

NYP Holdings, Inc. v Metropolitan Transp. Auth.

2025 NY Slip Op 30641(U)

January 31, 2025

Supreme Court, New York County

Docket Number: Index No. 153986/2024

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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INDEX NO. 153986/2024

NYP HOLDINGS, INC., NOLAN HICKS

MOTION DATE 04/08/2024

Petitioners,

MOTION SEQ. NO. 001

- v -

METROPOLITAN TRANSPORTATION AUTHORITY,

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 15, 16, 17, 31, 32, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46

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

Upon the foregoing documents, this motion is decided as follows. This is a special proceeding brought pursuant to CPLR Article 78 arising from petitioners NYP HOLDINGS, INC. ("NYP") and NOLAN HICKS (collectively "petitioners") Freedom of Information Law ("FOIL") request R001413-101723 to the METROPOLITAN TRANSPORTATION AUTHORITY ("MTA"). Petitioners seek an order pursuant to CPLR Article 78 and New York Public Officers Law Article 6 §§ 84-90 to compel the respondents to disclose the requested records and award attorney's fees and costs. Respondents oppose, arguing that the information sought is protected as intra-agency information, that the safety endangerment exception applies to the redacted information and that some of the information sought was not the subject of the FOIL request submitted by the petitioners. For the reasons that follow, the petition is denied.

Facts

The facts alleged in the petition are as follows. NYP is a corporation that publishes the New York Post (the "Post"). Hicks is a reporter who writes about politics and city agencies, including transportation. On October 17, 2023, Hicks submitted FOIL request R001413-101723 on behalf of

the Post through MTA's online portal. The request was seeking "Track alignment plan and profile schematics/drawings for the Second Avenue Subway Phase 1" and "Track alignment plan and profile schematics/drawings for the Second Avenue Subway Phase 2".

On November 7, 2023, the MTA denied the FOIL request pursuant to Public Officers Law § 87(2)(f), on the grounds that the disclosure "could endanger the life and safety of any person." The Post, via counsel, submitted an appeal of the denial on November 30, 2023, arguing that "MTA's notification that it is denying the FOIL Request does not elaborate what information in these records could conceivably imperil MTA customers or personnel." On December 15, 2023, MTA's Deputy General Counsel, Harris Berenson, Esq., responded to the appeal granting the appeal in part by instructing the MTA to provide the Phase 1 schematics within 15 days. The response confirmed the denial of the Phase 2 schematics, citing POL § 87(2)(f) and added two additional bases for denial.

The denial letter stated that pursuant to POL § 87(2)(c), the disclosure of the documents "would impair present or imminent contract awards or collective bargaining negotiations." This was based on the fact that "[t]he procurement process for this contract is not yet completed, and as such, release of said records could impair a pending procurement" and that the disclosure of the contract could lead to unequal knowledge between bidders. Additionally, the letter determined that the records were protected under POL § 87(2)(g) as intra-agency documents on the basis that "they are internal agency material. Further, the subject documents are still in draft format, not considered to be final, and are deliberative in nature." The letter also invited petitioners to resubmit a FOIL request for the Phase 2 schematics following the "finalization of these records and finalization of the procurement process", holding the right to invoke POL § 87(2)(f) in response to a future FOIL request.

MTA did not provide the records related to Phase 1 within 15 days, and on January 16, 2024, counsel for petitioners emailed the appeal officer noting they were late and requesting the documents.

The records were sent shortly thereafter, however the station schematics were not included in the documents provided. On January 25, 2025, petitioners emailed Berenson asking why the schematics were not included in the records provided. On February 1, 2024, Berenson responded, informing petitioners that MTA would investigate why they had not been included in the production.

On February 22, 2024, Berenson responded that the station drawings were not encompassed by the original FOIL request, as it did not specify “station schematics.” However, the email also stated that the MTA would provide the schematics “with any necessary redactions under the FOIL statute”. The Phase 1 station schematics were provided on February 29, 2024, with the description of the station rooms redacted. The instant petition was submitted on April 8, 2024.

Discussion

While agency actions are typically reviewed under an arbitrary and capricious standard, in the context of a FOIL request the court “is to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure (*New York Comm. for Occupational Safety and Health v Bloomberg*, 72 AD3d 153, 158 [1st Dept 2010]; see also *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). Mere speculation that harm will result from the disclosure of the records is not sufficient to warrant an exception to disclosure (see *Matter of Grabell v New York City Police Dept.*, 47 Misc 3d 203, 210 [Sup Ct, NY County 2014], *mod* 139 AD3d 477 [1st Dept 2016]; *Matter of Mack v Howard*, 91 AD3d 1315, 1316 [4th Dept 2012]).

Under POL § 87(2)(f), a denial may be made of records that “if disclosed could endanger the life or safety of any person.” “The agency in question need only demonstrate a possibility of endanger[ment] in order to invoke this exemption” (*Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011] [internal quotation marks omitted], *affd* 20 NY3d 1028 [2013]). Generally, the agency must show that disclosure of the record will endanger a specific person or

group of people (*see e.g. id.* at 875; *Matter of Hutchinson v Annucci*, 189 AD3d 1850, 1855 [3d Dept 2020]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 209 AD3d 1208, 1212 [3d Dept 2022], *lv granted*, 39 NY3d 910 [2023], *affd*, 42 NY3d 936 [2024]).

Petitioners argue that the MTA failed to provide any justification for redacting the Phase 1 station schematics. MTA contends that the schematics were properly redacted pursuant to POL § 87(2)(f) because the redacted information could aid a terrorist or criminal attack against the subway. The essence of the MTA's argument is that it is necessary to redact the labels of non-public rooms to prevent criminals from identifying rooms with sensitive functions that would be of interest in an attack. If unredacted versions of the schematics were made public, the potential for a terrorist attack would be increased as anyone with access to the documents could identify sensitive areas to attack without first having to visit them. If the MTA only redacted sensitive areas, attackers would still be able to identify which rooms are sensitive, even if they did not know exactly what they contained, and therefore all labels must be redacted to make sure it is not clear which rooms are better targets.

MTA relies on *Rankin v Metro. Transp Auth.*, where the court affirmed that maps provided in a FOIL request were properly redacted under the public safety exemption (2010 NY Slip Op 32161[U] [Sup Ct, NY County 2010]). In *Rankin*, the court said in part:

Respondent has set forth the kind of information that would be available if the NYCTA subway station blueprints were made available to petitioner or other members of the public and how such disclosure could have potentially devastating effect by making available to potential terrorists highly sensitive material concerning structural details of the stations, the location of electrical, computer and other equipment and other information which would enhance the ability of such terrorist to maximize the damage to the NYCTA subway system and increase the loss of lives. Moreover, respondent has made clear that the danger posed to the life and safety of riders and NYCTA employees by the disclosure of the materials sought is more than just speculative, but rather, based upon the number of terrorist attacks that have targeted transit systems around the world in recent years, is a very real and potential danger that far outweighs petitioner's right to access. (*id.*)

In reply, Petitioners argue that “the record does not contain a specific and particularized justification for redacting rooms on the Phase 1 operational drawings (or the Phase 2 station schematics)”. The court disagrees. The potential threat of disclosing an unredacted schematic of the subway station poses similar threats to the maps at issue in *Rankin*. Therefore, the MTA was correct in providing a redacted version of the schematic, as it falls squarely within the POL § 87(2)(f) public safety exemption.

Petitioners also argue that the MTA wrongfully withheld the Phase 2 materials. The MTA assert that POL § 87(2)(g) intra-agency exception applies to the records. POL § 87(2)(g) exempts any intra-agency materials that are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations or external audits. The MTA claims that the Phase 2 Documents are “internal draft drawings” and only hypothetical in nature.

“The intra-agency exception exists to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure” (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 478 [2005]). “Factual data simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 268 [1996]). “By contrast, any impressions, recommendations, or opinions recorded in the [records] would not constitute factual data and would be exempt from disclosure” (*Gould*, 89 N.Y.2d at 277).

