

**Matter of Castorina v New York City Human
Resources Admin./ Dept. of Social Servs.**

2019 NY Slip Op 32351(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 153487/2017

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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In the Matter of
RONALD CASTORINA, JR., and
NICOLE MALLIOTAKIS

Index No. 153487/2017

Petitioners,

v

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION/
DEPARTMENT OF SOCIAL SERVICES, STEVEN BANKS,
COMMISSIONER OF THE NEW YORK CITY HUMAN
RESOURCES ADMINISTRATION/DEPARTMENT OF
SOCIAL SERVICES, and MARTHA CALHOUN, in
her official capacity, as GENERAL COUNSEL
FOR THE NEW YORK CITY HUMAN RESOURCES
ADMINISTRATION,

DECISION, ORDER
and JUDGMENT

MOT. SEQ. 001

Respondents.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, the petitioners--two members of the New York State Assembly from Staten Island--seek to review a determination of the respondent New York City Human Resources Administration (HRA) dated January 13, 2017, denying their administrative appeal of the rejection of their request under the Freedom of Information Law (Public Officers Law § 84, et seq.) that HRA retain and produce certain agency records referable to the New York City Identity Card (IDNYC) Program, which was codified in section 3-115 of the Administrative Code of the City of New York (Ad. Code).

Specifically, the petitioners had requested the HRA to

retain and produce copies of the documentation submitted between 2014 and 2016 by applicants for an IDNYC card in support of their applications, which had been scanned and temporarily retained by the HRA, despite a provision in the Ad. Code that all such documentation in the HRA's possession be destroyed on or before December 31, 2016, and that such documentation not be scanned or retained at all in connection with future applications for IDNYC cards. See Ad. Code § 3-115(e).

The HRA invoked, and continues to invoke, several statutory exemptions to production, which it contends excuse it from disclosing and producing those records, including exemptions referable to unwarranted invasions of privacy (Public Officers Law § 87(2)(b)) and where the disclosure thereof could endanger the life or safety of numerous individuals. See Public Officers Law § 87(2)(f).

In the challenged determination, the HRA also explained that production of such documentation would yield 900,000 documents which, if redacted to protect confidential personal information, would take approximately 66,000 person hours of work to accomplish. It thus now argues that redaction would be unreasonable and burdensome, and that, in any event, the petitioners already are in possession of statistical information concerning the nature of the documentation supporting applications for IDNYC cards, which would be the only information

yielded if the documents were produced in redacted form.

II. BACKGROUND

In 2014, the City of New York adopted Ad. Code § 3-115 (the IDNYC Law), which provided for the issuance, by the HRA to City residents, of government-issued photo identification cards, upon application to the HRA supported by certain other official documentation. Under the program, any city resident over 14 years of age could apply for and receive such a card, regardless of immigration status. The HRA promulgated rules as to the nature of the documentation required to accompany an application for a card, and the relative weight to be accorded each type of document in order to accumulate sufficient "points" to warrant issuance of an IDNYC card. See Ad. Code § 3-115(d); 68 RCNY 6-04-6-06. The type of documents accepted by the HRA include passports, green cards, visas, leases, and certain bills. The IDNYC Law advises applicants that the documentation that they submit, and the information contained therein, would be treated as confidential "[t]o the maximum extent allowed by federal and state law." Ad Code § 3-115(e)(4).

The IDNYC Law initially required the HRA to scan and retain all documentation supporting applications for IDNYC cards for two years, and to determine, on or before December 31, 2016, whether continued retention was needed for the effective administration

of the program. See Ad. Code § 3-115(e)(1), (2). If the HRA determined that retention was unnecessary, or if it failed to make any such determination whatsoever, all such documents in HRA's possession were required to be destroyed by December 31, 2016. See Ad. Code § 3-115(e)(3).

On November 29, 2016, the petitioner Ronald Castorina, Jr., submitted a FOIL request to the HRA, seeking production of "all scanned application materials" associated with the IDNYC program. On December 2, 2016, the petitioner Nicole Malliotakis submitted a virtually identical FOIL request to the HRA. Specifically, the petitioners sought, as relevant here:

"Any and all passports (foreign and domestic, active or expired, and machine readable and non-readable) redacting all personal identifying information including name, address, and photograph;

"Any and all consular identification material, redacting all personal identifying information including name, address, and photograph;

"Any and all driver licenses (foreign and domestic, active or expired, and machine readable and non-readable) redacting all personal identifying information including name, address, and photograph;

"Any and all Visa documents Issued by U.S. State Department, U.S. Permanent Resident Card (Green Card), Current U.S. Work Permit, Certificate of Citizenship/Naturalization, Approval Notice on Form I797, I-797A, I-797B, I-797D issued by U.S. Citizenship and Immigration Services (USCIS), I-94 Form with photo and fingerprint, redacting all personal identifying information including name, address, and photograph;

"Any and all Foreign national identification card - machine readable, Consular identification Card, Foreign national identification card - NOT machine readable, Foreign military photo identification card, Foreign birth certificate, redacting all personal identifying information including name, address, and photograph."

On December 5, 2016, and thus prior to the HRA's consideration of their FOIL requests, the petitioners commenced a CPLR article 78 proceeding in the nature of prohibition in the Supreme Court, Richmond County, seeking to prohibit the respondents from effectuating the impending destruction of the documentation submitted by nearly 1 million applicants in support of their applications for IDNYC cards. The petitioners also sought a judgment declaring that the HRA's document retention policy, as set forth in the Ad. Code, was inconsistent with the Public Officers Law and the Arts and Cultural Affairs Law, and thus preempted thereby. The court in that matter temporarily restrained the HRA from destroying the scanned documentation, pending hearing of the petition. Upon the respondents' application to modify the temporary restraining order, the Appellate Division, Second Department, accelerated the return date of the petition to December 21, 2016.

On December 7, 2016, the respondent Steven Banks, as Commissioner of the HRA's Department of Social Services, determined that there was no continuing need to retain the documentation submitted in support of residents' applications for

IDNYC cards, that existing documentation should be destroyed by December 31, 2016, and that there was no need to scan or retain such documentation in connection with future applications for IDNYC cards.

Also on December 7, 2016, the HRA denied the petitioners' two FOIL requests, invoking the exemptions described above. On January 13, 2017, the HRA's FOIL Appeals Officer denied the petitioners' administrative appeal.

On April 3, 2017, in a detailed opinion and order, made after a hearing held pursuant to CPLR 7804(h), the Supreme Court, Richmond County (Minardo, J.), denied the petition in the prohibition proceeding on the merits and, upon searching the record, dismissed the remainder of the petitioners' causes of action based on their lack of standing. See Matter of Castorina v De Blasio, 56 Misc. 3d 413 (Sup. Ct., Richmond County 2017).

In so disposing of the matter before it, that court noted:

"After review, in order for this Court to require respondents to engage in an undertaking that would cost the City of New York up to six million dollars, petitioners would need a showing of good or reasonable cause. It would be nonsensical for this Court to order such an outrageous expenditure without a concrete purpose for the documents which would be redacted in large part. Petitioners may obtain the majority of the information sought through a data dump of the applicant's disclosable IDNYC information, which could be provided by respondents."

Id. at 430. The court nonetheless concluded that

"Petitioners, under FOIL are entitled to request

the scanned application materials underlying the IDNYC program, and may be entitled to a redacted and burdensome production of such documents. Petitioners however, have not specifically requested compliance with FOIL and a response to their FOIL requests. Considering the lack of a formal request, the unduly financially burdensome nature of the production, and lack of good cause shown, there is no reason for this Court to order the production."

Id. at 432. The Supreme Court, Richmond County, thus declined to address the issue of whether the petitioners are indeed entitled to such a "burdensome" production, and left that matter to this court, where it has been directly raised by the petitioners.

III. DISCUSSION

FREEDOM OF INFORMATION LAW

"While the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential." Matter of Fink v Lefkowitz, 47 NY2d 567, 571 (1979). When denying a FOIL request, a state agency must "state, in writing, the reason for the denial of access." Matter of West Harlem Bus. Group v Empire State Dev. Corp., 13 NY3d 882, 884 (2009). If the requesting party administratively appeals the denial, the agency's appeals officer must also provide written reasoning for upholding the denial. See id.

"[O]n the issue of whether a particular document

is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable."

Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 109 AD2d 92, 94 (3rd Dept. 1985), affd 67 NY2d 562 (1986); see Matter of Prall v New York City Dept. of Corrections, 129 AD3d 734 (2nd Dept. 2015); Matter of New York Comm. for Occupational Safety & Health v Bloomberg, 72 AD3d 153 (1st Dept. 2010). Rather, upon judicial review of an agency's determination to deny FOIL requests, the agency must show "that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Matter of Capital Newspapers Div. of Hearst Corp. v Burns, supra, 67 NY2d at 566; see Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 150 AD3d 13 (1st Dept. 2017).

Here, in connection with the production of unredacted documentation, the HRA properly invokes the statutory exemptions set forth in Public Officers Law §§ 87(2)(b) and 89(2)(b)(iv), (v) (unwarranted invasions of privacy), and Public Officers Law § 87(2)(f) (endangerment of life or safety of IDNYC applicants and their loved ones). The HRA further demonstrates that the production of redacted documentation, which would reveal only the nature of the document relied upon by an applicant, would be unduly burdensome, and would ultimately provide the very same

information to the petitioners that it has already provided to them in its tabulation of the absolute number of each of type of supporting document and the percentage of the entire universe of documents represented by each type of document.

A. Unwarranted Invasion of Privacy

Public Officers Law § 87(2)(b) provides that an "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." In general, that provision of law requires a balancing test, and warrants a finding of an "unwarranted invasion" where "privacy interests" outweigh the "public interest in disclosure of the information." Matter of Harbatkin v New York City Dept. of Records & Info. Servs., 19 NY3d 373, 380 (2012); see Matter of New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477 (2005); Matter of Thomas v New York City Dept. of Educ., 103 AD3d 495 (1st Dept. 2013). Generally,

"[d]isclosure may not be denied based upon the purpose for which the agency generated or holds the documents. Nor is there any requirement that the person seeking disclosure set forth good cause, or, indeed, any cause for requesting the documents, and disclosure may not be denied based on the identity of the person requesting disclosure."

Matter of Johnson v New York City Police Dept., 257 AD2d 343, 346 (1st Dept. 1999). However, in interpreting the federal Freedom of Information Act, on which FOIL is based, the United States

Supreme Court explained that, where an agency asserts an exemption based on personal privacy, the "usual rule that the citizen need not offer a reason for requesting the information must be inapplicable." National Archives & Records Admin. v Favish, 541 US 157, 172 (2004). In order to "give practical meaning to the exemption," which "requires the courts to balance the competing interests in privacy and disclosure," courts must examine whether the requestor has established a "sufficient reason for the disclosure" outweighing the privacy interests. Id. The Court of Appeals, in both Harbatkin and New York Times, supra, have effectively adopted the Favish test, since it expressly applied such a balancing test to FOIL in the context of claimed exemptions based on privacy.

The HRA correctly determined that there is no public interest whatsoever in the production and publication of personal information of IDNYC card applicants, as contained in birth certificates, passports, visas, consular IDs, permanent resident cards, U.S. work permits, certificates of naturalization, driver licenses, leases, utility bills, and national identification cards issued by other countries. See Matter of Seelig v Sielaff, 201 AD2d 298 (1st Dept. 1994); see also Matter of Data Tree, LLC v Romaine, 9 NY3d 454 (2007)

In addition, Public Officers Law §§ 89(2)(b)(iv) and (v) dispense with the otherwise applicable balancing test under

certain circumstances by expressly defining an unwarranted invasion of personal privacy as:

"disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; [and]

"disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

Here, applicants submitted personal information in confidence to the HRA solely to support their applications for an IDNYC card that is meant to provide a government-issued photo ID that would be easily recognizable for numerous purposes. In addition, disclosure of personal confidential information such as social security numbers, birth dates, driver ID numbers, and rental and utility obligations could and would result in personal economic peril if it got into the wrong hands. Crucially, the HRA has now determined that, once an IDNYC card is issued, it has no further use for the supporting information.

This court agrees with the reasoning of Justice Minardo that "[t]his type of information if released, allows the recipient information which could allow impersonation of the applicant, and access to the applicant's economic or personal information."

Matter of Castorina v De Blasio, *supra*, at 428.

B. Endangerment of Life or Safety

Public Officers Law § 89(2)(f) provides that an "agency may deny access to records or portions thereof that . . . if disclosed could endanger the life or safety of any person." In Matter of New York Times Co. v City of N.Y. Police Dept. (103 AD3d 405 [1st Dept. 2013]), the Court held that FOIL did not require the NYPD to reveal the home addresses of handgun licensees or hate crime victims, as the administrative record there reflected a "possibility of endanger[ment]" sufficient to invoke the exemption from disclosure articulated in Public Officers Law § 89(2)(f).

Here, the findings of the HRA, as set forth in the administrative record, similarly reflects the possibility of endangerment to untold numbers of applicants if their personal confidential information were revealed. As correctly noted by the respondents, the personal documents sought to be disclosed here belong, in large measure, to members of vulnerable populations, such as the elderly, the young, the homeless, immigrants, transgender individuals, and domestic violence victims. In fact, the Committee Report of the New York City Council Committee on Immigration for Intro 253/14, which ultimately was enacted as the IDNYC Law, explained as follows:

"People rely on identification for a myriad of reasons, including to 'prove' who they are, to become eligible for services and for their own self-esteem.' Identification is often required to access buildings, receive medical care and prescriptions, and open bank accounts. There have

been numerous articles and reports regarding the problems that undocumented immigrants face when trying to access basic services because they do not have identification. There has also been increased awareness of other populations facing similar problems and struggles because they do not possess identification. Reports indicate that New York City residents who lack formal identification experience difficulties when attempting to access financial services, libraries, schools, and hospitals. Undocumented immigrants, seniors, homeless, and transgender individuals are just some of the New Yorkers who may not have identification. In order to address the needs of these populations, Int. No. 253 was introduced to establish a municipal identification card program."

All city agencies are required to accept such card as proof of identity and residency for access to city services unless prohibited by federal or state law or additional documentation is required to obtain the benefits of a federal or state program (see Ad. Code § 3-115[f][1]), and the program was instituted precisely to afford a government-issued photo ID card regardless of a person's immigration status.

Hence, the court concludes that the HRA properly supported its invocation of the FOIL safety exemption, as it established the clear possibility that the revelation of an applicant's personal confidential information could indeed endanger that person's safety.

C. Burdensome Nature of Production

To the extent that the petitioners seek production of the scanned documentation in redacted form, FOIL requires redaction

only where it can be accomplished "without unreasonable difficulty." Matter of Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills, 18 NY3d 42, 45 (2011). Stated another way, if private information "can be redacted," the presence of such information "does not provide a basis for withholding entire documents" (Matter of Thomas v Condon, 128 AD3d 528, 530 [1st Dept. 2015]), but if private information "cannot be reasonably redacted from" agency records, "then such records may not be subject to disclosure under FOIL." Matter of Data Tree, LLC v Romaine, *supra*, at 466. The administrative record here reflects that, in order to provide redacted records in compliance with the petitioners' requests, 886,491 documents would have to be produced, totaling almost 2 million virtually blank pages, taking more than 66,000 person hours to accomplish, costing more millions of dollars, and leaving a stack of paper approximately 700 feet tall. This certainly constitutes "unreasonable difficulty."

In the context of assessing the HRA's determination to deny the petitioners' FOIL requests, this court agrees with Justice Minardo's conclusion that it would be "nonsensical" to order such an "outrageous expenditure" without a "concrete purpose" underlying the compelled disclosure of redacted documents that will reveal only the type of document initially scanned.

This conclusion is warranted since the HRA has provided both

the petitioners and the court with a tabulation showing that, of the 886,491 scanned documents sought by the petitioners, 88.93% fell into only four categories: 376,692 (42.49%) were machine-readable foreign passports, 274,228 (30.93%) were New York State driver licenses or learner's permits, 69,917 (7.89%) were current U.S. Passports or Passport Cards, and 67,557 (7.62%) were driver licenses from other states or New York driver licenses without current address. Of the remaining documents, 25,290 (2.85%) were U.S. Permanent Resident (Green) Cards, 19,845 (2.24%) were foreign birth certificates, 10,062 (1.14%) were consular ID cards, 9,739 (1.10%) were U.S. passports or passport cards that had been expired for less than three years, 5,066 (0.57%) were machine-readable foreign national ID cards, 4,915 (0.55%) were current U.S. work permits, 2,935 (0.33%) were non-machine-readable foreign national ID cards, 2,818 (0.32%) were certificates of citizenship or naturalization, 2,663 (0.30%) were non-machine-readable foreign passports, 2,047 (0.23%) were New York State interim driver licenses, learner's permits, and nondriver ID cards, 1,341 (0.15%) were U.S. State Department visas, 1,283 (0.14%) were non-machine-readable foreign driver licenses, 1,111 (0.13%) were machine-readable foreign driver licenses, 198 (0.02%) were U.S. Department of State driver licenses or nondriver ID cards with current address, 195 (0.02%) were U.S. Department of State driver licenses or nondriver ID cards without current address, 164 (0.02%) were foreign military

photo ID cards, 132 (0.01%) were U.S. Citizenship and Immigration Services I-797, I-797A, I-797B, and I-797D approval notices, and 21 (less than 0.01%) were Homeland Security I-94 Forms.

Since there is no other information that the petitioners would be able to glean from a full production of properly redacted documentation, there is no basis for directing the HRA to undertake what is essentially an otiose task.

IV. CONCLUSION

Accordingly, it is

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

Dated: July 31, 2019

ENTER: 
J.S.C.

HON. NANCY M. BANNON