

**Matter of Bronx Defenders v New York City Admin.
for Children's Servs.**

2025 NY Slip Op 31738(U)

May 12, 2025

Supreme Court, New York County

Docket Number: Index No. 154472/2023

Judge: Shahabuddeen A. Ally

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAHABUDDEN A. ALLY
Justice

PART 16

In the Matter of

THE BRONX DEFENDERS,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

The NEW YORK CITY ADMINISTRATION FOR
CHILDREN'S SERVICES, and JESS DANHAUSER, in his
official capacity as Commissioner of the Administration
for Children's Services,

Respondents.

INDEX NO. 154472/2023

MOTION DATE 5/17/2023

MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to **ARTICLE 78 (FOIL)**: 1-48, documents submitted for *in camera* review

On February 11, 2025, the Court issued an Interim Order in this special proceeding granting the Verified Petition and Notice of Petition insofar as requiring respondents NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES and JESS DANHAUSER, in his official capacity as Commissioner of the Administration for Children's Services (together, "ACS"), to submit withheld, redacted, and unredacted copies of documents sought by THE BRONX DEFENDERS ("Petitioner") via its Freedom of Information Law ("FOIL") request, dated December 8, 2021 (the "FOIL Request"), to the Court for *in camera* review. The Court assumes familiarity with the Interim Order.

I. PROPRIETY OF REDACTIONS AND WITHHOLDINGS

On April 4, 2025, and April 16, 2025, in compliance with the Interim Order, Respondents submitted two separate privilege logs and USB flash drives containing the withheld, redacted, and unredacted documents responsive to the FOIL Request. These documents are comprised of various PDF files and Outlook emails. The Court has reviewed the redacted, unredacted, and withheld documents and now determines whether exemptions were properly applied according to the claimed privileges under New York Public Officers Law (“POL”) § 87(2).

A. Redactions of personal information allegedly pertaining to individuals who are not city employees.

As detailed in the Article 78 Privilege Logs (the “Logs”) submitted by ACS, POL § 87(2)(b) is repeatedly applied to justify redactions of names, email addresses, and phone numbers of individuals who participated in responsive email chains, but who are not state employees.

Pursuant to POL § 87(2)(b), an agency “may deny access to records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.” POL § 89(2)(a) states that, absent guidelines promulgating “deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy . . . an agency may delete identifying details when it makes records available.” POL § 89(2)(b) provides an inexhaustive list of unwarranted invasions of personal privacy, including “disclosure of employment,” “disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency,” and “disclosure of electronic contact information, such as an e-mail address or a social network username.”

Most of ACS’s applied invasion-of-personal-privacy exemptions pertain to the redaction of non-ACS and non-state employees’ names, emails, and phone numbers within the responsive emails. In determining whether the “unwarranted invasion of personal privacy” exemption applies, the Court must balance the “privacy interests at stake against the public interest in disclosure of the information.” *The N.Y. Times Co. v. City of N.Y. Fire Dep’t*, 4 N.Y.3d 477, 486 (2005). ACS applied POL § 87(2)(b) to redact certain names, addresses, and phone numbers of non-ACS

employees to prevent an unwarranted invasion of their personal privacy. When considered on its own, this redacted information is neither substantively responsive to the FOIL Request, nor representative of “statistical or factual tabulations or data,” but instead merely provides the contact information for individuals employed by an external entity. *See Sell v. N.Y.C. Dep’t of Educ.*, 135 A.D.3d 594, 595 (1st Dep’t 2016). Because the redacted information falls within the POL § 87(2)(b) exemptions and since the risk of an unwarranted invasion of personal privacy for third-party individuals outweighs the public interest in disclosure of the information, ACS’s redactions pursuant to § 87(2)(b) are reasonable and justified.

B. Redactions to and withholding of intra-agency communications pertaining to deliberative processes, which are allegedly not subject to the four statutory exemption exceptions.

The Logs justify the other redactions through application of POL § 87(2)(g). POL § 87(2)(g)(i) allows an agency to deny access to documents or portions thereof where the materials pertain to intra-agency documents that do not fall under the four exemption exceptions: (1) statistical or factual tabulations or data, (2) instructions to staff that affect the public, (3) final agency decisions or policy, and (4) external audits. Notably, intra-agency documents containing statistical or factual tabulations remain subject to FOIL disclosure even when they are disclosed as a component of the agency’s deliberative process. *See Gould v. N.Y.C. Police Dep’t*, 89 N.Y.2d 267, 276 (1996).

Because the redactions claiming exemptions under POL § 87(2)(g)(i) adequately relate to deliberative intra-agency discussions absent a final agency decision or policy, the Court must now determine whether the withheld excerpts contain “statistical or factual tabulations.” Though not clarified by statute, “factual data” has been described as “objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” *Id.* at 276-77. This definition must be considered in tandem with the intra-agency exemption’s purpose, which is to safeguard “the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers . . . [because] conduct[ing] this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.” *Sea Crest*

Const. Corp. v. Stubing, 82 A.D.2d 546, 549 (2d Dep't 1981) (citing *Ryan v. Dep't of Just.*, 617 F.2d 781, 789-90 (D.C. Cir. 1980)).

Upon review, the Court finds that ACS's claimed intra-agency exemption-based redactions pertain to deliberative, opinion-based discourse between colleagues. Accordingly, these redactions are not comprised of "statistical or factual tabulations," as they do not contain the objective information for which the "factual data" exemption exception applies. Furthermore, none of the other three exemption exceptions apply to these communications, which are devoid of final agency decisions, instructions to staff that impacts the public, or external audits. See POL § 87(2)(g)(i). Because of the deliberative nature of the redacted text and in the interest of upholding the freedom of government advisors and decisionmakers to freely communicate, the Court finds that ACS has adequately justified its redactions pertaining to the intra-agency deliberation exemption.

ACS also asserts the intra-agency deliberative-process exemption as the privilege justification for withholding the "Safety Culture" document listed under Category No. 83. Category No. 83's withheld materials include an email sent on May 7, 2021, between two ACS employees, and an attached Word document, "used for training and internal conversation." Upon review, the Court finds that this document is subject to one of the four POL § 87(2)(g) exemption exceptions. Specifically, it falls under POL § 87(2)(g)(ii), which covers "instructions to staff that affect the public," since the document provides instruction and guidance to the agency's staff, thereby affecting ACS's programs, which in turn directly impacts the public.

While the Court agrees that the claimed intra-agency privilege justifies ACS's withholding of the deliberative email body text within Category No. 83, it determines that POL § 87(2)(g) may not be extended to deny disclosure of the "Safety Culture" Word attachment. Because this document reflects agency policy decisions and was prepared to train and guide staff as they navigate ACS programs and interact with the public, it triggers the POL § 87(2)(g)(ii) exception to the intra-agency exemption. Consequently, the Court hereby orders that the agency produce an unredacted copy of the "Safety Culture" Word document pursuant to Petitioner's FOIL Request.

C. Redactions to and withholding of documents that are allegedly exempt from disclosure pursuant to the attorney client privilege.

Alleging that several materials are exempt from disclosure under POL § 87(2)(a) and pursuant to the attorney-client privilege, ACS has withheld several emails and attachments that were either prepared by an attorney allegedly in anticipation of litigation or that contained confidential communications between the agency and counsel.

POL § 87(2)(a) authorizes an agency to deny access to records “specifically exempted from disclosure by state or federal statute.” Though ACS does not specify the statute relied upon here, it reasonably follows that an application of POL § 87(2)(a) to withhold purportedly confidential attorney-client materials must satisfy CPLR § 4503. CPLR § 4503 codifies New York’s attorney-client privilege and prohibits the disclosure of any confidential communication made between an attorney and his or her client “in the course of professional employment,” absent the client’s waiver of said privilege. *See* CPLR § 4503(a)(1). As such, the attorney-client privilege may only be used to justify withholding confidential communications between an attorney and their client that were made within the scope of their professional relationship. *See id.*

First, ACS employs POL § 87(2)(a) and applies the attorney-client privilege to responsive emails involving agency employees and agency counsel. Because these materials were transmitted between attorney and client, within the scope of their professional relationship, and under the assumption that they would remain confidential, the Court finds that the attorney client privilege adequately justifies ACS’s relevant withholdings and redactions.

Second, ACS applies the same statute to justify withholding emails containing legal deliberations between non-attorney ACS employees. While these categories cannot be withheld upon the basis of attorney-client privilege—as they do not contain communications between a client and attorney in relation to professional legal services—disclosure may instead be denied under the intra-agency deliberative-process exemption, which is simultaneously asserted by ACS.

