

**In Defense of Animals v New York City Dept. of  
Cultural Affairs**

2020 NY Slip Op 31479(U)

May 22, 2020

Supreme Court, New York County

Docket Number: 158771/2019

Judge: W. Franc Perry

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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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INDEX NO. 158771/2019

IN DEFENSE OF ANIMALS,

MOTION DATE 01/16/2020

Petitioner,

MOTION SEQ. NO. 001 002

- v -

NEW YORK CITY DEPARTMENT OF CULTURAL AFFAIRS, WILDLIFE CONSERVATION SOCIETY

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 were read on this motion to/for DISMISS

This Article 78 proceeding concerns the denial of a request made under the Freedom of Information Law (FOIL) (see Public Officers Law §§ 84, et seq.) by petitioner In Defense of Animals to respondents, the Wildlife Conservation Society (WCS) and the New York City Department of Cultural Affairs (DCLA) (together, respondents) for records pertaining to the operation of the Bronx Zoo, and more particularly, records pertaining to the three elephants – Happy, Maxine and Patti – residing there. WCS moves, pursuant to CPLR 3211 (a) (1) and (a) (7) and CPLR 7804 (f), for an order dismissing the petition, or in the alternative, an order for leave to serve and file an answer. DCLA cross-moves for dismissal on the ground that the petition against it is moot. Motion sequence nos. 001 and 002 are consolidated for disposition.

### Background

Petitioner is a not-for-profit organization committed to defending animals from abuse and exploitation (NY St Cts Elec Filing [NYSCEF], Doc No. 1 [petition], ¶ 11). One of its primary campaigns involves ending elephant captivity across the world, including those held in zoos and circuses (*id.*, ¶¶ 12 and 14).

WCS is a domestic not-for-profit organization founded in 1895 as the “New York Zoological Society” (Zoological Society) (NYSCEF Doc No. 1, ¶ 6; NYSCEF Doc No. 12, petition, exhibit 10 at 2). WCS currently manages four zoos (the Zoos) within the City of New York (the City) – the Bronx Zoo, the Central Park Zoo, the Prospect Park Zoo, and the Queens Zoo – and the New York Aquarium (Aquarium) for the New York City Department of Parks and Recreation (the Parks Department) (NYSCEF Doc No. 1, ¶¶ 58-59, 63; NYSCEF Doc No. 16, petition, exhibit 14 at 1). WCS maintains its headquarters at 2300 Southern Boulevard (NYSCEF Doc No. 15, petition, exhibit 13 at 1), which is the address for the Bronx Zoo (NYSCEF Doc No. 14, petition, exhibit 12 at 2). WCS also maintains offices in North America, Central and South America, Asia, Oceania, Africa and Europe (NYSCEF Doc No. 15 at 1-14).

DCLA is an agency of the City (NYSCEF Doc No. 1, ¶ 5). DCLA contributes to WCS’s operating costs (*id.*, ¶ 63 [b]).

Petitioner has ranked the Bronx Zoo as one of the 10 worst zoos in the world for elephants (NYSCEF Doc No. 1, ¶ 16). On February 4, 2019, petitioner submitted a 22-item FOIL request to DCLA and WCS for records for a period beginning January 1, 2013 related to the operation and management of the Bronx Zoo, and for records concerning Happy, Maxine and Patti, including their medical records and the designs of their individual enclosures, among other items (NYSCEF Doc No. 6, petition, exhibit 4 at 1-3). In a written response dated March 28, 2019, DCLA partially

granted and denied the request and posted records on an online portal (NYSCEF Doc No. 7, petition, exhibit 5 at 1). DCLA grounded the partial denial on the personal privacy exemption under Public Officers Law §§ 87 (2) (b) and 89 (2), and the intra-agency and inter-agency exemptions under Public Officers Law § 87 (2) (g) (i) through (iv) (NYSCEF Doc No. 1, ¶¶ 26-27; NYSCEF Doc No. 7 at 1). WCS did not respond to petitioner's FOIL request at all (NYSCEF Doc No. 8, petition, exhibit 6 at 2).

Petitioner submitted an appeal to DCLA on April 26, 2019, in which petitioner acknowledged receiving "certain financial disclosures, but no medical records" (NYSCEF Doc No. 8 at 2). Petitioner wrote that it sought "a directive compelling the DCLA and WCS to produce the requested medical records" (*id.*). Petitioner claimed WCS's management of the Bronx Zoo constituted a governmental function, thereby rendering WCS an agent or surrogate of the City or the State of New York (the State) (*id.* at 3-6).

On May 10, 2019, DCLA's FOILS Appeals Officer, Pranita A. Raghavan (Raghavan), denied the appeal and affirmed DCLA's decision (NYSCEF Doc No. 9, petition, exhibit 7 at 1). Raghavan explained that WCS was not an agency for purposes of FOIL for two reasons. First, WCS did not perform an essential government function, and, second, the City did not exercise any authority over WCS's activities (*id.* at 3). She affirmed the agency's decision to withhold certain financial records because disclosure would constitute an unwarranted invasion of personal privacy and other records based on the inter-agency and intra-agency exemptions (*id.*)

Petitioner subsequently commenced this special proceeding for an order: (1) declaring WCS an agency pursuant to Public Officers Law § 86 and subject to FOIL requests under Public Officers Law § 87; (2) compelling WCS and DCLA to produce records responsive to petitioner's FOIL request; (3) compelling respondents to comply with 43 RCNY 1-05 and furnish any records

possessed by a separate agency; and (4) ordering respondents to pay petitioner's costs, attorneys' fees and disbursements pursuant to Public Officers Law § 89 (4) (c). As an alternative, petitioner seeks expedited discovery on the issue of WCS's status as an agency subject to FOIL. Submitted in support of the petition is a copy of the statute that establishes WCS and subsequent amendments, WCS's audited financial statement for 2018, a "Return of Organization Exempt From Income Tax" IRS Form 990, a list of WCS's board of trustees, newspapers articles, and other exhibits.

WCS moves for dismissal on the ground that it is not an agency as that term is defined in FOIL. It relies on the statute incorporating it as a private organization, its 2018 audited financial statement, a March 24, 1897 land grant from the City to WCS of a portion the South Bronx Park, and an affidavit from Laura Stolzenhaler (Stolzenhaler), WCS's Senior Vice President and Chief Financial Officer.

DCLA cross moves for dismissal on the ground that it has furnished petitioner with all records responsive to petitioner's request in its possession. DCLA submits an affirmation from Raghavan, who states that upon receiving the petition, the agency re-reviewed its FOIL response (NYSCEF Doc No. 41, Raghavan affirmation, ¶ 12). On October 25, 2019, DCLA exchanged additional records it deemed responsive to items 1, 3, 7, 13, 14, 15, 16, 18 and 20 from petitioner's FOIL request (*id.*). The records consisted of salary charts listing the employees working at the Bronx Zoo, although the employees' names were redacted (*id.*). Records responsive to items 4, 5, 6, 8, 9, 10, 12, 17, 21 and 22 were not within the possession of DCLA (*id.*, ¶ 14).

### Discussion

Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "A paper will qualify as

‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v Sic Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe I*, 73 AD3d 78, 86-87 [2d Dept 2010]).

A motion brought under CPLR 3211 (a) (7) addresses the sufficiency of a pleading (*see Arister-Farer v State of New York*, 29 NY3d 501, 509 [2017]). The court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law,” the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). But, “allegations consisting of bare legal conclusions ... are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]). Additionally, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). “When documentary evidence is submitted by a defendant ‘the standard morphs from whether the plaintiff stated a cause of action to whether it has one’” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]).

“It is settled that FOIL is based on the overriding policy consideration that ‘the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government’” (*Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen*, 69 NY2d 246, 252 [1987] [internal citation omitted]). “FOIL provides the public with broad ‘access to the records of

government” (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007], quoting Public Officers Law § 84). “All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; accord *Matter of Data Tree, LLC*, 9 NY3d at 462). “[T]he ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption” (*Matter of Gould*, 89 NY2d at 275 [internal citation omitted]). To that end, “the agency must articulate ‘particularized and specific justification’ for not disclosing requested documents” (*id.* [internal citation omitted]).

Judicial review of administrative determinations is limited to the questions of law described in CPLR 7803 (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). As relevant here, the standard for judicial review of a response to a FOIL request is whether the determination “‘was affected by an error of law” (*Matter of Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012], quoting CPLR 7803 [3]).

#### **A. Whether WCS is an “Agency” for Purposes of FOIL**

Petitioner readily admits that WCS is not a state or municipal agency, but argues that WCS bears the attributes of a government agency. First, petitioner alleges that WCS was originally incorporated in 1895 as the Zoological Society by the State Legislature, which has amended the incorporation statute several times since. The Zoological Society was empowered with establishing a “zoological garden” on land owned by the City, and the City retained the right to revoke its grant of land if a zoological garden was not established (L 1895, ch 435, §§ 2 and 7). WCS currently maintains its headquarters within the grounds of the Bronx Zoo. Second, petitioner

claims that WCS receives significant public funding for its activities, and that WCS is required to publish audited financial statements each year. According to its 2018 audited financial statement, WCS received \$63 million in funding from the City, \$3 million from the State and \$34 million from federal sources (NYSCEF Doc No. 1, ¶ 62). Petitioner states that WCS is also authorized to raise money by issuing bonds (L 1895, ch 435, § 5), and that WCS has used proceeds from bonds issued by the Trust for Cultural Resources of the City of New York (TCRCNY) to finance construction and other improvements at the Bronx Zoo and the Aquarium (NYSCEF Doc No. 1, ¶¶ 63-64). Fourth, petitioner argues that seven government officials serve as ex officio trustees on WCS's board of trustees, including the mayor, the comptroller, the borough presidents for Brooklyn and the Bronx, and the Parks Department commissioner (NYSCEF Doc No. 20, petition, exhibit 18 at 3). According to WCS's Amended and Restated Bylaws (the Bylaws), each trustee, including an ex officio trustee, has voting rights (NYSCEF Doc No. 21, petition, exhibit 19 at 4). Finally, petitioner submits that an organization need not perform an essential government function to be considered an agency as defined in FOIL. Petitioner, therefore, maintains that WCS must respond to its FOIL request.

WCS argues that it is a private not-for-profit corporation performing a private function, and therefore, it is not a government agency subject to FOIL. WCS submits that it was originally incorporated by 40 private individuals, who were the Zoological Society's original members (L 1895, ch 435, § 1). WCS's charter (the Charter), as amended, provides that the corporation's affairs are managed by a 38-member board of trustees, which includes eight ex officio trustees, seven of whom are City government officials (NYSCEF Doc No. 30, Stolzenhaller aff, ¶¶ 16-17). Stolzenhaller avers, though, that the seven ex officio trustees regularly send representatives to attend board meetings in their stead, and that these representatives lack voting power (*id.*, ¶ 18).

Stolzenhaller further avers that the day-to-day operations of WCS and the Bronx Zoo are entrusted to WCS's senior management, and that WCS has independent control over the hiring and firing of all personnel (*id.*, ¶ 22). Though WCS receives public funding, Stolzenhaller maintains that these sums comprise a small percentage of WCS's overall operating expenses, and that the vast majority of WCS's operating budget is derived from admission and concession sales and from private donors (*id.*, ¶¶ 24-27). Stolzenhaller also states that the WCS, like all tax-exempt not-for-profit corporations, must publicly disclose its finances under state and federal law (*id.*, ¶ 28).

Public Officers Law § 86 (3) defines an "agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." Public Officers Law § 86 (4) defines a "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency ...." Records that are not kept by or for a governmental agency are not subject to disclosure under FOIL (*see Matter of Rumore v Board of Educ. of City School Dist. of Buffalo*, 35 AD3d 1178, 1180 [4th Dept 2006], *lv denied* 8 NY3d 810 [2007]). However, a nongovernmental entity that meets FOIL's definition for an agency must disclose "the requested records – without regard to whether they related to governmental or nongovernmental functions – unless one of the exceptions set forth in Public Officers Law § 87 (2) was applicable" (*Matter of Hayes v Chestertown Volunteer Fire Co., Inc.*, 93 AD3d 1117, 1119 [3d Dept 2012]).

"[T]he term 'agency' under FOIL must be given 'its natural and most obvious meaning' and must be 'liberally construed' to further the general purpose of FOIL" (*Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994] [internal quotation marks and citation omitted]). Thus, a nongovernmental entity, such as a not-for-for profit corporation, "may fall

within the definition of an agency subject to FOIL if its purpose is governmental and it has the attributes of a public entity” (*Matter of Rumore*, 35 AD3d at 1180). Factors for the court to consider include:

“[W]hether the entity is required to disclose its annual budget, maintains offices in a public building, is subject to a governmental entity’s authority over hiring or firing personnel, has a board comprised primarily of governmental officials, was created exclusively by a governmental entity, or describes itself as an agent of a governmental entity”

(*Matter of Outhouse v Cortlandt Community Volunteer Ambulance Corps, Inc.*, 171 AD3d 1071, 1072 [2d Dept 2019], quoting *Matter of Justice v King*, 60 AD3d 1452, 1453 [4th Dept 2009], *appeal dismissed* 12 NY3d 908 [2009], *cert denied* 558 US 994 [2009]). Furthermore, even if a nongovernmental entity engages in a governmental function, it is not considered an agency under FOIL (*see Matter of Ervin v Southern Tier Economic Dev., Inc.*, 26 AD3d 633, 635 [3d Dept 2006]).

As applied herein, several factors militate in favor of petitioner’s position. The 1897 land grant was issued after a special meeting of the City’s Commissioners of the Sinking Fund (NYSCEF Doc No. 33, Stolzenthaler aff, exhibit C at 1). The grant set aside 261 acres of City-owned land in South Bronx Park to the Zoological Society to establish a “Zoological Garden” (*id.*). WCS maintains its global headquarters within the Bronx Zoo’s grounds. Furthermore, WCS receives public funds, and TCRCNY has issued bonds to finance WCS’s operations.

Nevertheless, the remaining factors weigh in favor of WCS’s and DCLA’s position that WCS is not a government agency. Therefore, the court concludes that WCS is not an agency subject to FOIL (*see Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 37 [1st Dept 2005] [stating that the Metropolitan Museum of Art, which was a not-for-profit education corporation, was not subject to FOIL because the City did not control its operations or approve its budget]; *Lugo v Scenic Hudson*, 258 AD2d 626, 627 [2d Dept 1999] [stating that two

not-for-profit corporations were not subject to FOIL where both were formed by private individuals, were governed by a self-elected board of directors, and were funded primarily from private sources, and where their budgets did not require government approval]).

First, the record demonstrates that the City does not control WCS's budget (*see Metropolitan Museum Historic Dist. Coalition*, 20 AD3d at 37; *Matter of Ryan v Mastic Volunteer Ambulance Co.*, 212 AD2d 716, 717 [2d Dept 1995], *lv denied* 88 NY2d 804 [1996] [stating that a volunteer ambulance service was an agency under FOIL because the service "submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town"]). WCS receives the majority of its funding from private sources (*see Lugo*, 258 AD2d at 627). WCS's financial statement for 2018 shows revenues of \$309,052,713 in 2018 and \$294,575,882 in 2017, with the majority of WCS's revenue generated from contributions, membership dues, gate and exhibit admissions, educational programs, and sponsorship, licensing and royalties (NYSCEF Doc No. 34, petition, exhibit D at 5). WCS received \$15,660,917 in 2018 and \$15,006,909 in 2017 from the City to pay for part of the operating costs at the Bronx Zoo and the Aquarium (*id.* at 30). Stolzenhaller avers that those sums constitute approximately 6% of WCS's general operating revenues for those two years (NYSCEF Doc No. 30, ¶ 25). WCS also received \$12,199,406 in 2018 and \$10,403,632 in 2017 from the City for expenses and management fees for the Central Park Zoo, the Prospect Park Zoo, and the Queens Zoo (NYSCEF Doc No. 34 at 31). These amounts represent 4% of WCS's general operating revenues for those two years (NYSCEF Doc No. 30, ¶ 26).

Second, petitioner has not demonstrated that WCS's budget is subject to government review or approval (*see Matter of Outhouse*, 171 AD3d at 1072-1073 [reasoning that a volunteer ambulance service was not a governmental entity based, in part, on the fact that the Town of

Cortlandt and its subsidiary had no authority to review or approve the service's budget]; *see also Metropolitan Museum Historic Dist. Coalition*, 20 AD3d at 37). The 1897 land grant provides only that WCS shall furnish the City with a report listing its annual expenditures, revenues and donations (NYSCEF Doc No. 33 at 2). That WCS publishes its financial statements is not dispositive of whether its operating budget is subject to government oversight or review, as Raghavan states that WCS controls how it applies the operating subsidy it receives from DCLA (NYSCEF Doc No. 41, ¶ 22). Tax-exempt not-for-profit corporations, like WCS, are also legally required to make their finances public each year, as evidenced by language across the top of the IRS Form 990 stating that the document is "Open to Public Inspection" (NYSCEF Doc No. 18, petition, exhibit 16 at 1).

The record does not support petitioner's contention that the City controls WCS's operations. The Charter states that WCS shall be managed and controlled by a board of trustees (L 1895, ch 435, § 3, as amended by L 1969, ch 924 and L 1930, ch 19; NYSCEF Doc No. 32, Stolzthaler aff, exhibit B at 2). The Bylaws show that a total of 46 trustees may serve on the board, including 38 elected trustees (NYSCEF Doc No. 21 at 4). At present, WCS is managed by a 38-member board of which only seven members are City government officials, who have been designated in the Bylaws as ex officio trustees (NYSCEF Doc No. 30, ¶ 16; NYSCEF Doc No. 21 at 4). Given the total number of trustees serving on the board, these seven ex officio trustees do not form a majority, and therefore cannot exercise sole control over WCS's operations. Significantly, none of the officers on the board are City officials (NYSCEF Doc No. 20 at 1-2). Furthermore, Article II, section I of the Bylaws states that "a representative ... attend[ing] Board meetings in place of such City ex officio Trustee ... shall have no vote and shall not be counted in determining whether a quorum is present at any meeting" (NYSCEF Doc No. 21 at 4).

Stolzenhaller avers that “[i]n practice, the City officials generally send representatives to attend meetings of the Board, and such representatives do not have any voting power” (NYSCEF Doc No. 30, ¶ 18).

WCS retains exclusive control over the hiring and firing of its employees (*see Matter of Justice*, 60 AD3d at 1453 [concluding that a corporation that had contracted to provide services to the State was not an agency subject to FOIL, in part, because the State did not exercise any control over the hiring and firing of that corporation’s employees]). The 1897 land grant expressly states that the “Zoological Society shall have the right and power to appoint, direct, control and remove all persons and officers employed by them in and about the Zoological Gardens, and to fix the salaries of such persons and officers and to make promotions ...” (NYSCEF Doc No. 33 at 3). This authority has not been changed.

WCS also retains significant control over the animal collection at the Bronx Zoo with limited government oversight. WCS is responsible for purchasing and holding the animals at the Zoos (L 1895, ch 435, § 2, as amended by L 1969, ch 924; NYSCEF Doc No. 33 at 1-2). In addition, the 1897 land grant provides that WCS may remove the animals it owns if the City ceased to provide funds for their maintenance and care (*id.* at 2).

Next, WCS does not describe itself as an agent or surrogate for the City (*see Matter of Buffalo News*, 84 NY2d at 493 [reasoning that a local economic development corporation that described itself as an “agent” of the City of Buffalo constituted an “agency” for purposes of FOIL]). Excerpts from WCS’s website state that the City provided land for the Bronx Zoo and provided funds for buildings and annual operating costs, but “WCS raised most of the funds for construction and operations from private donors and selected the scientific and administrative personnel” (NYSCEF Doc No. 3, petition, exhibit 1 at 21). WCS also took over management of

the Aquarium in 1902, and the three zoos in Central Park, Queens and Prospect Park in 1988, 1992 and 1993, respectively, from the City (*id.*). These statements are insufficient to establish that WCS is the City's agent, as opposed to an independent entity.

Nor does the record suggest that WCS was formed by the City to advance a governmental purpose. As noted earlier, private individuals formed and incorporated WCS's predecessor for the purpose of establishing a zoological garden and to further the "study of zoology, original researches in the same and kindred subjects, and of furnishing instruction and recreation to the people" (L 1895, ch 435, § 2). Thus, WCS was formed to further these private individuals' interests as opposed to a governmental interest or purpose (*see Matter of Ervin*, 26 AD3d at 635; *Matter of Farms First v Saratoga Economic Dev. Corp.*, 222 AD2d 861, 862 [3d Dept 1995] [concluding that a development corporation formed by private businesspersons was not an agency]; *Lugo*, 258 AD2d at 627).

Likewise, petitioner has not demonstrated that WCS serves a governmental function. Whether a nongovernmental entity "performs a 'fundamentally governmental' function" must be made on a case-by-case basis (*Matter of Apollon v Giuliani*, 246 AD2d 130, 135 [1st Dept 1998], *lv dismissed* 92 NY2d 1046 [1999]). The court must look to "the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (*Matter of Perez v City Univ. of N.Y.*, 5 NY3d 522, 528 [2005] [internal quotation marks and citation omitted]). A nongovernmental entity may be found to have carried out a governmental function when it performs a service that has been delegated by law to a government agency to perform (*see Matter of Smith v City Univ. of N.Y.*, 92 NY2d 707 [1999], *rearg denied* 93 NY2d 889 [1999]).

Here, petitioner has not shown that the City delegated any of its statutory responsibilities to WCS or that WCS fulfilled a specific statutory mission for the City (*see Matter of Citizens for Alternatives to Animal Labs v Board of Trustees of State Univ. of N.Y.*, 92 NY2d 357, 360 [1998] [finding that a research facility, which was an “integral part of SUNY ... is fulfilling SUNY’s mission to provide educational services to the people of the State”]). Notably, this issue has been decided once before. In *Gartland v New York Zoological Socy.* (135 App Div 163, 171 [1st Dept 1909]), the Court stated that “there is no governmental duty put upon the municipality to provide parks and pleasure grounds, and collections of wild animals or fish, or paintings, or books, except in the large sense that a great city may with propriety consider the aesthetic and not be confined to the practical.” Although *Gartland* explored whether the Zoological Society could be held liable in tort for an employee injured working at the Bronx Zoo, there is no indication that operating a zoo furthers or carries out a governmental function or mission.

The cases cited by petitioner in support are distinguishable. In *Matter of Buffalo News*, the Court determined that a local economic development corporation formed under Not-For-Profit Corporation Law § 1411 qualified as an agency as that term is employed in FOIL (84 NY2d at 492). Critically, the City of Buffalo created the corporation to foster growth in and attract business to the city, the corporation had to disclose its annual budget to the city, the corporation’s budget was subject to a public hearing, and the corporation described itself as an agent of the city (*id.* at 493). As discussed above, WCS was not formed by the City, nor was its sole purpose to operate the Bronx Zoo on the City’s behalf.

In *Matter of Canandaigua Messenger v Wharmby* (Sup Ct, Ontario County, May 11, 2001, Henry, Jr., J., index No. 90259/01, *mod* 292 AD2d 835 [4th Dept 2002]), the trial court determined that a local development corporation formed to design, construct and operate Roseland Waterpark

qualified as an agency under FOIL (*Matter of Canandaigua Messenger* at \*1). The corporation's certificate of incorporation included specific language stating that its "purpose and lawful object ... is to act for the public purpose in financing the development of a water theme park recreation facility in the City of Canandaigua, New York ..." (*Matter of Canandaigua Messenger* at \*2 [emphasis in original]). The city retained the option to purchase the project and appointed each member of the corporation's board (*Matter of Canandaigua Messenger* at \*3). In addition, the Canandaigua City Council passed a resolution stating that the city would issue bonds to fund the project, and that the city would accept fee title to the property upon full payment of the bonds (*Matter of Canandaigua Messenger* at \*1, 3). In contrast here, the City does not make up the majority of members on WCS's board, nor does the Charter state that WCS shall act for the public purpose. The TCRCNY statements for the Revenue Bonds, Series 2014A state that the debt is not a debt of either the State, City or any other municipality (NYSCEF Doc No. 19, petition, exhibit at 1). Title to the land underlying the Bronx Zoo has always remained with the City (NYSCEF Doc No. 33 at 1).

In *Matter of Siani v Research Found. of the State Univ. of N.Y.* (2007 NY Misc LEXIS 9122 [Sup Ct, Albany County, Mar. 26, 2007, McNamara, J., index No. 6976/06]), the respondent, a non-profit educational corporation, maintained that it was a private not-for-profit corporation not subject to FOIL. However, the respondent was included in the definition of a "state agency" (*see* State Finance Law § 53-a), and it was included in the financial statements for the State University of New York (2007 NY Misc LEXIS 9122 at \*6). Such is not the case here.

## **B. Whether WCS Kept Records on Behalf of DCLA**

WCS submits that as an independent entity in charge of its own operations, it does not create or maintain records on behalf of the City. Petitioner counters that WCS manages the Zoos

owned by the City, and that DCLA pays the salaries of 100 employees at the Bronx Zoo. Petitioner posits that WCS keeps or holds records concerning these employees for DCLA.

It is well settled that “information kept or held for a government agency ... is within the embrace of FOIL’s ‘records’” (*Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 418 [1995]). The fact that a government agency does not have physical possession of the records is immaterial (*see Matter of Livson v Town of Greenburgh*, 141 AD3d 658, 660 [2d Dept 2016]).

As explained above, private individuals founded the Zoological Society to establish a zoological garden in the City and to advance the study of zoology, of which neither is considered a governmental duty or function (*see Gartland*, 135 App Div at 171). The Zoological Society was not obligated to create the Bronx Zoo for the City, and the City retained the right to revoke the grant of land in South Bronx Park if the Zoological Society did not establish a zoo within three years of the date of the grant (NYSCEF Doc No. 33 at 1). Moreover, WCS operates independently from the City in accordance with its Charter and Bylaws. DCLA funds a portion of WCS’s operating costs, but WCS is primarily a privately-funded entity. Consequently, WCS does not keep or hold records, particularly the medical records for Happy, Maxine and Patti, for a government agency, because WCS does not perform or fulfill a governmental function.

Petitioner’s reliance on *Matter of Encore Coll. Bookstores* and *Matter of Gould* is unavailing. At issue in *Matter of Encore Coll. Bookstores* was a booklist compiled by the respondent not-for-profit corporation’s subcontractor from purchase order forms completed by faculty members at the Farmingdale campus of the State University of New York (SUNY) (87 NY2d at 415). The respondent’s bylaws stated that the corporation was created “to establish, operate, manage and promote educationally related services for the benefit of the [SUNY] Campus

Community, including faculty, staff and students in harmony with the educational mission and goals of the College” (*id.* [internal quotation marks omitted]). Because the respondent provided SUNY with auxiliary services in furtherance of SUNY’s educational mission, the Court found that the booklist constituted a record under FOIL (*id.* at 417). In contrast, WCS was not incorporated to benefit the City or further a specific governmental purpose.

In *Matter of Gould*, the Court concluded that a police officer’s activity log qualified as an agency record under FOIL even though each officer kept physical possession of the log (89 NY2d at 278). Police Department regulations required each officer to maintain an activity log as part of his or her regular duties (*id.*). Officers were required to store their completed logs in their lockers, and had to surrender their logs for inspection upon request (*id.*). In this proceeding, petitioner has not, and cannot, cite a similar DCLA regulation that requires WCS to maintain records for DCLA. Accordingly, WCS’s motion to dismiss the petition against it is granted.

### C. DCLA’s FOIL Response

At the outset, DCLA argues that petitioner’s appeal sought the disclosure of only the medical records for Happy, Maxine and Patti (NYSCEF Doc No. 8 at 2), and therefore petitioner is precluded from challenging the sufficiency of DCLA’s response for all other requests. In any event, DCLA submits that the petition is moot since it has exchanged all records in its possession that are responsive to the FOIL request. Raghavan explains that DCLA is a member of the Cultural Institutions Group (CIG), a group of 33 not-for-profit cultural organizations such as art and history museums and botanical gardens that are located on City property and that receive capital and operating support from the City (NYSCEF Doc No. 41, ¶¶ 19 and 21). DCLA furnishes each CIG member with an operating subsidy to be applied towards eligible expenses, such as security, maintenance, and personnel (*id.*, ¶¶ 22-23). Each member, in turn, furnishes DCLA with an annual

plan describing how those funds will be applied (*id.*, ¶ 22). Raghavan states that WCS chose to apply its operating subsidy to employee salaries, as indicated in the salary charts WCS provided to DCLA (*id.*, ¶¶ 25-27). Citing privacy concerns, Raghavan submits that redactions were made on the salary charts (*id.*, ¶ 12). Raghavan certifies that “DCLA has produced all responsive records that were located after a diligent search” (*id.*, ¶ 34). DCLA also maintains that it has no obligation to disclose records in WCS’s possession because WCS operates independently from DCLA.

Petitioner posits that DCLA has not satisfied its obligations under FOIL because it has produced no records related to the treatment and care of the elephants at the Bronx Zoo, nor has it directed WCS, who maintains those records on behalf of DCLA, to disclose these records.

As an initial matter, the court need not revisit the arguments on whether WCS is an agency under FOIL or whether it kept records for DCLA, discussed *supra*. The court, therefore, turns to whether DCLA properly withheld records from disclosure.

It is incumbent upon the agency claiming an exemption to demonstrate 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] [internal quotation marks and citation omitted]). To that end, “the agency must articulate ‘particularized and specific justification’ for not disclosing requested documents” (*Matter of Gould*, 89 NY2d at 275 [citation omitted]). Public Officers Law § 87 (2) provides, in part, that an “agency may deny access to records or portions thereof that ... (b) 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) (b) identifies eight specific categories of what constitutes an unwarranted invasion of personal privacy, although it is not an exhaustive list.

In this instance, none of the eight enumerated categories discussed in Public Officers Law § 89 (2) (b) are applicable. Where a privacy concern does not fit within one of these eight categories, the court “must decide whether any invasion of privacy here is ‘unwarranted’ by balancing the privacy interests at stake against the public interest in disclosure of the information” (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). “What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities” (*Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 497 [1st Dept 2013] [internal quotation marks and citation omitted]).

Here, DCLA withheld the names, start dates and termination dates of WCS employees whose salaries were subsidized with DCLA funds. The court finds that the redactions were proper so as to avoid an unwarranted invasion of privacy (*see Matter of Hepps v New York State Dept. of Health*, — AD3d —, 2020 NY Slip Op 02517, \*3-4 [3d Dept 2020]). A person employed by a private entity would reasonably expect that his or her salary would not be disclosed publicly. Here, none of individuals listed on the salary charts is or was an employee of DCLA, and DCLA has no control over their hiring or firing or the setting of their salaries. As such, these employees have a clear privacy interest in their personal information. In addition, petitioner has expressed that “its mission [is] to defend animals, humans, and the environment from abuses and exploitation, and to foster peace between all life” (NYSCEF Doc No. 1, ¶ 11). Petitioner has not articulated how the disclosure of each employee’s name would serve this broad mission or benefit the public interest (*see Matter of Prall v New York City Dept. of Corr.*, 129 AD3d 734, 736 [2d Dept 2015]).

Furthermore, as DCLA points out, “ordering disclosure of the names would do nothing to further the policies of FOIL, which are to assist the public in formulating ‘intelligent, informed

choices with respect to both the direction and scope of governmental activities” (*Matter of New York State United Teachers v Brighter Choice Charter School*, 15 NY3d 560, 564 [2010], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). “If anything, ‘it is precisely because no governmental purpose is served by public disclosure’ of this information that section 87 (2) (b)'s privacy exemption falls squarely within FOIL's statutory scheme” (*Matter of New York State United Teachers*, 15 NY3d at 564-565, quoting *Matter of Federation of N.Y. State Rifle & Pistol Clubs v New York City Police Dept.*, 73 NY2d 92, 97 [1989]).

DCLA has complied with 43 RCNY 1-05 (4), which provides that if another agency is in possession, custody or control of a requested record, then the records access officer shall so state in writing to the party requesting the record and identify the name of that other agency. DCLA advised petitioner that records likely responsive to its FOIL request were in the possession of the Parks Department. Moreover, the proceeding has been rendered moot in light of Raghavan’s affirmation certifying that the agency has produced all records within its possession that are responsive to petitioner’s request (*see Matter of Covington v Sultana*, 59 AD3d 163, 164 [1st Dpet 2009]). Thus, DCLA has demonstrated that it has substantially complied with its disclosure obligations under FOIL. Consequently, DCLA’s cross motion to dismiss the petition is granted.

#### **D. Attorneys’ Fees**

The court declines to award petitioner its reasonable attorneys’ fees (*see Public Officers Law* § 89 [4] [c]), as petitioner has not substantially prevailed in this proceeding.

The court has considered the other arguments advanced by petitioner in support and finds them unavailing.

Accordingly, it is

ORDERED that the motion of respondent Wildlife Conservation Society for an order dismissing the petition (motion sequence no. 002) is granted; and it is further

ORDERED that the cross motion of respondent New York City Department of Cultural Affairs for an order dismissing the petition (motion sequence no. 002) is granted; and it is further

ADJUDGED that application of petitioner In Defense of Animals (motion sequence no. 001) is denied and the petition is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondent Wildlife Conservation Society, and respondent New York City Department of Cultural Affairs, do recover from petitioner, costs and disbursements in the amount, as taxed by the Clerk, and that respondents have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/22/2020  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE