

Roth & Roth, LLP v New York City Tr. Auth.
2024 NY Slip Op 32787(U)
August 7, 2024
Supreme Court, New York County
Docket Number: Index No. 155689/2018
Judge: Denise M. Dominguez
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NYC Police Department, and which cameras were owned, operated and controlled by other government agencies, private contractors, or any other entity (NYSCEF Doc. 3).

Transit timely denied the FOIL request by letter dated January 24, 2018, relying upon NY Public Officers Law §89[3][a] and §87[2][f] and stating that the records requested could not be turned over as such records were not reasonably described and could endanger the life and safety of people since such information could potentially be exploited by terrorists (NYSCEF Doc. 4). By letter dated January 30, 2018, Roth & Roth appealed the denial and argued that the records requested were proper under FOIL and that disclosure would not create a safety risk since it was not asking for the exact locations of the cameras (NYSCEF Doc. 5). By letter dated, February 16, 2018, Transit denied the appeal relying on Public Officers Law §87[2][f] and stating that even if Roth & Roth was not requesting the specific locations of the cameras, the denial was proper because turning over the names of the stations with cameras and the entities that controlled the cameras, would pose a risk to public safety in the wrong hands (NYSCEF Doc. 6).

Roth & Roth, pursuant to Art. 78, now moves for an order to compel Transit to provide all the records sought and to provide with specificity the records that are exempt and why. Roth & Roth argues that the Petition should be granted on the grounds that Transit's denial was a blanket denial not in compliance with FOIL. Transit in its answer argues that it did not provide a blanket denial and that the records sought presented a safety risk to the public.

Discussion

In deciding matters pursuant to Art. 78, it has long been held that judicial review is limited only to whether there was a rational basis for the public entity's determination, whether the determination was arbitrary and capricious, or whether there was an abuse of discretion (*see Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester*

Cnty., 34 NY2d 222 [1974]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *see also* CPLR §7803(3)).

However, when the challenge to a governmental decision is based on a denial of a FOIL request, courts must apply a different rule. It is presumed that all records of public entities are open to public inspection and copying, and when the records requested are not turned over, the public entity bears the burden of showing that the records fall within an exemption to disclosure (*New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 AD3d 153 [1st Dept 2010]; *see e.g. Matter of Capital Newspapers v. Whalen*, 69 NY2d 246 [1987]; NY Pub. Officer Law §87(2)).

FOIL was enacted under the fundamental principal that in a free society, the government is responsible to the public and the public has the right to be aware of the government's actions (NY Pub. Off Law §84). At the same time the legislature recognized that certain governmental records must be kept confidential and enacted an entire section of exemptions. (NY Pub. Officers Law § 87(2) and §87 (2)(a); *see M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 NY2d 75 [1984]; *Fink v. Lefkowitz*, 47 NY2d 567 [1979]; *Johnson v. New York City Police Department*, 257 AD2d 343 [1st Dept. 1999]; *Bellamy v. New York City Police Dep't*, 87 AD3d 874 [1st Dept 2011]).

Pursuant to NY Public Officers Law §87(2)(f), a governmental entity shall deny access to records if the disclosure would endanger the life or safety of any person and the entity meets its exemption burden by demonstrating a mere possibility of endangerment. (NY Pub. Officer Law §87(2)(f); *Bellamy*, 87 AD3d 874).

Here, Transit with the answer and accompanying affidavits submitted, more than meets its exemption burden under NY Pub. Officer Law §87(2)(f), and with the affidavit of Manpreet Kaur of the FOIL unit, explains that the denial was not a blanket one. Transit submits an affidavit by

Christopher Higgins, Chief of the Counter-Terrorism Command, Control & Operations Division of Security. He states under oath that he works closely with the NYC Police Department and other federal agencies to share credible evidence about terrorist threats in the NYC subway system. He provides specific examples of two terrorist attacks in subway systems in other countries. Notably he discusses a third terrorist attack that occurred in the NYC subway system on December 11, 2017, only over a month prior to Roth & Roth making its FOIL request on January 19, 2018. In his professional opinion, mass transportation with its predictable large number of users, is considered a “high level target” for terrorists who plot activities under a maximum “kill zone.” He concludes that threats in the subway station are real and constant and disseminating the names of stations with cameras and ownership “would be highly dangerous in today’s terrorist threat environment.”

The affidavit of Robert Levine, Senior Director of Security Capital Programs for the Department of Subways, who also serves as the Security Sensitive Information Coordinator for Transit, also states under oath that the records requested are security sensitive material that should not be disseminated to the public. According to Mr. Levine, the subway system is a high level target for terrorist activities with consistent and credible threats. In his professional opinion disseminating the requested information would undermine the safety of the subway system by providing vulnerabilities within the subway system.

Thus, Transit has made a particularized showing that disclosure of the location of any and all cameras in subway stations and their ownership, presents more than a possibility of endangering the public, instead it presents a real probability that such disclosure would endanger the lives and safety of many. (*see e.g.*, *Digital Forensics Unit, Legal Aid Soc’y v. Recs. Access Officer, New York City Police Dep’t*, 214 AD3d 532 [1st Dept 2023]; *Empire Ctr. for Pub. Pol’y v. New York*

City Off. of Payroll Admin., 187 AD3d 435 [1st Dept 2020]; see also Rankin v. Metropolitan Transp. Authority, 2010 NY Slip Op. 32161(U), 2010 WL 3285633, Index No. 101127/2010 [N.Y. Sup. Ct. 2010]).

Accordingly, it is hereby

ORDERED that the Petition is denied in its entirety and the proceeding is dismissed; and it is further

ORDERED that within twenty (20) days, Petitioner shall serve a copy of this Order with notice of entry upon all parties and the Clerk of the Court 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).

August 7, 2024

DATE

DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN