

Jewish Press v New York City Dept. of Investigation
2020 NY Slip Op 32813(U)
August 27, 2020
Supreme Court, New York County
Docket Number: 152939/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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THE JEWISH PRESS

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF INVESTIGATION,

Respondent.

-----X

INDEX NO. 152939/2020
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 14, 15, 16, 17, 18, 19, 20

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

Upon the foregoing documents, it is

Upon the forgoing documents, it is hereby ordered that the petition is denied for the reasons set forth herein.

Petitioner, The Jewish Press, commenced this special proceeding, pursuant to CPLR Article 78, against respondent, the New York City Department of Investigations (“the DOI”), asking this Court to vacate DOI’s response to petitioner’s request for documents pursuant to the Freedom of Information Law (“FOIL”), directing DOI to disclose all records responsive to petitioner’s FOIL request, and, pursuant to Public Officer Law (“POL”) § 89(4)(c), for an award of attorney’s fees.

The facts, simply stated, are as follows. In the summer of 2015, the New York City Department of Education (“DOE”) initiated an investigation into whether the education provided at Yeshiva schools was “substantially equivalent” to that provided in public schools (“the DOE Investigation”). DOI and the Special Commissioner of Investigation for the New York City

School District (“SCI”) then initiated their own joint investigation of the DOE Investigation due to allegations that the progress of the DOE Investigation, the substance of its conclusions, and the timing of an interim report on the DOE Investigation were influenced by political pressure. (NYSCEF Doc. No. 1 and 5.)

The DOE Investigation became the subject of a series of articles in the Jewish Press. Accordingly, on January 28, 2020, petitioner sent a FOIL request to DOI stating: “The [DOI] along with the [SCI] recently released a report outlining its findings into an investigation related to whether or not the [DOE] report on Yeshiva’s noncompliance with the education law was improperly delayed due to a political deal. We request the entire case file and all documents associated with said investigation.” (NYSCEF Doc. No. 4.)

On January 29, 2020, Christopher Tellet, Assistant General Counsel and Records Access Officer, responded to the FOIL request, providing one document – DOI’s closing memorandum – and withholding the remainder of DOI’s investigatory file, asserting that that the records were exempt pursuant to POL §§ 89(2)(b) (unwarranted invasion of personal privacy); 87(2)(e)(iii) (records compiled for law enforcement purposes); and 87(2)(g) (deliberative process).

On January 29, 2020, petitioner electronically submitted to DOI an administrative appeal, asserting that the exemptions cited by DOI were inapplicable and reminding DOI that a blanket denial of access to records is inconsistent with the requirements of FOIL. By letter dated February 12, 2020, DOI denied petitioner’s appeal, asserting that the remaining records were exempt from disclosure under the law enforcement, deliberative process, and unwarranted

invasion of privacy exemptions. DOI also stated that certain portions of the records were confidential pursuant to CPLR 3101(b) and 4503 and, therefore, exempt from disclosure pursuant to POL § 89(2)(a).

Petitioner then commenced the instant proceeding on March 18, 2020. Petitioner argues that the exemptions cited by DOI are inapplicable and contends that DOI unjustifiably denied the FOIL request by failing to offer any specifics to support its contentions and failing to demonstrate how the purported exemptions apply to the requested records.

Discussion

“The Freedom of Information Law requires state and municipal agencies ‘to make available for public inspection and copying all records,’ subject to certain exemptions.” Matter of Verizon N.Y., Inc. v Mills, 60 AD3d 958, 959 (2nd Dept 2009) (quoting POL § 87(2)). “However, the exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government.” Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 (2007). “The entity claiming an exemption has the burden of showing that the requested material falls squarely within the ambit of one of the statutory exemptions.” Matter of Verizon N.Y., Inc. v Bradbury, 40 AD3d 1113, 1114 (2nd Dept 2007).

This Court finds that two of the FOIL exemptions DOI claims, to wit, deliberative process and law enforcement exemptions, to be proper and valid.

Specifically, as to POL § 87(2)(g), DOI has met its burden of showing that the requested investigatory file falls within this exemption. “While the term ‘inter-agency materials’ is not defined under the FOIL statute, New York’s courts have construed this term to mean ‘deliberative material,’ i.e., communications exchanged for discussion purposes not constituting final policy decision.” Russo v Nassau County Community Coll., 81 NY2d 690, 699 (1993) (citing Xerox Corp. v Town of Webster, 65 NY2d 131 (1985)).

In its original denial of petitioner’s FOIL request, DOI explained that responsive records in its possession were exempt from disclosure as “disclosure of the materials would reveal pre-decisional opinions and ideas exchanged for discussion purposes – communications that do not constitute final policy decisions or findings” citing to POL § 87(2)(g). (NYSCEF Doc. No. 5.) DOI’s denial of petitioner’s administrative appeal mimics this sentiment. DOI contends that petitioner is seeking records that contain deliberative, pre-decisional materials exchanged within and among DOI, SCI, DOE, and the Office of the Mayor. Specifically, the affirmation of Leslie Dubeck, Deputy Commissioner and General Counsel of DOI, describes the types of deliberative, pre-decisional materials contained in DOI’s investigative file, including, inter alia, draft reports; internal DOI correspondence; investigative plans; materials generated and/or compiled by SCI and shared with DOI; and intra-agency emails. (NYSCEF Doc. No. 19.) In this Court’s view, DOI has made a sufficient showing that the investigative file sought is exempt from disclosure as it contains deliberative, pre-decisional materials exchanged within and among DOI, SCI, DOE, and the Office of the Mayor.

Petitioner argues that the deliberative process exemption is inapplicable here, arguing that “documents which an agency incorporated into its final decision making process may lose their deliberative process privilege if incorporated into a final opinion.” (NYSCEF Doc. No. 20.) In support, petitioner cites to NLRB v Sears, Roebuck & Co., 421 US 132, 161 (1975), in which the United States Supreme Court held that documents incorporated by reference in non-exempt records lose any exemption they might have had.

Petitioner claims that the requested file was incorporated into the DOI’s closing memorandum and therefore should be disclosed. This Court disagrees, as the closing memorandum makes no explicit reference to the undisclosed documents besides the December 18, 2019 statement of findings. In fact, the closing memorandum speaks to DOI’s findings and only references, generally, what DOI and SCI did during the investigation (i.e., interviewed representatives of the Mayor’s Office and DOE; reviewed email communications of representatives of the Mayor’s Office and DOE; and conducted other research).

DOI has also met its burden of showing that the requested material falls within the specific exemption of POL § 87(2)(e). Here, Leslie Dubeck outlined the types of records contained in DOI’s investigatory file and demonstrated several risks posed by their disclosure, including:

- (a) City agencies and others who are subject to DOI’s jurisdiction may alter their record-keeping practice or otherwise interfere with DOI’s access, including even failing to maintain self-critical or other records or asserting barriers that delay DOI’s review, out of concern that such records, after being provided to or otherwise obtained by DOI pursuant to a confidential law enforcement investigations, would be freely discoverable by the public-at-large under FOIL;

- (b) Prosecutors, with whom DOI partners in enforcing state and federal law, might be reluctant when making criminal cases to rely on evidence obtained by DOI that is so freely discoverable;
- (c) Were DOI's case file subject to broad disclosure, individuals engaged in misconduct could learn the techniques by which DOI obtains evidence, as well as the scope and nature of the evidence DOI chooses to review. With such knowledge, such individuals may take steps to obfuscate their communications or otherwise seek to frustrate DOI's inquiry; and
- (d) DOI's mission necessitates obtaining thousands of records from every city agency to identify relevant evidence. Were DOI required to produce the evidence obtained pursuant to an investigation, DOI would be forced to divert significant resources away from its investigative responsibilities to process requests for records better handled by the City agency in which the records originated.

(NYSCEF Doc. No. 19.)

In this Court's view, DOI has demonstrated that disclosing the requested records would reveal investigative techniques that would interfere with and discourage the progress of future investigations. Thus, the above reasoning is sufficient, pursuant to POL § 87(2)(e)(i) and (iv), to exempt the investigatory file from disclosure. Although petitioner contends that DOI's above reasoning is merely speculative, as the investigation has been closed and there are no pending proceedings arising therefrom, its argument is unpersuasive. While it is true that an agency may not rely on this specific exemption to refuse disclosure upon a speculative claim of potential

interference with an unspecified future investigation (see Church of Scientology of NY v State of New York, 61 AD2d 942, 943 (1st Dept 1978)), this Court believes this is not the case here as DOI is tasked with investigating many aspects of city governance. Furthermore, it appears that POL § 87(2)(e)(iii) would also be an applicable exemption.

The Court has considered petitioner’s remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

The Clerk is hereby directed to enter judgment denying and dismissing the instant petition.



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8/27/2020
DATE

ARTHUR F. ENGORON, J.S.C.

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APPLICATION:

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