon review, the Court found that these documents are not exempt and should be disclosed in its entirety.

Document Nos. 27, 29, 31, 32, 33, 35, 37, 38, 40 consist of “Loading Dock Management” applications. The Court has conducted an *in camera* inspection of these documents in unredacted form. Upon review, the Court found that the redactions were properly made upon privacy grounds. Document Nos. 23, 25, 30, 34, 36 and 39 consist of “dock-master” forms. The Court has conducted an *in camera* inspection of these documents in unredacted form. Upon review, while the Court found it was not necessary to redact the

vehicle make/model or year, the Court found that the remaining redactions were properly made upon privacy grounds.

The Court next turns to Document Nos. 4, 7 –11, 18 – 22, 24, 26, 28, 41 – 123 “emails.” Upon the Court’s review of the documents here, the Court finds that Document Nos. 4, 7, 8, 9, 10, 11, 15, 18, 19, 20, 21, 22, 24, 26, 28, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65 – 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 91, 92, 93, 94, 95, 96, 104, 105, 107, 111, 120, 121, 122 and 123 contain statistical or factual tabulations or data that must be disclosed. However, of those documents, the following also contain material that is not subject to disclosure reflecting ideas, opinions, speculation, or conjecture under this exception that should be redacted prior to disclosure (see, Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 463–464 [2007]; Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 133 [1985]): Document Nos. 4, 26, 41, 42, 43, 44, 46, 47, 48, 49, 50, 57, 59, 60, 61, 62, 65 – 75, 77, 78, 79 – 87, 90, 91, 93, 94, 95, 96, 105, 107, 12, 121 and 123. The “subject lines” need not be redacted.

The remaining documents were properly withheld as they are entirely deliberative in nature and exempt under the Public Officers Law § 87(2)(g).

#### Executive Chambers Documents

The log entitled “Log of Exempt Records” (respondents’ “Exhibit G”) consists of 30 separate pages of responsive emails, some with attachments, which the Executive Chamber asserts are exempt from disclosure under the attorney-client privilege and because they

constitute inter or intra-agency materials. Under FOIL, an agency need not disclose documents “specifically exempted from disclosure by state or federal law” (Public Officers Law § 87[2][a]). The CPLR creates privileges for communications between attorneys and their clients (see, CPLR § 4503 [a]), as well as for attorney work product (see, CPLR § 3101[c]).

Upon the Court’s review of the e-mails in their unredacted form, the Court finds that Page Nos. 1, 2, 3, 5, 6, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 contain factual data that must be disclosed. However, of those documents, the following also contain material that is intra-agency or communications protected by the attorney-client privilege that should be redacted prior to disclosure (see, Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 463–464 [2007]; Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 133 [1985]): Page Nos. 1, 3, 5, 6, 8, 11, 12, 17, 18, 23, 24, 27. The Court has taken the liberty of highlighting what information on these documents should be disclosed by respondents.<sup>2</sup> Pages 4, 7, 9, 10, were properly withheld as exempt intra-agency materials or communications protected by the attorney-client privilege.

#### State Police Documents

The log entitled “Confidential Memorandum” (respondents’ “Exhibit J”) consists of 63 pages of responsive documents which the State Police asserts are exempt either in whole

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<sup>2</sup>The Court did not highlight repetitive documents (i.e. Page Nos. 27 and 28) or “chain” e-mails.

or in part from disclosure based upon the inter or intra-agency exemption or the attorney-client privilege. The State Police also asserts that to disclose some documents would violate the personal privacy of certain individuals pursuant to Public Officers Law § 87(2)(b). The State Police also withheld certain documents on the grounds that disclosure of such documents compiled for law enforcement purposes would reveal non-routine criminal investigative techniques and procedures (Public Officers Law § 87[e][iv]) and could endanger the life and safety of police officers and other persons who are assigned to or attend similar public events in the future (Public Officers Law § 87 [f]). Under Public Officers Law § 87(2)(e)(iv), the State Police documents are exempt from disclosure if the disclosure of such files would reveal non-routine criminal investigative techniques or procedures. “The purpose of the exemption provided by Public Officers Law § 87 (2)(e)(iv) is to prevent violators of the law from being apprised of non-routine procedures by which law enforcement officials gather information” (Matter of Fink v Lefkowitz, 47 NY2d 567, 572 [1977]). In Fink, the Court distinguished agency records compiled for law enforcement purposes, which illustrate investigative techniques, from the documents which articulate the agency’s understanding of the rules and regulations it is empowered to enforce. The Court stated that records which “merely clarify procedural or substantive law must be disclosed” since such information in the hands of the public does not impede effective law enforcement (Matter of Fink v Lefkowitz, 47 NY2d 567, 572 [1977]). “Indicative, but not necessarily dispositive, of whether the investigative techniques are non-routine is whether disclosure of

those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by [law enforcement] personnel.” Matter of Fink v Lefkowitz, 47 NY2d 567, 572 (1977).

The State Police has provided responsive documents in their unredacted form as well as having provided to this Court the documents in their proposed redacted form.

Upon the Court’s review of the documents in their unredacted form, the Court finds that Document Nos.<sup>3</sup> 2, 3, 9, 10, 11, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 and 61 contain factual data that must be disclosed. However, of those documents, the following also contain material that is intra-agency or communications protected by the attorney-client privilege or are protected from disclosure pursuant to Public Officers Law § 87 (e)(iv) that should be redacted prior to disclosure (see, Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 463–464 [2007]; Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 133 [1985]): document numbers 2, 9, 10, 15, 16, 22, 23, 24, 25, 26, 27, 28, 29, 30, 34, 37, 40, 47, 48, 49, 53, 56, 57, 58, 59, 60, 61.

The Court has examined the proposed redactions for the afore stated documents and finds that the majority of the proposed redactions are appropriate and consistent with the

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<sup>3</sup>For the sake of brevity, the Court has intentionally omitted “SCOPE” followed by a zero(s) preceding each number.

afore stated principals of FOIL. However, the Court has identified certain instances where the State Police has proposed to redact certain lines contained in these documents that are objective and factual in nature, thus falling outside the afore stated exemptions. The Court has taken the liberty of highlighting what information on which documents should be disclosed by respondents and provided to petitioners.<sup>4</sup> Respondents are directed to produce these documents to petitioners with the information ordered by the Court to be disclosed.

Documents numbers 1, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 31, 32, 35, 43, 44, 45, 46, 53, 62 and 63 were properly withheld in their entirety.

Finally, petitioners seek an award of attorney's fees and costs pursuant to POL § 89(4)(c). Under the cited statute, a prevailing FOIL requestor may recover counsel fees and costs where the agency lacked a reasonable basis for denying access to the requested records.

Pursuant to Public Officers Law § 89(4)(c), the Court can award reasonable attorney's fees and other litigation costs to a petitioner who has substantially prevailed in a proceeding challenging the denial of a FOIL request, provided that the Court determines that the record sought clearly has significant interest to the public and that the government agency lacked a reasonable legal basis for withholding the record. An award of such fees is discretionary (Matter of Powhida v City of Albany, 147 AD2d 236, 238 [3<sup>rd</sup> Dept. 1989])

Here, the primary purpose for petitioners' FOIL request was to obtain evidence to

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<sup>4</sup>The Court did not highlight repetitive documents or "chain" e-mails.

support their argument that respondents concocted a special regulation designed to suppress protestors' right to use toy guns in the exercise of their First Amendment rights. While there is no doubt that the records in question are of "clearly significant interest to the general public," upon the instant record, the Court cannot find either that petitioners substantially prevailed due to the breadth of the original FOIL demand and notwithstanding this Court's directing that a limited number of documents be produced, or that respondents did not have a reasonable legal bases for withholding parts of the material sought. Thus, attorney's fees and litigation costs should not be awarded to petitioners.

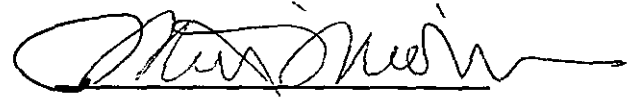
Accordingly, it is ORDERED and ADJUDGED, that, within thirty (30) days, respondents make available to petitioners the documents not previously furnished consistent with this Court's determination above; and it is further ORDERED and ADJUDGED that petitioners' application for costs and attorneys fees is denied.

This Memorandum constitutes the Decision and Order of the Court. This Decision and Order and confidential exhibits are returned to attorney for the respondents. All other papers are being retained by the Court. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of CPLR Rule 2220 respecting filing, entry and Notice of Entry.

SO ORDERED.

ENTER.

Dated: Troy, New York  
July 10, 2015

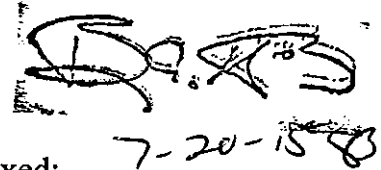


MICHAEL H. MELKONIAN

Acting Supreme Court Justice

Papers Considered:

- (1) Notice of Petition dated December 23, 2014;
- (2) Petition dated December 23, with exhibits annexed;
- (3) Answer dated March 13, 2015;
- (4) Memorandum of Law dated March 13, 2015;
- (5) Affidavit of Heather Groll dated March 10, 2015, with exhibits annexed;
- (6) Affirmation of Sherry Y. Hwang, Esq., dated March 4, 2015, with exhibits annexed; and
- (7) Affidavit of Debra L. Benziger dated March 6, 2015, with exhibits annexed.



7-20-15