Partnership for the Homeless v New York City Dept. of Educ.
2019 NY Slip Op 33193(U)
October 25, 2019
Supreme Court, New York County
Docket Number: 155996/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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THE PARTNERSHIP FOR THE HOMELESS,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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INDEX NO. 155996/2018

MOTION DATE 10/26/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the Petition is GRANTED, to the extent of directing the New York City Department of Education to submit sample unredacted documents to the court for in camera inspection, as directed by the court after a preliminary conference; and it is further

ORDERED that decision is reserved on all other relief pending completion of the in camera inspection; and it is further

ORDERED that this Court shall maintain continuing jurisdiction to ensure compliance; and it is further

ORDERED that counsel are directed to appear in IAS Part 59, 60 Centre Street, New York, New York on December 4, 2019, 10 AM, and move to the robing room for a preliminary conference to address the issue of selecting appropriate samples for in camera inspection and to provide an update on compliance with the FOIL Requests.

DECISION

In this Article 78 proceeding, petitioner, the Partnership for the Homeless, a not-for-profit organization that provides services for homeless people, and whose mission is to improve homeless children's access to public education, seeks a judgment concerning its December 6, 2016 request (the FOIL Request) for records under the Freedom of Information Law (Public Officers Law § 84).

The FOIL Request contains 33 separate, requests for records from respondent the New York City Department of Education (DOE) pertaining to many aspects of educating homeless children, including statistics relating to their attendance, performance, housing, school assignment and transportation. It seeks communications with the Mayor's Task Force on Absenteeism, communications with parents or guardians of homeless children, and records reflecting policies and practices involving Local

Educational Agencies (LEA) footnote[1]. In addition, petitioner requests all data sent through the New York State Student Information Repository System (SIRS) by LEAs relating to homeless children.

Finally, petitioner seeks records reflecting the DOE's compliance with statutory mandates, including the McKinney-Vento Act (42 USCA 11432) and its state law analogue, New York Education Law § 3209, which is captioned "Education of Homeless Children," and requires the DOE to

> "review and revise any local regulations, policies or practices that may act as barriers to the enrollment or attendance of homeless children in school or their receipt of comparable services"

(id., § 3209 [5] [b]).

Section 3209 of the New York Education Law also contains provisions relating to the designation of the appropriate

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[1] The term "local educational agency" is broadly defined under applicable federal law to include "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools," and includes "educational service agencies," as that term is defined to include "a regional public multiservice agency (i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and . . . includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.
(20 USCA § 1401).

schools for individual homeless children to attend, and requires the DOE to provide transportation.

The DOE responded to the FOIL Request with a series of monthly letters that repeatedly extended the time for production, citing the volume of the request, the need to obtain records from multiple agencies, and overall the high volume of FOIL requests.

During its serial postponements, the DOE engaged in a rolling production of records. The DOE based its objections to various requests, on grounds including that compiling the requested data would require more than reasonable effort, that some of the categories were not clearly described, and that some of the requested documents contain personally identifiable information protected under the federal Family Educational and Privacy Act (FERPA), and POL § 87 (2) (a), which authorizes an agency to withhold records that are "specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87 [2] [a]).

While there are 33 separate FOIL requests, many are addressed to the same set of requested records, and some stand alone.

FOIL request "one" seeks all data sent by local LEAs through SIRS "concerning students identified with a 'homeless indicator,' including but not limited to all information" from

academic achievement, absenteeism, tardiness, graduation and promotion rates, and "any other analysis specific to homeless students."

The DOE submits the affidavit of Tolani Adeboye, a senior director, attesting to DOE's efforts to comply with the request, and asserting that to comply with request number "one" would be prohibitively time-consuming, and would involve formidable privacy hurdles under FERPA and Education Law 3209. Adeboye states that the raw data of SIRS cannot be turned over to petitioner because of the amount of redaction of personal information that would be required. Adeboye also states that the DOE is unable to provide responsive documents other than what it provided in the January 12, 2018 letter.

FOIL requests "two" through "nine" seek documents relating to the DOE's statutorily mandated duties under McKinney-Vento and Education Law 3209, including documents reflecting policies practices or procedures," related to compliance, and documents enabling identification of all LEAs.

FOIL request "10" through "25" seek five years of data relating to housing of homeless children (10-11); how many attend the same school they attended when they became homeless; how many live in a different borough from the school they attend; how they are transported; how far they travel; the amount of time they spend traveling; the distribution of metro

cards to parents and students; the process of determining bus routes; and reports to the Chancellor or the Mayor.

FOIL request "26" seeks materials used to generate the 2016 NYC Independent Budget Office report titled "Not Reaching the Door: Homeless Students Face Many Hurdles on the Way to School." The DOE states that it cannot release the records sought because it would violate the privacy protections of FERPA, and it would not be possible to engage an outside service.

FOIL request "27" seeks records concerning the presence of a DOE staff member at the Project for Assistance in Transition from Homelessness (PATH). The DOE produced a 2016 Guidebook with cover sheet that it contends is the only responsive document that it possesses.

FOIL requests "28" through "31" seek records related to the Mayor's Inter-Agency Task Force on Chronic Absenteeism and School Attendance, including minutes, documents and reports. The DOE initially provided hyperlinks responsive to items 28 and 29, and provided additional records by letter dated April 12, 2017. The DOE denied items 30 and 31.

FOIL request "32" seeks records involving shelter placement policies and coordination for homeless children's school placement with the NYC Department of Homeless Services and/or the NYS Department of Education.

FOIL request "33" requests records reflecting practices or procedures concerning the transportation of homeless children to and from schools. The DOE contends in its February 26, 2018 letter that it produced its responsive documents for item 33, but reference to them was omitted as a result of a clerical error.

After two administrative appeals, petitioner argues that it has exhausted its administrative remedies with the DOE, culminating in the DOE's final determination, by letter from its general counsel, Howard Friedman, dated February 26, 2018 (the Final Determination), which denied petitioner's appeal, except it reopened items 10 through 13, and granted petitioner until March 26, 2018 to seek clarification with respect to items 28 and 31, which seek records relating to the Mayor's Interagency Task Force on Chronic Absenteeism and School Attendance. Items "12" and "13" request records for the prior five-year period on homeless children housed in a borough different from the borough of the school which they attend. The Final Determination stated that the DOE would be willing to produce records of homeless students who attended two or more schools.

The Final Determination emphasized the protections of FERPA, stating that it would not be possible to utilize the services of an outside professional service, as provided for in POL § 89 (3) (a), "to provide copying, programming or other

services required to provide the cop[ies]" (id.), because consultants "lack the experience and knowledge to properly identify records under FERPA's stringent standards, given their lack of familiarity with individual DOE school communities" (Abdallah affirmation at 8).

The Final Determination relies upon federal regulations under FERPA, promulgated by the United States Department of Education, for its holding that the DOE cannot produce many of the requested records because those records contain personally identifiable information. The Final Determination states that redaction is not practicable or reasonable, both because of the vast effort it would entail and the difficulty of protecting individual identities under applicable federal regulations.

The petition asserts a single cause of action for wrongful denial of FOIL requests. It seeks an order directing the DOE to either provide records that are responsive to the FOIL requests, or provide specific written explanations why the requested information is unavailable or subject to a valid and applicable FOIL exception. Petitioner also seeks an award of attorneys' fees pursuant to POL § 89 (4).[2]

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[2] POL § 89 (4) (c) provides: The court in such a proceeding: (i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory

Under FOIL,

> "agency records are presumptively available for inspection and copying under FOIL in accordance with the underlying 'premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. As relevant here, the agency bears the burden of demonstrating that the requested records are specifically exempted from disclosure. Under this framework, FOIL is to be "liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government"

(Kosmider v Whitney, 160 AD3d 1151, 1153 [1st Dept 2018]; Matter of Laveck v Village Bd. of Trustees of Vil. of Lansing, 145 AD3d 1168, 1169-70 [3d Dept 2016]).

A public agency must provide "particularized and specific justification for not disclosing requested documents [C]onclusory assertions, unsupported by facts, will not suffice (Matter of Laveck, 145 AD3d at 1169-1170).

Petitioner contends that the DOE has failed to comply with its FOIL obligations and has provided deficient and incomplete responses.

On the other hand, the DOE argues that

> "petitioner's argument that there are additional records that should be produced in response to Items 1-9, 18, 23 and 27-29 is not properly before the Court because Petitioner failed to raise this argument with DOE at the administrative level".

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time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

The DOE also argues that the petition is premature and the court lacks jurisdiction over the petition because petitioner failed to exhaust its administrative remedies with respect to the reopened items, which have not had a final administrative review, and because the DOE represented in its brief that its efforts to respond to the requests were ongoing. The DOE states that it has complied with the reopened items, which, if established, would render the petition moot with respect to those items. FOIL requests that have been satisfied by production of records during the pendency of this proceeding are moot (see Tellier v New York City Police Dept., 267 AD2d 9, 10 [1st Dept 1999]).

