

Jail Detainees' Birth Dates Denied to Data Firm That Provides Background Check Information

INVESTIGATION TECHNOLOGIES, LLC v. HORN — Petitioner moves pursuant to CPLR Article 78 for an order and judgment annulling, as arbitrary and capricious, the determination of respondent Commissioner of the New York City Department of Correction which denied petitioner's Freedom of Information Law (FOIL) letter request of March 18, 2003, to the extent it seeks the dates of birth for all New York City Department of Correction ("DOC") detainees held in custody since September 4, 2002.

Petitioner Investment Technologies LLC describes itself as a company which owns and operates a fee-based Internet website, Rapsheets.com, from which subscribers, allegedly conducting background checks, are allowed to access the website's database for the criminal records of persons, who petitioner claims are potential employees, apartment lease applicants and youth workers, etc. Petitioner claims further that it collects criminal records information from more than 150 state and county courts, departments of correction and probation departments within the United States, including the New York State Department of Correctional Services.

Initially, petitioner's FOIL request sought "a database containing the name, date of birth, race, sex, admission date, release date, description of the crime and the level of offense, case number and related information of all persons who have been detained by DOC since 1990" in electronic form. In a letter dated October 9, 2003, DOC granted in part and denied in part petitioner's request, on the ground that it could not segregate sealed detainees' records from the unsealed records. DOC has since been able to segregate its records for the period after September 4, 2002 and, therefore, now agrees to supply most of the information requested, except for the request for detainees' dates of birth, arguing that to disclose such personal data would constitute an unwarranted invasion of privacy in violation of New York Public Officers Law §§87(2)(b) and 89(2). Petitioner took an administrative appeal of the denial of its request for the birth date information. On November 19, 2003, DOC, by its Records Appeals Officer, Florence A. Hutner, upheld the denial of such information pursuant to Public Officers Law §§87(2)(b) and 89(2)(b), on the bases that public disclosure of the detainee's birth date was an unwarranted invasion of personal privacy and because petitioner's use of such information on its commercial Internet website would subject the detainees to possible identity theft and personal and economic hardship.

In an on-going effort to resolve this matter, petitioner sought an advisory opinion from the New York State Commission on Open Government concerning its request for the date of birth information of detainees in New York City jails. The opinion of the Commission on Open Government which favored disclosure was issued by letter dated December 1, 2003 and forwarded to DOC. While acknowledging the opinion, DOC adhered to its decision denying the request for birth date information and declined to meet with representatives of petitioner. Petitioner commenced this Article 78 proceeding on or about March 17, 2004.

"All government records are *** presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law §87(2). To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (citations omitted). Thus, the presumption is struck in favor of disclosure unless the governmental agency from which the information is sought "articulate[s] particularized and specific justification" for confidentiality (Gould v. New York City Police Department, 89 NY2d 267, 274-275; Matter of Fink v. Leikowitz, 47 NY2d 567, 571). Public access is the general rule; but it is inexorable, and the rule will give way whenever it is outweighed by other more compelling competing interests.

Here, I find that the DOC, in accordance with the rules promulgated, has demonstrated a "particularized and specific

ic justification" for withholding the birth dates of New York City jail detainees. Furthermore, DOC has agreed to supply petitioner with all the information which it is obligated to provide under the applicable rule.

Section 9-121 of the New York City Administrative Code states:

"§9-121. Records of inmates of institutions.

The commissioner of correction shall keep and preserve a proper record of all persons who shall come under the commissioner's care or custody, and of the disposition of each, with full particulars as to the name, age, sex, color, nativity and religious faith, together with a statement of the cause and length of detention. Except as otherwise provided by law, the records kept pursuant to this section shall be public and shall be open to public inspection."

Respondent argues, persuasively, that while this section of the Code permits disclosure of an individual's "age", it does not define an individual's "date of birth" as information open to public inspection, nor does it authorize DOC to disclose any detainee's actual date of birth. Indeed, Section 89(2) of the Public Officers Law reserves to the agency the authority "to delete identifying details" in order to prevent unwarranted invasion of personal privacy. Petitioner presents no declaratory law or statute which abrogates DOC's authority to redact information which it finds the public disclosure of which would be an invasion of privacy or would subject the affected persons to personal or economic hardship. In addition, some courts have ordered the deletion of dates of birth as "personal information which if disclosed would constitute an unwarranted invasion of personal privacy" (see e.g. *Beyah v. Goord*, 309 AD2d 1049, 1050-1052; *Lyon v. Dunne*, 180 AD2d 922, 924). Moreover, even the analogous state statutes alluded to by petitioner do not require the unrestricted dissemination of detainees' date of birth (see Correction Law §500-f; cf. 7 NYCRR §5.21 [date of birth released to the news media when related to a newsworthy event]).

To determine "what constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities [and] this determination requires balancing the competing interests of public access and individual privacy" (*Matter of Dobranski v. Houser*, 154 AD2d 736, 737; *Matter of Empire Realty Corporation v. New York State Division of Lottery*, 230 AD2d 270, 273). Petitioner's claim that a diminished expectation of privacy encompasses every person arrested and detained in a City jail lacks merit. Movant suggests nothing which would cause this court to conclude that every disclosure of date of birth data should not be considered in the context of the particular request made, or that by the fact of arrest and detention a person relinquishes his interest in the privacy of his personal birth data. Indeed, none of the cases cited by petitioner involve a private commercial interest as is the case herein and each of the cases cited, strike a careful balance between public access and the personal privacy right of the detainee. Furthermore, it is noted that in each case, the right to personal privacy right is only outweighed by a greater concern for orderly law enforcement, security by correctional facilities, or the need for legitimate public oversight of governmental operations, none of which are implicated by the present FOIL request.

Finally, a distinction must be made between convicted inmates sentenced to a term of imprisonment in a state facility and transient detainees of New York City jails. As pointed out by DOC, the average length of stay of a DOC detainee is approximately 45 days and a majority of those in DOC's custody are pretrial detainees to whom the presumption of innocence attach. Moreover, some of the City's jail population is comprised of "civil prisoners", not directly involved in the criminal process or serving a sentence, but are confined for other reasons, including civil process, civil contempt, or as a material witness. Neither, does it seem fair to have persons, against whom the criminal accusation may ultimately prove unfounded, to suffer the stigma of jail detention as a result of having their identities disclosed to the general public. Therefore, I find that because petitioner's Internet website allows for the virtual unrestricted and undetected gathering of personal data on an individual in violation of his personal privacy right, respondent's determination denying dissemination of detainees' birth dates cannot be said to be without basis in reason or arbitrary or capricious. Accordingly, it is ORDERED AND ADJUDGED that the application compelling DOC to disclose the dates of birth of detainees is denied and the respondent's cross-motion to dismiss the petition is granted. The foregoing constitutes the decision and judgment of the court. ■

Supreme
Court

Justice
Payne

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