

**Matter of Stroock & Stroock & Lavan, LLP v New
York State Dept. of Economic Dev.**

2023 NY Slip Op 34437(U)

December 12, 2023

Supreme Court, New York County

Docket Number: Index No. 153773/2023

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

In the Matter of

STROOCK & STROOCK & LAVAN, LLP,

Petitioner,

- v -

NEW YORK STATE DEPARTMENT OF ECONOMIC
DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S
BUSINESS DEVELOPMENT,

Respondent.

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INDEX NO. 153773/2023

MOTION DATE 08/08/2023

MOTION SEQ. NO. 001

DECISION and ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

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

In this CPLR article 78 proceeding, the petitioner seeks judicial review of a December 27, 2022 Empire State Development (ESD) Records Access Appeals Officer's (RAAO's) determination confirming, in part, an ESD Records Access Officer's (RAO's) November 18, 2022 decision, which had denied, in part, the petitioner's request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, et seq.; hereinafter FOIL). The respondent, New York State Department of Economic Development, Division of Minority and Women's Business Development, answers the petition and files the administrative record, asserting that the RAAO's determination did not constitute an error of law, and that it correctly invoked the statutory exemptions from disclosure of agency records pursuant to FOIL. The petition is granted to the extent that (a) the determination to withhold or redact agency records that were responsive to the petitioner's request, based solely on the ground that those records are exempt from disclosure pursuant to Public Officers Law § 87(2)(e), is vacated and annulled, and (b) the respondent shall provide the court with all other records that it withheld or redacted

for in camera review, and a judicial determination thereafter of the validity of the other claimed exemptions from disclosure.

On January 18, 2022, the petitioner submitted a FOIL request to the New York State Department of Economic Development (NYS DED), through the State's electronic FOIL portal, seeking the following agency records:

"1. Records sufficient to show the number of applications for certification as a Women-Owned Business ('WBE') made to Empire State Development Corporation's Division of Minority and Women's Business Development ('the Division') since January 1, 2017;

"2. Records sufficient to show the number of renewal applications for certification as a WBE made to the Division since January 1, 2017;

"3. Records sufficient to show the number of applications for certification as a WBE that have been denied by the Division since January 1, 2017;

"4. Records sufficient to show the number of renewal applications for certification as a WBE that have been denied by the Division since January 1, 2017;

"5. Records sufficient to show the Division's stated bases for denying WBE applications, including but not limited to renewal applications, since January 1, 2017;

"6. Any and all internal guidelines, instructions, and/or policies used by the Division when making determinations on applications for WBE certification."

ESD---the entity into which the operational tasks of the NYS DED and the New York State Urban Development Corporation had been consolidated in 1995---acknowledged receipt of the request on January 25, 2022, and thereafter provided the petitioner with regular updates as to the progress of its search (see Public Officers Law §89[3][a]). Inasmuch as ESD initially did not produce any documents responsive to the petitioner's request, the petitioner, on October 27, 2022, deemed the lack of response to constitute a constructive denial of its request, and appealed that denial to the RAO. On November 10, 2022, however, ESD's RAO provided documents to the petitioner that were responsive to its first through fourth requests. On November 18, 2022, ESD's RAO responded to the fifth and sixth requests by providing the

petitioner with a 503-page PDF document, with redactions, and otherwise denied the request, based on the following grounds:

“Pursuant to Public Officers Law § 87(2)(b), ESD has redacted and withheld information and documents that ‘if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.’

“Pursuant to Public Officers Law § 87(2)(d), ESD has redacted and withheld information and documents that ‘are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.’

“Pursuant to Public Officers Law § 87(2)(e), ESD has redacted information on investigative techniques and procedures that is exempt from disclosure.

“Pursuant to Public Officers Law §87(2)(g), ESD has redacted material and withheld records from disclosure as they are ‘inter-agency or intra-agency materials which are not (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determination; (iv) external audits, including but not limited to audits performed by the comptroller and the federal government.’

“Pursuant to Public Officers Law § 87(2)(i), ESD has withheld certain records as they contain information that ‘if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.’”

On December 12, 2022, the petitioner appealed the RAO’s November 18, 2022 determination to the RAAO, alleging that the RAO’s 15 redactions of the documents that ESD had produced were erroneous, and that the RAO failed to provide an explanation for each of the redactions. The petitioner further asserted that the RAO incorrectly invoked the exemption from disclosure set forth in Public Officers Law § 87(2)(e), as the investigative techniques and procedures referenced in that section applied only to records compiled for law enforcement purposes, which did not apply to ESD’s records. In a December 27, 2022 determination, the RAAO granted the appeal only to the extent of removing the redactions of those portions of ESD’s Best Practices Guide that no longer were in effect, and otherwise denied the appeal. Relying on an opinion of the New York State Committee on Open Government, the RAAO

concluded that ESD was permitted to invoke the investigative techniques and procedures exemption of Public Officers Law § 87(2)(e), explaining that

“the RAO withheld portions of the Best Practices Guide (‘Guide’) that include detailed instructions regarding analyses of documents and responses from MWBE certification applicants, audit and interview questions, and site-visit criteria. Following a review of the records, I find that these redactions were properly applied, as release of such information would ‘furnish the safecracker with the combination to the safe,’ therefore potentially allowing applications to be tailored to ensure certification, even in those instances where certification would be improper.”

The RAAO otherwise determined that the RAO correctly invoked FOIL’s personal privacy, trade secrets, inter/intra agency communications, and information technology exemptions in withholding certain agency records from the petitioner. In addition, the RAAO concluded that the RAO properly provided an explanation for each of the redactions pursuant to a “Denial Checklist template.”

This CPLR article 78 proceeding ensued.

“While the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential” (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). “All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records” (*Matter of Hanig v State of N.Y. Dept of Motor Vehs.*, 79 NY2d 106, 108 [1992] [citations omitted]). “Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (Public Officers Law § 89[4][b])” (*id.*). When denying a FOIL request, a state or municipal agency must “state, in writing, the reason for the denial of access” (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 884 [2009]). Thus, “to invoke one of the exemptions of section § 87(2), the agency must articulate particularized and specific justification for not disclosing requested documents” (*Matter of Gould v New York City Police Dept*, 89 NY2d 267,

275 [1996]). If the requesting party administratively appeals the denial, the agency's appeals officer must also provide written reasoning for upholding the denial (*see id.*).

“[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable”

(*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 94 [3rd Dept 1985], *affd* 67 NY2d 562 [1986]; *see Matter of Prall v New York City Dept. of Corrections*, 129 AD3d 734 [2d Dept 2015]; *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153 [1st Dept 2010]). Rather, upon judicial review of an agency's determination to deny a FOIL request, the court must assess whether “the requested material falls squarely within a FOIL exemption” and whether the agency, upon denying such access, “articulat[ed] a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566). In other words, the court may only review an agency's FOIL determination to ascertain whether the determination to invoke a particular statutory exemption was affected by an error of law (*see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 246 & n 2 [2018], *affg* 140 AD3d 419, 420-421 [1st Dept 2016]; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 531 [1st Dept 2015]; CPLR 7803[3]).

“Notably, a fundamental principle of administrative law long accepted limits judicial review of an administrative determination solely to the grounds invoked by the respondent, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis. Consequently, . . . Supreme Court . . . may [not] search the record for a rational basis to support respondent's determination, or substitute its judgment for that of respondent”

(*Matter of Figel v Dwyer*, 75 AD3d 802, 804-805 [3d Dept 2010] [internal quotation marks and citations omitted]; *see generally Matter of Stengel v Vance*, 192 AD3d 571, 571-572 [1st Dept 2021] [“Respondents' arguments in this article 78 proceeding properly rely on the same grounds invoked by the agency at the administrative level”]). A court thus is limited to considering only

those exemptions to disclosure that were invoked by the agency from whom disclosure is sought when it denied access to those records (see *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 593 [1982]; *Matter of Rose v Albany County Dist. Atty. Off.*, 141 AD3d 912, 914 [3d Dept 2016] *Matter of Karimzada v O'Mara*, 111 AD3d 1088, 1089 [3d Dept 2013]).

Public Officers Law § 87(2)(e) authorizes an agency to deny access to records or portions thereof that:

“[A]re compiled for law enforcement purposes only to the extent that disclosure would: (i) interfere with *law enforcement* investigations or judicial proceedings ...; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal *criminal* investigative techniques or procedures, except routine techniques and procedures”

The petitioner correctly argued that, for that section to apply, ESD would have to demonstrate that the subject records or redacted information would, if disclosed, somehow interfere with law enforcement investigations or have the potential to enable criminal activities. “The statute—on its face—references criminal investigative techniques or procedures, and prevailing case law suggests that this exemption applies only to a FOIL request that, at the very least, has its genesis in an underlying criminal investigation or prosecution” (*Matter of Aurigemma v New York State Dept. of Taxation & Fin.*, 128 AD3d 1235, 1237 [3d Dept 2015], citing *Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]; see *Matter of De Oliveira v Wagner*, 274 AD2d 904 [3d Dept 2000]; *Matter of Spencer v New York State Police*, 187 AD2d 919, 920-921 [3d Dept 1992]; *Matter of Dobranski v Houper*, 154 AD2d 736, 737 [3d Dept 1989]). If “[t]he record . . . makes no reference to a criminal investigation implicating petitioners, nor does it suggest that state or local law enforcement officials would be involved,” Public Officers Law § 87(2)(e) is inapplicable (*Matter of Aurigemma v New York State Dept. of Taxation & Fin.*, 128 AD3d at 1237). Any contrary opinions by the Committee on Open Government are advisory only, and have no binding precedential value (see FOIL Advisory Opn 19775, Comm. on Open Govt., Jul.

27, 2020, *2 [recognizing that Committee on Open Government opinions are advisory, and that any contrary judicial precedent would supersede those opinions]).

Since none of the requested records related to criminal investigations or proceedings, to the extent that ESD withheld or redacted records from the petitioner *solely* on the ground that they were exempt from disclosure by virtue of Public Officers Law § 87(2)(e), those records must be provided to the petitioner in unredacted form.

“[A]n agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information” (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v Mills*, 18 NY3d 42, 45 [2011]). “If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material” (*Matter of Gould v New York City Police Dept*, 89 NY2d at 275; see *Matter of Demirayak v New York City Dept. of Citywide Admin. Servs.*, 2019 NY Slip Op 31385[U], *4, 2019 NY Misc LEXIS 2482, *4-5 [Sup Ct, N.Y. County, May 17, 2019]).

Based on the record before it, this court cannot determine whether the records that ESD withheld or redacted on grounds other than the law enforcement exemption fall within the statutory exemptions from disclosure that are applicable to records that would, if disclosed, compromise personal privacy, reveal trade secrets, disclose inter- or intra- agency communications, and adversely affect ESD’s internal information technology protocols. Hence, it directs ESD to provide the court, for in camera review, with unredacted copies of the documents that it withheld or redacted on those grounds. To the extent that ESD withhold or redacted any records based **both** on the law enforcement exemption set forth in Public Officers Law § 87(2)(e), **and** on any one of the other statutory grounds, those records shall be provided

to the court for in camera review, along with those records that were not withheld or redacted based on the law enforcement exemption, but were withheld or redacted by virtue of the personal privacy, trade secret, inter/intra agency communication, and information technology exemptions.

Accordingly, it is,

ORDERED that the petition is granted to the extent that,

- (a) the respondent’s December 27, 2022 determination to withhold or redact agency records that were responsive to the petitioner’s request, based **solely** on the ground that they are exempt from disclosure pursuant to Public Officers Law § 87(2)(e), is vacated and annulled, and the respondent shall provide the petitioner with unredacted copies of those records on or before January 17, 2024, and
- (b) the respondent shall, on or before January 17, 2024, provide the court, for in camera review, with unredacted copies of agency records that are responsive to the petitioner’s request, that it withheld or redacted on the grounds that they are exempt from disclosure pursuant to Public Officers Law § 87(2)(b), (d), (g), or (i), or exempt from disclosure pursuant to **both** Public Officers Law § 87(2)(e) **and** any one of Public Officers Law § 87(2)(b), or (d), or (g), or (i), after which the court shall issue a supplemental order and final judgment disposing of the entirety of the proceeding; and it is further,

ORDERED that the respondent shall provide the court with the relevant records for in camera review, as set forth above, either by delivering or mailing them to the Part 56 courtroom at 71 Thomas Street, Room 204, New York, New York 10013, or by emailing them to LAGOLDBE@NYCOURTS.GOV.

This constitutes the Decision and Order of the court.

12/12/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER GRANTED IN PART

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE