

Cuddy Law Firm, PLLC v NYC Dept. of Educ.

2023 NY Slip Op 30539(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 153843/21

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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Cuddy Law Firm, PLLC,

Petitioner(s),

-against-

NYC Department of Education. et al.,

Respondent(s).
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**DECISION AND ORDER
AFTER HEARING**

INDEX No.: 153843/21

Mot Seq.: 001

Present:

Hon. Lynn R. Kotler, J.S.C.

This is an Article 78 proceeding. Petitioner Cuddy Law Firm (Petitioner or Cuddy) challenges respondents' denial and constructive denial of access to records, pertaining to attorney's fees, invoices for Independent Educational Evaluations (IEEs), as requested by petitioner in a letter dated August 9, 2019, pursuant to Article 6 of the New York State Public Officers Law (POL), more commonly referred to as New York's Freedom of Information Law ("FOIL"). Respondents oppose the petition and contend that petitioner's requests are unduly burdensome and implicate sensitive and private information that is protected by statute, which, if exchanged, would result in an unwarranted invasion of students' privacy, and that the records are not easily extracted from the records maintained by DOE and would require the individual review of thousands of digital and paper files, stored across various electronic and physical repositories.

In an interim order dated October 20, 2021, the court directed that respondents produce a representative sampling of documents relative to attorney's fees and invoices for IEEs for the month of February 2019 with redactions of personal information with an

accompanying sur-reply.

Subsequently, in an order dated January 27, 2022, the court directed a hearing be scheduled to determine whether the FOIL exemptions apply and whether producing certain documentation would create an undue burden on respondents. A pre-hearing conference was held to address the logistics of the hearing and the hearing was scheduled for May 11, 2022.

At the hearing, respondents called Frank Lanore, Chief Administrator for the New York City Department of Education, Emily Goodman, an attorney with the DOE special education department and Ann Macadangdang, the Records Access Officer and Assistant Deputy Counsel at DOE. Petitioner did not call any witnesses and conducted cross-examination of respondents' witnesses. Post-hearing memoranda were submitted by August 12, 2022 as per the parties' stipulation dated July 20, 2022.

Based upon the testimony and the evidence introduced at the hearing, the court makes the following findings of fact and conclusions of law.

FACTS

Frank Lanore testified that his title is Chief Administrator for the New York City Department of Education, Division of Financial Operations, which unit is responsible to oversee payments made for services for special education teacher support services, evaluations, settlements as well as for school-related payments to charter and public schools. Lanore testified that the Office of Related Services approves the invoices provided by the evaluator, which is a PDF file that is saved into a shared network drive and then a folder with a number of invoices is forwarded to "us", the documentation in the folder is reviewed and if all is in order, then payment is made. The file contains the

authorization for the evaluation, the invoice for the evaluation and sometimes the evaluation itself. Lanore further testified that if the evaluation is contained in the folder then there is identifiable information such as the name of the student and the student's identification number. After the documentation is reviewed, Lanore testified that we would go into the payment system, FAMIS (Financial Accounting Management and Information System), generate payments and enter the payee, tax ID number, the first initial of the student's last name, the last 5 digits of the ID number, the month and date of the evaluation and the evaluation type. Lanore stated that they use a reporting tool called COGNOS that can extract data from the FAMIS system which was done in November 2021. Lanore recalls receiving two FOIL requests on this case and that he used COGNOS to extract the relevant data and sent it to the FOIL unit. Lanore testified that it took maybe an hour or two to generate the report but that it "took some time to extract the evaluation type from the referenced field and just review the file...". Lanore recalled that he was requested to pull a sampling for February 2019, that 435 invoices were pulled for that month, but on average they receive about 3600 invoices a year. Lanore assigned the request for the February 2019 sample to one person and that over a two-week period that person was able to print out or pull up roughly 100 of the 400 evaluations. Lanore described the process by which those invoices were gathered in response to the request. He testified that the staff member went into the shared folder, reviewed the report given to him/her by Lanore, looked for the payment date included in the report and then located the invoice. Lanore testified that NYC Comptroller's Office requests documentation such as this but not to the extent of this volume. Lanore also testified that his unit cannot separate documents or redact information because the files

are PDFs.

Emily Goodman is a managing attorney in the Office of General Counsel Special Education Unit. The Special Education Unit handles all legal proceedings related to special education, which includes IDEA, Individuals with Disabilities in Education Act and FOIL requests. Her primary responsibility is to oversee a team of attorneys who review and negotiate post-hearing attorney's fees, to review all payments related to attorneys' fees that get negotiated before the impartial hearing decision or after as part of an SRO appeal as well reviewing federal court complaints and related documents. Ms. Goldman testified that she has been familiar with the Cuddy Law Firm for a very long time because they submit a number of fee claims following impartial hearings. Attorneys' fees get negotiated at different points throughout the filing process from the filing of the complaint until the issuance of the appeal decision. Goldman testified that if the case is resolved before the final decision, the attorneys' fees get submitted directly to the attorney negotiating that case as part of their settlement. If it is a post-hearing case, then the attorneys for the parents will email a request for attorney fees to a central email address and include a number of documents such as time sheets. Goldman further testified that she received claims through the Comptroller's Office if a firm submits a notice of claim, at which point Goldman's office will reach out to the law firm and request time sheets and the case would go directly to the assigned attorney. Goldman testified that the format for the documentation received by her unit/attorneys is a PDF file that contains a varying degree of documents and that every firm submits the documents differently such as only time sheets, or time sheets and the decision or notice of claim and time sheets or some may include resumes or time sheets and all

documents submitted on the matter including the complaint. The information contained in the time sheets varies by law firm and not all-time sheets provide total number of hours which would then have to manually calculated. Goldman testified that the applications contain identifiable information concerning minor students such as name, case number, date of birth and OSIS, which is an identification number assigned to every special ed student, some may include names of parents and the home address. Goldman testified that the time sheets may have personal identifiable information. Goldman testified that the number of fee claims has expanded exponentially over the years and that it's not uncommon for her office to receive between 60 – 250 post-hearing fee claims and that she cannot speak to the number of cases during settlement negotiations. Goodman recalled that she pulled a sampling of attorneys' fees applications for the month of February 2019 but that the sampling was only a portion of the payments made in that month. Goldman testified that they received 79 fee claims post-hearing but that her office wanted the information to be similar to Frank Lanore's submission based on payment. Based on that spreadsheet there were approximately 124 cases that were pulled by her office and that it took 8 hours over a number of days. Goodman testified that to pull all the claims it would have worked out to be approximately 4 to 6 weeks of non-stop time to pull, redact information and that she has other responsibilities. She indicated that the FOIL unit does the redactions on the pulled documents.

Respondent called Ann Macadangdang, Deputy Counsel and Records Access Officer, as its next witness. She testified that the Records Access Unit is part of the Office of General Counsel at the NYC Department of Education, and its role is to

monitor the Records Access which encompasses the FOIL unit and the Subpoenas Unit. The Records Access Unit collects, reviews and responds to requests from the public whether its by FOIL, subpoena or other method. Ms. Macadangdang testified that FOIL requests come to the DOE in many ways such as mail, fax, the open records portal or the dedicated FOIL inbox set up by DOE to receive these requests. Requests are then acknowledged within 5 days, sometimes complied within that timeframe or the requester is notified of approximately when the response would be fulfilled or to deny all or parts of the FOIL request. Macadangdang further testified that because there's an exemption from disclosure, it is her role to manage and apply the exemptions to all requests. Macadangdang testified that the FOIL request at issue was interpreted to request records reflecting payment of attorneys fees under the IDEA and records reflecting payment for IEE invoices for a two-year period. Macadangdang testified that generally whenever a FOIL request is received, it is reviewed and a determination is made whether the FOIL request can be processed, meaning whether it was reasonably described or whether they can interpret the request in order to process it.

Macadangdang explained that, for example, when they received this FOIL request for attorneys fees there was a paragraph with subparts and they requested "summary sheets" using the words "payments of attorneys fees" and they gave examples of time sheets, affidavits and other examples. Macadangdang testified that when they read the FOIL request, it was inconsistent, but that the request came under the umbrella called Attorneys Fees and concluded it would be any record reflecting the payment of attorneys fees under the IDEA litigation for the two-year period. Macadangdang performed a similar analysis for the independent education evaluators

and interpreted it as any record reflecting payments of IEE invoices for the two-year period. Macadangdang's role in consultation with the program offices is to make sure that they are applying consistent business rules in the sample. A meeting was held to determine how to comply with the request and then determine how the reports would be collected. Macadangdang testified that to track the data more accurately the order was interpreted to provide payments in the month of February 2019 as opposed to when the request for payment came and that is how she and her department/unit decided that it would apply to the entire FOIL request sampling. Macadagdang explained that with any FOIL request, records are sampled/reviewed to ensure the response collects the correct documents withing the correct timeframe. The first reviewer, an attorney, makes the first run of redactions and Ms. Macadangdang performs a second level review.

With regard to the IEE invoice records, Macadangdang testified that her unit received the documents in batches per the payment and that they identified under the law what should be redacted such as student names, parent names, addresses and telephone numbers. Her unit does research to determine if the names on the document are DOE employees, parents' names or student names which may be different than a parents' name. According to Macadangdang, many people review and re-review to quality check and make sure records are not over-redacted or under-redacted. It is essential that the DOE does not release personal information that would be a FERPA violation. For example, if the evaluator, a psychologist or speech therapist, sends documents such as an invoice and evaluation, to the DOE for payment, then those documents are stored and the entire record would be deemed as responsive. Macadangdang and another attorney conducted the redactions and quality check and it

took approximately 50 hours to redact files connected to the IEE. The same review and redactions occurred for the attorneys fees portion and all personal identification information needed to be redacted. The review included names of students, parents, school names, phone calls and a description of the call which were redacted in order to prevent it from being linkable to the student's identity. It took her and a colleague approximately 80 hours to perform the sampling of attorneys fees applications for the one month representative sample.

At the conclusion of the hearing, the court reserved decision and the parties were granted an opportunity to submit post-hearing memoranda of law. Petitioner submitted its post-hearing brief contending that the FOIL exemptions do not apply and that there is no undue burden on respondents to produce the requested documents. Respondent contends that petitioner's request as drafted would result in supplying information that is both private and protected and also because the request would impose an undue burden.

LAW

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public (see Public Officers Law § 84). The statute is based on the policy that 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government' " (*Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224-225, 76 NYS3d 460, 100 NE3d 799 [2018], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571, 393 NE2d 463, 419 NYS2d 467 [1979]).

POL § 87(2)(a) permits an agency to deny access to records or portions thereof

that are specifically exempted from disclosure by state or federal statute. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (together with its implementing regulations, 34 C.F.R. Part 99, "FERPA") prohibits disclosure of personally identifiable information constituting or derived from education records, absent consent of the parent or eligible student, or the existence of a specifically enumerated exception in FERPA that would permit non-consensual disclosure. See 34 C.F.R. § 99.3, § 99.30 and § 99.31. Accordingly, records constituting student evaluations, student ID numbers, student dates of birth, parent names and signatures, and other information that could enable a reasonable person in the school community to identify students with reasonable accuracy, have been withheld. This information includes the impartial hearing case numbers (the unique numbers assigned to every impartial due process hearing) and what are commonly referred to as "10-day numbers" (which refers to the unique numbers assigned to every notice provided to DOE that a parent of a special education student intends to challenge the recommendations for the student). These numbers, in conjunction with other information, could reveal the identity of students with special education needs and their parents, and other confidential information concerning these students and their parents.

POL § 87(2)(b) permits an agency to deny access to records or portions thereof that if disclosed would constitute an unwarranted invasion of personal privacy under POL § 89(2). Accordingly, records and portions thereof containing the FERPA-protected information listed above, as well as individuals' personal home addresses and evaluator tax identification numbers have been redacted to prevent an unwarranted invasion of personal privacy.

In a letter dated August 9, 2019, petitioner Cuddy Law Firm, P.L.L.C. (“CLF”) submitted a request under New York’s Freedom of Information Law (“FOIL”) for access to certain records, on a monthly rolling basis, concerning attorneys’ fees and costs and Independent Educational Evaluation (“IEE”) invoices and payments for the time period July 10, 2018 to July 9, 2020.

The court finds that respondents’ witnesses, Lanore, Goldman and Macadangdang, all testified credibly as to their responsibilities regarding the FOIL request, the processes and procedures, the number of cases and time it took to respond to the court’s directive of providing documents for the one-month February 2019 sampling and the sensitive nature of the personal information contained within the documents. The court agrees with respondents that “...due to the manner in which responsive records are submitted and stored, and in light of the extensive redactions that would be required before these records could be disclosed, the underlying request, as written, presents an undue burden.” Specifically, both Lanore and Goodman testified how their offices receive invoices for payment, whether by evaluator or attorney, and the processes that are utilized to pay these claims as well as the fact that these documents are stored in various repositories. Lanore compiled 100 of 400 evaluations, or 25%, in a period of 2 weeks that took 40 hours of time. He further testified that these records are PDFs which cannot easily be manipulated to remove sensitive or protected information such as the evaluations that contain significant and confidential personal information. Similarly, Goldman credibly testified that the amount of time to pull and redact attorneys’ fees files for the one month sampling took approximately 4 to 6 weeks. Respondents’ third witness, Ann Macadangdang credibly testified that it took approximately 80 hours

to review for attorneys' fees application for only the one-month sampling. Multiply the number of hours, documents and redactions per document, it would take well over 2000 hours or approximately one year to comply with petitioner's FOIL request. The court finds that the exorbitant amount of time and personnel to engage on this project renders petitioner's FOIL request unduly burdensome.

Furthermore, all three witnesses testified that these documents require significant redactions that can only be performed by their offices and therefore hiring an outside contractor is not a viable solution given the privacy concerns involved. *See Huseman v. New York City Dep't of Educ.*, 2016 NY Slip Op 30959(U) at *14-15 (Sup. Ct. N.Y. Cnty. May 25, 2016) (citing *New York Comm. for Occupational Safety and Health v. Bloomberg*, 72 A.D.3d 153, 892 N.Y.S.2d 377 (1st Dep't 2010)) It is undisputed that many of these documents contain sensitive and personal information of students and/or their parents.

In light of the foregoing, the request to find the "10-day numbers" as exempt enumerated in POL Sec 87(2)(a) is denied as moot.

Finally, petitioner argues that "Respondents failed to meet their burden that any of the requested, withheld information would have identified exempted information about students; and instead, would have this Court eschew a rule of law that conceals the important information sought—how taxpayer dollars are (and can be better) spent on attorney's fees and independent evaluations. (*See Matter of Abdur Rashid v. New York City Police Dept.*, 31 N.Y.3d 217, 224-225 [2018] ["The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government"])" While the court agrees with the premise that


agencies should be required to make their records available to the public, the court finds petitioner is being disingenuous when it claims “this information should be turned over for taxpayers to see how their taxpayer dollars are spent and can be better spent on attorneys fees and independent evaluations”. Petitioner is a law firm that practices in the niche area of special education. Respondents’ witness Emily Goodman testified that she has been familiar with the Cuddy Law Firm for some time. Petitioner is also well aware that should it prevail on a FOIL application, that it is entitled to attorneys fees. This is not petitioner’s first FOIL request for this type of information. Petitioner had a similar lawsuit before the Honorable Eileen Rakower that resulted in an appeal of Justice Rakower’ s decision that was remitted back to the Supreme Court. In the petition, petitioner claims that it needs the IEE-related records to find the “lowest priced acceptable evaluator from whom low-income clients may receive evaluations to determine their children’s special education needs.” While the court commends petitioner for providing representation for special needs students and their parents, the court is skeptical of its request for two years of records to find the lowest priced acceptable evaluator to conduct evaluations. There are certainly alternative methods to obtaining such information. If the Cuddy Law Firm is truly looking for the lowest priced evaluators to meet its demands for its low-income clients, then perhaps the one-month representative sample that petitioner has already obtained provides it with the information it needs rather than to have City agencies waste tax payer dollars on a fishing expedition.

Based on the foregoing, the court finds that respondent has satisfied its burden that the FOIL request is unduly burdensome.

Accordingly, it is hereby **ORDERED** that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
February 21, 2023

So Ordered:



Hon. Lynn R. Kotler, J.S.C.