

Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.
2019 NY Slip Op 30643(U)
March 15, 2019
Supreme Court, New York County
Docket Number: 157651/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of

Index No.
157651/2018

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

**DECISION
and ORDER**

- against -

NEW YORK CITY OFFICE OF PAYROLL
ADMINISTRATION,

Mot. Seq. 1

Respondent,

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

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Empire Center for Public Policy (“Empire Center” or “Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”) for an Order directing Respondent New York City Office of Payroll Administration (“OPA” or “Respondent”) to produce records relating to all individuals not included in the NYC Open Data Citywide Payroll database for fiscal year 2017. OPA opposes Empire Center’s Petition. Oral argument was held on January 22, 2019.

Relevant Background

On March 8, 2018, Empire Center submitted a Freedom of Information Law Request (“FOIL Request”) seeking “information relating to all individuals not included in the NYC Open Data Citywide Payroll database for fiscal year 2017, including: (1) name; (2) title; (3) compensation rate; (4) agency start date; (5) pay basis (annual, biweekly, etc.); and (6) total employee compensation (including overtime and other extras but excluding expense reimbursements)”. The FOIL

Request also specifically acknowledged that employee names may be redacted by OPA and asked that the missing names be replaced with four x's (XXXX).

On April 5, 2018, OPA sent an email stating that the FOIL Request would be granted in part and denied in part. OPA stated in the email "that the pay basis for all individuals not included in the payroll database is bi-weekly". OPA further stated that all other requested records are exempt from disclosure under Public Officers Law ("POL") § 87(2)(f) (disclosure could endanger the life and safety of the listed public employees), POL § 87(2)(e)(iii) (disclosure could identify confidential sources or confidential information related to a criminal investigation), and POL § 87(2)(e)(iv) (disclosure would reveal non-routine criminal investigative techniques or procedures).

On April 11, 2018, Empire Center appealed OPA's denial and stated in the appeal that OPA "had ten business days from receipt of the appeal to respond and that its options were to grant the FOIL Request and disclose the records or to deny it with a written explanation why". OPA did not respond to Empire Center's appeal.

Empire Center brings this Article 78 proceeding (1) declaring that OPA acted unlawfully in failing to produce records in response to the FOIL Request; and OPA must release the requested records; (2) directing OPA to produce to Empire Center within five days of the date of the order, the records requested in the Empire Center's FOIL Request; and (3) awarding attorneys' fees and costs reasonably incurred in this litigation as allowed under FOIL.

Parties' Contentions

Empire Center argues that this Court has previously decided an Article 78 proceeding brought by Empire Center for a July 2015 FOIL Request denial. Empire Center states that the Court held that OPA "failed to sustain its burden that disclosure of the payroll information for undercover officers, without any accompanying identifying information, would in any way endanger them, impede their work, or give valuable information to those attempting to evade their investigation". *Empire Ctr. for Pub. Policy, Inc. v N.Y.C. Off. of Payroll Admin.*, 54 Misc3d 1211[A], 2017 NY Slip Op 50099[u] [Sup Ct, NY County 2017]. Empire Center further states that the First Department on appeal reversed the trial court's holding that Empire Center exhausted its administrative remedies but did not address the trial court's ruling on the exemption claim. *Matter of Empire Ctr. for Pub. Policy, Inc. v N.Y.C. Off. of Payroll Admin.*, 158 AD3d 529 [1st Dept 2018].

Empire Center further contends that OPA does not describe how the requested records with names redacted could threaten the life or safety of any unidentified person or reveal non-routine criminal investigation techniques or procedures. Empire Center contends that pursuant to POL § 89(4)(c), a party making a FOIL Request can receive attorney's fees and litigation costs incurred against an agency when the agency failed to respond to an appeal in the statutory time or has no reasonable basis for denying the FOIL Request. Here, Empire Center argues that OPA has not timely responded to their appeal or provided a reasonable basis for the denial, and it is entitled to attorney's fees.

OPA contends that it properly denied Empire Center's FOIL Request based on POL § 87(2)(f) (disclosure could endanger the life and safety of the listed public employees), POL § 87(2)(e)(iii) (disclosure could identify confidential sources or confidential information related to a criminal investigation), and POL § 87(2)(e)(iv) (disclosure would reveal non-routine criminal investigative techniques or procedures). OPA argues that pursuant to POL § 87(2), OPA's response was appropriate. OPA contends that case law does not require the denial to "detail the manner in which each document sought would cause such interference" because "the assertion that disclosure would interfere with an on-going...investigation [is] a sufficiently particularized justification for the denial of access to [the] records." *Leshner v. Hynes*, 80 A.D.3d 611, 612 [2d Dep't 2011], *aff'd*, 19 N.Y.3d 57 [2012].

OPA further contends that there is a public safety exemption. OPA submits the Expert Affidavit of Sergeant Manuel Matos ("Sgt. Matos") in support of its Answer. OPA argues that the Court should defer to Sgt. Matos opinion, an experienced supervisor of undercover police operations. Sgt. Matos opines that even producing the information with redacted names could lead to the identification of officers with modern software since undercover officers are promoted from uniformed force or other commands, and uniformed force information is publicly available. Sgt. Matos further opines that redacted information would disclose the number of full-time undercover officers and would endanger the public by undermining the New York Police Department ("NYPD") program. OPA argues that providing Empire Center with the aggregate total of undercover officers' salaries would be easy to divide based on the average NYPD salaries and it would be easy to determine a reasonable estimate of undercover officers. OPA also argues that the aggregate information would reveal whether the NYPD has reduced or expanded its undercover program based on the salary information.

Legal Standard

“All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records.” *Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 108 [1992] (citations omitted). “Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (Public Officers Law § 89 [4] [b]).” *Id.* “[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 Dep't*, 89 N.Y.2d 267, 275 [1996]. Moreover, “an agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.” *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v. Mills*, 18 NY3d 42, 45 [2011].

Agencies may deny a FOIL Request pursuant to POL § 87(2)(e), where “access to records that reveal criminal investigative techniques or procedures, except routine techniques and procedures”. *Fink v. Lefkowitz*, 47 N.Y.2d 567, 568 [1979]. “Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine 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 agency personnel.” *Id.* at 572.

“Public Officers Law § 87 (2) (f) permits an agency to deny access to records, that, if disclosed, would endanger the life or safety of any person.” *Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875 [1st Dept. 2011], *aff'd*, 20 N.Y.3d 1028 [2013]. “The agency in question need only demonstrate ‘a possibility of endanger[ment]’ in order to invoke this exemption.” *Id.* (citation omitted).

Pursuant to POL § 89(4)(c), a court may award reasonable attorney’s fees and litigation costs incurred where a party has “substantially prevailed” and when the agency “failed to respond to a request or appeal within the statutory time”; and the agency had no “reasonable basis” for denial. *See* POL § 89(4)(c). The Court of Appeals has stated, “[p]ursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that ‘substantially prevailed’ in the proceeding if the court finds that (1) ‘the record involved was, in fact, of clearly significant interest to the general public,’ and (2) ‘the agency lacked a reasonable basis in law for withholding the record’ (Public Officers Law § 89 [4] [c]). Only after a court finds that the statutory prerequisites have been satisfied may

it exercise its discretion to award or decline attorneys' fees." *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 [2005].

Discussion

OPA does demonstrate that a "head count" of undercover officers could "convey investigative techniques or capability". There is "a possibility of endanger[ment]" to the life or safety of undercover officers if the number and title of undercover officers is provided. *Bellamy*, 20 N.Y.3d 1028 [2013] (citations omitted). Accordingly, OPA shall turn over the requested records in the aggregate with gross salary. Empire Center's request for attorneys' fees is denied. Empire Center has not shown that the records involved are of "significant interest to the general public." *Beechwood*, 5 N.Y.3d at 441.

Wherefore it is hereby

ORDERED that Respondent New York City Office of Payroll Administration shall provide Petitioner Empire Center for Public Policy, with the records relating to all individuals not included in the NYC Open Data Citywide Payroll database for fiscal year 2017 in the aggregate with gross salary within 45 days of service a copy of this Order with notice of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: MARCH 15, 2019



Eileen A. Rakower, J.S.C.