

<b>Empire Ctr. for Pub. Policy v Metropolitan Tr. Auth.</b>
2021 NY Slip Op 31358(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 155355/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM**

*Justice*

-----X

EMPIRE CENTER FOR PUBLIC POLICY

Plaintiff,

- v -

METROPOLITAN TRANSIT AUTHORITY,

Defendant.

-----X

INDEX NO. 155355/2020

MOTION DATE 11/05/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner Empire Center for Public Policy (motion sequence number 001) is granted, and the FOIL request which is the subject of that petition is remanded to the respondent Metropolitan Transit Authority for a response which complies with the FOIL and the terms of this decision; and it is further

ORDERED that the portion of said petition that seeks an award of attorney’s fees pursuant to Public Officers Law § 89 (4) (c) (ii) is also granted; and it is further

ORDERED that the issue of calculating the amount of said attorney’s fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the petitioner shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) ).

In this Article 78 proceeding, the petitioner Empire Center for Public Policy (Empire) seeks to compel the records access officer (RAO) of the respondent Metropolitan Transit Authority (MTA) to comply with a Freedom of Information Law (FOIL) request (motion sequence number 001). For the following reasons, the petition is granted.

#### FACTS

Empire is a private organization that collects and disseminates information to taxpayers and policymakers on “issues such as public spending and public employment, including public employees' pay.” *See* verified petition, ¶ 1. The MTA is a “state public benefit corporation,” which manages New York City’s public transportation system, and maintains its own police department as part of its mission (the MTAPD). *See* verified answer, ¶ 38.

On January 2, 2020, Empire submitted eight FOIL requests to MTA, one of which sought the following information:

“ . . . a copy of the complete payroll of the MTA Headquarters and any subsidiaries for monies paid out in calendar year 2019. The file should include all full-and part-time employees sorted by agency, including:

“Name;

“Title;

“Compensation rate;

“Hire date;

“Pay basis (annual, biweekly, etc);

“Location; and

“Year to date employee compensation (including overtime and other extras, but excluding expense reimbursements).

“Separate from year to date employee compensation, individual columns for regular earnings, overtime, retro pay and any other extra pay excluding expense reimbursements.”

*See* verified answer, ¶ 39; verified petition, exhibit A. Both parties acknowledge that the MTA’s response was delayed, although the MTA asserts that this was due to workforce reductions caused by the Covid-19 national pandemic. *Id.*, verified answer, ¶¶ 40-44; verified petition, ¶¶

6-15. In any event, the MTA eventually provided a partial response to Empire's FOIL request on June 3, 2020 which stated, in part, as follows:

"Pursuant to NY Public Officers Law § 87 (2) (f), an agency may deny access to records that 'if disclosed could endanger the life or safety of any person.' In accordance with this provision, names of certain MTA Police Officers have been removed from that report." *Id.*, verified petition, exhibit F. Empire initially sent the MTA an email on June 10, 2020 seeking a more detailed response, and later filed an administrative appeal on June 22, 2020 which sought the release of "the payroll records for the removed individuals, with their names redacted if they are undercover officers." *Id.*, exhibit H. On June 26, 2020, the MTA responded to Empire's June 10, 2020 email in an email of its own which stated, in part, as follows:

"... the total pay withheld is \$2,915,305.49, which represents various titles for names withheld from the MTA police force report due to security concerns. The names and number of the officers have been withheld pursuant to Public Officer Law § 87 (2) (f), because 'if disclosed could endanger the life or safety of any person.'" *Id.*, exhibit I. On July 6, 2020, the MTA responded to Empire's June 22, 2020 administrative appeal in a letter which stated as follows:

"On June 26, 2020, the MTA FOIL team provided you with a response to your June 8, 2020 follow-up questions regarding your January 2, 2020 FOIL request for 2019 MTA Police salary information. Based upon this response by the MTA FOIL team, your FOIL appeal is moot." *Id.*, exhibit J.

Believing this denial to be improper, Empire filed the instant Article 78 proceeding on July 17, 2020, and later filed its notice of petition on November 5, 2020. *See* verified petition. The MTA thereafter filed an answer on November 19, 2020. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

#### DISCUSSION

The Appellate Division, First Department, recently reiterated the rules that govern document requests submitted pursuant to the FOIL (Public Officers Law §§ 84-90) as follows:

“All government records are presumptively open for public inspection unless specifically exempted from disclosure as provided in the Public Officers Law.’ An agency may withhold records sought pursuant to FOIL only if it ‘articulate[s] particularized and specific justification for not disclosing requested documents.’ . . . In an article 78 proceeding, judicial review of an agency’s determination of a FOIL request is limited to whether it ‘was affected by an error of law.’”

*Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 490 (1<sup>st</sup> Dept 2021)

(internal citations omitted). Here, Empire argues that the MTA violated the FOIL with respect to its January 3, 2020 document request.

