Stengel v Vance
2020 NY Slip Op 30060(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 159740/2018
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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ANDREW STENGEL,

Petitioner,

- v -

CYRUS VANCE, SUSAN ROQUE

Respondent.

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INDEX NO. 159740/2018

MOTION DATE 07/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19

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

In this article 78 petition, petitioner Andrew M. Stengel seeks to compel respondents Cyrus Vance, Jr., in his official capacity as District Attorney of New York County (DANY) and Susan Roque (Roque) (collectively, respondents), to produce information pursuant to petitioner's March 23, 2018 request made under Public Officers Law (POL), § 84, *et seq.*, also known as the Freedom of Information Law (FOIL). Petitioner is also requesting attorney's fees and litigation costs. Respondents answer and oppose the petition.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is an attorney whose law firm is "primarily focused on the practice of criminal defense and civil rights litigation." NYSCEF Doc. No. 1, Petition at 2-3. On February 1, 2018, petitioner was acting as the attorney for a defendant in a criminal trial before the Honorable Judge Lyle Frank, and, in brief, "sought to introduce an audio recording of the police officers who effectuated defendant's arrest . . .." *Id.*, ¶ 16. According to petitioner, the audio recording "was evidence that the police officers employed by the New York City Police Department

(NYPD) had framed defendant." *Id.* Assistant District Attorney Jeffrey Levinson (Levinson), although not acting as the trial prosecutor, argued to Judge Frank that "the audio recording was extraneous evidence and the People should have been afforded an opportunity to investigate the police officers separate from defendant's prosecution." *Id.*, ¶ 19. Levinson then stated the following, in relevant part:

> If it is proven that the Sergeant or the Officer perjured themselves then Mr. Stengel – we have the transcript, we have a disk, we have a conviction integrity branch, we have a list of officers where we – that have adverse credibility findings, that have been found to have testified falsely. We disclose that to defendants, we investigate that. We have an official corruption unit that investigates these claims.

NYSCEF Doc. No. 3, portion of redacted transcript at 2.

On March 23, 2018, petitioner submitted a FOIL request to DANY's office seeking "from January 1, 2017, to the present the list of police officers of any rank or law enforcement agency indicating an adverse credibility finding that is maintained by [DANY's office]." Petitioner attached a copy of the excerpt of the February 1, 2018 transcript.

By letter dated June 7, 2018, Thandiwe Gray (Gray), an assistant district attorney who was assigned as the Records Access Officer (RAO), advised petitioner that his FOIL request was denied. Gray stated that DANY's office "does not have a 'list' directly responsive to your request," and that, pursuant to POL § 89 (3), DANY's office "cannot provide documents that we do not possess." NYSCEF Doc. No. 7 at 1. Citing CPLR 3102 (d) (2), Gray further advised petitioner that, "[w]hile this office does maintain information regarding a court's 'adverse credibility finding' these records are prepared in anticipation of litigation and thus are exempt from disclosure." *Id.*

By letter dated June 20, 2018, petitioner appealed the denial of his FOIL request. In pertinent part, petitioner argued that Gray's representation to him that no list exists directly

contradicts with what Levinson stated during the trial. Petitioner further argued that the protections of CPLR 3101 (2) (d) apply only when the materials sought are the subject of the instant litigation. He stated, "the plain wording of CPLR 3101 (2) (d) indicates that it does not apply to a FOIL request that is not connected to litigation." NYSCEF Doc. No. 8 at 2. Lastly, according to petitioner, by voluntarily disclosing adverse credibility findings to defense counsel, any privilege attached to attorney work-product is waived.

By letter dated July 9, 2018, respondents denied petitioner's appeal. Roque, an assistant district attorney and the RAO, explained that she was upholding Gray's initial determination. In relevant part, Roque concurred that DANY does not "possess a responsive list" to petitioner's request and cannot release something that it does not possess. NYSCEF Doc. No. 9 at 1. Roque continued that, to the extent that DANY "does maintain information regarding a court's 'adverse credibility finding,' it does so in anticipation of litigation so that if or when an officer testified and if the information qualifies, DANY can comply with the relevant disclosure obligations." *Id.*

Citing POL § 87 (2) (a), Roque explained that the requested material would be statutorily exempt under CPL §§ 240.10 (2) and (3) and CPLR 3101 (c) as attorney work product. After reviewing the material, Roque concluded that it contains "prosecutor's communications, mental impressions, conclusions, opinions, legal research/analysis, and interview notes which fall squarely within the work product exemption." *Id.* at 4. Roque advised the following, in pertinent part:

> The information DANY maintains was prepared by Assistant District Attorneys in anticipation of its use and assistance to Assistant District Attorneys in the office's prosecutions. The fact that the *requestor*, you, (not the individual creating the work-product) seeks it for other litigation - not related to the prosecution of the case - does not transform its status as the prosecutor's attorney work-product. . .. Further, your claim that ADA Levinson's confirmation in open court of the existence of such information somehow acts as a waiver of the attorney work-product privilege is further misplaced as the actual content of the list prepared by this office was not divulged.

Id. at 3.

Petitioner then commenced this article 78 petition, seeking to compel DANY to release the "list of or information regarding adverse credibility findings of police officers." Petition, ¶ 49. According to petitioner, as a former assistant district attorney, he is personally aware that DANY keeps this list and now, DANY's office has also publicly confirmed this assertion. Citing *Brady v State of Maryland* (373 US 83 [1963]) and *Giglio v United States* (405 US 150 [1972]), petitioner explains that DANY's office has the obligation to "disclose exculpatory and favorable impeachment evidence to the defense." *Id.*, ¶ 11.[1]

Petitioner provides several reasons for why respondents failed to provide a reasonable basis for denying access to the records. As stated in his appeal of the initial FOIL request, petitioner alleges that it is disingenuous for respondents to claim that they do not possess this list, as he knows it exists. Petitioner continues that CPLR 3101 (d) (2) (privilege of materials prepared in anticipation) does not apply to the FOIL request because the materials are not relevant to the instant litigation. In addition, these adverse credibility findings are, presumably, issued by a court, and not DANY's office, so they would not be considered material prepared in anticipation of ligation and would, in any event, be publicly disclosed, waiving any privilege claim.

Petitioner also argues that respondents waived their justification for denying access to the records based on the attorney work-product exception because they did not rely on this justification in the initial denial. Regardless, according to petitioner, CPLR 3101 "does not

[1] "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v State of Maryland*, 373 US at 87.

specifically exempt access to records obtainable by FOIL request." Petition, ¶ 40. Further, the attorney work-product privilege would be voluntarily waived as this information is disclosed to defendants.

In opposition, respondents provide an explanation of the requested material and why it is exempt from FOIL disclosure. In brief, as of 2015, DANY has compiled a police tracking spreadsheet, for internal purposes only, to assist the prosecution in meeting its disclosure obligations in criminal prosecutions. There is an excel spreadsheet "organized by name and affiliation and contains a wide range of information, including the phrase, 'adverse credibility finding.'" NYSCEF Doc. No. 13, Answer, ¶ 13. Other information on the spreadsheet may include notes from DANY attorneys and legal opinions on whether disclosure is required. This information is kept in a "pending, non-final" form, until, among other things, the assigned assistant district attorney determines whether disclosure may be required "within the context of a particular criminal case in which a police witness may testify." *Id.*, ¶ 16. There is no distinction between formal or judicial adverse credibility findings versus legal opinions.

In light of above, DANY's office maintains that the requested information is exempt from FOIL disclosure as it is protected as attorney work-product. Respondents continue that these adverse credibility findings, while sometimes preliminarily made by the "*Brady/Giglio* Committee," must ultimately be assessed by the assigned assistant district attorney "in the context of a specific criminal prosecution." *Id.*, ¶ 18. This legal analysis falls within the exemption of attorney work-product and is exempt from FOIL disclosure.

Respondents differentiate between judicial adverse credibility findings, which are court records and usually public, and the separate record prepared by DANY. They allege that this DANY record is attorney work-product "prepared in anticipation of a criminal case in which the

subject police officer may be called to testify." *Id.* ¶ 22. Addressing waiver, respondents note that, even if a voluntary submission of a disclosure letter would waive the work product privilege as to the letter itself, "such a waiver would not extend to attorney's notes, research analysis, drafts, or other work product utilized in its preparation." *Id.* In addition, although Levinson referred to a general list, he did not provide any specific information as to the contents.

Among other arguments, respondents claim that they are unable to provide petitioner with a list because they are unable to provide records that they do not possess. The requested information is a combination of attorney notes, information and other confidential information and "cannot be reasonably segregated into a topical list." *Id.*, ¶ 24. There is no way to extract judicial adverse credibility findings from the list "without making legal judgments outside the context of a criminal prosecution." *Id.*, ¶ 13.[2]

DISCUSSION

The policy underlying FOIL "is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public." *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 (1st Dept 1999); *see also Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224-225 (2018) (internal quotation marks and citation omitted) ("The statute is based on the policy that the

[2] Of note, in its answer, respondents stated that DANY has recently developed a new "internal information/database search application for potential disclosure purposes" that could be used to "readily identify judicial adverse credibility findings." *Id.*, ¶ 14. However, as this was not in place during petitioner's FOIL request, it was not relied upon by respondents in their determination. Respondents further advise that petitioner has recently made a new FOIL request for this information and that "the new tool is being utilized in an effort to determine" this request. *Id.*

public is vested with an inherent right to know and that official secrecy is anathematic to our form of government").

As set forth in the statute, FOIL involves a three-step process. After an agency initially receives a FOIL request, it must release the records or deny the request in writing. POL § 89 (3) (a). There is no requirement to specify the reasons for the denial. In the second step, upon receiving an appeal of an initial denial, the designated person in the agency must "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." POL § 89 (4) (a). If the appeal is denied, the last step is the article 78 proceeding. "In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two." POL § 89 (4) (b).

Citing *Matter of Madeiros v New York State Educ. Dept.* (30 NY3d 67, 74 [2017]), petitioner claims that Roque raised new grounds for the denial in the appeal, and should be barred from doing so. However, *Matter of Madeiros v New York State Educ. Dept.* refers to the principle that, in general, "[j]udicial review of an administrative determination is limited to the grounds invoked by the agency." *Id.* at 74 (internal quotation marks and citations omitted). Here, respondents followed the appropriate procedure as set forth in the FOIL process. The initial denial did not require a detailed explanation and then the appeal appropriately fully explained the reasons for further denial. Furthermore, respondents denied the requested material as attorney work-product and this is now the basis for the court's review.

Government records are presumed to be open to the public, unless they fall under one of the statutory exemptions listed in POL § 87 (2). *Matter of Thomas v New York City Dept. of*

Educ., 103 AD3d 495, 496 (1st Dept 2013). When a FOIL request is denied, the standard of review is not whether the decision was arbitrary and capricious, but whether the determination was affected by an error of law. *Matter of Thomas v Condon*, 128 AD3d 528, 529 (1st Dept 2015); *See* CPLR 7803 (3). The exemptions are to be "narrowly construed" and the agency has the burden "to demonstrate that the requested material indeed qualifies for exemption." *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d at 496 (internal quotation marks and citation omitted). "[B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government. Instead, to 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 Dept.*, 89 NY2d 267, 275 (1996) (internal quotation marks and citations omitted).

In opposing disclosure of the requested information, respondents relied upon the FOIL exemption set forth under POL § 87 (2) (a), which "provides that an agency may deny access to records that are specifically exempted from disclosure by state or federal statute." *Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 563 (2018) (internal quotation marks omitted). The initial determination stated that petitioner's request contained information prepared in anticipation of litigation that is exempt from disclosure under CPLR 3101 (d) (2). In denying the appeal, Roque advised that this information is compiled in anticipation of litigation so that if or when an officer testifies and the information qualifies, DANY can comply with its disclosure obligations. Further, Roque explained that the requested information contained opinions, theories, or conclusions of the prosecutor and is exempt as attorney work-product under CPLR 3101 (c). *See e.g. Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d 1283, 1286 (3d Dept 2018) (internal quotation marks omitted)

("CPLR 3101 (c) grants absolute immunity from disclosure to the work product of an attorney. Relatedly, CPLR 3101 (d) (2) accords a conditional immunity to materials . . . prepared in anticipation of litigation, commonly referred to as work product").

Based on the record, respondents have met their burden of articulating a "particularized and specific justification" for not disclosing the requested documents as they have established that the materials are exempt from disclosure as attorney-work product. *Data Tree, LLC v Romaine*, 9 NY3d 454, 463 (2007) (internal quotation marks and citations omitted). Contrary to petitioner's contention, while CPLR 3101 does not specifically exempt access to records obtainable by a FOIL request, the CPLR does exempt certain material as privileged, including attorney work-product. *See e.g. Matter of Morgan v New York State Dept. of Envtl. Conservation*, 9 AD3d 586, 587 (3d Dept 2004) ("Thus, [under CPLR 3101 (c)], title reports, handwritten notes and diagrams prepared by the Attorney General's office were all work product which was privileged, therefore exempt from disclosure"); *see also* CPLR 3101 (c) and (d) (2).

Here, the police tracking spreadsheet, used by an assistant district attorney in determining disclosure obligations, contains information including legal research, opinions and communications between DANY attorneys. While DANY's office does compile information in the spreadsheet regarding adverse credibility findings, this is only some of the information gathered to assist assistant district attorneys with disclosure obligations. The adverse credibility finding is ultimately assessed by the attorney, familiar with the particular facts of the case, and must be analyzed within the context of a particular criminal case where a police officer may testify. It is irrelevant that the material, which is prosecutor's attorney work-product, is not being used in the instant litigation. At this time, there is no distinction made between adverse credibility findings made by the court and legal opinions. Accordingly, respondents have met

their burden to demonstrate that the requested material qualifies for an exemption from FOIL disclosure as attorney-work product that may be used in litigation.

As respondents have met their burden to prove that the requested records are exempt from disclosure, waiver and the remaining arguments need not be addressed.

POL § 89 (3) (a)

When a FOIL request is made and the agency cannot locate the items, the agency's obligation is to "'certify that it does not have possession of a [requested] record or that such record cannot be found after diligent search' . . .. [n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required." *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001) quoting POL § 89 (3) (a); *see also Matter of Davidson v Police Dept. of City of N.Y.*, 197 AD2d 466, 466 (1st Dept 1993) (respondent is not compelled to provide documents it does not possess).

In addition to meeting their burden to establish that the requested materials fall within one of the statutory exemptions, respondents have also confirmed that they do not have a "list" directly responsive to petitioner's request and that they cannot provide documents that they do not possess. At the time the FOIL request was submitted, there was no way to extract judicial adverse credibility findings from the remainder of the information consisting of attorney notes, opinions and other confidential information. Accordingly, respondents met the requirements under FOIL that DANY cannot provide petitioner with the list of adverse credibility findings of law enforcement witnesses.

Petitioner's Request for Attorney's Fees

Pursuant to POL § 89 (4) (c) (i), "[a] court may award counsel fees and costs to a litigant who has substantially prevailed in a FOIL case where the court also determines that the agency

had no reasonable basis for denying access to the records sought." *Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d at 1284-1285 (internal quotation marks and citation omitted). *See* POL § 89 (4) (c) (i). For the reasons set forth above, as petitioner has not "substantially prevailed," his request for an award of attorney's fees and costs is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

1/6/2020
DATE

W. FRANC PERRY, J.S.C.
HON. W. FRANC PERRY, III
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
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