The final category of ACS’ attorney-client privilege claims pertains to redactions within documents that, while not strictly comprised of confidential communications between attorney

and client, contain confidential training materials put together by agency attorneys in anticipation of litigation. In *Appellate Advocates v. New York State Department of Corrections & Community Supervision*, the Court of Appeals deemed training materials containing confidential legal advice to be exempt from disclosure. See 40 N.Y.3d 547, 552-54 (2023). The Court reasoned that

[c]ounsel is free to determine the best method to communicate legal advice to the client. . . . The lawyer's communication of that analysis and advice is privileged regardless of whether counsel communicates its view to the client in a slide show, as opposed to in a letter or memorandum. Nor does it matter that this analysis and advice is communicated during a training session. What matters is that the information is advice on the law pertaining to the commissioners' decisions[.]

Id. at 554. Furthermore, merely because

"nonprivileged information is included in an otherwise privileged lawyer's communication to its client . . . does not destroy the immunity." . . . The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.

Id. at 552 (quoting *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 378-379 (1991)). Accordingly, ACS's attorney-made training materials may be redacted pursuant to POL § 87(2)(a) and the attorney-client privilege.

D. Redactions to and withholding of documents containing details regarding ACS's child-protection-investigation process.

ACS also asserts the POL § 87(2)(f) safety exemption, alleging that the disclosure of details pertaining to ACS's child-protective services would expose the agency's investigative process and put vulnerable persons at risk of harm.

To claim the safety exemption, an agency must show the mere "possibility of endanger[ment]." *Bellamy v. N.Y.C. Police Dep't*, 87 A.D.3d 874, 875 (1st Dep't 2011). In *Conolly v. New York Guard*, after *in camera* review, the Third Department affirmed the NYPD's assertion of POL § 87(2)(f) and exempted the disclosure of materials describing methods used to communicate and instruct the New York Guard in the event of mobilization, determining that the release of these documents "present[ed] the possibility of endangering the safety of members of the Guard or others." 175 A.D.2d 372, 373 (3d Dep't 1991). The Court agrees that the disclosure of

ACS's critical and confidential investigative processes would similarly endanger the safety of already vulnerable populations and thereby deems ACS's application of POL § 87(2)(f) to be valid.

E. Conclusion.

Based on the *in camera* review of ACS's redacted, unredacted, and withheld FOIL responsive materials, the Court concludes that all redactions were properly applied and all disclosure denials were properly made *except for*: the withholding of the "Safety Culture" Word document listed under Category No. 83. Accordingly, the Court orders that this document be produced to Petitioner.

II. ATTORNEY'S FEES

Pursuant to POL § 89(4)(c)(ii), the Court must:

assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

Upon review, the Court finds that Petitioner has not "substantially prevailed." Although the Article 78 proceeding resulted in ACS' disclosure of previously undisclosed FOIL-responsive materials, the vast majority of the agency's claimed exemptions have been sustained. *See Cook v. Nassau County Police Dep't*, 140 A.D.3d 1059, 1060 (2d Dep't 2016).

Accordingly, the statutory requirements to order payment of attorney's fees and other litigation costs have not been met, and the Court now exercises its discretion by declining to make such an award. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby,

ORDERED that Petitioner's Verified Petition and Notice of Petition are **GRANTED IN PART** to the extent set forth herein and otherwise **DENIED IN PART**; and it is further

ORDERED that, within 30 days of entry of this Decision and Order, ACS shall produce to Petitioner the unredacted "Safety Culture" Word document attachment contained within Category No. 83; and it is further


ORDERED that the ACS shall serve a copy of this Decision and Order upon Petitioner and the Clerk of the General Clerk's Office, with notice of entry within twenty (20) days thereof; and it is further

ORDERED that 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 (Revised August 15, 2019);¹ and it is further

ORDERED that the Clerk shall mark Motion Seq. No. 1 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision and order of the Court.

<p>May 12, 2025</p> <hr/> <p>DATE</p>	 <hr/> <p>SHAHABUDDEN A. ALLY, A.J.S.C.</p>			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	STAY CASE
			<input type="checkbox"/>	REASSIGN

¹ The protocols are available at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf>.