Petitioners assert that the documents are factual data and not opinions, and therefore not covered under the exception and cites *Matter of Humane Socy. of U.S. v Brennan*, as support that the Schematics constitute factual data (53 AD3d 909, 911 [3d Dept 2008]). In *Brennan*, the third department determined that portions of a document containing “objective factual information pertaining to the locations in which samples tested positive for avian influenza, the procedure for the

disposal of manure and a description of the manner in which ducks are moved within the farm” were not exempt from disclosure (*id.*). However, there were portions of that same document that were considered intra-agency communications which were exempt from disclosure, such as “agency discussions, recommendations and opinions” which were correctly redacted (*id.*).

MTA argues in opposition that the information contained in the Phase 2 records are subjective rather than factual information, as they relate to possible yet non-final designs and are still in the design phase of the project. Unlike Phase 1, the Phase 2 stations have not been built yet and the track alignment and schematics are subject to change and additional versions may be drafted in the future.

Petitioners contend that a document called the Project Management Oversight Contractor Risk Assessment Refresh Report (“PMOC Report”), which contains information on four contracts that encompass Phase 2, shows that the relevant design work is completed. Petitioners further argue that the PMOC Report reveals that the contract bid documents for Contract 1 have been completed and that all technical specifications and design drawings have been developed for Contract 2 and Contract 3 and that there is no “deliberation” ongoing which would exempt the Phase 2 records.

MTA explains that Phase 2 is being built using a “design-build” method in contrast to the “design-bid-build” method used in Phase 1. The MTA submitted an affirmation from their Senior Director of Construction Compliance at the MTA Construction & Development Company (“MTACDC”) explaining the difference between the methods. In the design-bid-build process, the MTACDC team finalized the designs and then had contractors bid on those designs. In the design-build method, the MTACDC only creates basic non-final plans “that dictate only certain essentials and otherwise provide the concept of what is needed”. The contractors who bid will “ultimately both develop the final designs and be responsible for the construction”. Further, the PMOC Report was not created by the MTA but by a contractor, Burns Engineering, Inc., “to confirm[] that the MTA has

established appropriate budget, schedule, and mitigation steps based on the risks that may be present.”

The court agrees with the MTA that the Phase 2 schematics are exempted from disclosure under the intra-agency exemption. The MTA correctly points out that the information disclosed in *Brennan* related to the description and structure of an actual farm already in existence, not hypothetical plans subject to change, and that other portions of the document were exempted. The records sought related to Phase 2 are still in draft form and not the final product or factual data as argued by the petitioners. In fact, these docs represent the internal recommendations and opinions of the MTA in the planning for Phase 2 of the Second Avenue subway line. In the appeal denial letter, the MTA noted that petitioners could submit a new FOIL request seeking the Phase 2 documents after the finalization of the documents, provided that any information that falls within the POL § 87(2)(f) exception will be redacted prior to disclosure. Based on the foregoing, the MTA is not required to disclose the Phase 2 related records.

Because the intra-agency exception applies to the Phase 2 records and the Phase 1 schematics were already provided, the court declines to determine if the schematics were included in the FOIL request for “[t]rack alignment plan and profile schematics/drawings”. Petitioners may request the Phase 2 schematics once they are final in a future FOIL request.

Petitioners’ request for attorney’s fees and other litigation costs is denied. POL § 89 provides an award for such fees “where the petitioner has substantially prevailed in the FOIL proceeding and the agency . . . lacked a reasonable basis for denying access to the requested records” (*Matter of Madeiros v. New York State Educ. Dep’t*, 30 NY3d 67, 78 [2017] [internal quotation marks omitted]). Here, petitioners did not substantially prevail in this FOIL proceeding, and therefore the statutory requirements for fees and costs have not been met.

Conclusion

Based on the foregoing, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

1/31/2025
DATE


LYNN R. KOTLER, 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"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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