The DOE then asserts that it has either produced the requested documents, or is unable to produce any more because they have searched and failed to find responsive documents; a search would require more than reasonable effort; the records are not adequately described; compiling the requested records would entail the creation of a new record, and would require enormous commitment of time and resources; and protected privacy interests make it unreasonable to make the necessary redactions to produce some of the requested records. Petitioner disputes that DOE would have to create a new document in order to comply with many of the requests.

The Court of Appeals has held that

> "an agency has no obligation to accommodate a request to compile data in a preferable commercial electronic format when the agency does not maintain the records in such a manner"

(Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 464 [2007]).

However, in 2008, after Data Tree, the Legislature amended POL § 89 (3) as follows:

> "when an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record"

(Public Officers Law § 89 [3] [a]).

The effect of the amendment was to add "language which prohibited an agency from denying a request because it was too voluminous or burdensome if the request could be satisfied by engaging an outside service (see Public Officers Law § 89 [3] [a]). The statute permitted an agency to recover the costs of engaging an outside service as provided in section 87 (1) (c) of the Public Officers Law" (Weslowski v Vanderhoef, 98 AD3d 1123, 1127 [2d Dept 2012]).

The Appellate Division, First Department has framed the issue of the new record exclusion as follows:

> "whether the computer manipulation which the City claims is necessary to retrieve the documents constitutes [a] simple manipulation of the computer necessary to

> transfer existing records, or whether it constitutes creation of a new document. Data Tree [Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 465, [2007])], the holding of which is reflected in the amendment to Public Officers Law section 89(3), instructs that the former does not excuse responding to a FOIL request, while the latter does (id.). On this record, it is not possible to conclude whether requiring the City to retrieve and produce the computerized records would be a "simple manipulation" or a creation of a new document ... A hearing is necessary to determine precisely what would be entailed were the City to attempt to retrieve the requested documents from electronic databases"

(In re New York Committee for Occupational Safety and Health v Bloomberg, 72 A.D.3d 153, 161-62 [1st Dept 2010]).

The court will exercise jurisdiction over the petition, and will maintain continuing jurisdiction to ensure compliance (see Matter of Friedland v Maloney, 148 AD2d 814, 816 [3d Dept 1989]). The court will hold in abeyance any rulings on FOIL requests with respect to which the DOE's efforts to locate and produce records are ongoing, or on reopened items with respect to which petitioner has not exhausted its administrative remedies. In the exercise of discretion, the DOE's application for attorneys' fees is denied. POL § 89 (4) (c) provides that the court

> "(i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has

> substantially prevailed and the court finds that the agency had no reasonable basis for denying access".

Given the complexity of the demands and the substantial efforts of the DOE to comply, the court finds no absence of good faith by the DOE in asserting exemptions, and that the DOE had a reasonable basis for withholding documents. The court finds no basis for an award of attorneys' fees at this juncture.

Petitioner's remaining application is for the court to direct the DOE to

> "provide records responsive to the [Foil Requests] and/or provide detailed written explanations for why the requested information is unavailable or subject to a valid and applicable FOIL exemption"

The determination of whether the DOE has fully met its obligations under FOIL involves factual and legal questions that cannot be fully determined on the parties' submissions.

The DOE has certified that it does not possess records responsive to various FOIL requests, which satisfies part of the rule that an agency may properly deny a FOIL request by establishing that it does "not possess or maintain the records sought by petitioner (Public Officers Law § 89 [3] [a])" and by certifying that, despite its reasonable efforts, pertinent documents were "not retrievable from its databases [citation omitted]" (Asian Am. Legal Defense & Educ. Fund v New York City Police Dept, 56 AD3d 321, 321 [1st Dept 2008]).

Petitioner has responded that the DOE would be expected to have records in connection with its statutory obligations under Education Law § 3209 and McKinney-Vento. The DOE counters that this argument was not raised in the administrative review and cannot be raised now (see Matter of Solutions Economics, LLC v Long Is. Power Auth., 97 AD3d 593, 595 [2d Dept 2012]). That petitioner raised the contention in the administrative hearings whether the DOE would be expected to have records related to McKinney-Vento, is partially supported by the Final Determination's statement in connection with items 12 and 13:

> "[t]he appeal with respect to these items contests the CRAO's explanation in the January 12, 2018 letter that the DOE does not compile the requested data on the basis that 'one would expect the DOE to collect such data"

(Final Determination at 5).

The Appellate Division, First Department, requires an evidentiary basis to overcome an agency's certification:

> "[n]othing in [petitioner's submissions] contradicts [the DOE's] certification, and petitioner has failed to articulate a demonstrable factual basis to support the contention that the documents exist and are within [the DOE's] control"

(Matter of Grabell v New York City Police Dept., 139 AD3d 477, 479 [1st Dept 2016]).

The DOE does have records that are responsive, but DOE is claiming an exemption for privacy reasons. The burden is on the DOE to establish "that the material requested falls squarely within the ambit of one of the statutory exemptions" (Matter of

Thomas v Condon, 128 AD3d 528, 529 [1st Dept 2015][citation omitted]).

The Final Determination states conclusively that an outside consultant cannot be entrusted with the task of de-identifying the records, and that redaction is not practical. The DOE submits the affirmation of Joseph Baranello, the chief privacy officer and records access officer of the DOE, stating that the DOE does not consider it possible to use an outside service to redact information, because of the risk of a FERPA violation by enabling members of the school communities to identify individual students with reasonable certainty based upon the information disclosed.

The Baranello affirmation makes a particularized showing of the application of federal regulations under McKinney-Vento to data that could inadvertently reveal personally identifiable information about students. The blanket scope of that claimed exemption, however, is open to question.

The DOE also argues that the FOIL requests, to the extent that they seek "documents reflecting policies or procedures," are not "record[s] reasonably described" within the meaning of POL § 89 (3) (a), citing Matter of Konigsberg v Coughlin (68 NY2d 245 [1986]). The DOE states that it does not "organize its documents in a manner that 'reflects' policies, and any search for such documents would require DOE to search all documents in

its possession, which would be overly burdensome and time consuming".

The purpose of the requirement that requested documents be reasonably described is "to enable the agency to locate the records in question" (id. at 249). The DOE has not met its burden of establishing that "the descriptions were insufficient for purposes of locating and identifying the documents sought . . . before denying a FOIL request for reasons of overbreadth" (id.). The DOE

> "offered no evidence to establish that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document from the virtual files through an electronic word search . . . or other reasonable technological effort"

(Pflaum v Grattan, 116 AD3d 1103, 1104 [3d Dept 2014]).

The court holds that an in camera inspection is necessary to determine whether it is reasonable and practical to perform redaction of records containing student identifying information (see Matter of Laveck v. Village Bd. of Trustees of Vil. of Lansing, 145 AD3d 1168, 1171 [3d Dept 2016]).

The court finds that the applicability of the privacy exemptions claimed cannot be fully evaluated without an in camera inspection of the actual documents to determine whether redaction is feasible. "When a document subject to FOIL falls within an exemption, the agency may be required to prepare a redacted version with the exempt material removed" (Whitfield v

Bailey, 80 AD3d 417, 418-19 [1st Dept 2013]; Matter of DJL Rest. Corp. v Department of Bldgs. of City of New York, 273 AD2d 167, 169 [1st Dept 2000]).

Upon completion of the in camera inspection, the court will determine whether

> "[f]actual issues are presented whether the records requested could be retrieved or extracted with reasonable effort, whether the requests required the creation of new records, and whether the cost of the retrieval could be passed on to the petitioner for a hearing forthwith (see CPLR 7804[h]), at which [the DOE] will have the opportunity to satisfy its burden of proof with respect to these triable issues of fact"

(Weslowski v Vanderhoef, 98 AD3d at 1132).

"[A] question of fact [is] presented by the petition [requiring] a hearing on the issue of whether complying with the request would be unduly burdensome, considering the state of the NYPD's current technology as well as any existing software programs that could be implemented" (Matter of Time Warner Cable News NY1 v New York City Police Dept., 53 Misc3d 657, 658, rearg granted 2017 WL 1354833 [Sup Ct, NY County 2017]).

As the Court of Appeals has stated:

> "an agency responding to a demand under the Freedom of Information Law (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 Cty. Society for Prevention of Cruelty to Animals, Inc. v Mills, 18 NY3d 42, 45 [2011]).

The counsel are directed to appear in the courtroom, and thereafter move to the court's robing room, to discuss the parameters and issues involving the proposed in camera inspection, and to provide an update on the status of production of the records requested, including the reopened items. Decision is reserved on the remaining issues under the verified petition pending the conference, including whether the FOIL Requests could be satisfied by engaging an outside service, whether it can do so without unreasonable difficulty, and whether compliance would require the DOE to create a new document (see Matter of County of Suffolk v Long Is. Power Auth., 119 AD3d 940, 942-43 [2d Dept 2014]).

10/25/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE