

**Center for Constitutional Rights v New York City
Admin. for Children's Servs.**

2022 NY Slip Op 32799(U)

August 19, 2022

Supreme Court, New York County

Docket Number: Index No. 153119/2022

Judge: Arlene Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

CENTER FOR CONSTITUTIONAL RIGHTS, JOYCE
MCMILLAN

Petitioners,

INDEX NO. 153119/2022

MOTION DATE 08/09/2022

MOTION SEQ. NO. 001

- v -

NEW YORK CITY ADMINISTRATION FOR CHILDREN S
SERVICES, THE CITY OF NEW YORK,

Respondent.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1 - 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28

were read on this motion to/for RELEASE RECORDS.

The petition to direct respondents to produce records pursuant to a New York State Freedom of Information Law (“FOIL”) request is denied.

Background

Petitioners explain that they requested records relating to the surveillance and firing of petitioner McMillan. They allege that she worked for an ACS contractor (“Sinergia”) and that ACS demanded that Sinergia fire her after McMillan criticized an ACS practice. Petitioners contend that Sinergia fired her on January 22, 2021 and then ACS reversed itself and Sinergia rehired her on January 25, 2021. Petitioners asked for records between ACS and Sinergia relating to petitioner McMillan, records of internal communications within ACS about petitioner McMillan, communications about an anti-ACS billboard in East Harlem, communications about a rally held in Harlem on MLK Day and communications about a Mother Jones feature story.

Petitioners acknowledge that ACS initially produced 16 documents in response to the FOIL request and, after an administrative appeal, another 7 documents were produced. They allege that the documents produced, all emails, almost entirely relate to incoming communications from media outlets about what ACS did to petitioner McMillan. Petitioners insist that these emails are “over-redacted” and unresponsive to the request.

Petitioners argue that the search conducted by ACS was inadequate and that the produced documents show how much more there is that was not produced. They observe that many of the emails suggest that many email chains were not included in the production nor were earlier emails (some of the emails clearly refer to earlier communications). Petitioners maintain that the exemptions to FOIL cited by respondents are not applicable. They reject the reliance on the inter-agency and intra-agency materials exemption.

In opposition, respondents insist that they conducted a diligent search and withheld certain records pursuant to the applicable FOIL exemptions. They point out that several emails were redacted because they contained deliberative communications between ACS staff. Respondents maintain that these communications involved opinions and advice exchanged between ACS staff and they need not be produced under FOIL. Respondents point out that they produced documents that involved internal communications that did not include tactical planning by ACS.

In reply, petitioners contend that respondents’ search was inadequate and that they improperly withheld (and redacted) records responsive to petitioner’s FOIL request.

Discussion

“All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions . . . [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 [a] particularized and specific justification for not disclosing requested documents" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-75, 653 NYS2d 54 [1996] [internal quotations and citations omitted]).

As an initial matter, the Court observes that the discussion about the substance of the dispute (petitioner McMillan's firing) has no effect on this decision. Petitioners' attempts to justify the reason for submitting a FOIL request is not the issue. The issue here is whether respondents complied with FOIL.

"FOIL requires state and municipal agencies to make available for public inspection and copying all records subject to ten exemptions" (*The New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 483, 796 NYS2d 302 [2005]). "To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material qualifies for exemption" (*Gould v New York City Police Dept.*, 89 NY2d 267, 275, 653 NYS2d 54 [1996] [internal quotations and citations omitted]). "As this Court has stated, only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld . . . In keeping with these settled principles, blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.* [internal citations omitted]).

Respondents satisfied their burden to perform a diligent search by submitting the affidavits of various ACS employees who detail the search they conducted (NYSCEF Doc. Nos. 21-23). This satisfies the obligations of respondents under FOIL (*Rattley v New York City Police Dept.*, 96 NY2d 873, 875, 730 NYS2d 768 [2001]).

The Court also finds that respondents met their burden to withhold or redact certain documents. Intra-agency communications are exempt from disclosure under FOIL if they are not “statistical or factual tabulations or data,” “instructions to staff that affect the public,” “final agency policy or determinations” or “external audits, including but not limited to audits performed by the comptroller and the federal government” (Public Officers Law § 87[2][g]). “[T]he exemption for intra-agency material does not apply as long as the material falls within one of the provision’s four enumerated exceptions. Thus, intra-agency documents that contain statistical or factual tabulations or data are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination” (*Gould*, 89 NY2d at 276). “[T]he purpose underlying the intra-agency exemption . . . is to protect the deliberative process of the government by ensuring that persons in an advisory role will be able to express their opinions freely to agency decision makers . . . [including] opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*id.* at 276-77).

Here, ACS’s final determination justifies the redactions it made and the documents it withheld. ACS noted that “The argument that there must be factual information included in the emails as well as instructions by ACS leadership on the treatment of Ms. Joyce McMillan, a private citizen, would qualify as a final agency policy or determination is not accurate. Merely because of news coverage and speculation of why Ms. McMillan's employment was terminated, does not make communication regarding Ms. McMillan and the contracted agency she worked for a topic area that affects the public or a final policy or determination” (NYSCEF Doc. No. 8). This observation and the determination itself are entirely rational. The situation at issue—news agencies asking ACS for comment about petitioner McMillan’s firing—is not inherently a final policy determination.

In fact, the very purpose of the intra-agency exemption seems designed for the factual scenario at issue here. “While disclosure of such mundane communications would certainly not be contrary to the purpose of the intra-agency exemption to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure, nevertheless, the communications were not factual in nature and do not otherwise fall within the specifically enumerated statutory exceptions to the intra-agency exemption” (*Matter of Tuck-it-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 166, 861 NYS2d 51 [1st Dept 2008] [internal quotations and citation omitted]).

Here, ACS allegedly (the parties dispute many of the facts) ordered a contractor to fire petitioner McMillan because she made critical comments about ACS in a social media post. And then, apparently, ACS changed its mind. Clearly, an agency must be allowed to reevaluate its actions and have robust discussions about how it should proceed. The fact that journalists were asking ACS about the situation only reinforces the notion that internal communications are not subject to disclosure under FOIL. Otherwise, as described above, there would be a chilling effect on agency employees willingness to discuss a serious issue.

Summary

To be clear, the Court’s decision only evaluates respondents’ reliance on FOIL exemptions. As stated above, the purpose of FOIL is to ensure public access to government records, subject to certain exemptions and the Court has found that those exemptions are applicable here. Because this case is about FOIL, the Court does not consider petitioners’ allegations of wrongdoing by ACS. Of course, the rules for disclosure are quite different in a plenary action.

Accordingly, it is hereby

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly in favor of respondents and against petitioners along with costs and disbursements upon presentation of proper papers therefor.

8/19/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: