

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 62/36

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THE NEW YORK ENVIRONMENTAL LAW &
JUSTICE PROJECT,

Petitioner,

INDEX NO.
112035/05

-against-

Motion Seq.
001

THE CITY OF NEW YORK &
THE NEW YORK CITY POLICE DEPARTMENT,
Respondents.

FILED

APR 19 2006
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DORIS LING-COHAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

During the Republican National Convention (Convention) in the summer of 2004, the New York City Police Department (NYPD) arrested more than 1,500 protesters and bystanders, and took most of them to Pier 57 for processing and detention.¹ Pier 57 is a former bus depot, owned and operated by the Metropolitan Transportation Authority, and was obtained by the Hudson River Trust in June 2004. At issue in this proceeding is whether environmental and hazard information and other documents related to Pier 57 should be turned over, pursuant to the Freedom of Information Law (FOIL).

Specifically, petitioner The New York Environmental Law and Justice Project (Law and Justice Project) brings this Article 78 proceeding to annul the determination of the NYPD denying petitioner's request, pursuant to FOIL, Public Officers Law (POL) § 84, et seq., for the following categories of documents: (1) all data and reports of environmental testing and analysis performed with respect to Pier 57 on the Hudson River, in Manhattan; (2) all agreements, stipulations and leases with non-party Hudson River Park Trust governing the use of Pier 57; (3) all communications

¹ The Court acknowledges the assistance of court attorney Samuel Cherniak and law intern Barbara Cole.

concerning Pier 57 with other city agencies; and (4) all health and safety complaints that have been made by police officers and civilians who were present on Pier 57 between August 26, 2004 and September 23, 2004.

By letter dated September 23, 2004, petitioner requested the above named documents from NYPD. According to petitioner Law and Justice Project, due to numerous reports of environmental contaminations and illnesses at Pier 57, petitioner sought the environmental health and hazard data, pursuant to FOIL, to protect the health of detainees and police officers who were present at the Pier during the Republican National Convention, and others who may be exposed to such alleged contamination in the future. The NYPD's April 27, 2005 denial of petitioner's FOIL request was categorical. It made no mention of any specific document. Petitioner seeks an order requiring the NYPD to provide the documents sought.

Respondents have cross-moved, prior to filing their answer, for an order dismissing the petition pursuant to CPLR 3211(a)(7) and 7804(f). In support, respondents argue that the records sought are exempt from disclosure pursuant to POL § 87(2)(e)(i) and (ii), and that certain responsive records consist of medical records of individuals and are, therefore, exempt pursuant to POL §§ 87(2)(a) and 89(2)(b)(i) and (ii). In addition, respondents represent that there are 43 civil cases (federal civil cases) currently pending in the United States District Court for the Southern District of New York arising out of the arrests made at the time of the Convention, that at least one of the respondents is a defendant in those cases, and that an unspecified number of the documents that are at issue here are the subject of discovery

disputes in those cases. Accordingly, respondents contend that this court should dismiss the petition on the ground of comity. Petitioner is not a party to any of the federal civil cases.

The standard to determine a pre-answer motion to dismiss for failure to state a cause of action is whether the facts stated are sufficient to support any cognizable legal theory. See Campaign for Fiscal Equity v. State of New York, 86 NY2d 307, 318 (1995). This standard is applicable to Article 78 proceedings. See Fitzgerald v. Matthews, 244 AD2d 193 (1st Dept 1997); Tucker v. Battery Park City Parks Corp., 227 AD2d 318 (1st Dept 1996). Here, as discussed below, the pleadings are sufficient to warrant a denial of the respondent's motion to dismiss.

POL § 87 (2) (e) - Interference with Law Enforcement

It is well settled that, pursuant to FOIL,

[a]ll government records are ... presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions [POL] § 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 an exemption. ... [O]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.

Matter of Gould v New York City Police Dept., 89 NY2d 267, 274-75 (1996) (citations and internal quotation marks omitted).

POL § 87 (2) provides in relevant part:

Each agency shall ... make available ... all records, except that such agency may deny access to records or portions thereof that:

(e) are compiled for law enforcement purposes, and which, if disclosed would:

- i. interfere with law enforcement investigations or judicial proceedings; [or]
- ii. deprive a person of a right to a fair trial or impartial adjudication

An agency that seeks to withhold documents, pursuant to one or another of the statutory exemptions, must make a particularized showing that each such document falls within that exemption. A conclusory contention that an entire category of documents is exempt will not suffice. Matter of Washington Post Co. v New York State Ins. Dept., 61 NY2d 557 (1984); Matter of Buffalo Broadcasting Co. v New York State Dept. of Correctional Svcs., 155 AD2d 106 (3d Dept 1990).

Although not applicable here, when a defendant in a pending criminal case makes a FOIA request for law enforcement records pertaining to his or her arrest and prosecution, a categorical determination may be made that the release of such delimited documents would interfere with the pending criminal proceeding. Matter of Legal Aid Soc. v New York City Police Dept., 274 AD2d 207 (1st Dept 2000); Matter of Pittari v Birro, 258 AD2d 202 (2d Dept 1999). It is noted that, here, it is undisputed that all of the criminal cases resulting from the Republican National Convention and Pier 57 have been concluded.

While respondents argue at some length that disclosure of the first three categories of the documents sought by petitioner would interfere with respondents' defense of the federal civil cases, respondents' claim, that those documents were prepared for "law enforcement purposes", is limited to counsel's mere statement that such documents were:

prepared in connection with the NYPD's preparation for the City's public safety needs at the time of the 2004 Republican National Convention. Specifically, the requested records pertain to the NYPD's use of arrest processing facilities at Pier 57, and as such, are records prepared for law enforcement purposes in the first instance.

(Tamari Affirm. in Support, ¶ 12). "This entirely conclusory statement does not meet respondents' significant burden to "articulate particularized and specific justification for not disclosing requested documents." Matter of Gould v New York City Police Dept., 89 NY2d at 275 (internal quotation marks omitted). Further, as pointed out by petitioner, all of the criminal cases have been resolved and there is no ongoing law enforcement investigation which might be impeded by disclosure of these documents. Moreover, the nature of the documents requested, such as agreements, stipulations, and leases with non-party Hudson Park Trust and other documents, cannot be characterized as having been "compiled for law enforcement purposes", given that such documents were prepared in the ordinary course of business, are not related to a criminal enterprise under investigation by the NYPD, and compiled for purposes entirely unrelated to law enforcement.

A "[f]ailure to establish the factual existence of [a] claimed exemption ... renders [the] claim for exemption unavailing." Matter of New York Assn. of Homes and Servs. for Aging, Inc. v Novello, 13 AD3d 958, 960-61 (3d Dept 2004). Thus, respondents have failed to show that the petition should be dismissed on the basis of POL 87 (2) (e).

Medical Records

POL 87 § (2) (a) allows agencies to withhold records that "are specifically exempted from disclosure by state or federal statute."

POL §§ 89 (2) provides, in relevant part, that:

(a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

- i. disclosure of ... medical ... histories ...;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility.

Although medical records including identifying information fall within the privacy exemption of POL 87(2)(b), this is not a blanket exemption. Agencies are directed to delete identifying information and release the redacted records:

Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...i. when identifying details are deleted...

POL §89(2)(c)(i); see also Matter of New York Times Co. v. New York State Dept. of Health, 243 AD2d 157, 159-160 (3d Dept 1998) (FOIL disclosure provided, subject to redaction of patient identifying information such as name, social security number and/or address).

Respondents represent that the records of health and safety complaints, made in connection with Pier 57, consist of several Occupational Health Nursing Unit Exposure Records, which contain personal information and details about the exposure and medical recommendations. (Tamara Affirm. in Support, ¶ 15). It is not

clear from that description whether respondents received complaints from civilians detained at Pier 57, and whether, if so, such complaints are included in respondents' description of the records. In any event, petitioner merely seeks redacted medical records and documents as to health complaints; respondents have failed even to suggest a reason why the NYPD cannot redact records of health complaints so as to "delete identifying details." POL § 89 (2) (a).

Comity

Even if the federal civil cases were pending in the courts of New York, such pendency would not entitle the NYPD to withhold the requested documents. In Matter of Farbman & Sons v New York City Health and Hosps. Corp. (62 NY2d 75 [1984]), the Court held that access to records under FOIL is unaffected by "the fact that there is pending or potential litigation between the person making the request and the agency." Id. at 78. Here, where the party making the request for documents is a stranger to the relevant pending civil litigation, access to the requested documents should not be less restrictive. The pendency of the civil cases in federal court does not shield the NYPD from the requirements of FOIL. A court of this state may not contravene an express statutory enactment of this state, in order to give effect to the principle of comity. Lemmon v People, 20 NY 562, 602-603 (1860).

Accordingly, it is

ORDERED that the cross motion is denied; and it is further

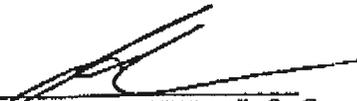
ORDERED that respondents shall serve their answer to the petition within twenty days of service upon them of a copy of this order with notice of entry; it is further

ORDERED that petitioner may re-notice this matter in accordance with CPLR §7804(f), returnable to the Motion Support Office, Room 130, 60 Centre Street; and it is further

ORDERED that within 20 days of entry of this order, petitioner shall serve a copy upon respondents with notice of entry.

Dated: April 10, 2006

ENTER:


DORIS LING-COHAN, J.S.C.

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