

**STATE OF NEW YORK
SUPREME COURT****COUNTY OF ALBANY**

In the Matter of the Application of
MARK GREEN, as Public Advocate for
The City of New York,

Petitioner,

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

**DECISION AND ORDER
INDEX NO. 1746-97**

-against-

BARBARA DeBUONO, as Commissioner of
the New York State Department of Health,
and **NEW YORK STATE DEPARTMENT OF HEALTH**,

Respondents.

(Supreme Court, Albany Co. Special Term - Calendar No. 21)
(RJI No. 0197 ST7635 April 18, 1997)

(Justice Joseph Harris, Presiding)

APPEARANCES: Paul A. Crotty, Esq.
Corporation Counsel of the City of N.Y.
(Hillary Weisman, Assistant Corporation
Counsel, Of Counsel)
Attorneys for Petitioner
100 Church Street - Room 3-155
New York, New York 10007

Hon. Dennis C. Vacco
Attorney General of State of New York
(Judith A. Avent, Assistant Attorney General,
Of Counsel)
Attorneys for Respondents
Department of Law
The Capitol
Albany, New York 12224

Healthcare Association of New York State
(Mark Thomas, Esq., of Counsel)
Amicus Curiae
74 N. Pearl Street
Albany, New York 12207

HARRIS, J:

Petitioner, the Public Advocate for the City of New York, commenced this CPLR article 78 proceeding to challenge two determinations of respondents, dated September 20, 1996 and November 29, 1996 respectively, which denied petitioner's request for disclosure of certain data pursuant to the Freedom of Information Law (hereinafter FOIL) (see, Public Officers Law § 84 et seq.).

As part of their statutory function, respondents compile and maintain a database of unusual incidents which take place at hospitals within the State. This database, know as the Patient Events Tracking System (hereinafter PETS) contains information submitted to respondents pursuant to Public Health Law § 2805-1, as well as information submitted pursuant to agency regulation (see, 10 NYCRR § 405.8).

The information, required to be reported pursuant to Public Health Law § 2805-1 and regulations (see, 10 NYCRR § 405.8), is submitted via the use of incident reports and consists of, inter alia: (1) deaths or impairments of bodily function other than those related to the natural course of an illness, disease, or despite proper treatment (see, Public Health Law § 2805-1 [2] [a]); (2) fires (see, Public Health Law § 2805-1 [2] [b]); (3) certain equipment malfunctions (see, Public Health Law § 2805-1 [2] [c]); (4) poisoning (see, Public Health Law § 2805-1 [2] [d]); (5) staff strikes (see, Public Health Law § 2805-1 [2] [e]); (6) infectious outbreaks (see, 10 NYCRR § 405.8 [b] [5]); and (7) patient

elopements and kidnappings (see, 10 NYCRR 405.8 [b] [6]).

Because of the sensitive nature of the incident reports, and the specific inculpatory information possibly contained therein, "reports required to be submitted pursuant to section [2805-1] of this article" are kept strictly confidential pursuant to statute (see, Public Health Law § 2805-m [1]).¹ The information in the reports is entered into the PETS database for tracking and monitoring purposes and can be outputted as raw statistics without reference to the specific incident upon which an outcome was based.

Petitioner sought, via two separate FOIL requests on July 21, 1996 and August 29, 1996, the disclosure of aggregated statistics on the number and type of reportable events on a hospital by hospital basis for 65 hospitals in the five boroughs of New York City (see, Verified Petition, at Exhibits A and E). Respondents denied both requests and the denials were later administratively affirmed.

The gravamen of petitioner's case is that the information it seeks is readily available and not subject to any exemptions from FOIL (see, Matter of Hanig v State of N. Y. Dept. of Motor Vehicles, 79 NY2d 106, 109; Matter of Leg. Aid Socy. of Northeastern N.Y. v New York State Dept. of Soc. Servs., 195 AD2d 150, 152). Public Officers Law § 87 (2) (a), however, allows

¹ Because information on patient elopements and infectious outbreaks is required pursuant to regulation only (see, 10 NYCRR §§ 405.8 [b] [5], [6]), it does not appear that statistics relating to those events would be exempt from FOIL under the statutory exception relied upon by respondents even if this court were to find that theory valid.

respondents to withhold from disclosure any information which is specifically exempted from disclosure by statute. Respondents argue that because Public Health Law § 2805-m prohibits disclosure of the specific reports discussed in § 2805-1, the information sought by petitioners is exempted from FOIL by Public Officers Law § 87 (a) (2) (see generally, Matter of Prisoners' Leg. Serv. of N.Y. v New York State Dept. of Corr. Servs., 73 NY2d 26).²

Unlike the typical CPLR article 78 proceeding, "on the issue of whether a particular document is exempt from disclosure under [FOIL], the oft-stated standard of review * * * i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without reasonable basis, is not applicable" (Matter of Capital Newspaper Div. of Hearst Corp. v Burns, 109 AD2d

² Curiously, respondents have apparently done an about face on this policy. In a letter from Peter J. Millock, Gen. Counsel to the Department of Health, dated July 7, 1986, to the then Governor's counsel, the agency stated that:

"the confidentiality provisions [of § 2805-m] apply only to the incident report itself and not the information in the report * * * or to statistical and other summaries of reported incidents" (see, Verified Petition, Exhibit I).

This policy was echoed by the agency in a December 29, 1986 memorandum to healthcare facilities wherein it stated:

"Statistical summaries relating to the Hospital Incident Reporting Program * * * are releasable by the Department consistent with personal privacy protections" (see, Verified Petition, Exhibit J, at 3).

Moreover, reports similar to those sought by petitioner have been produced and distributed before (see, Verified Petition, Exhibit L).

92, 94, affd 67 NY2d 562; see also, Matter of Laureano v Grimes, 179 AD2d 602, 603). Instead, "the person resisting disclosure must prove entitlement to one of the exceptions" (see, Matter of Laureano v Grimes, supra, at 604). This burden shift occurs because of the powerful presumption that all information is disclosable under FOIL unless specifically proven otherwise (see, Buffalo News, Inc. v Buffalo Enter. Dev. Corp., 84 NY2d 488). Furthermore, exemptions from FOIL disclosure are to be narrowly construed (Matter of Leg. Aid Socy. of Northeastern N.Y. v New York State Dept. of Soc. Servs., supra, at 153; see, Matter of Hanig v. State of N. Y. Dept. of Motor Vehicles, supra, at 109). The agency at issue must "articulat[e] a particularized and specific justification for denying access" to the requested documents (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566).

In the instant case, this Court does not find that respondents have satisfied the burden placed upon them to show that some exemption applies. It is this Court's duty to decide what the Legislature's intent was at the time of the passage of the statute. Here, the plain language of the statute requires only that the reports themselves be exempt from FOIL. The language of Public Health Law § 2805-m reads, in relevant part:

"1. The information required to be collected and maintained pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, reports required to be submitted pursuant to section twenty-eight hundred five-l of this article and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to

the provisions of this chapter shall be kept confidential and shall not be released except to the department or pursuant to subdivision four of section twenty-eight hundred five-k of this article.

2. Notwithstanding any other provisions of law, none of the records, documentation or committee actions or records required pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, the reports required pursuant to section twenty-eight hundred five-l of this article nor any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided by any other provision of law * * * [emphasis supplied].

This Court notes that the Legislature clearly set forth its wishes as to the confidentiality of "information"/"records, documentation or committee actions or records" held by respondents pursuant to Public Health Law §§ 2805-j and 2805-k. However, when addressing confidentiality surrounding the reporting requirements of § 2805-1, the Legislature simply stated that the "reports" would be confidential; it did not say the "information" or "records" would be confidential, as it had with respect to the other sections discussed in the statute. This differing statutory treatment of the information generated pursuant to the other statutes is strong evidence of the Legislature's desire not to keep aggregated data from the § 2805-1 incident reports confidential.

Respondent's rely on a Third Department case, Matter of Property Valuation Analysts v Williams (164 AD2d 131), for their assertion that the aggregated data should be given the same

protections as the reports themselves. In that case, the Appellate Division held that "[a]lthough th[e] statute exempts the 'form or report', its obvious legislative purpose is to protect the information contained therein from disclosure" (see, id., at 134). The situation in the current case is somewhat different from the facts in that case. In Property Valuation Assocs. (supra), the petitioner was requesting a copy of the "computer tape file" which contained the detailed information from the forms specifically exempted by statute.³ Thus, the court found that the tape was not disclosable because it would essentially give petitioner's access to the reports in an electronic form.

In the current case, however, petitioner is requesting aggregated data from a database. The data, if provided would simply consist of tabulations of the types of incidents which occurred in a particular hospital. No details of the incident would be provided, nor could the data provided be used to reconstruct or identify the incidents upon which the statistical outcomes are based. For these reasons, this Court finds the facts of this case to differ from those in Matter of Property Valuation Analysts v Williams (supra) and, thus, the same result is not mandated here.

As for the arguments posed by, amicus curiae, Healthcare Association of New York State (hereinafter HANYS), this Court

³ It is worth noting that the statute at issue in Property Valuation Analysts v Williams (supra), Real Property Tax Law former § 574 [5], was subsequently amended in 1993 to permit public review of the reports (see, L 1993, ch 257, § 5).

8

appreciates the factual background provided in the brief, but finds no substantive merit to various policy considerations asserted therein. HANYS is clearly an organization with partisan interests in not having the information disclosed. However, the fact remains that public policy is best served by allowing the release of information which can only make healthcare providers more accountable to their patients.

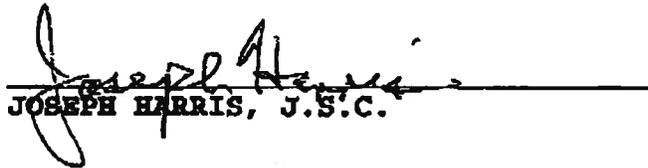
In light of the foregoing, this Court finds that respondents have failed to meet their burden of showing that some exemption from FOIL applies to the information requested and, therefore, grants the relief requested in the petition. Respondents are hereby ordered to provide the information requested in petitioner's July 21, 1995 and August 29, 1996 FOIL requests.

All papers, including this decision and order, are being returned to the petitioner's attorney. The signing of this decision and order shall not constitute entry or filing under CPLR section 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This memorandum shall constitute both the decision and the order of the Court.

SO ORDERED!

DATED: Albany, New York
June 11, 1997


JOSEPH HARRIS, J.S.C.