

Matter of Jewish Press, Inc. v New York City Dept. of Educ.
2019 NY Slip Op 30653(U)
March 1, 2019
Supreme Court, Kings County
Docket Number: 524411/2018
Judge: Reginald A. Boddie
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At I.A.S. Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 1st day of March 2019.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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In Re Application of JEWISH PRESS, INC.,

Plaintiff,

Index No. 524411/2018
Cal. No. 12

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

-against-

DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Defendant.

-----X

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Verified Petition	1-2
Verified Answer	3
Memorandum in Reply in Further Support of the Verified Petition	4

Upon the foregoing cited papers, and after oral argument, the decision and order on petitioner's Article 78 petition is as follows:

On April 22, 2108, petitioner Jewish Press, a New York City weekly newspaper, requested the following records, pursuant to Article 6 of the Freedom of Information Law (FOIL), from the New York City Department of Education (DOE): "a copy of each Form 201 submitted by an employee from 2015-4/20/2018 that fit the following criteria: Reason for request is Religious Observance (box "M"); The request was denied in either section 3 or 4."

By letter dated August 14, 2018, DOE issued a final determination denying petitioner's FOIL request on the grounds that the request was not reasonably described pursuant to Public Officers Law § 89 (3) (a). DOE acknowledged that it regularly grants and denies requests for religious accommodations from its employees, that the Form 201 is the mechanism by which employees request time off for religious observance, and that records of the form exist and are maintained by DOE.

However, DOE concluded that records of such forms, as requested by petitioner, are not accessible, with reasonable effort, by DOE employees. DOE explained that these records were not coded or indexed electronically, but rather maintained in over 100,000 individual employee personnel files which are located in approximately 1700 schools across New York City. DOE reasoned that in order to execute a search for records responsive to the request as phrased, DOE personnel would have to search through the individual personnel files of over 100,000 employees in order to determine whether the employee submitted a religious observance form within that time period and therefore the documents are not accessible with reasonable effort. Petitioner commenced this Article 78 seeking judicial review and vacatur of DOE's August 14, 2018 determination.

FOIL § 87 (2) provides for public inspection and copying of all agency records, subject to certain statutory exceptions. The Legislature declared "that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government" (*Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994], quoting Public Officers Law § 84, added by L.1977, ch. 933). "FOIL was enacted to provide the People with the means to access governmental records, to assure

accountability and to thwart secrecy” (*Matter of Buffalo News*, 84 NY2d at 492, citing *see Matter of Weston v Sloan*, 84 NY2d 462, 466 [1994]). “All records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant . . . ‘FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government’” (*Matter of Buffalo News*, 84 NY2d at 492, quoting *Matter of Capital Newspapers v Whalen*, 69 NY2d 246, 252 [1987]).

Public Officers Law § 89 (3) places the burden on petitioners to “reasonably describe” documents requested (*Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 41 Misc 3d 471, 481 [1st Dept 2013], citing *Konigsberg v Coughlin*, 68 NY2d 245 [1986]; *Mitchell v Slade*, 173 AD2d 226, 227 [1st Dept 1991]). While typically an agency action is reviewed under an “arbitrary and capricious” standard, that standard is inapplicable to the City’s refusal to disclose the subject records. When reviewing the denial of a FOIL request, a court is to presume that all records of a public agency are open to public inspection and copying. The agency bears the burden of showing that the records fall squarely within an exemption to disclosure (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 [1st Dept 2010] citing *see* Public Officers Law § 89 [5] [e]; *Matter of Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229-230 [2005], lv denied 6 NY3d 701 [2005]).

“The failure of a requester to reasonably describe desired records is a ground for nondisclosure that is entirely separate from the exemption provisions under section 87 (2) of the Public Officers Law” (*Asian Am. Legal Defense & Educ. Fund*, 41 Misc 3d at 481, citing

Konigsberg, 68 NY2d at 251). To support a denial because records are not reasonably described, the agency has to establish that “the descriptions [are] insufficient for purposes of locating and identifying the documents sought [with a reasonable amount of effort]” (Id. at 249, 251, citing *Marks v United States*, 578 F2d 261, 263 [9th Cir 1978] [citations omitted]).

Courts have found plausible claims of “nonidentifiability” where an agency’s indexing system was such that “the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency” (*Konigsberg*, 68 NY2d at 250, citing *National Cable Tel. Assn. v Federal Communications Commn., D.C. Cir.*, 479 F2d 183, 192 [USCA DC Cir 1973]; see also *Sears v Gottschalk*, 502 F2d 122, 125 [USCA 4th Cir 1974], citing *Irons v Schuyler*, 465 F2d 608 [USCA DC Cir 1972] [inspection of all unpublished manuscript decisions was denied based on the difficulty of locating the requested records rather than the categorical nature of the request]; see also *Marks v United States*, 578 F2d 261, 263 [9th Cir 1978] [the law does not require an agency to conduct an all-emcompassing search of the records in every field office to make requested records publically available]).

Here, DOE explained the Form 201s are kept in each employee’s personnel file which are located at the current or former employee’s last assigned school. Although DOE also keeps a central personnel file for each employee, Form 201s are not included in that file. DOE estimates there are approximately 100,000 personnel files relevant to the given period that are located in approximately 1700 schools throughout New York City. These files are paper, not electronic, and DOE does not organize the filing of the Form 201s based on the reason for the request or basis of the denial. The request, as phrased, would require DOE to look through the personnel files of all

its employees in all of its schools to determine whether a Form 201 was submitted during the relevant time period.

The law does not mandate that the agency undertake a search of all its records as required here to access the information sought by a FOIL request (see *Konigsberg*, 68 NY2d at 250; see also *Sears*, 502 F2d at 125; see also *Marks*, 578 F2d at 263). Further, the law does not require an agency to create indexing systems that are not already in use in order to retrieve the information sought (*Konigsberg*, 68 NY2d at 250, citing *National Cable Tel. Assn. v Federal Communications Commn.*, D.C.Cir., 479 F2d 183, 192 [USCA DC Cir 1973]). Accordingly, the Court finds DOE has demonstrated petitioner's request, as phrased, was insufficient for DOE to locate and identify the documents sought with a reasonable amount of effort. Although there is a strong presumption in favor of access to information, on these facts, the Court is constrained to deny the petition.

E N T E R:



Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.

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