

Roman v Davis

2023 NY Slip Op 32006(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 100210/2023

Judge: Sabrina Kraus

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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GENE ROMAN,

Petitioner,

- v -

DEREK DAVIS, CITY UNIVERSITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 100210/2023

MOTION DATE 05/31/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15

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

BACKGROUND

In January 2022, the Center for Puerto Rican Studies at Hunter College (“CENTRO”) was awarded a grant from the Andrew W. Mellon foundation to support the convening of interdisciplinary study groups focused on Puerto Rico’s collective future. This is known as the Bridging the Divides Mellon Fellowship Program at the Center for Puerto Rican Studies at Hunter College (the “Program”). The goal of each study group is to produce a collectively authored publication with concrete policy recommendations for Puerto Rico’s political, economic, social and cultural future. The inaugural study group was convened in August 2022 to focus on the question of decolonization. The inaugural study group was comprised of 12 artists, scholars, and journalists chosen to undergo collaborative research on questions of

decolonization. The applications for the inaugural study group were evaluated by members of CENTRO staff, and by members of an external review committee.

After an initial review by CENTRO staff to narrow the applicant pool, the members of the external review committee evaluated and ranked the remaining applicants and discussed their recommendations with CENTRO staff.

On September 22, 2022, Petitioner sent a FOIL request to Hunter College requesting certain records of the Program. Petitioner requested three categories of documents: (1) the names, job titles and/or professional affiliations of the members of the Program's external review committee; (2) records of meetings and deliberations for the selection of the Program's inaugural study group; and (3) any summaries listing semi-finalists, finalists and/or ranking of candidates for the Program (the "FOIL Request").

In response, Hunter College conducted a search and found: no documents in the first category; one document in the second category; and two documents in the third category.

The document in the second category is a record of notes taken by Cristel Justino Díaz, Director of Public Humanities at CENTRO, during a meeting of the Program's external review committee on or around May 13, 2022. The notes reflect the ideas shared at the meeting regarding the focus of the inaugural study group and the group's opinions regarding what types of applicants would be best to analyze the subject of decolonization. The two documents in the third category contain evaluations of the applicants for the Program's inaugural study group. The first is a document listing the external review committee's numerical evaluation of each candidate. The second is an excel spreadsheet containing the Director of CENTRO's evaluation of the Program's candidates.

On October 26, 2022, Hunter College responded to Petitioner's FOIL request and sent Petitioner a letter stating that Hunter College had located: (i) no documents in the first category; (ii) one document in the second category which was exempted from disclosure under FOIL § 87(2)(g); and (iii) two documents in the third category, one of which was exempted from disclosure under FOIL § 87(2)(b) and (g). Accompanying the letter was the document listing the external review committee's numerical evaluation of each candidate, but with the names of the fellowship candidates redacted under FOIL § 87(2)(b) to protect their privacy. The other two documents were withheld.

On November 22, 2022, Petitioner appealed Hunter College's decision to Derek Davis, General Counsel and Senior Vice Chancellor for Legal Affairs at CUNY. On December 7, 2022, CUNY responded to Petitioner's appeal. CUNY denied Petitioner's request for a written description of Hunter College's search methodology, and CUNY directed Hunter College to provide the notes from the meeting in redacted form to show the first names of the members of the external review committee.

With respect to Petitioner's third request CUNY stated:

Regarding your third request, the College identified two responsive records, one of which it withheld, and the other it provided in redacted form. With respect to the document the College withheld entirely, it contains a mix of facts and opinion. Upon further review, the College is directed to provide this record to you with any opinions and non-factual information redacted. (NYSCEF Doc No 27).

Pursuant to CUNY's December 7, 2022, decision, Hunter College provided Petitioner with redacted copies of the two documents it had previously withheld. Hunter College redacted non-factual material in the documents, including the ideas shared at the May 13, 2022 meeting regarding the focus of the inaugural study group and the group's opinions regarding what types

of applicants would be best to analyze the subject of decolonization, and the Director of CENTRO's evaluation of each candidate.

PENDING APPLICATIONS

Petitioner has now commenced this proceeding, and asks the Court to (i) annul the portions of CUNY's final determination which denied Petitioner's FOIL request, (ii) compel Hunter College to produce the full names, job titles and/or professional affiliations of the members of the External Review/Search Committee for the inaugural study group of the Program; (iii) compel Hunter College to produce "the second document the College identified as responsive" to the third category; (iv) compel Hunter College to produce two documents without redactions; and (v) award court costs.¹

Respondent cross-moves for dismissal asserting that the Petition fails to state a claim for relief.

For the reasons stated below, the cross-motion is granted, and the petition is dismissed.

DISCUSSION

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." *Jewish Press, Inc. v. N.Y.C. Police Dep't*, 190 A.D.3d 490, 490 (1st Dep't 2021) (quoting *Mulgrew v. Board of Educ. of the City School Dist. Of the City of N.Y.*, 87 A.D.3d 506, 507 (1st Dep't 2011), *lv denied* 18 N.Y.3d 806 (2012)). Petitioner has identified no such legal error in this proceeding.

FOIL requires public agencies to make available for public inspection and copying all records except where they fall within one of the statute's enumerated exemptions. POL § 87(2). The records and information Petitioner seeks are protected from disclosure under two of those

¹ Petitioner also moves for leave to participate virtually in any hearing scheduled by the court in this proceeding. As the court is dismissing the petition and holding no hearing, this motion is also denied as moot.

exemptions. POL § 87(2)(b), (g). Hunter College properly redacted that exempted material from its response to Petitioner's FOIL request, thus there was no error of law. Likewise, Hunter College properly certified that it was not able to locate a list of the members of the external review committee.

CUNY properly redacted deliberative material pursuant to POL § 87(2)(g) which provides for an exemption for materials which are not "statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations." The records Petitioner seeks are pre-decisional materials prepared to assist Hunter College in choosing the inaugural study group for the Program. They reflect ideas regarding the focus and composition of the inaugural study group, and opinions and evaluations of the Program candidates.

Petitioner's argument that the exemption for deliberative materials does not apply because the members of the external review committee are not public officers is without merit. The Court of Appeals has extended the privilege to materials prepared for a government agency, at its request, by an outside consultant. *See Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985).

Furthermore, CUNY properly redacted private material pursuant to POL §87(2)(b) which provides for an exemption where disclosure of records would "constitute an unwarranted invasion of personal privacy." Disclosing the two documents responsive to Petitioner's third category in unredacted form would constitute an unwarranted invasion of the personal privacy of the Program's applicants. A reasonable person would find it offensive and objectionable to disclose subjective evaluations of their candidacy for a job or fellowship. Indeed, "present employers, co-workers, and prospective employers . . . may learn that other people were deemed

better qualified for a competitive appointment” which may be embarrassing and harmful to applicants. *Core v. U.S. Postal Serv.*, 730 F.2d 946, 949 (4th Cir. 1984).

Finally, CUNY also properly responded to Petitioner’s request seeking the “[n]ames, job titles and/or professional affiliations of the External Review/Search Committee members who chose the inaugural class of Mellon Fellows.” Respondents properly certified that no list of the members of the external review committee could be located. Although FOIL gives the public access to the records of government with specific exemptions (see POL § 84) an agency “is under no obligation to furnish the petitioner with records it does not possess.” *Matter of Badalamenti v. Office of Dist. Attorney Nassau County*, 89 A.D.3d 1019, 1020 (2d Dep’t 2011).

WHEREFORE it is hereby:

ORDERED that Respondent’s cross-motion is denied and the Petition is dismissed; and it is further

ORDERED that Petitioner’s request for costs is denied as Petitioner is not the prevailing party; and it is further


ORDERED that Motion Seq No 2 is denied as moot; and it is further

ORDERED that, within 20 days from entry of this order, Respondent shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the 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); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.


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6/16/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>	
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