

**Matter of Greater N.Y. Laborers-Employers
Cooperation & Educ. Trust v New York City Dept. of
Small Bus. Servs.**

2019 NY Slip Op 31750(U)

June 20, 2019

Supreme Court, New York County

Docket Number: 158964/2018

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.
158964/2018

GREATER NEW YORK LABORERS-EMPLOYERS
COOPERATION AND EDUCATION TRUST,

**DECISION
and ORDER**

Petitioner,

For an Order and Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

Mot. Seq. 1

- against -

NEW YORK CITY DEPARTMENT OF SMALL
BUSINESS SERVICES, and GREGG BISHOP, in his
official capacity as COMMISSIONER OF THE NEW
YORK CITY DEPARTMENT OF SMALL BUSINESS
SERVICES,

Respondents.

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

Petitioner Greater New York Laborers-Employers Cooperation and Education Trust ("Petitioner") brings this action pursuant to Article 78 of the New York Civil Practice Law and Rules ("Article 78") for an Order directing Respondents New York City Department of Small Business Services ("SBS") and Gregg Bishop, in his official capacity as Commissioner of SBS (collectively, "Respondents") to produce un-redacted records relating to the HireNYC program from October 2015 through present. Respondents oppose.

Relevant Background

Petitioner was created under the Labor Management Cooperation Act of 1978 and is a labor-management committee. Petitioner contends that it advances issues to

members of the Laborers' International Union of North America, which is made up of members working in construction trades.

Petitioner contends that the HireNYC program was created to generate job opportunities for low-income New Yorkers receiving public assistance. The program imposes hiring obligations on contractors bidding on New York City contracts of more than \$250,000.00. Additionally, real estate development projects that receive more than \$2 million in combined New York City Department of Housing Preservation and Development subsidy and the value of the City-owned land must use the HireNYC program.

Petitioner contends that "the public has a right to know: (1) whether anyone is actually being referred through the HireNYC program; (2) whether anyone being referred is actually being hired; (3) whether the same individuals are being referred to multiple vacancies; (4) whether the referrals are from the communities targeted by the HireNYC program, including low-income communities and/or the communities where the project or contract is located; (5) the qualifications held by the referred employees; and, (6) whether developers, general contractors, and subcontractors are meeting their obligations under the HireNYC program." (Petitioner's Memorandum of Law at 2).

On November 30, 2017, Petitioner through its attorneys submitted a Freedom of Information Law Request ("FOIL Request") seeking:

"[c]opies of documents: 1. That evidence participation by any individuals/employees in the "HireNYC" program for any construction related positions. Your response should, at a minimum, include documents that identify: (i) the name of the individual(s)/employee(s) participating in the HireNYC program; (ii) the wages any individual(s)/employee(s) were paid as a result of being hired via the HireNYC program; (iii) the title or job category any individual(s)/employee(s) were hired to perform; and, (iv) the length of any individual(s)/employee(s) employment with the company/employer to which they were referred. Your response to this request should include responsive records from October 2015 through present. 2. Submitted by any employer participating in the HireNYC program that identify "Construction Job Opportunities" available to HireNYC workers/job candidates. Your response to this

request should include responsive records from October 2015 through present. 3. That identify job/candidate referral(s) for "Construction Job Opportunities" sent by HireNYC to employers. (i) the referral date; (ii) the company to whom the HireNYC candidate was referred for a Construction Job Opportunity; (iii) the job title for the referral; (iv) the job referral proposed hourly pay rate/salary; (v) the job start date; and, (vi) the proposed duration of the job. Your response to this request should include responsive records from October 2015 through present."

"Please produce copies of documents: 1. Submitted by employers that identify the reason(s) why candidates referred through the HireNYC program were not hired; 2. of all registration documents filed by contractors/employers who registered to participate in the HireNYC program having construction positions/job opportunities; 3. Evidencing all penalties levied against any employers for non-compliance with the mandates of the HireNYC program, including, but not limited to: the assessment of liquidated damages for not registering with the HireNYC system in a timely manner, withholding relevant job openings from the CITY of New York, or failing to interview qualified candidates; 4. That evidence "Training Opportunities" offered to individuals placed on construction jobs on SBS projects through the HireNYC program; 5. of all surveys prepared by the HireNYC program and completed by individuals referred and hired in construction jobs through the HireNYC program; 6. that identify all NYC contracts or development projects that require participation in the HireNYC program, including the name(s) of each Developer, General Contractor, or subcontractor with contracts of \$500,000 or more on a project, who must use HireNYC. Your response to all requests should include responsive records from October 2015 through present."

On December 4, 2017, SBS sent an email confirming the receipt of the FOIL Request. On April 6, 2018, Petitioner, through its attorneys, filed an appeal of SBS's constructive denial of the FOIL Request pursuant to N.Y. Pub. Off. Law § 89(4)(a).

On April 27, 2018, SBS produced the documents that were sought in the FOIL Request. SBS redacted the names of the individuals participating in the HireNYC program and the last four digits of the individuals' Social Security numbers. On June 11, 2018, Petitioner's attorneys wrote to SBS requesting a reason for the redaction. On June 15, 2018, SBS sent an email to Petitioner's attorneys stating "[t]he documents your [sic] received from SBS in reference to HireNYC are responsive to your FOIL Request. Providing names of participants in our program is considered an unwarranted invasion of personal privacy i.e. disclosure of employment history under the Freedom of Information Statute. You may appeal this determination to...".

On July 3, 2018, Petitioner, through its attorneys, sent a letter appealing SBS's June 15, 2018 determination that the names of individuals participating in HireNYC should be redacted. On July 12, 2018, SBS denied the appeal, citing the holding in *Matter of Empire Ctr. For NY State Policy v. Teacher's Retirement Sys. of the City of New York*, 2012 Misc. LEXIS 4078 [NU Sup. Ct., August 21, 2012], that "the names of retirees could be withheld on the basis that disclosure would constitute an unwarranted invasion of personal privacy". On July 23, 2018, Petitioner's attorneys replied to SBS's denial stating that *Matter of Empire Ctr. For NY State Policy v. Teacher's Retirement Sys. of the City of New York*, 2012 Misc. LEXIS 4078 [NU Sup. Ct., August 21, 2012] was reversed on Appeal and requested reconsideration of SBS's denial of the appeal. On July 26, 2018, SBS denied the request for reconsideration.

Petitioner brings this Article 78 proceeding (1) directing Respondents to produce to Petitioner within 20 days of the date of the Order, the records with the unredacted names of the participants referred by SBS through the HireNYC recruitment source; and (2) awarding attorneys' fees and costs reasonably incurred in this litigation as allowed under FOIL.

Parties' Contentions

Petitioner asserts that New York Courts have held that names and addresses of private individuals are appropriate information requested in FOIL Requests. Petitioner contends that Respondents failed to demonstrate that the information sought in the FOIL Request falls within a FOIL exemption by articulating a particularized and specific reason for the denial. Petitioner contends Respondents do not show how the information sought is considered "employment history" pursuant to N.Y. Pub. Off. Law § 87(2)(b)(i) (unwarranted invasion of personal privacy) which includes the exemption for disclosure of employment histories. Petitioner argues that it does not seek employment history on the names of individuals referred for employment through the HireNYC program. Petitioner further argues that it does

not seek employment records that could implicate privacy concerns, such as un-redacted performance evaluations, un-redacted employee disciplinary records, or employment references listed by individual applicants. Furthermore, Petitioner contends that it has exhausted all of its administrative remedies and it is entitled to its costs and attorney's fees.

In opposition, Respondents contend that Petitioner lacks standing. Respondents argue that all of the correspondences regarding the FOIL Request were between Petitioner's attorneys Archer, Byington, Glennon & Levine LLP ("Archer") and SBS. Respondents contend that Archer does not mention Petitioner in any of the correspondences regarding the FOIL Request. Respondents argue that records "are specifically exempted from disclosure by state or federal statute" pursuant to N.Y. Pub. Off. Law § 89(2)(a). Respondents contend that the names of participants in the HireNYC program are protected from disclosure pursuant to N.Y. Social Services Law ("SSL") § 136(1) which protects "[t]he names and addresses of persons applying for or receiving public assistance", SSL § 136(2) which states that "[a]ll communications and information relating to a person receiving public assistance . . . shall be considered confidential", and 18 N.Y.C.R.R. § 357.2 which states that "[o]fficers and employees of social services districts shall not reveal information obtained in the course of administering public assistance for purposes other than those directly connected with the administration of public assistance".

Respondents further contend that even if the Court rejects Respondents argument that the unredacted names of participants in the HireNYC program is not exempt pursuant to N.Y. Pub. Off. Law § 89(2)(a) because it was not included in SBS's appeal determination, the names are appropriately redacted based on the unwarranted invasion of privacy pursuant to N.Y. Pub. Off. Law § 89(2)(b). Respondents assert that names of the participants in the HireNYC program are recipients of public assistance and the privacy interest outweighs Petitioner's speculation that there is fraud. Respondents contend that participants in the HireNYC program are privately employed by the participating employer and are therefore not public employees. Additionally, Respondents contend that Petitioner's request for attorney's fees should be denied because SBS redacted the names of public assistance recipients from the records that were produced.

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].

“[J]udicial review of an administrative determination is limited to the grounds invoked by the agency” and “the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” *Madeiros v. New York State Educ. Dep’t*, 30 N.Y.3d 67, 74 [2017] (citation omitted). “Although review of an administrative determination is generally limited to the grounds invoked by the agency at the time of its determination, this principle of administrative law [does] not preclude [this Court] from addressing the... newly raised exemption where, as here the confidentiality rights of third parties not before the court are implicated by the disclosure determination”. *Empire Healthchoice Assurance, Inc. v. Clement*, 60 Misc. 3d 1207(A) [N.Y. Sup. Ct. 2018] (citations omitted).

Public Officers Law § 87(2)(b) states, in pertinent part, “[e]ach agency shall . . . make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article . . .”.

Public Officers Law § 89(2) contains a list of situations that would constitute an unwarranted invasion of personal privacy, including “i. disclosure of employment, medical or credit histories or personal references of applications for employment”. “[I]t is clear that a record is not considered an ‘employment history’ merely because it records facts concerning employment ... the term ‘employment history’ for purposes of FOIL exemptions is not defined in the statute, nor well interpreted by case law”. *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 426–27 [2d Dept 1995]. “However, its companion term ‘medical history’ has been defined as ‘information that one would reasonably expect to be included as a relevant and material part of a proper medical history’”. *Id.* at 427. (citations omitted).

Pursuant to Public Officers Law § 87(2)(a), an agency is exempt from disclosing records that “are specifically exempted from disclosure by state or federal statute.” N.Y. Social Services Law § 136(1) protects “[t]he names and addresses of persons applying for or receiving public assistance” from disclosure. Similarly, SSL § 136(2) states that “[a]ll communications and information relating to a person receiving public assistance . . . shall be considered confidential.”

Pursuant to Public Officers Law § 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

Respondents state on the record during oral arguments on May 7, 2019, that one-third of the “roughly 600” individuals participating in the HireNYC program in construction-related projects are public assistant recipients and the remaining two-thirds are not public assistant recipients. Respondents have demonstrated that one-third of the names of the participants in the HireNYC program are exempt from disclosure by state law, specifically N.Y. Social Services Law § 136(1), (2), and N.Y.C.R.R. § 357.2 because they are public assistant recipients. However, the remaining two-thirds of the names of the participants in the HireNYC program are not exempt from disclosure. Accordingly, Respondents shall turn over the records with the unredacted names of the individuals that are not public assistant recipients and redact the names of the public assistant recipients referred by SBS through the HireNYC recruitment source.

Petitioner’s request for attorneys’ fees is denied. Petitioner 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 the Petition is granted to the extent that Respondents New York City Department of Small Business Services and Gregg Bishop, in his official capacity as Commissioner of Small Business Services shall provide Petitioner Greater New York Laborers-Employers Cooperation and Education Trust, the records with the unredacted names of the participants referred by Small Business Services through the HireNYC recruitment source that are not public assistant recipients within 45 days of service of 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: JUNE 20, 2019



Eileen A. Rakower, J.S.C.