Empire first asserts that the “MTA failed to justify nondisclosure under FOIL § 87 (2) (f).” *See* petitioner’s mem of law at 4-6. That statute provides that “[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that . . . if disclosed could endanger the life or safety of any person.” Public Officers Law § 87 (2) (f). Empire then cites the general rule that:

“The agency’s burden of demonstrating that the material requested falls within a statutory exemption requires the [agency] to articulate a particularized and specific justification for denying access. Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.”

*Matter of Prall v New York City Dept. of Corr.*, 129 AD3d 734, 735-736 (2d Dept 2015)

(internal citations and quotation marks omitted). Finally, Empire asserts that the “MTA did not offer any evidence to establish that disclosing salary information would endanger MTA police officers,” but rather “simply parroted the language of the statute.” *See* petitioner’s mem of law at 5. As a result, Empire argues that the MTA’s reliance on Public Officers Law § 87 (2) (f) is based solely on an impermissible “conclusory assertion” that the statute’s disclosure exemption applies to the instant FOIL request. *Id.* at 6. For its part, the MTA admits that “FOIL does indeed require an agency to explain its denial to a requestor,” but asserts that it “provided

[Empire] with a proper explanation.”<sup>1</sup> See respondent’s mem of law at 8. Empire replies that the “MTA offered nothing to justify its discretionary application of FOIL’s life and safety exception.” See MacDonald reply affirmation at 2 (paragraphs not numbered). The text of the MTA’s June 3, June 10 and July 6 letters bears out Empire’s assertions, since none of those documents sets forth an explanation as to why Public Officers Law § 87 (2) (f) is applicable to Empire’s FOIL request. See verified petition, exhibits F, I, J. As a result, the court concludes that the MTA’s responses to that request plainly failed “to articulate a particularized and specific justification for denying access” to the information sought therein. *Matter of Prall v New York City Dept. of Corr.*, 129 AD3d at 735-736 (internal citations and quotation marks omitted). This is a sufficient ground to grant Empire’s Article 78 petition.

The MTA nevertheless argues that “undercover officer payroll records are exempt from FOIL disclosure.” See respondent’s mem of law at 2-7. So far as it goes, this is an accurate statement of the law. Last year in *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.* (187 AD3d 435 [1<sup>st</sup> Dept 2020]), the First Department held that the public safety exemption recognized in Public Officers Law § 87 (2) (f) justified the denial of petitioner’s FOIL request for “information . . . as to the salaries of undercover police officers, whether aggregated or individualized,” on the ground that the release of such information could “allow members of the public to estimate the increases or decreases in the overall number of undercover officers, which could ‘undermine their deterrent effect, hamper NYPD’s counterterrorism operations, and increase the likelihood of another terrorist attack.’” 187 AD3d at 435-436, quoting *Matter of*

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<sup>1</sup> The MTA supports its argument with an affidavit from the MTAPD’s Assistant Chief, Sean Montgomery (Montgomery), who convincingly addresses the need to safeguard information about the activities of undercover MTAPD officers. See verified answer, Montgomery aff, ¶¶ 1-13; respondent’s mem of law at 8-9. However, as will be discussed, Montgomery’s observations only apply to information regarding undercover police officers.

*Grabell v New York City Police Dept.*, 139 AD3d 477, 478 (1<sup>st</sup> Dept 2016). The First Department ruled that the “possibility of endangerment” standard applied to invoke the exemption, and found that the affidavit of the NYPD’s Undercover Coordinator which opined as to how the subject information could be misused by bad actors was a sufficient evidentiary basis to invoke the exemption. 139 AD3d at 435; *see also Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 (1<sup>st</sup> Dept 2015). The Court of Appeals recently repeated the more general observation that “FOIL was not designed to assist wrongdoers in evading detection or, put another way, ‘to furnish the safecracker with the combination to the safe.’” *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 226 (2018), quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 573 (1979). Nevertheless, it is unclear that these legal principles are applicable to the facts of this case.

A cursory review of Empire’s January 2, 2020 FOIL request shows that it did not seek any specific information about undercover MTAPD officers. *See* verified answer, exhibit A. Similarly, the MTA’s June 3, 2020 partial response and its July 6, 2020 denial of Empire’s administrative appeal contain no information about (or even mention) MTAPD undercover officers. *Id.*, exhibits F, J. The MTA’s June 26, 2020 email, which set forth the agency’s initial response to Empire’s administrative appeal, only disclosed that the MTA had paid of total of \$2,915,305.49 in salaries to “various titles for names withheld from the MTA police force report due to security concerns.” *Id.*, exhibit I. Presumably, the amount includes the salaries that the MTA paid to both undercover and non-undercover MTAPD officers, although this is uncertain. While *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.* held that the “public safety exemption” set forth in Public Officers Law § 87 (2) (f) allows the denial of FOIL requests for “information . . . as to the salaries of undercover police officers, whether aggregated

or individualized,” it is clear that that holding does not extend to salary information about non-undercover police officers. The court notes that the request in Empire’s June 22, 2020 administrative appeal, that “the MTA be directed to release the payroll records for the removed individuals, with their names redacted if they are undercover officers,” runs afoul of the First Department’s holding, since it would still result in the disclosure of “individualized” information. However, to the extent that Empire’s request seeks itemized job-related information about non-undercover MTAPD officers and/or employees, it appears to be proper. The MTA urges the court to accord the holding of *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.* stare decisis effect when determining the issue of whether to exempt non-undercover officers’ job-related information from disclosure pursuant to Public Officers Law § 87 (2) (f). See respondent’s mem of law at 3-4. The court can apprehend no reason to do so, however, since the First Department clearly limited that case’s holding to FOIL requests for information about undercover police officers. 187 AD3d at 435. The instant FOIL request does not seek the disclosure of specific information about undercover police officers. Therefore, the court rejects the MTA’s argument as inapposite.

The court similarly rejects the MTA’s alternate argument that “even without the *Empire Center* holding, the records are exempt under FOIL.” See respondent’s mem of law at 5-7. This argument simply restates the analysis of the Public Officers Law § 87 (2) (f) “public safety exemption” which the First Department followed in *Empire Center*, and repeats the Court’s conclusion that that exemption should apply to FOIL requests for information about undercover police officers. *Id.* The MTA supports its argument by citing to the same case holdings that the First Department cited as precedent in its *Empire Center* holding. *Id.*; see e.g., *Matter of Grabell v New York City Police Dept.*, 139 AD3d at 478; *Matter of Asian Am. Legal Defense & Educ.*

*Fund v New York City Police Dept.*, 125 AD3d at 531. However, none of those holdings are germane to the facts of this case, since they all involved FOIL requests for information about undercover police officers. The MTA ignores the distinction that Empire’s FOIL request did *not* seek specific information about undercover MTAPD officers. While the cited caselaw may all hold that the Public Officers Law § 87 (2) (f) “public safety exemption” applies to FOIL requests for information about undercover police officers, none of it suggests that that exemption also affords blanket protection from disclosure for requests for information about non-undercover police officers. With regard to Empire’s request for the latter type of information, the MTA has failed to carry its “burden of demonstrating that the material requested falls within a statutory exemption.” *Matter of Prall v New York City Dept. of Corr.*, 129 AD3d at 735-736. Therefore, the court rejects the MTA’s argument.

The court is mindful that Empire’s FOIL request sought payroll information from the MTA in a blanket, indiscriminate fashion, and did not account for the fact that such information as regards the MTA’s undercover police officers is exempt from disclosure. However, because the MTA’s payroll records are “presumptively open for public inspection,” it was incumbent on the MTA to produce the itemized information regarding its non-undercover police officers, and to separate and withhold the information regarding its undercover police officers. *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d at 490. It failed to do so. Thus, even though Empire’s FOIL request was inartfully drafted, the FOIL requires the MTA to make a more detailed response to it. Accordingly, the court grants Empire’s Article 78 petition to the extent of remanding the instant FOIL request to the MTA for a response that complies with the findings in this decision.

The balance of Empire's petition seeks an award of attorney's fees and court costs. *See* petitioner's mem of law at 7-8. Public Officers Law § 89 (4) (c) (ii) provides that the court "shall" make such an award "in any case . . . in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access." Empire asserts that it has met both of the statute's criteria. The MTA responds that Empire has met neither of them. *See* respondent's mem of law at 9-10. The MTA is incorrect. Empire has clearly "substantially prevailed" in this proceeding since the court has determined that the MTA is obliged to respond to Empire's FOIL request, and it has been held that a party "substantially prevails" where an agency is compelled to produce even a partial, redacted response. *See e.g., Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 (2017). Further, the MTA's assertion that it "clearly had at least a reasonable basis for withholding" the requested information is unavailing. The MTA bases this assertion on the First Department's *Empire Center* holding and on Montgomery's affidavit, both of which the court has determined to be inapposite since they only apply to information about undercover police officers. *See* respondent's mem of law at 9-10. Because the court has rejected them in the context of information about non-undercover police officers, it was not "reasonable" for the MTA to cite them as a justification for failing to comply with Empire's FOIL request. Therefore, the court grants Empire's Article 78 petition to the extent of awarding it attorney's fees and court costs pursuant to Public Officers Law § 89 (4) (c) (ii) in an amount to be determined.

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner Empire Center for Public Policy (motion sequence number 001) is granted, and the FOIL request

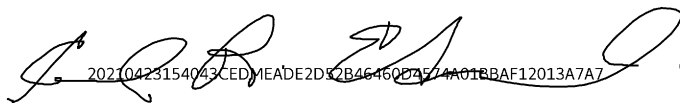
which is the subject of that petition is remanded to the respondent Metropolitan Transit Authority for a response which complies with the FOIL and the terms of this decision; and it is further

ORDERED that the portion of said petition that seeks an award of attorney’s fees pursuant to Public Officers Law § 89 (4) (c) (ii) is also granted; and it is further

ORDERED that the issue of calculating the amount of said attorney’s fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the petitioner shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh ).



4/23/2021  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: