

Roth & Roth, LLP v New York City Tr. Auth.
2026 NY Slip Op 31583(U)
April 14, 2026
Supreme Court, New York County
Docket Number: Index No. 156322/2024
Judge: Nicholas W. Moyne
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NICHOLAS W. MOYNE PART 41M

Justice

-----X

ROTH & ROTH, LLP,

Petitioner,

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY

Respondent.

-----X

INDEX NO. 156322/2024

MOTION DATE 07/11/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

Upon the foregoing documents, it is

In this CPLR Article 78 proceeding, the petitioner, Roth & Roth, LLP, seeks an order and judgment directing the respondents, New York City Transit Authority (NYCTA) and Metropolitan Transportation Authority (MTA), to produce complete and final copies in unredacted form of the records requested pursuant to the Freedom of Information Law (FOIL) (Public Officers Law § 84 et seq.), request made on September 5, 2023, and to identify those records that respondents do claim fall squarely within one of the specific exemptions from disclosure under FOIL, as well as an award of attorney's fees.

On May 21, 2023, the petitioner's client, Emine Ozsoy, was critically injured when she was shoved into a moving train at the Lexington Avenue and 63rd Street subway station. The incident left Ms. Ozsoy paralyzed.

On September 5, 2023, the petitioner submitted a FOIL request seeking seven categories of records related to the above-incident, including but not limited to: "1. Documents that contain the names of employees of the NYCTA\MTA who were present at the scene of this occurrence 2. The documents, emails, texts and recordings regarding communications from the train operator to the train service supervisor regarding this incident 3. The documents, emails, texts and recordings regarding communications from the train super intendent to the train service supervisor regarding this incident 4. Super intendents report 5. The documents,

emails, texts, social media communication and recordings regarding communications in possession of the NYCTA/MTA regarding this incident from any employees or members of the public 6. All social media postings, including Twitter and Instagram or the links thereto regarding this incident from any governmental account controlled by the NYCTA or MTA 7. The documents relating to the investigation of the occurrence that requestor does not know the names of and therefore was unable to specifically request but that exist and have not been requested in FOIL requests R000884- 090523&R000885-0” (NYSCEF Doc. No. 3).

On January 22, 2024, the MTA FOIL Office provided its response, partially denying the request. Specifically, MTA stated that after a "thorough search," no responsive records were found for Request No. 4 (the "Superintendent's report") (NYSCEF Doc. No. 5). The MTA identified responsive documents for items relating to Request No. 1 and 6, advising that “some portions of the enclosed records containing personal identifying information have been redacted as they are deemed to be exempt from disclosure pursuant to N.Y. Public Officers Law § 87(2)(b)” (*Id.*). Furthermore, the respondents withheld responsive emails and communications for Request Nos. 2, 3, 5, and 7, invoking the inter-agency and intra-agency exemption under Public Officers Law § 87(2)(g) (*Id.*).

On February 21, 2024, the petitioner appealed this determination as specifically relating to the emails and communications portion, arguing that the blanket denial of emails was improper (NYSCEF Doc. No. 6). On March 11, 2024, the MTA FOIL Appeals Officer denied the appeal, reasoning that the subject records were internal deliberative and pre-decisional communications consisting of opinions, advice, and recommendations which may be withheld by an agency (NYSCEF Doc. No. 7). Following this final determination, the petitioner then commenced the present Article 78 proceeding challenging the denial as to the requested communications.

DISCUSSION

“To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public” (*Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224 [2018]). FOIL proceeds under the premise that the public is vested with an inherent right to know, and that all government records are presumptively open for public inspection unless they fall squarely within one of the enumerated statutory exemptions (*see Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 109 [1992]). Accordingly, consistent with the legislative declaration, FOIL is liberally construed, and its statutory exemptions narrowly interpreted (*Data Tree, LLC v*

Romaine, 9 NY3d 454, 462 [2007]). In an Article 78 proceeding to compel production of records, the burden rests upon the agency to demonstrate that the requested material qualifies for an exemption and “the agency must articulate particularized and specific justification for not disclosing requested documents” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]).

I. The Withheld Communications (Request Nos. 2, 3, 5, and 7)

Here, the issue is whether the communications sought are exempt from disclosure under POL § 87(2)(g), the inter- or intra-agency exemption. “[T]he purpose of the intra-agency exception is to allow individuals within an agency to exchange their views freely, as part of the deliberative process, without the concern that those ideas will become public” (*Matter of Town of Waterford v New York State Dept. of Env'tl. Conservation*, 18 NY3d 652, 658 [2012]). While the intra-agency exception allows government officials to exchange views freely as part of the deliberative process (*Matter of The New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 488 [2005]), POL § 87(2)(g) expressly provides that the exemption does not apply to records or portions thereof which consist of “statistical or factual tabulations or data” (POL § 87[2][g][i]). The Court of Appeals has made clear that “factual data... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277 [1996]).

The respondents assert that the emails and communications are exempt from disclosure under POL § 87(2)(g) as inter-agency or intra-agency materials that did not fall under one of the enumerated exceptions. In support of their position, the respondents submitted an affirmation from Oma Hemnath, an MTA FOIL Records Officer, attesting that following their review and examination, the withheld documents consisted of “internal communications between MTA departments concerning a press inquiry” and “consideration of a response to same” (NYSCEF Doc. No. 24). Therefore, respondents argue these records were properly withheld as they are purely deliberative and subjective.

However, petitioner asserts that the records do not fall under this exemption as “all of the requested communications and other documents are essentially the contemporaneous accounts of Respondents’ employees regarding the incident—in other words, the records simply contain factual observations and data” (NYSCEF Doc. No. 1 at 13).

Considering, it appears that at least some of the communications concerning a catastrophic train accident would be factual accounts or fundamentally factual in

nature given they are documenting real events, emergency responses, and investigative findings (*see generally Sell v New York City Dept. of Educ.*, 135 AD3d 594, 595 [1st Dept 2016]). The mere fact that these factual accounts may have been shared with a press office does not automatically transform their essential character into one of opinion or protected policy deliberations. The respondents fail to provide a basis to otherwise substantiate a connection between the entirety of the sought communications and a deliberative process.

Notably, there is no categorical exemption for certain types of materials as such a blanket exemption is inimical to FOIL's policy of open government (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277 [1996]). Therefore, while it may be true that the materials relating to Request Nos. 2, 3, 5, and 7 may be covered by the exemption and/or properly withheld, respondents have not met their required burden of demonstrating as such. Given that the information in the record is too conclusory to establish that these requested documents fall within the claimed exemption, the appropriate remedy is an *in camera* review (*Ctr. for Constitutional Rights v New York City Admin. for Children's Services*, 224 AD3d 537, 538 [1st Dept 2024]). Therefore, the Court directs the Respondents to submit all withheld communications responsive to Request Nos. 2, 3, 5, and 7 for an *in camera* inspection to determine whether the documents contain factual data that should have been disclosed or if they fall squarely within the asserted exemption (*Jewish Press, Inc. v New York City Dept. of Investigation*, 193 AD3d 461, 463 [1st Dept 2021], citing *Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 133 [1985]).

II. The Adequacy of the Search (Request No. 4)

“When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search” (*Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-41 [2005]). Here, in their response to the request, the respondents certified that a diligent search yielded no responsive records for Request No. 4, which sought the "Superintendent's report" (POL § 89[3][a]).

Under FOIL, when an agency certifies that it has conducted a diligent search and cannot locate requested documents (*Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]), the burden shifts to the petitioner to articulate a demonstrable factual basis to support the contention that the requested documents actually exist and are within the agency's control (*see Matter of Gould*, 89 NY2d at 279).

Relying on respondents records and operating procedures, the petitioner has sufficiently demonstrated a strong factual basis that the identified record should exist, thereby warranting an evidentiary hearing. First, the petitioner points to the Department of Subways Agency Safety Plan, which explicitly mandates the investigation and reporting of incidents involving collisions between trains and customers, particularly those resulting in serious injuries such as hospitalization, fractures, and severe nerve/muscle damage—all of which sadly applies to Ms. Ozsoy (NYSCEF Doc. No. 32). Second, the petitioner submitted concrete documentary evidence obtained from other FOIL requests showing that Superintendent's reports or similar reports are routinely created as a matter of standard operating procedure for highly similar subway pushing and train-strike incidents (NYSCEF Doc. No. 36-39). Furthermore, the petitioner provided correspondence from the Public Transportation Safety Board (PTSB) stating (incorrectly) that the incident was characterized to them as involving a minor injury, establishing that some communication between the respondents and their oversight agency must have occurred regarding this specific event (NYSCEF Doc. No. 33). The respondents' failure to explain why a Superintendent's report and/or related investigation documentation would be meticulously created for other similar incidents yet remain completely absent in a high-profile case involving catastrophic paralysis, strains credulity and requires further judicial scrutiny. Accordingly, an evidentiary hearing shall be scheduled to determine the adequacy of respondents' search efforts and to ascertain whether the requested records were improperly concealed or destroyed.

III. Attorney's Fees

Pursuant to POL § 89(4)(c), in a proceeding such as this, the Court may assess reasonable attorneys' fees where a petitioner "substantially prevails" and it is found that the agency lacked a reasonable basis for denying access. As the issue of whether the exemptions apply and the ultimate production of records remains contingent upon *in camera* review and an evidentiary hearing, the determination of whether petitioner has "substantially prevailed" for purposes of POL § 89(4)(c) is premature (*see Aron Law, PLLC v New York City Health and Hosps. Corp.*, 232 AD3d 528, 529 [1st Dept 2024]; *DJL Rest. Corp. v Dept. of Bldgs. of City of New York*, 273 AD2d 167, 169 [1st Dept 2000]). Therefore, the petitioner's request for attorneys' fees and costs is deferred until the final resolution of the underlying issues regarding the existence and exemption of the records.

CONCLUSION AND ORDER

Accordingly, it is hereby:

ORDERED that the petition is granted to the extent that the respondents shall submit unredacted copies of all records withheld in response to Request Nos. 2, 3, 5, and 7 to this Court for an *in camera* inspection within thirty (30) days of the date of this Order; and it is further

ORDERED that an evidentiary hearing shall be scheduled before this Court to determine the adequacy of the respondents' search for records responsive to Request No. 4 (the Superintendent's report) and any related investigatory communications; and it is further

ORDERED that the petitioner's request for attorney's fees and costs is held in abeyance pending the outcome of the *in camera* review and the evidentiary hearing.

This constitutes the Decision and Order of the Court.



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4/14/2026

DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE