

**Freedom Found. v New York Dept. of Citywide
Admin. Servs.**

2022 NY Slip Op 34078(U)

December 1, 2022

Supreme Court, New York County

Docket Number: Index No. 152725/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

Straka's affiliation with Freedom Foundation. In an e-mail dated September 28, 2021, the Records Access Officer, Alan Deutsch, rejected said FOIL request as "essentially identical" to a May 3, 2021 FOIL request filed by Erin Volz, also associated with the Freedom Foundation, which was denied on July 16, 2021, and not appealed. A review of said FOIL request reveals that although the requests are very similar, the May 3 request only demands information regarding DC37 members and the instant request demands information for all New York City employees. Said denial was appealed to Sanford Cohen, Deputy Commissioner and General Counsel for DCAS and in a letter dated November 29, 2021 said appeal was denied on the grounds that in the denial of the May 3 FOIL Request, the records officer denied same as "pursuant to Section 87(2)(b) and 87(2)(b)(iii) of the Public Officers Law, the RAO found that the disclosure of the requested information would constitute an unwarranted invasion of personal privacy in that its intended use would be to solicit, request, entreat or seek to influence persons appearing on the list with respect to the Freedom Foundation's goal of persuading public employees to reject union membership. He further determined that the 'the disclosure of contact information for City of New York employees, in the absence of any official governmental purpose, does not further the purposes of FOIL, which is to ensure access to information regarding "the process of governmental decision-making', and to review documents and statistics leading to governmental determinations.'" The specific request for e-mail addresses was also rejected as it constitutes a risk to the City of New York's information technology infrastructure. Said denial resulted in the instant proceeding.

Before reaching the merits of Petitioner's FOIL request, Respondent raises several procedural issues.

Respondent contends that the instant Petition was not filed within the applicable four-month statute of limitations. As discussed in *Heffernan v. New York City Mayor's Off. of Hous.*

Recovery Operations, 196 A.D.3d 426 (1st Dept 2021), leave to appeal denied, 38 N.Y.3d 904 (2022), “An article 78 proceeding must be commenced within four months of the final determination under review (see CPLR 217 [1]). Such a proceeding is commenced when the clerk of the court receives the petition in valid form (see generally *Matter of Ennis v Annucci*, 160 AD3d 1321 [3d Dept 2018]).” Here, Petitioner initially filed a “Verified Article 78 Petition and Memorandum of Law in Support” on the final day of the statute of limitations, March 29, 2022. On March 31, 2022, the Petition was returned for correction as follows: “Reason for Returning: Please file a Petition or Verified Petition ONLY using the ‘refile document’ link for document #1. Once an Index number has been assigned you can file the Memorandum of Law in Support using document type ‘MEMORANDUM OF LAW IN SUPPORT.’ Thank you and have a great day.” Thereafter on April 1, 2022, Petitioner filed an identical Verified Petition, omitting the Memorandum of Law. Clearly, the verified Petition was timely filed, but simply included additional information. To punish a party for providing too much information too soon is an improper rationale to render the instant Petition untimely.

Respondent further objects to the signing of the Petition by Shella Alcabas, “who is admitted to practice in New York State but lists her address as a post office box in Olympia, Washington. She lists the same Olympia, Washington address in the database maintained by the New York State Office of Court Administration of registered New York attorneys.” Petitioner argues that same is a violation of Judiciary Law § 470, which requires that a non-resident attorney who is admitted to practice law in New York must maintain a law office in New York. Petitioner has submitted documentation establishing that any such violation has been cured.

Respondent further alleges that as Petitioner failed to exhaust its administrative remedies on the May 3 request, that the instant request cannot be revived by submitting a second FOIL

request for substantially the same records or data. As discussed in *Stankevich v. New York City Police Dep't*, 173 A.D.3d 507, 508 (1st. Dept 2019) “...Petitioner's second FOIL request, though broader than his first request, was essentially ‘duplicative of his prior request, and therefore did not extend or toll his time to commence an article 78 proceeding’ (*Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 [1st Dept 2001]; see *Matter of Walker v Roque*, 137 AD3d 643 [1st Dept 2016]).” Here, while the separate requests are similar, they were submitted by different requestors, and request different categories of information related to different groupings of City employees.

Respondent further contends that the Petition has been rendered academic as on December 14, 2021 the City of New York Office of Payroll Administration (“OPA”) responded to a March 19, 2021 request by Petitioner’s employee, Volz, providing all of the requested information other than “Work Email Address” which was denied citing Pub. Off. §§ 87(2)(b), 89(2)(b)(iii) and 87(2)(i). The Court notes that this is likely the reason why Petitioner did not appeal the May 3 request. Contrary to Respondent’s argument, the provision of information relating to DC 37 employees does not render the Petition moot as to all other city employees.

As to the merits of the instant action, Pursuant to Pub. Off. Law § 89(4)(b), “a person denied access to a record in an appeal determination under the provisions” governing appeals “may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.” Pursuant to CPLR 7803(3), review is appropriate where “a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”

As discussed in *Gould v. New York City Police Dep't*, 89 N.Y.2d 267 (1996) “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). 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 indeed qualifies for exemption” (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750; *see*, Public Officers Law § 89[4][b]). As this Court has stated, “[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld” (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

Respondent contends that disclosure of the requested records would constitute an invasion of privacy. Public Officers Law Section 87(b) provides such an exception exempting records that “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.” Section 89(2)(b)(iii) specifically defines the “sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes” as unwarranted invasions of personal privacy. Black's Law Dictionary (11th ed. 2019) defines solicitation (in this context) as 1. The act or an instance of requesting or seeking to obtain something; a request or petition.

The instant case presents the mirror issue addressed in *N.Y. State United Teachers v. Brighter Choice Charter Sch.* 15 N.Y.3d 560 (2010). In that case, the New York State United Teachers (“NYSUT”), a union, sought to enforce a FOIL request against Brighter Choice Charter School, seeking functionally the same information about its employees as Petitioner herein seeks. The Court inferred that “it is evident that NYSUT's intent in requesting the teacher names is to expand its membership and, by extension, obtain membership dues” and as such sought to engage in solicitation. The Court further held that

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 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 Federation of N.Y. State Rifle & Pistol Clubs*, 73 NY2d at 97). There is no indication that NYSUT intends to use the names to, for example, expose governmental abuses or evaluate governmental activities. It appears, instead, that NYSUT seeks the teachers' names as a convenient mechanism for contacting prospective members. Although NYSUT certainly possesses a right to seek dues-paying members, it may not rely on FOIL to achieve that end.

It is indisputable that pursuant to § 87(3)(b), that DCAS, an agency subject to FOIL is required to maintain the records requested by Petitioner and that such records are ordinarily disclosable. Petitioners contend and specifically certified in their FOIL request that the information will not be used for solicitation purposes. Petitioner focuses solely on their position that they are not seeking compensation but merely wish to educate workers. However, their argument ignores the definition of solicitation. Petitioners contend that “Informing public employees of their constitutional rights and providing pro bono legal assistance to those who should require it is neither solicitation nor fund-raising and cannot be classified as such.” As the Court in *NYSUT* was easily able to infer that NYSUT sought records for the purpose of soliciting charter school employees to join a union, so too this Court must infer that the Freedom Foundation seeks to solicit members of New York City Public Employee unions to reject their union membership thereby depriving said unions of dues paying members. There is no requirement that a solicitation involve money in any form, only that the solicitor is seeking to obtain something. Petitioners are clearly seeking to obtain the requested items through abuse of FOIL. If a union cannot use FOIL to assist

it in obtaining members, an explicitly anti-union organization cannot use FOIL to oppose those aims. Both are misuses of the purpose behind FOIL requests.

ORDERED that the instant Petition is DENIED in its entirety; and it is further

ORDERED that DC37's motion seeking leave to intervene in this action is DENIED as moot.

12/1/2022

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE