

SUPREME COURT, WESTCHESTER COUNTY

NYLJ, July 12, 2001

MATTER OF CHITTENDEN v. NOVACK —

Upon the foregoing papers, It is hereby ORDERED that the petition is dismissed for failure to exhaust administrative remedies.

Petitioner, a police officer of the City of Rye and president of the Rye Police Association, commenced this proceeding, pursuant to CPLR article 78, to review the denial of access to certain records under the Freedom of Information Law by the records access officer (the Interim Police Commissioner) for the City of Rye Police Department and the determination by the City Manager that the grievance procedure under the collective bargaining agreement was not the proper procedure for appealing the denial of FOIL requests.

Respondents contend that the petition should be dismissed on the ground petitioner failed to exhaust his administrative remedies. Respondents argue that petitioner and his counsel were aware of the proper method for taking an appeal as evidenced by the fact in 1999 petitioner pursued an appeal from the denial of access to a document by the City Manager to the Mayor and City Council. The City Council adopted a resolution on 2/19/75, setting forth regulations for implementation of FOIL requests, under 21 NYCRR 1401.7. Pursuant to section 2 of the resolution, the City Manager is designated the records access officer for assuring compliance with the regulations and the Chief of Police is designated the access officer for records in the Department of Police. Pursuant to section 8, the City Council is designated the entity responsible for hearing administrative appeals.

Although the Chief of Police, in denying access to the records which are the subject of this dispute, did not advise petitioner of his right to appeal to the body established to hear appeals, as required by 12 NYCRR 1407.1 and section 8 of the resolution, petitioner and his counsel were aware of said right as evidenced by their prior administrative appeal to the City Council of the denial of records by the City Manager. A grievance procedure under the collective bargaining agreement is not the proper procedure for appealing the denial of access to records under FOIL. Accordingly, the petition is subject to dismissal for failing to exhaust administrative remedies (see Public Officers Law §89(4)(a), [b]; 21 NYCRR 1401.7[h]; Dickman v. Tritley, 268 AD2d 914; cf. Barrett v. Morgenthau, 74 NY2d 907).

Even if the Court were to entertain the petition, the denials would not be overturned. The FOIL request for the names of all members of the department who have been on chronic sick leave, with six interrogatories regarding each member, [Petition, Exhibit A] and the FOIL request for the names of all persons who received a handicap permit from the City of Rye Police Department in 1999 and 2000 [Petition, Exhibit D] is not a specific request for records and records disclosing the medical history of employees or applicants is exempt as an unwarranted invasion of personal privacy under the Public Officer's Law §89(2)(b)(i). However, to clarify the law with respect to any future applications, records of absences from duty similar to the "last time report" in Capital Newspapers, Div. Of Hearst Corp. v. Burns, 67 NY2d 562, are not exempt from disclosure either under FOIL or Civil Rights Law 50-a. Attendance records or time sheets for employees, that are redacted as to the medical reason for the absence, are not an unwarranted invasion of personal privacy. Records containing statistical data, such as the amount of sick time or vacation time accumulated or used, dates or times of an employee's attendance or absence, notations that sick leave or vacation time was charged, are relevant to public accountability and subject to disclosure (see also N.Y. State Commission on Open Government, AO 11513). In contrast, public inspections of portions of employment records or applications, which reveal an existing medical condition and/or treatment for disabilities is exempt from disclosure as "medical histories" (see Public Officers Law §89(2)(b)(i); Hanig v. State Dept. of Motor Vehicles, 79 NY2d 106).

Interrogatories framed by petitioner are also improper requests for FOIL documents. A records access officer is not required to answer questions or analyze information on behalf of petitioner (see N.Y. State Commission on Open Government AO 11543). Requests pertaining to the 2000 canceled uniform order [Petition, Exhibit D] and "New Lockers in Mens Locker Room" [Petition, Exhibit N] are deficient for the aforementioned reasons. However, records disclosing the total moneyspent on new uniforms, the monetary value of uniform allotments for members of the department and the percentage expanded would be discoverable upon a proper request, provided such records exist. Respondent is under no obligation to furnish records, which do not exist (Rivette v. District Attorney of Rensselaer County, 2'2 AD2d 648). The request for assignment records for new lockers that identify the member assigned to a specific locker number was properly withheld as confidential and not admissible under FOIL. In contrast, records if any, containing statistical data, such as the number of new lockers installed in the mens locker room, the percentage of new lockers assigned to members of the force or the percentage that are empty would be discoverable as relevant to public accountability of fiscal dollars.

Petitioner's FOIL request for copy of a tape recording of a phone conversation he had with Officer Groglio on 5/15/00 regarding B-tour overtime (Petition, Exhibit F) and a phone conversation he had with Lt. Reichert on 10/11/00 at 1615 with respect to reporting late for duty after negotiations with the City Manger (Petition, Exhibit J), were properly denied by respondent on the ground these records, if they exist, constitute intra-agency materials not subject to disclosure. While a party to a tap recorded conversation with a public officer cannot be denied access to the recording on the ground of an invasion of personal privacy (N.Y. State Commission on Open Gov. AO 10950), intra-agency materials consisting of opinions, advice, evaluations, deliberation, proposals, policy formulation, conclusions or recommendations are exempt from public access as government agency deliberative functions (Town of Oyster Bay v. Williams, 134 AD2d 267). Respondent's unrefuted description of the substance of the recorded communications belie that they contain statistical or factual tabulations or data, instruction to staff that affect the public or are final agency policy or determinations. Consequently, said records are exempt as intra-agency material. (Public Officers Law §87(2)(1)-(iii); cf. Buffalo Broadcasting Co, Inc v. City of Buffalo, 126 AD2d 983).

Last, access to "information relating to FOB # 84592" [FOIL Request Exhibit H], which is an electronic key issued to petitioner was properly denied as a request for predecisional material regarding a potential disciplinary action to be taken by respondent (see Matter of Prisoners Legal Services v. New York State Department of Correctional Services, 73 NY2d 26; Kheel v. Ravitch, 62 NY2d 1; Matter of McAulay v. Board of Educations of City of New York, 61 AD2d 1048, aff'd 48 NY2d 659; Sicropi v. City of Nassau, 76 AD2d 832; see also Daily Gazette Co. v. City of Schenectady, 93 NY2d 145). Petitioner's request for attorney fees is denied on the ground he has not substantially prevailed in this proceeding (Public Officer's Law §89(4)(c)(i); cf. Banchs and Coughlin, 168 AD2d 711).

The foregoing constitutes the decision, order and judgment of the Court.