SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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Application of
WASSERMAN GRUBIN & ROGERS, LLP,

Index No. 115881-2008

Petitioner,

For an Order pursuant to Article 78 of the CPLR

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION and CHRISTINE KICINSKI, in her Official Capacity as New York City Department of Education Central Records Access Officer,

Respondents.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Law firm Wasserman Grubin & Rogers, LLP ("petitioner") commenced this Article 78 proceeding to compel respondents New York City Department of Education ("DOE") and Christine Kicinski (collectively, "respondents") to produce documents requested pursuant to New York's Freedom of Information Law ("FOIL") (Public Officers Law, "POL" §§ 84-90), and for attorneys' fees and costs related to this action.

Factual Background

On April 11, 2008, petitioner made a FOIL request to DOE for certain documents relating to Employee Protection Provisions ("EPPs") in school bus transportation contract specifications,[1] and a privilege log as to any information withheld on the basis of privilege or

[1] Petitioners sought
(1) All . . . communications between the [DOE] and Amalgamated Transit Union Local 1181 ("ATU Local 1181") pertaining to the insertion or use of [EPPs] in a DOE solicitation or contract for Pre-Kindergarten ["Pre-K"] and Early Intervention ["EI"]Transportation Services . . . ;

exemption from FOIL.

After more than six months, petitioner requested Chancellor Joel Klein to, *inter alia,* inquire as to why the documents were not produced. On November 5, 2008, DOE provided seven pages of "responsive and disclosable records," and denied certain requested items, explaining:

> . . . Public Officers Law §87(2) (a) permits an agency to deny access to records or portions of records that are specifically exempted from disclosure by state or federal law. Communications between attorneys and their clients are exempt from disclosure pursuant to §3101 (b) and §4503 of the Civil Practice Law and Rules (CPLR) as attorney-client communications. Also, other documents are exempt as attorney work product in accordance with CPLR §3101(c) or as materials prepared for litigation in accordance with CPLR §3101(d). Furthermore, access to other records or portions of records is denied pursuant to the speech or debate clause of the New York State Constitution (Article 3, §11). Finally, in accordance with POL §87(2)(g), access to other responsive records or portions of records is denied as inter-agency or intra-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits.

DOE indicated that it would provide a further response by December 8, 2008.

In response, petitioner requested a list of the withheld documents and the basis for each claim of privilege. On November 14, 2008, DOE denied petitioner's request as unwarranted.

On the same day, DOE's General Counsel ("DOE's Counsel") advised petitioner that

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footnote 1 contd.

(2) All . . . communications, between DOE and any school bus transportation company that provides transportation services for general education schoolchildren under contract with DOE, pertaining to the insertion or use of [EPPs] provisions in a DOE solicitation or contract for [Pre-K] and [EI] Transportation Services, such as, but not limited to, Bid No. B0553;
(3) All . . . communications among DOE and NYC . . . evidencing . . . reasons . . . for seeking amendment of the public bidding requirements of the Family Court Act, or their understanding of the legality of the insertion of [EPPs] in DOE contracts for [Pre-K] and [EI] Transportation Services in the absence of such an amendment;
(4) Documents referring to or evidencing the questions and/or answers voiced and other statements made at the DOE February 11, 2008 Pre-Bid Meeting for [Pre-K] and [EI] Transportation Services . . . .

petitioner's letter to the Chancellor was being treated "as an appeal of a purportedly constructive denial of records . . ." and that petitioner's appeal was denied as moot, in light of DOE's November 5th response. DOE's Counsel also advised that if petitioner wished to appeal the November 5th response, petitioner "may do so in accordance with the information provided therein." Notably, the November 5th response directs all appeals to be sent to DOE's counsel.

Article 78 Petition

Petitioner now argues that DOE failed to demonstrate that the exemptions applies to the FOIL request.

Documents responsive to the first and second itemized requests would not be protected as an attorney/client communication or work product, material prepared for litigation, or exempt pursuant to Article III § 11 of the Speech or Debate Clause of the New York Constitution (the "Speech and Debate Clause"). Moreover, by definition, such documents are not inter- or intra-agency documents, instructions to staff, or external audits.

Further, the claim of "inter-agency" exemption does not apply to materials submitted by DOE to the Legislature to justify its "recommendation" to pass the bill amending the Family Court Act, (third category of documents) as the Legislature is not an "agency." Petitioner and its clients are interested in the legislation and have a right to receive the documents upon which DOE has based its official statements.

And, the claim of exemption for notes recording the questions and answers discussed with potential bidders at a pre-bid meeting (fourth category), and forming the basis for a report based on those discussions, also fails to meet any exemption under POL §§ 87(2), 89(3).

Petitioner claims that Agency records are presumptively open to public inspection, and

the 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." And, the assertion that the appeal is "moot" because of the few pages the agency produced and DOE's "we're working on it" excuse is contemptuous.

The various claims including attorney-client privilege, material prepared for litigation, are wholly unsupported, and the recitation of allegedly applicable FOIL exemptions merely parrot the statute. DOE's failure to prove that a statutory exemption applies warrants disclosure.

Petitioner also argues that DOE violated petitioner's FOIL rights in bad faith, in that DOE has withheld documents in order to improve its chances in related litigation and to conceal its legislative machinations until its requested amendment has passed. As litigation counsel for L&M Bus Corp. in a related matter, Assistant Corporation Andrew Gelfand has no role in DOE's FOIL administration; yet, he was provided copies of the FOIL-related correspondence sent to petitioner. Mr. Gelfand conceded that he has reviewed documents pertaining to DOE's purposes for including the EPPs in the bid materials, which DOE has refused to produce and which may be highly relevant to the petitioner's case in the related proceeding.[2] DOE's attempt to manipulate the FOIL process so petitioner's clients cannot challenge the purported reasons DOE has given for its pending request to amend the Family Court Act, is improper. Having released documents for one purpose (*i.e.*, Mr. Gelfand's benefit), DOE may not withhold them from another party.

In support of attorneys' fees, petitioner asserts that DOE's actions forced petitioner to commence this second Article 78 proceeding to obtain documents that should have been

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[2] The Court notes that the related proceeding has been decided by this Court.

provided. The documents sought relate to the expenditure of millions of dollars in public funds, the transportation of schoolchildren, DOE's acts to appease a Union that has threatened a city-wide bus strike, and meaningful access to the political process. Thus, an award of attorneys' fees to petitioner, pursuant to POL§ 89(4)(c), is justified.

Opposition

Respondents contend that the petition should be dismissed for petitioner's failure to exhaust its administrative remedies. Before a petitioner may commence an Article 78 proceeding seeking production of records under FOIL, petitioner must first bring an administrative appeal, after having been "denied access to a record." Although petitioner wrote to the DOE Chancellor on October 20, 2008 to complain that DOE had not yet produced documents responsive to petitioner's FOIL request, DOE had not by that time denied petitioner access to any of the requested records. Rather, DOE timely acknowledged the receipt of petitioner's request and thereafter updated petitioner on DOE's progress. At no point during this time frame did DOE state that it was denying access to the requested records. Thus DOE fully complied with POL §89(3)(a), and there was no denial of records to appeal as of petitioner's writing to the Chancellor on October 20, 2008. It is undisputed that petitioner did not appeal DOE's November 5, 2008 response, which DOE, along with producing certain responsive documents, for the first time denied access to other records that were exempt from disclosure. Instead, petitioner requested a list of withheld documents. Thus, petitioner failed to exhaust its administrative remedies.

Further, the petition is moot because all responsive nonexempt records have been provided. After the commencement of this proceeding, the DOE supplemented its response to

the FOIL request and provided additional responsive, non-exempt documents.

Moreover, the withheld documents are properly exempt from disclosure. The largest category of records withheld by respondents are documents that are exempt under POL §87(2)(g), which provides that an agency may withhold documents that "are inter-agency or intra-agency materials which are not: (I) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; [or] (iv) external audits." Many of the records withheld and described by DOE in opposition include discussion documents, draft documents, internal memoranda, and an internal e-mail. These materials consist of non-final analysis, opinions, deliberations, proposals, and recommendations used by DOE employees in order to reach final decisions, and do not contain statistical or factual data, instructions to staff that affect the public, final agency policy or determinations or external audits.

The other category of records withheld are documents that are protected under the Speech or Debate Clause, which provides that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." The Clause has been held to provide "at least as much protection as the immunity granted by the comparable provision of the Federal Constitution," which "confers immunity on members of Congress for legislative acts." The Supreme Court of the United States has expanded the interpretation of the federal clause to broadly cover documents and reports considered by legislators, and activities performed by legislative staff. Analogously, the Speech or Debate Clause "permits legislators or their agents to 'conduct investigations and obtain information without interference from the courts, at least when these activities are performed in procedurally regular fashion,'" and protects "documents or data produced at the request of legislators, as such documents could reveal the various policy

options considered by individual legislators." Here, respondents withheld two memoranda that were prepared at the request of legislators and that set forth DOE and City of New York opinions and policy recommendations related to a proposed amendment of the Family Court Act. These documents were produced at the behest of legislators and are directly related to the process of creating legislation, and their dissemination would thus unquestionably reveal the thought processes of the legislators to whom they were provided.

Respondents also argue that attorney's fees and costs are unwarranted. Petitioner cannot establish, as a matter of law, that it "substantially prevailed." Even if the Court were to find that some or all of the documents withheld by respondents should have been disclosed, an award of fees is inappropriate under POL § 89(4)(c) because petitioner cannot establish that "(I) the agency had no reasonable basis for denying access; or (ii) the agency failed to respond to a request or appeal within the statutory time."

Reply

In reply, petitioner contends that DOE's document search was dilatory and that petitioner did not fail to exhaust its administrative remedies. The Chancellor, through DOE's Counsel, dismissed petitioner's appeal and specifically affirmed DOE's grounds for denying portions of petitioner's request. Thus another appeal to DOE's Counsel, challenging the very denial by DOE he had already affirmed, would have been utterly futile, thereby negating any need for such an appeal. Further, additional time spent on appeals might have caused irreparable injury.

Nor is the petition moot. Respondents failed to address the first two of petitioner's four document requests, which seek documents relating to communications with Local 1181 or bus companies regarding EPPs. Further, the privilege under the Speech and Debate Clause belongs

to the Legislature or his/her aides, not to respondents, who failed to show how disclosure impairs the Legislature's deliberations. Petitioner contends that an *in camera* inspection by the Court of the documents withheld (or redacted), which according to DOE, are only eight documents, is warranted. Petitioner also reiterated its request for attorneys' fees.

Parties' Arguments Regarding Waiver

Based on a further telephonic conference, the parties submitted arguments as to whether the DOE waived the Speech or Debate privilege. Petitioner argues that DOE waived such privilege as to documents Bates-stamped NYC A1 and NYC A2, by DOE's public disclosure of two other memoranda (Bates-stamped A356, which was prepared by DOE's Office of Intergovernmental Affairs - the very same office that prepared NYC A1 and NYC A2, and Bates-stamped A570, which was prepared by the Mayor's Legislative Representative). Documents Bates-stamped NYC A1 and NYC A2 were given to the Legislature on the same issue: the City's reasons for seeking the amendment and the effects of the amendment if passed. Once the party opens the door on an issue by providing selected communications, all related communications must be produced as well.

Further, NYC A2, provided to Senator Padavan's Legislative Director, purports to have set forth "DOE's opinion regarding the fiscal impact of the proposed amendment." The Senator himself chose to disclose it in a "Local Fiscal Impact Note", in which Senator Padavan stated that DOE "estimates that this legislation will have no significant impact if enacted." Local Fiscal Impact Note is "required by § 51 of the Legislative Law and Permanent Joint Rule 1." Thus, the Senator referenced to what appears to be the very document DOE has withheld (NYC A2). It is inconceivable that the Senator, or anyone else in the Legislature, would assert a privilege against

disclosure of a memorandum clearly intended, and required, to be public.

Petitioner also asserts that in Campaign for Fiscal Equity, the legislators themselves were being sued, and the privilege was asserted to protect legislators with whom the deponent had worked on a particular project pertinent to the litigation. However here, no one is seeking information about a legislator or what he/she did or did not do, or materials that may disclose Senator Padavan's motivations for sponsoring the Senate Bill. Further, Senator Padavan had already conducted his investigation and obtained information and was formally and publicly proposing the bill.

Although DOE contends that NYC A1 and NYC A2 were "prepared ... at the request of and provided to the New York State Legislature," no one asserting the privilege has submitted any request from the Legislature or testified or provided an affidavit supporting the allegation.

In response, DOE points out that petitioner fails to cite a single case that actually addresses waiver of the Speech or Debate Clause privilege, or waiver in the FOIL context, but instead, cites an unpublished, uncorrected Nassau County Supreme Court opinion[3] that was decided on other grounds. Further, the United States Supreme Court has held that waiver of the privilege provided by the Speech or Debate Clause "can be found only after explicit and unequivocal renunciation of the protection." It has also been held that the "ordinary rules for determining the appropriate standard of waiver do not apply in this setting" and that testimony and conduct "cannot be seen as an explicit and unequivocal waiver" of the protection provided by the Speech or Debate clause, "assuming such a waiver can be made."

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[3] *Farina v Merchants Ins. Co.*, 9 Misc 3d 1106, 806 NYS2d 444 [Sup Ct 2005]).

And, although Senator Padavan may have relied on the information provided by DOE in preparing the Local Fiscal Impact Note, the Local Fiscal Impact Note can hardly be characterized as a "disclosure" of document NYC A2. Also, petitioner's argument that a waiver occurred because the City disclosed other memoranda "on the same issue," also fails. The expression of waiver would need to come from the legislative member who is the beneficiary of the protection-another individual or entity cannot effect the waiver; finally, it would result in absurd outcomes-and an evisceration of the privilege-if such a waiver were permitted. Under Petitioner's argument, the vast majority of information obtained from outside agencies by legislative members would likely not be protected, an outcome that is completely inconsistent with the purpose of the Speech or Debate Clause. Finally, the Speech or Debate Clause protects a legislator's gathering of information in connection with legislative activities, including communications with other organizations, as documents NYC A1 and NYC A2 reflect.[4]

Analysis

Failure to Exhaust Administrative Remedies

Section 7801(1) of the CPLR unequivocably states that no determination shall be challenged in an Article 78 proceeding "which is not final or can be adequately reviewed by appeal to a court or to some other body or officer...." A determination is deemed final and binding and thereby ripe for review "when it 'has its impact' upon the petitioner who is thereby aggrieved " (*Parent Teacher Ass'n of P.S. 124M v Board of Educ. of City School Dist. of City of*

[4] In a reply, petitioner's point out that neither Senator Padavan. his aide, another legislator, or, for that matter, any human being with know ledge ever asserted the alleged privilege in the first place. It is absurd to argue that DOE cannot waive a "privilege" which DOE and DOE alone asserted. In response, DOE argues that the Court explicitly directed that no reply papers were permitted. Thus, the Court should reject petitioner's reply. Atlhough the Court considered petitioner's reply, such reply did not affect the outcome of this decision.

N.Y., 138 AD2d 108, 529 NYS2d 761 [1st Dept 1988], *citing Matter of Edmead v McGuire*, 67 NY2d 714, 716, 499 NYS2d 934, 490).

Respondents' claim that petitioner failed to exhaust its administrative remedies is unpersuasive. The exhaustion rule is not inflexible; it need not be followed, for example, when resort to an administrative remedy would be futile (*id. citing Usen v Sipprell*, 41 AD2d 251, 342 NYS2d 599; 1 N.Y.Jur., Administrative Law, s 171, p. 575). Here, DOE finally issued its determination of petitioner's request on November 5, 2008, wherein DOE produced documents and withheld others based on certain privileges. Petitioner was also advised that it could appeal DOE's determination within 30 days to DOE's General Counsel. Later, on November 14, 2009, DOE's counsel, in response to petitioner's letter to the Chancellor concerning its FOIL request, treated petitioner's complaint for DOE's delay in producing documents as "an appeal" and rendered petitioner's complaint "moot" in light DOE's then recent production. General Counsel advised petitioner to appeal DOE's November 5th letter according to the instructions contained therein. However, the instructions directed petitioner to appeal to the General Counsel, himself. Under such circumstances, it cannot be said that petitioner failed to exhaust its administrative remedies. The official before whom the administrative appeal would be held had a direct involvement in this matter and had already considered the DOE's response sufficient to render the matter "moot." Therefore, denial of the petition on the ground that petitioner failed to exhaust its administrative remedies is unwarranted.

Nor can it be said that petitioner's FOIL request is moot. Whether respondents' properly withheld certain documents from disclosure is at issue and properly before this Court.

Standard of Review for Foil Request

The usual standard of review in Article 78 proceedings, *i.e.*, that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable. Rather, the agency resisting disclosure must prove entitlement to one of the exceptions (*Laureano v Grimes*, 179 AD2d 602, 603-04 [1st Dept 1992]). FOIL is based upon the policy that agency records are presumptively available to members of the public, unless the agency establishes that the records fall within one of the statute's exemptions (*Pinks v Turnbull*, 13 Misc 3d 1204, 824 NYS2d 758 [Sup Ct New York County 2006]). Thus, the burden rests on the agency to demonstrate the applicability of an exemption (*DJL Rest. Corp. v Dept of Buildings of the City of New York*, 273 AD2d 167, 710 NYS2d 564 [1st Dept 2000] *citing Gould v New York City Police Dept*, 89 NY2d 267, 275, 653 NYS2d 54), which requires a particularized and specific justification for denying access to demanded documents that is more than a "blanket" exemption (internal citations omitted). Affidavits merely repeating the statutory phrasing of an exemption are insufficient to establish the requirement of particularity *(id. citing Brown v Town of Amherst*, 195 AD2d 979, 980, 600 NYS2d 601)

Public Officers Law

FOIL imposes a broad duty of disclosure on government agencies (*Matter of Hanig v State of New York Dept of Motor Vehicles*, 79 NY2d 106 [1992]). "All agency records are presumptively available for public inspection and copying unless they fall within 1 of 10 categories of exemptions which permit agencies to withhold certain records" (*Id*).

A. *POL § 87(2)(a)*

POL §87(2)(a) exempts from disclosure information specifically exempted by state (or

federal) statute, *i.e.*, attorney-client information pursuant to CPLR 4503 and the Speech and Debate Clause.

As relevant herein, the attorney-client privilege (CPLR 4503) applies to confidential communications between clients and their attorneys made "in the course of professional employment" (*New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169 *citing Spectrum Systems Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377, 575 NYS2d 809).

The Speech and Debate Clause (NY Const, art III, §11), provides that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." This Clause provides "at least as much protection as the immunity granted by the comparable provision of the Federal Constitution" (*Campaign for Fiscal Equity v State of New York*, 179 Misc 2d 907, 687 NYS2d 227 [Sup Ct New York County, Degrasse, J. 1999] *citing People v Ohrenstein*, 77 NY2d 38, 53 [1990]).

In *Campaign for Fiscal Equity v State of New York* (*supra*), plaintiffs sought to challenge the adequacy of State funding for public schools. In the course of discovery, plaintiffs deposed a former employee (the "deponent") of the State Education Department (the "Education Department") "concerning her contacts with State legislators and officials of the executive branch regarding computer models for State funding of public schools." At her deposition, the deponent testified that she "would act on requests from the Division of the Budget and from the Legislature and provide the requested information." Plaintiffs sought further testimony concerning "documents she used to prepare for the meetings, the documents that were produced as a result of the meetings." Her counsel at the deposition asserted the "legislative privilege."

Relying on the caselaw interpreting the federal version of the Speech and Debate Clause, the Court held that the documents sought were protected from disclosure. Under the federal Speech and Debate Clause, "legislative activities by legislators or their staff are beyond judicial scrutiny" so as permit legislators or their agents to "conduct investigations and obtain information without interference from the courts, at least when these activities are performed in a procedurally regular fashion." Further, legislative acts included acts that are an "integral part of the deliberative and communicative processes by which Members participate in a committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation" (*id.* at 911, *citing Gravel v United States*, 408 US 606, 625). Finding that the formulation of budgetary legislation is an "integral" legislative function, the Court held that the documents the deponent produced at the behest of legislators were also protected by the Speech and Debate Clause, as such documents could reveal the various policy options considered by individual legislators.

Petitioner's claim that the privilege applies to legislators and their aides, and not to the DOE is unavailing. In *Campaign for Fiscal Equity (supra)*, the plaintiff argued similarly that the deponent worked for the Education Department and not for any particular legislator or legislative committee. However, the Court rejected this argument, stating that it was the nature of the work in question performed by Education Department employee, and not the employee's title, which determined whether the Speech or Debate Clause applied. The Court also rejected the argument that the privilege must be asserted by the legislator. Although the Court acknowledged that the Speech and Debate Clause applies only to "members" of the Legislature, and to the staff that assist them, the Court reasoned that to the extent the deponent's testimony "would reveal a

legislator's thought process or the iterative process of creating legislation, she may assert the testimonial privilege created by the Speech and Debate Clause on legislators' behalf." (*Id.* at 910-912). In essence, to the extent a document is provided to the legislature for consideration in creating legislation, the Clause applies.

B. *POL § 87(2)(g)*

POL § 87(2)(g) allows an agency to deny public access to records that "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public;
iii. final agency policy or determinations;
iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

(*see Pinks v Turnbull*, 13 Misc 3d 1204, 824 NYS2d 758 [Sup Ct New York County 2006]). The exemption in POL § 87(2)(g) applies to "predecisional information which is prepared in order to assist the decision-making process" (*Pinks v Turnbull, supra*; *Matter of McAulay v Board of Educ. of the City of New York*, 61 AD2d 1048 [2d Dept 1978], *affd* 48 NY2d 659 [1979]). The purpose of this exemption is to "protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers" and permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure *(Pinks v Turnbull, supra, The New York Times Co. v City of New York Fire* Dept, 4 NY3d 477 [2005]; *Rothenberg v City University of New York*, 191 AD2d 195, 594 NYS2d 219 [1st Dept 1993]). Correspondence from an official of one agency to an official of another or to an official within the same agency are not available if the communication is purely advisory in nature (*Miracle*

Mile Associates v Yudelson, 68 AD2d 176, 417 NYS2d 142 [1979] [suggesting that written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff (not factual information upon which the agency relies in carrying out its duties) is exempt from public disclosure]). Thus, the exemption applies to deliberative materials, i.e., communications exchanged for discussion purposes not constituting final policy decisions (*Matter of Mothers on the Move*, 263 AD2d 408 [2d Dept 1997]).

The exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated categories (*Gould v New York City Police* Dept, 89 NY2d 267 [1996]). Thus, intra-agency documents that contain "statistical or factual tabulations or data" are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (*id.*) (*see e.g.*, *Matter of Mothers on the Move*, supra [form in the nature of factual presentation to show only that the appropriate procedures under Chancellor's Regulation C-30 were followed, not exempt under POL §87(2)(g)).

Based on a conference call and the submissions, it is understood that respondents provided petitioner with all of the documents responsive to petitioner's FOIL request falling within the first and second categories, namely, communications between DOE and ATU Local 1181 pertaining to the insertion of EPPs, and communications between DOE and school bus transportation companies pertaining to the insertion of EPPs, respectively.

However, respondents are withholding eight documents falling within the third and fourth categories (communications among DOE and NYC officials evidencing reasons to amend the Family Court Act or the legality of EPPs, and Pre-Bid Meeting questions and answers, respectively) based on the attorney-client privilege, Speech and Debate Clause of the New York

Constitution, inter-agency/intra-agency exemption, or a combination thereof. Likewise, the documents provided *via* respondents' December 31, 2008 letter response were redacted for information that constitutes (1) inter-agency/intra-agency exemption pursuant to POL §87(2)(g); or (2) deliberative materials, *i.e.*, communications exchanged for discussion purposes not constituting final policy decisions, pursuant to caselaw.[5]

According to the affirmation of Christine J. Kincinski, the Central Records Access Officer for DOE, and the DOE's Answer, the documents being withheld are:

> (a) a memorandum prepared at the request of and provided to New York State Legislatures of opinions on the reasons the City of New York seeks to amend the Family Court Act;
> (b) a memorandum prepared by DOE at the request of and provided to New York State Legislatures of DOE's opinions regarding the fiscal impact of the proposed Family Court Act amendment;
> (c) a partial draft of the memorandum is subparagraph (a) above, consisting of opinions and comments regarding the reasons the City of New York is seeking to amend the Family Court Act and potential effects of such amendment;
> (d) draft legislative language for the proposed Family Court Act amendment, which was circulated within DOE's Office of Intergovernmental Affairs and edited by DOE employees;
> (e) draft document consisting of analysis and opinion about reasons the City of New York and DOE seek the Family Court Act amendment, and how it would benefit the City of New York and DOE;
> (f) draft memorandum prepared by a legislative representative of the City of New York's Office of the Mayor describing reasons the City is seeking the Family Court Act amendment;
> (g) an internal DCP memorandum that discusses and evaluates opinions pertaining to the procurement of Pre-K transportation services and that requests approval for a particular

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[5] When an agency claims a FOIL exemption that cannot be evaluated on the basis of the documentation submitted on the motion, an in camera inspection is an appropriate, and likely necessary, method for the court to evaluate whether the exemption is applicable *(DJL Rest. Corp. v Dept. of Buildings of the City of New York*, 273 AD2d 167, *supra citing Fink v Lefkowitz*, 47 NY2d 567, 571, 419 NYS2d 467), in that the court may then balance the right of access against the agency's interest in nondisclosure, without the contents of the documents being compromised prior to the ruling (*id. citing Johnson v New York City Police Dept.*, 257 AD2d 343, 349, 694 NYS2d 14 *lv. dismissed* 94 NY2d 791, 700 NYS2d 422). Thus, as to the eight documents withheld from disclosure, and the documents DOE produced in redacted form, the Court requested the production of the eight documents as well as an unredacted version of such documents accompanied with a privilege log.

option; and
(h) an email from DCP director to the Office of Legal Services that discusses options related to the procurement of Pre-K transportation services and the opinions "of OPT and DCP regarding the advantages and disadvantages" of those options.

DOE asserts that subparagraphs (c), (d), (e), (f), (g) and (h) do not contain statistical or factual data, instructions to staff that affect the public, final agency policy or determinations, or external audits. DOE also asserts that (g) and (h) are further protected by the attorney-client privileges.

Upon review of such records, *in camera*, and applying the principles noted above, the Court determines that the following Bates-stamped records withheld by respondents are protected from disclosure, on the grounds noted below.

The memoranda prepared at the request of and provided to New York State legislators, *NYC A1 and NYC A2*, are protected by the Speech and Debate Clause. Such documents reflect data and information that were provided to the legislature, and thus, expose the options that the legislators considered in connection with the possible amendment of the Family Court Act. That such documents may fall outside the intra-agency exemption does not render the privilege afforded by the Speech and Debate Clause any less effective. Public Officers Law expressly provides that agencies may withhold information protected by statutory privileges, and here, the documents are clearly records that fall within the protection of the Speech and Debate Clause.

NYC A3-NYC A14 are protected by POL 87(2)(g), as they do not contain statistical or factual data, instructions to staff that affect the public, final agency policy or determinations, or external audits.

NYC A15 is protected by POL 87(2)(g), except as to the entire, full sentence: "Using

recent ridership figures . . . . annually." Therefore, DOE shall produce NYC A15 as redacted to disclose the above sentence.

NYC A16 is protected by POL 87(2)(g) as well as the attorney-client privilege afforded by POL §87(2)(a) and CPLR 4503.

NYC A17-NYC A38 were properly redacted by the DOE, pursuant to POL 87(2)(g).

Petitioner's claim that the DOE waived the Speech or Debate Clause privilege is unavailing. Such a "waiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting" (*U.S. v Helstoski*, 442 US 477, 99 SCt 2432 [1979] [defendant's conduct in testifying before grand jury and voluntarily producing documentary evidence of legislative acts did not waive protection of speech or debate clause]). The submissions herein fail to establish any such explicit and unequivocal waiver. None of the alleged acts of DOE or Senator Padavan rise to the level of an explicit and unequivocal waiver. Further, the cases upon which petitioner relies address waiver of the attorney-client privilege, and are inapplicable to the privilege asserted herein.

Therefore, the petition to compel respondents to produce documents requested pursuant to FOIL is granted to the limited extent noted above.

Attorneys' Fees

Pursuant to POL 89(4)(c), the court

> may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:
> I. the agency had no reasonable basis for denying access; or
> ii. the agency failed to respond to a request or appeal within the statutory time.

A party may recover reasonable attorney fees under POL 89(4)(c) by establishing that (1) it has "substantially prevailed," (2) the record sought was "of clearly significant interest to general public," and (3) "the agency lacked reasonable basis in law for withholding record" *(Beechwood Restorative Care Center v Signor,* 11 AD3d 987, 988, 784 NYS2d 750 [4th Dept 2004], *leave to appeal granted* 4 NY3d 703, 792 NYS2d 1, *affd* 5 NY3d 435). However, even if party meets those requirements, award of attorney fees remains discretionary with Supreme Court (*id.*). Here, the DOE had a reasonable basis for denying access to the records at issue, and petitioner did not substantially prevail in this proceeding. Therefore, petitioner's request for attorneys' fees is denied as unwarranted.

Conclusion

Based on the foregoing, the Article 78 petition for an order compelling the respondents Department of Education and Christine Kicinski to produce documents requested pursuant to New York's Freedom of Information Law ("FOIL") (Public Officers Law, "POL" §§ 84-90), is granted solely to the extent that within 30 days of the date of this Order, DOE shall disclose the entire, full sentence beginning with "Using recent ridership figures" and ending with "annually" appearing on Bates-stamped page NYC A15; and it is further

ORDERED that petitioner's request for attorneys' fees and costs related to this action is denied; and it is further

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

This constitutes the decision and order of the Court.

Dated: August 7, 2009

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD