

**Wagner v New York City Dept. of Health & Mental
Hygiene**

2023 NY Slip Op 35022(U)

June 12, 2023

Supreme Court, Queens County

Docket Number: Index No. 700407/23

Judge: Kevin J. Kerrigan

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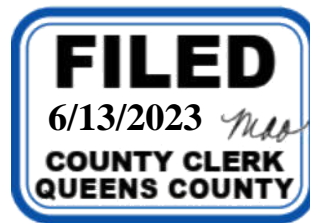
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



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Jimmy Wagner,

Index
Number: 700407/23

Petitioner,
- against -

Motion
Date: 3/20/23

New York City Department of Health and
Mental Hygiene,

Motion Seq. No.: 1

Respondent.
-----X

The following papers numbered E1-E9 & E11-E15 read on this application by petitioner in the Article 78 proceeding for an order to compel discovery or in the alternative, to hold an in camera inspection and awarding costs and fees; and cross-motion by respondent for an order to dismiss.

Papers
Numbered

- Notice of Petition-Petition-Exhibits..... E1-9
- Notice of Cross-Motion-Affirmation-Memorandum of Law E11-14
- Memorandum of Law in Opp. to Cross-Motion..... E15

Upon the foregoing papers it is ordered that the application by petitioner in the Article 78 proceeding for an order to compel discovery or in the alternative, to hold an in camera inspection and awarding costs and fees; and cross-motion by respondent for an order to dismiss are decided as follows:

In this CPLR Article 78 proceeding, pursuant to which the petitioner seeks judicial review of the portion of a partially adverse August 19, 2022, determination by New York City Department of Health and Mental Hygiene ("DOHMH"), which partially granted and partially denied petitioner's Freedom of Information Law (FOIL) request. On September 9, 2022, DOHMH informed petitioner confirming the determination of August 19, 2022, that redactions were made pursuant to the inter/intra agency exemption, FOIL §87(2)(g). Petitioner seeks review of the redaction and/or withholding associated with seven documents and/or their attachments. The respondents oppose the petition and cross-move to dismiss the petition.

On October 9, 2021, petitioner made a FOIL request seeking, inter alia, emails containing the terms "COVID VACCINE" or "COVID-19 VACCINE" sent to or from the email address associated with the uniform resource locator "uft.org", for the United Federation of Teachers, from July 21, 2021, to the present, and

Department of Health "internal memos and talking points" relating to "COVID-19" or "Covid 19 Vaccine".

On November 1, 2021, petitioner submitted an amended FOIL request. On November 9, 2021, petitioner submitted a final modified amended FOIL request ("FMA FOIL Request") seeking, inter alia, '1. emails containing the terms "COVID VACCINE" or "COVID-19 VACCINE" sent to or from uft.org, from July 21, 2021 to the present, and 2. emails containing the keywords "MEMO" and "COVID-19" OR "COVID-19 vaccine" TO the Commissioner from July 21, 2021 to the present. It is undisputed that during the period covered by the Amended Request, July 21, 2021 to November 9, 2021, the Commissioner of DOHMH was Dr. Dave Chokshi.

By order issued on April 11, 2023, the Court held a conference on April 24, 2023, at which a stipulation was so ordered granting an in camera review of the unredacted versions of the documents and/or their attachments which were redacted or withheld by DOHMH.

Said documents were provided on June 5, 2023, directly to the Court by DOHMH via email to the Court's Part 10 email address. The Court then conducted a review of the unredacted documents which contain the redactions or withholdings challenged by petitioner.

Each of the unredacted documents and withheld attachments submitted by DOHMH was reviewed, compared and contrasted with the corresponding redacted version of each document in the record. The previously withheld documents, provided to the Court by DOHMH, were reviewed. Each redaction, and each redacted document as a whole, was reviewed for content and then compared with its unredacted version. Thereafter, the redaction was examined within the context of the FMA FOIL Request to determine whether the content of the redaction, looking at both form and substance, fell within the parameters of the FMA FOIL Request. The same review was undertaken with each of the previously withheld documents provided to the Court by DOHMH.

The seven PDF documents reviewed by the Court listed in the petition are referred to by the Court according to the names of the unredacted versions of each PDF document as submitted by respondent as follows: PDF 33 ("PDF 33"), PDF 81-82 ("PDF 81"), PDF 576-577 ("PDF 576"), PDF 664 ("PDF 664"), PDF 669 ("PDF 669"), PDF 684-685 ("PDF 684"), PDF 913-920 ("PDF 912"). In addition the Court reviewed an eighth PDF 666 ("PDF 666"), which consists of an email forwarding an article published on the Politico NY website regarding clinics focusing on the prevention of drug overdoses. Although petitioner did not challenge the redactions to PDF 666, since it was submitted by respondent to in camera review, the Court reviewed PDF 666 in the same manner as the seven subject documents listed in the petition were reviewed.

The redactions to PDF 33 are appropriate as the single sentence redaction is to an email sent from the Executive Director

of the Big Cities Health Coalition, a private organization and not a governmental entity, and the sole redaction is to a remark by the author regarding her children and is not responsive to petitioner's FMA FOIL Request. Those attachments to PDF 33 which were redacted or withheld are, upon review by the Court, concerning the operations of Big Cities Health Coalition regarding its operations and are not responsive to petitioner's FMA FOIL Request.

The redactions to PDF 81 are appropriate as they are draft materials relating to DOHMH proposed transition materials and is not a document that contains a memo or talking points regarding Covid or the Covid Vaccine and, accordingly, is not responsive to petitioner's FMA FOIL Request. However, there is one attachment to PDF 81, namely, the DOHMH transition book 10.21.21.draft.docx, that, arguendo, appears, in limited part, responsive to petitioner's FMA FOIL Request. The draft DOHMH transition book is, as stated, a draft overview of DOHMH operations. This draft document addresses operational issues of DOHMH and mentions Covid in so far as it is mentioned along with other infections, including tuberculosis, heart disease, mental health concerns and economic instability.

Respondent avers that the document is explicitly stated to be a draft document that was being provided for further review and revision, and this draft document is therefore exempt pursuant to the intra/inter-agency FOIL exemption (See Public Officers Law § 87(2)(g)). After a thorough review of the document in camera the Court agrees and the redaction is appropriate and the draft document is therefore exempt pursuant to the intra/inter-agency FOIL exemption.

Public Officers Law 87(2)(g) provides an exemption from disclosure for:

"[I]nter-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 determinations;
(iv) external audits, including but not limited to audits, performed by the comptroller and the federal government..."

This intra/inter-agency FOIL exemption applies to all intra-agency and inter-agency communications other than those within the enumerated exceptions. The exemption applies to all communications and not just records that were part of an agency's internal decision-making process, but all internal conversations about an agency's work. (See Matter of New York Times Co. v. City of New York Fire Dep't., 4 N.Y.3d 477 [2005])

The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure (see Xerox, 65 NY2d at 132, citing Matter of Sea Crest Constr.

Corp. v Stubing, 82 AD2d 546, 549 [2d Dept 1981]). This purpose applies not only to comments made in official policy meetings and well-considered memorandums, but also to suggestions and criticisms offered with little chance for reflection... (See Matter of New York Times Co. v. City of New York Fire Dep't. supra).

Intra/inter-agency FOIL exemption applies to such mundane communications as scheduling meetings, because these communications do not fall within any of the four statutory exceptions to the exemption. (See Matter of Tuck-It Away Assoc., L., P v. Empire Stat Development Corp., 54 A.D.3d 154, 166 (1st Dept. [2008])).

The fundamental purpose and procedure contained in the Freedom of Information statute is to permit members of the public to request records from government agencies and to receive records responsive to these requests. (See Konigsberg v. Coughlin, 68 N.Y.2d 245, 249 [1986]; Matter of Jewish Press, Inc. v. N.Y. State Police, 207 A.D.3d 971, 974-75 3rd Dep't [2022]; Matter of Aron Law v. N.Y.C. Dep't of Educ., 2 192 A.D.3d 552, 553 1st Dep't [2021]; Matter of Asian Am. Legal Def. & Educ. Fund v. N.Y.C. Police Dep't, 125 A.D.3d 531, 531 1st Dep't [2015]).

The failure of a requester to "reasonably describe" desired records, however, is a ground for non-disclosure that is entirely separate from the exemption provisions under §87(2) of the Public Officers Law (See Ferri v Bell, 645 F2d 1213, 1219; see also Konigsberg, supra.)

The redactions to PDF 576 are appropriate. After review of the unredacted document the redactions are not responsive to petitioner's FMA FOIL Request.

PDF 576 has several attachments and these are properly withheld. There are two attachments regarding the DOHMH workforce, the first of which is a chart of data concerning DOHMH staff departures and the reasons for said departures, the second of which has data summarizing DOHMH staff 'Tele-work'. The third and fourth attachments are a chart containing data regarding the number of COVID vaccinations at various locations. There are two attachments regarding DOHMH Covid-19 expenditures, namely a summary of expenses and a summary of proposed spending and funding for the years 2020-2022, and reflect speculative opinions concerning potential sources of future funding and potential future expenditures. None of these attachments or emails are internal memos or talking points, nor do these attachments, or the email to which they are attached, contain references responsive to petitioner's FMA FOIL Request.

The redactions to PDF 664 are appropriate since, after review of the unredacted document, the redactions are not responsive to petitioner's FMA FOIL Request. The document consists of an email and a response which merely convey that President Biden extended federal funding for COVID-19 declarations. The redacted portions of the document does not comport to the searches under the FMA Foil

Request and therefore the document is not responsive to petitioner's FMA FOIL Request.

The redactions to PDF 666 are appropriate and, it is of note that petitioner does not challenge the redaction in the petition. The document consists of an email forwarding an article published on the Politico NY website regarding clinics focusing on the prevention of drug overdoses. The redacted portions of the document does not comport to the searches under petitioner's FMA Foil Request and therefore the document is not responsive to petitioner's FMA FOIL Request.

The redactions to PDF 669 are appropriate since, after review of the unredacted document, they are not responsive to petitioner's FMA FOIL Request. The document is an email and letter which address topics including DOHMH's process of operations, revenue and systems management and information and technology procedures. The document redactions are not responsive to petitioner's FMA FOIL Request.

The redactions to PDF 684 are appropriate. After review of the unredacted document, they are not responsive to petitioner's FMA FOIL Request. This document consists of three emails. The first email addresses the propriety of an information request regarding a parent and her children who were asked to quarantine after a Covid-19 close contact. The second email is an information request email sent, not to Commissioner Chokshi, but to the DOHMH general email box. The third email is a general response, from a general DOHMH email address, and not from Commissioner Chokshi.

The redactions in the subject emails and attached documents are appropriate, since their content is not responsive to petitioner's FMA FOIL Request.

The redactions to PDF 912 are appropriate. After review of the unredacted document, they are not responsive to petitioner's FMA FOIL Request. The document consists of an inter/intra agency email chain discussing a draft memo discussed for further review and revision, and as such this draft document is exempt pursuant to the intra/inter-agency FOIL exemption (See Public Officers Law § 87(2)(g)). After a thorough review of the document in camera, it is determined that the redaction is appropriate. It is of note that pages 913-920, were provided to petitioner by DOHMH as part of the FMA FOIL Request administrative appeal before the commencement of the instant proceeding; therefore any issue regarding the production of these pages is moot.

After reviewing the documents in camera, the redactions and withholding by DOHMH of the subject documents is appropriate, since

the redacted materials are not responsive to petitioner's FMA FOIL Request or are exempt from disclosure as covered by the intra/inter-agency FOIL exemption pursuant to Public Officers Law §87(2)(g).

On this record, petitioner and respondent have had significant discussions regarding the records sought, and respondent worked with petitioner to craft the several records requests that culminated in petitioner's FMA FOIL Request. After working cooperatively to create petitioner's FMA FOIL Request, petitioner now seeks disclosure of records with redactions that are not responsive to petitioner's FMA FOIL Request and, therefore, DOHMH was not obligated to produce them.

Based on the in camera review by the Court of the documents produced by DOHMH, petitioner is not entitled to receive the information which was redacted or withheld and is entitled to the information he did receive from DOHMH pursuant to the FMA FOIL Request.

Therefore, on this record, the petition is denied.

Respondent DOHMH cross-moves to dismiss the petition pursuant to CPLR §3211(a)(2), for lack of subject matter jurisdiction, and also CPLR §3211(a)(7), for failure to state a cause of action.

Respondent avers that "[i]nsofar as the Court determines that the challenged documents are not responsive to the [FMA] FOIL request, then the Court has no subject matter jurisdiction to determine whether FOIL exemptions would have been properly invoked to redact or withhold a document if the document was responsive to the FOIL request". The Court finds this argument unpersuasive.

Where, as here, petitioner is not seeking compensation for some wrongdoing by the respondent, but merely is seeking to have respondent comply with a law, in this instance New York Public Officers Law §89, Freedom of Information Law, which provides for payment to petitioner incidental to the relief sought, the Supreme Court has subject matter jurisdiction over the proceeding. (See Mtr. of Gross v. Perales 72 N. Y2d 231, 235-36 [1988]; Morell v. Balasubramanian, 70 N. Y2d 297 [1987]).

However, "[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity" (See §CPLR 7806). On the other hand, where a party seeks only money damages against the State, the proper forum for such an action is the Court of Claims (N.Y. Const., art. VI, § 9; Court of Claims Act §§ 8, 9; See, Cass v. State of New York, 58 N.Y.2d 460, 463). Therefore the cross-motion to dismiss for lack of subject matter jurisdiction is denied.

Considering the cross-motion to dismiss for petitioner's failure to state a cause of action, the sole criterion on a 3211(a)(7) motion is whether the factual allegations articulated in the four corners of the complaint itself manifest any cognizable cause of action (see Klepetko v. Reisman, 41 AD 3d 551 [2nd Dept 2007]; Operative Cake Corp. v. Nassour, 21 AD 3d 1020 [2nd Dept 2005]). "When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Goldman v. Metropolitan Life Ins. Co., 5 NY 3d, at 570-571 [internal quotations omitted]).

Further, "on a motion to dismiss pursuant to CPLR §3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such affidavits, the facts alleged therein must also be assumed to be true" (see Barry's Auto Body of NY, LLC v. Allstate Fire & Cas. Ins. Co., 190 AD3d 807, 809 2d Dept [2021]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its [causes of action], of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (see Barry's Auto Body of NY, LLC, supra; Doe v. Ascend Charter Schs., 181 AD3d 648, 649-650 2d Dept [2020]).

The burden "never shifts to the non-moving party to rebut a defense asserted by the moving party" on a motion to dismiss under CPLR §3211(a)(7). (see Bianco v. Law Offs. of Yuri Prakhin, supra, at 1328; Weill v. East Sunset Park Realty, LLC, 101 AD3d 859, 860 [2d Dept. 2012]; Sokol v. Leader, supra, at 1181)

Plaintiff's allegations contained within the four corners of the application, challenging the redactions or withholding of certain information that petitioner avers is to be produced in response to his FMA FOIL Request, and injury to petitioner proximately caused thereby, if true, state a cognizable cause of action capable of redress.

Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (Bianco v. Law Offs. of Yuri Prakhin, 189 AD3d 1326, 1328-1329 2d Dept. [2020]) Therefore the cross-motion to dismiss for failure to state a cause of action is denied.

After an in camera inspection and review of the subject documents and redactions, the application by petitioner for an order to compel discovery of the subject documents which were withheld and production of unredacted versions of those documents which were redacted by respondent, and for an award of costs and attorneys fees is denied; and cross-motion by respondent for an order to dismiss is denied.

Accordingly, the petition is denied and dismissed in its entirety, and the cross-motion is denied, for the reasons stated above.

Respondent my enter judgment accordingly.

Dated: June 12, 2023



KEVIN J. KERRIGAN, J.S.C.

