

Century Indem. Co. v Office of the N.Y. Attorney Gen.
2025 NY Slip Op 35576(U)
February 10, 2025
Supreme Court, Albany County
Docket Number: Index No. 909064-24
Judge: Gerald W. Connolly
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STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

CENTURY INDEMNITY COMPANY,

Petitioner,

- against -

DECISION AND ORDER

Index No.: 909064-24

OFFICE OF THE NEW YORK ATTORNEY GENERAL,

Respondent.

(Supreme Court, Albany County Special Term)

APPEARANCES: Avi Schick, Esq.
 Faegre Drinker Biddle & Reath LLP
 1177 Avenue of the Americas, 41st Floor
 New York, New York 10036

Ever M. Hess, Esq.
Attorneys for Petitioner
Faegre Drinker Biddle & Reath LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005

Letitia James, Esq.
Attorney General of the State of New York
Lauren R. Eversley, Esq.
Assistant Attorney General, Of Counsel
Attorneys for Respondent
The Capital
Albany, New York 12224

Connolly, J:

Before the Court is an Article 78 petition filed by Century Indemnity Company (Century) against the Office of the New York Attorney General (OAG). Century is challenging the OAG's denial of their Freedom of Information Law (FOIL) request.

BACKGROUND

In September 2018, the OAG began investigations into each of the dioceses of the Roman Catholic Church in New York, including the Archdiocese of New York (ADNY), issuing subpoenas for documents to each of the dioceses (NYSCEF Doc No. 23, ¶¶ 2 & 3).¹ The OAG's investigations "focused on the institutional response by each of the dioceses to allegations of sexual abuse of minors and vulnerable adults by clergy and other diocesan employees" (*Id.*, ¶ 3).

On February 1, 2024, Petitioner Century submitted a FOIL request to Respondent OAG via Century's attorney, Nathaniel Marmon.² The FOIL request sought records obtained by the OAG in connection with its September 2018 subpoena to the ADNY. On February 9, 2024, the OAG's Records Access Officer asked Century to clarify its FOIL request, and, on February 13, 2024, Century did.

Century's revised FOIL request stated that Century was seeking via FOIL:

All documents obtained by the NYAG in connection with the subpoena issued on or around September 6, 2018 to The Archdiocese of New York, together with any other documents obtained or generated by the NYAG's office in connection with its ongoing investigation of sexual abuse by the clergy and employees of The Archdiocese of New York, including but not limited to: complaints against Catholic clergy and other diocese employees; diocese personnel records; diocese disciplinary records; records of proceedings of the dioceses' independent review boards; diocese "secret archive" files; internal diocese documents and/or databases on clergy or other employees accused of sexual assault or related acts; and all NYAG documents concerning sexual abuse by the Catholic Church including transcripts and/or recordings of interviews with alleged perpetrators, supervisors, members of church leadership, or victims of sexual abuse, together with any associated subpoenas, correspondence, production letters, or other related communications about the requested documents.

¹ Each diocese is a separate not-for-profit religious corporation, subject to the jurisdiction of the OAG (*id.*).

² The FOIL request (as amended) at issue in this case was submitted by attorney Nathaniel Marmon. Marmon has attested in the verification to the Petition in this Article 78 proceeding that he is "an attorney for the Petitioner" who submitted the FOIL request and related follow-up "[o]n behalf of Petitioner" Century (NYSCEF Doc No. 1).

In response, on April 3, 2024, Assistant Attorney General Abisola Fatade advised Century on behalf of the OAG that:

[T]he records that respond to your request are exempt from disclosure and have been withheld pursuant to... Public Officers Law § 87(2)(e), because the documents requested were compiled for law-enforcement purposes and would, if disclosed, interfere with law-enforcement investigations or judicial proceedings.

In a letter dated May 3, 2024, Century appealed this decision. OAG FOIL Appeals Officer Kathryn Sheingold, in a letter dated May 17, 2024, disclosed certain responsive records³ but withheld the remaining responsive records, citing Public Officers Law § 87(2)(e)(i), Public Officers Law § 87(2)(a & b), Public Officers Law § 89(2)(b)(iv), Public Officers Law § 87(2)(a & g), Civil Practice Law & Rules § 3101(c), and Civil Rights Law § 50-a.⁴

In September 2024, Century filed an Article 78 petition, challenging the OAG's denial of Century's FOIL request, asking that this Court issue a judgment (a) reversing the denial of the FOIL request, (b) instructing the OAG to produce all records responsive to the FOIL request, and (c) awarding Century its costs and attorneys' fees.

ANALYSIS

Century maintains that the OAG improperly denied its FOIL request and "failed to provide the necessary, specific, and particularized justification for withholding the documents sought by the FOIL request" (NYSCEF Doc No. 1, ¶¶ 35 & 36). Century also asserts that the OAG cannot

³ Minimal records were disclosed, compared to what was requested. For example, Official Catholic Directories (updated by year) constituted the overwhelming majority of the pages of disclosure. The additional records disclosed included things that are likely already available in substance on the internet, such as documents related to the ADNY's Safe Environment Program. Beyond that, no witness interviews were disclosed, no victim complaints (redacted, if appropriate) were disclosed, no employment files of priests who were accused were disclosed, no diocese disciplinary records or records of proceedings of the dioceses' independent review boards were disclosed, etc.

⁴ Sheingold mistakenly cited repealed Civil Rights Law § 50-a instead of correctly citing Civil Rights Law § 50-b.

rely upon exemptions to FOIL that were not raised or cited in the OAG's initial denial of the FOIL request (*Id.*, ¶ 38).

Century is seeking documents produced to the OAG by the ADNY in connection with the OAG's September 2018 subpoena, and Century is seeking records generated by the OAG in connection with its investigation of sexual abuse by the clergy and employees of the ADNY. Century specified that this request includes materials such as "all NYAG documents concerning sexual abuse by the Catholic Church including transcripts and/or recordings of interviews with alleged perpetrators... together with any associated... correspondence, production letters, or other related communications about the requested documents" (NYSCEF Doc No. 6).

Initially, the OAG denied this request, explaining that "the responsive records were excepted from disclosure because the documents requested were compiled for law enforcement purposes and would, if disclosed, interfere with law enforcement investigations or judicial proceedings, under Public Officers Law § 87(2)(e)" (NYSCEF Doc No. 8). When Century administratively appealed this determination, a small number of records were disclosed while the remaining responsive records were withheld (*Id.*).

In withholding the records, the OAG categorized them as falling within one or more of the following categories: Correspondence with counsel to the ADNY; records responsive to requests for information concerning allegations of improper sexual conduct by ADNY personnel; records responsive to requests for information concerning ADNY's response to allegations of improper sexual conduct; policies and procedures relating to addressing and responding to allegations of improper sexual conduct and preventing improper sexual conduct; personnel files of those accused of improper sexual conduct; and complaints submitted to the OAG on a confidential basis.

Citing Public Officers Law § 87(2)(e)(i), the OAG justified withholding those records by maintaining that they were compiled for law enforcement purposes. Releasing them “would interfere with the ongoing investigation by revealing the OAG’s legal strategy and analysis of the strengths and weaknesses of the ADNY matter” (NYSCEF Doc No. 8). Specifically:

Disclosure of counsel’s correspondence during an ongoing investigation would likely affect future interactions with counsel, hindering the OAG’s ability to efficiently conduct the investigation. Disclosure of the substance of responsive records would affect future investigatory steps, such as witness interviews and examinations, by prematurely revealing the extent and the nature of the evidence already obtained. That in turn would impede the OAG’s ability to get other witnesses to give candid, unprepared testimony. Disclosure would likely bring unwanted publicity to the investigation and the ADNY’s response to it, interfering with the OAG’s ability to pursue the investigation in the manner it deems most effective. And disclosure likely would affect the willingness of witnesses to speak with OAG investigators, again interfering with the OAG’s ability to pursue the investigation in the manner it deems most effective.”

Moreover, citing both Public Officers Law § 87(2)(a & g) and Civil Practice Law & Rules 3101(c), the OAG advised, “OAG-generated records can also be withheld as attorney work product and as intra-agency materials that are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or decisions, or external audits” (*Id.*). The OAG also opined that, pursuant to Public Officers Law § 87(2)(a & b), Public Officers Law § 89(2)(b)(iv), and Civil Rights Law § 50-b, records “that provide identifying details of victims of sexual abuse” are “subject to redaction and withholding” (NYSCEF Doc No. 8).

Century argues that this is insufficient. Century maintains that there is no pending investigation or proceeding to justify the OAG’s reliance on Public Officers Law § 87(2)(e)(i). Century contends that, to the extent that there was an investigation or judicial proceedings, it is finished, and the OAG cannot hide behind conclusory contentions that there is an ongoing investigation. Century maintains that even if there is still the prospect of a continuing

investigation, this is not sufficient to justify reliance on the law enforcement exemption to FOIL. Further, Century contends that the OAG is issuing a categorical denial or blanket exemption, both of which are impermissible.

Century further argues that, in responding to Century's administrative appeal, the OAG improperly relied on exemptions not mentioned in its initial denial and that the OAG has not provided facts sufficient to justify a denial on any bases that were timely asserted OAG, instead relying on insufficient and conclusory allegations.

"To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public" (*Matter of Gould v. N.Y.C Police Dept.*, 89 N.Y.2d 267, 274 [1996]). "All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)" (*id.*, at 274-275). "Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (*Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 [1979]; *see also Friedman v. Rice*, 30 N.Y.3d 461, 475 [2017]).

An agency has the burden of demonstrating that an exemption to FOIL's disclosure mandate "applies by articulating a particularized and specific justification for denying access"⁵ (*Kosmider v. Whitney*, 34 N.Y.3d 48, 54 [2019] [internal citations and quotations omitted]). To satisfy this burden, "evidentiary support is needed," and an agency must do more than proffer "[c]onclusory assertions that certain records fall within a statutory exemption" (*see Mazza v. Vill. of Croton-on-Hudson*, 140 A.D.3d 878, 879 [2d Dept. 2016]; *see also Xerox Corp. v. Town of*

⁵ "[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" (*In the Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 109 A.D.2d 92, 94 [3d Dept. 1985]). The standard instead is that "the person resisting disclosure must prove entitlement to one of the exceptions" (*id.*).

Webster, 65 N.Y.2d 131, 133 [1985] [burden was not carried when “only the barest description” of the withheld records was provided and the lower court did not conduct an in camera inspection of the records]; *Church of Scientology of N.Y. v. State of New York*, 46 N.Y.2d 906, 908 [1979] [burden was not carried when “conclusory characterizations of the records sought to be withheld” were provided; there was “no tender of any factual basis on which to determine whether the materials sought” could be withheld]).

An agency can satisfy their burden to articulate a particularized and specific justification for denying access by submitting to the court the documents responsive to the FOIL request with a privilege log (*see Matter of Moody’s Corp. & Subsidiaries v. New York State Dept. of Taxation & Fin.*, 141 AD3d 997, 999 [3d Dept 2016]). “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” (*Gould*, 89 N.Y.2d at 275; *see also Hutchinson v. Annucci*, 189 A.D.3d 1850, 1855 [3d Dept. 2020] [internal citations and quotations omitted])[“[T]he preferred practice is for the agency defending nondisclosure to submit, for in camera inspection, the records sought to be disclosed, or a sample thereof, to allow an informed determination by the court on whether an exemption applies or redacted disclosure is appropriate.”)].

The question is whether the OAG provided the required “particularized and specific justification for denying access” (*Kosmider*, 34 N.Y.3d at 54 [internal citations and quotations omitted]). As noted above, “evidentiary support is needed” to satisfy this burden, and “[c]onclusory assertions that certain records fall within a statutory exemption” are insufficient (*see Mazza*, 140 A.D.3d at 879).

A. Records Pertaining To A Pending Law Enforcement Investigation

Public Officers Law Section 87 (2)(c)(i) allows an agency to deny access to records or portions of records that are compiled for law enforcement purposes, “only to the extent that disclosure would interfere with law enforcement investigations or judicial proceedings.” The OAG maintains that the bulk of the records withheld can be withheld on this basis, because, while the dioceses of Brooklyn and Buffalo have settled with the OAG, the investigations of each of the remaining six dioceses remain open.⁶ By affidavit, the OAG maintains that disclosing records obtained in the investigations “could result in third parties contacting witnesses concerning issues the OAG is investigating before the OAG investigation is complete,” which could “likely affect the OAG’s future interactions with witnesses and counsel for the Archdiocese of New York, impairing the OAG’s ability to conduct the investigation and obtain candid unprepared testimony from relevant witnesses” (NYSCEF Doc No. 23, ¶ 8). The OAG also maintains that disclosure could “bring unwanted publicity to the investigation,” which “likely would... affect the willingness of witnesses to cooperate with the OAG, further interfering with its law enforcement investigation” (*Id.*).

The OAG has not presented enough information to assess whether there is an ongoing investigation, much less a particularized showing that the requested disclosure would interfere with any investigation. Accordingly, the OAG must submit the records that it has withheld on this basis for an *in camera* review (*see, e.g., Gould*, 89 N.Y.2d at 275). The records must be accompanied by a supporting affidavit,⁷ a records list, and a detailed privilege log as described

⁶ The Affidavit provides no specific reference to the dates of any ongoing actions taken in furtherance of such open investigations, or of any specific contemplated steps tied to the concerns asserted immediately below the section above.

⁷ CPLR 7804(e) permits the Court to direct the Respondent to address any defects or omissions in an answer, transcript, or answering affidavit.

below⁸ (*see Matter of Moody's Corp.*, 141 AD3d at 999). The affidavit must set forth particularized and specific justifications (record by record, document by document, and redaction by redaction) explaining how, in light of instant status and contemplated actions in furtherance of the ongoing investigation, the requested disclosure would interfere with law enforcement or judicial proceedings.

B. Records Constituting Attorney Work Product Or Intra-Agency Material

The OAG argues that it properly withheld material that qualifies as attorney work product, which is specifically exempt from disclosure under CPLR § 3101(c). The OAG also maintains that it properly withheld records that are intra-agency materials under Public Officers Law § 87(2)(g).

The OAG describes its undisclosed attorney work product and intra-agency materials as “attorney work product and as intra-agency materials that are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or decisions, or external audits” (NYSCEF Doc No. 8). No specific list of documents or even a more detailed description of those documents (e.g. “list of potential witnesses in Albany diocese,” “notes from interviews on July 16, 2019,” “memo regarding relevant law”) was provided. This is not enough information for the Court to determine whether any items (and, if so, which items) are attorney work product or intra-agency materials. Accordingly, the OAG must submit the records that it has withheld on this basis for an in camera review (*see, e.g., Gould*, 89 N.Y.2d at 275). Those records must be

⁸ In *Matter of Mazzone v. New York State Dept. of Transp.*, 95 AD3d 1423 [2012], the court observed that the respondent submitted to the court “a voluminous set of e-mails and memoranda that were neither paginated nor otherwise segregated into any identifiable group” (*id.* at 1425, n.1). The court further remarked that “[a]n index or list was not provided with the exhibit and no effort was made to collate these materials to facilitate the court’s review” (*id.*). As described herein and otherwise ordered, the Respondent is directed in this case to ensure that all submissions to the Court pursuant to this order are paginated, segregated into identifiable groups, identified by group and by record name, and otherwise organized, described, and collated in a way that is intended by the Respondent to facilitate the court’s review. The Respondent is further directed to make any log as specific possible.

accompanied by a supporting affidavit, a records list, and a detailed privilege log as described below (*see Matter of Moody's Corp.*, 141 AD3d at 999).

C. Identification Of Victims Of A Sex Offense

The OAG cites Public Officers Law §§ 87(2)(b) and 89(2)(b)(iv) and Civil Rights Law § 50-b to justify withholding records to prevent identification of victims of sexual abuse. It is indeed the case that the identity of a victim “of a sex offense... shall be confidential,” and no document “which identifies such a victim shall be made available for public inspection” (Civil Rights Law § 50-b). However, the Civil Rights law “does not justify a blanket denial of a request for any documents relating to a sex crime” (*see Mazza*, 140 A.D.3d at 880 [internal citations and quotations omitted]). If the FOIL request is otherwise valid, and the document at issue does not “contain information that tends to identify the victim of a sex crime,” the document must be disclosed (*id.* [internal citations and quotations omitted]). “The agency must make a particularized showing that the statutory exemption from disclosure pursuant to Civil Rights Law § 50-b(1) applies to all the records that the petitioner seeks (*Id.*).

The OAG has not provided a list of documents that are being withheld pursuant to this statutory provision much less a particularized showing that they are exempt from disclosure pursuant to the statute. Accordingly, the OAG must submit the records that it has withheld for an in camera review (*see, e.g., Gould*, 89 N.Y.2d at 275; *see also Mazza*, 140 A.D.3d at 880 [the trial court “should have conducted an in camera inspection”])). Those records must be accompanied by a supporting affidavit, a records list, and a detailed privilege log as described below (*see Matter of Moody's Corp.*, 141 AD3d at 999).

D. Reasons For The Denial

Century complains that the OAG cannot rely upon FOIL exemptions in its May 2024 administrative appeal denial that were not raised or cited in the OAG's initial April 2024 denial of the FOIL request. To support this contention, Century cites *Matter of Madeiros v. N.Y. State Educ. Dept.*, 30 N.Y.3d 67, 74 [2017]. But *Madeiros* held that "[j]udicial review of an administrative determination is limited to the grounds invoked by the agency" (*id.*). Meaning, an agency cannot assert a new FOIL exemption in litigation. The OAG did not do this. An agency that initially denies a FOIL request is not required to specify a reason for the initial denial but, upon administrative appeal, must fully explain the reasons for any further denial (*see Matter of Suhr v. New York State Dept. of Civ. Serv.*, 193 A.D.3d 129, 131 [3d Dept. 2021]). That is what the OAG did: in their May 2024 denial letter, they expanded upon and added reasons for their denial that were not contained in their initial April 2024 denial letter. That is permissible.

E. Costs and Fees

Section 89(4)(c) of the Public Officers Law authorizes a court to assess "reasonable attorney's fees and other litigation costs reasonably incurred" by a petitioner who "has substantially prevailed." The Petitioner has not "substantially prevailed" in this proceeding, at least as of yet⁹, such that consideration of a discretionary award of costs is premature (*see Mazza*, 140 A.D.3d at 880).

CONCLUSION

Upon the above findings, it is hereby:

ORDERED that the Article 78 petition of Century Indemnity Company is **GRANTED** in part; it is further

⁹ The Court notes that the Petitioner could argue that the patently insufficient responses to the initial application, FOIL appeal and within Petition merit the later imposition of some fees and costs.

ORDERED that, within 45 days of the date of this Order, the Office of the Attorney General of the State of New York shall provide a detailed affidavit from a party or parties with actual knowledge which addresses or includes the following items:

(1) Provides to the Court for *in camera* review all records responsive to the FOIL request that were not previously provided. The records shall be numbered (e.g. "Record #1 of 529"), paginated (e.g. "page 1 of 1400"), and collated in a way that is intended by the Respondent to facilitate the Court's review. The records shall be accompanied by a records list (Records List), including each record's number (e.g. "Record 12 of 529") and page range (e.g. "pp. 46-68 of 1400"), describing each record (e.g. "First of Three Interviews by Sue Smith of Bob Jones, 12/14/19"), and identifying the specific aspect or topic of the FOIL request to which each numbered record is responsive. The Records List shall list the records that were previously provided, with the notation that those records were previously provided and are not provided herein.

(2) Provides to the Court and the Petitioner's counsel a privilege log (Privilege Log) which addresses both the records that the Respondent wants to withhold and any redactions that the Respondent proposes for any record. With respect to records that the Respondent wants to withhold, the Privilege Log must identify the record (by record number and page number, with a summary description included) and the specific reason(s) why the record is proposed to be withheld. The reason must include a citation to the applicable law, a description of the relevant facts, and a detailed explanation of how the law applies to those facts. If the Respondent proposes a redaction (or redactions) within a record, the Privilege Log must identify each specific redaction proposed and the page number of the proposed redaction. For each proposed redaction, the

Respondent must provide a citation to the law supporting that redaction, identify the specific facts justifying that redaction, and explain the application of law to support the redaction.

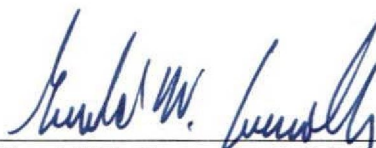
(3) Provides both the Records List and Privilege Log organized in the same manner, so that Record #1 on the Records List is the first record listed and detailed on the Privilege Log (if it is proposed to be withheld or redacted).

ORDERED that, within 60 days of the date of this Order, the Petitioner submit any Reply to the Respondent's herein directed response.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for the OAG shall promptly serve notice of entry on all parties entitled to such notice.

SO ORDERED.
ENTER.

Dated: February 10, 2025
Albany, New York


Gerald W. Connolly, A.J.S.C.

02/10/2025

Papers considered:
NYSCEF Doc Nos. 1-8, 14-24, 29-44