

**Matter of Demirayak v New York City Dept. of
Citywide Admin. Servs.**

2019 NY Slip Op 31385(U)

May 17, 2019

Supreme Court, New York County

Docket Number: 157290/2018

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 the Application of

Index No.
157290/2018

CANER DEMIRAYAK,

Petitioner,

**DECISION
and
ORDER**

- against -

NEW YORK CITY DEPARTMENT OF
CITYWIDE ADMINSTRATIVE SERVICES,

Motion Seq. 1

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

Petitioner, Caner Demirayak (“Petitioner”), is an attorney and attempts to access the courts on a weekly basis. Petitioner has a disability and uses a motorized wheelchair.

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 Department of Citywide Administrative Services (“Respondent” or “DCAS”), to produce records that Petitioner demanded through the New York State Freedom of Information Law (“FOIL”). These records relate to the renovations of the City courthouses, including specifically the courthouse located at 360 Adams Street, to comply with the Americans with Disabilities Act (“ADA”).

Relevant Background

In 2015, the New York Lawyers for the Public Interest (“NYLPI”) issued a report alleging that courthouses in the City are inaccessible to people with physical disabilities. On or about June 20, 2016, DCAS and NYLPI executed a Structured Negotiation Agreement (“SNA”) to address the issues related to physical accessibility of the courthouses. In connection with the SNA, DCAS retained

Ronnette Riley Architect (“RRA”) pursuant to a five-year contract (“the DCAS/RRA Contract”). The scope of the work under the DCAS/RRA Contract includes (i) a survey of courthouse buildings to identify elements that do not comply with the ADA Standards for Accessible Design, with the accessibility requirements of the New York City Building Code, and with the signage needed to comply with Local Law 47; (ii) analysis of the survey findings; (iii) feasibility studies; (iv) design development, final design, and construction documents; (v) design consultant services for project-related build-outs at various DCAS court buildings; and (vi) architectural and related engineering ADA design services during construction on renovation projects. RRA’s work under the DCAS/RRA Contract began in 2017. DCAS states that RRA’s work “informs the ongoing negotiations between DCAS and NYLPI pursuant to the SNA.”

By email dated November 30, 2017, Petitioner demanded 32 categories of documents relating to renovations of the City courthouses, including specifically the courthouse located at 360 Adams Street.

By email dated July 13, 2018, DCAS provided Petitioner with a copy of the DCAS/RRA Contract and RRA’s “full request for proposal.” DCAS denied access to all other records, determining that items “1” through “17” could not be located and/or exceeded the scope of FOIL, and that items “18” through “32” were exempt from disclosure pursuant to N.Y. Pub. Off. Law (“POL”) §§ 87(2)(a), (c), and (g).

By email dated July 13, 2018, Petitioner administratively appealed DCAS’s July 13, 2018 FOIL determination. By memorandum dated August 3, 2018, DCAS affirmed its prior FOIL determination, finding that it was appropriate to grant Petitioner access to the DCAS/RRA Contract, and denying access to all other records. DCAS determined that records responsive to items “18” through “22,”¹

¹ Specifically, Item 18 requests “[t]erms and conditions or the actual agreement relating to the [SNA].” Item 19 requests “[s]tatus updates provided by DCAS pursuant to the [SNA].” Item 20 requests “[s]urveys of court facilities conducted by DCAS or any independent contractor or firm pursuant to the [SNA].” Item 21 requests “[r]ecords of any meetings conducted by DCAS pursuant to the [SNA].” Item 22 requests “[c]orrespondence, emails, memos between DCAS and New York Lawyers for the Public Interest relating to the [SNA].”

items “25” through “26,”² and items “29” through “32”³ (seeking a copy of the SNA, status updates, surveys and related documents, records of meetings, and correspondence between DCAS and NYLPI) were exempt from disclosure pursuant to POL § 87(2)(a), as they are “confidential communications made in the course of an alternative dispute resolution process under the SNA.”

DCAS further stated that records responsive to the above items were also exempt from disclosure pursuant to POL § 87(2)(a), as they are “material[s] prepared by or at the request of an attorney in anticipation of litigation.” DCAS further stated that records responsive to the above items were also exempt from disclosure pursuant to POL § 87(2)(c), as their disclosure would impair ongoing negotiations between DCAS and NYLPI “directed toward execution of a settlement contract.” DCAS further stated that records responsive to item “24” and items “27” through “28” (documents relating to the vetting of RRA and correspondence between DCAS and RRA)⁴ were exempt from disclosure pursuant to POL § 87(2)(g) because they constitute “intra-agency pre-decisional material.”

Petitioner commenced this special proceeding against DCAS, seeking, *inter alia*, access to the requested records, in addition to costs and attorney’s fees.

At oral argument, Petitioner stated that there are two categories of records that he is still seeking which are the architectural accessibility surveys done by RRA and the records leading to the SNA. The application was marked fully submitted upon the receipt of the minutes from the oral argument.

² Item 25 requests “[s]urveys conducted by Ronnette Riley Architect regarding Disability Accessibility consulting contract with DCAS.” Item 26 requests those surveys taken at 360 Adams Street, Brooklyn, NY.

³ Item 29 requests “[d]ocuments/surveys/plans relating to surveys conducted by DCAS and/or any contractors hired by DCAS in the month of November 2017 at 260 Adams Street, Brooklyn, NY,” and for the months of October 2017 (Item 30), September 2017 (Item 31), and in the years 2015-2017 (Item 32).

⁴ Item 24 requests “[d]ocuments relating to [the] vetting process of Ronnette Riley Architect relating to the Disability Accessibility consulting contract.” Items 27 and 28 request correspondence, emails, and memos between DCAS and RRA regarding their contract.

Discussion

“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 N.Y.3d 42, 45 (2011). “If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material.” *Gould*, 89 N.Y. 2d at 275.

Here, DCAS is claiming that the subject records being sought by Petitioner are exempt from disclosure: (1) pursuant to POL § 87(2)(a) because they are “confidential communications made in the course of an alternative dispute resolution process under the SNA” and are exempt under the Alternative Dispute Resolution Act of 1998 (“ADRA”), 28 U.S.C. 651; (2) pursuant to POL § 87(2)(a) because they are “material[s] prepared by or at the request of an attorney in anticipation of litigation;” (3) pursuant to POL § 87(2)(c) because their disclosure would impair ongoing negotiations between DCAS and NYLPI “directed toward execution of a settlement contract” and impair contracts; and (4) pursuant to POL § 87(2)(g) because they constitute intra-agency materials.

Petitioner disputes that these exemptions apply. At oral argument, Petitioner claimed that to the extent that certain portions of the requested records may fall under one of the exemptions, they should be provided for the Court for an *in camera* inspection.

1. Records Withheld Pursuant to ADRA and POL §87(2)

POL § 87(2) permits an agency to deny access to records that are specifically exempted from disclosure of law. DCAS claims that in this case, this would include the provisions of the ADRA. The ADRA “requires each federal district court to authorize, by local rule, the use of alternative dispute resolution processes in all civil actions” and “requires that ADR processes be confidential and prohibits disclosure of confidential dispute resolution communications.” *Fields-D’Arpino v. Restaurant Assocs., Inc.*, 39 F. Supp. 2d 412, 418 (S.D.N.Y. 1999) (citing 28 U.S.C. § 652[d]). “A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality.” *Savage & Assocs. P.C. v. K&L Gates LLP (“In re Teligent, Inc.”)*, 640 F.3d 53, 57 (2d Cir. 2011).

DCAS argues that the records sought in items 18 through 22, 25 through 26, and 22 through 32 are exempt under the ADRA. As identified above, these items request a copy of the SNA, status updates provided by DCAS pursuant to the SNA, surveys conducted pursuant to the SNA including those by RRA and in certain time periods, records of DCAS meetings, and communications between DCAS and NYLPI relating to the SNA. DCAS argues that the records sought were prepared “in connection with ongoing, private negotiations between DCAS and NYLPI,” and should be granted protection under the ADRA and POL § 87(2)(a).

Petitioner argues that the ADRA only applies to court ordered mediation in federal litigation and does not apply to the SNA between the City and NYLPI. Petitioner argues that “[s]ince this statute only applies to pending federal litigations, it has no applicability to the SNA between the City and the New York Lawyers for the Public Interest (‘NYLPI’) as same was entered into voluntarily between the parties, not within a federal action, and no district court issued an order of confidentiality.”

Petitioner argues that even if the ADRA did apply, “the First Department previously held in *City of Newark v. Law Dep’t of N.Y.*, 305 A.D.2d 28 that a confidentiality order issued by an arbitration panel does not override the public’s right to access to government records under FOIL.” Petitioner further contends that “(1) the public under FOIL has a special need to see these materials as it must see what the City is actually doing to end disability discrimination in the courthouses; (2) it is totally unfair for the public to be denied access to records of the government’s attempts to remedy disability discrimination and only permitting a

private law firm, i.e., NYLPI and its four clients to know what is going on; and (3) the public's need to see and hold the City accountable outweighs any confidentiality, especially because the [RRA Consulting] contract costs \$12,000,000 and any construction arising from same across the City will cost hundreds of millions of tax payer (sic) dollars."

The Court finds that the ADRA does not apply to the SNA that was entered between DCAS and NYLPI. Furthermore, even if the ADRA did apply, Petitioner has "demonstrate[d] (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality." *In re Teligent, Inc.*, 640 F.3d at 57.

2. Records Withheld Pursuant to the Work Product Doctrine and POL §87(2)(a)

POL § 87(2) permits an agency to deny access to records that are specifically exempted from disclosure of law. DCAS claims that in this case, this would include the attorney-work product doctrine. DCAS claims that the requested records constitute "materials prepared by or at the request of an attorney in anticipation of litigation."

CPLR § 3101(c) codifies the work-product doctrine and provides that the "work product of an attorney shall not be attainable." The work-product doctrine "applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co. v. American Home Assur. Co.*, 23 A.D. 3d 190, 190-191 (1st Dept 2005).

DCAS contends that records responsive to Items 18 through 22, 25 through 26, and 29 through 32 "have been created by City attorneys in anticipation of litigation, or else by RRA at the direction of City attorneys," and are therefore exempt under CPLR § 3101(c) and POL § 86(2)(a). Petitioner, in turn, contends that DCAS has not demonstrated that this exemption applies. Petitioner contends that the work-product doctrine does not apply to documents that would have been prepared regardless of the prospect of litigation such as here where the City is mandated under federal law to ensure that court buildings are accessible to all. Petitioner further claims that the materials requested such as surveys and architectural plans are

completely factual in nature and do not constitute the mental impressions, opinions or advice of an attorney.

The Court finds that DCAS has failed to satisfy its burden of demonstrating that the work product doctrine applies to the documents requested. To the extent that DCAS contends that certain documents (or portions thereof) reflect mental impressions of a lawyer, those documents should be submitted for in camera inspection to the Court in an unredacted form with proposed redactions and a privilege log.

3. Records Withheld Pursuant to POL § 87(2)(c)

Under POL § 87(2)(c), an agency may deny access to records that, “if disclosed, would impair present or imminent contract awards or collective bargaining negotiations.” DCAS contends that here, “DCAS and NYLPI are engaged in negotiations in an effort to resolve issues related to the physical accessibility of courthouses in the City.” DCAS contends that “[p]ursuant to the SNA, DCAS has begun efforts to remedy and remediate existing barriers to accessibility and will likely seek to procure construction and/or construction related services in the near future.” DCAS claims that disclosure of records that contain information concerning existing barriers to accessibility to the courthouses “may, *inter alia*, deter potential bidders, and will thereby impair DCAS’ ability to procure construction and/or construction-related services ‘of maximum quality at the lowest possible cost’” and “would impair imminent contract awards.” Petitioner argues that DCAS’ position is unsubstantiated and lacks evidentiary support.

The Court finds that DCAS has not provided any evidentiary support for its contention that disclosure of the requested records “would impair present or imminent contract awards or collective bargaining negotiations” and therefore has not presented a basis for an exemption under POL § 87(2)(c).

4. Records Withheld Pursuant to POL § 87(2)(g)

POL § 87(2)(g) exempts from disclosure records which “are inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; (iv) external audits, including but not limited to audits performed by the comptroller and the federal government.” The Court of Appeals has explained that “[t]he point

of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” *New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 488 (2005).

DCAS argues that to the extent that the documents requested relate to the “vetting process” of RRA and correspondence between DCAS and RRA regarding their contract, “[s]uch communications constitute pre-decisional, non-final decisions and are therefore exempt pursuant to N.Y. Pub. Off. Law 87(2)(g).” Petitioner, in turn, argues that the exemption does not apply to the compilation and gathering of facts and data that are contained in the requested documents. Petitioner contends that “the plans to remediate the courthouses and remove barriers based on such factual data is not subject to this exemption from FOIL as they would not constitute deliberative government decision making” and “would constitute RRA’s proposal to remedy barriers.” Petitioner argues that “[a]ny later commentary from the [Respondent] which could arguably be considered deliberative decision making could then be redacted.”

Here, based on the record before the Court, it cannot be determined as a matter of law whether DCAS has properly asserted the intra-agency exemption. DCAS is directed to submit the documents that are being withheld based on this exemption for an *in camera* review in an unredacted form with proposed redactions and a privilege log.

5. Request for Attorneys’ Fees

A party may recover reasonable attorney fees under POL §89(4)(c) by establishing that (1) it has “substantially prevailed,” (2) the record sought was “of clearly significant interest to general public,” and (3) “the agency lacked reasonable basis in law for withholding record.” *Beechwood Restorative Care Center v Signor*, 11 A.D.3d 987, 988 (4th Dept 2004), *aff’d*, 5 N.Y.3d 435 (2005). However, even if a party meets those requirements, the award of attorney fees remains discretionary with the Supreme Court. *Beechwood*, 11 A.D.3d at 988. Furthermore, an “attorney petitioner’s self-representation does not preclude an award of attorneys’ fees” under POL § 89(4)(c). *Kohler-Hausmann v. New York City Police Dept.*, 133 A.D.3d 437, 438 (1st Dept 2015). At this juncture, a determination of whether Petitioner is entitled to recover reasonable attorney fees under POL §89(4)(c) is

premature. An *in camera* inspection will determine whether DCAS had a reasonable basis in law for withholding the requested records.

Wherefore, it is hereby

ORDERED that Petitioner's Article 78 Petition seeking an Order compelling DCAS to produce documents requested pursuant to FOIL is granted to the extent that within 30 days of this Order, DCAS shall either disclose the remaining items of discovery that are subject to this motion or submit those documents for an *in camera* inspection in accordance with this decision.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: MAY 14, 2019

 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION