To Be Argued By:
ROBERT HODGSON
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

—against—

VILLAGE OF FREEPORT and FREEPORT POLICE DEPARTMENT,

Respondents-Respondents.

DOCKET NO. 2022-03104

BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

PAGE(S)

Statutes

Rules

Other Authorities

PAGE(S)

QUESTIONS PRESENTED

1. Whether a government agency is permitted to invoke the narrow, "unwarranted-invasion-of-privacy" exemption of Public Officers Law Section 87(2)(b) of FOIL or the limited "life and safety" exemption of Section 87(2)(f), without justification, to create a categorical bar to the production of any records regarding complaints of police misconduct that have not resulted in discipline, or whether the agency is instead required to produce the records and apply targeted redactions, if necessary, pursuant to the redaction scheme recently added to the FOIL statute as part of the Section 50-a repeal Bill, which applies squarely to the records that were requested from the agency.

   The lower court erroneously ruled that Respondents-Respondents (hereinafter, "Freeport" or the "FPD") may withhold police disciplinary files in their entirety that are related to "unfounded" complaints under FOIL's "unwarranted-invasion-of-privacy" and "life and safety" exemptions.

2. Whether denying the Petitioner-Appellant's (hereinafter "NYCLU" or "Appellant") request for attorneys' fees and litigation costs constitutes error of law.

   The lower court erred as a matter of law in denying the NYCLU's request for attorneys' fees and costs.

I. PRELIMINARY STATEMENT

The NYCLU challenges Freeport's blanket denial of a Freedom of Information Law ("FOIL") request seeking records related to police misconduct complaints that have not been substantiated, did not result in officer discipline, or that have not yet been deemed final. In light of the repeal of New York Civil Rights Law Section 50-a ("Section 50-a"), such categorical denials violate the plain text of the FOIL statute, frustrate its purpose, and are precluded by binding case law. The lower court's decision allowing the FPD to categorically withhold such records should be reversed.

For decades, police misconduct records had been shielded from disclosure by Section 50-a. In June 2020, the Legislature repealed Section 50-a in its entirety, making all police misconduct records presumptively public, and created a targeted redaction scheme specifically for police misconduct records to address the privacy and safety concerns of police officers. Instead of producing redacted versions of records consistent with FOIL as amended, the FPD ignored the applicable statutory changes, proceeded as if the Legislature had not acted, and issued a blanket denial, withholding the records in full. The FPD justified its denial by first invoking FOIL's longstanding general catch-all privacy exemption, arguing that production of any part of any record related to any instance in which the FPD declined or failed to discipline its own officers constitutes an unwarranted invasion of privacy. The FPD

further justified its denial by invoking FOIL's life and safety exemption, similarly asserting without any factual basis that disclosure of any portion of the records in question would lead to the endangerment of officers.

The lower court's decision to allow the FPD to categorically withhold all "unsubstantiated" or "unfounded" complaints against officers based on FOIL's privacy and safety provisions cannot be squared with the law. When the Legislature fully repealed Section 50-a—which previously shielded all police misconduct complaints from FOIL disclosure—it simultaneously added language to the FOIL statute making "complaints" and "allegations," regardless of disposition, presumptively public and establishing a detailed ***redaction*** scheme for exactly these records to address the privacy and safety concerns of police officers. And binding Court of Appeals precedent mandates targeted redaction rather than blanket withholding when an agency invokes a FOIL exemption. Accordingly, the Court should reverse the lower court's decision and order the FPD to produce the requested police misconduct records, regardless of their disposition, with limited redactions consistent with FOIL.

II. STATEMENT OF FACTS AND PROCEDURE

A. The FOIL Request, Administrative Proceedings, And Article 78 Proceedings

In response to the repeal of Section 50-a—and as part of a statewide effort to better understand police disciplinary practices in over a dozen jurisdictions around

the state—the NYCLU submitted a FOIL request to the FPD's FOIL officer on September 15, 2020. (R. at 88-95.)[1] It sought records related to the FPD's police accountability processes, including many records that had previously been shielded from the public by Section 50-a. (*Id.*) In issuing its FOIL request, the NYCLU sought to vindicate New Yorkers' right to information that the New York State Legislature recognized as vital to understanding how police disciplinary and accountability mechanisms function.

In response to the NYCLU's request for "[a]ll civilian complaints against law enforcement officers" from January 1, 2000, to the present, the FPD provided 25 officer disciplinary reports, limited to only what it described as the "***founded*** complaints . . . during the period requested." (R. at 100 [emphasis added].) The FPD categorically refused to produce any part of any complaint that did not result in discipline—what it described as "unfounded" or "unsubstantiated" complaints—based on the FPD's interpretation of Public Officers Law ("POL") Section 89(2)(b) (FOIL's "personal privacy" exemption).

On December 24, 2020, in accordance with POL Section 89(4)(a), the NYCLU filed an administrative appeal of the FPD's partial denial. (R. at 106-113.) On January 7, 2021, the FPD sent the NYCLU a response denying that administrative appeal and raising an additional rationale for its denial, claiming that

[1] R. refers to the Record on Appeal, which is the record provided by Petitioner-Appellant.

every part of every "unfounded" complaint is also categorically exempt from disclosure under POL Section 89(2)(f) (FOIL's "life and safety" exception). (R. at 132-134.)

On May 6, 2021, the NYCLU timely filed an Article 78 Petition (the "Petition") in which it challenged the FPD's failure to provide a particularized and specific justification for the nondisclosure of unsubstantiated complaints, and the FPD's contention that the materials sought were protected, as a categorical matter, by POL Sections 87(2)(b) and (f). (R. at 21-31.)

B. The Trial Court's Decision

On February 10, 2022, the trial court issued a four-page opinion denying the NYCLU's Petition in its entirety, affirming the FPD's denial of the NYCLU's FOIL request, denying the NYCLU's request for attorney's fees, and granting the FPD's request for costs and disbursements. (R. at 4-14.) The NYCLU now appeals from those orders.

III. STANDARDS OF REVIEW

Article 78 relief should be granted if an agency determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." (CPLR § 7803[3].) With respect to FOIL, Article 78 relief is appropriate when a reviewing court determines the agency's determination was "affected by an error of law." (*Id.*; *Matter of Stonewall Contr.*

Corp. v New York City Sch. Constr. Auth., 120 AD3d 503, 504 [2d Dept 2014]; *see also Jewish Press, Inc. v N.Y. City Police Dept.*, 190 AD3d 490, 490 [1st Dept 2021].) In reviewing the trial court's disposition in an Article 78 proceeding, the Appellate Division reviews legal conclusions of the trial court *de novo*. (*Matter of Barry v O'Neill*, 185 AD3d 503, 505 [1st Dept 2020].)

For the following reasons, the FPD's categorical refusal to review or produce any portion of any records of civilian complaints against the FPD's officers that did not result in discipline was affected by an error of law and should be reversed.

IV. ARGUMENT

A. FOIL's Limited Exemptions Under Sections 87(2)(b) And 87(2)(f) Do Not Justify Categorically Withholding Every Portion of Every Police Record That Did Not Result In Discipline And Instead Mandate That Records Be Produced With Appropriate Redactions.

1. The New York State Legislature repealed Section 50-a to make police misconduct records public and amended FOIL to establish a detailed redaction scheme addressing concerns of officer privacy and safety.

In June 2020, well-publicized examples of police misconduct prompted the Legislature of this State to reexamine the balance between the public's interest in transparency and accountability as to the conduct of law enforcement personnel and the privacy rights of those personnel. Following extensive hearings and debate, the Legislature repealed Section 50-a and amended FOIL.

Prior to that legislative action, Section 50-a broadly insulated police personnel records from public disclosure. The provision created an exception to the default rule embodied in POL Section 87(2) of FOIL, which provides that "[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records" unless a specific statutory exemption applies. (POL § 87[2].) When initially enacted, Section 50-a imposed relatively modest limitations to the public disclosure of police misconduct records. Over time, however, the cloak it placed over official records expanded.[2] Police departments and unions increasingly utilized the provision to shield from public scrutiny and civilian oversight records that described the conduct and oversight of law enforcement personnel. Thus, by the time of its repeal, Section 50-a had come to render "***all*** records of police conduct or misconduct essentially invulnerable." (*Schenectady Police Benevolent Ass'n. v City of Schenectady*, No. 2020-1411, 2020 WL 7978093 *8 [Sup Ct, Schenectady County Dec. 29, 2020] [emphasis added].)

In 2020, the Legislature reassessed—and fundamentally altered— the balance between privacy and public access. It did so by effecting a complete repeal of Section 50-a and amending POL Section 86(6) of FOIL on the same day. The latter action for the first time defined "law enforcement disciplinary records" and added

[2] Brendan J. Lyons, *Court rulings shroud records*, TIMES UNION, [Dec. 15, 2016], available at https://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php [last accessed October 18 2022].

them to the class of records of government presumptively subject to disclosure under FOIL. (*See* 2020 McKinney's Session Law News of NY, No 96 at § 2 [June 2020]; POL § 86[6].) The amendment provides:

> "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

(POL § 86[6].) "'Law enforcement disciplinary proceeding' means the commencement of any investigation and subsequent hearing *or* disciplinary action conducted by a law enforcement agency." (POL § 86 [7] [emphasis added].)

The second act of legislative rebalancing of the interests of law enforcement personnel and the public was the addition of two new provisions to POL Section 87. Those new provisions created targeted protections for a "law enforcement agency responding to a request for law enforcement disciplinary records." (2020 McKinney's Session Law News of NY, No 96 at § 3 [June 2020].) First, the new statute states that "[a] law enforcement agency responding to a request for law enforcement disciplinary records . . . shall redact any portion of such record containing the information specified in [POL § 89(2-b)] prior to disclosing such record." (POL § 87[4-a].) POL Section 89(2-b) requires the producing agency to

redact from law enforcement records: (i) medical history information; (ii) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of the officer and their family members; (iii) any social security number; or (iv) the use of an employee assistance program, mental health service, or substance abuse assistance service. (POL § 89[2-b].)

The second new privacy provision permits redaction of any portion of a law enforcement disciplinary record that pertains only to "technical infractions." (*See* POL §§ 87[4-b], 89[2-c].) "Technical infractions" are defined as minor rule violations by law enforcement solely related to the enforcement of administrative departmental rules. (POL § 86[9].) The statute provides that "technical infractions" do not include incidents stemming from law enforcement personnel's interactions with the public, that are of public concern, or that are otherwise related to an officer's investigative or enforcement responsibilities. (*Id.*)

The law that governs the NYCLU's FOIL request, therefore, reflects a new, finely-honed legislative judgment as to the appropriate scope of FOIL exemptions for law-enforcement related records and how they are to be addressed (*i.e.*, through redactions). Nowhere does the statute distinguish between substantiated, unsubstantiated, unfounded, or unresolved complaints, and nowhere does it create a categorical exemption from disclosure for any type of law enforcement record. Most importantly, by creating a detailed new redaction scheme that applies exclusively to

law enforcement records, the amended law plainly established that redaction—not categorical withholding—is the appropriate method to address any privacy and safety concerns associated with the production of those records.

Considering versions of this exact question, multiple New York courts have agreed that FOIL compels the production of all such complaint records—appropriately redacted if necessary—irrespective of their disposition. (*See Zhang v City of New York*, No. 157088/2015, 2020 WL 12589238, *1 [Sup Ct, NY County Nov. 5, 2020] [in the context of a discovery dispute, stating that "[i]n light of the repeal of Civil Rights Law 50-a, these records . . . are subject to Freedom of Information Law Requests under [POL] sections 84-90."], *aff'd*, 198 AD3d 504 [1st Dept 2021] [unanimously affirming]; *Schenectady Police Benevolent Assn. v City of Schenectady*, No. 2020-1411, 2020 WL 7978093, *14 [Sup Ct, Schenectady County Dec. 29, 2020] [holding that, under FOIL, withholding "unsubstantiated" complaints "would render the Legislature's repeal of CRL §50-a utterly meaningless"]; *New York Civ. Liberties Union v New York City Dept. of Correction*, 2022 WL 1156208, *2 [Sup Ct, NY County Apr. 19, 2022] [holding that "if the legislature's intent was to shield unsubstantiated [disciplinary] records it could have specified as such"]; *Rickner PLLC v City of New York*, 2022 WL 1664298, *4 [Sup Ct, NY County May 25, 2022] [holding that unsubstantiated claims are "subject to disclosure" in furtherance of FOIL's "underlying policy aims of promoting public inspection" and

"governmental transparency."]; *People v Herrera*, 71 Misc 3d 1205(A), CR-004539-20NA, 2021 WL 1247418, *5 [Nassau County Dist Ct Apr. 5, 2021] [declining to limit production to only "substantiated" records and noting that "privacy concerns should be allayed by" redactions listed in POL §§ 89[2-b] and [2- c]]; *People v Cooper*, 71 Misc 3d 559, 567 [Sup Ct, Erie County 2021] ["The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available."]; *Buffalo Police Benevolent Assn. v Brown*, 69 Misc 3d 998, 1003 [Sup Ct, Erie County 2020] [holding that "a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated' – is not merely a drastic remedy, it is an inappropriate one."]; *People v Perez*, 71 Misc 3d 1214(A), 2021 NY Slip Op 50374[U], *4 [Crim Ct, Bronx County 2021] [holding that the repeal of Section 50-a requires "disclosing both substantiated and unsubstantiated records"]; *see also Uniformed Fire Officers Assn. v De Blasio*, 846 F Appx 25, 30 [2d Cir 2021] [rejecting police union's privacy and safety arguments]; *Fowler Washington v City of New York*, 2020 WL 5893817, *3 [ED NY, Oct. 5, 2020] ["[B]y repealing Section 50-a, the State of New York has legislatively required that police officers' personnel records should be available to the public[,]" including "unsubstantiated, exonerated, and unfounded allegations."].)

The trial court ignored these decisions and their analyses completely; it neither cited to them nor grappled with their reasoning. Instead, it cited *Matter of New York*

Civ. Liberties Union v City of Syracuse (72 Misc 3d 458 [Sup Ct, Onondaga County 2021], *appeal pending at* Appeal No CA-21-00796 [4th Dept]), wherein the court allowed the Syracuse Police Department to withhold complaint records that did not result in discipline pursuant to the privacy exemption (*id.* at 467), and *Newsday LLC v Nassau County Police Dept.* (Index No. 601813/2021 [Sup. Ct., Nassau County Nov. 3, 2021], *appeal pending at* Appeal No 2021-08455 [2d Dept]), which similarly allowed the Nassau Police Department to withhold unsubstantiated police disciplinary reports (*id.*). The trial court additionally relied on a nonbinding Committee on Open Government ("COOG") advisory opinion. For the reasons described below, *Syracuse* and *Newsday* misinterpret both legislative command and the authorities on which they purport to rely, and the COOG opinion relied upon by the trial court in fact supports granting the NYCLU's FOIL request. The Petitioner-Appellant respectfully submits that nothing in those decisions and opinions persuasively counsels against reversal here.

2. The text and legislative history of the Section 50-a repeal preclude the FPD's categorical withholding of complaint records that did not result in discipline.

The text of the amended FOIL statute, the legislative history of its passage, and binding Court of Appeals precedent all foreclose the trial court's conclusion that the FPD can invoke FOIL's privacy and safety provisions to justify its wholesale withholding of unsubstantiated complaints against FPD officers. In New York,

government records are "presumptively open for public inspection . . . unless they fall within one of the enumerated exemptions of [FOIL]." (*Gould v NY City Police Dept.*, 89 NY2d 267, 274-75 [1996].) The text of the Section 50-a repeal bill established a disclosure regime for *all* disciplinary records, including *allegations*, regardless of their status or disposition, and the complete records the FPD has decided to withhold do not fall within any exception to FOIL's disclosure rule.

The text and legislative history of the Section 50-a repeal bill makes clear that the Legislature intended to make *all* law enforcement disciplinary records available to the public, regardless of disposition, subject only to limited exceptions. The Section 50-a repeal bill amended POL Section 86 to add subdivisions 6 and 7, which define "law enforcement disciplinary records" and "law enforcement proceedings." POL Section 86(6) defines "law enforcement disciplinary records" as:

> any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to the ***complaints, allegations,*** and charges against an employee.

(POL § 86[6][a] [emphasis added].) The plain text of POL § 86(6)(a) provides that *allegations* are law enforcement disciplinary records now subject to disclosure under FOIL: it does not state that allegations are subject to FOIL only if substantiated. Furthermore, POL Section 86(7) clearly indicates that a "law enforcement disciplinary proceeding" encompasses records created prior to any conclusion regarding officer culpability. They include records related to "the ***commencement***

of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency." (POL § 86[7] [emphasis added].) By definition, allegations of officer misconduct, regardless of whether they are ultimately substantiated, are records related to "the commencement of any investigation" and, therefore, subject to disclosure pursuant to the text of the amended FOIL statute.

The trial court's ruling that "the repeal of CRL § 50-a [does not] require [that] records of unsubstantiated claims against police officers be released" renders meaningless the Legislature's particularizing of "allegations," "charges," "the commencement of an investigation," "any subsequent hearing," and any "disciplinary action." (*See* POL § 86[6].) This, in turn, contravenes the "well-established rule that courts should not interpret a statute in a manner that would render it meaningless." (*Suarez v Williams*, 26 NY3d 440, 451 [2015].)[3] As the New York Court of Appeals has explained, "[w]hen the language of a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words." (*Cole v Mandell Food Stores*, 93 NY2d 34, 39 [1999].)

[3] *See also Matter of Brown v Wing* (93 NY2d 517, 522 [1999] ["When an enactment displays a plain meaning, the courts construe the legislatively chosen words so as to give effect to that Branch's utterance"]; *Matter of Indus. Commr. of State of NY v Five Corners Tavern*, 47 NY2d 639, 646–647 [1979] ["It remains a basic principle of statutory construction that a court will 'not by implication read into a clause of a rule or statute a limitation for which no sound reason [can be found] and which would render the clause futile"].)

In addition to contradicting the plain text of the amended statute, the trial court's ruling frustrates the express intent of the Legislature—to provide and preserve the public's right of access to law enforcement disciplinary records, regardless of their disposition. (*See Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565-66 [1986] [finding that FOIL was enacted "in furtherance of the public's vested and inherent right to know"]; *People v Cooper*, 71 Misc 3d 559, 567 [Sup Ct, Erie County 2021] [finding that the legislative intent of the repeal of Section 50-a was to make all police disciplinary records, "subject to statutorily approved redactions," available to the public and further asserting that the definition of "law enforcement disciplinary records" encompasses all records, including unfounded, exonerated, substantiated, and exonerated complaints].) When the legislature expressly invokes a purpose, it is fundamental that a court should effectuate it. (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [1998], *citing Tompkins v Hunter*, 149 NY 117 [1896].) Indeed, in cases involving statutory construction, the legislature's intent "is the controlling principle." (*Leach v Ocean Black Car Corp.*, 122 AD3d 587, 589 [2d Dept 2014].)

Here, the Legislature made clear that the repeal of Section 50-a would require the production of records related to so-called "unsubstantiated" complaints. While debating the repeal in the New York State Assembly, the bill's sponsor, Assemblymember Daniel J. O'Donnell, explicitly stated that the bill does not

distinguish between substantiated and unsubstantiated records. (R. at 213.) Assemblymember Philip Ramos further cited public access to unsubstantiated complaints as a possible means of establishing patterns of misconduct and identifying officers "[w]ho might be a problem and who might be a risk to the public[,]" arguing that "the core of the problem is that throughout history, crimes against people of color have been unsubstantiated." (R. at 252; *see also*, 243rd Leg., Sess. [June 6, 2020] [Justification] ["Repeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct"].)

This makes sense, because knowing whether or not a complaint of police misconduct resulted in discipline—or remains pending for years without any action—is a critical data point in the public's understanding of the credibility (or lack thereof) of police accountability systems. Assemblymember O'Donnell and Senator Bailey remarked on the significance of the dual purpose served by the repeal and stressed the importance of examining all records regardless of disposition. (R. at 250 ["The last two years there were 4,000 complaints at the CCRB alleging racial profiling. Do you know how many have been substantiated? Zero. Zero. Which means to me very clearly that the process, whatever that may be, is fatally flawed."]; *see also id.* at 322; NY Senate, Floor Debate, 243rd NY Leg., Reg. Sess. 1805-06 [June 9, 2020].) Indeed, the NYPD's Internal Affairs Bureau substantiated ***none*** of

the 2,495 complaints alleging biased policing made against NYPD officers from 2014 to 2018. (*See* Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training* 17-18 [2019]; *see also Suffolk County Police Department Internal Affairs Bureau Report* [June 2021] [indicating that Suffolk County Police Department ("SCPD") substantiated only one allegation of biased policing in 2020][4]; *Plaintiffs' Rule 56.1 Counter-Statement* at 48*, Plaintiffs #1-21 v County of Suffolk et al.*, No. 2:15-cv-02431 [Oct. 16, 2020], NYSCEF Doc No. 303 [indicating that SCPD "never" substantiated an allegation of biased policing as of the date of certain SCPD personnel depositions].) The Legislature, therefore, plainly determined that the public has a significant interest not only in identifying officer misconduct, but also in understanding the specific issue of which complaints go unsubstantiated by police departments and why.

Additionally, when contemplating the repeal of Section 50-a, the Legislature considered and rejected competing narrower proposals. The final repeal measure was one of five Section 50-a related bills of the 2019-2020 session. One of those bills, S.4213, provided for the release of specific categories of records only in

[4] A more specific citation for this source is unavailable as of the date of this filing due to a cyber attack on the Suffolk County Government's servers which has substantially limited access to materials published online by the Suffolk County Police Department and other Suffolk County government agencies.

situations where the allegations had been "substantiated." (*See* S.4213, 242nd Leg., Reg. Sess. [NY 2019].) The Legislature, therefore, expressly considered and rejected the FPD's view of what the law should be when it rejected this narrower, competing bill. The trial court committed legal error by rewriting the Section 50-a repeal bill in a manner that wholly disregards the Legislature's clearly-expressed intent.

3. FOIL's longstanding "unwarranted invasion of privacy" exemption cannot justify Respondents' blanket refusal to produce any portion of any complaint that did not result in discipline.

Declining to analyze the text or the purpose of the changed statutory scheme, the lower court held that FOIL's preexisting privacy provision—POL Section 87(2)(b), which protects "records or portions thereof" that would constitute an "unwarranted invasion of privacy"—should be read to permit the categorical refusal to produce any part of any complaint against FPD officers that did not result in the FPD disciplining its own officers. (*See* R. at 17-18.)

As an initial matter, this interpretation renders meaningless the Legislature's amendments to FOIL. It is a generally accepted canon of statutory interpretation that exceptions should be read narrowly to preserve the primary purpose of a statutory provision. (*Comm'r v Clark*, 489 US 726, 739 [1989].) Here, the trial court gives such broad effect to FOIL's privacy exemption that the Legislature's purpose of making law enforcement disciplinary records presumptively available—

including records of *allegations* against officers—is rendered meaningless. Similarly, specific provisions of statues should be given effect over more general provisions. (*People v Sprint Nextel Corp*., 26 NY3d 98, 116 [2015].) Here, the trial court failed to give effect to the more specific provisions of FOIL rendering the exact records at issue presumptively disclosable and providing a solution to law enforcement privacy concerns—in particular, the amended FOIL law's introduction of a new mandatory redaction scheme specific to law enforcement disciplinary records (*see* POL §§ 89[2-b], [2-c])—in favor of a breathtakingly broad application of the general privacy exemption applicable to all FOIL requests.

Moreover, the trial court's holding cannot be squared with binding Court of Appeals precedent that creates a presumption in favor of disclosure, prohibits the categorical withholding of records pursuant to POL Section 87(2)(b), and mandates targeted redaction instead if necessary to protect officers' interests. It also cannot be reconciled with the amended statute, which prescribes a redaction scheme that applies to exactly these types of records.

FOIL creates a presumption that all records should be available for public inspection unless they fall within a narrow set of exceptions. (*See Gould v New York City Police Dept*., 89 NY2d 267, 274-75 [1996] ["All government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of [POL] § 87(2)."].) The burden rests on the agency to

establish that requested material qualifies for any of the exemptions, which must be narrowly construed. (*Id.* at 275; POL § 89[4][b]; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979].) An agency is required to meet this burden in "more than just a 'plausible fashion,'" by articulating a "particularized and specific justification" for withholding information. (*Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *see also Matter of Fink*, 47 NY2d at 571 ["Only where the material requested falls squarely within the ambit of one of [the] statutory exemptions may disclosure be withheld."].)

In the context of POL Section 87(2)(b)—the general privacy exemption invoked by the FPD here—binding precedent from the Court of Appeals provides that agencies must employ redaction instead of blanket withholding, specifically holding that they cannot "refuse to produce the whole record simply because some of it may be exempt from disclosure." (*Schenectady County Socy. for Prevention of Cruelty to Animals v Mills*, 18 NY3d 42, 46 [2011]; *see also Capital Newspapers,* 67 NY2d at 569 [noting that a court did not need to grant a blanket exemption from FOIL disclosure to police records because redaction of material that fit within narrowly- construed exemption adequately provided protection]; *see also Newsday LLC v Nassau County Police Dep't*, 42 Misc 3d 1215[A], No. 8172/13, 2014 WL 258558, *6 [Sup Ct, Nassau County Jan. 16, 2014] ["A blanket refusal based on the 'mixed' nature of requested documents cannot be countenanced"].)

Consistent with that scheme, to address legitimate privacy concerns, the amended FOIL law introduced an entirely new mandatory redaction scheme specific to law enforcement discipline records. (*See* POL §§ 89[2-b], [2-c] [requiring redaction of a host of sensitive information including an officer's address, telephone number, and medical history].) Beyond that, other sensitive material from such records may be redacted as an "unwarranted invasion of privacy" pursuant to POL Section 89(2)(b) on a case-by-case basis. The disclosure of complaints that—for many different reasons, including potentially lackluster investigations or faulty oversight systems—did not result in the FPD substantiating those complaints, does not and cannot rise to the level of an unwarranted invasion of privacy justifying the categorical withholding of every part of every responsive record.

Courts have repeatedly held that the release of job performance-related information of public employees—even negative information such as that involving misconduct or alleged misconduct—does not constitute an unwarranted invasion of privacy, even if it obviously implicates privacy concerns, because of the public's strong interest in how public employees do their jobs. (*See Capital Newspapers*, 67 NY2d at 569-70; *Mulgrew v Board of Educ. of City Sch. Dist. of City of New York*, 31 Misc 3d 296, 301-03 [Sup Ct, NY County 2011] [collecting cases]; *see also Faulkner v Del Giacco*, 139 Misc 2d 790, 794 [Sup Ct, Albany County 1988] [finding "no basis to support the claim that releasing the names of guards accused of

inappropriate behavior is an unwarranted invasion of their personal privacy"]; *Schenectady Police Benevolent Assn.*, 2020 WL 7978093, *5 ["Privacy, is, of course, a subjective issue for individuals but it is not as to public employee records. Public employees have less entitlement to privacy than do non-public employees, at least where job performance is concerned."]; *Uniformed Fire Officers*, 846 Fed Appx at 33 [finding that police unions' stated interests in preserving confidentiality over unsubstantiated complaints "are counterbalanced by other important policies" and denying the unions' requests to block the publication of such complaints].) With respect to the records at issue here, the people of Freeport's compelling public interest is as much in how and why allegations were determined "unfounded" as it is in the substance of complaints that resulted in discipline.

Turning to the authorities on which the lower court's decision relied (*see* R. at 15-18), the Petitioner-Appellant respectfully submits that they do not weigh in favor of affirmance here, and that the underlying authorities on which they in turn rely are in fact inapposite and support the NYCLU's arguments. First, the court cited *Matter of New York Civ. Liberties Union v City of Syracuse* (72 Misc 3d 458 [Sup Ct, Onondaga County 2021], *appeal pending at* Appeal No CA-21-00796 [4th Dept]). This case was wrongly decided for all the reasons described in the previous sections: it permitted the Syracuse Police Department to categorically withhold documents despite the fact that the Court of Appeals has made clear that "blanket"

withholding is not permitted, and a record-by-record analysis considering redaction is required (*see Gould,* 89 NY2d at 275); it ignored the plain text and legislative history of the repeal of Section 50-a, despite the Court of Appeals' emphasis on the importance of understanding and giving effect to legislative intent (*see e.g. Albany Law Sch. v NYS Office of Mental Retardation*, 19 NY3d 106, 120 [2012]); and it failed to address meaningfully the significant public interest in transparency and accountability, despite the Court of Appeals' instruction that the public interest must be considered when evaluating privacy claims (*see NY Times v NYC Fire Dept.*, 4 NY3d 477, 485-86 [2005]).

Importantly, the decision in *Syracuse* also relied on a fundamental mischaracterization of this Court's decision in *LaRocca v Bd. of Educ. of Jericho Union Free Sch. Dist.* (220 AD2d 424 [2d Dept 1995]), which the *Syracuse* court cited for the sweeping proposition that "the release of unsubstantiated claims" regarding public employees is "prohibited" as a *per se* "unwarranted invasion of privacy" (72 Misc3d at 466). Leaving aside that *LaRocca* predates the 2020 amendment of FOIL by twenty-five years—and thus could not have addressed the statutory language that now defines "allegations" as part of the "law enforcement disciplinary records" subject to FOIL disclosure—that decision stands for no such thing. It was a case about the fact-specific *in camera* inspection and partial redaction of one educator's disciplinary records, not the blanket withholding of all

"unsubstantiated" complaints associated with public employees. (*See id.*; *see also Matter of Thomas v New York City Dept. of Educ.* (103 AD3d 495 [1st Dept 2013] ["There is no statutory blanket exemption for investigative records, even where the allegations of misconduct are . . . not substantiated, and the ability to withhold records under FOIL can only be based on the effects of disclosure in conjunction with attendant facts."].)

LaRocca also deals with Education Law Section 3020-a—a separate standalone statute making records of *educators'* disciplinary proceedings confidential—and the specific privacy interests of *educators* created by Section 3020-a. (*See LaRocca v Bd of Educ. of Jericho Union Free Sch. Dist.*, 159 Misc 2d 90, 93 [Sup Ct, Nassau County, 1993] ["[T]o allow the inspection sought would be violative of the legislative intent of Education Law Section 3020-a and Section 89, Subdivision 2 of the Public Officers Law."], *affd as modified by* 220 AD2d at 426 [disclosure of portions of the particular record "would violate the legislative intent of Education Law § 3020-a in providing tenured educators with the option of having confidential disciplinary proceedings"].) But there is no equivalent to Education Law Section 3020-a for police misconduct records because that equivalent—Section 50-a—*has been repealed*, and further, the Legislature has codified the public's unique interest in accessing law enforcement disciplinary "complaints" and "allegations" by affirmatively adding a broad definition of those records to FOIL

(*see* R. at 214 [legislator emphasizing, in opposition to the repeal of Section 50-a, that "3020- a of the Education Law renders unfounded complaints against schoolteachers confidential," and noting that the repeal of Section 50-a would remove parallel protections for law enforcement].) For all these reasons, *LaRocca* does not support the FPD's position and in fact undermines it.

The lower court here also cited *Newsday LLC v. Nassau County Police Dept*, No. 601813/2021 [Sup Ct, Nassau County Nov. 3, 2021], *appeal pending at* Appeal No 2021-08455 [2d Dept]). As a preliminary matter, it is difficult to determine exactly what the court held in *Newsday*. (*See Newsday* at *5 [noting that an agency asserting the personal privacy exemption "has an obligation to redact those invasive details and disclose the remainder of the records," yet affirming the agency's determination to withhold such records in full]). It appears that the *Newsday* court, at least in part, based its ruling on a misapprehension of Newsday's argument—specifically, that Newsday's argument was based on the position that FOIL's settled exemptions were repealed alongside of Section 50-a. (*See Newsday* NYSCEF Doc. No. 38 ["To say that the Legislature intended the settled exemption of [POL] §§ 84, et seq, to no longer exist as a result of a repeal of another law would be incorrect . . . if the Legislature intended the settled exemption of [POL] to be repealed, then it could have specifically repealed same."]) This was not, however, Newsday's argument; rather, Newsday's position was, similar to the NYCLU's argument here,

that "FOIL's exemptions must be 'narrowly interpreted.'" (*See Newsday* NYSCEF Doc. No. 21.) Indeed, the *Newsday* court's other findings support the positions set forth by the NYCLU in the case at bar: that "[t]he exemptions in the FOIL law are numerous and clearly leave to an agency, department, or municipality the discretion to ***redact*** same"; that "FOIL now requires that upon a request thereof, a law enforcement agency must review all records of complaints, ***whether or not substantiated***, to determine rights of access"; and that "an agency or department seeking to prevent disclosure of records that would constitute an unwarranted invasion of personal privacy has an obligation to ***redact*** those invasive details and disclose the remainder of the records." (*Newsday* NYSCEF Doc. 38 [emphasis added].)

Finally, the trial court relied on two Committee on Open Government ("COOG") opinions for the proposition that the law permits the blanket withholding of "unsubstantiated" complaints against officers. (R. at 16-17 [citing COOG, FOIL Advisory Opinion 19785 [2021] [the "March 2021 COOG Opinion"] and Advisory Opinion 19775 [2020] [the "July 2020 COOG Opinion"].) As an initial matter, it is well settled that COOG advisory opinions are not binding on courts. (*See Buffalo News, Inc. v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 493 [1994] [holding that the advisory opinions of the COOG are "neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the

agency"].) Even if the trial court were correct in relying on them, however, it was incorrect in holding that the COOG supports the FPD's view and counsels against the review and production of unsubstantiated records here.

The trial court described the March 2021 COOG opinion as follows:

> On March 19, 2021 the Committee on Open Government issued a second FOIL opinion [following a July 27, 2020 opinion wherein COOG stated that "in the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose 'unsubstantiated and unfounded complaints'] wherein they were asked whether they had changed their opinion on the legal standard applicable to records of unsubstantiated or pending complaints of misconduct made against law enforcement officers. The Committee responded that "[t]he short answer is no."

(R. at 17 [citing COOG, FOIL Advisory Opinion 19785 [2021]). Although it is true that COOG's "short answer" was "no," COOG also provided a longer answer in the very same opinion that elaborates on the question of whether an agency has the right to categorically withhold unsubstantiated complaints. In the March 2021 COOG Opinion, COOG explained that "[i]n light of the repeal of Section 50-a of the Civil Rights Law and the provisions added to FOIL to address law enforcement agency disciplinary records, FOIL now requires that upon a request therefor, a law enforcement agency must review all records of complaints, ***whether or not substantiated***, to determine rights of access." (COOG, FOIL Advisory Opinion 19785 [2021] [emphasis added].) In reaching this conclusion, COOG considered the decisions in *Buffalo*, *Schenectady*, and *Uniformed Fire Officers* and found them

"consistent with [its] opinion issued in 2020." A month later, COOG confirmed that FOIL "imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted ***prior to disclosing the remainder***." (COOG, FOIL Advisory 19805 [April 30, 2021] [emphasis added].) (the "April 2021 COOG Opinion").[5]

The court below thus erroneously relied on the March 2021 COOG Opinion in support of the FPD's view that unsubstantiated complaints may be categorically withheld, when in fact that very opinion stated that review of all records, "whether or not substantiated," was necessary; and it ignored the April 2021 COOG Opinion providing that redaction, not wholesale withholding, is the proper avenue for agencies to address privacy concerns. For this reason, and all those described above, this Court should reverse.

[5] Still, the NYCLU does not agree with those portions of the COOG's analysis seeming to suggest that all the names of individual officers should or must be redacted before records related to "unsubstantiated complaints" are produced. (*See* Comm on Open Govt. FOIL-AO-19805.) That result is not what the amended statute requires or permits. The COOG correctly explains, though, that categorical withholding cannot be countenanced because, if an agency wished to shield officers from any possible invasion of privacy, that agency could redact all identifying details and anonymize the records. (*Id*.) While such extensive redactions would be a drastic means to address privacy concerns—though, of course, far less drastic than the categorical withholding that the FPD chose here—the COOG is correct that, pursuant to the plain text of FOIL, an agency can no longer invoke Section 87 (2)(b)'s privacy exemption if identifying details have been redacted. (Public Officers Law § 89 [2][c][i] ["[D]isclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted."].) The FPD's refusal to produce even anonymized versions of the disputed records cannot be reconciled with this basic FOIL principle.

4. The "life and safety" exemption of Section 87(2)(f) cannot justify the FPD's categorical withholding of every portion of every complaint that did not result in discipline.

The trial court, in a single conclusory sentence, held that Respondents made a "showing" that "the life and safety of the officers would be affected by disclosure of the unfounded complaints." (R. at 18.) As an initial matter, the lower court misstated the standard for withholding materials pursuant to POL Section 87(2)(f), which only permits an agency to withhold records—"or portions thereof"—that "if disclosed would *endanger* the life of safety of any person" (emphasis added). The lower court did not find that the disputed materials here would "endanger" anyone's life or safety, and its vague conclusion that "the disclosure of unfounded complaints" would "affect" the life and safety of officers thus cannot justify the FPD's withholding. This misstatement of the statutory standard is a straightforward error of law sufficient to merit reversal on its own.

Furthermore, there is no evidence in the decision indicating that the FPD met its burden to articulate a "particularized and specific justification for denying access" (*Capital Newspapers,* 67 NY2d at 566) pursuant to POL Section 87(2)(f) as a blanket matter to every part of every misconduct record that did not result in discipline, because indeed the FPD could not meet such a burden. No court other than the lower court here has ever accepted the FPD's argument (*see* post-50-a-repeal cases discussed *supra*); the Second Circuit has squarely rejected a nearly-identical

"general assertion of heightened danger and safety risks to police officers" in the context of a challenge to the release of "unsubstantiated" NYPD complaint records (*see Uniformed Fire Officers*, 846 F Appx at 31 [noting both that the police unions "have not sufficiently demonstrated that those dangers and risks are likely to increase because of" the release of unsubstantiated complaints, and "that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers"]); and the Appellate Division has similarly rejected a police department's attempts to assert a categorical exemption pursuant to POL Section 87(2)(f) for all "complaint follow-up reports" and held that "the blanket exemption to disclosure advocated by [the police] pursuant to [Section 87[2][f]] is not legally sustainable" (*Johnson v NYPD*, 257 AD2d 343, 349 [1st Dept 1999]; *see also Laveck v Vill. Bd. of Trustees of Vill. of Lansing*, 145 AD3d 1168, 1171 [3d Dept 2016] [rejecting generalized assertion of danger based on threats in other communities]). Here, where the FPD failed to articulate the alleged danger in anything but the most general terms, and where the lower court did not even consider the possibility of redaction to address any legitimate safety concerns, the FPD's blanket withholding cannot be squared with these authorities. This Court should reverse.

B. The Lower Court Erred In Denying The Petitioner-Appellant's Request For Attorneys' Fees And Costs

Finally, the trial court erred in summarily denying the Petitioner-Appellant's request for attorneys' fees and litigation costs. The NYCLU is entitled to mandatory attorneys' fees and costs because the Respondents failed to provide a reasonable basis for their categorical denial.

Courts must assess reasonable attorneys' fees and costs when a party has "substantially prevailed" and the agency had "no reasonable basis for denying access" to the records in dispute. (POL § 89[4][c].)[6] Here, even if the Respondents' denial as to some portion of the withheld records could be construed as reasonable, their decision to categorically withhold those records instead of applying targeted redactions lacked any reasonable basis in light of binding Court of Appeals precedent mandating such redaction (*see Schenectady County Socy. for Prevention of Cruelty to Animals*, 18 NY3d at 46). An award of fees and costs is warranted where, as here, a government agency "seek[s] to broaden" a well-established FOIL exemption without a reasonable basis for doing so. (*See Rauh v De Blasio*, 161

[6] Prior to 2017, POL § 89 (4) (c) merely *permitted* courts to assess attorneys' fees upon a successful challenge to the denial of a FOIL request if an agency lacked a reasonable basis for the denial. In December 2017, the New York Legislature amended § 89 (4) (c) of the POL to *require* courts to award attorneys' fees in this situation and did so "to encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding." (A2750, 240th Leg, Reg Sess [NY 2017]; *see also Rauh v DeBlasio*, 161 AD3d 120, 127 [1st Dept 2018] ["The language of the statute is mandatory and not precatory, if the statutory requirements are met . . . this evinces an unmistakable legislative intent that attorney's fees are to be assessed . . . ."].)

AD3d 120, 126 [1st Dept 2018].) Therefore, in the event this Court grants the relief sought herein, such that the NYCLU can be said to have substantially prevailed in this action, this Court should also reverse the trial court's decisions to deny NYCLU's request for attorneys' fees and costs and grant the FPD's request for fees and disbursements.

V. CONCLUSION

For the foregoing reasons, the Petitioner-Appellant the NYCLU respectfully requests that the Court reverse the rulings below and order the Village of Freeport and the Freeport Police Department to produce records responsive to the NYCLU's September 2020 FOIL request in the manner described above, with the narrow redactions permitted by FOIL and on a reasonable rolling basis as necessary, and to pay reasonable attorneys' fees and costs associated with this litigation.

Dated: October 20, 2022
New York, New York

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

—against—

VILLAGE OF FREEPORT and FREEPORT POLICE DEPARTMENT,

Respondents-Respondents.

Nassau County Clerk's Index No. 605669/21

Appellate Division Docket No. 2022-03104

1. The index number of the case is 605669/21.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, Nassau County.

4. The action was commenced on May 6, 2021 by notice of petition and verified petition; the answer of Defendant was served on July 26, 2021.

5. The nature and object of the action is an Article 78 proceeding.

6. This appeal is from the Judgment of the Honorable R. Bruce Cozzens entered in favor of Respondents against Petitioner on April 4, 2022, which denied Petitioner's Article 78 Petition.

7. The appeal is on a full reproduced record.

McKinney's Consolidated Laws of New York Annotated
Civil Rights Law (Refs & Annos)
Chapter 6. Of the Consolidated Laws
Article 5. Right of Privacy (Refs & Annos)

McKinney's Civil Rights Law § 50-a

§ 50-a. Repealed by L.2020, c. 96, § 1, eff. June 12, 2020

Effective: June 12, 2020

Currentness

McKinney's Civil Rights Law § 50-a, NY CIV RTS § 50-a
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)
McKinney's Public Officers Law § 84

§ 84. Legislative declaration

Currentness

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

Credits

(Added L.1977, c. 933, § 1.)

Notes of Decisions (103)

McKinney's Public Officers Law § 84, NY PUB OFF § 84
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)

McKinney's Public Officers Law § 86

§ 86. Definitions

Effective: August 8, 2022

Currentness

As used in this article, unless the context requires otherwise:

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.

2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.

3. "Agency" means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.

4. "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

(a) the complaints, allegations, and charges against an employee;

(b) the name of the employee complained of or charged;

(c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(d) the disposition of any disciplinary proceeding; and

(e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

10. "Retiree" means a former officer or employee of an agency, the state legislature, or the judiciary who was a member of a public retirement system of the state, as such term is defined in subdivision twenty-three of section five hundred one of the retirement and social security law and is receiving, or entitled to receive, a benefit from such public retirement system.

11. "Beneficiary" means a person designated by a member or retiree of a public retirement system of the state to receive retirement or death benefits following the death of the member or retiree.

Credits

(Added L.1977, c. 933, § 1. Amended L.2003, c. 403, § 2, eff. Aug. 26, 2003; L.2020, c. 96, § 2, eff. June 12, 2020; L.2022, c. 482, § 1, eff. Aug. 8, 2022.)

Notes of Decisions (151)

McKinney's Public Officers Law § 86, NY PUB OFF § 86
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)

McKinney's Public Officers Law § 87

§ 87. Access to agency records

Effective: December 29, 2021

Currentness

1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.

(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

i. the times and places such records are available;

ii. the persons from whom such records may be obtained, and

iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

(c) In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except those records or portions thereof that may be withheld pursuant to the exceptions of rights of access appearing in this subdivision. A denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes only to the extent that disclosure would:

i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;

(g) 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; or

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) [Deemed repealed Dec. 1, 2024, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and deemed repealed Dec. 1, 2024, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 22, § 22; L.2009, c. 23, § 9; L.2009, c. 383, § 24.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

(l) [Expires and deemed repealed Sept. 20, 2025, pursuant to L.2010, c. 59, pt. II, § 14.] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(m) [Expires and deemed repealed July 1, 2025, pursuant to L.2013, c. 189, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

(n) Expired and deemed repealed July 25, 2018, pursuant to L.2014, c. 43, § 12. See, also, par. (n) below.

(n) [Expires and deemed repealed Dec. 1, 2024, pursuant to L.2014, c. 99, § 15; L.2014, c. 101, § 15; L.2014, c. 123, § 15. See, also, par. (n) above.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

(o) [Expires and deemed repealed Sept. 12, 2024, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

(p) [As added by L.2019, c. 59, pt. ZZZ, subpt. A, § 7. See, also, par. (p) below.] are data or images produced by an electronic toll collection system under authority of article forty-four-C of the vehicle and traffic law and in title three of article three of the public authorities law.

(p) [Expires and deemed repealed Sept. 6, 2024, pursuant to L.2019, c. 148, § 14. As added by L.2019, c. 148, § 12. See, also, par. (p) above.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-d of the vehicle and traffic law.

(q) [Expires and deemed repealed Dec. 1, 2024, pursuant to L.2019, c. 145, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred seventy-four-a of the vehicle and traffic law.

(r) [Expires and deemed repealed Oct. 6, 2026, pursuant to L.2021, c. 421, § 16. As added by L.2021, c. 421, § 14. See, also, pars. (r) below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-e of the vehicle and traffic law.

(r) [Expires and deemed repealed Dec. 1, 2026, pursuant to L.2021, c. 460, § 14. As added by L.2021, c. 460, § 12. See, also, pars. (r) above and below.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-f of the vehicle and traffic law.

(r) [Expires and deemed repealed Dec. 1, 2025, pursuant to L.2021, c. 773, § 16. As added by L.2021, c. 773, § 13. See, also, pars. (r) above.] are photographs, microphotographs, videotape or other recorded images or information and data prepared under authority of section three hundred eighty-five-a of the vehicle and traffic law.

3. Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term “agency” or “state agency” means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the

agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and, if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

5. (a) An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service. Records provided in a computer format shall not be encrypted.

(b) No agency shall enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency's records.

6. Repealed by L.2022, c. 155, § 1, eff. Dec. 29, 2021.

Credits

(Added L.1977, c. 933, § 1. Amended L.1981, c. 890, § 1; L.1982, c. 73, § 1; L.1983, c. 80, § 1; L.1984, c. 283, § 1; L.1987, c. 814, § 12; L.1988, c. 746, § 15; L.1990, c. 289, § 1; L.1999, c. 510, § 12, eff. Sept. 28, 1999, deemed eff. Jan. 1, 1999; L.2001, c. 368, § 1, eff. Oct. 16, 2001; L.2003, c. 403, § 3, eff. Aug. 26, 2003; L.2007, c. 102, § 1, eff. Oct. 31, 2007; L.2008, c. 223, §§ 1 to 3, eff. Aug. 6, 2008; L.2008, c. 499, § 1, eff. Jan. 2, 2009; L.2009, c. 19, § 8, eff. May 28, 2009; L.2009, c. 20, § 22, eff. May 28, 2009; L.2009, c. 21, § 20, eff. May 28, 2009; L.2009, c. 22, § 20, eff. May 28, 2009; L.2009, c. 23, § 7, eff. May 28, 2009; L.2009, c. 383, § 22, eff. Sept. 25, 2009; L.2010, c. 59, pt. II, § 12, eff. Sept. 20, 2010; L.2010, c. 154, § 1, eff. July 7, 2010; L.2013, c. 189, § 13, eff. Aug. 30, 2013; L.2014, c. 43, § 5, eff. July 25, 2014; L.2014, c. 99, § 13, eff. Aug. 21, 2014; L.2014, c. 101, § 13, eff. Aug. 21, 2014; L.2014, c. 123, § 13, eff. Aug. 21, 2014; L.2015, c. 222, § 13, eff. Sept. 12, 2015; L.2019, c. 59, pt. ZZZ, subpt. A, § 7, eff. April 12, 2019; L.2019, c. 145, § 15, eff. Sept. 5, 2019; L.2019, c. 148, § 12, eff. Sept. 6, 2019; L.2020, c. 96, § 3, eff. June 12, 2020; L.2021, c. 421, § 14, eff. Oct. 6, 2021; L.2021, c. 460, § 12, eff. Nov. 7, 2021; L.2021, c. 808, §§ 1, 3, eff. Dec. 29, 2021; L.2021, c. 773, § 13, eff. Dec. 22, 2021; L.2022, c. 155, §§ 1, 2, eff. Dec. 29, 2021.)

Notes of Decisions (1151)

Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)
McKinney's Public Officers Law § 89

§ 89. General provisions relating to access to records; certain cases

Effective: August 8, 2022

Currentness

The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;

ii. furnish to any person advisory opinions or other appropriate information regarding this article;

iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;

iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties;

v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and

vi. report on its activities and findings regarding this article and article seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (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 employment, medical or credit histories or personal references of applicants for employment;

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

iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;

vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or

viii. disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her; or

iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and

dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided

that the written requests do not seek a response in some other form.

(c) Each state agency, as defined in subdivision five of this section, that maintains a website shall ensure its website provides for the online submission of a request for records pursuant to this article.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding: (i) 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, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall 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 and the court finds that the agency had no reasonable basis for denying access.

(d) (i) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:

(A) shall be given preference;

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application of any party to the proceeding; and

(C) shall be deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal, unless consent to further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

5. (a) (1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on public access to records.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision:

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

(d) (i) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision. The proceeding shall be given preference and shall be brought on for argument on such terms and conditions as the presiding justice may direct, not to exceed forty-five days.

(ii) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(iii) An appeal taken from an order of the court requiring disclosure:

(A) shall be given preference; and

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application by any party to the proceeding; and

(C) shall be deemed abandoned when the party requesting an exclusion from disclosure fails to serve and file a record and brief within sixty days after the date of the notice of appeal, unless consent of further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records. A denial of access to records or to portions thereof pursuant to this article shall not limit or abridge any party's right of access to such records pursuant to the civil practice law and rules, the criminal procedure law, or any other law.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public retirement system of the state, as such term is defined in subdivision twenty-three of section five hundred one of the retirement and social security law; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public retirement system of the state, as such term is defined in subdivision twenty-three of section five hundred one of the retirement and social security law, or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.

10. Nothing in this article shall be construed to limit a person or entity that is a party to any civil or criminal action or proceeding from gaining access to records pursuant to this article relating to such action or proceeding, provided, however, that nothing in this subdivision shall prevent the denial of access to such records or portions thereof after providing particularized and specific justification that such records may be withheld pursuant to this article.

Credits

(Added L.1977, c. 933, § 1. Amended L.1981, c. 890, §§ 2, 3; L.1981, c. 975, § 1; L.1982, c. 73, § 2; L.1983, c. 80, § 2; L.1983, c. 652, § 3; L.1983, c. 783, § 1; L.1984, c. 33, § 1; L.1984, c. 227, § 1; L.1989, c. 705, § 2; L.1998, c. 545, §§ 2, 3, eff. Jan. 1, 1999; L.2003, c. 403, § 4, eff. Aug. 26, 2003; L.2004, c. 339, § 1, eff. Aug. 10, 2004; L.2005, c. 22, § 1, eff. May 3, 2005; L.2006, c. 182, § 1, eff. Oct. 24, 2006; L.2006, c. 492, § 1, eff. Aug. 16, 2006; L.2008, c. 223, §§ 4 to 6, eff. Aug. 6, 2008; L.2008, c. 351, § 1, eff. July 21, 2008; L.2011, c. 61, pt. U, § 11, eff. March 31, 2011; L.2016, c. 487, § 1, eff. May 27, 2017; L.2017, c. 453, § 1, eff. Dec. 13, 2017; L.2018, c. 47, § 1, eff. Jan. 1, 2019; L.2019, c. 55, pt. II, subpt. K, § 2, eff. April 12, 2019; L.2019, c. 59, pt. GGG, § 2, eff. April 12, 2019; L.2019, c. 707, § 1, eff. June 17, 2020; L.2020, c. 96, § 4, eff. June 12, 2020; L.2021, c. 808, § 2, eff. Dec. 29, 2021; L.2022, c. 482, § 2, eff. Aug. 8, 2022.)

Notes of Decisions (677)

McKinney's Public Officers Law § 89, NY PUB OFF § 89
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Education Law (Refs & Annos)
Chapter 16. Of the Consolidated Laws (Refs & Annos)
Title IV. Teachers and Pupils
Article 61. Teachers and Supervisory and Administrative Staff (Refs & Annos)
McKinney's Education Law § 3020-a

§ 3020-a. Disciplinary procedures and penalties

Effective: July 1, 2015

Currentness

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section eleven hundred two, and sections twenty-five hundred nine, twenty-five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve and three thousand fourteen of this chapter shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employed is normally required to serve. Except as provided in subdivision eight of section twenty-five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this chapter, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. a. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against an employee pursuant to this section. If such determination is affirmative, a written statement specifying (i) the charges in detail, (ii) the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing and (iii) the employee's rights under this section, shall be immediately forwarded to the accused employee by certified or registered mail, return receipt requested or by personal delivery to the employee.

b. The employee may be suspended pending a hearing on the charges and the final determination thereof. The suspension shall be with pay, except the employee may be suspended without pay if the employee has entered a guilty plea to or has been convicted of a felony crime concerning the criminal sale or possession of a controlled substance, a precursor of a controlled substance, or drug paraphernalia as defined in article two hundred twenty or two hundred twenty-one of the penal law; or a felony crime involving the physical abuse of a minor or student.

c. Where charges of misconduct constituting physical or sexual abuse of a student are brought on or after July first, two thousand fifteen, the board of education may suspend the employee without pay pending an expedited hearing pursuant to subparagraph (i-a) of paragraph c of subdivision three of this section. Notwithstanding any other law, rule, or regulation to the contrary, the commissioner shall establish a process in regulations for a probable cause hearing before an impartial

hearing officer within ten days to determine whether the decision to suspend an employee without pay pursuant to this paragraph should be continued or reversed. The process for selection of an impartial hearing officer shall be as similar as possible to the regulatory framework for the appointment of an impartial hearing officer for due process complaints pursuant to section forty-four hundred four of this chapter. The hearing officer shall determine whether probable cause supports the charges and shall reverse the decision of the board of education to suspend the employee without pay and reinstate such pay upon a finding that probable cause does not support the charges. The hearing officer may also reinstate pay upon a written determination that a suspension without pay is grossly disproportionate in light of all surrounding circumstances. Provided, further, that such an employee shall be eligible to receive reimbursement for withheld pay and accrued interest at a rate of six percent compounded annually if the hearing officer finds in his or her favor, either at the probable cause hearing or in a final determination pursuant to the expedited hearing held pursuant to subparagraph (i-a) of paragraph c of subdivision three of this section. Any suspension without pay shall last no longer than one hundred and twenty days from the decision of the board of education to suspend the employee without pay and such suspension shall only relate to employee compensation, exclusive of other benefits and guarantees. Notwithstanding any other provision of law or regulation to the contrary, any provision of a collective bargaining agreement entered into by the city of New York as of April first, two thousand fifteen, that provides for suspension without pay for offenses as specified in this paragraph shall supersede the provisions hereof and shall continue in effect without modification and may be extended.

d. The employee shall be terminated without a hearing, as provided for in this section, upon conviction of a sex offense, as defined in subparagraph two of paragraph b of subdivision seven-a of section three hundred five of this chapter. To the extent this section applies to an employee acting as a school administrator or supervisor, as defined in subparagraph three of paragraph b of subdivision seven-b of section three hundred five of this chapter, such employee shall be terminated without a hearing, as provided for in this section, upon conviction of a felony offense defined in subparagraph two of paragraph b of subdivision seven-b of section three hundred five of this chapter.

e. (i) For hearings commenced by the filing of charges prior to July first, two thousand fifteen, within ten days of receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board in writing whether he or she desires a hearing on the charges and when the charges concern pedagogical incompetence or issues involving pedagogical judgment, his or her choice of either a single hearing officer or a three member panel, provided that a three member panel shall not be available where the charges concern pedagogical incompetence based solely upon a teacher's or principal's pattern of ineffective teaching or performance as defined in section three thousand twelve-c of this article. All other charges shall be heard by a single hearing officer.

(ii) All hearings commenced by the filing of charges on or after July first, two thousand fifteen shall be heard by a single hearing officer.

f. The unexcused failure of the employee to notify the clerk or secretary of his or her desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Where an employee requests a hearing in the manner provided for by this section, the clerk or secretary of the board shall, within three working days of receipt of the employee's notice or request for a hearing, notify the commissioner of the need for a hearing. If the employee waives his or her right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all members of such board, to determine the case and fix the penalty, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings. a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section,

the commissioner shall forthwith notify the American Arbitration Association (hereinafter "association") of the need for a hearing and shall request the association to provide to the commissioner forthwith a list of names of persons chosen by the association from the association's panel of labor arbitrators to potentially serve as hearing officers together with relevant biographical information on each arbitrator. Upon receipt of said list and biographical information, the commissioner shall forthwith send a copy of both simultaneously to the employing board and the employee. The commissioner shall also simultaneously notify both the employing board and the employee of each potential hearing officer's record in the last five cases of commencing and completing hearings within the time periods prescribed in this section.

b. (i) Hearing officers. All hearings pursuant to this section shall be conducted before and by a single hearing officer selected as provided for in this section. A hearing officer shall not be eligible to serve in such position if he or she is a resident of the school district, other than the city of New York, under the jurisdiction of the employing board, an employee, agent or representative of the employing board or of any labor organization representing employees of such employing board, has served as such agent or representative within two years of the date of the scheduled hearing, or if he or she is then serving as a mediator or fact finder in the same school district.

(A) Notwithstanding any other provision of law, for hearings commenced by the filing of charges prior to April first, two thousand twelve, the hearing officer shall be compensated by the department with the customary fee paid for service as an arbitrator under the auspices of the association for each day of actual service plus necessary travel and other reasonable expenses incurred in the performance of his or her duties. All other expenses of the disciplinary proceedings commenced by the filing of charges prior to April first, two thousand twelve shall be paid in accordance with rules promulgated by the commissioner. Claims for such compensation for days of actual service and reimbursement for necessary travel and other expenses for hearings commenced by the filing of charges prior to April first, two thousand twelve shall be paid from an appropriation for such purpose in the order in which they have been approved by the commissioner for payment, provided payment shall first be made for any other hearing costs payable by the commissioner, including the costs of transcribing the record, and provided further that no such claim shall be set aside for insufficiency of funds to make a complete payment, but shall be eligible for a partial payment in one year and shall retain its priority date status for appropriations designated for such purpose in future years.

(B) Notwithstanding any other provision of law, rule or regulation to the contrary, for hearings commenced by the filing of charges on or after April first, two thousand twelve, the hearing officer shall be compensated by the department for each day of actual service plus necessary travel and other reasonable expenses incurred in the performance of his or her duties, provided that the commissioner shall establish a schedule for maximum rates of compensation of hearing officers based on customary and reasonable fees for service as an arbitrator and provide for limitations on the number of study hours that may be claimed.

(ii) The commissioner shall mail to the employing board and the employee the list of potential hearing officers and biographies provided to the commissioner by the association, the employing board and the employee, individually or through their agents or representatives, shall by mutual agreement select a hearing officer from said list to conduct the hearing and shall notify the commissioner of their selection.

(iii) Within fifteen days after receiving the list of potential hearing officers as described in subparagraph (ii) of this paragraph, the employing board and the employee shall each notify the commissioner of their agreed upon hearing officer selection. If the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from the list of potential hearing officers, or fail to notify the commissioner of a selection within such fifteen day time period, the

commissioner shall appoint a hearing officer from the list. The provisions of this subparagraph shall not apply in cities with a population of one million or more with alternative procedures specified in section three thousand twenty of this article.

(iv) In those cases commenced by the filing of charges prior to July first, two thousand fifteen in which the employee elects to have the charges heard by a hearing panel, the hearing panel shall consist of the hearing officer, selected in accordance with this subdivision, and two additional persons, one selected by the employee and one selected by the employing board, from a list maintained for such purpose by the commissioner. The list shall be composed of professional personnel with administrative or supervisory responsibility, professional personnel without administrative or supervisory responsibility, chief school administrators, members of employing boards and others selected from lists of nominees submitted to the commissioner by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members other than the hearing officer shall be compensated by the department at the rate of one hundred dollars for each day of actual service plus necessary travel and subsistence expenses. The hearing officer shall be compensated as set forth in this subdivision. The hearing officer shall be the chairperson of the hearing panel.

c. Hearing procedures. (i)(A) The commissioner shall have the power to establish necessary rules and procedures for the conduct of hearings under this section.

(B) The department shall be authorized to monitor and investigate a hearing officer's compliance with statutory timelines pursuant to this section. The commissioner shall annually inform all hearing officers who have heard cases pursuant to this section during the preceding year that the time periods prescribed in this section for conducting such hearings are to be strictly followed. A record of continued failure to commence and complete hearings within the time periods prescribed in this section shall be considered grounds for the commissioner to exclude such individual from the list of potential hearing officers sent to the employing board and the employee for such hearings.

(C) Such rules shall not require compliance with technical rules of evidence. Hearings shall be conducted by the hearing officer selected pursuant to paragraph b of this subdivision with full and fair disclosure of the nature of the case and evidence against the employee by the employing board and shall be public or private at the discretion of the employee and provided further that the hearing officer, at the pre-hearing conference, shall set a schedule and manner for full and fair disclosure of the witnesses and evidence to be offered by the employee. The employee shall have a reasonable opportunity to defend himself or herself and an opportunity to testify in his or her own behalf. The employee shall not be required to testify. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer is hereby authorized to administer. A child witness under the age of fourteen may be permitted to testify through the use of live, two-way closed-circuit television, as such term is defined in subdivision four of section 65.00 of the criminal procedure law, when the hearing officer, after providing the employee with an opportunity to be heard, determines by clear and convincing evidence that such child witness would suffer serious mental or emotional harm which would substantially impair such child's ability to communicate if required to testify at the hearing without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of such harm. In making such determination, the hearing officer shall consider any applicable factors contained in subdivision ten of section 65.20 of the criminal procedure law. Where the hearing officer determines that such child witness will be permitted to testify through the use of live, two-way closed-circuit television, the testimony of such child witness shall be taken in a manner consistent with section 65.30 of the criminal procedure law.

(D) An accurate record of the proceedings shall be kept at the expense of the department at each such hearing in accordance

with the regulations of the commissioner. A copy of the record of the hearings shall, upon request, be furnished without charge to the employee and the board of education involved. The department shall be authorized to utilize any new technology or such other appropriate means to transcribe or record such hearings in an accurate, reliable, efficient and cost-effective manner without any charge to the employee or board of education involved.

(i-a)(A) Where charges of misconduct constituting physical or sexual abuse of a student are brought, the hearing shall be conducted before and by a single hearing officer in an expedited hearing, which shall commence within seven days after the pre-hearing conference and shall be completed within sixty days after the pre-hearing conference. The hearing officer shall establish a hearing schedule at the pre-hearing conference to ensure that the expedited hearing is completed within the required timeframes and to ensure an equitable distribution of days between the employing board and the charged employee. Notwithstanding any other law, rule or regulation to the contrary, no adjournments may be granted that would extend the hearing beyond such sixty days, except as authorized in this subparagraph. A hearing officer, upon request, may grant a limited and time specific adjournment that would extend the hearing beyond such sixty days if the hearing officer determines that the delay is attributable to a circumstance or occurrence substantially beyond the control of the requesting party and an injustice would result if the adjournment were not granted.

(B) The commissioner shall annually inform all hearing officers who have heard cases pursuant to this section during the preceding year that the time periods prescribed in this subparagraph for conducting expedited hearings are to be strictly followed and failure to do so shall be considered grounds for the commissioner to exclude such individual from the list of potential hearing officers sent to the employing board and the employee for such expedited hearings.

(ii) The hearing officer selected to conduct a hearing under this section shall, within ten to fifteen days of agreeing to serve in such position, hold a pre-hearing conference which shall be held in the school district or county seat of the county, or any county, wherein the employing school board is located. The pre-hearing conference shall be limited in length to one day except that the hearing officer, in his or her discretion, may allow one additional day for good cause shown.

(iii) At the pre-hearing conference the hearing officer shall have the power to:

(A) issue subpoenas;

(B) hear and decide all motions, including but not limited to motions to dismiss the charges;

(C) hear and decide all applications for bills of particular or requests for production of materials or information, including, but not limited to, any witness statement (or statements), investigatory statement (or statements) or note (notes), exculpatory evidence or any other evidence, including district or student records, relevant and material to the employee’s defense.

(iv) Any pre-hearing motion or application relative to the sufficiency of the charges, application or amendment thereof, or any preliminary matters shall be made upon written notice to the hearing officer and the adverse party no less than five days prior to the date of the pre-hearing conference. Any pre-hearing motions or applications not made as provided for herein shall

be deemed waived except for good cause as determined by the hearing officer.

(v) In the event that at the pre-hearing conference the employing board presents evidence that the professional license of the employee has been revoked and all judicial and administrative remedies have been exhausted or foreclosed, the hearing officer shall schedule the date, time and place for an expedited hearing, which hearing shall commence not more than seven days after the pre-hearing conference and which shall be limited to one day. The expedited hearing shall be held in the local school district or county seat of the county or any county, wherein the said employing board is located. The expedited hearing shall not be postponed except upon the request of a party and then only for good cause as determined by the hearing officer. At such hearing, each party shall have equal time in which to present its case.

(vi) During the pre-hearing conference, the hearing officer shall determine the reasonable amount of time necessary for a final hearing on the charge or charges and shall schedule the location, time(s) and date(s) for the final hearing. The final hearing shall be held in the local school district or county seat of the county, or any county, wherein the said employing school board is located. In the event that the hearing officer determines that the nature of the case requires the final hearing to last more than one day, the days that are scheduled for the final hearing shall be consecutive. The day or days scheduled for the final hearing shall not be postponed except upon the request of a party and then only for good cause shown as determined by the hearing officer. In all cases, the final hearing shall be completed no later than sixty days after the pre-hearing conference unless the hearing officer determines that extraordinary circumstances warrant a limited extension.

(vii) All evidence shall be submitted by all parties within one hundred twenty-five days of the filing of charges and no additional evidence shall be accepted after such time, absent extraordinary circumstances beyond the control of the parties.

d. Limitation on claims. Notwithstanding any other provision of law, rule or regulation to the contrary, no payments shall be made by the department pursuant to this subdivision on or after April first, two thousand twelve for: (i) compensation of a hearing officer or hearing panel member, (ii) reimbursement of such hearing officers or panel members for necessary travel or other expenses incurred by them, or (iii) for other hearing expenses on a claim submitted later than one year after the final disposition of the hearing by any means, including settlement, or within ninety days after the effective date of this paragraph, whichever is later; provided that no payment shall be barred or reduced where such payment is required as a result of a court order or judgment or a final audit.

4. Post hearing procedures. a. The hearing officer shall render a written decision within thirty days of the last day of the final hearing, or in the case of an expedited hearing within ten days of such expedited hearing, and shall forward a copy thereof to the commissioner who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board. The written decision shall include the hearing officer’s findings of fact on each charge, his or her conclusions with regard to each charge based on said findings and shall state what penalty or other action, if any, shall be taken by the employing board. At the request of the employee, in determining what, if any, penalty or other action shall be imposed, the hearing officer may consider the extent to which the employing board made efforts towards correcting the behavior of the employee which resulted in charges being brought under this section through means including but not limited to: remediation, peer intervention or an employee assistance plan. In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions. Provided, however, that the hearing officer, in exercising his or her discretion, shall give serious

consideration to the penalty recommended by the employing board, and if the hearing officer rejects the recommended penalty such rejection must be based on reasons based upon the record as expressed in a written determination.

b. Within fifteen days of receipt of the hearing officer's decision the employing board shall implement the decision. If the employee is acquitted he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges expunged from the employment record. If an employee who was convicted of a felony crime specified in paragraph b of subdivision two of this section, has said conviction reversed, the employee, upon application, shall be entitled to have his or her pay and other emoluments restored, for the period from the date of his or her suspension to the date of the decision.

c. The hearing officer shall indicate in the decision whether any of the charges brought by the employing board were frivolous as defined in section eighty-three hundred three-a of the civil practice law and rules. If the hearing officer finds that all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the department the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges. If the hearing officer finds that some but not all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the department a portion, in the discretion of the hearing officer, of the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee a portion, in the discretion of the hearing officer, of the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges.

5. Appeal. a. Not later than ten days after receipt of the hearing officer's decision, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to section seventy-five hundred eleven of the civil practice law and rules. The court's review shall be limited to the grounds set forth in such section. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

b. In no case shall the filing or the pendency of an appeal delay the implementation of the decision of the hearing officer.

Credits

(Added L.1970, c. 717, § 16. Amended L.1971, c. 703, §§ 1 to 3; L.1973, c. 772, § 1; L.1977, c. 82, § 4; L.1978, c. 591, § 1; L.1978, c. 594, § 1; L.1994, c. 565, § 5; L.1994, c. 691, § 3; L.2008, c. 296, § 2, eff. July 21, 2008; L.2008, c. 325, § 2, eff. July 21, 2008; L.2010, c. 103, §§ 3 to 5, eff. July 1, 2010; L.2012, c. 57, pt. B, § 1, eff. March 30, 2012; L.2015, c. 56, pt. EE, subpt. G, § 3, eff. July 1, 2015.)

Notes of Decisions (833)

McKinney's Education Law § 3020-a, NY EDUC § 3020-a
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)
McKinney's CPLR § 7803

§ 7803. Questions raised

Effective: September 1, 2003

Currentness

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

Credits

(L.1962, c. 308. Amended L.1962, c. 318, § 26; L.2003, c. 492, § 2, eff. Sept. 1, 2003.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Vincent C. Alexander

2021

C7803:2. The "Arbitrary and Capricious" Standard.

A driver experienced the "quintessence of arbitrary and capricious action" when the DMV revoked his license based on a default traffic conviction that occurred 24 years ago, but which DMV never reported to him because of a data-entry error that, for 23 years, indicated he had a clean driving record. (The driver's last name was Sonders, but a DMV clerk entered the data under the name "Sanders.") *Sonders v. New York State Dep't of Motor Vehicles*, 2020, 187 A.D.3d 1, 4, 129 N.Y.S.3d 411, 413 (1st Dep't). For DMV to punish the driver "for its own admitted errors ... and thereafter [for over 20 years] affirming that he possessed a valid license" was "truly irrational"--indeed, "almost worthy of Kafka." Id. at 3, 129 N.Y.S.3d at 412, quoting *Hall v. New York State Dep't of Motor Vehicles*, 2002, 192 Misc.2d 300, 300-01, 745 N.Y.S.2d 892, 893 (Sup.Ct.Monroe Co.). More's the pity, it is submitted, that the Supreme Court upheld DMV's action, and the driver had to appeal to the Appellate Division to get his license restored.

2019

C7803:1. Issues That May Be Raised in an Article 78 Proceeding, In General.

Abuse of discretion, which is specifically identified in CPLR 7803(3) as a ground for Article 78 review, can apply either to the content of the agency's determination or the procedure the agency followed in reaching the determination. Thus, in *Bursch v. Purchase College of SUNY*, 2019, 33 N.Y.3d 1014, 102 N.Y.S.3d 165, 125 N.E.3d 830, a procedural abuse of discretion by a college disciplinary board resulted in a new hearing for a college student who was expelled after being found guilty of sexually assaulting a fellow student. Two days before his scheduled hearing, the student and his recently retained attorney asked for a three-hour adjournment, from 9:00 AM to 12:00 noon, because the attorney had a previous engagement at 9:00 AM. The college said no, and the hearing proceeded in the absence of the attorney. In a terse memorandum, the Court said the college abused its discretion "as a matter of law by failing to grant the requested adjournment."

The facts are developed in detail in the opinion of the Appellate Division (164 A.D.3d 1324, 85 N.Y.S.3d 157 (2d Dep't, 2018)), which upheld, 3-2, the college's denial of the adjournment because, one, the student himself had caused the timing problem by not sooner executing a privacy release allowing the college to communicate with the attorney and, two, the college had "difficulty" in arranging a convenient hearing time for all of the various witnesses.

The forceful two-judge dissent (164 A.D.3d at 1329-40, 85 N.Y.S.3d at 162-70) stressed the importance of the presence of an attorney when an accused student faces grave consequences (permanent expulsion), especially when a parallel criminal investigation is underway, as it was here. Although administrative agencies have discretion when it comes to such matters as adjourning a hearing, "this discretion will be more narrowly construed where fundamental rights are at issue.... Courts have consistently held that, unless the record establishes the existence of a legitimate countervailing reason, it is an abuse of discretion to deny a request for a

short adjournment to permit an individual to secure the presence of an attorney." 164 A.D.3d at 1335, 85 N.Y.S.3d at 166-67 (internal quotation marks omitted). The college proffered no such countervailing explanation in its conclusory assertion that it was "unable" to grant the adjournment because of "the availability of the people involved in the hearing." All of the witnesses were either employees or students at the same college, all within easy reach, and the requested three-hour delay was both timely and "exceedingly minimal." Even if the assistance of the attorney was not mandated by constitutional due process, the circumstances of the student's potential punishment created a "fundamental right" to have the attorney's assistance at the hearing.

In reversing the Appellate Division majority, it is not clear whether the Court of Appeals agreed with everything the dissenters said, but this observer found their arguments powerful.

C7803:3. The "Substantial Evidence" Test.

In an Article 78 certiorari review of a state college disciplinary hearing, the Court of Appeals took the opportunity to once again state the contours of the substantial evidence standard. *Haug v. State University of New York at Potsdam*, 2018, 32 N.Y.3d 1044, 87 N.Y.S.3d 146, 112 N.E.3d 323. The student petitioner was charged with sexual assault of another student, found guilty after a hearing, and expelled. The evidence against him at the hearing was mostly hearsay (testimony and written notes about the complainant's statements by a campus police officer to whom she reported the incident shortly after it happened, other students, and a school administrator); the complainant herself did not appear at the hearing. In his own testimony, the accused student gave his version of his and the complainant's conduct and her consent, but he also described post-event conduct that reasonably could be interpreted as a consciousness of guilt on his part. The Appellate Division three-judge majority held that substantial evidence was lacking for the school's determination of guilt. The majority essentially re-evaluated the evidence, including the conduct of both participants in the sexual act, stressing the hearsay nature of complainant's statements, and concluded that no reasonable person could find that the complainant had not affirmatively given consent to the sexual activity that occurred. See 149 A.D.3d 1200, 51 N.Y.S.3d 663 (3d Dep't).

The Court of Appeals reversed, holding that the hearsay accounts, coupled with petitioner's testimony, constituted substantial evidence of the unconsented sexual misconduct. The Appellate Division had improperly second-guessed the school by "re-weighing the evidence" and "substituting its own factual findings for those of [the school]." It was within the hearing board's province to "resolve any conflicts in the evidence and make credibility determinations," including finding that the petitioner's testimony was not credible. 32 N.Y.3d at 1046-47, 87 N.Y.S.3d at 149, 112 N.E.3d at 326

The Court made the following observations about the substantial evidence rule. 32 N.Y.3d at 1045-46, 87 N.Y.S.3d at 148-49, 112 N.E.3d at 325-26 (internal citations and quotation marks omitted): First, the standard itself: "[S]ubstantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion of ultimate fact.... Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently." Second, it is possible that both sides present substantial evidence on contested issues. Even so, the agency's determination must be sustained. Third, the substantial evidence standard is a "minimal standard"--"less than a preponderance of the evidence"--that "demands only that a given inference is reasonable and plausible, not necessarily the most probable." Courts may not do what the Appellate Division majority did here, which is "to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence." Finally, as to the use of hearsay evidence, it "is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds."

It is significant--and an important lesson for practitioners--that the petitioner in *Haug* waived potential due process and other procedural errors in the conduct of the hearing by failing to raise them at the disciplinary hearing. My fellow CPLR commentator Thomas F. Gleason has written elsewhere that seeking to invalidate an administrative determination solely for lack of substantial evidence is almost always an uphill battle. Thomas F. Gleason, "The Power of Administrative Agencies and the Peril of Substantial Evidence Review," N.Y.L.J., February 17, 2019, p.3, col.1. See, e.g., *Pena v. New York State Gaming Ass'n*, 2018, 32 N.Y.3d 1122, 91 N.Y.S.3d 783, 116 N.E.3d 74, reversing for the reasons stated by the dissenting opinion in the Appellate Division, 144 A.D.3d 1244, 1247-52, 40 N.Y.S.3d 665, 667-71 (3d Dep't 2016). In contrast, error-of-law review (CPLR 7803(3)), such as that based on unconstitutional or otherwise unlawful procedure, gives a court greater authority over the agency's adjudicative activity, but any such errors must be preserved by objection at the administrative level. See, on remand, *Haug v. State University of New York at Potsdam*, 2018, 166 A.D.3d 1404, 1405, 88 N.Y.S.3d 678, 679 (3d Dep't). See also 2019 Commentaries C7802:1 & C7803:1.

2018

C7803:3. The "Substantial Evidence" Test.

If the burden of proof at an agency hearing is the "clear and convincing evidence" standard, as, for example, at a DMV proceeding for the suspension of a driver's license, the court in an Article 78 challenge must apply the substantial-evidence standard of review through the lens of the elevated burden of proof that applied at the agency level. *Seon v. New York State Dep't of Motor Vehicles*, 2018, 159 A.D.3d 607, 74 N.Y.S.3d 20 (1st Dep't). "[W]hile the appellate standard of review of substantial evidence requires great deference to findings that a hearing officer makes based on the evidence placed before it, it still calls for the reviewing court to ensure that such findings are not made in the absence of evidence that could, again with the proper amount of deference, reasonably be called clear and convincing." Here, the First Department majority found that clear and convincing evidence was lacking for an agency determination that a bus driver's negligent driving was the cause of a pedestrian's death.

2017

C7803:2. The "Arbitrary and Capricious" Standard.

When an agency has made a determination on specified grounds, the reviewing court should not uphold the determination if those grounds are irrational or improper, even if some other ground might support the decision. See main text, p.16. The Third Department invoked this rule in *Tri-Serendipity, LLC v. City of Kingston*, 2016, 145 A.D.3d 1264, 42 N.Y.S.3d 682 (3d Dep't), where a landowner in a residential neighborhood challenged a zoning board's decision to deny its request to renovate a building that had acquired permissible non-conforming use status in 1963. The premises were now being used as a boarding house. The zoning board determined that the property's nonconforming use in 1963 was as a nursing home and therefore the new use as a boarding house could be restricted or eliminated.

In the Article 78 challenge, the Supreme Court rejected the board's finding that the premises were originally used as a nursing home. Rather, the Supreme Court found that it was always a boarding house, but the nature of the boarding had changed to such a degree as to justify elimination of the nonconforming use. The Third Department held that the Supreme Court acted improperly because the court may not "search the record for a rational basis to support [an administrative agency's] determination, substitute its judgment for that of the [agency] or affirm the underlying determination upon a ground not invoked ... in the first instance." 145 A.D.3d at 1266, 42 N.Y.S.3d at 684 (internal quotation marks and citation omitted). Nevertheless, after reviewing the evidence supporting the board's finding that the building was originally a nursing home, the Appellate Division

affirmed the rationality of the board's determination that such use had been discontinued.

C7803:2. The "Substantial Evidence" Test.

In *In re Yoga Vida NYC, Inc*., 2016, 28 N.Y.3d 1013, 41 N.Y.S.3d 456, 64 N.E.3d 276, a majority of the Court of Appeals held that substantial evidence was lacking to support the Unemployment Insurance Appeal Board's determination that certain instructors retained by a yoga school to teach yoga classes were employees rather than independent contractors. For an employer-employee relationship to exist, the hiring organization must either exercise control over the results reached by the worker or must control the means used to achieve the results. Here, there was evidence only of "incidental" control. The Court reached a similar conclusion a few years ago with respect to a car-rental company's imposition of certain "incidental" requirements on a promoter whose services the company engaged. *In re Hertz Corp*., 2004, 2 N.Y.3d 733, 778 N.Y.S.2d 743, 811 N.E.2d 5.

The two-judge dissent in *Yoga Vida* argued that there was enough evidence of control in the record to permit reasonable inferences that met the necessary standard, and that the Court should defer to the Board's drawing of those inferences. Since the evidence reasonably supported a decision either way, the majority was said to have erroneously substituted its judgment for that of the Board.

Yoga Vida demonstrates that the existence, or not, of substantial evidence sometimes can be a close question. The majority seems to have determined that it was simply unreasonable as a matter of law for the Board to have made a finding of an employer-employee relationship on the evidence presented. See also *Home Run KTV Inc. v. New York State Liquor Auth*., 2016, 142 A.D.3d 451, 36 N.Y.S.3d 641 (1st Dep't) (Liquor Authority's determination that licensee knew or should have known of the presence of illegal drugs on the premises was based on "surmise, conjecture, speculation or rumor," rather than substantial evidence) (3-2).

On another aspect of the substantial evidence test--the principle that substantial evidence may consist entirely of hearsay--the court in *Watson v. New York State Justice Center for the Protection of People with Special Needs*, 2017, 152 A.D.3d 1025, 59 N.Y.S.3d 558 (3d Dep't), held that reliable hearsay can constitute substantial evidence by itself, "even where there is contrary sworn testimony." In the instant case, the hearsay, comprised of consistent eyewitness interview statements describing an abuse incident by two individuals, was substantial enough for the agency to have rejected contrary testimony by the accused individuals. See also *Roberts v. New York State Justice Center for the Protection of People with Special Needs*, 2017, 152 A.D.3d 1021, 59 N.Y.S.3d 554 (3d Dep't).

2013

C7803:1. Issues That May Be Raised in an Article 78 Proceeding, In General.

In the penalty review proceeding of *Perez v. Rhea*, 2013, 20 N.Y.3d 399, 960 N.Y.S.2d 727, 984 N.E.2d 925, the Court of Appeals overturned a "shock-the-conscience" determination by the Appellate Division that a tenant in a public housing project could not be evicted. Even though the tenant had lied to the housing authority over a seven-year period about her employment status and income--lies that resulted in her criminal conviction for larceny--the Appellate Division held that eviction was too severe a penalty because of the homelessness to which the tenant, the mother of three youngsters, would be subjected. The Court of Appeals, however, found no basis in the record for a finding that homelessness for the tenant was certain or even likely. The Appellate Division had improperly imported into its analysis an "assumption" that any termination of public housing was a " 'drastic penalty' ... that, by default, is excessive.... Instead, reviewing courts must consider each petition on its own

merit." Id. at 404, 960 N.Y.S.2d at 729-30, 984 N.E.2d at 927-28. As a policy matter, the Court of Appeals held that the threat of eviction from public housing is an important deterrent against false claims of poverty--a deterrent that is proper in light of the scarcity of public housing and the long lines of genuinely poor persons in need of such housing. The possibility that a tenant might be ordered in a criminal proceeding to make restitution to the housing authority, which is what happened in the instant case, "may not serve adequately to discourage" misrepresentation.

In *Kickertz v. New York University*, 2012, 99 A.D.3d 502, 952 N.Y.S.2d 147 (1st Dep't), appeal dismissed, 2013, 20 N.Y.3d 1004, 959 N.Y.S.2d 687, 983 N.E.2d 765, the Appellate Division expressed the view that a student's expulsion from dental school was shocking to the court's conscience where the offense was the first transgression by a student with an otherwise exemplary record, it was a lapse in judgment that lacked premeditation, and the penalty was not in conformity with discipline previously imposed under similar circumstances. See also 2013 Supplementary Practice Commentaries on CPLR 7802, at C7802:1.

C7803:2. The "Arbitrary and Capricious" Standard.

In *Ward v. City of Long Beach*, 2013, 20 N.Y.3d 1042, 962 N.Y.S.2d 587, 985 N.E.2d 898, all of the courts reviewing the matter, including the Court of Appeals, held that a city's denial of work-related disability retirement benefits to an injured fire department officer (Gen.Mun.Law § 207-a) lacked a rational basis and was therefore arbitrary and capricious. At the time he presented his claim to the city, the petitioner had already been found eligible for disability retirement benefits from the state based on the same medical evidence that was presented to the city; and the city's denial of benefits was based only on personal observations by the city's attorney together with hearsay allegations by the petitioner's estranged wife as to which he was given no notice or opportunity to respond.

The 2009 Supplementary Practice Commentary to this section discusses the *Infante* case, in which the Court of Appeals held that a medical agency, specifically the medical examiner's office, could not be impeded in its decision-making by the operation of common law presumptions such as the presumption against suicide. The situation is quite different, however, when the Legislature adopts a statutory presumption applicable to the decision-making of a particular agency. Such was the case in *Bitchatchi v. Board of Trustees of the New York City Police Dep't Pension Fund*, 2012, 20 N.Y.3d 268, 958 N.Y.S.2d 680, 982 N.E.2d 600. This was a consolidated appeal of three proceedings challenging the denial of work-related disability benefits to police officers and their families. Each of the three officers had experienced bad health after working on rescue, recovery and clean-up missions at the World Trade Center site in the immediate aftermath of the 9/11 attacks. The officers were entitled to take advantage of the so-called "World Trade Center" presumption in N.Y.C.Admin. Code § 13-252.1, which makes it conclusive, thereby eliminating the need for medical proof, that adverse health conditions discernible after work at the World Trade Center site were caused by work-related exposure to toxins at the site "unless the contrary be proved by competent medical evidence." (Firefighters, state police, and sanitation workers get the same presumption.) As to each of the officers, the medical board's evidence was insufficient to rebut the presumption largely because the board failed to enter relevant data in the administrative record, rendering its conclusions conjectural. The Court applied the World Trade Center presumption in the robust manner that the Legislature undoubtedly intended for the benefit of 9/11 first responders.

2011

C7803:3. The "Substantial Evidence" Test.

The Court of Appeals recently provided insight into the nature of the substantial evidence standard, defining it once again as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Ridge Road Fire District v. Schiano*, 2011, 16 N.Y.3d 494, 499, 922 N.Y.S.2d 249, 252, 947 N.E.2d 140, 143 (internal citation omitted). The rule "demands only that 'a given inference is reasonable and plausible, not necessarily the most probable.' " Id. (internal citations omitted). Significantly, the court stressed that an administrative decision supported by substantial evidence must be upheld even if there is substantial evidence in opposition. "It is of no consequence that the record ... indicates that there was evidence supporting [the agency opponent's] contention. Quite often there is substantial evidence on both sides." Id. at 500, 922 N.Y.S.2d at 252, 947 N.E.2d at 143.

Both the majority and dissenting judges in the case agreed with the articulation of the substantial evidence standard. The disagreement among the judges concerned the stage of the particular administrative proceedings in which the standard was applicable--a fire district's initial determination that a firefighter was not entitled to certain benefits (as contended by the majority), or only to a hearing officer's later review of the same issue (as contended by the dissent).

2009

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

The doctrine of administrative res judicata provides that the determination of an administrative tribunal generally should be given binding effect by agencies and courts if the fact-finding process that led to the first determination was substantially similar to that used in a court of law, i.e., a quasi-judicial (trial-type) hearing preserved in a fully developed record. *Ryan v. New York Telephone Co*., 1984, 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 825-26, 467 N.E.2d 487, 489-90; *Evans v. Monaghan*, 1954, 306 N.Y. 312, 323-24, 118 N.E.2d 452, 457-58. An agency's improper refusal to give res judicata effect to a prior agency decision that was the product of a quasi-judicial hearing can be challenged in an Article 78 proceeding.

The key question is whether the first proceeding was truly quasi-judicial in nature. It was not in *Jason B. v. Novello*, 2009, 12 N.Y.3d 107, 876 N.Y.S.2d 682, 904 N.E.2d 818. There, a young man was found eligible in 2003 to receive certain disability support services based on the relevant agency's review of the applicant's medical records. No hearing was conducted. Three years later, an interested party requested the agency to reconsider the man's eligibility. Based on a reassessment of the same medical records, the agency terminated his benefits. There was no need for a showing of newly discovered evidence, which is a possible exception to the operation of res judicata (see *Evans v. Monaghan*, supra, 306 N.Y. at 326, 118 N.E.2d at 459), because the original determination was not the product of quasi-judicial fact-finding. Res judicata simply did not apply. The Court stressed that an agency should have the freedom to reconsider prior administrative action "where a nonadjudicative determination was initially made."

C7803:2 The "Arbitrary and Capricious" Standard.

As noted in Commentary C7803:3, main volume at p.19, the rules of evidence do not apply with strictness in quasi-judicial (trial-type) hearings conducted by administrative tribunals. See, e.g., *Tsirelman v. Daines*, 2009, 61 A.D.3d 1128, 1130, 876 N.Y.S.2d 237, 240 (3d Dept.) (medical license revocation proceeding). Even greater informality attends administrative fact-finding that takes place outside the context of trial-type hearings. See *125 Bar Corp. v. State Liquor Auth*., 1969, 24 N.Y.2d 174, 178-79, 299 N.Y.S.2d 194, 198, 247 N.E.2d 157, 159 ("competent common-law evidence" not necessary to sustain denial of license renewal); Commentary C7803:1, main volume at p.10.

It is not surprising, therefore, that the Court of Appeals refused to impose the common law presumption against suicide on a medical examiner's inquiry into the cause of a person's death. *Infante v. Dignan*, 2009, 12 N.Y.3d 336, 879 N.Y.S.2d 824, 907 N.E.2d 702. Here, the medical examiner who conducted an autopsy relied on toxicological findings and the circumstances at the scene of death in making a determination of suicide. In the decision below, a majority of the Appellate Division held that the presumption against suicide precluded such a determination. 55 A.D.3d 1258, 865 N.Y.S.2d 167 (4th Dep't). But the Court of Appeals ruled that the presumption against suicide "has no role to play" either in the medical examiner's decision-making or judicial review thereof. The Court wrote, "If medical examiners were forced to leaven their decision-making with a common-law evidentiary presumption, the medical and scientific quality of their work would be seriously compromised to the detriment of the citizenry." 12 N.Y.3d at 340, 879 N.Y.S.2d at 826-27, 907 N.E.2d at 704-05.

Thus, the sole standard of judicial review in such cases is that of arbitrariness. So long as the evidence considered by the medical examiner raised reasonable inferences of death by either accident or suicide, the court must respect the medical expert's decision. The evidence relied upon by the medical examiner in the instant case contained such conflicting inferences. The Court concluded by citing *Flacke v. Onondaga Landfill Systems, Inc.*, 1987, 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 693, 507 N.E.2d 282, 286, which reiterated a policy of judicial deference to the factual evaluations of administrative agencies, especially in matters involving medical and scientific expertise.

PRACTICE COMMENTARIES

by Vincent C. Alexander

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

CPLR 7803 specifies "the only questions" that may be raised in an Article 78 proceeding. As discussed in the Practice Commentaries on CPLR 7801, at C7801:1, supra, Article 78 was adopted for the purpose of achieving procedural, not substantive, reform in the law of prerogative writs. Some of these procedural reforms are embodied in the scope of judicial review contained in this section. See N.Y.Adv.Comm. on Prac. & Proc., Second Prelim.Rep., Legis.Doc.No.13, pp.398-99 (1958); N.Y.Adv.Comm. on Prac. & Proc., Fifth Prelim.Rep., Legis.Doc.No.15, pp.750-51 (1961).

The first question in CPLR 7803--"whether the body or officer failed to perform a duty enjoined upon it by law"--corresponds with the writ of mandamus to compel. The scope of this writ and its modern application in an Article 78 proceeding are discussed in Commentary C7801:3, supra, under the subheading of "Mandamus to

Compel."

The second question--"whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction"--restates the writ of prohibition. Commentary C7801:4, supra, describes the present-day contours of this remedy.

By-passing question (3) for the moment, the fourth question--whether substantial evidence, on the entire record, supports a determination based on a hearing at which evidence was taken pursuant to direction by law--covers ground occupied exclusively by certiorari, which is described in Commentary C7801:2, supra. Briefly, certiorari encompasses review of judicial and quasi-judicial determinations of an agency that are made on the basis of statutorily or constitutionally required trial-type hearings in which all of the evidence relied upon by the agency must be contained in a written record of the hearing. Whether the agency's factual determination in such a proceeding is justified depends on whether it is supported by substantial evidence. Much judicial ink has been spilled in analyzing the substantial evidence test, thus warranting treatment of this topic in its own subsection, Commentary C7803:3, below.

To be distinguished from certiorari is mandamus to review, which is discussed in Commentary C7801:3, supra, under the subheading of "Mandamus to Review." Mandamus to review is the category of judicial review of agency determinations that are "administrative," as opposed to judicial or quasi-judicial, in nature. Administrative determinations may properly be made without a trial-type hearing and may be based on "whatever evidence is at hand," regardless of whether it appears in the record of a hearing. *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services,* 1991, 77 N.Y.2d 753, 757-58, 570 N.Y.S.2d 474, 477, 573 N.E.2d 562, 565.

Having made the distinction between certiorari and mandamus to review, we can now return to question (3) of CPLR 7803. Three of the grounds listed in CPLR 7803(3) for challenging agency action--violation of lawful procedure, error of law and abuse of discretion--may be relevant in both certiorari and mandamus to review.

To determine whether an agency has violated lawful procedure, reference must be made to the statutes, rules and regulations governing the particular agency and its area of regulatory competence. The legality of the procedure will often turn on the nature of the action taken. For example, if the agency took purely "administrative" action, such as denying an application for a license, the agency could have properly relied on ex parte information and need not have conducted an adversarial trial. See, e.g., *125 Bar Corp. v. State Liquor Auth.,* 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157. Conversely, if the action taken by the agency was of a quasi-judicial nature, such as revoking an existing license, the agency's failure to conduct a trial-type hearing (see, e.g., *Application of Brody's Auto Wreckers, Inc.,* 1961, 31 Misc.2d 466, 220 N.Y.S.2d 936 (Sup.Ct.Bronx Co.)) or to confine itself to evidence in the hearing record (see, e.g., *Mulligan's Night Club & Cafe, Inc. v. Buffalo Common Council,* 1992, 184 A.D.2d 1016, 584 N.Y.S.2d 499 (4th Dep't)) would be grounds for annulment of the determination. Similarly, in a trial-type hearing to impose a penalty, an administrative tribunal's reliance on evidence that was seized by the agency's investigators in violation of the fourth amendment may constitute a procedural violation sufficient to require annulment. See *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 1969, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440, certiorari denied 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91. But see *Boyd v. Constantine,* 1993, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511 (exclusionary rule inapplicable where seizure was not made by police officers acting on behalf of the agency).

Courts seldom single out "error of law," by name, as the question for consideration in an Article 78 proceeding. This question is often implicit, however, in the nature of the grievance, such as an allegation that the agency improperly interpreted or applied a statute or regulation. See *New York City Health and Hospitals Corp. v. McBarnette*, 1994, 84 N.Y.2d 194, 205, 616 N.Y.S.2d 1, 6, 639 N.E.2d 740, 745. In this regard, courts will uphold

the interpretation of statutes and regulations by the agencies responsible for their administration if such interpretation is reasonable. See *Howard v. Wyman,* 1971, 28 N.Y.2d 434, 438, 322 N.Y.S.2d 683, 685-86, 271 N.E.2d 528, 529-30; *Marburg v. Cole,* 1941, 286 N.Y. 202, 212, 36 N.E.2d 113, 117.

"Abuse of discretion," another of the specified grounds for review under CPLR 7803(3), arguably is superfluous. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St. John's L.Rev. 86, 123 (1963) (abuse of discretion is encompassed by arbitrary and capricious test). Historically, abuse of discretion was not included as an independent ground of review in the original version of Article 78 of the Civil Practice Act. If a court overturned an agency's exercise of discretion, the agency was said to have acted arbitrarily and capriciously or unreasonably, and this was a sufficient basis to annul the determination both at common law and under the Civil Practice Act. See, e.g., *People ex rel. Empire City Trotting Club v. State Racing Comm'n,* 1907, 190 N.Y. 31, 82 N.E. 723; *Rochester Colony, Inc. v. Hostetter,* 1963, 19 A.D.2d 250, 241 N.Y.S.2d 210 (4th Dep't).

On the other hand, the measure of an agency's imposition of a punishment--a discretionary determination--originally was held to be unreviewable by the courts. *Barsky v. Board of Regents of University of New York,* 1953, 305 N.Y. 89, 111 N.E.2d 222, affirmed 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829; *Sagos v. O'Connell,* 1950, 301 N.Y. 212, 93 N.E.2d 644. This limitation on judicial review was changed by an amendment to the Civil Practice Act that expressly permitted courts to consider whether an agency had abused its discretion in the measure of punishment, penalty or discipline imposed. Laws of 1955, ch.661. See N.Y.Adv.Comm. on Prac. & Proc., Second Prelim.Rep., Legis.Doc.No.13, pp.398-99 (1958). CPLR 7803(3) goes one step further by making abuse of discretion, standing alone, a ground for review and specifying that the mode or measure of punishment is merely one possible type of such abuse. The purpose of this additional change, according to the Advisory Committee, was to "extend the scope of review to include any abuse of discretion, so that the scope will be no narrower than the scope of review on appeal from a determination of a judge at Special Term." N.Y.Adv.Comm. on Prac. & Proc., Fifth Prelim.Rep., Legis.Doc.No.15, p.751 (1961).

Aside from consideration of administrative sanctions, however, most courts continue to analyze abuses of discretion in traditional terms of whether the agency's action was arbitrary and capricious or lacked a rational basis. See, e.g., *Older v. Board of Educ. of Union Free School District No. 1, Town of Mamaroneck,* 1971, 27 N.Y.2d 333, 318 N.Y.S.2d 129, 266 N.E.2d 812 (board of education's exercise of discretion in assigning students to schools had a rational basis and was not arbitrary and capricious); *Burke's Auto Body, Inc. v. Ameruso,* 1985, 113 A.D.2d 198, 495 N.Y.S.2d 393 (1st Dep't) (agency's exercise of discretion in rejecting all bids lacked a rational basis and was arbitrary).

With respect to the harshness of penalties and discipline meted out by administrative agencies, the standard for judicial review is as follows: An administrative sanction "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 2000, 95 N.Y.2d 550, 554, 720 N.Y.S.2d 93, 96, 742 N.E.2d 607, 610. In *Featherstone*, the Court of Appeals stressed that the Appellate Division lacks discretionary authority to substitute its judgment for that of the agency under an "interest-of-justice" inquiry. Furthermore, judicial review of the penalty issue must be limited to the evidentiary submissions that were before the administrative agency; consideration may not properly be given to circumstances that may have developed after the agency's final determination, such as subsequent ameliorating conduct by the person who was punished.

A few months after *Featherstone*, the Court again addressed the shock-the-conscience standard in *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280. There, the Court said the standard "involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or the harm to the agency or the public in general." Id. at 38, 724 N.Y.S.2d at 683, 747 N.E.2d at 1283.

The Court made clear that the shock-the-conscience standard requires significant judicial deference: " '[G]reat leeway' must be accorded to the [Police] Commissioner's determinations ... for it is the Commissioner, not the courts, who 'is accountable to the public for the integrity of the Department.' " Id. at 38, 724 N.Y.S.2d at 683, 747 N.E.2d at 1284. See also *Scahill v. Greece Central School District*, 2004, 2 N.Y.3d 754, 778 N.Y.S.2d 771, 811 N.E.2d 33. *Kelly* also made the point that in reviewing a penalty, the court may not properly consider facts outside the administrative record.

The shock-the-conscience standard has its origins in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 N.Y.2d 222, 233, 356 N.Y.S.2d 833, 841, 313 N.E.2d 321, 327. The *Pell* Court, in turn, relied heavily on the Appellate Division decision in *Stolz v. Board of Regents of the University of the State of New York*, 1957, 4 A.D.2d 361, 165 N.Y.S.2d 179 (3d Dep't), where it was said that an administrative punishment or discipline may be set aside only if it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 364, 165 N.Y.S.2d at 182. The *Stolz* court reasoned that the abuse of discretion standard in the statutory predecessor of CPLR 7803(3) was intended to preclude courts from substituting their judgment on the appropriate measure of punishment for that of the administrative agency. Otherwise, "the power of administration would, to a large extent, be transferred from the administrative agency to the courts." 4 A.D.2d at 364, 165 N.Y.S.2d at 182.

Both *Featherstone* and *Kelly* involved the scope of judicial review in the Appellate Division. It is a fair inference that the same shock-the-conscience standard should also apply to the Supreme Court's review of administrative punishments and penalties. See, e.g., *Zuntag v. City of New York*, 2007, 18 Misc.3d 210, 853 N.Y.S.2d 469 (Sup.Ct.Richmond Co.) (permanent revocation of attorney's visitation rights at jail facilities based on isolated incident of unknowing transfer of contraband tobacco to inmate was held to be "shocking to one's sense of fairness").

As a practical matter, the Supreme Court seldom passes on penalty issues. The question of excessive penalties is most frequently presented in the context of certiorari review of trial-type hearings. In such a case, the agency's fact-findings with respect to the underlying conduct are reviewed in accordance with the substantial evidence test. See Commentary C7803:3, below. Although a certiorari proceeding is commenced in the Supreme Court, the case will be transferred to the Appellate Division for determination of the substantial evidence question. CPLR 7804(g). The only matters that Supreme Court may decide prior to transfer are "objections as could terminate the proceeding," such as CPLR 3211-type defenses. See Practice Commentaries on CPLR 7804, at C7804:8. Petitioner's challenge to a penalty imposed by the agency does not qualify as such an objection. Cf. *Donofrio v. City of Rochester*, 1988, 144 A.D.2d 1027, 534 N.Y.S.2d 630 (4th Dep't), leave to appeal denied, 1989, 73 N.Y.2d 708, 540 N.Y.S.2d 1003, 538 N.E.2d 355. Thus, the penalty issue will be transferred to the Appellate Division where it will be reviewed in the first instance along with the substantial evidence question. See, e.g., *Diefenthaler v. Klein*, 2006, 27 A.D.3d 347, 811 N.Y.S.2d 653 (1st Dep't); *Dewey v. Powley*, 1999, 261 A.D.2d 901, 902, 690 N.Y.S.2d 365, 366 (4th Dep't).

If the reviewing court concludes that the punishment was too harsh, the court may either remand the matter to the agency for a lesser penalty (see, e.g., *Diefenthaler v. Klein*, supra) or specify the appropriate sanction itself (see, e.g., *Mitthauer v. Patterson,* 1960, 8 N.Y.2d 37, 42, 201 N.Y.S.2d 321, 324, 167 N.E.2d 731, 733).

The final question listed in CPLR 7803(3) is whether a determination was arbitrary and capricious. The arbitrary and capricious standard is used to examine fact-finding determinations only in mandamus to review. Like its substantial evidence counterpart in certiorari, the arbitrary and capricious test merits its own subsection, Commentary C7803:2, below.

Subdivision (5) of CPLR 7803 was added to the statute in 2003. This subdivision, together with amendments to Education Law § 4404(3), was intended to bring New York law into compliance with federal regulations regarding the scope of judicial review of determinations regarding children with disabilities. According to the legislative memorandum in support of the amendments, continued federal financing would be forfeited in the absence of such compliance. The relevant federal regulations require that judicial review of these matters be based on the entire administrative record, allow for additional evidence at the request of the parties and be determined on the basis of a preponderance of the evidence. Article 78 proceedings in this context are determined in accordance with the substantial evidence standard and do not provide for the presentation of additional evidence. By taking judicial review of these matters out from under the umbrella of Article 78, it was thought that the desired compliance with federal law could be achieved. Judicial review in this specialized area is now governed by CPLR Article 4, augmented by the procedural specifics set forth in Education Law § 4404(3).

C7803:2 The "Arbitrary and Capricious" Standard.

Whether a determination was arbitrary and capricious is the standard used in mandamus to review, i.e., where the agency was not required to conduct a trial-type hearing. See Practice Commentaries on CPLR 7801, at C7801:3, supra. Although the phrase "arbitrary and capricious" was not used in Article 78 of the Civil Practice Act, this was the standard used by the courts to analyze the legality of administrative determinations. See, e.g., *Marburg v. Cole,* 1941, 286 N.Y. 202, 36 N.E.2d 113. CPLR 7803(3) aligned Article 78 with judicial practice. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St. John's L.Rev. 86, 123 (1963).

The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County,* 1974, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321: "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The question, said the Court, is whether the determination has a "rational basis." Id. Interestingly, the *Pell* Court observed that rationality is the underlying basis for both the arbitrary and capricious standard and the substantial evidence rule of CPLR 7803(4).

125 Bar Corp. v. State Liquor Auth., 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157, provides an example of the operation of the arbitrary and capricious standard. Inherent in mandamus to review is the principle that the agency, in making its determination, was authorized to consider ex parte materials generated by an independent investigation or materials that were already in its files. The agency's reliance on such information, however, must be rationally based. Thus, in *125 Bar Corp.,* an agency's refusal to renew a tavern-owner's liquor license was held to be arbitrary and capricious because the agency had relied principally on investigatory reports that were "insufficient, inapplicable, or irrelevant" on their face. The data before the agency simply did not provide a rational basis for its action. The determination was thus annulled and the case was remanded to the agency for appropriate proceedings.

Another aspect of the arbitrary and capricious test is that the reasonableness of the agency's determination must be judged solely on the grounds stated by the agency at the time of its determination. If those grounds are arbitrary and capricious, the court may not uphold the determination even if the agency proffers a proper, alternative ground in the Article 78 proceeding. *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services,* 1991, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 478, 573 N.E.2d 562, 566. Similarly, the court is not permitted to consider facts or claims that were not presented at the agency level. *Fanelli v. New York City Conciliation and Appeals Bd.*, 1982, 90 A.D.2d 756, 757, 455 N.Y.S.2d 814, 816 (1st Dep't), affirmed for reasons stated below, 1983, 58 N.Y.2d 952, 460 N.Y.S.2d 534, 447 N.E.2d 82. See also *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684, 747 N.E.2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency").

Occasionally, however, it may be necessary for the court to take evidence or conduct a hearing for the purpose of ascertaining the facts upon which the agency based its decision. See, e.g., *Pasta Chef, Inc. v. State Liquor Auth.*, 1976, 54 A.D.2d 1112, 389 N.Y.S.2d 72 (4th Dep't), affirmed, 1978, 44 N.Y.2d 766, 406 N.Y.S.2d 36, 377 N.E.2d 480. See generally Practice Commentaries on CPLR 7804, at C7804:9, infra. By definition, mandamus to review involves a situation in which the agency did not conduct a trial-type hearing with a formal record. Thus, factual questions may arise as to exactly what evidence was considered by the agency in making its determination. The rationality of the agency's decision cannot be determined until the evidence relied upon by the agency is made known.

Loose language in judicial opinions sometimes makes it difficult to say whether a particular type of agency determination should be reviewed under the arbitrary and capricious standard or that of substantial evidence. The Appellate Division, Second Department, recently struggled with this problem in the context of challenges to the decisions of municipal land use agencies regarding applications for zoning variances. The court concluded that such matters fall within the Article 78 category of mandamus to review and are therefore to be evaluated under the arbitrary and capricious standard. *Halperin v. City of New Rochelle*, 2005, 24 A.D.3d 768, 769-72, 809 N.Y.S.2d 98, 103-05 (2d Dep't), leave to appeal dismissed, 2006, 6 N.Y.3d 890, 817 N.Y.S.2d 624, 850 N.E.2d 671. The substantial evidence standard of review, which applies to certiorari, is inappropriate for the review of zoning agency decisions, the Appellate Division reasoned, because the public hearings conducted in connection with variance applications are not quasi-judicial in nature. Such hearings do not involve sworn testimony, cross-examination and the making of an evidentiary record within the meaning of CPLR 7803(4). See generally Practice Commentaries on CPLR 7801, at C7801:2, supra, and 7803, at C7803:3, below.

The *Halperin* court was put to the task of reconciling conflicting language in certain opinions in which the Court of Appeals sought to explain how "substantial evidence" was part of the standard of review in zoning variance cases. See *Wilcox v. Zoning Board of Appeals of the City of Yonkers,* 1966, 17 N.Y.2d 249, 255, 270 N.Y.S.2d 569, 572, 217 N.E.2d 633, 635; *Sasso v. Osgood*, 1995, 86 N.Y.2d 374, 384 n.2, 633 N.Y.S.2d 259, 264, 657 N.E.2d 254, 259; *Pecoraro v. Board of Appeals of the Town of Hempstead*, 2004, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 237, 814 N.E.2d 404, 407. The Appellate Division discerned in *Pecoraro*, the most recent of these decisions, a commitment by the Court of Appeals to the arbitrary and capricious standard in order to ensure, as a policy matter, that significant deference be paid to zoning decisions of local officials regarding land use in their communities. 24 A.D.3d at 771, 809 N.Y.S.2d at 104.

Often, the shadowy distinction between the arbitrary and capricious standard and the substantial evidence standard makes no practical difference because the Court of Appeals, as previously noted, has said that rationality is the underlying basis for both standards. *Pell v. Board of Educ. of Union Free School Dist. No. 1*, supra, 34 N.Y.2d at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The distinction made a difference in *Halperin* because the Supreme Court, mistakenly thinking the variance determination at issue was to be judged under the substantial evidence standard, transferred the case to the Appellate Division for review pursuant to CPLR 7804(g) (question of substantial evidence to be transferred to Appellate Division when Supreme Court's ruling on other objections, if any, does not dispose of case). See Practice Commentaries on CPLR 7804, at C7804:8, infra. The Appellate Division, however, held that the Supreme Court should have retained jurisdiction and addressed the merits because the proceeding was in the nature of mandamus to review, requiring application of the arbitrary and capricious standard.

C7803:3 The "Substantial Evidence" Test.

The substantial evidence test is the exclusive standard for the review of an agency's fact-finding determination in an Article 78 proceeding in the nature of certiorari. CPLR 7803(4). The test was given shape by the Court of Appeals in the 1940 decision of *Stork Restaurant v. Boland,* 282 N.Y. 256, 26 N.E.2d 247:

> A finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based. That requires 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' .... The same test is applied in trials before a court and jury. Evidence which is sufficient to require the court to submit a question of fact to a jury is sufficient to support a finding by the administrative board.

Id. at 273-74, 26 N.E.2d at 255.

Another formulation appears in *300 Gramatan Ave. Associates v. State Div. of Human Rights,* 1978, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, where the Court said, "In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically.... Put a bit differently, 'the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision.' " Id. at 181-82, 408 N.Y.S.2d at 57, 379 N.E.2d at 1186-87, quoting C. McCormick, *Evidence* 847 (2d ed. 1972).

Yet another variation appears in *People ex rel. Vega v. Smith,* 1985, 66 N.Y.2d 130, 495 N.Y.S.2d 332, 485 N.E.2d 997, where the Court quotes Learned Hand: "While the quantum of evidence that rises to the level of 'substantial' cannot be precisely defined, the inquiry is whether 'in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' " Id. at 139, 495 N.Y.S.2d at 337, 485 N.E.2d at 1002, quoting *N.L.R.B. v. Remington Rand,* C.A.N.Y.1938, 94 F.2d 862, 873, certiorari denied 304 U.S. 576, 58 S.Ct. 1046, 82 L.Ed. 1540.

Under the substantial evidence test, the court is not to weigh the evidence, for that would usurp the function of the administrative fact-finder. Thus, courts may not "reject the choice made by [the agency] where the evidence is conflicting and room for choice exists." *Stork Restaurant v. Boland*, supra, 282 N.Y. at 267, 26 N.E.2d at 252. The court, in other words, may not substitute its own view, even if it would have reached a different conclusion. *Sowa v. Looney,* 1968, 23 N.Y.2d 329, 336, 296 N.Y.S.2d 760, 767, 244 N.E.2d 243, 247. Similarly, the credibility of witnesses who testified at the hearing is essentially beyond the scope of judicial review: " '[W]here reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [agency].' " *Berenhaus v. Ward,* 1987, 70 N.Y.2d 436, 443-44, 522 N.Y.S.2d 478, 481-82, 517 N.E.2d 193, 196, quoting *Stork Restaurant v. Boland*, supra, 282 N.Y. at 267, 26 N.E.2d at 252. See generally *Café La China v. New York State Liquor Auth.*, 2007, 43 A.D.3d 280, 841 N.Y.S.2d 30 (1st Dep't) (summary of characteristics of substantial evidence standard of review).

The determination of whether substantial evidence supports the agency's conclusion is to be made upon the record as a whole. Thus, "[t]he evidence produced by one party must be considered in connection with the evidence produced by the other parties." *Stork Restaurant v. Boland*, supra, 282 N.Y. at 274, 26 N.E.2d at 255. A corollary of the "whole record" rule is that a decision may be upheld even if evidence was erroneously admitted at the administrative hearing, provided a review of the entire record discloses independent substantial evidence in support of the decision. See, e.g., *Sowa v. Looney,* 1968, 23 N.Y.2d 329, 296 N.Y.S.2d 760, 244 N.E.2d 243 (results of polygraph examination should not have been admitted, but other evidence in the record was sufficient). In a "rare case," however, the admission of improper evidence may taint the proceeding to such an extent that the "fundamentals of a fair hearing" are violated regardless of whatever other evidence is in the record. Id. at 334, 296 N.Y.S.2d at 765, 244 N.E.2d at 246. Cf. *Freymann v. Board of Regents of University of State of New York*, 1984, 102 A.D.2d 912, 477 N.Y.S.2d 494 (3d Dep't), appeal dismissed 64 N.Y.2d 645, 485 N.Y.S.2d 1032, 474 N.E.2d

260 (in proceeding for revocation of license, even if evidence of physician's prior disciplinary "conviction" violated the *Molineux* rule, such error was not so prejudicial as to require annulment). Obviously, if the agency's decision is based entirely on improper evidence, annulment will be the result. See, e.g., *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 1969, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440, certiorari denied 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (decisive evidence seized in violation of the fourth amendment).

A question that often arises in connection with the substantial evidence test is the extent to which the agency may properly rely on hearsay that is introduced at the hearing. It is well settled, of course, that trial-type proceedings of an administrative agency are not governed by the same formal rules of evidence that are operative in the courts. See *Hecht v. Monaghan,* 1954, 307 N.Y. 461, 470, 121 N.E.2d 421, 425; *Sowa v. Looney*, supra, 23 N.Y.2d at 333, 296 N.Y.S.2d at 764, 244 N.E.2d at 245. See also N.Y.State Admin.Proc.Act § 306(1) (in adjudicatory proceedings, agencies generally need not observe formal rules of evidence except rules of privilege); *Berenhaus v. Ward,* 1987, 70 N.Y.2d 436, 522 N.Y.S.2d 478, 517 N.E.2d 193 (rule of criminal procedure that prohibits conviction based solely on uncorroborated testimony of accomplice is inapplicable in police disciplinary hearing). Thus, hearsay is admissible in such proceedings. See, e.g., *Lumsden v. New York City Fire Dep't,* 1987, 134 A.D.2d 595, 522 N.Y.S.2d 4 (2d Dep't); *King v. McMickens,* 1986, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1st Dep't), affirmed sub nom. *Perez v. Ward,* 1987, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296.

May an agency's determination be based exclusively on hearsay? A 1916 decision of the Court of Appeals answered this question in the negative when it held that "there must be a residuum of legal evidence to support the [determination]." *Carroll v. Knickerbocker Ice Co.,* 1916, 218 N.Y. 435, 440, 113 N.E. 507, 509. In other words, among the data in the hearing record, there had to be some evidence--a "legal residuum" of either non-hearsay evidence or evidence that fell within a hearsay exception--that would be admissible in a court of law. The legal residuum rule, however, was roundly criticized by commentators as an artificial ingredient in a review process that should focus solely on the rationality of the agency's fact-findings in the particular circumstances. See, e.g., Davis, "Hearsay in Administrative Hearings," 32 Geo.Wash.L.Rev. 689, at 689 (1964); Weinstein, "Probative Force of Hearsay," 46 Iowa L.Rev. 331, 347-48 (1961).

The CPLR did not explicitly jettison the legal residuum rule, but the Court of Appeals interpreted the statutory adoption of the substantial evidence test in CPLR 7803(4) as an implicit rejection of the rule. See *300 Gramatan Ave. Associates v. State Div. of Human Rights,* 1978, 45 N.Y.2d 176, 180 n. *, 408 N.Y.S.2d 54, 56, 379 N.E.2d 1183, 1185. Substantial evidence, we are told, is evidence that a reasonable person would rely upon in reaching a conclusion, and relevant and probative hearsay, standing alone, can satisfy this standard. See *People ex rel. Vega v. Smith,* 1985, 66 N.Y.2d 130, 139, 495 N.Y.S.2d 332, 337, 485 N.E.2d 997, 1002. At the hearing, potential unfairness caused by the absence of confrontation of the hearsay declarant can be overcome, in most instances, by the aggrieved party's ability to demand that the declarant be subpoenaed to appear for examination as a hostile witness. See N.Y.State Admin.Proc.Act § 304(2); *Gray v. Adduci,* 1988, 73 N.Y.2d 741, 536 N.Y.S.2d 40, 532 N.E.2d 1268. Thus, it is now well settled that the legal residuum rule is a dead letter in New York in virtually all trial-type agency proceedings. See *Gray v. Adduci*, supra (revocation of driver's license based on arresting officer's written report of driver's refusal to submit to chemical test); *Eagle v. Paterson,* 1982, 57 N.Y.2d 831, 455 N.Y.S.2d 759, 442 N.E.2d 56 (finding of untrustworthy conduct by real estate brokers based on homeowners' written communications to Secretary of State); *People ex rel. Vega v. Smith*, supra (prison discipline based on correction officers' written misbehavior reports); *Hirsch v. Corbisiero,* 1989, 155 A.D.2d 325, 548 N.Y.S.2d 1 (1st Dep't), appeal denied, 1990, 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279 (suspension of horse racing license on basis of investigating officer's report).

This is not to say, however, that an agency determination based solely on hearsay will always pass the substantial evidence test. In some cases, the quality and reliability of the hearsay may be so poor as to render reliance thereon unreasonable. See, e.g., *In re National Basketball Ass'n,* 1985, 115 A.D.2d 365, 495 N.Y.S.2d 904 (1st Dep't), affirmed 1986, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d 222 (conclusory affidavit of physician describing

patient's physical condition was insufficient to establish patient's ability to perform physical duties of professional basketball referee). See also *Hoch v. New York State Dep't of Health*, 2003, 1 A.D.3d 994, 768 N.Y.S.2d 53 (4th Dep't) (substantial evidence lacking where critical issue of student's age was based on uncorroborated hearsay).

In applying the substantial evidence standard, courts must confine their review to the record as it existed at the time of the agency's determination. See *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684, 747 N.E.2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency"). See also *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 1991, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 478, 573 N.E.2d 562, 566 (judicial review of agency determination is limited to grounds stated by agency; if those grounds are inadequate or improper, court may not uphold agency's determination by substituting a proper basis).

LEGISLATIVE STUDIES AND REPORTS

This section is based on part of § 1296 of the civil practice act. The comprehensive discussion of this section in the Second Report states that the first question specified is the same as the first of § 1296; the second combines the second and third stated in § 1296; the third question specified combines the three paragraphs in § 1296 numbered 4, 5 and 5-a. Paragraph 5-a was enacted to overcome the rule stated in the cases of Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E.2d 222, aff'd, 347 U.S. 442 (1953), and Sagos v. O'Connell, 301 N.Y. 212, 93 N.E.2d 644 (1950), which held that the degree of punishment was not reviewable. In the final draft of the third question in this section it was amended to indicate that abuse of discretion may include, but is not limited to, the measure or mode of punishment, and the Revisers comment in the Fifth Report that this change extends the scope of review to include any abuse of discretion, so that the scope will be no narrower than the scope of review on appeal from a determination of a judge at Special Term.

The Second Report further states that the fourth question specified in this section replaces numbered paragraphs 6 and 7 in § 1296 of the civil practice act, as well as the qualifying paragraph preceding those paragraphs. Paragraph 6 is formulated in terms of a lack of competent proof of all the facts necessary to be proved; paragraph 7 speaks of such a preponderance of proof against the existence of a material fact that a jury verdict would be set aside as against the weight of the evidence. These formulations have been severely criticized and their amendment has been proposed. See 1 Benjamin, Administrative Adjudication in New York 335-340 (1942); Communications to N.Y.Temp.Comm'n on the Courts. The statement in this section accords with the amendments suggested and reflects the law as construed by the courts in Miller v. Kling, 291 N.Y. 65, 68-69, 50 N.E.2d 546, 547-48 (1942), and Kilgus v. Board of Estimate of City of New York, 308 N.Y. 620, 626-27, 127 N.E.2d 705, 709 (1955). Similar language may be found in § 9(e) of the Federal Administrative Procedure Act, 5 U.S.C.A. § 1009(e), § 207(f) of the proposed Administrative Code, and § 12(7)(e) of the Model State Administrative Procedure Act. The final draft of question 4 stated the question affirmatively rather than negatively, by changing the word "unsupported" to "supported." The Revisers remark in the Fifth Report that this change is intended to clarify the meaning, and that the language in question 4 more aptly describes the "substantial evidence" test of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940); Miller v. Kling, 291 N.Y. 65, 50 N.E.2d 546 (1943), and Brennan v. Rubino, 8 N.Y.2d 16, 21, 167 N.E.2d 332, 334 (1960); see generally, Toch, Judicial Review of Administrative Determinations in New York State, 24 Albany L.Rev. 95, 115-19 (1960). This rule is not intended to change, affect or impair in any manner established principles of judicial review which hold the burden of overcoming an administrative determination to be upon the petitioner; as for example, a proceeding by a taxpayer to review a determination of the State Tax Commission under McKinney's Tax Law §§ 199 and 375, where the burden rests upon the taxpayer to show the determination is "clearly erroneous." See, e.g., People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346, 146 N.E. 622 (1925); People ex rel. Hull v. Graves, 289 N.Y. 173, 45 N.E.2d 161 (1942); Young v. Bragalini, 3 N.Y.2d 602, 148 N.E.2d 143 (1958).

Finally, the Revisers explain in the Second Report that paragraph 5-a was added to § 1296 of the civil practice act in 1955, with no express indication of where it was to be placed. N.Y.Laws 1955, c. 661. It seems apparent, however, that it was not intended that paragraph 5-a be qualified by the paragraph preceding paragraphs 6 and 7. This may be inferred from the numbering "5-a" rather than "8" and from the simultaneous amendment of the paragraphs following paragraph 7. The latter

amendment included paragraph 5-a with paragraphs 1 through 5 as describing matters to be decided in the first instance by the Special Term. Ibid.

The last phrase of the qualifying paragraph which was added in 1951 (Laws 1951, c. 663) is discussed in the notes to § 7804 of CPLR.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 398.

5th Report Leg.Doc. (1961) No. 15, p. 750.

6th Report Leg.Doc. (1962) No. 8, p. 671.

Notes of Decisions (5488)

McKinney's CPLR § 7803, NY CPLR § 7803
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

19 N.Y.3d 106
Court of Appeals of New York.

In the Matter of ALBANY LAW SCHOOL et al., Respondents–Appellants, v. NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES et al., Appellants–Respondents.

April 26, 2012.

Synopsis
Background: Petitioners, who provided protection and advocacy (P & A) services to individuals with developmental disabilities pursuant to contracts with the State Commission on Quality of Care and Advocacy for Persons with Disabilities, brought combined article 78 proceeding and § 1983 action, seeking to enforce their right of access to all clinical records in Commission's facilities. The Supreme Court, Albany County, Robert A. Sackett, J., found that petitioners were limited to the access conferred upon them by federal law, and petitioners appealed. The Supreme Court, Appellate Division, 81 A.D.3d 145, 915 N.Y.S.2d 747, McCarthy, J., affirmed as modified. Both parties were granted leave to appeal.

Holdings: The Court of Appeals, Graffeo, J., held that:

provisions of New York's Mental Hygiene Law, which addressed access rights of P & A organizations to clinical records of developmentally disabled individuals, implemented federal law, and

actively involved family members possessed sufficient decision-making authority to qualify as "legal representatives" under federal law.

Affirmed as modified.

Ciparick, J., filed a dissenting opinion in which Lippman, Chief Judge, and Smith, J., concurred.

Attorneys and Law Firms

***614** Eric T. Schneiderman, Attorney General, Albany (Victor Paladino, Barbara D. Underwood, Andrea Oser and Nancy A. Spiegel of counsel), for appellants-respondents.

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Paul Kietzman, Delmar, for NYSARC, Inc., amicus curiae.

Wilmer Cutler Pickering Hale and Dorr LLP, New York City (Fraser L. Hunter, Jr., David F. Olsky and Edward Sherwin of counsel), for National Disability Rights Network and others, amici curiae.

***112 OPINION OF THE COURT**

GRAFFEO, J.

**968 Petitioners Albany Law School and Disability Advocates, Inc. provide protection and advocacy services to individuals with developmental disabilities pursuant to contracts with the New York State Commission on Quality of Care and Advocacy for **969 ***615 Persons with Disabilities, an agency that oversees New York's protection and advocacy system. After receiving a complaint regarding the discharge practices of respondent New York State Office of Mental Retardation and Developmental Disabilities—now the Office for People with Developmental Disabilities (OPWDD)—petitioners requested access to the clinical records of all individuals residing at two OPWDD facilities to investigate whether they were being denied the opportunity to live in less restrictive settings. Relying on Mental Hygiene Law § 45.09(b) and § 33.13(c)(4), petitioners asserted that they were entitled to unrestricted access to the clinical records.

OPWDD disagreed, taking the position that the two Mental Hygiene Law provisions cited by petitioners

incorporate the records access procedures established in the federal Developmental Disabilities Assistance and Bill of Rights Act, which were designed to balance the privacy rights of developmentally disabled persons with the need of protection and advocacy organizations to access residents' personal information in order to investigate complaints and advocate on behalf of those individuals. In accordance with federal law, OPWDD agreed to provide records pertaining to residents for whom petitioners had obtained authorization, either from the individuals themselves or their legal representatives (which, in OPWDD's view, included actively-involved family members), and for individuals who were unable to provide authorization and did not have a legal representative.

This case requires us to decide two significant issues that implicate competing interests with regard to the clinical records of developmentally disabled persons. First, whether Mental Hygiene Law § 45.09(b) and § 33.13(c)(4) provide petitioners with unqualified access to clinical and other records or whether the state statutes embrace the access provisions in federal law. And second, whether actively-involved family members can be deemed legal representatives for purposes of the federal and state access provisions. We conclude that section 45.09(b) and section 33.13(c)(4) must be read in accord with federal law and that actively-involved family members can possess sufficient ***113** decision-making authority to qualify as legal representatives under the pertinent regime.

I.

In 1975, in response to the deplorable conditions revealed at New York's Willowbrook State School and other state-operated facilities, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act (the DD Act).[1] The DD Act was designed to encourage states to safeguard the rights of individuals with developmental disabilities by offering federal funds to states with an effective protection and advocacy (P & A) system (*see Virginia Office for Protection and Advocacy v. Stewart,* 563 U.S. ——, ——, 131 S.Ct. 1632, 1635–1636, 179 L.Ed.2d 675 [2011]). To qualify for funding, a state's P & A system must, among other powers, "have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred" (42 USC § 15043[a] [2] [B]). The P & A system must also be able to "pursue legal, administrative, and other appropriate remedies ... to ensure the protection ****970 ***616** of, and advocacy for, the rights of such individuals" (42 USC § 15043[a][2][A] [i]).

In 1984, Congress amended the DD Act to require states, as a condition to maintaining eligibility for federal funding under the program, to grant their P & A systems access to the records of individuals with developmental disabilities subject to certain requirements (*see* Pub. L. 98–527, § 142, 98 U.S. Stat. 2662, 2679–2680 [98th Cong., 2d Sess., Oct. 19, 1984], amending 42 USC former § 6042[a]). The 1984 amendment gave the states until October 1986 to implement these access requirements (*see id.*). In particular, the DD Act currently describes four sets of circumstances under which a P & A entity must be given access to the clinical and other records of developmentally disabled persons.

First, the P & A organization is entitled to "immediate access," without the consent of any person, if it "determines there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy" (42 USC § 15043[a][2][J][ii][I]) or if the individual dies (*see* 42 USC § 15043 ***114** [a][2][J][ii][II]). In these emergency or death situations, Congress determined that facilities must provide immediate, full record access in order to protect the health and safety of the resident or, in the case of death, to timely commence an investigation.

Second, in nonemergencies, the facility must grant access to the P & A organization if authorization is given by the individual or the individual's "legal guardian, conservator, or other legal representative" (42 USC § 15043 [a] [2][I][i]). Not all developmentally disabled persons residing in facilities are incompetent to participate in medical and therapy decisionmaking or decisions relating to training or residential choices. Federal law acknowledges the right of these residents who are consistently involved in the management of their own care to be notified and to authorize or deny access, recognizing the reasonable privacy expectations of these individuals in their personal information and their right to make decisions regarding their own treatment and welfare.

Third, a P & A entity is to be afforded access where (a) the individual is incapable of granting authorization; (b) the individual does not have a legal representative; and (c) the system has received a complaint with regard to the individual's treatment or, as a result of monitoring activities, there is probable cause to believe that the

individual has been abused or neglected (*see* 42 USC § 15043[a][2][I][ii]). Clearly, the DD Act recognizes the imperative need of P & A organizations to protect and advocate on behalf of residents who are not capable of providing authorization and lack a legal representative. Even without receiving a complaint, if P & A personnel have probable cause to believe that a resident has been neglected or abused—reflecting the importance of on-site monitoring activities by P & A organizations—they may demand record access to investigate the circumstances and safeguard the resident at risk.

Finally, access is mandated if (a) the individual has a legal representative; (b) the P & A entity has received a complaint with regard to the individual's treatment or, as a result of monitoring activities, there is probable cause to believe that the individual has been abused or neglected; and (c) the P & A entity has contacted the legal representative and offered assistance but the representative has failed or refused to act on the individual's behalf (*see* 42 USC § 15043[a][2][I][iii]). In nonemergency situations, the records of individuals who lack the ***115** ability to consent but who have a legal representative (according ****971 ***617** to OPWDD, this is fairly common) must therefore be disclosed if the legal representative grants authorization (category two) or if the legal representative fails or refuses to act in response to a complaint or probable cause (category four). Again, if the situation is such that the health or safety of the resident is in "serious" or "immediate jeopardy," the immediate access provisions of category one would instead apply.

In short, in amending the DD Act, Congress acknowledged the necessity of allowing P & A entities record access in order to fulfill their "watchdog" role. Yet, Congress also considered the right of competent individuals or legal representatives acting on behalf of developmentally disabled persons to participate in the decision to disclose their records—some of which may contain sensitive, personal information. Therefore, federal law established a carefully calibrated system that took into consideration both the privacy interests of developmentally disabled persons and the need for P & A organizations to examine records in order to pursue their statutory functions.

Following the adoption of the DD Act, the New York Legislature created what is now known as the Commission on Quality of Care and Advocacy for Persons with Disabilities (the Commission) to oversee the care, treatment and delivery of services to individuals who are developmentally disabled (L. 1977, ch. 655; *see also* Mental Hygiene Law art 45). The Commission is empowered to review the operations of the Department of Mental Hygiene, which includes OPWDD, and to investigate complaints pertaining to the treatment and care of individuals who are patients or residents of any facility providing services to developmentally disabled persons (*see* Mental Hygiene Law § 45.07; *see generally Matter of Reckess v. New York State Commn. on Quality of Care for Mentally Disabled,* 7 N.Y.3d 555, 560, 825 N.Y.S.2d 178, 858 N.E.2d 772 [2006]). The Legislature vested the Commission with the power to inspect all books and records of mental hygiene facilities "deemed necessary for carrying out the commission's functions, powers and duties" (Mental Hygiene Law § 45.09[a]). The Commission is also the agency designated under the DD Act to administer the P & A system to ensure continued federal funding (*see* Mental Hygiene Law § 45.07[p]). It administers its P & A responsibilities, in part, through contracts with independent P & A organizations, such as petitioners (*see* Mental Hygiene Law § 45.07[i]). Hence, in New York the Commission itself serves as the State's P & A system while P & A entities like petitioners function as contractors to the system (*see generally* ***116** *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.,* 675 F.3d 149 [2d Cir.2012]).

Although the Commission has been granted broad access to facility records since its inception (see L. 1977, ch. 655; *see also* Mental Hygiene Law § 45.09[a]), state law did not originally afford P & A organizations that contract with the Commission an independent right to examine the clinical records of developmentally disabled individuals. In response to the 1984 amendments to the DD Act—which conditioned the continued eligibility for federal funding on allowing such entities access to records—the Legislature amended the Mental Hygiene Law in 1986 to address the access rights of these P & A organizations (*see* L. 1986, ch. 184).

Specifically, the Legislature added Mental Hygiene Law § 45.09(b), which provides, in relevant part:

> "Pursuant to the authorization of the commission to administer the protection ****972 ***618** and advocacy system as provided for by federal law, any agency or person within or under contract with the commission which provides protection and advocacy services must be granted access at any and all times to any facility, or part thereof, serving a person with a disability operated or licensed by any office or agency of the state, and to all books, records, and data pertaining to any such facility upon receipt of a complaint by or on behalf of a person with a disability."

The 1986 legislation simultaneously amended Mental Hygiene Law § 33.13, the provision that secures the

confidentiality of clinical records in the possession of OPWDD or the Office of Mental Health absent enumerated exceptions, by adding the following emphasized language to subdivision (c)(4):

> "(c) Such information about patients or clients reported to the offices ... shall not be released by the offices or its facilities to any person or agency outside of the offices except as follows: ...
>
> "4. to the commission on quality of care for the mentally disabled *and any person or agency under contract with the commission which provides protection and advocacy services pursuant to the authorization of the commission to administer the protection and advocacy system as provided for by federal law*."

***117** This remains the current state statutory scheme governing P & A record access.

II.

In 2008, petitioners, as P & A organizations under contract with the Commission, wrote to OPWDD requesting review of the records of more than 200 residents at two facilities operated by OPWDD—the Capital District and Taconic Developmental Disabilities Service Offices. The requests indicated that petitioners had received a "complaint of neglect" pertaining to the discharge policies at the Taconic facility and that, as a result of monitoring activities at the Capital District facility, petitioners were concerned about the timeliness of the transfer of individuals into more integrated placements—clearly an issue within petitioners' advocacy responsibilities. Petitioners claimed that they were entitled to unrestricted access to the documents pursuant to Mental Hygiene Law § 45.09(b) and § 33.13(c)(4).

OPWDD rejected petitioners' contention that they had full access to the clinical records under these circumstances and asserted that section 45.09(b) and section 33.13(c)(4) required petitioners to comply with the federal procedures prescribed by the DD Act. Consequently, OPWDD agreed to provide the records of individuals for whom petitioners had obtained authorization and the records of individuals who were incapable of providing authorization and had no legal representative.[2] But OPWDD indicated that access could not be provided for individuals who had legal representatives unless petitioners first notified those legal representatives (most of whom were actively-involved family members rather than formal guardians). In the event those legal representatives gave consent or failed or refused to act, OPWDD represented that petitioners would be entitled to access in accordance with federal procedures. OPWDD further advised petitioners that it would provide the contact information for these legal representatives to allow petitioners to seek their consent. Petitioners declined to obtain ****973 ***619** the authorizations or contact the individuals' representatives, reiterating their view that state law required access without notice or consent considerations.

As a result of this conflict over the proper procedures governing record access, petitioners brought this combined ***118** CPLR article 78 proceeding and action pursuant to 42 USC § 1983 against OPWDD and its Commissioner (collectively, OPWDD) to enforce their right of access to all clinical records at the Taconic and Capital District facilities. According to the petition/complaint, there was evidence that OPWDD was neglecting the care of individuals residing at the two facilities both through "the denial of rights to live in less restrictive settings and the failure to provide necessary treatment that would prepare and enable individuals with disabilities to live in such settings." Petitioners asked the court to issue an order compelling OPWDD to provide prompt access to the residents' clinical records pursuant to Mental Hygiene Law § 45.09(b) and § 33.13(c)(4). Alternatively they requested an order obligating OPWDD to provide the records of individuals without a legal representative under 42 USC § 15043(a)(2)(I)(ii), and they maintained that actively-involved family members were not legal representatives for purposes of record access.

OPWDD moved to dismiss under CPLR 3211 for failure to state a cause of action. In the alternative, OPWDD requested that the court strike certain paragraphs of the petition/complaint as prejudicial and irrelevant under CPLR 3024(b).[3] In support of its dismissal motion, OPWDD included an affidavit from the Commission's chief operating officer explaining the Commission's view that the access rights of P & A organizations under contract with it, such as petitioners, were not coextensive with the Commission's expansive authority established by Mental Hygiene Law § 45.09(a). Instead, the Commission concurred with OPWDD's view that section 45.09(b) and section 33.13(c)(4) incorporated the federal criteria set forth in the DD Act. OPWDD also submitted affidavits from the executive director of Parent to Parent of NYS and the president of the Self–Advocacy Association of New York State, two not-for-profit advocacy

organizations, opposing petitioners' assertion of blanket authority and emphasizing the privacy interests developmentally disabled persons and their families have in their sensitive medical records.

Supreme Court granted OPWDD's motion in part. The court agreed with OPWDD that Mental Hygiene Law § 45.09(b) and § 33.13(c)(4) adopted the federal access procedures and ***119** therefore did not grant petitioners access to the records at issue absent compliance with the federal requirements. The court also determined that legal representatives, for purposes of the federal regime, could include actively-involved family members. Finally, the court struck a number of paragraphs from the petition/complaint pursuant to CPLR 3024(b).[4]

The Appellate Division modified (81 A.D.3d 145, 915 N.Y.S.2d 747 [3d Dept.2011]). The Court concurred with Supreme Court's conclusion that Mental Hygiene Law § 33.13(c)(4) did not afford petitioners unrestricted access to clinical ****974 ***620** records but, rather, required petitioners to comply with the DD Act's requirements. Yet the Court reached a different conclusion regarding Mental Hygiene Law § 45.09(b), holding that it authorized access to petitioners upon receipt of a complaint because that statute was not structured to incorporate the federal access requirements. The Court further disagreed with Supreme Court's determination that actively-involved family members can be legal representatives for purposes of the federal notice provisions, reasoning that they lack the authority to make "all decisions" on behalf of their developmentally disabled relatives (81 A.D.3d at 152, 915 N.Y.S.2d 747). Finally, the Court ruled that Supreme Court did not err in striking out portions of the petition/complaint.

The Appellate Division granted OPWDD and petitioners leave to appeal on a certified question.

III.

On this appeal, OPWDD argues that the Mental Hygiene Law does not grant P & A organizations under contract with the Commission unrestricted access to clinical records. Rather, OPWDD contends that Mental Hygiene Law § 45.09(b) authorizes petitioners to review patient records only in accordance with the four categories of access procedures enumerated in the DD Act. OPWDD further asserts that Mental Hygiene Law § 45.09(b) cannot reasonably be interpreted inconsistently with Mental Hygiene Law § 33.13(c)(4) since both provisions were enacted jointly in the same legislative proposal. In OPWDD's view, neither section 45.09(b) nor section 33.13(c)(4) grants petitioners access greater than what is permitted under federal law. Petitioners agree that Mental Hygiene Law § 45.09(b) and ***120** § 33.13(c)(4) should be construed in pari materia, but counter that neither provision ties their access rights to federal law. They read the two statutes—as does the dissent—as allowing them full access to the clinical records they seek, claiming that such access is integral to their mission. Amici organizations support both parties in this controversy.

In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention (*see Yatauro v. Mangano,* 17 N.Y.3d 420, 426, 931 N.Y.S.2d 36, 955 N.E.2d 343 [2011]). As we have repeatedly stated, the text of a provision "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v. Spitzer,* 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88, 860 N.E.2d 705 [2006]). Additionally, we should inquire "into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Nostrom v. A.W. Chesterton Co.,* 15 N.Y.3d 502, 507, 914 N.Y.S.2d 725, 940 N.E.2d 551 [2010] [internal quotation marks and citation omitted]). Finally, it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another (*see Friedman v. Connecticut Gen. Life Ins. Co.,* 9 N.Y.3d 105, 115, 846 N.Y.S.2d 64, 877 N.E.2d 281 [2007]).

At the heart of this appeal is the proper scope of Mental Hygiene Law § 45.09(b) and § 33.13(c)(4). In relevant part, section 45.09(b) provides:

> "Pursuant to the authorization of the commission to administer the protection and advocacy system *as provided for by federal law,* any agency ... under contract with the commission which provides protection and advocacy services must be granted access ... to all ... ****975 ***621** records ... pertaining to any such facility upon receipt of a complaint" (emphasis added).

Similarly, section 33.13(c)(4) permits facilities licensed or operated by OPWDD or the Office of Mental Health to release clinical records to any "agency under contract with the commission which provides protection and advocacy services pursuant to the authorization of the commission to administer the protection and advocacy system *as provided for by federal law* " (emphasis added). The reference to federal law appears in both statutes, but the placement of the reference differs.

As an initial matter, we disagree with the approach taken by the Appellate Division, which applied different interpretations ***121** to the two provisions. Statutes that relate to the same subject are in pari materia and should "be construed together unless a contrary intent is clearly expressed by the Legislature" (*Matter of Plato's Cave Corp. v. State Liq. Auth.,* 68 N.Y.2d 791, 793, 506 N.Y.S.2d 856, 498 N.E.2d 420 [1986]). Indeed, in pari materia principles "apply with peculiar force to statutes passed at the same legislative session" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 221 [a], Comment, at 375). Here, the two statutory amendments relate to the same subject matter, contain identical language and were adopted together. We therefore concur with the parties that the statutes should be read consistently with one another to effect the same legislative intent. We do not find the placement of the "pursuant to" clause at the beginning of the sentence in section 45.09(b) but at the end of the sentence in section 33.13(c)(4) a sufficient basis to create divergent meanings, particularly where the two provisions were amended by the very same enactment. The more difficult question before us is ascertaining whether the statutes grant P & A organizations broad access rights uninhibited by the federal criteria, as petitioners assert, or implement the access procedures outlined in the DD Act, as OPWDD proposes.

Although the issue is admittedly close, we believe that OPWDD's interpretation of the statutes is more persuasive as a matter of both text and context. In contrast to Mental Hygiene Law § 45.09(a), which accords the Commission broad access to records as long as they relate to the Commission's "functions, powers and duties," Mental Hygiene Law § 45.09(b) expressly ties the access rights of P & A organizations to the Commission's administration of the P & A system "as provided for by federal law." Likewise, although Mental Hygiene Law § 33.13(c)(4) contemplates the release of records to the Commission itself without any limiting language, the amended language that incorporates P & A organizations includes the identical reference to federal law. Hence, contrary to the view expressed by the dissent, the most plausible reading of the two statutes is that P & A organizations are entitled to review records in compliance with federal law. As discussed, the DD Act recognizes the critical advocacy and investigative functions of P & A organizations by authorizing "immediate access" without permission in emergency situations. But the DD Act also strove to balance the purpose and objectives of P & A organizations with the privacy interests of individuals with developmental disabilities by requiring P & A organizations, in situations not involving an ***122** emergency, to notify and obtain the consent of those individuals or, if they are not competent to consent, their legal representatives, unless there is no legal representative or the representative fails to act on their behalf, in which case access will be granted. There is no indication that the ****976 ***622** New York Legislature intended to deviate from the federal scheme.

The context underlying the enactment of Mental Hygiene Law § 45.09(b) and amendment to Mental Hygiene Law § 33.13(c)(4) by the Legislature in 1986 supports this statutory interpretation (*see Consedine v. Portville Cent. School Dist.,* 12 N.Y.3d 286, 290, 879 N.Y.S.2d 806, 907 N.E.2d 684 [2009] ["Pertinent also are the history of the times, the circumstances surrounding the statute's passage, and ... attempted amendments" (internal quotation marks and citation omitted)]). When Congress amended the DD Act in 1984 to require states to grant their P & A systems access to records under specified circumstances in order to maintain eligibility for funding under the federal program, it gave states until 1986 to comply (*see* Pub. L. 98–527, § 142, 98 U.S. Stat. 2662, 2679–2680 [98th Cong., 2d Sess., Oct. 19, 1984]). In 1985, Governor Mario Cuomo executed an assurance to the federal Department of Health and Human Services that New York would enact amendments to the Mental Hygiene Law to "ensure access by the Protection and Advocacy Program contract agencies consistent with the requirements of Public Law 98–527" (Assurances by the Governor of the State of New York for the Protection of Rights and Advocacy for Persons with Developmental Disabilities, Mar. 12, 1985, Bill Jacket, L. 1986, ch. 184, at 5). Senator Padavan's memorandum in support of the 1986 legislation affirmed that "[t]he purpose of this bill is to ensure compliance by New York State with ... (Public Law 98–527) governing the operation of the Protection and Advocacy Program for persons with developmental disabilities which is administered by the Commission" (Mem. of Senator Frank Padavan, Bill Jacket, L. 1986, ch. 184, at 9, 1986 N.Y. Legis. Ann., at 126). He further observed that the amendment was necessary to avoid "jeopardizing continued federal funding to the Commission" (*id.*). Hence, it is clear that the impetus for the 1986 legislation was to ensure New York's compliance with the DD Act in order to maintain eligibility for federal funding. Notably absent from the legislative history is any pronouncement that New York was adopting standards that were broader than required by federal law or ***123** conferring authority on P & A organizations that was coterminous with that enjoyed by the Commission itself.[5]

In sum, we conclude that the Mental Hygiene Law implements federal law such that petitioners must follow

the safeguards outlined in the DD Act. If this is not the desire of the Legislature, it can certainly amend the statutes to provide otherwise. We now turn to the question of whether petitioners must notify actively-involved family members of individuals with disabilities who lack the capacity to consent in order to comply with the federal directives.

*****623 **977** IV.

OPWDD next argues that the Appellate Division erred in holding that actively-involved family members cannot be considered legal representatives for notice and authorization purposes under the DD Act. It contends that New York law grants family members of individuals with developmental disabilities significant powers to make personal decisions on their behalf when they lack the ability to do so for themselves. OPWDD further submits that it has in place an appointment and review system with regard to these family members. Petitioners respond that the Appellate Division correctly determined that family members who have not been formally appointed as guardians do not hold the status of legal representatives and, therefore, P & A organizations need not give them notice or seek their consent under the DD Act access procedures.

The federal regulations implementing the DD Act define "[l]egal [g]uardian, conservator and legal representative" as

> "an individual appointed and regularly reviewed by a State court or agency empowered under State law ***124** to appoint and review such officers and having authority to make all decisions on behalf of individuals with developmental disabilities. It does not include persons acting only as a representative payee, person acting only to handle financial payments, attorneys or other persons acting on behalf of an individual with developmental disabilities only in individual legal matters, or officials responsible for the provision of treatment or habilitation services to an individual with developmental disabilities or their designees" (45 CFR 1386.19).

The regulation prescribes two requirements for individuals to qualify as legal representatives: (1) they must have sufficient decision-making authority and (2) they must be appointed and regularly reviewed by a court or state agency. Moreover, the regulation looks to state law for both elements. We address each in turn.

A.

"Actively involved" or "qualified" family members enjoy a recognized status and are able to make a number of critical decisions on behalf of individuals with developmental disabilities under New York law. For example, actively-involved family members may give informed consent for major medical procedures on behalf of individuals residing in OPWDD facilities who lack the "capacity to understand appropriate disclosures regarding proposed professional medical treatment" (14 NYCRR 633.11[a][1][iii][b]). Similarly, they may approve service plans involving an "untoward risk to an individual's protection or rights" (14 NYCRR 681.13) and object to OPWDD-related services on behalf of such individuals (*see* 14 NYCRR 633.12). Most notably, New York law now permits actively-involved family members to make end-of-life decisions on behalf of developmentally disabled individuals without capacity, including the decision to "withhold or withdraw life-sustaining treatment" (SCPA 1750–b [1][a]; *see also* 14 NYCRR 633.10[a][7][iv]; *Matter of M.B.,* 6 N.Y.3d 437, 441, 813 N.Y.S.2d 349, 846 N.E.2d 794 [2006] [describing the process applicable to the cessation of life-sustaining medical treatment for individuals "who never had capacity to make such a decision"]).

New York law further affords family members of individuals with developmental disabilities various notification and document access rights. Under OPWDD's regulations, family ***125** members are entitled to notice of reports of abuse, neglect and injuries (*see* 14 NYCRR 624.6), and are to receive investigative reports pertaining to such matters (*see* 14 NYCRR 624.8). The ****978 ***624** Mental Hygiene Law also grants them the ability both to access and authorize the release of their disabled relative's clinical records (*see* Mental Hygiene Law § 33.13[c][7]; § 33.16).

These provisions, taken together, amply demonstrate that actively-involved family members enjoy sufficient decisionmaking authority such that they may be classified as legal representatives within the meaning of 45 CFR 1386.19. We reject petitioners' assertion that a legal representative must have the ability to make every possible decision. Indeed, such an interpretation would render the entire second sentence of the regulation unnecessary, as it is plain that "representative payee[s]," persons that "handle financial payments" and attorneys

who provide representation on "individual legal matters" do not have unqualified decision-making powers. The negative examples cited in the regulation support our conclusion that actively-involved family members qualify under New York law as each of the stated examples involves persons who have only discrete authorization with regard to financial or legal matters. In contrast, actively-involved family members possess the authority to make many of the most important personal decisions affecting the health and well-being of their developmentally disabled relative. As NYSARC, Inc. observes in its amicus brief, it would be peculiar for a parent or other family member who enjoys the ability to withhold or withdraw life-sustaining treatment to lack the much less intrusive right to be consulted before a third party reviews a resident's personal records.

Under the federal regulation, however, it is not enough that the individual possesses sufficient decision-making authority. There must also be in place an appointment and review mechanism in connection with these legal representatives.

B.

According to OPWDD, the staff at its facilities considers the relationship between a developmentally disabled individual and each actively-involved family member to make a determination as to which relative is best suited to make decisions on behalf of the individual. Under OPWDD's regulations, an "[a]ctively involved adult family member" is defined to mean "[s]omeone 18 years of age or older who is related to a person in a facility ***126** and who has demonstrated, in the opinion of the interdisciplinary team, significant and ongoing involvement in the individual's life, as well as sufficient knowledge of the individual's needs" (14 NYCRR 681.99[k]; *see also* 14 NYCRR 633.99 [ax]). OPWDD represents that, through this process, a family member is "designated" as the legal representative, and that designation is noted in the facility's records. OPWDD further asserts that the legal representative designation is reviewed and changed as circumstances require.

[3] Petitioners submit that OPWDD's system is inadequate as a matter of law because there is no statute in place governing these procedures. But we note that OPWDD's regulatory authority may suffice under 45 CFR 1386.19 (*see Matter of Allstate Ins. Co. v. Rivera,* 12 N.Y.3d 602, 608, 883 N.Y.S.2d 755, 911 N.E.2d 817 [2009] [explaining that agency regulations have "the force of law" (internal quotation marks and citation omitted)]). Nevertheless, given the pre-answer procedural posture of this case, we agree with petitioners that a remittal for further proceedings is necessary to examine the nature and adequacy of OPWDD's process for selecting and reviewing actively-involved family members.

V.

[4] On their cross appeal, petitioners contend that the courts below erred in ****979 ***625** striking certain paragraphs of the petition/complaint pursuant to CPLR 3024(b), which permits a court "to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." We perceive no abuse of discretion as a matter of law on this issue.

* * *

We stress that our decision does not preclude P & A organizations like petitioners from gaining access to the clinical records of individuals with developmental disabilities. Undoubtedly, petitioners perform critically important services aimed at safeguarding and improving the conditions under which these vulnerable citizens live. But based on the language and structure of the statutes at issue, we hold that New York law parallels federal law, which balances the privacy rights of such individuals with the need of P & A organizations to examine records to further their advocacy mission. Under this regime, petitioners are entitled to immediate access of records without consent in an emergency situation—which they acknowledge is not implicated by the facts of this case. In other scenarios, they ***127** may obtain the consent of the individual or his or her legal representative; they are entitled to access where there is no legal representative and the individual lacks capacity to consent; and they are entitled to access where the legal representative takes no action in the face of a complaint or probable cause. Given the role played by actively-involved family members of individuals with developmental disabilities under New York law, we further conclude that it is possible for them to be classified as legal representatives for compliance with federal requirements, but remit the issues relating to OPWDD's appointment and review process for further development.

Accordingly, the order of the Appellate Division should be modified, without costs, and the case remitted to

Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed. The certified question should be answered in the affirmative.

CIPARICK, J. (dissenting).

Because I believe that Mental Hygiene Law § 45.09(b) and § 33.13(c)(4) give the protection and advocacy agencies (P & A agencies) equal access to the clinical records of residents in facilities operated under the auspices of the Office for People with Developmental Disabilities (OPWDD) and records and data of those same facilities as are available to the Commission on Quality of Care and Advocacy for Persons with Disabilities (the Commission), I respectfully dissent. I further believe that OPWDD's definition of an "actively involved family member" does not meet the federal requirements for a "legal guardian, conservator and legal representative," and that access to the clinical records of residents should not be conditioned upon the consent of such family members.

It is uncontroverted that, pursuant to Mental Hygiene Law § 45.09(a) and § 33.13(c)(4), the Commission has broad, unrestricted access to the clinical records of residents of OPWDD facilities as well as to the facilities' own records and data. In order to be eligible for federal funding under the Developmental Disabilities Assistance and Bill of Rights Act pursuant to 42 USC § 15043 and 45 CFR § 1386.21, minimal access to these records must be given to P & A agencies. However, the State may also provide P & A agencies, charged with the duty of providing protection and advocacy services pursuant to contracts with the Commission, greater authority than exists under the federal statutes (*see* 45 CFR 1386.21[f]). In determining what degree of access the P & A ****980 ***626** agencies shall enjoy, we must interpret both Mental Hygiene Law provisions.

***128** I agree with the majority's conclusion that the phrase "as provided for by federal law" as used in both section 45.09(b) and section 33.13(c)(4) should be read harmoniously and interpreted in the same manner. However, I disagree with the majority's conclusion that "as a matter of both text and context" the phrase mandates that the access to records accorded to the P & A agencies is limited to that which is delineated in the federal scheme and is consequently less broad than the access granted to the Commission (majority op. at 121–122, 945 N.Y.S.2d at 621, 968 N.E.2d at 975), I believe that both a plain reading of the statutes (*see Matter of Orens v. Novello,* 99 N.Y.2d 180, 185, 753 N.Y.S.2d 427, 783 N.E.2d 492 [2002]) and the context in which the statutes were enacted demonstrate that the intent of the Legislature was to provide the P & A agencies with access as broad as that provided to the Commission in order to enable them to carry out their protection and advocacy functions.

Turning to the text of the statutes, Mental Hygiene Law § 45.09(b) provides:

> "Pursuant to the authorization of the commission to administer the protection and advocacy system *as provided for by federal law,* any agency or person within or under contract with the commission which provides protection and advocacy services must be granted access at any and all times to any facility, or part thereof, serving a person with a disability operated or licensed by any office or agency of the state, and to all books, records, and data pertaining to any such facility upon receipt of a complaint by or on behalf of a person with a disability. Information, books, records or data which are confidential as provided by law shall be kept confidential by the person or agency within the protection and advocacy system and any limitations on the release thereof imposed by law upon the party furnishing the information, books, records or data shall apply to the person or agency within the protection and advocacy system" (emphasis added).

While the majority would have the phrase "as provided for by federal law" apply to the entire section, it is noteworthy that the phrase "[p]ursuant to the authorization of the commission to administer the protection and advocacy system as provided for by federal law" is set off from the rest of the paragraph by a comma. "Common marks of punctuation are used to clarify the writer's intended meaning and thus form a valuable aid in ***129** determining legislative intent" (*A.J. Temple Marble & Tile v. Union Carbide Marble Care,* 87 N.Y.2d 574, 581, 640 N.Y.S.2d 849, 663 N.E.2d 890 [1996]). Therefore, a natural reading of the statute would indicate that the qualifier "as provided for by federal law" refers to the federal authorization of the commission to administer the protection and advocacy system and is not a limitation on the scope of the authority of the P & A agencies to request records. It identifies P & A agencies as those agencies under contract with the Commission providing services to the developmentally disabled and having access to facility records as opposed to contracting agencies that provide other services.

Similarly, Mental Hygiene Law § 33.13(c) provides:

> "Such information about patients or clients reported to the offices, including the identification of patients or clients, clinical records or clinical information tending

> to identify patients or clients, and records and information concerning persons under consideration for proceedings pursuant to article ten of this ****981 ***627** chapter, at office facilities shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except as follows: ...
>
> "4. to the commission on quality of care for the mentally disabled and any person or agency under contract with the commission which provides protection and advocacy services pursuant to the authorization of the commission to administer the protection and advocacy system *as provided for by federal law* " (emphasis added).

The placement of "as provided for by federal law" at the end of section 33.13(c)(4) indicates that it was only intended to modify the last clause (*see People v. Shulman,* 6 N.Y.3d 1, 34, 809 N.Y.S.2d 485, 843 N.E.2d 125 [2005] ["(r)elative or qualifying words of clauses ordinarily are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote, unless the intent of the statute clearly indicates otherwise" (internal quotation marks and ellipsis omitted)]). Here the immediate antecedent phrase is "the authorization of the commission to administer the protection and advocacy system." Again, as in section 45.09, the most natural reading of this provision is that the reference to federal law concerns the federal authorization of the Commission to administer the protection and advocacy system and to give access to the P & A agencies to records—in this case, clinical records of residents.

***130** Although the majority is correct in pointing out that the primary impetus for passing the two provisions was to ensure that New York State remained in compliance with the federal requirements necessary to receive federal funding for the program (*see* majority op. at 122–123, 945 N.Y.S.2d at 621–23, 968 N.E.2d at 975–77), there is no indication in the legislative history that the Legislature intended to restrict the P & A agencies' access to the records to comply with the federal requirements. In fact, the Legislature was concerned about issues of access to the records. Senator Padavan noted in his memorandum in support of the 1986 legislation that "during the past year, the Commission had difficulty accessing records involving an individual living in a facility for developmentally disabled individuals certified by an agency outside of the Department of Mental Hygiene" (Mem. of Senator Frank Padavan, Bill Jacket, L. 1986, ch. 184, at 9, 1986 N.Y. Legis. Ann., at 126). Furthermore both counsel for the Commission and counsel for OPWDD (formerly the New York State Office of Mental Retardation and Developmental Disabilities) interpreted the statute as providing the broad access to records that is enjoyed by the Commission. Counsel for the Commission noted that "[t]his bill accomplished two essential goals. First, section one of the bill will enable the agencies under contract with the Commission as part of this protection and advocacy program, to obtain access to mental hygiene residential facilities and client records allowed to the Commission itself under current law" (Letter of Paul F. Stavis, Commission on Quality of Care for the Mentally Disabled, to Evan A. Davis, Counsel to the Governor, June 18, 1986, Bill Jacket, L. 1986, ch. 184, at 12). Counsel for OPWDD was concerned that

> "[a]s currently proposed, this amendment to § 45.09 would permit any person or agency within the protection and advocacy system to have access to all of the facility's information, regardless of whether or not that person is investigating the complaint
>
> ...
>
> "The amendment enlarges the scope of access required by the Act" (Letter of ****982 ***628** Paul R. Kietzman, Office of Mental Retardation and Developmental Disabilities, to Evan A. Davis, Counsel to the Governor, June 19, 1986, Bill Jacket, L. 1986, ch. 184, at 21).

Thus it seems that the concerned agencies understood that the ***131** Legislature gave to the P & A agencies the same access as given to the Commission. True, these letters were not before the Legislature prior to the passage of the bill, however, they do indicate that the interpretation of the statutes as allowing the P & A agencies access to the records equivalent to that of the Commission is a rational one and in keeping with the purpose of the creation of the protection and advocacy programs.

Further, being on notice of this broad reading of the statutes, the Legislature did not see fit to amend them to indicate that the P & A agencies' access is limited to that codified in the federal statute. Accordingly, it may be inferred that the interpretation proposed by petitioners here is in line with the intent of the Legislature, which was free to grant more access to the records than that required by the federal statutes, and in my opinion, sought to give equal access to the Commission and its P & A agencies.

Having determined that both statutes, enacted as part of the same legislation, must be interpreted harmoniously to allow the P & A agencies unrestricted access to both the facility records and data and the clinical records of facility residents equal to that enjoyed by the Commission itself, I turn to the further issue wherein respondents seek to limit access to the clinical records by requiring permission

from an "actively involved family member."

I disagree with the majority's conclusion that "actively involved" or "qualified" family members may qualify as a "legal guardian, conservator and legal representative" as defined by the Developmental Disabilities Assistance and Bill of Rights Act (see majority op. 125, 945 N.Y.S.2d at 623–24, 968 N.E.2d at 977–78) and agree with the Appellate Division's finding that they do not qualify as legal guardians.

45 CFR § 1386.19 provides: "Legal Guardian, conservator and legal representative all mean an individual appointed and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers and having authority to make all decisions on behalf of individuals with developmental disabilities." It is uncontroverted that New York State has no formal appointing or reviewing process for designating family members as "actively involved." The OPWDD argues that it has sufficient procedures in place to designate a family member as a legal guardian within the ambit of the federal requirements. The OPWDD's regulations define an "[a]ctively involved adult family member" as "[s]omeone 18 years of age or ***132** older who is related to a person in a facility and who has demonstrated, in the opinion of the interdisciplinary team, significant and ongoing involvement in the individual's life, as well as sufficient knowledge of the individual's needs" (14 NYCRR 681.99[k]). While it may be true, as the majority notes, that the OPWDD's regulatory authority may have "the force of law" (majority op. at 126, 945 N.Y.S.2d at 624, 968 N.E.2d at 978), this informal process as defined in the OPWDD's regulations does not adequately regulate the appointment or the reviewing process as opposed to a court appointed guardian pursuant to the provisions of Mental Hygiene Law article 81 or Surrogate's Court Procedure Act article 17–A, wherein much court oversight exists. Therefore, as a matter of law, the OPWDD's regulation is inadequate to fulfill the requirements of 45 CFR 1386.19.

*****629 **983** Accordingly, I would vote to modify the Appellate Division order as indicated above and grant the petition to the extent of ordering respondents to provide petitioners the clinical records as well as the system data facility records sought.

Judges READ, PIGOTT and JONES concur with Judge GRAFFEO; Judge CIPARICK dissents in a separate opinion in which Chief Judge LIPPMAN and Judge SMITH concur.

Order modified, etc.

All Citations

19 N.Y.3d 106, 968 N.E.2d 967, 945 N.Y.S.2d 613, 2012 N.Y. Slip Op. 03227

Footnotes

1 The DD Act of 1975 (42 USC § 6001 *et seq.*) was repealed and incorporated into the DD Act of 2000 (42 USC § 15001 *et seq.*), which retained the name of the act and most of its provisions.

2 Although OPWDD questioned whether there was probable cause to believe that the individuals were being neglected, it stated that it would provide the records if petitioners otherwise satisfied the federal access criteria.

3 The paragraphs at issue described the "inhumane conditions" of the Willowbrook State School in the 1970s and the 2007 death of a child in OPWDD's care in an unrelated case.

4 Although Supreme Court agreed with OPWDD on the legal issues, it declined to dismiss the petition/complaint in its entirety, finding that factual issues existed as to whether petitioners had followed the DD Act's procedures with respect to a number of residents.

5 Petitioners place heavy reliance on letters written by OPWDD's general counsel and the Commission's counsel commenting that

the 1986 bill expanded the scope of access contemplated by the DD Act (*see* Letter of Paul R. Kietzman, Office of Mental Retardation and Developmental Disabilities, to Evan A. Davis, Counsel to the Governor, June 19, 1986, Bill Jacket, L. 1986, ch. 184, at 21; Letter of Paul F. Stavis, Commission on Quality of Care for the Mentally Disabled, to Evan A. Davis, Counsel to the Governor, June 18, 1986, Bill Jacket, L. 1986, ch. 184, at 12). But postpassage opinions of state agencies are generally entitled to "little weight" in discerning legislative intent (*Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 587 n. 2, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]). Even considering the views expressed in such correspondence, the structure of the statutes and the expressed legislative objective prior to passage convince us that, although counsel may have wanted to substitute other statutory language, the amendments as adopted were intended to incorporate the federal access standards.

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185 A.D.3d 503
Supreme Court, Appellate Division, First Department, New York.

In re Sergeant Hugh BARRY, Petitioner–Appellant,
v.
James P. O'NEILL, etc., et al., Respondents–Respondents.

11849
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Index 157969/18
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Entered: July 16, 2020

Synopsis

Background: Freedom of Information Law (FOIL) requester commenced article 78 proceeding seeking review of New York Police Department's redactions and withholdings of requested documents related to incident in which police officer fatally shot an emotionally disturbed person. The Supreme Court, New York County, Arthur F. Engoron, J., denied requester's amended petition and granted police department's cross motion to dismiss proceeding. Requester appealed.

Holdings: The Supreme Court, Appellate Division held that:

police department could not rely on FOIL exemption for nonroutine criminal investigation techniques;

disclosure of documents under FOIL did not moot proceeding; and

requester was not entitled to metadata of documents disclosed.

Reversed.

Attorneys and Law Firms

****184** Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

Manzanet–Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

Opinion

***503** Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered July 8, 2019, which denied the amended petition seeking the disclosure of documents under the Freedom of Information Law (FOIL), and granted respondent's cross motion to dismiss this proceeding ***504** brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the amended petition granted to the extent of ordering disclosure of withheld documents, and the proceeding remanded to Supreme Court for review of any necessary redactions in all documents disclosed both before entry of judgment and as a result of this decision, pursuant to the exemptions based upon invasions of personal privacy, preserving the safety of persons, and the attorney-client privilege, as well as for consideration of petitioner's request for attorneys' fees and litigation costs.

In October 2016, petitioner responded to a call, which resulted in him fatally shooting an emotionally disturbed person (EDP). In February 2018, he was acquitted of murder and manslaughter charges after a trial. In the meantime, respondent Police Department (N.Y.P.D), which brought disciplinary charges in 2016, amended those charges after the acquittal.

In May 2018, petitioner's union submitted a FOIL request seeking "complete copies of any communications" between respondent O'Neill or the NYPD and the Mayor or the Mayor's Office related to the incident. The union also sought "complete copies of any documents" related to an NYPD task force convened to review its ****185** EDP policy and make recommendations for changes thereto. Respondents denied the request in its entirety, invoking the exemption pertaining to interference with a law enforcement investigation or judicial proceeding, in both the NYPD FOIL Unit's June 21, 2018 decision and the Records Access Appeals Officer's July 9, 2018 decision upon administrative appeal (Public Officers Law § 87[2][e][i]). Petitioner commenced this proceeding on August 27, 2018.

On December 21, 2018, respondents issued a second decision on the same administrative appeal, producing over 3,200 pages of responsive documents, with

numerous redactions, and withholding 462 pages pursuant to, inter alia, the inter- and intra-agency materials exemption (Public Officers Law § 87[2][g]). For the redactions, they relied on, inter alia, exemptions for nonroutine criminal investigation techniques and preserving the integrity of agency information technology assets (Public Officers Law § 87[2][e][iv], [2][i]). They also raised protection of individuals' privacy and safety, and the attorney-client privilege (Public Officers Law § 87[2][a], [2][b], [2][f]; CPLR 4503), which petitioner does not challenge. There was no mention of the previously raised law enforcement exemption.

After petitioner filed an amended petition challenging respondents' reliance on exemptions not previously raised, ***505** respondents cross-moved to dismiss, asserting that the proceeding was moot, relying only on those new exemptions, and arguing that judicial review was not limited to the original determination since the proceeding was in the nature of mandamus to compel. Supreme Court granted the cross motion. We now reverse. First, respondents' challenge to petitioner's standing, although reviewable for the first time on appeal (*Matter of Fleisher v. New York State Liq. Auth.*, 103 A.D.3d 581, 584, 960 N.Y.S.2d 395 [1st Dept. 2013], *lv denied* 21 N.Y.3d 856, 2013 WL 2395583 [2013]), is unavailing. Petitioner's union filed the FOIL request on his behalf and respondents specifically referenced him in their administrative appeal determinations (*see Matter of Norton v. Town of Islip*, 17 A.D.3d 468, 470, 793 N.Y.S.2d 133 [2d Dept. 2005], *lv denied* 6 N.Y.3d 709, 813 N.Y.S.2d 45, 846 N.E.2d 476 [2006]).

This proceeding is not in the nature of mandamus to compel. Instead, the standard of review is whether the denial of the FOIL request was "affected by an error of law" (CPLR 7803[3]; *see Matter of Empire State Beer Distribs. Assn., Inc. v. New York State Liq. Auth.*, 158 A.D.3d 480, 481, 67 N.Y.S.3d 833 [1st Dept. 2018], *lv denied* 31 N.Y.3d 907, 2018 WL 2123207 [2018]), for which judicial review is "limited to the grounds invoked by the agency" in its determination (*Matter of Madeiros v. New York City Educ. Dept.*, 30 N.Y.3d 67, 74, 64 N.Y.S.3d 635, 86 N.E.3d 527 [2017] [internal quotation marks omitted]). Since respondents abandoned the exemption raised in their initial decision, they cannot meet their burden to "establish[ ] that the ... documents qualif[y] for the exemption" (*id.* [internal quotation marks and ellipsis omitted]). Further, as respondents "did not make any contemporaneous claim that the requested materials" fit the newly raised exemptions, "to allow [them] to do so now would be contrary to [Court of Appeals] precedent, as well as to the spirit and purpose of FOIL" (*id.* at 74–75, 64 N.Y.S.3d 635, 86 N.E.3d 527).

Contrary to respondents' contention, the disclosure of documents did not moot this proceeding. Hundreds of pages were still withheld and petitioner challenged the bases for both the failure to produce and the redactions made to the documents disclosed (*see* ****186** *Matter of Madeiros*, 30 N.Y.3d at 72, 64 N.Y.S.3d 635, 86 N.E.3d 527; *compare Matter of Corbett v. New York City Police Dept.*, 160 A.D.3d 415, 73 N.Y.S.3d 568 [1st Dept. 2018], *lv denied* 31 N.Y.3d 913, 2018 WL 3151743 [2018]).

Petitioner's demand for the metadata of documents disclosed must be denied. An agency is only required to produce "a record reasonably described" (Public Officers Law § 89[3][a]). Contrary to petitioner's contention, the FOIL request for "complete copies" of communications and documents cannot fairly be read to have implicitly requested metadata associated with those copies. His reliance on a Fourth Department case, ***506** which held that a request for "all computer records that are associated with published [photographs] ... included a demand for the metadata associated with those images," is misplaced, as petitioner's request is distinguishable and the Fourth Department "decision is limited to the facts of th[e] case" (*Matter of Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314, 319, 895 N.Y.S.2d 262 [4th Dept. 2010]). Respondents emailed petitioner records maintained in electronic form, as required (*see* Public Officers Law § 89[3][a]; *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007]).

The issue of attorneys' fees and litigation costs is remanded to Supreme Court, which failed to address it (*see Matter of Reiburn v. New York City Dept. of Parks & Recreation*, 171 A.D.3d 670, 670–671, 98 N.Y.S.3d 49 [1st Dept. 2019]). Petitioner "substantially prevailed" even prior to this appeal (Public Officers Law § 89[4][c][ii]), as respondents made "*no* disclosures, redacted or otherwise, prior to petitioner's commencement of this ... proceeding," and he "ultimately succeeded in obtaining substantial ... post-commencement disclosure responsive to [his] FOIL request" (*Matter of Madeiros*, 30 N.Y.3d at 79, 64 N.Y.S.3d 635, 86 N.E.3d 527). On remand, the court must determine whether there was "no reasonable basis" for the NYPD to deny access based on the law enforcement exemption, and if so, it "shall assess" fees and costs (Public Officers Law § 89[4][c][ii]).

All Citations

185 A.D.3d 503, 128 N.Y.S.3d 183, 2020 N.Y. Slip Op.

04007

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93 N.Y.2d 517
Court of Appeals of New York.

In the Matter of Marie R. BROWN, Respondent,
v.
Brian J. WING, as Acting Commissioner of the New York State Department of Social Services, Appellant, et al., Respondent.
In the Matter of Marie V. Schmidt, Respondent,
v.
Brian J. Wing, as Acting Commissioner of the New York State Department of Social Services, Appellant, et al., Respondent.
In the Matter of Elizabeth Waldron, Respondent,
v.
Brian J. Wing, as Acting Commissioner of the New York State Department of Social Services, Appellant, et al., Respondent.

June 3, 1999.

Synopsis
Medicaid recipient brought Article 78 proceeding to challenge calculation of penalties affecting her eligibility date. The Supreme Court, Suffolk County, W. Bromley Hall, J., granted petition and directed recalculation of penalty period. Appeal was taken, and the Supreme Court, Appellate Division, 251 A.D.2d 572, 675 N.Y.S.2d 103, affirmed as modified. Second Medicaid recipient brought Article 78 proceeding raising similar claim, and the Supreme Court, Suffolk County, W. Bromley Hall, J., granted petition. Appeal was taken, and the Supreme Court, Appellate Division, affirmed as modified, 251 A.D.2d 590, 673 N.Y.S.2d 604. Third Medicaid recipient brought similar claim, and after the Supreme Court, Suffolk County, W. Bromley Hall, J., granted petition, the Supreme Court, Appellate Division, affirmed as modified, 251 A.D.2d 586, 673 N.Y.S.2d 937. Appeals were taken, and after cases were considered jointly, the Court of Appeals, Bellacosa, J., held that Medicaid ineligibility period for applicant who has made below-market transfer commences either on the first day of the month in which such a transfer occurs, or on the first day of the month after transfer occurred.

Reversed, and petitions dismissed.

Attorneys and Law Firms

***475 *519 **479** Eliot Spitzer, Attorney–General, Albany (Alicia R. Ouellette, Peter H. Schiff, John W. McConnell and Preeta D. Bansal ***476** of counsel), for appellant in the three above-entitled proceedings.

***520** Davidow, Davidow, Siegel & Stern, L.L. P., Islandia (Steven H. Stern and Beth L. Polner of counsel), for Marie R. Brown, respondent in the first above-entitled proceeding, Marie V. Schmidt, respondent in the **480 second above-entitled proceeding, and Elizabeth Waldron, respondent in the third above-entitled proceeding.

OPINION OF THE COURT

BELLACOSA, J.

The common issue in these three jointly considered cases is whether a Medicaid ineligibility period must be fixed as of the first day of the month in which an improper asset transfer takes place, or whether, at the State's option, it may be set as of the first day of the month after the transfer occurred. The Department of Social Services used the latter eligibility option, which resulted in less benefits being allowed to the petitioners by reason of the financial penalty imposed. We conclude that DSS acted within its authority and that the pertinent statutory schemes permit the State to measure the ineligibility period as of the first day of either the month of the transfer or the following month. Thus, we reverse the respective orders of the Appellate Division, and reinstate the determinations made by DSS in each case.

After fair hearings, the Suffolk County DSS fixed respective periods of ineligibility for Medicaid adversely to petitioners. Petitioners brought administrative challenges to review the financial aid consequences that ensued. They argued that their respective ineligibility periods were improperly set on the first day of the month *following* the initial below-market asset transfers. The

State DSS sustained the County DSS determinations in each case.

Petitioners thereafter commenced these CPLR article 78 proceedings, arguing primarily that the pertinent Federal statutory structure and, therefore, the parallel State provisions ***521** require that ineligibility periods must commence on the first day of the month in which the asset transfer occurred. Supreme Court granted each petition, annulled the agency determinations and directed it to recalculate the penalty periods by measuring ineligibility as of the month of the initial transfer. After the Appellate Division affirmed in each case as pertinent to this appeal, this Court granted DSS leave to appeal, and we now reverse.

The factual background in each case is similar. Petitioner Brown was institutionalized in February 1995 and applied for Medicaid on April 26, 1995, requesting eligibility as of May 1, 1995. DSS approved the application but found that uncompensated transfers occurred during the three-year look-back period, specifically November 1994 through March 1995. Accordingly, DSS calculated an ineligibility period of 8.46 months, which it measured from December 1, 1994. Brown was given an eligibility date of August 1, 1995.

Petitioner Schmidt was institutionalized in September 1994 and applied for Medicaid on June 13, 1995, requesting eligibility as of June 1995. DSS approved the application but found that an uncompensated transfer had occurred during the look-back period, in August 1993. Accordingly, DSS calculated an ineligibility period of 22.486 months, which it measured from September 1, 1993. Schmidt was given an eligibility date of July 1, 1995.

Petitioner Waldron was institutionalized in September 1994 and applied for Medicaid on October 24, 1995, requesting eligibility as of October 1995. DSS approved the application but found that uncompensated transfers had occurred during the look-back period, specifically February and April 1995. Accordingly, DSS calculated an ineligibility period of 8.78 months, which it measured from March 1, 1995. Waldron was given an eligibility date of December 1, 1995.

*****477** Federal law requires States to deny Medicaid benefits during a penalty period to applicants who have made below-market transfers of assets within three years prior to applying for Medicaid (42 USC § 1396p [c][1][A]). The control date for commencement of the penalty period is defined as follows:

> "The date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection" (42 USC § 1396p [c][1][D]).

***522 **481** The State statute's parallel provision provides in pertinent part:

> "The period of ineligibility shall begin with the first day of the first month during or after which assets have been transferred for less than fair market value, and which does not occur in any other periods of ineligibility under this paragraph" (Social Services Law § 366[5][d][4]).

These cases present a question of pure statutory construction. In such controversies, " 'legislative intent is the great and controlling principle,' " and the "proper judicial function is to 'discern and apply the will of the Legislature' " (*Matter of Scotto v. Dinkins,* 85 N.Y.2d 209, 214, 623 N.Y.S.2d 809, 647 N.E.2d 1317 [citations omitted]; *see also, Griffin v. Oceanic Contrs.,* 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973). The Court's threshold inquiry in this regard is how to discern the legislative intent. When an enactment displays a plain meaning, the courts construe the legislatively chosen words so as to give effect to that Branch's utterance (*see, Matter of Raritan Dev. Corp. v. Silva,* 91 N.Y.2d 98, 667 N.Y.S.2d 327, 689 N.E.2d 1373; *see also, Griffin v. Oceanic Contrs., supra*).

Here, the language and authorization of the pertinent Federal statute are "reasonably plain" (*Griffin v. Oceanic Contrs., supra,* at 570, 102 S.Ct. 3245; *Negonsott v. Samuels,* 507 U.S. 99, 104, 113 S.Ct. 1119, 122 L.Ed.2d 457). The commencement date for the period of ineligibility is expressed in the alternative—ineligibility may commence the first day of the month during which a transfer occurs *or* the first day of the month after which the transfer occurred. This use of a disjunctive is particularly significant in view of the fact that the prior version of the statute provided only that the "period of ineligibility shall begin with the month in which such resources were transferred" (42 USC § 1396p [former (c)] [1]).

Petitioners contend that the authorizing use of "or" is not sufficient support for the State's theory. They argue that if the statute meant what DSS urges, the statute would state that the ineligibility period may commence on the first day of the month in which the transfer occurred, "or at the option of the State" it may commence on the first day of the following month. The use of the term "or," however, is reasonably plain and persuasive, without the additional words petitioners propose. Indeed, this Court has recently

endorsed the availability of an option with respect to a statute that stated much less (*see, Matter of Golf v. New York State Dept. of Social Servs.,* 91 N.Y.2d 656, 663, 674 N.Y.S.2d 600, 697 N.E.2d 555 [analyzing a statute that was "entirely silent" as to the statutory question involved]). By complementary operation ***523** of the statutes here, we are satisfied that the agency was authorized to determine the commencement date of each of petitioners' ineligibility periods as of the month following the asset transfer. This statutory construction is an a fortiori extension of *Golf.*

Petitioners further argue that the phrase "during or after" was simply placed into the statutory scheme to eliminate concurrent penalty periods. They build this claim on a view that the latter part of the ineligibility date provision requires that the critical date "does not occur in any other periods of ineligibility under this subsection" (42 USC § 1396p [c][1][D]). *****478** DSS offers a compelling response: 1993 Federal amendments included a separate section to address the procedure for calculating penalty periods so as to ensure consecutive, rather than concurrent, periods (42 USC § 1396p [c] [1][E]).

Petitioners' reading of subdivision (c)(1)(D) would effectively render subdivision (c)(1)(E) of section 1396p meaningless—a transgression of a standard statutory interpretation canon. Since courts must read statutes so as to give effect to all their parts, it behooves this Court to conclude that subdivision (c)(1)(D) was not enacted solely to address the issue of concurrent eligibility periods.

Despite the obvious use of the dual authorization by the use of "or" in the statute and the patently superfluous consequence of petitioners' interpretive theory, petitioners urge that we resort to Federal legislative history to resolve "any purported ambiguity" and support their "no option" thesis. While we do not find the language ambiguous, we note ****482** that the proffered information does not, in any event, support petitioners' theory.

Petitioners cite a portion from the House Conference Report regarding the Budget Reconciliation Act, which states that "[t]he period of delay begins with the first month during which the assets were disposed of" (HR ConfRep No. 103–213, 103d Cong, 1st Sess 3, reprinted in 1993 U.S.Code Cong & Admin News 1088, 1523). This statement does not support the "no option" position on which petitioners and the lower courts rely. The "period of delay" technically begins with the first month regardless of whether the interpretation urged by petitioner or DSS is utilized—the question is whether the "first day" of ineligibility falls within that month or the month immediately thereafter.

DSS also urges a "backup" statutory construction position through the operation of a Federal agency's interpretation of ***524** the legislation—a step that is, again, unnecessary to our straight line disposition, but also provides some support for the ultimate decision we reach. If the Federal statute was construed as ambiguous, it would be proper to utilize a rational interpretation by the agency responsible for administering the statute—in this case, the Health Care Financing Administration (HCFA) (*see, Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694). This Court has previously relied on positions taken by the HCFA and we, therefore, gave some deference to a State agency's determination that comported with the Federal agency's interpretation (*see, Matter of Golf v. New York State Dept. of Social Servs.,* 91 N.Y.2d 656, 666–667, 674 N.Y.S.2d 600, 697 N.E.2d 555, *supra; Cricchio v. Pennisi,* 90 N.Y.2d 296, 309, 660 N.Y.S.2d 679, 683 N.E.2d 301). Here, the HCFA construction interprets the commencement of the penalty period as "the first day of the month in which the asset was transferred (or, at State option, the first day of the month following the month of transfer)" (HCFA State Medicaid Manual § 3258.5[A], at 3–3–109.7).

Federal law plainly provides the choice of ineligibility commencement dates, as urged by the County and State DSS, and the same statutory provisions are mirrored in the pertinent State statute (*see,* Social Services Law § 366 [5] [d][4]). We are therefore satisfied that the agency did not err in its determinations.

Accordingly, the respective orders of the Appellate Division should be reversed, without costs, and each petition should be dismissed.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY and ROSENBLATT concur.

In each case: Order reversed, etc.

All Citations

93 N.Y.2d 517, 715 N.E.2d 479, 693 N.Y.S.2d 475, 1999 N.Y. Slip Op. 04938

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84 N.Y.2d 488
Court of Appeals of New York.

In the Matter of BUFFALO NEWS, INC., Respondent,
v.
BUFFALO ENTERPRISE DEVELOPMENT CORPORATION, Appellant.

Dec. 6, 1994.

Synopsis
Newspaper sought review of decision of board of directors of local not for profit corporation to refuse access to its records. The Supreme Court, Erie County, Gorski, J., 148 Misc.2d 657, 561 N.Y.S.2d 406,denied petition. The Supreme Court, Appellate Division, 173 A.D.2d 43, 578 N.Y.S.2d 945, reversed and remanded for in camera inspection of disputed documents. On remand, the Supreme Court ordered disclosure of materials not otherwise exempt, and the Supreme Court, Appellate Division, 201 A.D.2d 988, 608 N.Y.S.2d 755, affirmed. Appeal was taken. The Court of Appeals, Bellacosa, J., held that: (1) not for profit local corporation administering government loan programs was "agency" subject to Freedom of Information Law (FOIL), and (2) advisory opinions of Committee on Open Government were not binding on agency.

Affirmed.

Attorneys and Law Firms

*****696 *489 **278** John P. Lane, Williamsville, for appellant.

Jaeckle, Fleischmann & Mugel, Buffalo (Andrea R. Moore, of counsel), for respondent.

***490 OPINION OF THE COURT**

BELLACOSA, Judge.

The question in this case is whether appellant Buffalo Enterprise Development Corporation (BEDC) is an "agency" within the meaning of the Freedom of Information Law (FOIL) (*see,* Public Officers Law § 86[3]). The controversy relates solely to statutory interpretation of an aspect of FOIL. We agree with the Appellate Division that appellant is an agency for FOIL purposes and that petitioner, Buffalo News, is entitled to financial information contained in appellant's files.

As a corporation created under the Not–For–Profit Corporation Law, the BEDC is a local development corporation "performing an essential governmental function" (Not–For–Profit Corporation Law § 1411[a]). The BEDC was created "to lessen the burdens of government" and to administer loan programs and encourage, through incentive loans, the development of local growth-oriented manufacturing companies and other small businesses. Its certificate of incorporation states that its purposes are "to relieve and reduce unemployment, to promote and to provide for additional and maximum employment, to better and to maintain job opportunities * * * [to] encourag[e] [ ] development * * * in the community * * * and to lessen the burdens of government and to act in the public interest." BEDC is subject to regulation by the United States Small Business Administration and its entire source of funding is through that Federal agency, the United States Department of Housing and Urban Development, and other State and Federal governmental entities. Since its creation in 1978, the BEDC has assisted hundreds of Buffalo-based businesses to retain and create thousands of new jobs for the community, and has channeled financing for the construction of scores of new buildings.

Membership in the BEDC is limited to individuals or entities residing in or doing business in the City of Buffalo. The BEDC maintained, until recently, offices in a public building. ***491** It is managed by a Board of Directors which, according to its bylaws, consists of the following permanent directors: the Mayor of the City of Buffalo; the Commissioner of Community Development for the City of Buffalo; the President of the BEDC; a representative of the River–Rock Resurgence Corporation and a representative of the Grant–Ferry LDC. The Board of Directors designated the original members of the corporation, and, at the time this proceeding was commenced, a member of the City of Buffalo's Common Council was one of the appointed members of the Board.

Petitioner is the publisher of Buffalo's daily newspaper.

In February 1990, Thomas Dolan, a reporter, filed a FOIL request with the BEDC, requesting access to financial records pertaining to nonperforming loans made by the BEDC which had been discharged or forgiven. The BEDC provided "The News" with a limited compilation of delinquent borrowers, but refused to grant access to records concerning discharged or forgiven loan obligations. When the Mayor of Buffalo, as Chairperson of the Board of Directors of the BEDC, continued to refuse access to the records, "The News" commenced this CPLR article 78 proceeding to compel disclosure of the documents.

Supreme Court denied the petition, holding that the BEDC does not fit within the definition of "agency" (*see,* Public Officers Law § 86[3]). The Appellate Division, with two Justices dissenting, reversed, on the law, concluding that the BEDC acts as a governmental agency and is thus subject to FOIL's disclosure requirements (173 A.D.2d 43, 578 N.Y.S.2d 945). It remanded to the Supreme Court for an in camera inspection of the disputed documents to determine if they fell within any exemption from disclosure and for a determination whether "The News" should be awarded attorneys' fees and costs. Supreme Court conducted the in camera inspection, identified certain materials subject to the FOIL privacy exemptions, otherwise ordered disclosure, and denied "The News" ***697 **279 attorneys' fees. This is an appeal as of right on the predicate two-Justice dissent (CPLR 5601[d]), and the final judgment brings up for review the prior nonfinal Appellate Division order, ruling that the BEDC is an "agency" for FOIL purposes.

The Legislature declared "that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government" (Public Officers Law § 84, added by L.1977, ch. *492 933). FOIL was enacted to provide the People with the means to access governmental records, to assure accountability and to thwart secrecy (*see, Matter of Weston v. Sloan,* 84 N.Y.2d 462, 466, 619 N.Y.S.2d 255, 643 N.E.2d 1071 [decided today]). All records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that " 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' " (*Matter of Russo v. Nassau County Community Coll.,* 81 N.Y.2d 690, 697, 603 N.Y.S.2d 294, 623 N.E.2d 15, quoting *Matter of Capital Newspapers v. Whalen,* 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932; *Matter of Federation of N.Y. State Rifle & Pistol Clubs v. New York City Police Dept.,* 73 N.Y.2d 92, 96, 538 N.Y.S.2d 226, 535 N.E.2d 279; *Matter of Washington Post Co. v. New York State Ins. Dept.,* 61 N.Y.2d 557, 564, 475 N.Y.S.2d 263, 463 N.E.2d 604; *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). In *Russo,* we held that the term "agency" under FOIL must be given " 'its natural and most obvious' meaning" and must be " 'liberally construed' " to further the general purpose of FOIL (81 N.Y.2d, at 697, 698, 603 N.Y.S.2d 294, 623 N.E.2d 15, *supra* [citing McKinney's Cons. Laws of NY, Book 1, Statutes § 94]; *see also, Matter of Capital Newspapers v. Whalen,* 69 N.Y.2d 246, 251, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932, *supra*).

The BEDC, a not-for-profit local development corporation, channels public funds into the community and enjoys many attributes of public entities. It should therefore be deemed an "agency" within FOIL's reach in this case.

Public Officers Law § 86(3) defines an "agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other *governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof* " (emphasis added). The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's Federal counterpart, the Freedom of Information Act (5 U.S.C. § 552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an "agency" only if there is substantial governmental control over its daily operations (*see, e.g., Irwin Mem. Blood Bank v. American Natl. Red Cross,* 9th Cir., 640 F.2d 1051; *Rocap v. Indiek,* D.C.Cir., 539 F.2d 174). The Buffalo News counters by arguing that the City of Buffalo is "inextricably involved in the core planning and execution of the agency's [BEDC] program"; thus, the BEDC is a "governmental *493 entity" performing a governmental function for the City of Buffalo, within the statutory definition.

The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an "agent" of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would

contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments.

Although we agree with the persuasive reasoning in Presiding Justice Denman's opinion in reaching our determination to affirm ***698 **280 the Appellate Division's order on traditional statutory interpretation analysis, we note that the advisory opinions of the Committee on Open Government are " neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency" (*Matter of John P. v. Whalen,* 54 N.Y.2d 89, 96, 444 N.Y.S.2d 598, 429 N.E.2d 117).

Accordingly, the judgment of Supreme Court appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs.

KAYE, C.J., and SIMONS, TITONE, SMITH, LEVINE and CIPARICK, JJ., concur.

Judgment of Supreme Court appealed from and order of the Appellate Division brought up for review affirmed, with costs.

All Citations

84 N.Y.2d 488, 644 N.E.2d 277, 619 N.Y.S.2d 695, 23 Media L. Rep. 1187

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69 Misc.3d 998
Supreme Court, Erie County, New York.

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., and Buffalo Professional Firefighters Association, Inc., Local 282, IAFF, AFL-CIO, Petitioners/Plaintiffs
v.
Byron W. BROWN, in his official capacity as Mayor of the City of Buffalo; Byron C. Lockwood, in his official capacity as commissioner of the Buffalo Police Department; the Buffalo Police Department; William Renaldo, in his capacity as commissioner of the Buffalo Fire Department; and, the Buffalo Fire Department, Respondents/Defendants
and
James Kistner, Intervenor/Respondent

807664/2020
|
Decided on October 9, 2020

Synopsis
Background: Police and firefighter associations brought action against mayor, police department and its commissioner, and fire department and its commissioner, seeking declaration that any future decision to publicly release any information concerning unsubstantiated and pending allegations against police officers and firefighters would violate collective bargaining agreements between city and police and firefighter unions, would violate police officers' and firefighters' due process and equal protection rights, and would otherwise be arbitrary, capricious, and mistaken. Associations filed petition to enjoin defendants from releasing that information.

Holdings: The Supreme Court, Frank A. Sedita III, J., held that:

associations failed to exhaust administrative remedies as to whether freedom of information (FOIL) officers acted arbitrarily or capriciously in ruling on disclosure requests, and

associations failed to demonstrate a likelihood of success on claims alleging release of information would be violative of due process and equal protection rights.

Petition denied.

Attorneys and Law Firms

****151** JOHN J. GILMOUR, ESQ., Buffalo, & DANIEL M. KILLILEA, ESQ., Attorneys for Petitioners/Plaintiffs

CORPORATION COUNSEL FOR THE CITY OF BUFFALO, Attorneys for Respondents/Defendants, William C. Matthewson, Esq. of counsel

STEPHANIE A. ADAMS, ESQ., Attorney for Intervenor/Respondent

Opinion

Frank A. Sedita III, J.

****152** ***999** The principal issue before the court is whether to enjoin the Respondents from releasing certain information contained in the disciplinary files of City of Buffalo police officers and firefighters.

§ 50-a of the NY Civil Rights Law (50-a) was repealed on June 12, 2020. Enacted in 1976, 50-a provided, in relevant part, that personnel records used to evaluate the performance of police officers and firefighters could not be publicly disclosed unless the officer/firefighter consented to it or a court ordered it. Soon after the repeal of 50-a, the Buffalo Common Council requested that the Buffalo Police Department turn over information concerning complaints of police officer misconduct. The Buffalo Police Benevolent Association (PBA) filed a grievance, under its collective bargaining agreement with the City of Buffalo, to prevent the release of this information. This lawsuit -- a Petition pursuant to CPLR Articles 75 and 78, combined with a Declaratory Judgment action -- was commenced by the filing of an Order to Show Cause application on July 22, 2020.

Petitioners sought declaratory, injunctive and provisional relief, based upon seven causes of action set forth in the Verified Petition of Buffalo PBA President John Evans. More specifically, the court is being asked to declare that

any future decision to publicly release any information concerning "unsubstantiated and pending allegations," as well as those concerning, "settlement agreements entered into before June 12, 2020," would violate collective bargaining agreements entered into between the City of Buffalo and its police and ***1000** firefighter unions; would violate Petitioners' due process and equal protection rights; and, would otherwise be arbitrary, capricious and mistaken.

Petitioners emphasize that they are not seeking to block the public disclosure of information concerning proven instances of police misconduct. They are instead seeking protection from the irreparable reputational harm that would result from the disclosure of unsubstantiated allegations; i.e. alleged instances of misconduct that were not proven to be true or turned out to be unfounded or demonstrably false. Petitioners note that members of many other occupations and professions are afforded statutory protection from the disclosure of unsubstantiated allegations made against them. 50-a had afforded similar statutory protections to police officers and firefighters.

Petitioners believe their disciplinary records should remain secret, despite the repeal of 50-a, because a privacy interest in the confidentiality of information contained in the records is recognized at common law. According to Petitioners, a "judicial consensus" in this regard pre-dates and is independent of the statutory protection once afforded by 50-a. Petitioners contend that in light of these remaining common law protections for their own occupations, as well as statutory protections in place for those in "similarly situated" occupations, the release of any unsubstantiated or pending allegations lodged in their personnel files would violate their due process and equal protection rights, as guaranteed by the Federal and State Constitutions.

Respondents objected to neither the issuance of a show cause order nor the imposition of a temporary restraining order. Respondents then filed an Answering Affirmation, additionally consenting to the injunctive relief sought by Petitioners.

James Kistner promptly filed a motion to intervene. Mr. Kistner is the plaintiff in an ongoing federal lawsuit, alleging mistreatment at the hands of City of Buffalo police officers. The defendants in the federal case allegedly refused to release their ****153** disciplinary files, even for the limited purpose of discovery. The basis for that refusal was none other than the TRO issued in this action. Mr. Kistner wished to intervene because he was being directly and substantially impacted by the TRO. Mr. Kistner also suggested a conflict of interest existed, noting that the City of Buffalo Corporation Counsel represented both the defendants in the federal lawsuit as well ***1001** as the Respondents in this one. Mr. Kistner then went on to list several legal arguments that he would assert if named a party.

Mr. Kistner's principal contention strikes at the very heart of the Petitioners' case theory. Petitioners suggest the collective bargaining agreements and common law precedents which shield the disclosure of police disciplinary files fill the vacuum caused by the repeal of 50-a. Mr. Kistner suggests that no such vacuum exists by pointing to what both named parties neglect to mention: that state statutes governing freedom of information (FOIL) requests were amended simultaneous to the repeal of 50-a. For example, Public Officers Law § 86(6)(a), now provides law enforcement disciplinary records that must presumptively be disclosed, include "***any*** record created in furtherance of a law enforcement disciplinary proceeding [including] complaints, ***allegations***, and charges against an employee" (emphasis supplied). In other words, there exists clear statutory authorization for release of the very information that Petitioners seek to enjoin.

Respondents changed course and filed a CPLR 3211 motion to dismiss. Respondents now oppose Petitioners' request for injunctive relief. Respondents contend that disclosure of unsubstantiated allegations is neither automatic nor inevitable and cite statutory due process protections that remain in place. They point out that Public Officers Law § 87(2)(b), for example, still authorizes FOIL officers (like Respondents) to refuse disclosure of records that would "constitute an unwarranted invasion of personal privacy." Respondents emphasize that they comprehend their statutory duties under FOIL as well as their contractual duties under the CBA; that they have yet to release anything to anyone; and, that Petitioners haven't even come close to exhausting their administrative remedies.

Exhaustion of remedies is one of the devices by which the courts prevent premature or unnecessary resort to their jurisdiction, particularly where an administrative remedy is provided by statute, by regulations, or by contract. It is rooted in the principle that a reviewing court usurps an agency's function when it sets aside an administrative determination upon grounds not yet presented, thus depriving the agency of the opportunity to consider the matter, make its ruling, and state the reasons for its decision. The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is ***1002** challenged as either unconstitutional or

wholly beyond its grant of power. *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 412 N.Y.S.2d 821, 385 N.E.2d 560.

It would be error for the court to consider whether the Respondents, in their capacity as FOIL officers, acted or might act arbitrarily or capriciously. *Spring v. County of Monroe,* 141 A.D.3d 1151, 36 N.Y.S.3d 330. It would also be inappropriate for the court to speculate as to how the Respondents might rule on the disclosure requests before them, what they might exempt or whether those rulings or disclosures would be consistent with or inconsistent with the lawful provisions of any collective bargaining agreements. These ****154** questions would presumably be answered when Respondents make their disclosure rulings and Petitioners, should they wish to challenge those rulings, pursue their available administrative remedies. Accordingly, Respondents' motion to dismiss, made pursuant to CPLR § 3211, is GRANTED as to the Petitioners' first, fourth, fifth and sixth causes of action and corresponding claims for declaratory relief.

Petitioners' remaining claims are premised on the notion that the release of any information concerning unsubstantiated and pending allegations would be violative of their constitutional rights. Since release of that information is now authorized by new amendments to the Public Officers Law, Petitioners are, by implication, challenging the constitutional validity of the new statutes themselves (as opposed to what a FOIL officer might or might not decide to do down the road). Mindful of the admonition that the court's role is to determine only whether the facts as alleged fit within any cognizable legal theory, Respondent's motion to dismiss the second cause of action (alleged due process violation) and third cause of action (alleged equal protection violation), on procedural grounds, is DENIED.

The question remaining is whether injunctive relief, premised upon Petitioners' due process and equal protection claims, is warranted.

The standard of judicial review for the grant of injunctive relief differs substantially from that required on a motion to dismiss. When considering a motion to dismiss, the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference. *Murnane Building Contractors, LLC v. Cameron Hill Construction, LLC,* 159 A.D.3d 1602, 73 N.Y.S.3d 848. By contrast, a party seeking to enjoin ***1003** or prohibit someone from doing something, has the burden of demonstrating, by clear and convincing evidence (1) a substantial likelihood of success on the merits (2) irreparable injury in the absence of injunctive relief and (3) a balance of the equities in its favor. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.,* 4 N.Y.3d 839, 800 N.Y.S.2d 48, 833 N.E.2d 191. Injunctive relief is viewed as a drastic remedy that is not routinely granted. *Eastview Mall LLC v. Grace Holmes, Inc.* 182 A.D.3d 1057, 122 N.Y.S.3d 848. Petitioners have the burden of satisfying all three prongs of the test and must do so by clear and convincing evidence; i.e. evidence or proof that makes it highly probable that what a party claims is true or will actually happen. *Monto v. Zeigler,* 183 A.D.3d 1294, 123 N.Y.S.3d 393.

At the core of this case, is Petitioners' dismay that FOIL officers will release unfiltered information that serves not to inform but to defame, especially when revealed to those whom already view police officers with disdain. The prospect of such irreparable harm is viewed as especially inequitable given the fact that members of so many other occupations and professions -- including lawyers and judges -- are protected by statutes that prevent the disclosure of misconduct allegations made against them, unless and until they are actually proven to be true.

There is indeed a consistent thread throughout the law that distinguishes bare allegations from allegations proven by credible evidence, better known as "facts." Allegations, in general, are much easier to make than to prove. Misconduct allegations, in particular, are sometimes the product of an accuser feeling embarrassed or feeling insulted or feeling intimidated by the accused, as opposed to any actual wrongdoing by the accused. Allegations are also at times the product of less than ****155** laudable motives, such as secondary gain. Perhaps the most frightful aspect of allegations is their power to destroy. This seems particularly acute today, when so many receive their information from social media, where a keyboard is often wielded as a cudgel. It is a sad reality that in the modern world, all that is required to malign is an agenda, an audience and an accusation.

Although Petitioners make compelling arguments regarding irreparable harm and the imbalance of the equities, the court does not sit as one of equity. It sits as a court of law and it must therefore follow the law. More to the point, it must hold the Petitioners to their burden of proving, by clear and convincing ***1004** evidence, that they have a substantial likelihood of success on the merits of their equal protection or due process claims.

What Petitioners find objectionable is specifically authorized by statute. Public Officers Law § 86(6)(a) defines as presumptively disclosable any record created in

furtherance of a law enforcement disciplinary proceeding, including allegations, regardless of whether they were substantiated or unsubstantiated. Curiously, Petitioners fail to address why these statutory mandates give constitutional offense, instead tying their due process and equal protection claims to the imagined vacuum left by the repeal of § 50-a, coupled with speculation as to what FOIL officers might do or could do in the future, and the constitutional consequences of those yet-to-be-made decisions.

Regardless of one's thoughts about the wisdom of the statute, the anti-law enforcement bias of many of those who supported it, or its pernicious unintended consequences, the fact remains that it is the law of this state and it can only be set aside by a court when it clearly offends the Federal or State Constitutions. Gazing into a crystal ball to divine what municipalities and their FOIL officers might do in the absence of 50-a is not a basis for the court to overturn a statute passed by both houses of the Legislature and enacted into law by the Governor. Indeed, it is well-settled that the acts of the Legislature are entitled to a strong presumption of constitutionality and that the Petitioners bear the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt. *American Economy Insurance Co. v. State of New York,* 30 N.Y.3d 136, 149, 65 N.Y.S.3d 94, 87 N.E.3d 126 (2017); *Matter of Murtaugh,* 42 A.D.3d 986, 841 N.Y.S.2d 189 (4th Dept. 2007).

What Petitioners essentially seek -- a pre-emptive strike that will serve as a blanket prohibition on the release of any and all information regarding any complaint deemed "unsubstantiated" -- is not merely drastic remedy, it is an inappropriate one. Petitioners advance no persuasive arguments as to why the controlling statutes violate due process, equal protection or any other provision of the Federal and State Constitutions. Petitioners have thus fallen well short of demonstrating a likelihood of success on the merits of their remaining claims and prayers for relief. Accordingly Petitioners' request for declarative relief and injunctive relief is DENIED in all respects and the TRO is vacated.

Finally, it should be noted that the court's rulings do not mean that police disciplinary records -- whether requested by ***1005** the Buffalo Common Council or whether demanded by some other entity by some other method -- shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions ****156** and exemptions set forth in the Public Officers Law, including § 87(2)(b).

The foregoing shall constitute the decision and order of this court.

All Citations

69 Misc.3d 998, 134 N.Y.S.3d 150, 2020 N.Y. Slip Op. 20257

109 S.Ct. 1455
Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, Petitioner
v.
Donald E. CLARK et ux.

No. 87-1168.
|
Argued Nov. 7, 1988.
|
Decided March 22, 1989.

Synopsis
Taxpayers petitioned for review of assessment of deficiency arising out of substantial cash payment made in connection with stock-for-stock exchange. The Tax Court, 86 T.C. 138, held in taxpayers' favor. On appeal, the United States Court of Appeals for the Fourth Circuit, 828 F.2d 221, affirmed, and certiorari was granted. The Supreme Court, Justice Stevens, held that substantial cash payment made in connection with stock-for-stock exchange pursuant to corporate reorganization plan was subject to capital gains, rather than ordinary income treatment.

Affirmed.

Justice Scalia joined in all but Part III of the opinion.

Justice White filed a dissenting opinion.

****1456 *726** Syllabus*

Under the Internal Revenue Code of 1954, gain resulting from the sale or exchange of property is generally treated as capital gain. Although the Code imposes no current tax on certain stock-for-stock exchanges, § 356(a)(1) provides that if such an exchange pursuant to a corporate reorganization plan is accompanied by a cash payment or other property-commonly referred to as "boot"-any gain which the recipient realizes from the exchange is treated in the current tax year as capital gain up to the value of the boot. However, § 356(a)(2) creates an exception, specifying that if the "exchange ... has the effect of the distribution of a dividend," the boot must be treated as a dividend and is therefore appropriately taxed as ordinary income to the extent that gain is realized. In 1979, respondent husband (hereinafter the taxpayer), the sole shareholder of Basin Surveys, Inc. (Basin), entered into a "triangular merger" agreement with NL Industries, Inc. (NL), whereby he transferred all of Basin's outstanding shares to NL's wholly owned subsidiary in exchange for 300,000 NL shares-representing approximately 0.92% of NL's outstanding common stock-and substantial cash boot. On their 1979 joint federal income tax return, respondents reported the boot as capital gain pursuant to § 356(a)(1). Although agreeing that the merger at issue qualified as a reorganization for purposes of that section, the Commissioner of Internal Revenue assessed a deficiency against respondents, ruling that the boot payment had "the effect of the distribution of a dividend" under § 356(a)(2). On review, the Tax Court held in respondents' favor, and the Court of Appeals affirmed. Both courts rejected the test proposed by the Commissioner for determining whether a boot payment has the requisite § 356(a)(2) effect, whereby the payment would be treated as though it were made in a hypothetical redemption by the acquired corporation (Basin) immediately *prior* to the reorganization. Rather, both courts accepted and applied the post-reorganization test urged by the taxpayer, which requires that a pure stock-for-stock exchange be imagined, followed immediately by a redemption of a portion of the taxpayer's shares in the acquiring corporation (NL) in return for a payment in an amount equal to the boot. The courts ruled that NL's ***727** redemption of 125,000 of its shares from the taxpayer in exchange for the boot was subject to capital gains treatment under § 302 of the Code, which ****1457** defines the tax treatment of a redemption of stock by a corporation from its shareholders.

Held: Section 356(a)'s language and history, as well as a commonsense understanding of the economic substance of the transaction at issue, establish that NL's boot payment to the taxpayer is subject to capital gains rather than ordinary income treatment. Pp. 1462-1466.

(a) The language of § 356(a) strongly supports the view that the question whether an "exchange ... has the effect of the distribution of a dividend" should be answered by examining the effect of the exchange as a whole. By referring to the "exchange," both § 356(a)(2) and § 356(a)(1) plainly contemplate one integrated transaction and make clear that the character of the exchange as a whole and not simply its component parts must be examined. Moreover, the fact that § 356 expressly limits the extent to which boot may be taxed to the amount of gain realized in the reorganization suggests that Congress

intended that boot not be treated in isolation from the overall reorganization. Pp. 1462-1463.

(b) Viewing the exchange in this case as an integrated whole, the pre-reorganization analogy is unacceptable, since it severs the payment of boot from the context of the reorganization, and since it adopts an overly expansive reading of § 356(a)(2) that is contrary to this Court's standard approach of construing a statutory exception narrowly to preserve the primary operation of the general rule. P.-1463.

(c) The postreorganization approach is preferable and is adopted, since it does a far better job of treating the payment of boot as a component of the overall exchange. Under that approach, NL's hypothetical redemption easily satisfied § 302(b)(2), which specifies that redemptions whereby the taxpayer relinquishes more than 20% of his corporate control and thereafter retains less than 50% of the voting shares shall not be treated as dividend distributions. Pp. 1463-1464.

(d) The Commissioner's objection to this "recasting [of] the merger transaction" on the ground that it forces courts to find a redemption where none existed overstates the extent to which the redemption is imagined. Since a tax-free reorganization transaction is, in theory, merely a continuance of the proprietary interests in the continuing enterprise under modified corporate form, the boot-for-stock transaction can be viewed as a partial repurchase of stock by the continuing corporate enterprise-*i.e.,* as a redemption. Although both the prereorganization and postreorganization analogies "recast the transaction," the latter view at least recognizes that a reorganization has taken place. P. 1464.

***728** e) Even if the postreorganization analogy and the principles of § 302 were abandoned in favor of a less artificial understanding of the transaction, the result would be the same. The legislative history of § 356(a)(2) suggests that Congress was primarily concerned with preventing corporations from evading tax by "siphon[ing] off" accumulated earnings and profits at a capital gains rate through the ruse of a reorganization. This purpose in turn suggests that Congress did not intend to impose ordinary income tax on boot accompanying a transaction that involves a bona fide, arm's-length exchange between unrelated parties in the context of a reorganization. In the instant transaction, there is no indication that the reorganization was used as a ruse. Thus, the boot is better characterized as part of the proceeds of a sale of stock subject to capital gains treatment than as a proxy for a dividend. Pp. 1464-1466.

828 F.2d 221 (CA 4 1987), affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, MARSHALL, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined, and in all but Part III of which SCALIA, J., joined. WHITE, J., filed a dissenting opinion, *post,* p. ----.

Attorneys and Law Firms

****1458** Alan I. Horowitz argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Rose, Deputy Solicitor General Wallace,* and *Ernest J. Brown.*

Walter B. Slocombe argued the cause for respondents. With him on the brief was *Daniel B. Rosenbaum.*

Opinion

Justice STEVENS delivered the opinion of the Court.*

This is the third case in which the Government has asked us to decide that a shareholder's receipt of a cash payment in exchange for a portion of his stock was taxable as a dividend. In the two earlier cases, *Commissioner v. Estate of Bedford,* 325 U.S. 283, 65 S.Ct. 1157, 89 L.Ed. 1611 (1945), and *United States v. Davis,* 397 U.S. 301, 90 S.Ct. 1041, 25 L.Ed.2d 323 (1970), we agreed with the Government largely because the transactions involved redemptions of stock by single corporations that did not "result in a meaningful reduction of the shareholder's proportionate interest in the corporation." ***729** *Id.,* at 313, 90 S.Ct. at 1048. In the case we decide today, however, the taxpayer[1] in an arm's-length transaction exchanged his interest in the acquired corporation for less than 1% of the stock of the acquiring corporation and a substantial cash payment. The taxpayer held no interest in the acquiring corporation prior to the reorganization. Viewing the exchange as a whole, we conclude that the cash payment is not appropriately characterized as a dividend. We accordingly agree with the Tax Court and with the Court of Appeals that the taxpayer is entitled to capital gains treatment of the cash payment.

I

In determining tax liability under the Internal Revenue Code of 1954, gain resulting from the sale or exchange of property is generally treated as capital gain, whereas the receipt of cash dividends is treated as ordinary income.[2] The Code, however, imposes no current tax on certain stock-for-stock exchanges. In particular, § 354(a)(1) provides, subject to various limitations, for nonrecognition of gain resulting from the exchange of stock or securities solely for other stock or securities, provided that the exchange is pursuant to a plan of corporate reorganization and that the stock or securities ***730** are those of a party to the reorganization.[3] 26 U.S.C. § 354(a)(1).

Under § 356(a)(1) of the Code, if such a stock-for-stock exchange is accompanied by additional consideration in the form of a ****1459** cash payment or other property-something that tax practitioners refer to as "boot"-"then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property." 26 U.S.C. § 356(a)(1). That is, if the shareholder receives boot, he or she must recognize the gain on the exchange up to the value of the boot. Boot is accordingly generally treated as a gain from the sale or exchange of property and is recognized in the current tax year.

Section 356(a)(2), which controls the decision in this case, creates an exception to that general rule. It provided in 1979:

> "If an exchange is described in paragraph (1) but has the effect of the distribution of a dividend, then there shall be treated as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after ***731** February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be treated as gain from the exchange of property." 26 U.S.C. § 356(a)(2) (1976 ed.).

Thus, if the "exchange ... has the effect of the distribution of a dividend," the boot must be treated as a dividend and is therefore appropriately taxed as ordinary income to the extent that gain is realized. In contrast, if the exchange does not have "the effect of the distribution of a dividend," the boot must be treated as a payment in exchange for property and, insofar as gain is realized, accorded capital gains treatment. The question in this case is thus whether the exchange between the taxpayer and the acquiring corporation had "the effect of the distribution of a dividend" within the meaning of § 356(a)(2).

The relevant facts are easily summarized. For approximately 15 years prior to April 1979, the taxpayer was the president of Basin Surveys, Inc. (Basin). In January 1978, he became sole shareholder in Basin, a company in which he had invested approximately $85,000. The corporation operated a successful business providing various technical services to the petroleum industry. In 1978, N.L. Industries, Inc. (NL), a publicly owned corporation engaged in the manufacture and supply of petroleum equipment and services, initiated negotiations with the taxpayer regarding the possible acquisition of Basin. On April 3, 1979, after months of negotiations, the taxpayer and NL entered into a contract.

The agreement provided for a "triangular merger," whereby Basin was merged into a wholly owned subsidiary of NL. In exchange for transferring all of the outstanding shares in Basin to NL's subsidiary, the taxpayer elected to receive 300,000 shares of NL common stock and cash boot of $3,250,000, passing up an alternative offer of 425,000 shares of NL common stock. The 300,000 shares of NL issued to the taxpayer amounted to approximately 0.92% of the outstanding ***732** common shares of NL. If the taxpayer had instead accepted the pure stock-for-stock offer, he would have held approximately 1.3% of the outstanding common shares. The Commissioner and the taxpayer agree that the merger at issue qualifies as a reorganization under §§ 368(a)(1)(A) and (a)(2)(D).[4]

Respondents filed a joint federal income tax return for 1979. As required by § 356(a)(1), they reported the cash boot as taxable gain. In calculating the tax owed, ****1460** respondents characterized the payment as long-term capital gain. The Commissioner on audit disagreed with this characterization. In his view, the payment had "the effect of the distribution of a dividend" and was thus taxable as ordinary income up to $2,319,611, the amount of Basin's accumulated earnings and profits at the time of the merger. The Commissioner assessed a deficiency of $972,504.74.

Respondents petitioned for review in the Tax Court, which, in a reviewed decision, held in their favor. 86 T.C. 138 (1986). The court started from the premise that the question whether the boot payment had "the effect of the distribution of a dividend" turns on the choice between "two judicially articulated tests." *Id.,* at 140. Under the test advocated by the Commissioner and given voice in *Shimberg v. United States,* 577 F.2d 283 (CA5 1978), cert. denied, 439 U.S. 1115, 99 S.Ct. 1019, 59 L.Ed.2d 73 (1979), the boot payment is treated as though it were made in a hypothetical redemption by the acquired

corporation (Basin) immediately *prior* to the reorganization. ***733** Under this test, the cash payment received by the taxpayer indisputably would have been treated as a dividend.[5] The second test, urged by the taxpayer and finding support in *Wright v. United States,* 482 F.2d 600 (CA8 1973), proposes an alternative hypothetical redemption. Rather than concentrating on the taxpayer's prereorganization interest in the acquired corporation, this test requires that one imagine a pure stock-for-stock exchange, followed immediately by a *post*reorganization redemption of a portion of the taxpayer's shares in the acquiring corporation (NL) in return for a payment in an amount equal to the boot. Under § 302 of the Code, which defines when a redemption of stock should be treated as a distribution of dividend, NL's redemption of 125,000 shares of its stock from the taxpayer in exchange for the $3,250,000 boot payment would have been treated as capital gain.[6]

***734** ****1461** The Tax Court rejected the prereorganization test favored by the Commissioner because it considered it improper "to view the cash payment as an isolated event totally separate from the reorganization." 86 T.C., at 151. Indeed, it suggested ***735** that this test requires that courts make the "determination of dividend equivalency fantasizing that the reorganization does not exist." *Id.,* at 150 (footnote omitted). The court then acknowledged that a similar criticism could be made of the taxpayer's contention that the cash payment should be viewed as a postreorganization redemption. It concluded, however, that since it was perfectly clear that the cash payment would not have taken place without the reorganization, it was better to treat the boot "as the equivalent of a redemption *in the course of implementing the reorganization,*" than "as having occurred *prior to and separate from the reorganization.*" *Id.,* at 152 (emphasis in original).[7]

***736** The Court of Appeals for the Fourth Circuit affirmed. 828 F.2d 221 (1987). Like the Tax Court, it concluded that although "[s]ection 302 does not explicitly apply in the reorganization context," *id.,* at 223, and although § 302 differs from § 356 in important respects, *id.,* at 224, it nonetheless provides "the appropriate test for determining whether boot is ordinary income or a capital gain," *id.,* at 223. Thus, as explicated in § 302(b)(2), if the taxpayer relinquished more than 20% of his corporate control and retained less than 50% of the voting shares after the distribution, the boot would be treated as capital gain. However, as the Court of Appeals recognized, "[b]ecause § 302 was designed to deal with a stock redemption by a single corporation, rather than a reorganization involving two companies, the section does not indicate which corporation [the taxpayer] lost interest in." *Id.,* at 224. Thus, like the Tax Court, the Court of Appeals was left to consider whether the hypothetical ****1462** redemption should be treated as a prereorganization distribution coming from the acquired corporation or as a postreorganization distribution coming from the acquiring corporation. It concluded:

> "Based on the language and legislative history of § 356, the change-in-ownership principle of § 302, and the need to review the reorganization as an integrated transaction, we conclude that the boot should be characterized as a post-reorganization stock redemption by N.L. that affected [the taxpayer's] interest in the new corporation. Because this redemption reduced [the taxpayer's] N.L. holdings by more than 20%, the boot should be taxed as a capital gain." *Id.,* at 224-225.

This decision by the Court of Appeals for the Fourth Circuit is in conflict with the decision of the Fifth Circuit in *Shimberg v. United States,* 577 F.2d 283 (1978), in two important respects. In *Shimberg,* the court concluded that it was inappropriate to apply stock redemption principles in reorganization cases "on a wholesale basis." *Id.,* at 287; see also *ibid.,* n. 13. In addition, the court adopted the prereorganization ***737** test, holding that "§ 356(a)(2) requires a determination of whether the distribution would have been taxed as a dividend if made prior to the reorganization or if no reorganization had occurred." *Id.,* at 288.

To resolve this conflict on a question of importance to the administration of the federal tax laws, we granted certiorari. 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988).

II

We agree with the Tax Court and the Court of Appeals for the Fourth Circuit that the question under § 356(a)(2) whether an "exchange ... has the effect of the distribution of a dividend" should be answered by examining the effect of the exchange as a whole. We think the language and history of the statute, as well as a commonsense understanding of the economic substance of the transaction at issue, support this approach.

The language of § 356(a) strongly supports our understanding that the transaction should be treated as an integrated whole. Section 356(a)(2) asks whether "*an exchange* is described in paragraph (1)" that "has the

effect of the distribution of a dividend." (Emphasis supplied.) The statute does not provide that boot shall be treated as a dividend if its payment has the effect of the distribution of a dividend. Rather, the inquiry turns on whether the "exchange" has that effect. Moreover, paragraph (1), in turn, looks to whether "the property received in *the exchange* consists not only of property permitted by section 354 or 355 to be received without the recognition of gain but also of other property or money." (Emphasis supplied.) Again, the statute plainly refers to one integrated transaction and, again, makes clear that we are to look to the character of the exchange as a whole and not simply its component parts. Finally, it is significant that § 356 expressly limits the extent to which boot may be taxed to the amount of gain realized in the reorganization. This limitation suggests that Congress intended that boot not be treated in isolation from ***738** the overall reorganization. See Levin, Adess, & McGaffey, Boot Distributions in Corporate Reorganizations-Determination of Dividend Equivalency, 30 Tax Lawyer 287, 303 (1977).

Our reading of the statute as requiring that the transaction be treated as a unified whole is reinforced by the well-established "step-transaction" doctrine, a doctrine that the Government has applied in related contexts, see, *e.g.,* Rev.Rul. 75-447, 1975-2 Cum.Bull. 113, and that we have expressly sanctioned, see *Minnesota Tea Co. v. Helvering,* 302 U.S. 609, 613, 58 S.Ct. 393, 394, 82 L.Ed. 474 (1938); *Commissioner v. Court Holding Co.,* 324 U.S. 331, 334, 65 S.Ct. 707, 708, 89 L.Ed. 981 (1945). Under this doctrine, interrelated yet formally distinct steps in an integrated transaction may ****1463** not be considered independently of the overall transaction. By thus "linking together all interdependent steps with legal or business significance, rather than taking them in isolation," federal tax liability may be based "on a realistic view of the entire transaction." 1 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 4.3.5, p. 4-52 (1981).

Viewing the exchange in this case as an integrated whole, we are unable to accept the Commissioner's prereorganization analogy. The analogy severs the payment of boot from the context of the reorganization. Indeed, only by straining to abstract the payment of boot from the context of the overall exchange, and thus imagining that Basin made a distribution to the taxpayer independently of NL's planned acquisition, can we reach the rather counterintuitive conclusion urged by the Commissioner-that the taxpayer suffered no meaningful reduction in his ownership interest as a result of the cash payment. We conclude that such a limited view of the transaction is plainly inconsistent with the statute's direction that we look to the effect of the entire exchange.

The prereorganization analogy is further flawed in that it adopts an overly expansive reading of § 356(a)(2). As the Court of Appeals recognized, adoption of the prereorganization approach would "result in ordinary income treatment in ***739** most reorganizations because corporate boot is usually distributed pro rata to the shareholders of the target corporation." 828 F.2d, at 227; see also Golub, "Boot" in Reorganizations-The Dividend Equivalency Test of Section 356(a)(2), 58 Taxes 904, 911 (1980); Note, 20 Boston College L.Rev. 601, 612 (1979). Such a reading of the statute would not simply constitute a return to the widely criticized "automatic dividend rule" (at least as to cases involving a pro rata payment to the shareholders of the acquired corporation), see n. 8, *supra,* but also would be contrary to our standard approach to construing such provisions. The requirement of § 356(a)(2) that boot be treated as dividend in some circumstances is an exception from the general rule authorizing capital gains treatment for boot. In construing provisions such as § 356, in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision. See *Phillips, Inc. v. Walling,* 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people"). Given that Congress has enacted a general rule that treats boot as capital gain, we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception.

The postreorganization approach adopted by the Tax Court and the Court of Appeals is, in our view, preferable to the Commissioner's approach. Most significantly, this approach does a far better job of treating the payment of boot as a component of the overall exchange. Unlike the pre-reorganization view, this approach acknowledges that there would have been no cash payment absent the exchange and also that, by accepting the cash payment, the taxpayer experienced a meaningful reduction in his potential ownership interest.

Once the postreorganization approach is adopted, the result in this case is pellucidly clear. Section 302(a) of the ***740** Code provides that if a redemption fits within any one of the four categories set out in § 302(b), the redemption "shall be treated as a distribution in part or full payment in exchange for the stock," and thus not regarded as a dividend. As the Tax Court and the Court of Appeals correctly determined, the hypothetical postreorganization redemption by NL of a portion of the taxpayer's shares satisfies at least one of the ****1464**

subsections of § 302(b).[8] In particular, the safe harbor provisions of subsection (b)(2) provide that redemptions in which the taxpayer relinquishes more than 20% of his or her share of the corporation's voting stock and retains less than 50% of the voting stock after the redemption shall not be treated as distributions of a dividend. See n. 6, *supra.* Here, we treat the transaction as though NL redeemed 125,000 shares of its common stock (*i.e.,* the number of shares of NL common stock forgone in favor of the boot) in return for a cash payment to the taxpayer of $3,250,000 (*i.e.,* the amount of the boot). As a result of this redemption, the taxpayer's interest in NL was reduced from 1.3% of the outstanding common stock to 0.9%. See 86 T.C., at 153. Thus, the taxpayer relinquished approximately 29% of his interest in NL and retained less than a 1% voting interest in the corporation after the transaction, easily satisfying the "substantially disproportionate" standards of § 302(b)(2). We accordingly conclude that the boot payment did not have the effect of a dividend and that the payment was properly treated as capital gain.

III

The Commissioner objects to this "recasting [of] the merger transaction into a form different from that entered ***741** into by the parties," Brief for Petitioner 11, and argues that the Court of Appeals' formal adherence to the principles embodied in § 302 forced the court to stretch to "find a redemption to which to apply them, since the merger transaction entered into by the parties did not involve a redemption," *id.,* at 28. There are a number of sufficient responses to this argument. We think it first worth emphasizing that the Commissioner overstates the extent to which the redemption is imagined. As the Court of Appeals for the Fifth Circuit noted in *Shimberg,* "[t]he theory behind tax-free corporate reorganizations is that the transaction is merely 'a continuance of the proprietary interests in the continuing enterprise under modified corporate form.' *Lewis v. Commissioner of Internal Revenue,* 176 F.2d 646, 648 (CA1 1949); Treas.Reg. § 1.368-1(b). See generally Cohen, *Conglomerate Mergers and Taxation,* 55 A.B.A.J. 40 (1969)." 577 F.2d, at 288. As a result, the boot-for-stock transaction can be viewed as a partial repurchase of stock by the continuing corporate enterprise-*i.e.,* as a redemption. It is, of course, true that both the prereorganization and postreorganization analogies are somewhat artificial in that they imagine that the redemption occurred outside the confines of the actual reorganization. However, if forced to choose between the two analogies, the postreorganization view is the less artificial. Although both analogies "recast the merger transaction," the postreorganization view recognizes that a reorganization has taken place, while the prereorganization approach recasts the transaction to the exclusion of the overall exchange.

Moreover, we doubt that abandoning the prereorganization and postreorganization analogies and the principles of § 302 in favor of a less artificial understanding of the transaction would lead to a result different from that reached by the Court of Appeals. Although the statute is admittedly ambiguous and the legislative history sparse, we are persuaded-even without relying on § 302-that Congress did not intend to except reorganizations such as that at issue ***742** here from the general rule allowing capital gains treatment for cash boot. 26 U.S.C. § 356(a)(1). The legislative history of § 356(a)(2), although perhaps generally "not illuminating," *Estate of Bedford,* 325 U.S., at 290, 65 S.Ct., at 1160, suggests that Congress was primarily ****1465** concerned with preventing corporations from "siphon[ing] off" accumulated earnings and profits at a capital gains rate through the ruse of a reorganization. See Golub, 58 Taxes, at 905. This purpose is not served by denying capital gains treatment in a case such as this in which the taxpayer entered into an arm's-length transaction with a corporation in which he had no prior interest, exchanging his stock in the acquired corporation for less than a 1% interest in the acquiring corporation and a substantial cash boot.

Section 356(a)(2) finds its genesis in § 203(d)(2) of the Revenue Act of 1924. See 43 Stat. 257. Although modified slightly over the years, the provisions are in relevant substance identical. The accompanying House Report asserts that § 203(d)(2) was designed to "preven[t] evasion." H.R.Rep. No. 179, 68th Cong., 1st Sess., 15 (1924). Without further explication, both the House and Senate Reports simply rely on an example to explain, in the words of both Reports, "[t]he necessity for this provision." *Ibid.;* S.Rep. No. 398, 68th Cong., 1st Sess., 16 (1924). Significantly, the example describes a situation in which there was no change in the stockholders' relative ownership interests, but merely the creation of a wholly owned subsidiary as a mechanism for making a cash distribution to the shareholders:

> "Corporation A has capital stock of $100,000, and earnings and profits accumulated since March 1, 1913, of $50,000. If it distributes the $50,000 as a dividend to its stockholders, the amount distributed will be taxed at the full surtax rates.

> "On the other hand, Corporation A may organize Corporation B, to which it transfers all its assets, the consideration for the transfer being the issuance by B of all its stock and $50,000 in cash to the stockholders of Corporation ***743** A in exchange for their stock in Corporation A. Under the existing law, the $50,000 distributed with the stock of Corporation B would be taxed, not as a dividend, but as a capital gain, subject only to the 12 ½ per cent rate. The effect of such a distribution is obviously the same as if the corporation had declared out as a dividend its $50,000 earnings and profits. If dividends are to be subject to the full surtax rates, then such an amount so distributed should also be subject to the surtax rates and not to the 12 ½ per cent rate on capital gain." *Ibid.*; H.R.Rep. No. 179, at 15.

The "effect" of the transaction in this example is to transfer accumulated earnings and profits to the shareholders without altering their respective ownership interests in the continuing enterprise.

Of course, this example should not be understood as exhaustive of the proper applications of § 356(a)(2). It is nonetheless noteworthy that neither the example, nor any other legislative source, evinces a congressional intent to tax boot accompanying a transaction that involves a bona fide exchange between unrelated parties in the context of a reorganization as though the payment was in fact a dividend. To the contrary, the purpose of avoiding tax evasion suggests that Congress did not intend to impose an ordinary income tax in such cases. Moreover, the legislative history of § 302 supports this reading of § 356(a)(2) as well. In explaining the "essentially equivalent to a dividend" language of § 302(b)(1)-language that is certainly similar to the "has the effect ... of a dividend" language of § 356(a)(2)-the Senate Finance Committee made clear that the relevant inquiry is "whether or not the transaction by its nature may properly be characterized as a sale of stock...." S.Rep. No. 1622, 83d Cong., 2d Sess., 234 (1954); cf. *United States v. Davis,* 397 U.S., at 311, 90 S.Ct., at 1047.

Examining the instant transaction in light of the purpose of § 356(a)(2), the boot-for-stock exchange in this case "may ***744** properly be characterized as a sale of stock." Significantly, unlike traditional single corporation redemptions and unlike reorganizations involving commonly owned corporations, there is little risk that the ****1466** reorganization at issue was used as a ruse to distribute a dividend. Rather, the transaction appears in all respects relevant to the narrow issue before us to have been comparable to an arm's-length sale by the taxpayer to NL. This conclusion, moreover, is supported by the findings of the Tax Court. The court found that "[t]here is not the slightest evidence that the cash payment was a concealed distribution from BASIN." 86 T.C., at 155. As the Tax Court further noted, Basin lacked the funds to make such a distribution:

> "Indeed, it is hard to conceive that such a possibility could even have been considered, for a distribution of that amount was not only far in excess of the accumulated earnings and profits ($2,319,611), but also of the total assets of BASIN ($2,758,069). In fact, only if one takes into account unrealized appreciation in the value of BASIN's assets, including good will and/or going-concern value, can one possibly arrive at $3,250,000. Such a distribution could only be considered as the equivalent of a complete liquidation of BASIN...." *Ibid.*[9]

In this context, even without relying on § 302 and the post-reorganization analogy, we conclude that the boot is better characterized as a part of the proceeds of a sale of stock than ***745** as a proxy for a dividend. As such, the payment qualifies for capital gains treatment.

The judgment of the Court of Appeals is accordingly

Affirmed.

Justice WHITE, dissenting.

The question in this case is whether the cash payment of $3,250,000 by N.L. Industries, Inc. (NL) to Donald Clark, which he received in the April 18, 1979, merger of Basin Surveys, Inc. (Basin), into N.L. Acquisition Corporation (NLAC), had the effect of a distribution of a dividend under the Internal Revenue Code of 1954, 26 U.S.C. § 356(a)(2) (1976 ed.), to the extent of Basin's accumulated undistributed earnings and profits. Petitioner, the Commissioner of Internal Revenue (Commissioner), made this determination, taxing the sum as ordinary income, to find a 1979 tax deficiency of $972,504.74. The Court of Appeals disagreed, stating that because the cash payment resembles a hypothetical stock redemption from NL to Clark, the amount is taxable as capital gain. 828 F.2d 221 (CA4 1987). Because the majority today agrees with that characterization, in spite of Clark's explicit refusal of the stock-for-stock exchange imagined by the Court of Appeals and the majority, and because the record demonstrates, instead, that the transaction before us involved a boot distribution that had "the effect of the distribution of a dividend" under § 356(a)(2)-and hence properly alerted the Commissioner to Clark's tax deficiency-I dissent.

The facts are stipulated. Basin, Clark, NL, and NLAC executed an Agreement and Plan of Merger dated April 3, 1979, which provided that on April 18, 1979, Basin would merge with NLAC. The statutory merger, which occurred pursuant to §§ 368(a)(1)(A) and (a)(2)(D) of the Code, and therefore qualified for tax-free reorganization status under § 354(a)(1), involved the following terms: Each outstanding share of NLAC stock remained outstanding; each outstandingshare ***746** of Basin common stock was exchanged for $56,034.482 cash and 5,172.4137 shares of NL common stock; and each share of Basin common stock held by Basin was canceled. NLAC's name was amended to Basin Surveys, Inc. The Secretary of State of West Virginia certified that the merger complied with West Virginia law. Clark, the owner ****1467** of all 58 outstanding shares of Basin, received $3,250,000 in cash and 300,000 shares of NL stock. He expressly refused NL's alternative of 425,000 shares of NL common stock without cash. See App. 56-59.

Congress enacted § 354(a)(1) to grant favorable tax treatment to specific corporate transactions (reorganizations) that involve the exchange of stock or securities solely for other stock or securities. See *Paulsen v. Commissioner,* 469 U.S. 131, 136, 105 S.Ct. 627, 630, 83 L.Ed.2d 540 (1985) (citing Treas.Reg. § 1.368-1(b), 26 CFR § 1.368-1(b) (1984), and noting the distinctive feature of such reorganizations, namely, continuity of interests). Clark's "triangular merger" of Basin into NL's subsidiary NLAC qualified as one such tax-free reorganization, pursuant to § 368(a)(2)(D). Because the stock-for-stock exchange was supplemented with a cash payment, however, § 356(a)(1) requires that "the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property." Because this provision permitted taxpayers to withdraw profits during corporate reorganizations without declaring a dividend, Congress enacted § 356(a)(2), which states that when an exchange has "the effect of the distribution of a dividend," boot must be treated as a dividend, and taxed as ordinary income, to the extent of the distributee's "ratable share of the undistributed earnings and profits of the corporation...." *Ibid.;* see also H.R.Rep. No. 179, 68th Cong., 1st Sess., 15 (1924) (illustration of § 356(a)(2)'s purpose to frustrate evasion of dividend taxation through corporate reorganization distributions); S.Rep. No. 398, 68th Cong., 1st Sess., 16 (1924) (same).

***747** Thus the question today is whether the cash payment to Clark had the *effect* of a distribution of a dividend. We supplied the straightforward answer in *United States v. Davis,* 397 U.S. 301, 306, 312, 90 S.Ct. 1041, 1044, 1047, 25 L.Ed.2d 323 (1970), when we explained that a pro rata redemption of stock by a corporation is "essentially equivalent" to a dividend. A pro rata distribution of stock, with no alteration of basic shareholder relationships, is the hallmark of a dividend. This was precisely Clark's gain. As sole shareholder of Basin, Clark necessarily received a pro rata distribution of moneys that exceeded Basin's undistributed earnings and profits of $2,319,611. Because the merger and cash obligation occurred simultaneously on April 18, 1979, and because the statutory merger approved here assumes that Clark's proprietary interests continue in the restructured NLAC, the exact source of the pro rata boot payment is immaterial, which truth Congress acknowledged by requiring only that an exchange have the *effect* of a dividend distribution.

To avoid this conclusion, the Court of Appeals-approved by the majority today-recast the transaction as though the relevant distribution involved a single corporation's (NL's) stock redemption, which dividend equivalency is determined according to § 302 of the Code. Section 302 shields distributions from dividend taxation if the cash redemption is accompanied by sufficient loss of a shareholder's percentage interest in the corporation. The Court of Appeals hypothesized that Clark completed a pure stock-for-stock reorganization, receiving 425,000 NL shares, and thereafter redeemed 125,000 of these shares for his cash earnings of $3,250,000. The sum escapes dividend taxation because Clark's interest in NL theoretically declined from 1.3% to 0.92%, adequate to trigger § 302(b)(2) protection. Transporting § 302 from its purpose to frustrate shareholder sales of equity back to their own corporation, to § 356(a)(2)'s reorganization context, however, is problematic. Neither the majority nor the Court of Appeals explains why § 302 should obscure the core attribute ***748** of a dividend as a pro rata distribution to a corporation's shareholders;[1] nor offers insight into the mechanics of valuing hypothetical stock transfers and equity reductions; ****1468** nor answers the Commissioner's observations that the sole shareholder of an acquired corporation will always have a smaller interest in the continuing enterprise when cash payments combine with a stock exchange. Last, the majority and the Court of Appeals' recharacterization of market happenings describes the exact stock-for-stock exchange, without a cash supplement, that Clark refused when he agreed to the merger.

Because the parties chose to structure the exchange as a tax-free reorganization under § 354(a)(1), and because the pro rata distribution to Clark of $3,250,000 during this reorganization had the *effect* of a dividend under § 356(a)(2), I dissent.[2]

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* Justice SCALIA joins all but Part III of this opinion.

1 Respondent Peggy S. Clark is a party to this action solely because she filed a joint federal income tax return for the year in question with her husband, Donald E. Clark. References to "taxpayer" are to Donald E. Clark.

2 In 1979, the tax year in question, the distinction between long-term capital gain and ordinary income was of considerable importance. Most significantly, § 1202(a) of the Code, 26 U.S.C. § 1202(a) (1976 ed., Supp. III), allowed individual taxpayers to deduct 60% of their net capital gain from gross income. Although the importance of the distinction declined dramatically in 1986 with the repeal of § 1202(a), see Tax Reform Act of 1986, Pub.L. 99-514, § 301(a), 100 Stat. 2216, the distinction is still significant in a number of respects. For example, 26 U.S.C. § 1211(b) (1982 ed., Supp. IV) allows individual taxpayers to deduct capital losses to the full extent of their capital gains, but only allows them to offset up to $3,000 of ordinary income insofar as their capital losses exceed their capital gains.

3 Title 26 U.S.C. § 368(a)(1) defines several basic types of corporate reorganizations. They include, in part:

"(A) a statutory merger or consolidation;

"(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356;

"(E) a recapitalization;

"(F) a mere change in identity, form, or place of organization of one corporation, however effected...."

4 Section 368(a)(2)(D) provided in 1979:

"The acquisition by one corporation, in exchange for stock of a corporation (referred to in this subparagraph as 'controlling corporation') which is in control of the acquiring corporation, of substantially all of the properties of another corporation which in the transaction is merged into the acquiring corporation shall not disqualify a transaction under paragraph (1)(A) if

(i) such transaction would have qualified under paragraph (1)(A) if the merger had been into the controlling corporation, and (ii) no stock of the acquiring corporation is used in the transaction." 26 U.S.C. § 368(a)(2)(D) (1976 ed.).

5 The parties do not agree as to whether dividend equivalence for the purposes of § 356(a)(2) should be determined with reference to § 302 of the Code, which concerns dividend treatment of redemptions of stock by a single corporation outside the context of a reorganization. Compare Brief for Petitioner 28-30 with Brief for Respondents 18-24. They are in essential agreement, however, about the characteristics of a dividend. Thus, the Commissioner correctly argues that the "basic attribute of a dividend, derived from Sections 301 and 316 of the Code, is a pro rata distribution to shareholders out of corporate earnings and profits. When a distribution is made that is not a formal dividend, 'the fundamental test of dividend equivalency' is whether the distribution is proportionate to the shareholders' stock interests (*United States v. Davis,* 397 U.S. 301, 306 [90 S.Ct. 1041, 1044, 25 L.Ed.2d 323] (1970))." Brief for Petitioner 7. Citing the same authority, but with different emphasis, the taxpayer argues that "the hallmark of a non-dividend distribution is a 'meaningful reduction of the shareholder's proportionate interest in the corporation.' *United States v. Davis,* 397 U.S. 301, 313 [90 S.Ct. 1041, 1048, 25 L.Ed.2d 323] (1970)." Brief for Respondents 5.

Under either test, a prereorganization distribution by Basin to the taxpayer would have qualified as a dividend. Because the taxpayer was Basin's sole shareholder, any distribution necessarily would have been pro rata and would not have resulted in a "meaningful reduction of the [taxpayer's] proportionate interest in [Basin]."

6 Section 302 provides in relevant part:

"(a) General rule

"If a corporation redeems its stock (within the meaning of section 317(b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

"(b) Redemptions treated as exchanges

"(2) Substantially disproportionate redemption of stock

"(A) In general

"Subsection (a) shall apply if the distribution is substantially disproportionate with respect to the shareholder.

"(B) Limitation

"This paragraph shall not apply unless immediately after the redemption the shareholder owns less than 50 percent of the total combined voting power of all classes of stock entitled to vote.

"(C) Definitions

"For purposes of this paragraph, the distribution is substantially disproportionate if-

"(i) the ratio which the voting stock of the corporation owned by the shareholder immediately after the redemption bears to all of the voting stock of the corporation at such time,

"is less than 80 percent of-

"(ii) the ratio which the voting stock of the corporation owned by the shareholder immediately before the redemption bears to all of the voting stock of the corporation at such time.

"For purposes of this paragraph, no distribution shall be treated as substantially disproportionate unless the shareholder's ownership of the common stock of the corporation (whether voting or nonvoting) after and before redemption also meets the 80 percent requirement of the preceding sentence...."

As the Tax Court explained, receipt of the cash boot reduced the taxpayer's potential holdings in NL from 1.3% to 0.92%. 86 T.C. 138, 153 (1986). The taxpayer's holdings were thus approximately 71% of what they would have been absent the payment. *Ibid.* This fact, combined with the fact that the taxpayer held less than 50% of the voting stock of NL after the hypothetical redemption, would have qualified the "distribution" as "substantially disproportionate" under § 302(b)(2).

7 The Tax Court stressed that to adopt the pre-reorganization view "would in effect resurrect the now discredited 'automatic dividend rule' ..., at least with respect to pro rata distributions made to an acquired corporation's shareholders pursuant to a plan of reorganization." 86 T.C., at 152. On appeal, the Court of Appeals agreed. 828 F.2d 221, 226-227 (CA4 1987).

> The "automatic dividend rule" developed as a result of some imprecise language in our decision in *Commissioner v. Estate of Bedford,* 325 U.S. 283, 65 S.Ct. 1157, 89 L.Ed. 1611 (1945). Although *Estate of Bedford* involved the recapitalization of a single corporation, the opinion employed broad language, asserting that "a distribution, pursuant to a reorganization, of earnings and profits 'has the effect of a distribution of a taxable dividend' within [§ 356(a)(2)]." *Id.,* at 292, 65 S.Ct., at 1161. The Commissioner read this language as establishing as a matter of law that all payments of boot are to be treated as dividends to the extent of undistributed earnings and profits. See Rev.Rul. 56-220, 1956-1 Cum.Bull. 191. Commentators, see, *e.g.,* Darrel, The Scope of *Commissioner v. Bedford Estate,* 24 Taxes 266 (1946); Shoulson, Boot Taxation: The Blunt Toe of the Automatic Rule, 20 Tax L.Rev. 573 (1965), and courts, see, *e.g., Hawkinson v. Commissioner,* 235 F.2d 747 (CA2 1956), however, soon came to criticize this rule. The courts have long since retreated from the "automatic dividend rule," see, *e.g., Idaho Power Co. v. United States,* 161 F.Supp. 807, 142 Ct.Cl. 534, cert. denied, 358 U.S. 832, 79 S.Ct. 53, 3 L.Ed.2d 70 (1958), and the Commissioner has followed suit, see Rev.Rul. 74-515, 1974-2 Cum.Bull. 118. As our decision in this case makes plain, we agree that *Estate of Bedford* should not be read to require that all payments of boot be treated as dividends.

8 Because the mechanical requirements of subsection (b)(2) are met, we need not decide whether the hypothetical redemption might also qualify for capital gains treatment under the general "not essentially equivalent to a dividend" language of subsection (b)(1). Subsections (b)(3) and (b)(4), which deal with redemptions of all of the shareholder's stock and with partial liquidations, respectively, are not at issue in this case.

9 The Commissioner maintains that Basin "could have distributed a dividend in the form of its own obligation (see, *e.g.,* I.R.C. § 312(a)(2)) or it could have borrowed funds to distribute a dividend." Reply Brief for Petitioner 7. Basin's financial status, however, is nonetheless strong support for the Tax Court's conclusion that the cash payment was not a concealed dividend.

1 The Court of Appeals' zeal to excoriate the "automatic dividend rule" leads to an opposite rigidity-an automatic nondividend rule, even for pro rata boot payments. Any significant cash payment in a stock-for-stock exchange distributed to a sole shareholder of an acquired corporation will automatically receive capital gains treatment. Section 356(a)(2)'s exception for such payments that have attributes of a dividend disappears. Congress did not intend to handicap the Commissioner and courts with either absolute; instead, § 356(a)(1) instructs courts to make fact-specific inquiries into whether boot distributions accompanying corporate reorganizations occur on a pro rata basis to shareholders of the acquired corporation, and thus threaten a bailout of the transferor corporation's earnings and profits escaping a proper dividend tax treatment.

2 The majority's alternative holding that no statutory merger occurred at all-rather a taxable sale-is difficult to understand: All parties stipulate to the merger, which, in turn, was approved under West Virginia law; and Congress endorsed exactly such tax-free corporate transactions pursuant to its § 368(a)(1) reorganization regime. However apt the speculated sale analogy may be, if the April 3 Merger Agreement amounts to a sale of Clark's stock to NL, and not the intended merger, Clark would be subject to taxation on his full gain of over $10 million. The fracas over tax treatment of the cash boot would be irrelevant.

67 N.Y.2d 562
Court of Appeals of New York.

In the Matter of CAPITAL NEWSPAPERS DIVISION OF the HEARST CORPORATION et al., Respondents,
v.
T. Garry BURNS, as Records Access Officer for the Albany City Police Department, et al., Respondents,
and
James Tuffey, Intervenor-Appellant.

July 3, 1986.

Synopsis
Investigative reporter sought information as to absence from employment of particular police officer, and denial by city was affirmed on administrative appeal. Article 78 proceeding was brought to compel disclosure, and the Supreme Court, Special Term, Albany County, Klein, J., ordered disclosure. Officer, as intervenor, appealed. The Supreme Court, Appellate Division, 109 A.D.2d 92, 490 N.Y.S.2d 651, Mahoney, P.J., affirmed. On appeal by permission, the Court of Appeals, Simons, J., held that: (1) "Lost Time Report" was not exempt from disclosure under Freedom of Information Law.

Affirmed.

Attorneys and Law Firms

***563 ***577 **666** Mark T. Walsh, Jr., Albany, for intervenor-appellant.

Peter L. Danziger, Salvatore D. Ferlazzo, New York City and Thomas F. Gleason, Albany, for Capital Newspapers Div. of the Hearst Corp. and another, respondents.

***564** Robert Abrams, Atty. Gen. (Frank K. Walsh, Robert Hermann and Peter H. Schiff, Albany of counsel), for Division of State Police and another, amici curiae.

OPINION OF THE COURT

SIMONS, Judge.

Petitioner Cipriano is a newspaper reporter. In the course of investigating administrative and fiscal procedures in the City of Albany, he was informed that certain members of the Albany police force were abusing the sick leave privileges accorded them by the collective bargaining agreement their union had negotiated with the city. He attempted to verify this information by a series of requests under the Freedom of Information Law (FOIL; Public Officers Law art. 6) through which he sought access to police records containing "statistical or factual tabulations of data of the number of days and dates" on which certain named officers were absent from their scheduled employment. One of the requests concerned the records of Officer James Tuffey who was president of the local police officers' union. Cipriano's first request, for records of Tuffey's absences during January 1983, was granted by the City Hall Records Access Officer and he was informed that Tuffey had not taken any sick time during January 1983. All Cipriano's subsequent requests were denied.

This proceeding challenges only one of those denials, that ***565** which denied Cipriano's request for records containing statistical or factual tabulations of sick time taken by Officer Tuffey during the month of February 1983. The City Hall Records Access Officer denied access to those records, contending that disclosure would constitute an unwarranted invasion of personal privacy (*see,* Public Officers Law § 87[2][b]; § 89[2][b]). On administrative appeal, however, Cipriano's request was denied because the records were confidential and, absent the officer's consent or a court order, exempt from disclosure by Civil Rights Law § 50–a.

Petitioners, Cipriano and his employer, then instituted this article 78 proceeding to compel the police department to release the record of Tuffey's February sick time. Officer Tuffey moved to intervene in the proceeding and Special Term granted his request. The court thereafter examined in camera all records falling within the description of petitioners' FOIL request and ruled that the "Lost Time Report" was not *****578** a personnel record within the meaning of Civil Rights Law § 50–a and that its release did not constitute an unwarranted invasion of personal privacy. Accordingly, it ordered release of the "Lost Time

Report" in redacted form showing Tuffey's **667 absences from scheduled employment during February 1983. On appeal by the intervenor, the Appellate Division affirmed, 109 A.D.2d 92, 490 N.Y.S.2d 651, but on different grounds. It found the information part of intervenor's personnel record, but held, nonetheless, that the document should be released because Civil Rights Law § 50–a did not provide an exemption for FOIL requests, but rather was only intended to prevent a litigant in a civil or criminal action from obtaining documents in a police officer's file that are not directly related to that action. The Appellate Division also agreed with Special Term that release of the "Lost Time Report" would not be an unwarranted invasion of personal privacy.

There should be an affirmance. The redacted "Lost Time Report" is not exempt from disclosure by Civil Rights Law § 50–a and intervenor has failed to show that its disclosure would constitute an unwarranted invasion of privacy.

The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (*see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 79, 476 N.Y.S.2d 69, 464 N.E.2d 437). The statute, enacted in furtherance of the public's vested and *566 inherent "right to know", affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to "make intelligent, informed choices with respect to both the direction and scope of governmental activities" and with an effective tool for exposing waste, negligence and abuse on the part of government officers (*Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 [citing Public Officers Law § 84]).

To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 79–80, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra).* This presumption specifically extends to intraagency and interagency materials, such as the report sought in this proceeding, comprised of "statistical or factual tabulations or data" (*see,* Public Officers Law § 87[2][g][i]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (*see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra; Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463, *supra*).* Moreover, because FOIL has ***579 **668 made full disclosure by by *567 public agencies a public right, the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions. Finally, we note that, while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses (*see, Matter of Short v. Board of Managers,* 57 N.Y.2d 399, 404, 456 N.Y.S.2d 724, 442 N.E.2d 1235; *Matter of John P. v. Whalen,* 54 N.Y.2d 89, 94, 444 N.Y.S.2d 598, 429 N.E.2d 117).

Intervenor relies on two FOIL exemptions to resist disclosure of his "Lost Time Report" for February 1983. First, he argues that the document is a personnel record within the meaning of Civil Rights Law § 50–a and, as such, is exempt from disclosure under Public Officers Law § 87(2)(a). Second, he contends that release of the document is barred because it would constitute an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b).

FOIL provides that an agency may deny access to records, or portions of records, that "are specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87[2][a]). Intervenor urges that the "Lost Time Report" is a personnel record specifically exempted by Civil Rights Law § 50–a. That statute provides, in pertinent part, that: "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency * * * shall be considered confidential and not subject to inspection or review without the express written consent of such police officer except as may be mandated by lawful court order." Intervenor contends that even though no litigation involving him is pending this statute provides a blanket exemption foreclosing disclosure without his consent of any police personnel records used to evaluate his performance. Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection (*see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 81, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra; Matter of John*

P. v. Whalen, 54 N.Y.2d 89, 96–97, 444 N.Y.S.2d 598, 429 N.E.2d 117, *supra).* The legislative history does not indicate that the Civil Rights Law provision was enacted with the intention claimed by intervenor.

***568** Prior to the enactment of section 50–a, the confidentiality of police records was governed by common-law rules governing privileged "official information" which permitted public officials to withhold official records or communications under some circumstances (*see generally, Cirale v. 80 Pine St. Corp.,* 35 N.Y.2d 113, 117–119, 359 N.Y.S.2d 1, 316 N.E.2d 301; *People v. Keating,* 286 App.Div. 150, 153, 141 N.Y.S.2d 562 [Breitel, J.]). The privilege was said to be highly qualified, however, and the court could compel disclosure where it was necessary to avoid false testimony or to secure useful testimony (*see, People v. Keating,* 286 App.Div. 150, 153, 141 N.Y.S.2d 562, *supra* [citing 8 Wigmore, Evidence, at 756 [3d ed]). The enactment of the broad disclosure provisions of CPLR article 31 permitted parties to obtain evidence "material and necessary" to pending actions or proceedings and, as litigation involving municipalities and police officers multiplied, these provisions were used increasingly to obtain police records to attack police officers' credibility in pending litigation or for harassment purposes. Section 50–a was enacted to control that practice (*see,* Memorandum of Senator Padavan and Assemblyman De Salvio, and Memorandum *****580** of Division of Criminal Justice Services, Governor's Bill Jacket, L 1976, ch 413; *see also,* Assembly Debates, June 1, 1976, at 7335–7343; Opn of Committee on Public Access to Records [FOIL–AO–904], Sept. 6, 1978). We recognized that underlying purpose ****669** in *Carpenter v. City of Plattsburgh,* when we affirmed an Appellate Division determination that section 50–a "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (*Carpenter v. City of Plattsburgh,* 105 A.D.2d 295, 298, 484 N.Y.S.2d 284 [Main, J.], *affd. for reasons stated below* 66 N.Y.2d 791, 497 N.Y.S.2d 909, 488 N.E.2d 839).

The intent behind the legislation was reaffirmed in 1981 when the section was amended to extend its protections to local corrections officers (L.1981, ch. 778). The amendment was sponsored by Senator Marino, who had also been active in formulating the FOIL (*see generally,* Marino, New York Freedom of Information Law, 43 Fordham L.Rev. 83). His memorandum sponsoring the amendment to section 50–a stated that statutory protection should be expanded because: "The increasing number of legal actions brought by inmates and ex-inmates of correctional facilities has been accompanied by an increase in the number of requests from counsel representing them for unlimited access to personnel records of corrections officers. Corrections Officers are concerned that such unrestricted ***569** examinations of their personnel records increases their vulnerability to harassment or reprisals. To help alleviate this concern and to promote better relations between corrections officers and their governmental employers, this legislation imposes reasonable limitations on access to personnel records in the custody of a sheriff's office or county department of corrections." (1981 N.Y. Legis. Ann., at 419.)

Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law § 50–a was narrowly specific, "to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action" (*Matter of Capital Newspapers v. Burns,* 109 A.D.2d 92, 96, 490 N.Y.S.2d 651). In view of FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50–a should not be construed to exempt intervenor's "Lost Time Report" from disclosure by the police department in a nonlitigation context under Public Officers Law § 87(2)(a).

Intervenor contends that *Matter of Gannett Co. v. James,* 86 A.D.2d 744, 447 N.Y.S.2d 781, *lv. denied* 56 N.Y.2d 502, 450 N.Y.S.2d 1023, 435 N.E.2d 1099 holds otherwise. Indeed, in that case the Appellate Division did construe Civil Rights Law § 50–a as granting a blanket exemption from FOIL disclosure to police personnel records sought by a nonlitigating newspaper. The result reached by the court was clearly correct, however, for each of the requests purportedly exempted from disclosure by section 50–a in that case were also exempt under other FOIL provisions, namely Public Officers Law § 87(2)(e), (g); § 89(3) (*see, id.,* 86 A.D.2d pp. 745–746, 447 N.Y.S.2d 781). Thus, to the extent that the court held that section 50–a created a blanket exemption insulating police records from FOIL disclosure, its holding was unnecessary because statutory exemptions contained in other sections, which are generally available to public officials, adequately provided protection for the police in that case and should provide similar protection against future unwarranted requests. Insofar as the court in *Gannett* relied on a blanket exemption in section 50–a, it erred.

Intervenor Tuffey also claims that release of the "Lost

Time Report" would constitute an unwarranted invasion of personal privacy and, hence, the document is exempt from FOIL disclosure under Public Officers Law § 87(2)(b). He relies on two clauses of section 89(2)(b), which set out the characteristics of an unwarranted invasion of personal privacy. They provide that

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

*****581** "i. disclosure of employment, medical or credit histories or personal references of applicants for employment

****670** "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or".

As with all FOIL exemptions, intervenor has the burden of proving he is entitled to the exemption. He has not met that burden. Clause (i) of section 89(2)(b) is inapplicable to the disputed record because it is neither an employment history (although it records facts concerning employment) nor a medical history, and it does not come within any of the other listed categories. Nor has intervenor satisfied his burden of proving exemption under clause (iv) because his assertion that he will suffer "economic or personal hardship" if the "Lost Time Report" is released to the newspaper is conclusory and not supported by any facts (*see, Matter of Gannett Co. v. County of Monroe,* 59 A.D.2d 309, 312, 399 N.Y.S.2d 534, *affd. on opn. below* 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151).

In sum, Officer Tuffey has failed to demonstrate that the material requested by investigative reporter Cipriano comes squarely within a FOIL exemption such that the police department would be justified in barring access to the information by the public or the press.

Accordingly, the order of the Appellate Division granting release of the redacted "Lost Time Report" should be affirmed.

WACHTLER, C.J., and MEYER, KAYE, ALEXANDER, TITONE and HANCOCK, JJ., concur.

Order affirmed, with costs.

All Citations

67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576, 13 Media L. Rep. 2237

Footnotes

* Both the statute itself, and our case law interpreting it, speak only of the agency's burden of proof when its denial of disclosure to a FOIL applicant is challenged in an article 78 proceeding (*see, e.g.,* Public Officers Law § 89[4][b]; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 464 N.E.2d 437; *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). Here, neither the police department nor the City Hall Records Access Officer appealed the decision of Special Term to release the redacted "Lost Time Record". The appeal is prosecuted solely by intervenor Tuffey, and it is he who seeks to have this court apply a FOIL exemption to bar access to his records. We note that FOIL does not specifically grant a public employee the right to resist disclosure of agency records. The issue of intervenor's standing to prosecute this appeal is not before us, however, and the parties below consented to Tuffey's intervention to protect his interests in nondisclosure. Thus, on the record before us we do not reach the issue whether a public employee has a cause of action under FOIL to prevent disclosure (*compare, Carpenter v. City of Plattsburgh,* 105 A.D.2d 295, 484 N.Y.S.2d 284 [Main, J.], *affd. for reasons stated below* 66 N.Y.2d 791, 497 N.Y.S.2d 909, 488 N.E.2d 839). Nor do we reach the issue of whether an agency's failure to appeal from court-ordered release of agency records is tantamount to a nonreviewable discretionary decision on the part of the agency to release records it might have exempted from disclosure under Public Officers Law § 87(2)'s permissive exemption provision.

93 N.Y.2d 34
Court of Appeals of New York.

Charles E. COLE, Appellant–Respondent,
v.
MANDELL FOOD STORES, INC.,
Respondent and Third–Party
Plaintiff–Respondent.
United Steel Products, Third–Party
Defendant–Respondent–Appellant.

Feb. 16, 1999.

Synopsis

Supermarket customer who was injured when roll-up metal security gate fell and struck him sued supermarket, and supermarket brought third-party claim against manufacturer of gate. After jury returned verdict for customer finding manufacturer 80% at fault and supermarket 20% at fault, the Supreme Court, Kings County, Held, J., entered judgment that, in part, permitted customer to recover 100% of noneconomic damages from supermarket. Supermarket and manufacturer appealed, and the Supreme Court, Appellate Division, reversed in part, 242 A.D.2d 552, 662 N.Y.S.2d 89. Granting leave to appeal to customer and manufacturer, the Court of Appeals, Smith, J., held that: (1) customer's recovery of noneconomic damages from supermarket was limited by supermarket's equitable share of fault in view of customer's failure to plead an exception to general rule; and (2) jury was properly instructed on res ipsa loquitur with respect to supermarket's alleged negligence.

Judgment of Appellate Division affirmed.

Attorneys and Law Firms

*****598 *35 **244** Seligson, Rothman & Rothman, New York City (Alyne I. Diamond, Martin S. Rothman and Eugene A. Tomei of counsel), for appellant-respondent.

Steve S. Efron, New York City, for respondent and third-party plaintiff-respondent.

***36** Melito & Adolfsen, P.C., New York City (Ignatius John Melito of counsel), for third-party defendant-respondent-appellant.

***37 OPINION OF THE COURT**

SMITH, J.

In this personal injury action, the primary issue is whether a plaintiff seeking to recover noneconomic damages from a defendant whose liability is less than 50% may claim an exemption set forth in CPLR 1602 without pleading the exemption or seeking leave to amend the pleadings to include the allegation at any stage of the action. We answer this question in the negative. Plaintiff here failed *****599 **245** to satisfy his pleading burden and is therefore precluded from raising the issue on appeal. Moreover, on the cross appeal by third-party defendant, we conclude that Supreme Court properly submitted the case against defendant to the jury under the doctrine of res ipsa loquitur. Accordingly, we affirm the Appellate Division order.

I.

While plaintiff was entering a Key Food supermarket owned and operated by defendant Mandell Food Stores, Inc., a roll-up metal security gate, designed and manufactured by third-party defendant United Steel Products, unexpectedly descended, striking plaintiff on the head. As a result, plaintiff sustained serious injuries and instituted this negligence action against Mandell. Mandell, in turn, commenced a third-party action against United Steel seeking contribution. Plaintiff did not at any time sue United Steel.

Following a bifurcated trial, the jury returned a special verdict finding Mandell and United Steel jointly liable for plaintiff's injuries. The same jury apportioned 20% of the fault to Mandell and 80% to United Steel and awarded plaintiff (1) ***38** economic damages for the loss of past and future earnings in the amount of $230,000, which was reduced to $128,400 by collateral source contributions, and (2) noneconomic damages totaling $750,000 for past and future pain and suffering. Supreme Court denied the joint motion of Mandell and United Steel, pursuant to

CPLR 1601(1), to limit plaintiff's recovery for noneconomic loss to Mandell's equitable share of fault, or 20%, and permitted plaintiff to recover from Mandell the full amount of the judgment. Mandell and United Steel separately appealed.

On appeal, plaintiff averred for the first time that an exception to CPLR 1601(1) applied which precluded the court from limiting Mandell's liability to its equitable share of plaintiff's noneconomic loss. Specifically, plaintiff argued that Mandell, as owner and operator of premises open to the public, had a nondelegable duty to provide reasonably safe means of ingress to its supermarket (*see,* CPLR 1602[2][iv]).

The Appellate Division reversed, on the law, holding that Mandell was not liable to plaintiff for noneconomic loss in excess of its equitable share because plaintiff had not demonstrated an applicable exception to CPLR article 16 to preclude limiting Mandell's liability. In addition, the Court determined that Mandell was not entitled to contribution from United Steel for its proportionate share of the award (*Cole v. Mandell Food Stores,* 242 A.D.2d 552, 662 N.Y.S.2d 89). The Appellate Division concluded that plaintiff could, however, recover 100% of the economic loss from Mandell, and Mandell could then seek 80% contribution from United Steel (CPLR 1402). We granted plaintiff's motion and United Steel's cross motion for leave to appeal, and now affirm the Appellate Division order.

Enacted in 1986, CPLR article 16 modifies the traditional rule of joint and several liability (*see,* L.1986, ch. 682). Under the traditional rule, each tortfeasor is jointly and severally liable to the plaintiff for the full amount of plaintiff's damages regardless of each tortfeasor's degree of culpability (*Cooney v. Osgood Mach.,* 81 N.Y.2d 66, 76, 595 N.Y.S.2d 919, 612 N.E.2d 277). Under article 16, however, a personal injury defendant whose pro rata share of fault is 50% or less is liable for the plaintiff's noneconomic loss only to the extent of such proportionate share (CPLR 1601 [1]; *Sommer v. Federal Signal Corp.,* 79 N.Y.2d 540, 556, n. 6, 583 N.Y.S.2d 957, 593 N.E.2d 1365).

The limitation of liability prescribed in CPLR 1601(1) is inapplicable when any of 11 exceptions delineated in CPLR 1602 applies. Pursuant to CPLR 1603, a party asserting an ***39** exception to article 16 has the affirmative obligation of pleading and proving that exception by a preponderance of the evidence (CPLR 1603). The party asserting the limitation of liability has the burden of proving by a preponderance of the evidence that its share of the liability is 50% or less (*id.*).*

*****600 **246** Commentators have noted that CPLR 1603 can be "procedurally awkward" for plaintiffs (Alexander, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 1603, at 623; Siegel, N.Y.Prac. § 168D, at 255 [2d ed.]). Requiring a plaintiff to "allege and prove" an exception to CPLR 1601 (1) "would require the plaintiff to anticipate defendant's invocation of the Article 16 defense, which may not be possible" (Alexander, Practice Commentaries, *op. cit.,* at 623). Since CPLR 1603 does not articulate when a plaintiff must plead an exception to CPLR 1601(1) and, in keeping with the liberal rules of CPLR 3025, courts have generally permitted plaintiffs to amend the pleadings at various points throughout an action in order to comply with CPLR 1603 (*see, e.g., Detrinca v. De Fillippo,* 165 A.D.2d 505, 568 N.Y.S.2d 586; *Rubinfeld v. City of New York,* 170 Misc.2d 868, 652 N.Y.S.2d 688).

In this case, plaintiff recognizes that he failed to plead an exception to CPLR 1601(1) and that he never sought leave to amend the pleadings to include an exception. In fact, plaintiff first asserted that Mandell breached a nondelegable duty on appeal to the Appellate Division. Nonetheless, plaintiff urges that this omission was harmless because raising the exemption earlier would not have affected the legal theory of the case, but only the apportionment of damages. As such, plaintiff maintains that Mandell and United Steel were not prejudiced by introducing the exception on appeal. We disagree.

When the language of a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words (*People ex rel. Harris v. Sullivan,* 74 N.Y.2d 305, 309, 546 N.Y.S.2d 821, 545 N.E.2d 1209). The plain words of CPLR 1603 require a plaintiff seeking to recover noneconomic loss from a joint tortfeasor 50% or less liable in a personal injury action to ***40** "allege and prove by a preponderance of the evidence" that the limitation of liability delineated in CPLR 1601(1) does not apply (CPLR 1603). Implicit in this requirement is that a defendant potentially subject to the weight of a full judgment must have appropriate notice provided by pleadings.

Indeed, it is elementary that the primary function of a pleading is to apprise an adverse party of the pleader's claim (*see,* Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C3013:1, at 721) and to prevent surprise (*Matter of Pittsford Gravel Corp. v. Zoning Bd.,* 43 A.D.2d 811, 812, 350 N.Y.S.2d 480, *lv. denied* 34 N.Y.2d 618, 355 N.Y.S.2d 365, 311 N.E.2d 501; *Foley v. D'Agostino,* 21 A.D.2d 60, 62–63, 248

N.Y.S.2d 121). Absent such notice, a defendant is prejudiced by its inability to prepare a defense to the plaintiff's allegations (*see,* Siegel, N.Y.Prac. § 208, at 302 [2d ed.]).

Here, plaintiff concededly never pleaded an exception to CPLR 1601 as required by CPLR 1603. Moreover, plaintiff failed to amend his pleadings during the course of the action to notify Mandell and United Steel of his allegations. Plaintiff's novel argument on appeal that Mandell breached a nondelegable duty was never raised or argued at any point during trial. Therefore, bound by the clear language of the statute, we conclude that, having failed to meet this threshold requirement, plaintiff is barred from asserting the exception on appeal. To hold otherwise would abrogate the clear language of CPLR 1603. Moreover, the assertion by plaintiff that Mandell is liable for the full amount of the judgment by reason of a nondelegable duty to plaintiff required that Mandell have notice of such assertion so that it could prepare its defense or adjust its trial strategy. Failure to provide such notice cannot be deemed harmless.

II.

We have reviewed United Steel's cross appeal and conclude that Supreme Court properly submitted to the jury the case against Mandell under the doctrine of ***601 **247 res ipsa loquitur (*see, Kambat v. St. Francis Hosp.,* 89 N.Y.2d 489, 497–498, 655 N.Y.S.2d 844, 678 N.E.2d 456; *Dermatossian v. New York City Tr. Auth.,* 67 N.Y.2d 219, 227, 501 N.Y.S.2d 784, 492 N.E.2d 1200).

Accordingly, the Appellate Division order should be affirmed, with costs to defendant Mandell Food Stores, Inc. on plaintiff's appeal and with costs to plaintiff and defendant Mandell Food Stores, Inc. on the appeal by United Steel Products.

*41 Chief Judge KAYE and Judges BELLACOSA, CIPARICK and WESLEY concur.

Judges LEVINE and ROSENBLATT taking no part.

Order affirmed, etc.

All Citations

93 N.Y.2d 34, 710 N.E.2d 244, 687 N.Y.S.2d 598, 1999 N.Y. Slip Op. 01388

Footnotes

* CPLR 1603 provides:

> "In any action or claim for damages for personal injury a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies. A party asserting limited liability pursuant to this article shall have the burden of proving by a preponderance of the evidence its equitable share of the total liability."

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9 N.Y.3d 454
Court of Appeals of New York.

In the Matter of DATA TREE, LLC, Appellant, v. Edward P. ROMAINE, as Suffolk County Clerk, Respondent.

Dec. 18, 2007.

Synopsis
Background: Commercial provider of online public land records brought Article 78 proceeding to compel county clerk to produce electronic real estate records pursuant to the Freedom of Information Law (FOIL). The Supreme Court, Suffolk County, Michael F. Mullen, J., denied provider's request for production, and provider appealed. The Supreme Court, Appellate Division, 36 A.D.3d 804, 828 N.Y.S.2d 512,affirmed, and leave to appeal was granted.

Holdings: The Court of Appeals, Pigott, J., held that:

clerk had burden under FOIL to justify the denial of access to requested records;

provider's commercial motive was irrelevant and was an improper basis for clerk's denial of provider's request;

whether such records were exempt from disclosure as containing private information, such as social security numbers and dates of birth, was question of fact; and

whether disclosure of requested records could be accomplished by merely retrieving information already maintained electronically by the clerk's office or whether complying with request would require creating a new record was question of fact.

Reversed and remitted.

Attorneys and Law Firms

*****491** DLA Piper U.S. LLP, New York City (Andrew L. Deutsch of counsel), for appellant.

Christine Malafi, County Attorney, Hauppauge (Christopher A. Jeffreys of counsel), for respondent.

*****492** Cowan, Liebowitz & Latman, P.C., New York City (Robert W. Clarida of counsel), and Meyer, Klipper & Mohr, PLLC, Washington, D.C. (Michael R. Klipper, Christopher A. Mohr and David Ludwig of counsel), for American Business Media and others, amici curiae.

Levine Sullivan Koch & Schulz, L.L.B., New York City (David A. Schulz of counsel), for Advance Publications, Inc. and others, amici curiae.

Michael A. Cardozo, Corporation Counsel, New York City (Kristin M. Helmers and Alan G. Krams of counsel), for City of New York, amicus curiae.

***459 **13 OPINION OF THE COURT**

PIGOTT, J.

The issue presented on this appeal is whether the Suffolk County Clerk is required by the Freedom of Information Law (FOIL) to provide certain land records requested by Data Tree, LLC, a commercial provider of on-line public land records, and if so, whether the records must be provided in the electronic format specified by Data Tree. We hold that questions of fact exist as to whether compliance with such request would require the Clerk to disclose information excluded under the privacy exemption of FOIL and whether the Clerk has the ability to ***460** comply with the request in the format sought by Data Tree. Therefore, we reverse the Appellate Division order denying disclosure and remit the matter to Supreme Court for those determinations.

I.

Data Tree is a national company that provides on-line public land records such as deeds, mortgages, liens, judgments, releases and maps, and maintains a database

of nearly two billion documents, providing its customers with immediate electronic access to the information. Its customers are those entities who purchase, sell, finance and insure property. Data Tree obtains the public land records by requesting them from county clerks, or other public officials who have the responsibility of recording and archiving such documents, throughout the country.

In January 2004, Data Tree, pursuant to FOIL, wrote to the Records Access Officer of the Suffolk County Clerk's Office requesting copies of various public land records from January 1, 1983 to the present. It asked the Clerk to provide these records in "Tiff images or images in the electronic format regularly maintained by the County ... on CD–ROM or other electronic storage medium regularly used by the County ... If electronic images are not maintained, then [in] microfilm [format]."

The Clerk failed to respond to the request within the five-day period required by Public Officers Law § 89(3), thereby constructively denying the request. Upon Data Tree's administrative appeal, the Suffolk County Attorney also denied the request, identifying three reasons: (1) the FOIL request would require rewriting and reformatting of the data, which the Clerk's Office is not required to do; (2) disclosure would constitute an unwarranted invasion of personal privacy due to the volume of the records requested and the commercial nature of Data Tree's business; and (3) the records are available for copying and/or downloading from the computer terminals at the Clerk's Office.

Data Tree then brought the instant CPLR article 78 proceeding seeking a judgment directing the Clerk to provide the records sought along with costs and attorneys' fees.

Supreme Court held that "[t]he Clerk's Office has rightly denied petitioner's ****14** *****493** request (2005 WL 5970817, 2005 N.Y. Slip Op 30134[U], *3). It noted that many of the requested documents are available either by computer or in paper form at the Clerk's Office or on its Web site. Additionally, the court adopted the argument of the ***461** Clerk that the bulk of the remaining documents could not be transferred to the requested form (TIFF) or any other electronic medium without creating a new record. It noted that the Clerk's Office was not required to create a new record where none existed, "particularly when that would be at considerable expense to the taxpayers" (*id.* *4). Finally, the court granted Data Tree's application "for access ... to the extent the documents are maintained and available in the Clerk's Office, or on the internet" (*id.*). In essence, the court limited the relief sought by Data Tree to allowing it to attend the Clerk's Office during regular business hours and make individual copies of the public documents and/or download the documents available on the Internet at Data Tree's expense.

The Appellate Division affirmed, holding first that the Clerk's Office established an exemption to FOIL, namely, that disclosure of the documents sought would entail an unwarranted invasion of personal privacy (36 A.D.3d 804, 828 N.Y.S.2d 512 [2d Dept.2007]). The Appellate Division stated that the burden was on the Clerk to prove this exemption and that the Clerk here demonstrated "in a plausible fashion" that the exemption applied (*id.* at 805, 828 N.Y.S.2d 512). The court then shifted the burden to Data Tree to establish that the claim of exemption was erroneous or that the Clerk acted in an arbitrary and capricious manner in attempting to invoke an exemption. The court held that Data Tree failed to meet that burden, stating:

> "To the extent that the request was viewed by the Clerk as data mining, the Clerk determined that such request was clearly within the ambit of the enumerated exemptions to FOIL. In view of the rapid advances in technology, the misuse of that data for purposes unfathomable only a few short years ago is now possible. Whether such raw data (as opposed to the records actually maintained) should be available, and what constraints, if any, should be placed on that access, is a public policy better addressed by the appropriate legislative bodies" (*id.* at 805–806, 828 N.Y.S.2d at 513).

The Appellate Division noted that the right to access and copy such public records has not been construed to "require extraordinary efforts by the agency to provide the records in any manner requested and without regard to other statutorily mandated obligations to take prudent efforts to protect the guaranteed privacy interests of the citizens of the state" ***462** (*id.* at 806, 828 N.Y.S.2d at 513). Thus, it held that the Clerk's refusal was justified in this case both as to the burden imposed and the legitimate desire to protect the privacy of the citizens of Suffolk County. We granted Data Tree leave to appeal.

II.

FOIL provides the public with broad "access to the records of government" (Public Officers Law § 84). The term "record" is defined to include:

> "[A]ny information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, *but not limited to,* reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or ****15 ***494** codes" (Public Officers Law § 86[4] [emphasis supplied]).

An agency must "make available for public inspection and copying all records" unless it can claim a specific exemption to disclosure (*see* Public Officers Law § 87[2]; § 89[3]). However, the exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government (*Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen,* 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932 [1987]).

In denying Data Tree's FOIL request, the Clerk relied in part on the privacy exemption, which authorizes each agency to deny access to records or portions of such records that, if disclosed, would constitute an "unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]). The law defines an "unwarranted invasion of personal privacy" with a nonexclusive list of examples (*see* Public Officers Law § 89[2][b][i]-[vi]).

Data Tree contends that the Appellate Division used an improper burden-shifting analysis to determine whether the privacy exemption applied in this case. We agree. FOIL is based on a presumption of access to the records, and an agency (in this case the Clerk) carries the burden of demonstrating that the exemption applies to the FOIL request (*see* Public Officers Law § 89[4] [b]; *Matter of Hanig v. State of N.Y Dept. of Motor Vehs.,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 [1992]). Contrary to the Appellate Division's view, the Clerk must meet this burden in more than just a "plausible fashion." In order to deny disclosure, the Clerk must show that the requested information "falls squarely within ***463** a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665 [1986]; *see Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 464 N.E.2d 437 [1984]; *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 [1979]). If the Clerk fails to prove that a statutory exemption applies, FOIL "compels disclosure, not concealment" (*Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 580, 430 N.Y.S.2d 574, 408 N.E.2d 904 [1980]). In short, the burden of proof rests solely with the Clerk to justify the denial of access to the requested records.

Similarly, it was error for the Appellate Division to conclude that as a matter of law the Clerk met its burden in establishing that the privacy exemption to FOIL applies in this case. Although the court failed to articulate the specific basis for its holding, it remarked that Data Tree is a commercial enterprise and was seeking the documents for "data mining" purposes. However, FOIL does not require the party requesting the information to show any particular need or purpose (*see Matter of Daily Gazette Co. v. City of Schenectady,* 93 N.Y.2d 145, 156, 688 N.Y.S.2d 472, 710 N.E.2d 1072 [1999]; *Farbman,* 62 N.Y.2d at 80, 476 N.Y.S.2d 69, 464 N.E.2d 437). Data Tree's commercial motive for seeking the records is therefore irrelevant in this case and constitutes an improper basis for denying the FOIL request.

We note, however, that motive or purpose is not always irrelevant to a request pursuant to FOIL. Public Officers Law § 89(2)(b)(iii) includes as an "unwarranted invasion of personal privacy" the "sale or release of lists of names and addresses *if such lists would be used for commercial or fund-raising purposes*" ****16 ***495** (emphasis added; *see Matter of Federation of N.Y. State Rifle & Pistol Clubs v. New York City Police Dept.,* 73 N.Y.2d 92, 538 N.Y.S.2d 226, 535 N.E.2d 279 [1989] [organization's request denied under FOIL for use in direct mail membership solicitation of names and addresses of persons holding rifle or shotgun permits]). That particular exemption does not apply in this case however because Data Tree is not seeking a list of names and addresses to solicit any business. Rather, Data Tree is seeking public land records for commercial reproduction on line.

We conclude that a question of fact exists in this case as to whether the privacy exemption applies to the records because some of the documents requested may contain private information, such as Social Security numbers and dates of birth (*see Matter of Seelig v. Sielaff,* 201 A.D.2d 298, 607 N.Y.S.2d 300 [1st Dept.1994] [release ***464** of officers' Social Security numbers in response to request pursuant to FOIL constituted unwarranted invasion of officers' privacy]). However, even when a document subject to FOIL contains such private, protected information, agencies may be required to prepare a redacted version with the exempt material removed (*see* Public Officers Law § 89[2][c][i]; *see e.g. Matter of Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse,* 65 N.Y.2d 294, 491 N.Y.S.2d 289, 480 N.E.2d 1071 [1985]). We therefore remit this matter to Supreme Court to determine (upon an in camera inspection of a representative sample of the documents, if necessary)

whether any of the records contain information exempt from disclosure on the basis of privacy, and whether that information can be redacted.

III.

As another basis for its denial of disclosure, the Clerk contends that Data Tree's FOIL request requires the creation of a new record. An agency is not required to create records in order to comply with a FOIL request, as Public Officers Law § 89(3)(a) provides: "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity." Thus, an agency has no obligation to accommodate a request to compile data in a preferable commercial electronic format when the agency does not maintain the records in such a manner.

Nonetheless, FOIL does not differentiate between records stored in paper form or those stored in electronic format. As stated earlier, the term "record" means, among other things, "computer tapes or discs." Disclosure of records is not always necessarily made by the printing out of information on paper, but may require duplicating data to another storage medium, such as a compact disc.* Thus, if the records are maintained electronically by an agency and are retrievable with reasonable effort, that agency is required to disclose the information. In ***465** such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium. On the other hand, if the ****17 ***496** agency does not maintain the records in a transferable electronic format, then the agency should not be required to create a new document to make its records transferable. A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document.

This does not mean, however, that an agency must accord a commercial entity any more or less access to records than any other citizen. Section 89(3) of the Public Officers Law requires that upon receipt of a request, an agency has five business days in which it must either grant access to the records, deny access or furnish a written acknowledgment of the receipt of such request. When such acknowledgment is given, it must include a statement of the approximate date when the request will be granted or denied. Further, Public Officers Law § 87 provides that the agency may establish procedures including the time and place when such records will be made available, the persons from whom such records may be obtained and the fees for copies of records. Thus, there is no specific time period in which the agency must grant access to the records. Indeed, the time needed to comply with the request may be dependent on a number of factors, including the volume of the request and the retrieval methods. Therefore, complying with a commercial entity's request for an enormous number of records may require substantial time and expense by the Clerk's Office and may not, absent an agreement providing otherwise, require the Clerk to provide such records in a time other than that which is reasonable in view of the attendant circumstances.

[3] Here, the Clerk argues that he does not maintain the information in the electronic form requested by Data Tree. The Clerk submitted the affidavit of the Director of Optical Imaging for the Suffolk County Clerk's Office who avers that the Clerk's Office would need to have a separate computer program written that would permit the information to be readable on a compact disc or other electronic means. He further states that under the current computer system he is unable to redact all of the private information prior to reproduction. In response, Data Tree proffered the affidavit of its senior software engineer, who claims, by giving examples, that the Clerk could comply with the FOIL request without any computer programming. Further, Data Tree ***466** emphasizes that its FOIL request merely asks that the records be provided in any "electronic format regularly maintained by the County." Based on these submissions, questions of fact exist as to whether disclosure may be accomplished by merely retrieving information already maintained electronically by the Clerk's Office or whether complying with Data Tree's request would require creating a new record.

Further, privacy concerns may also exist with respect to the information contained in the electronic format requested by Data Tree. If such information cannot be reasonably redacted from the electronic records, then such records may not be subject to disclosure under FOIL. We therefore remit the matter to Supreme Court to consider these issues in determining whether the Clerk must comply by providing the records in an electronic format requested by Data Tree.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, without costs, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

**18 ***497 Chief Judge KAYE and Judges CIPARICK, GRAFFEO, READ, SMITH and JONES concur.

Order, insofar as appealed from, reversed, etc.

All Citations

9 N.Y.3d 454, 880 N.E.2d 10, 849 N.Y.S.2d 489, 36 Media L. Rep. 1394, 2007 N.Y. Slip Op. 09906

Footnotes

* Indeed, the Legislature contemplated disclosure by electronic means when Public Officers Law § 89(3) was amended by adding a new paragraph (b) to read:

> "All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form."

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139 Misc.2d 790
Supreme Court, Albany County, New York.

In the Matter of the application of Joan Simon FAULKNER, Shakkim Allah, and Ruben Rodriguez, Petitioners,
For a Judgment Pursuant to Article 78 of the CPLR,
v.
Stephen DEL GIACCO, Public Information Officer, State Commission of Correction; William G. McMahon, Chairman, State Commission of Correction, Respondents.

May 20, 1988.

Synopsis
Prison inmates brought Article 78 proceeding to challenge denial of their freedom of information law request to discover state commission's investigatory file concerning prison disturbance. The Supreme Court, Albany County, Keniry, J., held that certain intra-agency documents were exempt from discovery, but inmate statements and names of guards accused of inappropriate behavior were discoverable.

Petition granted in part and denied in part.

Attorneys and Law Firms

****255 *791** Joan Simon Faulkner, petitioner *pro se,* Prisoners' Legal Services of New York, Plattsburgh, for petitioners.

Robert Abrams, Atty. Gen. (Steven H. Schwartz, of counsel), Albany, for respondents.

Opinion

****256** WILLIAM H. KENIRY, Justice.

The petitioners, two inmates in the custody of the New York State Department of Correctional Services (DOCS) and a staff attorney with Prisoners' Legal Services of New York, have initiated this CPLR Article 78 proceeding to challenge the denial of their Freedom of Information Law (FOIL) request by the respondents, employees of the State Commission of Corrections (the Commission). The request sought the Commission's "entire investigatory file" concerning a July 8, 1986 melee in the north yard of the Clinton Correctional Facility resulting in injuries to a number of inmates and guards. The Commission initiated an investigation of the incident. The FOIL request was granted to the extent that the Commission supplied records from its files which the petitioners had already secured from DOCS. The remainder of the Commission's investigatory file was classified as exempt from disclosure under Public Officers Law § 87(2)(b), (e), (f) and (g). This proceeding then ensued.

The respondents move to dismiss in point of law upon the ground that the petition fails to state a cause of action.

***792** The respondents have submitted the documents in question for the court's *in camera* review (see *Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 490 N.Y.S.2d 488, 480 N.E.2d 74). The documents fall into three categories: handwritten notes, comments and observations prepared by Commission employees; an inter-office memorandum prepared by a Commission employee and what appears to be an unsigned, undated report commenting on the underlying incident; and signed statements by four inmates (including the petitioners Allah and Rodriguez) wherein they identify certain guards by name who allegedly assaulted them. It is clear, based upon the petitioners' reply affirmation dated March 17, 1988, that the above-enumerated documents are the records that the petitioners seek access to.

Article 6 of the Public Officers Law imposes a broad standard of disclosure upon the State and its agencies (*Matter of Capital Newspapers v. Burns,* 67 N.Y.2d 562, 565, 505 N.Y.S.2d 576, 496 N.E.2d 665). However, the Freedom of Information Law is not absolute and does exempt certain records from public scrutiny. Exemptions are specified in Public Officers Law § 87(2). The Court of Appeals has held "that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Newsday, Inc. v. Sise,* 71 N.Y.2d 146, 150, 524 N.Y.S.2d 35, 518 N.E.2d 930; *Matter of Capital Newspapers v. Whalen,* 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932). The burden of demonstrating that material is exempt from disclosure rests on the agency resisting disclosure which must articulate "a particularized and specific justification for denying access" (*Matter of Konigsberg v. Coughlin,* 68

N.Y.2d 245, 251, 508 N.Y.S.2d 393, 501 N.E.2d 1; *Matter of Capital Newspapers v. Burns,* supra, 67 N.Y.2d at 566, 505 N.Y.S.2d 576, 496 N.E.2d 665).

Guided by the above principles, the court must determine whether the records sought by the petitioners are exempt from disclosure. The respondents in their submissions to the court rely upon three of the statutory exemptions, Public Officers Law § 87(2)(b), (e) and (g).[1] That statute reads, in pertinent part, as follows:

> 2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:
>
> (b) if disclosed would constitute an unwarranted invasion ***793** of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
>
> ****257** (e) are compiled for law enforcement purposes and which, if disclosed would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
>
> (g) 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, including but not limited to audits performed by the comptroller and the federal government;

The court has carefully reviewed the documents in question and has considered the legal arguments presented by both sides. With respect to the Commission documents categorized as staff handwritten notes, comments and observations and the inter-office memorandum and report, the court concludes that such documents fall within the exception set forth in Public Officers Law § 87(2)(g). Such intra-agency documents are not subject to FOIL discovery unless they are statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations or external audits. The notes and memoranda in this case pertain to the Commission's investigation of the prison melee. They do not reflect any final agency determination but rather contain subjective comments and observations of Commission staffers. To release such information would be inappropriate since these records are clearly predecisional material prepared to assist the Commission in making a final determination (see *Matter of Kheel v. Ravitch,* 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118; *Matter of Bray v. Mar,* 106 A.D.2d 311, 482 N.Y.S.2d 759; *Matter of Miller v. New York State Dept. of Health,* 91 A.D.2d 975, 457 N.Y.S.2d 564; *Sinicropi v. County of Nassau,* 76 A.D.2d 832, 428 N.Y.S.2d 312, lv. denied 51 N.Y.2d 704, 432 N.Y.S.2d 1028, 411 N.E.2d 797). In view of the court's conclusion that such records are exempt as intra-agency material, it need not reach the merits of the respondents' other claims of exemption.

***794** The court reaches a different conclusion with respect to the four inmate statements and finds that the petitioners are entitled to copies of those documents. Contrary to the Commission's claims, those signed statements do not constitute investigator's notes and thus cannot be classified as intra-agency material. The statements simply recite factual claims made by alleged assault victims.

The respondents next argue that the inmate statements are exempt under Public Officers Law § 87(2)(e) as being compiled for law enforcement purposes. The respondents have failed to substantiate this particular exemption. There is no proof in the record that such statements were gathered specifically for law enforcement purposes and there is no indication in the record that any criminal proceedings have been initiated or are even contemplated. The case of *Hawkins v. Kurlander,* 98 A.D.2d 14, 469

N.Y.S.2d 820, cited by the respondents involved an actual criminal investigation into suspicious hospital deaths wherein certain witnesses gave statements to the District Attorney under a promise of confidentiality. In this case, the statements were given by the alleged victims wherein they identified their alleged assailants. There is no indication that confidentiality was promised or expected. The statements set forth factual information and do not contain any exempt information. The mere fact that the signed statements were obtained by a Commission investigator does not transform them into intra-agency material (see *Ingram v. Axelrod,* 90 A.D.2d 568, 456 N.Y.S.2d 146).

****258** The court also finds no basis to support the claim that releasing the names of guards accused of inappropriate behavior is an unwarranted invasion of their personal privacy under Public Officers Law § 89(2). Such allegations do not fit within any of the five statutory definitions of the personal privacy exemption. The petitioners are therefore entitled to copies of the four signed inmate statements.

Petitioners also seek an award of attorney's fees and costs pursuant to Public Officers Law § 89(4)(c) which provides as follows:

> The court in such a proceeding 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, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> ***795** i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record.

The assessment of attorney's fees and costs lies within the sound discretion of the court (*Matter of McAndrew v. Board of Educ.,* 120 A.D.2d 591, 502 N.Y.S.2d 70).

The application is denied. The petitioners have not substantially prevailed in this proceeding even though the court has granted some relief to them.

The petition is granted without costs to the extent that the respondent is directed to provide the petitioners with copies of the four signed inmate statements. In all other respects, the petition is denied.

All Citations

139 Misc.2d 790, 529 N.Y.S.2d 255

Footnotes

1 The Commission has apparently abandoned its contention that discovery is also precluded under Public Officers Law § 87(2)(f).

47 N.Y.2d 567
Court of Appeals of New York.

In the Matter of Robert S. FINK,
Appellant-Respondent,
v.
Louis J. LEFKOWITZ, as
Attorney-General,
Respondent-Appellant.

July 10, 1979.

Synopsis
Action was brought under Freedom of Information Law to compel release of office manual by deputy attorney general and special prosecutor for nursing homes. The Supreme Court, Special Term, New York County, Arnold L. Fein, J., granted the application and attorney general appealed. The Supreme Court, Appellate Division, 63 A.D.2d 569, 404 N.Y.S.2d 610, modified and leave to appeal was granted. The Court of Appeals, Cooke, C. J., held that provisions of manual which set forth confidential techniques used in successful nursing home prosecutions were exempt from disclosure under the Freedom of Information Law.

Affirmed as modified.

Attorneys and Law Firms

***568 ***469 **464** Leonard R. Rosenblatt, Brooklyn, for appellant-respondent.

Charles J. Hynes, Deputy Atty. Gen. (Arthur Weinstein, New York City, of counsel), for respondent-appellant.

***569** OPINION OF THE COURT

COOKE, Chief Judge.

Petitioner commenced this proceeding to compel release of the office manual of the Deputy Attorney-General and Special Prosecutor for Nursing Homes pursuant to the Freedom of Information Law (Public Officers Law, art. 6). The issue posed is whether certain portions of the manual that reveal confidential methods used for investigating nursing home fraud are exempt from disclosure pursuant to section 87 (subd. 2, par. (e), cl. iv) of the Public Officers Law.

In 1974, amid widespread reports of patient abuse, Medicaid fraud and inadequate governmental supervision of the nursing home industry in the State, the Commissioners of the Departments of Health and Social Services requested the Attorney-General to investigate and prosecute offenses committed in connection with the operation of these health care facilities. Early the following year, Charles J. Hynes was appointed Deputy Attorney-General and Special Prosecutor to lead this investigation into "the rampant corruption in nursing homes" (Matter of Hynes v. Moskowitz, 44 N.Y.2d 383, 396, 406 N.Y.S.2d 1, 8, 377 N.E.2d 446, 453). Subsequently, on February 7, 1975, the Governor promulgated an executive order (9 NYCRR 3.4) pursuant to subdivision 8 of section 63 of the Executive Law significantly expanding the jurisdiction of the Special Prosecutor, directing him to investigate "criminal violations committed in connection with or in any way related to the management, control, operation, or funding of any nursing home" (see Matter of Sigety v. Hynes, 38 N.Y.2d 260, 263-265, 379 N.Y.S.2d 724, 728, 342 N.E.2d 518, 521, cert. den., Kent Nursing Home v. Office of Special State Prosecutor for Health and Social Service, 425 U.S. 974, 96 S.Ct. 2174, 48 L.Ed.2d 798).

Shortly after taking office, the Special Prosecutor compiled a comprehensive office manual entitled "Materials on the Nursing Home Investigation" for the use of his staff. The first three chapters of the manual provided an overview of the nursing home industry, chronicling past abuses which necessitated creation of the office of the Special Prosecutor and explaining the Medicaid reimbursement system. Chapter IV contained a step-by-step guide to an investigation and audit of ***570** a nursing home, including specific illustrations of some of the techniques and procedures which had proven successful in detecting nursing home fraud. The final chapter contained a "sample nursing home investigation", featuring the audit and investigative reports that had lead to a successful prosecution by the Deputy Attorney-General.

On February 11, 1977, petitioner, an attorney for several nursing homes, requested a copy of the manual pursuant

to the former ****465** version of the Freedom of Information Law (L.1974, chs. 578-580). Upon refusal of respondent to disclose the manual, this article 78 proceeding was commenced. Special Term conducted an In camera inspection of the documents and found them to be *****470** within the definition of disclosable "administrative staff manuals and instruction to staff that affect members of the public" provided by former section 88 (subd. 1, par. e) of the Public Officers Law. In so holding, the court rejected respondent's assertion that the manual was exempt from disclosure as "part of investigatory files compiled for law enforcement purposes" (former Public Officers Law, s 88, subd. 7, par. d (L.1974, ch. 579, s 3)).

While respondent's appeal was pending before the Appellate Division, there occurred a number of developments which significantly altered the posture of the case. Although the order of Special Term had been statutorily stayed pending appeal (CPLR 5519, subd. (a), par. 1), respondent voluntarily disclosed the first three chapters of the manual as well as substantial portions of chapter IV. In addition, petitioner was informed that the manual had been revised and was furnished with the new pages corresponding to those materials previously disclosed. Most significant, effective January 1, 1978, the Legislature reenacted the Freedom of Information Law (L.1977, ch. 933), clarifying what were perceived to be troublesome areas in the prior law. Both sides agree that the current version of the statute governs resolution of the questions presented on this appeal.

The Appellate Division modified the order of Special Term, concluding that chapter V of the manual and the still undisclosed portions of chapter IV were exempt from disclosure (63 A.D.2d 569, 571, 404 N.Y.S.2d 610, 612). Both sides appealed to this court: petitioner as of right (CPLR 5601, subd. (a)); respondent, seeking to withhold an additional four and one-half pages of chapter IV ordered disclosed by the Appellate Division, by permission of that court (CPLR 5602, subd. (a), par. 1, cl. (i)).

***571** Crucial to the determination of this case is an appreciation of the function of the documents petitioner seeks in the context of the purpose and operation of the Freedom of Information Law. That act, of course, proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Thus, the statute affords the public the means to attain information concerning the day-to-day operations of State government. By permitting access to official information long shielded from public view, the act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities (see Public Officers Law, s 84). Moreover, judicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, "to hold the governors accountable to the governed" (NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159).

But while the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential. To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, s 87, subd. 2). Thus, the agency does not have carte blanche to withhold any information its pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for In camera inspection, to exempt its records from disclosure (see Church of Scientology of N. Y. v. State of New York, 46 N.Y.2d 906, 908, 414 N.Y.S.2d 900, 901, 387 N.E.2d 1216). Only where the *****471** material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.

****466** Respondent seeks to avoid disclosure of portions of its office manual, claiming that it has the right to "deny access to records or portions thereof that: * * * are compiled for law enforcement purposes and which, if disclosed, would: * * * reveal criminal investigative techniques or procedures, except routine techniques and procedures" (***572** Public Officers Law, s 87, subd. 2, par. (e), cl. iv).* The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm. (2nd Cir.) 460 F.2d 813, 817, cert. den. 409 U.S. 889, 93 S.Ct. 125, 34 L.Ed.2d 146). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body

charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan (5th Cir.) 476 F.2d 699, 702; Hawkes v. Internal Revenue Serv. (6th Cir.) 467 F.2d 787, 794-795; Daivs, Administrative Law (1970 Supp.), s 3A, p. 114).

Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice (8th Cir.) 576 F.2d 1302, 1307-1308; City of Concord v. Ambrose (D.C.) 333 F.Supp. 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling ***573** miscreants to alter their books and activities to minimize the possibility of being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe.

Tested by these criteria, and after an In camera inspection of the documents withheld by respondent, we find that the information petitioner seeks on its direct appeal should not be disclosed. Chapter V of the Special Prosecutor's manual provides a *****472** graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are "routine" in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong. 2d Sess. (1974)). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been ****467** less than exemplary. Similarly, the portions of chapter IV of the manual ordered withheld by the Appellate Division pinpoint numerous factors which should alert an investigator that something is awry. To permit disclosure of these time-tested techniques which have led to numerous successful prosecutions would have a dramatic impact on law enforcement investigations by alerting prospective defendants to the course those inquiries would be likely to take. An unscrupulous nursing home operator aware of these factors would naturally try to channel irregularities into other avenues or erect obstacles in the path of investigation.

These same considerations apply with equal force to page 305 and the last item on page 336 and page 337 of the manual, which are the subject of respondent's cross appeal. Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increases in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed.

Accordingly, the order of the Appellate Division should be ***574** modified, with costs to respondent, by affirming so much of that order encompassed by petitioner's appeal, and reversing so much of that order as directed respondent to disclose page 305 and the last item on page 336 and page 337 of the office manual of the Deputy Attorney-General and Special Prosecutor for Nursing Homes.

JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

Order modified, with costs to the respondent, in accordance with the opinion herein and, as so modified, affirmed.

All Citations

47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467, 5 Media L. Rep. 1581

Footnotes

* The legislative history of the Freedom of Information Law indicates that many of its provisions, including the exemption at issue here, were patterned after the Federal analogue (U.S.Code, tit. 5, s 552, subd. (b), par. (7), cl. (E); see letters of Senators Anderson and Marino, Governor's Bill Jacket to 16-A). Accordingly, Federal case law and legislative history on the scope of this exemption are instructive.

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2020 WL 5893817
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Ikeem FOWLER-WASHINGTON,
Plaintiff,
v.
CITY OF NEW YORK, et al., Defendants.

19-CV-6590(KAM)(JO)
|
Signed 10/05/2020

Attorneys and Law Firms

Amy Rameau, The Rameau Law Firm, Brooklyn, NY, for Plaintiff.

Christopher Dominick DeLuca, New York City Law Department, New York, NY, for Defendants.

MEMORANDUM AND ORDER

KIYO A. MATSUMOTO, United States District Judge:

***1** This is a civil rights action brought pursuant to 42 U.S.C. §§ 1983 and 1988 in which the plaintiff, Ikeem Fowler-Washington ("Plaintiff"), alleges that police officers from the New York City Police Department ("NYPD") used excessive force while arresting him at his home in 2017.[1] Presently before the court are Defendants' objections to discovery orders dated August 12 and September 2, 2020 issued by Magistrate Judge James Orenstein, which directed Defendants to produce various personnel records concerning the NYPD officers who are named as defendants. (ECF No. 47, Motion to Set Aside.)

For the reasons that follow, Defendants' objections are granted in part and denied in part. The personnel records requested by Plaintiff regarding the named defendants' work and disciplinary history at the NYPD are relevant and were properly ordered to be produced under the terms of a protective order, but Defendants are permitted to redact the records to protect certain limited categories of private information described below.

Background

Plaintiff alleges that on December 16, 2017, NYPD officers entered his home at 6:00 a.m. while he was sleeping, and used excessive physical force prior to arresting him. (ECF No. 14, Amended Complaint, ¶¶ 40-41.) Plaintiff alleges that the officers hit him in his face with an object, causing "deep gashes" that required stitches, and also struck multiple blows to his body. (*Id.* ¶¶ 42-46.)

On August 3, 2020, Plaintiff filed a motion seeking to compel discovery of "all of the documents and materials in [Defendants'] possession concerning the personnel records of the defendants including but not limited to CCRB records, IAB records, performance evaluations, records of disciplinary proceedings, [and] Chief of Department records, in light of the recent repeal of Civil Rights Law 50a."[2] (ECF No. 35, Motion for Discovery, at 1.) Defendants opposed the motion, insofar as it sought unredacted records. (*See* ECF No. 36, Response in Opposition.) Magistrate Judge Orenstein held a status conference on August 12, 2020, at which he granted the motion to compel discovery and ordered that the records be produced by August 19, "subject to the parties' agreement that social security numbers and birth dates will be kept confidential and available for review only by counsel." (ECF No. 37, Minute Entry.)

Following Magistrate Judge Orenstein's initial ruling, Defendants sought a stay of his order until Defendants filed objections to it pursuant to Federal Rule of Civil Procedure 72 ("Rule 72"). (ECF No. 38, Motion to Stay.) Magistrate Judge Orenstein granted in part and denied in part the motion to stay, ordering that the records still had to be produced by August 19, but that production of the records would be subject to Defendants' proposed stipulation of confidentiality and protective order (to which Plaintiff had not yet agreed) until a ruling was issued on Defendants' objections. (ECF Dkt. Order Aug. 18, 2020.) Defendants complied and produced the records. The proposed stipulation and protective order required, *inter alia*, Plaintiff's counsel to "keep confidential for 'attorney's eyes only' names, addresses, telephone numbers, social security numbers, dates of birth, and other identifying personal information" that was contained in the records. (ECF No. 40, Proposed Stipulation of Confidentiality, ¶ 5.)

***2** On August 26, 2020, Defendants filed a request for a pre-motion conference that was misdirected to the undersigned, rather than to Magistrate Judge Orenstein, to discuss an "anticipated motion for reconsideration of Judge Orenstein's August 12, 2020 Order." (ECF No. 43, Motion for Pre-Motion Conference, at 1.) The court denied the motion without prejudice on procedural grounds, because Defendants were seeking reconsideration before the undersigned of Magistrate Judge Orenstein's August 12, 2020 order (rather than filing objections with the undersigned under Rule 72). (ECF Dkt. Order Aug. 31, 2020.) Defendants then filed a motion for reconsideration directed to Magistrate Judge Orenstein (ECF No. 44, Motion for Reconsideration), which he denied on September 2, 2020, finding that Defendants "ha[d] not established that in making the challenged ruling [he] overlooked any matters or controlling decisions." (ECF Dkt. Order Sept. 2, 2020.)

On September 16, 2020, Defendants filed the instant objections, and on September 17, Defendants filed a supplemental letter in support of their objections. (ECF No. 47, Motion to Set Aside; *see* ECF No. 48, Defendants' Memorandum in Support ("Mem."; ECF No. 49, Supplemental Letter in Support ("Supp. Let.").) Plaintiff responded in opposition to the objections. (ECF No. 50, Response in Opposition ("Opp.").)

Legal Standard

Under Rule 72, "[a] party may serve and file objections to [a magistrate judge's non-dispositive] order within 14 days after being served with a copy." Fed. R. Civ. P. 72(a). "The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.* "[T]he magistrate judge's findings should not be rejected merely because the court would have decided the matter differently." *Alvarado v. City of New York*, No. 04-cv-2558, 2009 WL 510813, at *1 (E.D.N.Y. Feb. 27, 2009) (Mauskopf, C.J.). Rather, under the "clearly erroneous" or "contrary to law" standard, the "court must affirm the decision of the magistrate judge unless the district court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

Discussion

I. Timeliness of Objections

As an initial matter, Plaintiff argues that Defendants' objections are untimely, given that the initial order to which Defendants object was issued by Magistrate Judge Orenstein on August 12, but Defendants did not file the instant objections until September 16. (Opp. at 3.) The court finds that Defendants' objections are timely for two reasons. First, though misdirected to the undersigned and erroneously characterized as an effort to seek a pre-motion conference, rather than as objections to Magistrate Judge Orenstein's order, the pre-motion conference request cited Rule 72 and was filed on August 26, which was 14 days after Magistrate Judge Orenstein's initial August 12 order. The court denied that request without prejudice because it indicated that Defendants sought leave to move for reconsideration, a request that should have been directed to the judge issuing the order, but Defendants' request still notified the court of Defendants' general intention to file objections under Rule 72, and did so within 14 days of the August 12 order. Second, as advised, Defendants moved for reconsideration before Magistrate Judge Orenstein on September 1, 2020 (ECF No. 44, Motion for Reconsideration), Magistrate Judge Orenstein denied that motion on the merits by docket order on September 2, 2020, and Defendants then filed the instant objections within 14 days of that denial.[3] The court will therefore consider objections to Magistrate Judge Orenstein's denial of the motion for reconsideration, even though doing so requires the court to also review his original August 12 order.

***3** The court will turn to the merits of Defendants' objections and assess whether Magistrate Judge Orenstein's discovery orders were "clearly erroneous" or "contrary to law."

II. Discoverability of Police Personnel Records

Under Federal Rule of Civil Procedure 26 ("Rule 26"), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case...." Fed. R. Civ. P. 26(b)(1). "Because of the interest in broad discovery, the party opposing the discovery of relevant information, whether through a privilege or protective order, bears the burden of showing that based on the balance of interests the information should not be disclosed." *Collens v. City of New York*, 222 F.R.D. 249,

253 (S.D.N.Y. 2004).

There is no doubt that the personnel records regarding the NYPD work histories of the officers involved in the alleged incident giving rise to this lawsuit are relevant, and are thus discoverable under Rule 26. Any disciplinary matters, CCRB complaints, past accusations of excessive force (whether exonerated, unsubstantiated, or unfounded), or other wrongdoing implicating the honesty of the defendant officers would clearly be relevant to Plaintiff's allegations. *See id.* at 254 (a "plaintiff will be able to investigate the defendant's prior conduct as an officer"). The extent to which such records will be admissible at trial is a question for another day. The question before the court, which is one under Rule 26, is merely whether the records are *relevant* to a claim or defense.

Moreover, by repealing Section 50-a, the State of New York has legislatively required that police officers' personnel records should be available to the public. Plaintiff directs the court's attention to a filing made by the City of New York in a case in the Southern District of New York in which the police union sought to enjoin the release of personnel records, and the City urged disclosure in light of the repeal of Section 50-a and "the clear intent of that legislative action, which was to increase transparency by permitting the disclosure of ... disciplinary records (unsubstantiated, exonerated, and unfounded allegations)...." (Opp., Ex. 1 at 1.)

If police personnel records are available to the public, they are certainly available to civil rights plaintiffs if relevant to the litigation under Rule 26.

III. Need for Redactions

Determining that the records are discoverable does not end the inquiry, because the right to obtain police officers' personal information is not unlimited. Indeed, Magistrate Judge Orenstein's initial order to produce the documents required that "social security numbers and birth dates will be kept confidential and available for review only by counsel." (ECF Dkt. Order Aug. 12, 2020.) Subsequently, Magistrate Judge Orenstein ordered that the records be produced pursuant to Defendants' proposed stipulation of confidentiality and protective order, which restricted the following personal information to attorney's eyes only for use in the instant action: "names, addresses, telephone numbers, social security numbers, dates of birth, and other identifying personal information of witnesses...." (ECF Dkt. Order, Aug. 18, 2020; ECF No. 40, Proposed Stipulation of Confidentiality, ¶ 5.)

***4** Defendants assert that the records that were produced pursuant to Magistrate Judge Orenstein's orders contain unredacted personal identifying information, including "social security numbers, pension information, spousal identifying information, religious affiliations, home addresses, phone numbers, and photos" (Mem. at 6.), the disclosure of which in unredacted form is contrary to the body of law governing production of police officers' records. The court agrees that such information should not be disclosed.

In his well-reasoned opinion on this topic in *King v. Conde*, Judge Jack B. Weinstein wrote that "plaintiffs in federal civil rights actions are presumptively entitled to ... documents on prior complaints and police history," "*except for* reasonable redactions of names and addresses to protect privacy...." 121 F.R.D. 180, 198 (E.D.N.Y. 1988) (emphasis added). Courts in this circuit have subsequently followed Judge Weinstein's guidance, and ordered redactions of police officers' records to protect their privacy where the information was not relevant to the plaintiff's claims. *See Cody v. New York State Div. of State Police*, No. 07-cv-3735, 2008 WL 3252081, at *4 (E.D.N.Y. July 31, 2008) ("any information of a personal nature, such as social security numbers, personal telephone numbers, and home addresses should be permitted redact[ed]"); *Collens*, 222 F.R.D. at 254 ("[D]isclosure of an officer's home address may be required in individual cases where there is a need for such disclosure," but "in this case the plaintiff's interests in obtaining the officer's home address are extremely weak.").

Plaintiff argues, without citing any authority, that defendants in civil rights actions routinely use personal identifying information of plaintiffs to conduct thorough investigations into the plaintiff's background. (*See* Opp. at 6.) It is only fair, Plaintiff avers, that plaintiffs also be allowed to investigate the defendant officers' backgrounds. (*Id.*) However, Plaintiff has not identified how social security numbers, birth dates, home addresses, or other personal information is relevant to his case, or would lead to the discovery of information relevant to any claims or defenses. Plaintiff has a right to the officers' records to the extent they show past performance as an NYPD officer, including misconduct or discipline. But there is no right in civil litigation, even under the broad discovery obligations imposed by Rule 26, to gain access to private information, such as social security numbers, home addresses, the or names of family members, that is not otherwise relevant to an officer's performance on the

job.

The recent repeal of Section 50-a does not alter this analysis. Though the repeal of Section 50-a allows the public to access certain records, New York's Freedom of Information Law requires redaction of a police officer's social security number, home address, personal telephone numbers and email addresses, and medical history. N.Y. Pub. Off. Law §§ 87(4-a); 89(2-b). Because Plaintiff has not articulated a clear basis for how extensive personal information would be relevant, and federal courts have long recognized a need to protect police officers' private information, the production of records in this case should have excluded or redacted certain personal identifying information.

For purposes of applying this Memorandum and Order, Defendants should redact personal identifying information *only* if it falls into one of the following categories: social security numbers, dates of birth, home addresses, and the names of family members.[4] In addition, the redacted records that are produced shall continue to be restricted to attorney's eyes only.

***5** If Plaintiff comes to believe that a particular piece of personal identifying information that was redacted would be relevant to his claims, Plaintiff may file a motion, directed to the magistrate judge, to compel production of that specific piece of information.

* * *

Finally, the court will take a moment to directly address the gravamen of Defendants' argument. Defendants cited in their objections an article about the recent shooting of two police officers in Los Angeles as an example demonstrating "that law enforcement is under siege." (Mem. at 14.) Two days after filing their objections, Defendants filed a supplemental letter, notifying the court of an attack on a police officer at his home in New Jersey that, according to Defendants, was an example of "law enforcement officers' personal information such as home addresses ... being used so that acts of violence can be carried out against them." (Supp. Let. at 1.)

Any act of violence against a police officer, or any public official, is unwarranted and tragic. The court notes, however, that Defendants have made no showing of how the disclosure of records pertaining to the police officer defendants in this matter, to a single plaintiff's attorney under an "attorney's eyes only" protective order forbidding the disclosure of any of the officers' personal information, is in any way linked to these heinous crimes in California and New Jersey. The court appreciates and understands the City of New York's desire to protect the safety of its police officers, as all citizens should. But Defendants' insinuation that the records produced here could lead to similar violent acts against these officers because, as Defendants put it, "information gets leaked" (Mem. at 13), was misguided, and can only inflame an already difficult situation in this city.

Defendants ask this court to "order [P]laintiff's counsel to certify that she has not disclosed any of the defendants' [personal identifying information] documents to anyone – including, without limitation, [P]laintiff or members of the plaintiffs' bar." (*Id.*) Any such disclosure would have violated the protective order of Magistrate Judge Orenstein and would be subject to contempt. The court need not separately order Plaintiff's counsel to comply with a court order; complying with court orders is expected of all counsel in all cases, and any violation will result in sanctions or other measures.

Conclusion

For the foregoing reasons, Defendants' requests that the court set aside the orders of August 12, 2020 and September 2, 2020 are GRANTED. In addition, Plaintiff's counsel is ORDERED to promptly destroy or return all copies of the records that were produced in unredacted form pursuant to those orders, and to certify as an officer of the court that she has done so. Defendants are ORDERED to produce the same records, with redactions of social security numbers, dates of birth, home addresses, and the names of family members, by no later than October 16, 2020. The remainder of Defendants' objections and requests are DENIED.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 5893817

Footnotes

1 The named defendants in this action are the City of New York and several NYPD officers and detectives (collectively, "Defendants").

2 New York Civil Rights Law § 50-a ("Section 50-a") was a state law that barred public access to police officer's disciplinary and personnel records. Its repeal was signed by New York Governor Andrew Cuomo on June 12, 2020.

3 Plaintiff argues that Magistrate Judge Orenstein's order denying the motion for reconsideration found that the order was "moot," and thus Defendants are effectively filing objections to only the August 12 order. (Opp. at 3.) However, Magistrate Judge Orenstein's September 2 order found that a separate motion to extend discovery filed by Defendants was moot, but denied the motion for reconsideration on the merits because Defendants did not point to any matters or controlling law he overlooked. (*See* ECF Dkt. Order Sept. 2, 2020.)

4 The court finds that social security numbers, dates of birth, home addresses, and the names of family members are the most sensitive categories of information of all the personal information that Defendants contend are contained in the records, and that information may be redacted. Personal telephone numbers, email addresses, medical information, and other personal identifying information should not be redacted, but is restricted to attorney's eyes only.

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89 N.Y.2d 267
Court of Appeals of New York.

In the Matter of Khalib GOULD,
Appellant,
v.
NEW YORK CITY POLICE
DEPARTMENT et al., Respondents.
In the Matter of Harold SCOTT,
Appellant,
v.
NEW YORK CITY POLICE
DEPARTMENT, Respondent.
In the Matter of Joseph F. DeFELICE ex
rel., on Behalf of Christopher BARBERA,
Appellant,
v.
NEW YORK CITY POLICE
DEPARTMENT, Respondent.

Nov. 26, 1996.

Synopsis
Criminal defendant brought Article 78 petition challenging police department's denial of Freedom of Information Law (FOIL) request for police officers' memo books and complaint follow-up reports. The Supreme Court, New York County, Tolub, J., denied petition. Petitioner appealed. The Supreme Court, Appellate Division, 223 A.D.2d 468, 636 N.Y.S.2d 1009, affirmed. Petitioner appealed. In separate proceeding, criminal defendant brought Article 78 petition to compel police department's disclosure of police officer's memo book and other records under FOIL. The Supreme Court, New York County, McCooe, J., denied application. Petitioner appealed. The Supreme Court, Appellate Division, 225 A.D.2d 338, 638 N.Y.S.2d 612, affirmed. Petitioner appealed. In separate proceeding, criminal defendant filed FOIL application challenging police department's denial of access to complaint follow-up reports and police officer's memo book. The Supreme Court, New York County, Cohen, J., granted department's motion to dismiss. Applicant appealed. The Supreme Court, Appellate Division, 226 A.D.2d 176, 640 N.Y.S.2d 536,affirmed. Applicant appealed. After consolidation, the Court of Appeals, Ciparick, J., held that: (1) police complaint follow-up reports were not entitled to blanket exemption to FOIL as intraagency material; (2) police activity logs were available under FOIL; but (3) applicant's conjecture that documents existed some ten years ago was insufficient to establish existence of records sought.

Two holdings reversed, one holding affirmed as modified.

Bellacosa, J., filed dissenting opinion.

Attorneys and Law Firms

*****55 *269 **809** Rosemary Herbert, E. Joshua Rosenkranz and Richard M. Greenberg, New York City, for appellant in the first above–entitled proceeding.

*****56 **810** Steven B. Wasserman, Robert M. Baum, Daniel L. Greenberg and Laura R. Johnson, New York City, for appellant in the second above–entitled proceeding.

***270** Joseph F. DeFelice, Kew Gardens, pro se.

Paul A. Crotty, Corporate Counsel of New York City (Margaret G. King and Barry P. Schwartz, of counsel), New York City, for respondents in first, second and third above–entitled proceedings.

***271** Robert M. Baum, Steven B. Wasserman and Laura R. Johnson, New York City, for Legal Aid Society, amicus curiae in the first above–entitled proceeding

***272** Charles J. Hynes, District Attorney of Kings County, Brooklyn (Roseann B. MacKechnie, Virginia C. Modest and Thomas M. Ross, of counsel), for New York State District Attorneys Association, amicus curiae in the first, second and third above–entitled proceedings.

OPINION OF THE COURT

CIPARICK, Associate Judge.

The three separate proceedings on appeal all involve petitioners' efforts, pursuant to the Freedom of Information Law (FOIL), to obtain documents relating to their arrests from the New York City Police Department.

In response to petitioners' FOIL requests, the Police Department furnished assorted documents to petitioners, but refused to disclose complaint ***273** follow-up reports (commonly referred to as DD5's) and police activity logs (commonly referred to as memo books). We hold that the complaint follow-up reports are not categorically exempt from disclosure as intra-agency material and that the activity logs are agency records subject to the provisions of FOIL. Consequently, we remit these proceedings to Supreme Court to determine whether the Police Department can make a particularized showing that a statutory exemption applies to justify nondisclosure of the requested documents.

I.

In *Matter of Gould,* 223 A.D.2d 468, 636 N.Y.S.2d 1009 attorneys for petitioner Khalib Gould submitted a FOIL request to the Police Department for all documents pertaining to his arrest and the related police investigation leading to his conviction for murder in the second degree and attempted murder in the second degree. In response, the Police Department furnished arrest, complaint and ballistic reports to Gould, but withheld complaint follow-up reports on the ground that the reports are exempt from FOIL production as intra-agency material and withheld police activity logs on the ground that the logs are the officers' personal property. Gould instituted a CPLR article 78 proceeding challenging the Police Department's decision, which was dismissed by Supreme Court. The Appellate Division unanimously affirmed.

In *Matter of DeFelice,* 226 A.D.2d 176, 640 N.Y.S.2d 536, petitioner Christopher Barbera, through his attorney, requested police reports relating to his 1993 arrest that led to his conviction for attempted murder in the second degree and assault in the first degree. The Police Department provided Barbera with complaint reports, property vouchers, and arrest reports, but refused to produce the requested complaint follow-up reports and activity logs. On Barbera's CPLR article 78 challenge, Supreme Court upheld the Police Department's action, finding that the complaint follow-up reports and activity logs are exempt intra-agency material. The Appellate Division unanimously affirmed.

In *Matter of Scott,* 225 A.D.2d 338, 638 N.Y.S.2d 612, petitioner Harold Scott, in a series of FOIL requests, sought Police Department documents relating to his 1983 arrest and subsequent conviction for rape and homicide. In response to the latest of these requests, the Police Department refused to produce police activity logs and interviews of witnesses who had testified at Scott's criminal trial on the ground that the documents are exempt from disclosure under FOIL and further informed Scott that all ***274** other responsive documents had been provided to him in response to prior FOIL requests. On Scott's subsequent CPLR article 78 challenge, Supreme Court upheld the Police Department's refusal to produce the activity *****57 **811** logs, but ordered the Department to disclose the interview reports. As to Scott's request for additional documents which the Police Department certified it did not possess, Supreme Court denied the petition concluding that Scott only speculated that these documents existed. On Scott's appeal, the Appellate Division unanimously affirmed, holding that police activity logs are exempt intra-agency material and that the Police Department's certification sufficed to establish the nonexistence of other records. This Court granted leave to appeal in all three proceedings.

II.

To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public (*see,* Public Officers Law § 84 [legislative declaration]). Moreover, access to government records does not depend on the purpose for which the records are sought. We recognize that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is governed generally by CPL article 240 as well as the *Rosario* and *Brady* rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such a categorical limitation into the statute (*see,* Public Officers Law § 87[2][a]; *accord, Matter of Farbman & Sons v New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 81, 476 N.Y.S.2d 69, 464 N.E.2d 437 [absent an express provision or unequivocal legislative intent so indicating, CPLR article 31—the civil litigation disclosure article—is not a statute specifically exempting public records from disclosure under FOIL]).[1]

All government records are thus presumptively open for public inspection and copying unless they fall within one of ***275** 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" (*Matter of Hanig v. State of New York Dept. of Motor Vehicles,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750; *see,* Public Officers Law § 89[4][b]). As this Court has stated, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (*Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

In keeping with these settled principles, blanket exemptions for particular types of documents are inimical to FOIL's policy of open government (*accord, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 569, 505 N.Y.S.2d 576, 496 N.E.2d 665). Instead, to invoke one of the exemptions of section 87(2), the agency must articulate "particularized and specific justification" for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra,* 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 480 N.E.2d 74; ****812** *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra,* *****58** 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437).

Despite these principles, the courts below relied on the case of *Matter of Scott v. Chief Med. Examiner of City of N.Y.,* 179 A.D.2d 443, 577 N.Y.S.2d 861, *lv denied* 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, *cert denied* 506 U.S. 891, 113 S.Ct. 259, 121 L.Ed.2d 190 as establishing a blanket exemption from FOIL disclosure for complaint follow-up reports and police activity logs. We conclude that this was error and hold, first, that the complaint follow-up reports are not entitled to a blanket exemption as intra-agency material, and, second, that the police activity logs are agency "records" available under FOIL. In addition, we hold that the Police Department adequately established the nonexistence of other documents requested by petitioner Scott. Accordingly, we reverse in *Gould* and *DeFelice,* modify in *Scott,* and remit in all three proceedings for Supreme Court to determine, upon an in camera inspection if necessary, whether the Police Department can make a particularized showing that any claimed exemption applies.

***276** A.

A complaint follow-up report is a form document on which a police officer "report[s] additional information concerning a previously recorded complaint" (New York City Police Dept Patrol Guide § 108–8). The courts below held that the Police Department properly withheld these reports under the intra-agency exemption, which provides that an "agency may deny access to records or portions thereof 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" (Public Officers Law § 87[2][g]). Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree.

Initially, we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute *nonfinal* intra-agency material, irrespective of whether the information contained in the reports is "factual data" (*see, Matter of Scott v. Chief Med. Examiner of City of N.Y.,* 179 A.D.2d 443, 444, 577 N.Y.S.2d 861, *supra* [citing Public Officers Law § 87(2)(g)(iii)]). However, under a plain reading of section 87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. 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 (*see, Matter of Farbman & Sons v New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra; Matter of MacRae v. Dolce,* 130 A.D.2d 577, 515 N.Y.S.2d 295).

The question before us, then, is whether the complaint follow-up reports contain "factual data." Although the term "factual data" is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is " 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' " (*Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [quoting *Matter of Sea Crest Constr. Corp. v. Stubing,* 82 A.D.2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of "statistical or factual tabulations or data" (***277** Public Officers Law § 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or

advice exchanged as part of the consultative or deliberative process of government decision making (*see, Matter of Johnson Newspaper Corp. v. Stainkamp,* 94 A.D.2d 825, 827, 463 N.Y.S.2d 122, *mod on other grounds* 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613; *Matter of Miracle Mile Assocs. v. Yudelson,* 68 A.D.2d 176, 181–182, 417 N.Y.S.2d 142).

Against this backdrop, we conclude that the complaint follow-up reports contain substantial ***59 **813** factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated "details" in which the officer records the particulars of any action taken in connection with the investigation.

However, the Police Department argues that any witness statements contained in the reports, in particular, are not "factual" because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase "factual data," as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (*see, Matter of Ingram v. Axelrod,* 90 A.D.2d 568, 569, 456 N.Y.S.2d 146 [ambulance records, list of interviews, and reports of interviews available under FOIL as "factual data"]). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made. In this connection, we are well aware that an indeterminate amount of data collected during a criminal investigation may find its way into police files regardless of whether it ultimately proves to be reliable, credible, ***278** or relevant. Disclosure of such documents could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures. The statutory exemptions contained in the Public Officers Law, however, strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files (*see, e.g.,* Public Officers Law § 87[2][b], [e], [f]).

B.

We next address the Police Department's refusal to disclose police activity logs. The Police Department, which is indisputably an "agency" for FOIL purposes (*see,* Public Officers Law § 86[3]), contends that the activity logs are the officers' personal property and, therefore, not agency "records." We disagree. Because the activity logs contain "information kept [or] held * * * for an agency," they are "records" available under FOIL (Public Officers Law § 86[4]).[2]

Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York* ***60 **814** *State Ins. Dept.,* 61 N.Y.2d 557, 564–565, 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation and turned over to Insurance Department for inspection, are "records" under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless "kept [or] held" by the officers for the Police Department, which places these ***279** documents squarely within the statutory definition of "records" (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.,* 87 N.Y.2d 410, 417, 639 N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see,* Public Officers Law § 87[1][b][iii]), the activity logs are agency records available under the provisions of FOIL.

C.

Supreme Court did not abuse its discretion in concluding that the Police Department adequately established the nonexistence of additional records requested by petitioner Scott. Once the records access officer for the Police Department certified to Supreme Court that the Police Department had provided Scott with all responsive documents in its possession, Scott was required to articulate a demonstrable factual basis to support his contention that the requested documents existed and were within the Police Department's control (*see, Matter of Calvin K. v. De Francesco,* 200 A.D.2d 619, 608 N.Y.S.2d 850; *Matter of Ahlers v. Dillon,* 143 A.D.2d 225, 226, 532 N.Y.S.2d 22). Scott's conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue.

Finally, we note the Police Department's argument and the dissent's concern that the requests serve not the underlying purposes of FOIL, but the quite different private interests of petitioners in obtaining documents bearing on their cases and will produce an enormous administrative burden. This argument, however, is unavailing as the statutory language imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved. Should the Legislature see fit to do so, it might, as the dissent suggests, amend the statute to balance the rights accorded.

Accordingly, the order in *Gould* should be reversed, with costs, the order in *DeFelice* should be reversed, with costs, and the order in *Scott* should be modified, without costs, and, as so modified, affirmed, and all three proceedings remitted to Supreme Court for further proceedings in accordance with the opinion herein.

BELLACOSA, Judge (dissenting).

The Freedom of Information Law (FOIL) (Public Officers Law § 84 *et seq.*) and this Court's implementing and interpretive precedents (*see, e.g., Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.,* 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302; ***280** *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437) combine to produce an unintended and anomalous set of results in these cases (*see, New York State Bankers Assn. v. Albright,* 38 N.Y.2d 430, 438, 381 N.Y.S.2d 17, 343 N.E.2d 735; *Doctors Council v. New York City Employees' Retirement Sys.,* 71 N.Y.2d 669, 675, 529 N.Y.S.2d 732, 525 N.E.2d 454).

The net practical result is a super-discovery tool affecting criminal proceedings by overarching application of FOIL. This overshadows this Court's many specific precedents governing disclosure in criminal proceedings and the specific, calibrated remedies of the CPL (art 240) (*see, e.g., People v. Mobil Oil Corp.,* 48 N.Y.2d 192, 200, 422 N.Y.S.2d 33, 397 N.E.2d 724 [general statutory provisions apply only where particularized statutory provisions do not]; McKinney's Cons Laws of N.Y., Book 1, Statutes § 238). It also evokes serious concern that systemic overload and inordinate delays in police departments and courts will result. Occasional FOIL efforts are more likely now to be encouraged and pursued as standard operating practice. File-by-file FOIL reviews and evaluations *****61 **815** in virtually every criminal case will be the standing orders of the day, with many personnel displaced from other direct-line duties to process and evaluate eligibility, compliance, confidentiality, privilege, safety, security, and redactions galore in connection with massive document turnovers. The validation of this new staple of discovery is not within FOIL's purpose and contemplated effectuation, though the acronym forecasts an ironic set of consequences.

For these reasons and with the shared hope that legislative attention will be alerted promptly to restore, at least prospectively, a fair and sensible balance of proportionate rights in this discovery field, I respectfully dissent and vote to affirm.

The fundamental policy underlying FOIL is the "people's right to know the process of governmental decision-making and to review the documents and statistics *leading to determinations* " made by government (Public Officers Law § 84 [emphasis added]). The focus of this fresh and open air reform is to provide the public with access to the same information used by public officials to arrive at official "determinations." This statutory focus should be key in interpreting the interagency exemption contained in Public Officers Law § 87(2)(g) as applied to these cases.

The petitioners here argue that criminal complaint follow-up reports (DD5's) and the personal memo books of individual police officers are subject to and not exempt from FOIL because ***281** they are "statistical or factual tabulations or data" (*see,* Public Officers Law § 87[2][g][i]). This proffered interpretation fails to consider

this subsection of the statute in its particular context and full import (*New York State Bankers Assn. v. Albright,* 38 N.Y.2d 430, 436–438, 381 N.Y.S.2d 17, 343 N.E.2d 735, *supra*). Public Officers Law § 87(2)(g) additionally subjects three other categories of interagency materials to disclosure: instructions to staff that affect the public, final agency policy or determinations, and external audits. Thus, this subsection focuses on subjecting to disclosure only those internal agency documents which pertain to official actions affecting the public generally. This limitation is further understood by reference to other subsections of the statute specifically exempting evidence compiled for law enforcement purposes in certain circumstances and where disclosure would risk life or safety (*see,* Public Officers Law § 87[2][e], [f]).

The latter specifications are markedly different from those here. The contents of investigatory files which contain raw information gathered for the purposes of criminal investigation, and potentially prosecution, do not constitute the type of information upon which official determinations and actions are taken in the context framed and intended by FOIL. Raw evidence acquired by the police has not been "tabulated," or processed, but simply recorded. As such, it has not been filtered or subjected to any analysis, verification or protective shielding by the relevant agency under specific regulatory guidelines.

This Court, in effect, shifts the emphasis of FOIL so that it will functionally eclipse the nuanced procedural safeguards governing disclosure in criminal matters, as such. This is done with no evidence that the Legislature ever contemplated by language or history this significant joint availability.

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra,* need not be applied so inexorably and extended in this fashion. In *Farbman,* this Court held that records which were subject to disclosure under FOIL could not be withheld merely because the requestor was a civil litigant against the agency, and rejected a blanket exemption from FOIL based on CPLR article 31 (*id.,* at 78, 80–81, 476 N.Y.S.2d 69, 464 N.E.2d 437). That holding relied on especially the fact that " 'the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced * * * nor restricted * * * because he is also a litigant or potential litigant' " (*id.,* at 82, 476 N.Y.S.2d 69, 464 N.E.2d 437, quoting *Matter of John P. v. Whalen,* 54 N.Y.2d 89, 99, 444 N.Y.S.2d 598, 429 N.E.2d 117 [citations omitted]).

***282** In these cases, the official respondents do not seek exemption from FOIL because the petitioners are defendants in criminal proceedings, but because of the interagency *****62 **816** nature of the requested documents themselves (DD5's and officers' memo books). Interestingly and perhaps ironically, the rule of this case should entitle victims, and others, to disclosure of these same materials under a fair-game-for-all application of these enhanced FOIL principles. That may well multiply the administrative difficulty and, perhaps, even impossibility of compliance.

Substantial public policy considerations underlie the encouragement of and incentives for members of the community to be forthcoming with information serving the investigation of criminal activity and the apprehension and prosecution of criminals. Accurate and complete recordkeeping by officers is also important. Granting general access to raw observations, suppositions, notations and opinions, as in these cases, cannot well serve those overriding objectives in the criminal jurisprudence arena.

Thus, I vote to affirm in each case.

In *Matter of Gould v. New York City Police Dept.* and *Matter of DeFelice v. New York City Police Dept.:* Order reversed, with costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

KAYE, C.J., and SIMONS, TITONE, SMITH and LEVINE, JJ., concur with CIPARICK, J.

BELLACOSA, J., dissents and votes to affirm in a separate opinion.

In *Matter of Scott v. New York City Police Dept.:* Order modified, without costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

KAYE, C.J., and SIMONS, TITONE, SMITH and LEVINE, JJ., concur with CIPARICK, J.

BELLACOSA, J., dissents in part and votes to affirm in a separate opinion.

All Citations

89 N.Y.2d 267, 675 N.E.2d 808, 653 N.Y.S.2d 54, 25 Media L. Rep. 1104

Footnotes

1 The dissent reads *Farbman* to stand primarily for the proposition that an individual's status as a litigant in an action against a governmental entity does not preclude reliance on FOIL. Although the Court did make this important point in *Farbman,* the Court also concluded, as an independent ground of decision, that "[g]iven FOIL's purpose, its broad implementing language, and the narrowness of its exemptions, [CPLR] article 31 cannot be read as a blanket exception from its reach. * * * Nowhere in FOIL * * * is there specific reference to records already subject to production under article 31, and no provision of FOIL bars simultaneous use of both statutes" (62 N.Y.2d, at 81, 476 N.Y.S.2d 69, 464 N.E.2d 437). Because CPL article 240 likewise fails to specifically exempt criminal-disclosure documents from FOIL, we are, just as in *Farbman,* not free to disregard the open-government mandate of FOIL based on what is perceived as some generalized tension between FOIL and a distinct statutory disclosure scheme.

2 Although it was suggested in the courts below that police activity logs could be withheld under the privacy and intra-agency exemptions (*see,* Public Officers Law § 87[2][b], [g]), the Police Department does not advance these positions on appeal. Neither does the Police Department make the argument that *all* documents relating to law enforcement are categorically exempt from FOIL. Indeed, the Police Department acknowledges that it routinely discloses law-enforcement documents pursuant to FOIL requests, which is evidenced not only by the arrest, complaint, and ballistic reports turned over to petitioners herein, but also by the myriad lower court cases evaluating whether the Police Department justifiably withheld particular law-enforcement documents requested under FOIL.

47 N.Y.2d 639
Court of Appeals of New York.

In the Matter of the INDUSTRIAL COMMISSIONER OF the State of New York, Respondent, v. FIVE CORNERS TAVERN, INC., Respondent, and Manufacturers Hanover Trust Company, Appellant.

July 9, 1979.

Synopsis
Industrial commissioner brought action to obtain court order directing lender-bank to remit money in judgment debtor's account. The Supreme Court, New York County, Irving Kirschenbaum, J., entered judgment for commissioner, and appeal was taken. The Supreme Court, Appellate Division, First Department, 60 A.D.2d 528, 400 N.Y.S.2d 510, affirmed, and permission to appeal was granted. The Court of Appeals, Jasen, J., held that where lender-bank was given as security for the loan a continuing lien and/or right of setoff upon borrower's deposits with the lender, and loan agreement further provided that upon entry of judgment, issuance of order of attachment, making a tax assessment, or an execution against borrower's property, the indebtedness to lender would become immediately due and payable, the depository bank's statutory right of setoff was not extinguished by service of a tax compliance agent's levy pursuant to statute providing judgment creditors with procedure for levying upon an interest of judgment debtor in personal property not capable of delivery or upon any debt owed a judgment debtor by a third party.

Reversed.

Attorneys and Law Firms

***641 ***932 **1006** Whitney North Seymour, Jr., Roy L. Reardon and Thomas M. Bistline, New York City, for appellant.

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OPINION OF THE COURT

JASEN, Judge.

In this case, we are called upon to determine whether a depository bank's statutory right of setoff (Debtor and Creditor Law, s 151) is extinguished by service of a tax compliance agent's levy pursuant to CPLR 5232 (subd. (a)).

The facts are not in dispute. In February, 1976, appellant Manufacturers Hanover Trust Company (hereinafter Manufacturers) extended a loan of approximately $1,800 to its depositor, Five Corners Tavern, Inc. (hereinafter Five Corners), to enable the latter to secure a liquor license. Pursuant *****933** to the ***643** terms of the loan agreement, Manufacturers was given as security for the loan "a continuing lien and/or right of set-off * * * upon any and all deposits (general or special) and credits of (Five Corners) with (Manufacturers)." This agreement further provided that upon the occurrence of certain specified events with respect to Five Corners including "entry of judgment, issuance of an order of attachment, making of a tax assessment by the United States or any state, or an execution against property of (Five Corners) * * * or the commencement of any proceeding or procedure for the enforcement of a money judgment" the indebtedness of Five Corners to Manufacturers would become immediately due and payable without notice or demand, and Manufacturers's right of setoff might then be exercised.

On April 8, 1976, respondent Industrial Commissioner of the State of New York filed in the office of the Bronx County Clerk a warrant against Five Corners in the amount of $522.54 alleging Five Corners' failure to pay contributions due and owing under the New York State Unemployment Insurance Law (Labor Law, art. 18). By statute, when such warrant remains unsatisfied, as occurred here, it can be treated as a judgment and is

enforceable as such. (Labor Law, s 573, subd. 2.)

Thereafter, on May 13, 1976, a tax compliance agent's levy was served on Manufacturers pursuant to CPLR 5232 (subd. (a)) garnishing its Five Corners' account. By letter dated May 24, 1976, Manufacturers advised the Industrial Commissioner that although there was a balance of $263.69 in the Five Corners' account at the time of levy, this balance no longer existed to satisfy the levy and execution inasmuch as Manufacturers exercised its right to set off these funds against the indebtedness owing it by Five Corners. The Industrial Commissioner, however, responded by making a written demand on June 10, 1976 for the funds on deposit in the Five Corners' account, maintaining that under the law as then construed by the courts of this State, the balance in a bank account "may not be ****1007** applied in reduction of indebtedness once (the bank has) been served with a Tax Compliance Agent's levy." The next day, Manufacturers again informed the Industrial Commissioner that it was unable to remit any funds, remaining steadfast in its position that it possessed an indefeasible right to set off the funds in question against the moneys owing it by Five Corners pursuant to the loan agreement, even if such ***644** right to set off was actually exercised subsequent to the service of the tax compliance levy.

Faced with Manufacturers' refusal to turn over the funds, the Industrial Commissioner then commenced this proceeding pursuant to CPLR 5225, 5227 to obtain a court order directing Manufacturers to remit the moneys in Five Corners' account. Special Term granted the requested relief and an unanimous Appellate Division affirmed. Leave to appeal to this court was granted by the Appellate Division. There should be a reversal.

At issue here is the resolution of an apparent conflict between two statutory provisions to wit: CPLR 5232 (subd. (a)) and section 151 of the Debtor and Creditor Law. In essence, CPLR 5232 (subd. (a)) provides judgment creditors with a procedure for levying upon any interest of the judgment debtor, here Five Corners, in personal property not capable of delivery or upon any debt owed a judgment debtor by a third party.[1] CPLR 5232 (subd. (a)) states in pertinent part that "(t)he person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff and execute *****934** any document necessary to effect the transfer of payment." The statute further provides that "the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court." The Industrial Commissioner argues that this express language mandates that Manufacturers relinquish the funds in Five Corners' account at the time of service of the tax compliance agent's levy. Simply stated, the Industrial Commissioner maintains that Manufacturers had no option but to turn over the funds.

Manufacturers counters the position taken by the Industrial Commissioner by claiming that section 151 of the Debtor and Creditor Law bestows upon it the indefeasible right to set off Five Corners' deposits against the debt owing it by the latter, ***645** even if the setoff is not exercised until after levy by service of execution. Specifically, Manufacturers cites the following statutory language: "Every debtor (here, Manufacturers)[2] shall have the right upon * * * the issuance of any execution against any of the property of * * * a creditor (here, Five Corners), to set off and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, any amount owing from such debtor to such creditor, at or at any time after, the happening of * * * the above mentioned (event), and the aforesaid right of set off may be exercised by such debtor against such creditor * * * notwithstanding the fact that such right of set off shall not have been exercised by such debtor prior to the making, filing or issuance, or service upon such debtor of, or of notice of * * * issuance of execution, subpoena or ****1008** order or warrant." (Debtor and Creditor Law, s 151.) In short, Manufacturers' position is that when the garnishee is also a creditor of the judgment debtor, section 151 of the Debtor and Creditor Law provides a specific exception to the general rule set forth in CPLR 5232 (subd. (a)) that the property of the judgment debtor should be transferred to the judgment creditor forthwith. We agree with this contention.

In our view, the legislative history of these two sections indicates an intention on the part of the Legislature to preserve the set-off defense for use by a garnishee-creditor against a levying judgment creditor any time after issuance of execution. Levy by execution upon intangibles such as bank accounts by judgment creditors first became authorized in 1952 when the Legislature enacted section 687-a of the Civil Practice Act, the predecessor of CPLR 5232 (subd. (a)). (L.1952, ch. 835.) To ensure that the garnishee's defenses and set-off rights would not be extinguished or jeopardized by permitting levy by service of execution upon intangibles, the Legislature simultaneously modified section 151 of the Debtor and Creditor Law to preserve the right of a garnishee to interpose against executing judgment creditors, even subsequent to the "issuance of execution", any right to setoff the garnishee may have possessed against the judgment debtor. (L.1952, ch. 835.) The ***646**

underlying reason prompting this amendment to section 151, as stated by the New York Law Revision Commission the body responsible for recommending the enactment of section 687-a of the Civil Practice Act and the amendment to section 151 was to make "clear that the third party debtor (garnishee) is entitled to utilize (in defending a suit brought against him by the judgment creditor), ***935 All defenses and set-offs he might have had against the judgment debtor". (1952 Report of the N.Y. Law Rev.Comm., p. 365 (emphasis added).)[3]

This legislative intent to permit a setoff by a garnishee any time after issuance of execution, and even at any time subsequent to levy by service of execution, is reflected in unequivocal terms in the language of section 151 of the Debtor and Creditor Law itself, for the statute expressly provides that the issuance of any execution against any property of the judgment debtor shall not work to preclude the right of the garnishee to set off any amount owing from the judgment debtor to the garnishee. To hold, as the courts below did, that this right terminates upon levy by service of execution not only contravenes legislative intent, but, also, ignores the realities of everyday practice regarding executions generally, and would work to nullify a garnishee's right to setoff after issuance of execution the very benefit which section 151 of the Debtor and Creditor Law bestows. This is so because, in most instances, the garnishee bank's first effective notice of the issuance of execution occurs only upon service. Executions are often issued by the attorney for the judgment creditor in the privacy of his or her office (CPLR 5230, subd. (b)), with levy by service of execution upon the garnishee usually occurring only a few days thereafter. (See Siegel, Practice Commentary, McKinney's Cons.Law of N.Y. Book 7B (1965 Supp.), CPLR 5230, p. 35.) Thus, to limit the availability of section 151 to garnishees only to that time at which a copy of the execution is served would work to deprive a garnishee of its opportunity to assert its right of setoff against a creditor a result clearly not intended by the Legislature. It remains a basic principle of statutory construction that a court will "not by implication read into a clause of a rule or statute a limitation for which * * * no sound reason (can be found) and *647 which would render the clause futile." (Lederer v. Wise Shoe Co., 276 N.Y. 459, 465, 12 N.E.2d 544, 546.)

**1009 In holding that the right of setoff embodied in section 151 of the Debtor and Creditor Law is not extinguished upon levy by service of execution pursuant to CPLR 5232 (subd. (a)), we reject the analysis adopted by the court in Matter of Industrial Comr. of State of N. Y. v. South Shore Amusements, 55 A.D.2d 141, 389 N.Y.S.2d 850 the case relied upon by the courts below in reaching a contrary result. In South Shore, a divided Appellate Division reasoned that inasmuch as "nothing in section 151 * * * requires the nullification of such levy" and the funds of the judgment debtor on deposit cease to belong to it upon levy, the right of setoff terminated upon levy by service of execution since CPLR 5232 (subd. (a)) expressly provides that " '(t)he person served with the execution shall forthwith transfer such property' ". (Id., at p. 143, 389 N.E.2d at p. 851.)

In reaching this result, the South Shore majority relied extensively upon the decision in United States v. Sterling Nat. Bank & Trust Co. of N. Y., 360 F.Supp. 917, affd. in relevant part 494 F.2d 919. Such reliance is misplaced. In Sterling, the court held that a bank cannot exercise its right of setoff after a levy is effected pursuant to Federal law. This result, however, was clearly predicated upon the basis that the provisions of the Internal Revenue Code, by virtue of the supremacy clause (U.S.Const., art. VI, cl. 2), supersede any right of setoff which may be granted by State law. In South Shore (supra), as in the present case, however, the levy was effectuated pursuant to State law, rather than Federal law. Therefore, we find no justification for not ***936 permitting the garnishee to invoke its right of setoff even after levy by service of execution pursuant to CPLR 5232 (subd. (a)) a result clearly intended by the Legislature, as reflected by legislative history and unequivocal statutory language. (See Matter of Industrial Comr. of State of N. Y. v. South Shore Amusements, 55 A.D.2d 141, 144-146, 389 N.Y.S.2d 850, 852-853 (dissenting opn.), Supra ; 51 St. John's L.Rev., pp. 651-655.)

Accordingly, the order of the Appellate Division should be reversed, with costs, and the Industrial Commissioner's motion denied.

COOKE, C. J., and GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

Order reversed, etc.

All Citations

47 N.Y.2d 639, 393 N.E.2d 1005, 419 N.Y.S.2d 931

Footnotes

1 CPLR 5232 (subd. (a)) provides that "(t)he sheriff shall levy * * * upon any debt owed to the judgment debtor, by serving a copy of the execution upon the garnishee". A garnishee is defined as "a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest." (CPLR 105, subd. (i).) In this case, Manufacturers is a garnishee.

2 In this case, Manufacturers is a "debtor" for purposes of section 151 of the Debtor and Creditor Law, for it is the well-settled rule of law in this State that the bank becomes the debtor of the depositor (here, Five Corners) with respect to the deposited funds. (Brigham v. McCabe, 20 N.Y.2d 525, 530-531, 285 N.Y.S.2d 294, 297-298, 232 N.E.2d 327, 330-331; Solicitor for Affairs of His Majesty's Treasury v. Bankers Trust Co., 304 N.Y. 282, 291, 107 N.E.2d 448, 452.)

3 For purposes relevant to this case, the subsequent amendment to section 151 of the Debtor and Creditor Law made the right of setoff available to a garnishee against a judgment creditor in supplementary proceedings, in addition to a judgment creditor actually levying execution or serving a warrant of attachment as previously embodied in the statute. (L.1959, ch. 156.)

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190 A.D.3d 490
Supreme Court, Appellate Division, First Department, New York.

In the Matter of the JEWISH PRESS, INC., Petitioner–Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, Respondent–Respondent.

12855
|
Index No. 155280/19
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Case No. 2020-03715
|
ENTERED: January 12, 2021

Synopsis

Background: Newspaper commenced article 78 proceeding seeking, among other things, to compel city police department to disclose certain records concerning a traffic accident pursuant to the Freedom of Information Law (FOIL). The Supreme Court, New York County, William Franc Perry, J., 2020 WL 5026665, denied petition and granted department's cross motion to dismiss. Newspaper appealed.

The Supreme Court, Appellate Division, held that department failed to meet its burden of showing a particularized justification for withholding records under FOIL's law enforcement exemption.

Reversed.

Attorneys and Law Firms

****486** Aron Law PLLC, Brooklyn (Joseph H. Aron of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Philip W. Young of counsel), for respondent.

Acosta, P.J., Webber, González, Scarpulla, JJ.

Opinion

***490** Judgment (denominated an order), Supreme Court, New York County (W. Franc Perry, J.), entered on or about August 26, 2020, which denied the petition seeking, among other things, to compel respondent to disclose certain records concerning a traffic accident pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84–90), and granted respondent's cross motion to dismiss this proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted and the cross motion denied.

"All government records are presumptively open for public inspection unless specifically exempted from disclosure as provided in the Public Officers Law" *(Matter of Fappiano v. New York City Police Dept.,* 95 N.Y.2d 738, 746, 724 N.Y.S.2d 685, 747 N.E.2d 1286 [2001]). An agency may withhold records sought pursuant to FOIL only if it "articulate[s] particularized and specific justification for not disclosing requested documents" *(Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 275, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996] [internal quotation marks omitted]).

In an article 78 proceeding, judicial review of an agency's determination of a FOIL request is limited to whether it " 'was affected by an error of law' " (*Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y.,* 87 A.D.3d 506, 507, 928 N.Y.S.2d 701 [1st Dept. 2011], *lv denied* 18 N.Y.3d 806, 2012 WL 446222 [2012], quoting CPLR 7803[3]). The only FOIL exemption at issue in this case applies to records that "are compiled for law enforcement purposes and which, if disclosed, would ... interfere with ... judicial proceedings" (Public Officers Law § 87[2][e][i]).

****487 *491** Preliminarily, we find that Traffic Violations Bureau (TVB) hearings are "judicial proceedings" (Public Officers Law § 87[2][e]). The TVB of the New York State Department of Motor Vehicles, an administrative agency that was legislatively created to adjudicate traffic violation charges for the purpose of reducing caseloads of courts in New York City (Vehicle and Traffic Law article 2–A; *see Matter of Rosenthal v. Hartnett,* 36 N.Y.2d 269, 271, 367 N.Y.S.2d 247, 326 N.E.2d 811 [1975]). At a TVB hearing, the accused motorist has a right to be represented by counsel (15 NYCRR 124.2) and the administrative law judge presiding over the hearing must determine whether the police officer has established the charges by clear and convincing evidence (15 NYCRR

124.4[a], [d]). Although the CPL and the CPLR are generally "not binding on" TVB (15 NYCRR 123.1), it has been held that the motorist "is entitled to the issuance of a properly worded judicial subpoena duces tecum under CPLR 2307 requiring the production of relevant records" (*People v. Russo,* 149 A.D.2d 255, 256, 545 N.Y.S.2d 211 [2d Dept. 1989]).

Pursuant to the statute, NYPD has a burden of showing a particularized justification for withholding the records at issue pursuant to the interference exemption. We find that under the specific facts presented here, NYPD failed to meet that burden. NYPD asserts that any release of documents would somehow tip the hand of the TVB's prosecuting attorney or prevent the prosecutor from testing the recollection of witnesses. Yet, NYPD concedes that these documents would be released to the motorist who would not be under any legal admonition not to release the documents to others. Additionally, the recollection of witnesses and the basis of their testimony would certainly be determined by questioning and cross examination at the hearing. Given this, we find that NYPD's blanket denial of document release fell short of meeting its admittedly low burden (see *Matter of Lesher v. Hynes,* 19 N.Y.3d 57, 67, 945 N.Y.S.2d 214, 968 N.E.2d 451 [2012]; *Matter of Whitley v. New York County Dist. Attorney's Off.,* 101 A.D.3d 455, 455, 955 N.Y.S.2d 42 [1st Dept. 2012]).

We find no basis for awarding attorney's fees and costs to petitioner, (Public Officers Law § 89[4][c][ii]).

All Citations

190 A.D.3d 490, 140 N.Y.S.3d 485, 2021 N.Y. Slip Op. 00119

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257 A.D.2d 343
Supreme Court, Appellate Division, First Department, New York.

In re Application of William JOHNSON, Petitioner–Respondent, For an Order, etc., v. NEW YORK CITY POLICE DEPARTMENT, et al., Respondents–Appellants.

June 29, 1999.

Synopsis

Petitioner brought Article 78 proceeding after city police department denied access under Freedom of Information Law (FOIL) to complaint follow-up reports, known as "DD–5s," relating to fatal shooting for which petitioner received first-degree manslaughter conviction. The Supreme Court, New York County, Lebedeff, J., denied petition. Petitioner appealed. The Supreme Court, Appellate Division, affirmed denial of petition but remanded for determination as to whether other materials existed that were not exempt, 220 A.D.2d 320, 632 N.Y.S.2d 568. On remand, the Supreme Court, New York County, Diane Lebedeff, J., granted motion for reconsideration and ordered that DD–5s be produced. Department appealed. The Supreme Court, Appellate Division, Ellerin, P.J., held that: (1) personal privacy provisions of FOIL do not warrant a blanket exemption from disclosure of all DD–5s, but they do require an evaluation of privacy issues; (2) public safety provisions of FOIL likewise do not confer a blanket exemption from disclosure of DD–5s; (3) invocation of public safety exemption from disclosure of DD–5s did not require a showing that petitioner had threatened witnesses; and (4) remand was required for in camera review of requested information.

Reversed and remanded.

Attorneys and Law Firms

****16 *344** Rosemary Herbert, of counsel (Richard M. Greenberg, Office of the Appellate Defender, attorney) for petitioner-respondent.

Margaret G. King, of counsel (Barry P. Schwartz, William Tesler and Phyllis Calistro, on the brief, Michael D. Hess, Corporation Counsel of the City of New York, attorney) for respondents-appellants.

BETTY WEINBERG ELLERIN, P.J., PETER TOM, RICHARD W. WALLACH and DAVID FRIEDMAN, JJ.

Opinion

ELLERIN, P.J.

At issue on this appeal are the circumstances under which documents generated during a police investigation should be released to a criminal defendant pursuant to a Freedom of Information Law ["FOIL"] request.

The documents sought in the instant matter are complaint follow-up reports, known as DD–5s. They were produced by respondent New York City Police Department ["NYPD"] in connection with its investigation into the shooting death of George Braswell. As a result of that investigation, petitioner was arrested, charged with murder in the second degree, and, after a jury trial in which he set forth the defense of justification, convicted of manslaughter in the first degree. That conviction was affirmed on appeal (*People v. Johnson,* 222 A.D.2d 316, 636 N.Y.S.2d 2, *lv. denied* 87 N.Y.2d 974, 642 N.Y.S.2d 204, 664 N.E.2d 1267).

****17** After his conviction, petitioner submitted a FOIL request to NYPD seeking "[a]ny written report or document, or portion thereof, concerning Mr. Johnson's arrest or the investigation of the case," specifically including "complaint follow up informational reports," which is commonly referred to as a DD–5.

Eight months later, NYPD responded to the request by disclosing eight pages of documents and nine copies of photographs. Although the disclosed materials included a ***345** redacted copy of the complaint report completed on the day of the incident, the request insofar as it sought DD–5s was denied "on the basis of Public Officers Law section 87(2)(g)(iii) as such records are inter-agency or intra-agency materials which are not final agency policy or determination." Petitioner filed an administrative appeal of the denial, which was unsuccessful.

Petitioner thereupon filed the instant petition pursuant to Article 78. It was denied on the ground that DD–5s are exempt from disclosure as intra-agency materials, and that

denial was affirmed by this Court (220 A.D.2d 320, 632 N.Y.S.2d 568, *lv. dismissed* 87 N.Y.2d 943, 641 N.Y.S.2d 825, 664 N.E.2d 890). However, the matter was remanded to Supreme Court for a determination as to whether other materials existed that were not exempt from FOIL. On remand, petitioner moved for reconsideration as to the DD–5s in light of the Court of Appeals' decision in *Matter of Gould v. New York City Police Dept.* (89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808), which specifically held that DD–5s are not subject to a blanket exemption from FOIL pursuant to the exemption set forth in Public Officers Law § 87(2)(g) for certain intra-agency material. In response, while NYPD at that point disclosed certain other documents that had originally been withheld, it opposed the request for reconsideration of the denial of disclosure of the DD–5s on the alternative ground that they were "exempt from the disclosure requirements of FOIL under the privacy exemptions set forth in Public Officers Law § 87(2)(b) and the public interest exemption set forth in Public Officers Law § 87(2)(f)." NYPD did not set forth any specific factual information that would support exemption of the documents generated in petitioner's case, but simply asserted that the DD–5s were subject to exemption under these provisions.[1]

Supreme Court thereupon granted petitioner's motion for reconsideration and ordered respondents to produce the DD–5s. The court held that DD–5s "are not exempted *per se* from FOIL's scope" and that respondent's objections to disclosure were "conclusory and lacking in justification, specificity and particularity" and were not sufficient to warrant an *in camera* inspection of the documents at issue.

While we agree with Supreme Court that the blanket exemption to disclosure advocated by NYPD pursuant to Public Officers Law §§ 87(2)(b) and (f) is not legally sustainable, we do not ***346** agree that under the circumstances here petitioner's application should be granted outright.

The purpose of FOIL is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public (*see,* Public Officers Law § 84; *see also, Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d *supra,* at 274, 653 N.Y.S.2d 54, 675 N.E.2d 808).

In accord with these principles, agency records are presumptively open to the public (*see, Matter of Citizens for Alternatives to Animals Labs, Inc. v. Bd. of Trustees of the State Univ. of New York,* 92 N.Y.2d 357, 362, 681 N.Y.S.2d 205, 703 N.E.2d 1218). Disclosure may not be denied based upon the purpose for which the agency generated or holds the documents ****18** (*id.,* at 361, 681 N.Y.S.2d 205, 703 N.E.2d 1218; *Matter of Capital Newspapers v. Whalen,* 69 N.Y.2d 246, 252–253, 513 N.Y.S.2d 367, 505 N.E.2d 932). Nor is there any requirement that the person seeking disclosure set forth good cause, or, indeed, any cause for requesting the documents (*Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d, *supra* at 274, 653 N.Y.S.2d 54, 675 N.E.2d 808) and disclosure may not be denied based on the identity of the person requesting disclosure (*Matter of M. Farbman & Sons, Inc. v. New York City Health and Hosps. Corp.,* 62 N.Y.2d 75, 82, 476 N.Y.S.2d 69, 464 N.E.2d 437). Furthermore, exemptions from disclosure are to be narrowly construed, with the burden resting on the agency to justify the applicability of the exemption upon which it relies (*see, Matter of Citizens for Alternatives to Animals Labs, Inc. v. Bd. of Trustees of the State Univ. of New York,* 92 N.Y.2d, *supra,* at 362, 681 N.Y.S.2d 205, 703 N.E.2d 1218; *Matter of Hanig v. State Dept. of Motor Vehicles,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750). In order to assure that these standards are met, it is necessary that the agency set forth a "particularized and specific justification for denying access" (*Matter of Capital Newspapers v. Burns,* 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665; *see also, Church of Scientology of New York v. State of New York,* 46 N.Y.2d 906, 907–908, 414 N.Y.S.2d 900, 387 N.E.2d 1216).

In *Matter of Gould v. New York City Police Dept.* (*supra*), the Court of Appeals dealt with the difficult issue presented in the instant matter, specifically, whether disclosure of documents generated by the police during the investigation of a crime is warranted under FOIL, when disclosure is sought by an individual who has been convicted of the very crime in question.

Among the documents frequently sought in these circumstances are DD–5s, which are reports produced by police officers to record the information they have gathered in conjunction with an investigation made pursuant to a complaint. They may include the officer's record of the details of any action taken relating to the investigation, including summaries of interviews with witnesses and crime victims as well as their ***347** names and addresses. They may also include such information as whether victims and witnesses have been shown photographs, whether neighborhood residents have been canvassed and whether the crime scene has been photographed and dusted for fingerprints.

While holding that these reports were not categorically exempt as intra-agency materials, the Court of Appeals in *Matter of Gould* clearly expressed reservations about their

being released too freely. In that regard, the Court noted that "[d]isclosure of such documents could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures" (89 N.Y.2d, *supra* at 278, 653 N.Y.S.2d 54, 675 N.E.2d 808).

These concerns are reflected in Public Officers Law § 87(2)(b), which permits an agency to deny access to a document, or portion of a document, if disclosure would result in an unwarranted invasion of personal privacy, which, under § 89(2)(b) may include, though is not limited to:

> (i) disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> (ii) disclosure of items involving the medical or personal records of a client or patient in a medical facility;
>
> (iii) sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;
>
> (iv) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> (v) disclosure of information of a personal nature reported in confidence to ****19** an agency and not relevant to the ordinary work of such agency.

NYPD, citing *Matter of Empire Realty Corp. v. New York State Div. of the Lottery*, 230 A.D.2d 270, 273, 657 N.Y.S.2d 504, argues that the release of the information requested here would constitute an unwarranted invasion of personal privacy. However, NYPD makes no specific reference to any of the foregoing sections, but rather generally asserts that the disclosure of such material would be " 'offensive and objectionable to a reasonable person of ordinary sensibilities' " (*id.* at 273, 657 N.Y.S.2d 504, *quoting Matter of Dobranski v. Houper,* 154 A.D.2d 736, 737, 546 N.Y.S.2d 180). This conclusion is based on its contention that all witnesses always believe in and rely on the confidentiality of all of their statements to the police.

While we do not disagree with the fundamental premise that information imparted in confidence to the police, and in reliance ***348** on the expectation that such confidentiality will be respected, should be exempt from FOIL, it is clear that respondents' attempt to apply such an exemption to *all* information imparted by *all* witnesses under *any* circumstances is overly broad. Nevertheless, it is equally clear that this exemption would unquestionably apply to some information provided to the police. Thus, as recognized by the Court of Appeals in *Gould,* the release of certain information contained in DD5s may in and of itself constitute an unwarranted invasion of personal privacy.

We reject petitioner's argument that because he knew the identity of many of the witnesses to the crime, both testifying and non-testifying, the privacy exemption could not apply. Merely because petitioner knew that someone was a witness does not mean that he knew what such witness told the police, which could well have been information imparted in confidence. Nor do we find that NYPD must be able to show, in order to warrant exemption, that a witness was specifically promised confidentiality, if the circumstances give rise to the clear inference that such a promise was assumed. Of course, if NYPD were able to show that the witness was expressly promised confidentiality, that would serve as a compelling reason to decline to disclose the information. Finally, although redaction of names and addresses will sometimes suffice to protect personal privacy, NYPD has convincingly argued that redaction will not necessarily protect an individual's privacy if the circumstances themselves reveal his or her identity.

While the personal privacy provisions of FOIL do not warrant a blanket exemption from disclosure of all DD–5s, they do require an evaluation of the type of information contained in each document, the inferences that may be drawn from it, and the effectiveness of redaction in protecting privacy in the particular situation at hand.

As to the public safety provisions of § 87(2)(f), which permit an agency to deny access to records that "if disclosed, would endanger the life or safety of any person", contrary to petitioner's argument, we do not find that there must be a specific showing by respondents that petitioner, who is presently incarcerated, has threatened or intimidated any of the witnesses in his criminal case (*see, Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d, *supra,* at 277, 653 N.Y.S.2d 54, 675 N.E.2d 808) in order to warrant redaction of certain identifying information. The determination of which disclosures represent a potential danger to witnesses should not necessarily depend on whether petitioner has ***349** articulated a threat against them. Even in the absence of such a threat, certain information found in DD–5s could, by its inherent nature, give rise to the implication that its

release, in unredacted form, could endanger the life and safety of witnesses or have a chilling effect on future witness cooperation. However, this does not mean, as respondents argue, similar to their argument on privacy grounds, ****20** that a blanket exemption is warranted on public safety grounds for all DD–5s that reveal, directly or indirectly, the identity of individuals. For example, the disclosure of information that tends to exonerate a criminal defendant would not be likely to present any apparent danger to the witness from whom it was derived.

NYPD's failure to present a more expansive "particularized and specific justification for denying access" (*Matter of Capital Newspapers v. Burns,* 67 N.Y.2d, *supra,* at 566, 505 N.Y.S.2d 576, 496 N.E.2d 665) and instead seeking a blanket exemption on privacy or safety grounds is unfortunate, and precludes a summary disposition of petitioner's FOIL request. However, under the circumstances, present here, where there has been a homicide investigation, we find that NYPD's showing with respect to the nature of police investigation and the type of information contained in DD–5s is sufficient to demonstrate the necessity of protecting the safety and privacy rights of witnesses. The strong policy considerations favoring open disclosure articulated in *Matter of Gould, supra,* and other Court of Appeals precedents dictate that petitioner's FOIL rights must also be accorded protection. A decision reflecting the necessary delicate balance between these two competing interests can best be achieved after an in camera review of the requested information by the Supreme Court (*see, Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463; *Walker v. City of New York,* 64 A.D.2d 980, 408 N.Y.S.2d 811).

Respondents further claim that the materials sought contain communications that are subject to a common law privilege because their disclosure would be contrary to the public interest, citing, *inter alia, Matter of World Trade Center Bombing Litig.,* 93 N.Y.2d 1, 686 N.Y.S.2d 743, 709 N.E.2d 452. On the record before us, it appears that this argument is improperly raised by respondents for the first time on appeal (*see, Recovery Consultants v. Shih–Hsieh,* 141 A.D.2d 272, 276, 534 N.Y.S.2d 374).

In any event, respondents' argument, that the public interest privilege creates a broader shield than FOIL by placing the burden on petitioner to demonstrate that it has a compelling and particularized need for the information that outweighs the potential harm to the public good assertedly ***350** demonstrated by respondents, is untenable. The public safety provisions of FOIL are quite explicit and it is by these provisions that a FOIL request is to be judged (*see, Matter of Doolan v. Bd. Of Coop. Educ. Servs.,* 48 N.Y.2d 341, 347, 422 N.Y.S.2d 927, 398 N.E.2d 533).

Accordingly, the order and judgment (one paper), Supreme Court, New York County (Diane Lebedeff, J.), entered December 8, 1997, which, in this proceeding brought pursuant to CPLR article 78 and the Freedom of Information Law (Public Officers Law, art 6), directed respondents to produce certain complaint follow-up reports to petitioner, should be reversed, on the law, without costs and the matter remanded for further proceedings in accordance with this opinion.

Order and judgment (one paper), Supreme Court, New York County (Diane Lebedeff, J.), entered December 8, 1997, reversed, on the law, without costs, the proceeding brought pursuant to CPLR article 78 and the Freedom of Information Law (Public Officers Law, art. 6) remanded for further proceedings in accordance with this Court's opinion.

All concur.

All Citations

257 A.D.2d 343, 694 N.Y.S.2d 14, 1999 N.Y. Slip Op. 06339

Footnotes

1 NYPD, on this appeal, asserts that all of the DD–5s at issue "would identify witnesses to a crime and other private citizens."

159 Misc.2d 90
Supreme Court, Nassau County, New York,
IAS Part 25.

In the Matter of the Application of Anthony LaROCCA, individually and as Vice–President of the Jericho Teachers Association, Petitioner,
v.
BOARD OF EDUCATION OF the JERICHO UNION FREE SCHOOL DISTRICT, the Jericho Union Free School District, Dr. Robert Manheimer, as Superintendent of Schools of the Jericho Union Free School District, Martin L. Billig, as Records Access Officer of the Jericho Union Free School District, Dr. Marc Horowitz, Respondents.

Aug. 31, 1993.

Synopsis
Vice president of teachers' association sought settlement agreement disposing of disciplinary charges against principal. The Supreme Court, Nassau County, Hart, J., held that settlement agreement remained confidential and private.

Application denied.

Attorneys and Law Firms

****1010 *90** James R. Sander, by Stuart I. Lipkind, New York City, for petitioner.

Louis N. Orfan, West Hempstead, for School District.

Jerome Ehrlich, Ehrlich, Frazer & Feldman, Garden City, for Marc Horowitz.

Opinion

***91** EDWARD HART, Justice.

Anthony LaRocca, the vice president of the Jericho Teachers' Association makes this application pursuant to Article 78 of the Civil Practice Law and Rules. In essence, the relief sought is in the nature of mandamus, i.e., a direction from the Court to the respondent school boards and officials to make available for Mr. LaRocca's inspection certain records referable to a disciplinary matter involving respondent Dr. Marc Horowitz, a principal employed by the Jericho Union Free School District. Mr. LaRocca is neither a resident, taxpayer nor parent in the school district.

On November 19, 1992 charges against Dr. Horowitz were filed by the relevant Board of Education pursuant to Education Law Section 3020–a and thereafter on December 3, 1992 the Board of Education gave the Superintendent of Schools full authority within his discretion to negotiate a disposition with Dr. Horowitz or his attorney of the charges. Subsequently, a settlement was reached. The Board, based on the settlement agreement, directed that the charge be withdrawn and further directed that the New York State Commissioner of Education be so advised.

The request, at issue in this proceeding, was made by the petitioner on February 3, 1993 and sought a copy of the negotiated disposition of the charges and specifications, which request was denied by the relevant District official on February 24, 1993.

THE DECISION

The Court's mandate in ascertaining legislative intent is to base interpretation of statutory language on the natural and most obvious sense of the words used without resorting to an artificial or forced construction. (See McKinney's Statutes Section 94).

Under the provisions of Education Law Section 3020–a and Commissioner's Regulations (8 NYCRR Part 82.9) unless the charged party demands a public hearing, all hearings and related material remain private and confidential absent guilt being established by a Panel Finding after a due process hearing. This court equates the provision for a private hearing and expunction, with the concept of confidentiality. Against this background, the petitioner urges upon the Court the proposition that the right to privacy and confidentiality does not extend to situations in which there is a negotiated disposition ***92** of the charges by ****1011** way of settlement and no finding of guilt made.

The request for copies of the documents at issue was made pursuant to Section 87, Subdivision 2(g)(iii) of the Public Officers Law which has been acronymed FOIL. It must be noted that the public access to official documents is additionally impacted by Section 89, Subdivision 2 of the Public Officers Law which deals with an individual's right to privacy. The importance accorded to this right in a democratic society has been memorialized in one of the most important United States Supreme Court decisions of this century, i.e., *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, rehearing denied 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973). The importance of "open government" in a democracy cannot ever be underestimated but the citizen's right to privacy cannot be removed absent adequate supportive authority.

Section 89, *supra,* affords broad protection to records relevant to an individual's privacy clearly demonstrating a legislative intent to restrict public access to governmental-type records rather than what have been characterized in the law as personnel records. This is not to say that a citizen seeking government records must support the request by a reason satisfactory to the reviewing officer but rather that some records of government employees are cloaked, under certain circumstances, with an immunity from inspection.

The dichotomous nature of the petitioner's submission i.e., that the record is subject to publication if the charges are withdrawn, but immunized if tried successfully, does not in the opinion of the Court, pass dialectical muster. If such were the law, no educator would ever settle knowing that the charges, unproven as they might be, would become a matter of public currency impacting adversely and, perhaps irreparably, on that professional's reputation. The educator, to ensure confidentiality, would almost of necessity have to opt for a hearing with the consequent unnecessary expense and effort expended both by the district and the educator. The Court rejects this submission as being, in its opinion, violative of the intent of Education Law Section 3020–a and Public Officers Law Section 89, Subdivision 2.

Insofar as Section 89 is concerned, the Court is of the opinion that what is being sought is an employment record and, absent a sustaining of the charges made, disclosure would constitute an "unwarranted invasion of * * * privacy." The employment record exception, as the Court of Appeals pointed ***93** out in *Hanig v. New York State Dept. of Motor Vehicles,* 79 N.Y.2d 106, 111, 580 N.Y.S.2d 715, 588 N.E.2d 750, is not meant to apply only to employment applications but rather to all material that would be considered part of an employment record as would the settlement documents in Dr. Horowitz's case.

While the case of *Doe v. The Office of Professional Medical Conduct, et al.,* 81 N.Y.2d 1050, 601 N.Y.S.2d 456, 619 N.E.2d 393 as petitioner urges is not completely in point as it involves a member of another professional discipline, the Court's language is relevant "and it also 'evinces a sensibility to the possibility of irreparable harm to a professional reputation ...' " (at 1052, 601 N.Y.S.2d 456, 619 N.E.2d 393).

In sum, to allow the inspection sought would be violative of the legislative intent of Education Law Section 3020–a and Section 89, Subdivision 2 of the Public Officers Law. The Legislature, when it established the FOIL inspection scheme, intended to eliminate *in camera* governance not to remove the right to privacy that protects municipal employees as well as private citizens. The application of the petitioner is denied for the reasons set forth.

All Citations

159 Misc.2d 90, 602 N.Y.S.2d 1009, 86 Ed. Law Rep. 342

End of Document

220 A.D.2d 424
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Anthony LaROCCA, etc., Appellant,
v.
BOARD OF EDUCATION OF THE JERICHO UNION FREE SCHOOL DISTRICT, et al., Respondents.

Oct. 2, 1995.

Synopsis
Vice-president of teachers' association brought Article 78 proceeding to review denial of his application to obtain copy of settlement agreement disposing of disciplinary charges against tenured school principal. The Supreme Court, Nassau County, Hart, J., dismissed proceeding, and appeal was taken. The Supreme Court, Appellate Division, held that: (1) entire settlement agreement did not constitute an "employment history" as defined by Freedom of Information Law (FOIL) and therefore, it was presumptively available for public inspection, and (2) release of that portion of settlement agreement containing references to charges which were denied and/or not admitted by principal or containing names of teachers would constitute unwarranted invasion of privacy and therefore, agreement would be redacted prior to its release to vice-president.

Modified, and as modified, affirmed.

O'Brien, J., filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

****577** James R. Sandner, New York City (Stuart I. Lipkind, of counsel), for appellant.

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger, Reich & Scricca, Northport (Mary Anne Sadowski and John Gross, of counsel), for respondents Board of Education of the Jericho Union Free School District, Jericho Union Free School District, Dr. Robert Manheimer, and Martin L. Billig.

Ehrlich, Frazer & Feldman, Garden City (Jerome H. Ehrlich, of counsel), for respondent Marc Horowitz.

Before ROSENBLATT, J.P., and MILLER, O'BRIEN and FLORIO, JJ.

Opinion

MEMORANDUM BY THE COURT.

***424** In a proceeding pursuant to CPLR article 78 to review a determination of Robert Manheimer, ***425** dated March 9, 1993, which confirmed a determination of the Jericho Union Free School District, dated February 12, 1993, denying the petitioner's application to obtain a copy of a settlement agreement, the appeal is from a judgment of the Supreme Court, Nassau County (Hart, J.), entered September 13, 1993, which dismissed the proceeding.

ORDERED that the judgment is modified, on the law, by deleting therefrom the provision which dismissed the proceeding in its entirety and substituting therefor a provision granting the petition to the extent of directing the release of a redacted copy of the settlement agreement; as so modified, the judgment is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for release to the petitioner of a redacted copy of the settlement agreement.

In November 1992 written disciplinary charges were filed against Dr. Marc Horowitz pursuant to Education Law § 3020–a. Dr. Horowitz is employed by the Jericho Union Free School District (hereinafter the School District) as a principal and is a tenured employee. Thereafter, the Board of Education of the Jericho Union Free School District (hereinafter the Board of Education) determined that probable cause existed to support the disciplinary charges brought against Dr. Horowitz.

In December 1992 the Board of Education delegated to Dr. Robert Manheimer, the School District's Superintendent of Schools, the authority to negotiate a settlement which would dispose of the charges against Dr. Horowitz. The charges against Dr. Horowitz were "disposed of by negotiation and settled by an Agreement duly executed by [Dr. Manheimer] and [Dr. Horowitz] on December 14, 1992" (hereinafter the settlement agreement). The Board of Education then adopted a resolution withdrawing, without prejudice, the charges against Dr. Horowitz and directing the School District's attorney to advise the New York State Department of Education that the charges were withdrawn.

The petitioner Anthony LaRocca, Vice–President of the Jericho Teachers Association, which represents teachers employed in the school supervised by Dr. Horowitz, requested "a copy of the Board [of Education] resolution regarding the negotiated disposition and a copy of the accepted agreement between Dr. Horowitz, [Dr. Manheimer] and the Board of Education". LaRocca's request was denied because disclosure of the agreement "would constitute an unwarranted invasion of personal privacy" and "[t]he request relates to intra-agency or inter-agency materials which the School District is not required to disclose". LaRocca appealed the School District's determination ***426** to Dr. Manheimer. ****578** He subsequently affirmed the School District's determination.

LaRocca then commenced the instant CPLR article 78 proceeding, seeking disclosure of the settlement agreement under Public Officers Law article 6, commonly known as the Freedom of Information Law (hereinafter FOIL). He argued that FOIL makes the records of public agencies presumptively accessible, and that the settlement agreement did not fall within any of the recognized exceptions. The School District, as well as Dr. Horowitz, opposed the petition on the same basis as had previously been relied upon in denying LaRocca's initial request. The court denied the petition and dismissed the proceeding, finding, *inter alia,* that disclosure of the settlement agreement was exempt under FOIL because the document sought was an employment record, disclosure of which would be an unwarranted invasion of privacy. It also found that disclosure of the settlement agreement would violate the legislative intent of Education Law § 3020–a in providing tenured educators with the option of having confidential disciplinary proceedings.

It is well settled that FOIL imposes a broad duty of disclosure on government agencies (*see,* Public Officers Law § 84; *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463). 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 (Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 79–80, 476 N.Y.S.2d 69, 464 N.E.2d 437; *Matter of Hanig v. State of New York Dept. of Motor Vehicles,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750). The Court of Appeals has repeatedly stated that "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Capital Newspapers v. Whalen,* 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932; *Matter of Buffalo News v. Buffalo Enter. Dev. Corp.,* 84 N.Y.2d 488, 492, 619 N.Y.S.2d 695, 644 N.E.2d 277; *Matter of Russo v. Nassau County Community Coll.,* 81 N.Y.2d 690, 697, 603 N.Y.S.2d 294, 623 N.E.2d 15).

However, expressly exempted from mandatory disclosure are records that "if disclosed would constitute an unwarranted invasion of * * * privacy" (Public Officers Law § 87[2][b]), including but not limited to "disclosure of employment, medical or credit histories or personal references of applicants for employment" (Public Officers Law § 89[2][b][i]). Further, although it is clear that a record is not considered an "employment history" merely because it records facts concerning employment (*see,* ***427** *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 570, 505 N.Y.S.2d 576, 496 N.E.2d 665), the term "employment history" for purposes of FOIL exemptions is not defined in the statute, nor well interpreted by case law. However, its companion term "medical history" has been defined as "information that one would reasonably expect to be included as a relevant and material part of a proper medical history" (*Matter of Hanig v. State of New York Dept. of Motor Vehicles,* 168 A.D.2d 884, 564 N.Y.S.2d 805, *aff'd* 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750). The Court of Appeals has approved this definition, stating that it "capture[d] the essence of the exemption in that it encompasses the very sort of detail about personal medical condition that would ordinarily and reasonably be regarded as intimate, private information" (*Matter of Hanig v. State of New York Dept. of Motor Vehicles,* 79 N.Y.2d 106, 112, 580 N.Y.S.2d 715, 588 N.E.2d 750).

Having examined the settlement agreement, we find that the entire document does not constitute an "employment history" as defined by FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records (*see,* ****579** *Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943). Thus, to the extent that the settlement agreement, or any part thereof, purports to deny the public access to it in its entirety, such a provision is unenforceable as against the public interest.

However, having examined the settlement agreement in camera, we find that the release of that portion of the

agreement which contains references to charges which were denied and/or not admitted by Horowitz or which contain the names of any teachers, would constitute an unwarranted invasion of privacy as defined by Public Officers Law § 87(2). Therefore, the agreement must be redacted prior to its release to the petitioner. In the interest of judicial economy, we have redacted it, and the matter is remitted to the Supreme Court, Nassau County, to release copies of the redacted agreement to the petitioner.

We have examined the respondents' remaining contentions and find them to be without merit.

ROSENBLATT, J.P., and MILLER and FLORIO, JJ., concur.

O'BRIEN, J., concurs in part and dissents in part and votes to reverse the judgment and grant the petition in its entirety, with the following memorandum:

I disagree with the majority's conclusion that the settlement ***428** agreement should be disclosed in a redacted form. The disciplinary charges against Dr. Horowitz which he neither admitted nor denied are not protected from disclosure under the Freedom of Information Law (Public Officers Law article 6) (hereinafter FOIL). Accordingly, I would reverse the judgment, grant the petition, and direct the respondent agency to disclose the settlement agreement in its entirety.

The School District denied the petitioner access to the settlement agreement based on two exemptions in the Public Officers Law. The School District claimed that (1) the agreement constituted nonfinal intra-agency or inter-agency materials (*see,* Public Officers Law § 87[2][g][iii]) and (2) disclosure would constitute an unwarranted invasion of personal privacy because the agreement constituted an employment history (*see,* Public Officers Law §§ 87[2][b], 89[2][b][i]). The Supreme Court, in upholding the School District's decision, determined that the settlement agreement was an employment record and that disclosure of the disciplinary charges would constitute an unwarranted invasion of personal privacy contrary to the intent of Education Law § 3020–a and Public Officers Law § 89(2) (*see, Matter of LaRocca v. Board of Educ.,* 159 Misc.2d 90, 602 N.Y.S.2d 1009). I conclude that the settlement agreement is not exempt from disclosure on any of these grounds.

The exemption for intra-agency or inter-agency materials is inapplicable as that term applies to " 'deliberative material,' i.e., communications exchanged for discussion purposes not constituting final policy decisions" (*Matter of Russo v. Nassau County Community Coll.,* 81 N.Y.2d 690, 699, 603 N.Y.S.2d 294, 623 N.E.2d 15; *see also, Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 490 N.Y.S.2d 488, 480 N.E.2d 74). The respondents contend that the settlement agreement was nonfinal because the Board of Education's withdrawal of the charges, based on that agreement, was without prejudice to renewal of those charges if Dr. Horowitz failed to abide by the terms of the settlement. This contention is unpersuasive. The settlement agreement was for all practical purposes a final determination of the charges against Dr. Horowitz, not merely a predecisional document (*cf., Matter of Elentuck v. Green,* 202 A.D.2d 425, 608 N.Y.S.2d 701).

The settlement agreement is not exempt from disclosure under the privacy protection accorded to employment histories, even though it contains facts concerning Dr. Horowitz' employment (*see, e.g., Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665 ["Lost Time Report" in police officer's personnel record was not an employment history]). A FOIL exemption should be given its "natural and obvious meaning" consistent with the legislative intent and policy underlying the statute (*Matter* ***429** *of Hanig v. State of New York Dept. of Motor Vehicles,* 79 N.Y.2d 106, 110, 580 N.Y.S.2d 715, 588 N.E.2d 750). Charges of misconduct and the ****580** disposition of such charges by an employee's current employer do not constitute an employment history as that term is commonly understood (*see, e.g., Matter of Anonymous v. Board of Educ. for the Mexico Cent. School Dist.,* 162 Misc.2d 300, 616 N.Y.S.2d 867 [terms of settlement of charges of misconduct against teacher did not constitute employment history protected from disclosure under Public Officers Law § 89(2)(b)(i)]). Moreover, the purpose of FOIL is to provide citizens with the means to obtain information about the day-to-day functioning of government and to provide a tool for exposing waste, negligence, and abuse on the part of government officers (*see, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, supra,* 67 N.Y.2d at 566, 505 N.Y.S.2d 576, 496 N.E.2d 665; *see also, Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). The disclosure of employee disciplinary determinations is consistent with that purpose (*see, e.g., Matter of Powhida v. City of Albany,* 147 A.D.2d 236, 542 N.Y.S.2d 865 [disclosure of police department's

response to officer's misconduct contributed to general public's evaluation of the agency]). Certainly the general public has an interest in how a school board responds to allegations of misconduct made against an educator.

Although the School District relies on the specific privacy exemption for employment histories, it is noted that FOIL also includes a more general "unwarranted invasion of personal privacy" exemption which applies to the disclosure of information of a personal nature when disclosure would result in personal and economic hardship and such information is not relevant to the work of the agency maintaining it (*see,* Public Officers Law § 89[2][b][iv]; *Matter of Gannett Co. v. County of Monroe,* 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151). This exemption does not apply to the case at bar, however, as employee discipline is clearly relevant to the work of the School District (*see, e.g., Matter of Buffalo News v. Buffalo Mun. Hous. Auth.,* 163 A.D.2d 830, 558 N.Y.S.2d 364 [employee disciplinary files, including charges, agency determination of charges, and penalty imposed, should be disclosed under FOIL]).

Finally, the confidentiality provisions in Education Law § 3020–a do not preclude disclosure of the settlement agreement. Public Officers Law § 87(2)(a) provides that access to records may be denied if they are specifically exempted from disclosure by a State statute. An express statement of confidentiality is not required in the statute to establish an exemption under FOIL but a "clear legislative intent to establish and preserve confidentiality" must be shown (*Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 81, 476 N.Y.S.2d 69, 464 N.E.2d 437).

***430** Education Law § 3020–a evinces a legislative intent to preserve confidentiality only while a disciplinary proceeding is pending and, once a final determination is reached, to maintain confidentiality only as to those charges of which the educator has been acquitted. Pursuant to Education Law § 3020–a(2)(a), disciplinary charges are voted on in executive session by the school board. The educator has the right to determine whether the disciplinary hearing shall be public or private (Education Law § 3020–a [3][c][i]). Pursuant to Education Law § 3020–a(4)(b), those charges of which the educator has been acquitted must be expunged from the employment record. Education Law § 3020–a, however, does not include any provision with respect to the confidentiality of the final disposition of charges when there has not been an acquittal (*see, Matter of Anonymous v. Board of Educ. for the Mexico Cent. School Dist., supra,* 162 Misc.2d 300, 616 N.Y.S.2d 867 [education law § 3020–a does not exempt from disclosure negotiated settlement of misconduct charges against teacher]).

The respondents' assurance to Dr. Horowitz that the agreement would remain confidential does not affect the applicability of any exemption under FOIL (*see, e.g., Matter of Washington Post Co. v. New York State Ins. Dept.,* 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604). In order to deny access, the School District must establish that the settlement agreement "falls squarely within the ambit of one of [the] statutory exemptions" ****581** (*Matter of Fink v. Lefkowitz, supra,* 47 N.Y.2d at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463), which it has failed to do. Moreover, the School District may not, by private agreement, limit the public's right to access to records which are otherwise subject to disclosure under FOIL (*see, e.g., Matter of Anonymous v. Board of Educ. of the Mexico Cent. School Dist., supra,* 162 Misc.2d 300, 616 N.Y.S.2d 867 [an agreement to keep secret that to which public has a right of access under FOIL unenforceable as against public policy]).

My colleagues, in redacting substantial portions of the settlement agreement, rely on Public Officers Law § 89(2)(a), which permits an agency to withhold or delete from "records otherwise available", information which would constitute an unwarranted invasion of personal privacy (*Matter of Short v. Board of Managers of the Nassau County Med. Center,* 57 N.Y.2d 399, 405, 456 N.Y.S.2d 724, 442 N.E.2d 1235). However, for the reasons previously stated, I do not agree that the privacy exemption applies to any portion of the settlement agreement. Although disclosure of the charges might cause some embarrassment, that is an insufficient basis under FOIL to deny disclosure.

I recognize that this result may be unfair to Dr. Horowitz, who gave up his right to a confidential hearing on the charges and to the remedy of expungement of those charges of which he was acquitted, based in part on the assurance that the agreement, ***431** and the substance of the charges, would remain confidential. However, whether Dr. Horowitz has any potential remedy in this regard is not an issue raised in this proceeding. (*See,* 159 Misc.2d 90, 602 N.Y.S.2d 1009.)

All Citations

220 A.D.2d 424, 632 N.Y.S.2d 576, 104 Ed. Law Rep. 468

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145 A.D.3d 1168
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of James LAVECK, Appellant, v. VILLAGE BOARD OF TRUSTEES OF the VILLAGE OF LANSING, Respondent.

Dec. 1, 2016.

Synopsis
Background: Requester commenced article 78 proceeding, seeking order directing mayor of village to provide complete and unredacted electronic copies of all records requested under Freedom of Information Law (FOIL) related to village's deer management activities. The Supreme Court, Tompkins County, Rumsey, J., dismissed. Requester appealed.

Holdings: The Supreme Court, Appellate Division, Clark, J., held that:

names, addresses, and other identifying information related to participants in village's deer management program were not exempt from disclosure under FOIL's exemption for information that would constitute unwarranted invasion of personal privacy, and

names, addresses, and other identifying information were not exempt from disclosure under FOIL's exemption for information that could endanger the lives or safety of the participants.

Affirmed as modified.

Attorneys and Law Firms

****461** Trevor J. DeSane, Center for Wildlife Ethics Inc., New York City, for appellant.

William J. Troy III, Ithaca, for respondent.

Before: McCARTHY, J.P., GARRY, LYNCH, DEVINE and CLARK, JJ.

Opinion

CLARK, J.

***1168** Appeal from a judgment of the Supreme Court (Rumsey, J.), entered December 24, 2015 in Tompkins County, which dismissed ****462** petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Mayor of the Village of Lansing partially denying petitioner's Freedom of Information Law request.

In conjunction with the Department of Environmental Conservation and Cornell University, the Village of Lansing, a municipal corporation located in Tompkins County, participates in a deer management program that, subject to various restrictions, allows approved hunters to hunt and kill deer with bows and arrows on the private property of consenting landowners in the Village. In January 2015, petitioner submitted a Freedom of Information Law (*see* Public Officers Law art. 6 [hereinafter FOIL]) request to respondent seeking numerous documents relating to the Village's deer management activities, including all communications with property owners in the Village. In response, Jodi Dake, the Village clerk and treasurer, provided petitioner with a list of documents that would be made available to him upon payment of copying costs (*see* Public Officers Law § 87[1][b][iii]), as well as the cost of employee time required to prepare the copies. Dake explained that some of the documents could not be reproduced electronically, ***1169** as requested by petitioner, due to redactions that were necessary "to protect information that would, if disclosed, result in an unwarranted invasion of personal privacy and could, if disclosed, endanger the life and safety of persons."

Petitioner appealed to the Mayor (*see* Public Officers Law § 89[4][a]), asserting, among other things, that the justifications provided for the redactions were insufficient and that the imposition of costs for redacted copies and employee preparation time was improper. The Mayor, concluding that petitioner's "[r]equest involved records that included material that could properly be redacted," upheld the imposition of copying costs incurred as a result of the redactions, but determined that petitioner could not be charged for employee preparation time. Petitioner then commenced this CPLR article 78 proceeding seeking, among other things, an order directing respondent to provide complete and unredacted electronic copies of all requested records. Following joinder of issue, Supreme

Court dismissed the petition, concluding that the safety and lives of landowners who participated in the deer management program could be endangered by the release of information revealing their identities and therefore such information was exempt from disclosure under Public Officers Law § 87(2). Petitioner appeals.

Under FOIL, "[a]ll 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)" (*Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 274–275, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996]; *see Matter of Johnson v. Annucci,* 138 A.D.3d 1361, 1362, 28 N.Y.S.3d 922 [2016], *lv. denied* 27 N.Y.3d 911, 2016 WL 3553444 [2016]). These exemptions are construed narrowly and the burden rests on "the public agency to demonstrate that 'the material requested falls squarely within the ambit of one of the[ ] statutory exemptions' " (*Matter of Newsday, Inc. v. Empire State Dev. Corp.,* 98 N.Y.2d 359, 362, 746 N.Y.S.2d 855, 774 N.E.2d 1187 [2002], quoting *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 [1979]; *see* Public Officers Law § 89[4][b]; *Matter of Columbia–Greene Beauty Sch., Inc. v. City of Albany,* 121 A.D.3d 1369, 1370, 995 N.Y.S.2d 340 [2014]). "[T]he [public] agency must articulate 'particularized and specific justification' for not disclosing requested documents" ****463** (*Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d at 275, 653 N.Y.S.2d 54, 675 N.E.2d 808, quoting *Matter of Fink v. Lefkowitz,* 47 N.Y.2d at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463; *see Matter of Rose v. Albany County Dist. Attorney's Off.,* 111 A.D.3d 1123, 1125, 975 N.Y.S.2d 258 [2013]); conclusory assertions, unsupported by facts, will not suffice (*see Church of Scientology of N.Y. v. State of New York,* 46 N.Y.2d 906, 907–908, 414 N.Y.S.2d 900, 387 N.E.2d 1216 [1979]; ***1170** *Matter of Rose v. Albany County Dist. Attorney's Off.,* 111 A.D.3d at 1126, 975 N.Y.S.2d 258; *Matter of Carnevale v. City of Albany,* 68 A.D.3d 1290, 1292, 891 N.Y.S.2d 495 [2009]).

To justify the redaction of the names, addresses and other identifying information relating to participants in the deer management program,[1] respondent asserts that disclosure of this information "would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]) or "could endanger the li[ves] or safety" of the participants (Public Officers Law § 87[2][f]). Turning first to the personal privacy exemption, respondent failed to demonstrate that the redacted information fell into any of the categories of information that the Legislature has specifically determined would qualify as an unwarranted invasion of personal privacy if disclosed (*see* Public Officers Law § 89[2][b]). In the absence of proof establishing the applicability of one of these specifically-enumerated categories, we evaluate whether disclosure would constitute an unwarranted invasion of personal privacy "by balancing the privacy interests at stake against the public interest in disclosure of the information" (*Matter of New York Times Co. v. City of N.Y. Fire Dept.,* 4 N.Y.3d 477, 485, 796 N.Y.S.2d 302, 829 N.E.2d 266 [2005]; *accord Matter of Massaro v. New York State Thruway Auth.,* 111 A.D.3d 1001, 1002, 974 N.Y.S.2d 636 [2013]; *Matter of Hearst Corp. v. City of Albany,* 88 A.D.3d 1130, 1132, 931 N.Y.S.2d 713 [2011]). Respondent, however, has not articulated the implicated privacy interests, if any, that are to be weighed against the community's interest in knowing the locations in which deer-hunting activities may take place. Furthermore, respondent offered no proof that participants in the program had any expectation that their identities would remain strictly confidential. Rather, it is clear that the success of the program depends upon the release of the addresses of consenting landowners to approved hunters. In short, respondent failed to establish that disclosure of the participants' names, home addresses or other personal identifying information would constitute an unwarranted invasion of personal privacy (*see* Public Officers Law §§ 87[2][b]; 89[2] [b]; *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v. Mills,* 74 A.D.3d 1417, 1419, 904 N.Y.S.2d 512 [2010], *affd.* 18 N.Y.3d 42, 935 N.Y.S.2d 279, 958 N.E.2d 1194 [2011]; *Matter of Carnevale v. City of Albany,* 68 A.D.3d at 1292, 891 N.Y.S.2d 495).

Nor did respondent demonstrate that disclosure of the ***1171** redacted information "could endanger the li[ves] or safety" of the program's participants (Public Officers Law § 87[2][f]). While respondent was only required to demonstrate " 'a possibility of endangerment' " (*Matter of Bellamy v. New York City Police Dept.,* 87 A.D.3d 874, 875, 930 N.Y.S.2d 178 [2011], *affd.* ****464** 20 N.Y.3d 1028, 960 N.Y.S.2d 343, 984 N.E.2d 317 [2013], quoting *Matter of Connolly v. New York Guard,* 175 A.D.2d 372, 373, 572 N.Y.S.2d 443 [1991]; *see Matter of Johnson v. Annucci,* 138 A.D.3d at 1362, 28 N.Y.S.3d 922), respondent's submissions, which included the affidavits of Dake and the Mayor of the Village of Cayuga Heights, which adjoined the Village of Lansing, fell short of such demonstration. Dake merely stated that deer management programs "can be contentious" and that board members of the Village of Cayuga Heights had received threats when they "considered" those programs. The Mayor of the Village of Cayuga Heights confirmed that "[p]roponents of [the] culling operation, including [her] and other Village officials, ha[d] received death threats and other threats of personal harm." However, neither affidavit

established that similar threats had been made in the Village of Lansing or that participation in the deer management program was controversial in that community. Moreover, there was no indication that participants in the program, who were known to each other and whose participation could be discovered through observation, had received any threats. As respondent failed to demonstrate the possibility of endangerment in its community, it could not rely on Public Officers Law § 87(2)(f) to justify the redactions (*see Matter of Mack v. Howard,* 91 A.D.3d 1315, 1316, 937 N.Y.S.2d 785 [2012]; *Matter of Carnevale v. City of Albany,* 68 A.D.3d at 1292, 891 N.Y.S.2d 495).

Having failed to establish the applicability of a statutory exemption, respondent improperly redacted the names, addresses and other identifying information of participants in the deer management program (*see Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v. Mills,* 74 A.D.3d at 1418, 904 N.Y.S.2d 512; *Matter of Carnevale v. City of Albany,* 68 A.D.3d at 1292, 891 N.Y.S.2d 495). Consequently, respondent is directed to provide petitioner with unredacted copies of the requested documents, in electronic form if possible. Finally, although petitioner has substantially prevailed in this proceeding, we decline to award him counsel fees and costs, inasmuch as the redactions were made in good faith (*see* Public Officers Law § 89[4][c]; *compare Matter of New York State Defenders Assn. v. New York State Police,* 87 A.D.3d 193, 197, 927 N.Y.S.2d 423 [2011]).

Petitioner's remaining contentions relating to the imposition of copying costs are rendered academic by our determination.

***1172** ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as dismissed that part of the petition seeking to compel respondent to provide complete and unredacted electronic copies of all records responsive to his Freedom of Information Law request; petition granted to that extent; and, as so modified, affirmed.

McCARTHY, J.P., GARRY, LYNCH and DEVINE, JJ., concur.

All Citations

145 A.D.3d 1168, 42 N.Y.S.3d 460, 2016 N.Y. Slip Op. 08150

Footnotes

1 While the unredacted documents at issue were not provided to this Court, and Supreme Court did not conduct an in camera review, respondent represented at oral argument that the redacted information was restricted to the names, addresses and other information that would identify participants in the program.

122 A.D.3d 587
Supreme Court, Appellate Division, Second Department, New York.

Jordan Edward LEACH, etc., et al., respondents,
v.
OCEAN BLACK CAR CORP., et al., appellants.

Nov. 5, 2014.

Synopsis
Background: Plaintiff brought action against defendant, seeking to recover for injuries allegedly sustained in motor vehicle accident. The Supreme Court, Nassau County, Bruno, J., 2012 WL 11837413, denied the parties' motions for summary judgment and, 2013 WL 9607420, subsequently denied defendant's renewed motion for summary judgment and granted plaintiff's motion for summary judgment. Defendant appealed.

The Supreme Court, Appellate Division, held that plaintiff's premature birth of a living child was not a loss of a fetus.

Reversed.

Attorneys and Law Firms

****308** Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn, N.Y. (Colin F. Morrissey of counsel), for appellants.

Richard M. Kenny, New York, N.Y. (James M. Sheridan, Jr., of counsel), for respondents.

RANDALL T. ENG, P.J., MARK C. DILLON, COLLEEN D. DUFFY, and BETSY BARROS, JJ.

Opinion

***587** In an action to recover damages for personal injuries, etc., the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Bruno, J.), dated February 19, 2013, as, upon renewal, adhered to its original determination in an order dated May 2, 2012, denying that branch of their motion which was for summary judgment dismissing so much of the complaint as alleged that the plaintiff Carolyn ***588** Oddo, individually, sustained a serious injury under the "loss of a fetus" category of Insurance Law § 5102(d) as a result of the subject accident, and, in effect, vacated its original determination in the prior order denying that branch of the plaintiffs' cross motion which was for summary judgment on so much of the complaint as alleged that the plaintiff Carolyn Oddo, individually, sustained a serious injury under the "loss of a fetus" category of Insurance Law § 5102(d) as a result of the subject accident, and thereupon granted that branch of the plaintiffs' cross motion.

ORDERED that the order dated February 19, 2013, is reversed insofar as appealed from, on the law, with costs, and, upon renewal, the determination in the order dated May 2, 2012, denying that branch of the defendants' motion which was for summary judgment on so much of the complaint as alleged that the plaintiff Carolyn Oddo, individually, sustained a serious injury under the "loss of a fetus" category of Insurance Law § 5102(d) as a result of the subject accident is vacated, that branch of the defendants' motion is thereupon granted, and the determination in the order dated May 2, 2012, denying that branch of the plaintiffs' cross motion which was for summary judgment on so much of the complaint as alleged that the plaintiff Carolyn Oddo, individually, sustained a serious injury under the "loss of a fetus" category of Insurance Law § 5102(d) as a result of the subject accident is adhered to.

On December 12, 2006, the plaintiff Carolyn Oddo was involved in a motor vehicle accident with a vehicle owned by the defendant Ocean Black Car Corp. and operated by the defendant C.M. Morselli. Oddo was pregnant at the time of the accident, and she alleges that she suffered a placental abruption which caused her son, the infant plaintiff, to be born prematurely and delivered by caesarean section. Following the accident, the infant plaintiff, by his mother Oddo, and Oddo individually, commenced this action to recover damages for the resulting injuries allegedly sustained by each of them.

The defendants subsequently moved, inter alia, for summary judgment dismissing so much of the complaint as alleged that Oddo, individually, sustained a serious injury under the "loss of a fetus" category of Insurance Law § 5102(d) as a result of the subject accident, and the plaintiffs cross-moved, inter alia, for summary judgment

on that portion of the complaint. In the order appealed from, upon renewal, the Supreme Court adhered to a prior determination ****309** denying that branch of the defendants' motion which was for summary judgment as to that issue, and granted the corresponding branch of the plaintiffs' cross motion. ***589** In reaching its determination, the Supreme Court concluded, in essence, that the phrase "loss of a fetus" encompassed any termination of a pregnancy caused by an accident, regardless of whether the fetus was born alive.

In cases involving statutory construction, legislative intent is the controlling principle (*see Matter of Brown v. Wing,* 93 N.Y.2d 517, 522, 693 N.Y.S.2d 475, 715 N.E.2d 479). "The Court's threshold inquiry in this regard is how to discern the legislative intent. When an enactment displays a plain meaning, the courts construe the legislatively chosen words so as to give effect to that Branch's utterance" (*id.*). Contrary to the Supreme Court's determination, the plain meaning of the term "loss of a fetus" does not include the premature birth of a living child. Rather, this category of damages is applicable where, as a result of an automobile accident, a viable pregnancy terminates with loss of the fetus (*see Brown v. Mat Enters. of N.Y. Inc.,* 97 A.D.3d 401, 947 N.Y.S.2d 117; *Lawman v. Gap, Inc.,* 38 A.D.3d 852, 853, 832 N.Y.S.2d 670).

We note that this determination is consistent with legislative history, which reveals that the "loss of a fetus" category was added to Insurance Law § 5102(d) in 1984 in response to *Raymond v. Bartsch,* 84 A.D.2d 60, 447 N.Y.S.2d 32. In that case, the Appellate Division, Third Department, held that Insurance Law § 5102(d), as then constituted, did not permit a woman, who was nine months pregnant at the time of her accident, to recover damages resulting from her delivery of a stillborn baby. The "loss of a fetus" category was added to the statute in recognition that "[a] woman who is involved in an automobile accident that results in the termination of her pregnancy has suffered a serious injury and should have the right to recover from a negligent operator for her non-economic loss" (Sponsor's Mem, Bill Jacket, L. 1984, ch. 143). The policy considerations underlying the 1984 amendment of Insurance Law § 5102(d) are not implicated when a child is born alive.

Accordingly, upon renewal, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing so much of the complaint as alleged that Oddo, individually, sustained a serious injury under the "loss of a fetus" category of Insurance Law § 5102(d) as a result of the subject accident, and adhered to its prior determination denying that branch of the plaintiffs' cross motion which was for summary judgment on that portion of the complaint.

All Citations

122 A.D.3d 587, 996 N.Y.S.2d 307, 2014 N.Y. Slip Op. 07477

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91 N.Y.2d 577
Court of Appeals of New York.

Thomas MAJEWSKI, Respondent,
v.
BROADALBIN–PERTH CENTRAL SCHOOL DISTRICT, Defendant and Third–Party Plaintiff–Respondent.
Adirondack Mechanical Corporation, Third–Party Defendant–Appellant.

May 12, 1998.

Synopsis
Worker who was injured while performing repair work brought action against premises owner, and owner filed third-party claim against worker's employer for contribution and/or indemnification. The Supreme Court, Fulton County, Stephen A. Ferradino, J., 169 Misc. 2d 429, 653 N.Y.S.2d 822, granted employer's motion for summary judgment. Worker and premises owner appealed. The Supreme Court, Appellate Division, 231 A.D.2d 102, 661 N.Y.S.2d 293,reversed, denied employer's motion and certified question for review. The Court of Appeals, Smith, J., held that amendments to Workers' Compensation Law barring third-party claims against employer for contribution or indemnity except when employee has sustained "grave injury" did not apply retroactively to actions pending on effective date of amendments.

Affirmed.

Attorneys and Law Firms

***966 *578 **978** Thuillez, Ford, Gold & Johnson, L.L.P., Albany (Michael J. Hutter, Dale M. Thuillez and Debra J. Schmidt, of counsel), and James P. O'Connor, New York City, for third-party defendant-appellant.

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***967 *579 **979** Maynard, O'Connor, Smith & Catalinotto, L.L.P., Albany (Leslie B. Neustadt and Michael E. Catalinotto, of counsel), for defendant and third-party plaintiff-respondent.

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Schneider, Kleinick, Weitz, Damashek & Shoot, New York City (Brian J. Shoot, Harry Steinberg and John C. Cherundolo, of counsel), for New York State Trial Lawyers Association, amicus curiae.

***581 OPINION OF THE COURT**

SMITH, Judge.

This case requires this Court to examine whether certain amendments to the Workers' Compensation Law should be construed as retroactively applicable to pending actions. We conclude that the Appellate Division properly held that the relevant provisions of the new legislation should not apply to actions pending on the effective date of the amendments. Rather, the provisions should be applied prospectively to actions filed postenactment. Thus, the order of the Appellate Division should be affirmed and the certified question should be answered in the negative.

I

As alleged in the complaint, plaintiff was employed by third-party defendant Adirondack Mechanical Corporation (AMC). On October 26, 1994, plaintiff was assigned by AMC to perform certain repair work at a school operated and maintained by defendant ***582** Broadalbin–Perth Central School District. AMC had contracted with defendant for the completion of this work.

While performing the assigned repair work on the school's premises, plaintiff fell from an allegedly

defective ladder which had been provided by defendant. Plaintiff commenced a lawsuit on December 20, 1995 against defendant to recover for his personal injuries based upon claimed violations of Labor Law §§ 200 and 240(1). On January 29, 1996, defendant commenced a third-party action against AMC which alleged that AMC had negligently supervised and failed to protect its employee. Defendant further claimed that AMC owed defendant a duty of contribution and/or indemnification for damages plaintiff might recover.

On July 12, 1996, new legislation, commonly referred to as the Omnibus Workers' Compensation Reform Act of 1996, was passed which amended Workers' Compensation Law § 11 to provide that:

> "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' " (L. 1996, ch. 635, § 2).

However, the amendments did not affect the power of a third party to recover under express contractual obligations between the employer and the third party (*id.*). The legislation was signed into law by Governor Pataki on September 10, 1996 with the relevant portions of the Act designated to "take effect immediately." Thereafter, on September 20, 1996, AMC filed a motion for summary judgment against the third-party complaint arguing that the action for contribution and/or indemnification was now barred by the recent enactment.[1]

Finding that the legislation was to have retroactive application to pending actions, Supreme Court granted AMC's summary judgment motion and dismissed the third-party complaint. In reversing and denying AMC's motion, the Appellate Division concluded "that the clear legislative intent underlying sections 2 through 9 of the Omnibus Act was that those provisions ***583** apply prospectively only" (231 A.D.2d 102, 111, 661 N.Y.S.2d 293). That Court certified the following *****968 **980** question to this Court: "Did this court err as a matter of law in reversing the order of the Supreme Court and denying the third-party defendant's motion for summary judgment?" We answer that question in the negative, and affirm the Appellate Division order.

II

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. v. City of New York,* 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338; *see also, Longines–Wittnauer v. Barnes & Reinecke,* 15 N.Y.2d 443, 453, 261 N.Y.S.2d 8, 209 N.E.2d 68). As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:

> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Tompkins v. Hunter,* 149 N.Y. 117, 122–123, 43 N.E. 532; *see also, Matter of Raritan Dev. Corp. v. Silva,* 91 N.Y.2d 98, 667 N.Y.S.2d 327, 689 N.E.2d 1373).

Here, the Act says only that the subject provisions are to "take effect immediately" (L. 1996, ch. 635, § 90). However, the date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence (*see, Shielcrawt v. Moffett,* 294 N.Y. 180, 61 N.E.2d 435 [separately analyzing retroactive or prospective application of a statute enacted to "take effect immediately"]).

While the fact that a statute is to take effect immediately "evinces a sense of urgency," "the meaning of the phrase is equivocal" in an analysis of retroactivity (*Becker v. Huss Co.,* 43 N.Y.2d 527, 541, 402 N.Y.S.2d 980, 373 N.E.2d 1205). In fact, we noted in *Becker* that "[i]dentical language in other acts has not been enough to require application to pending litigation" (*id.,* at 541, 402 N.Y.S.2d 980, 373 N.E.2d 1205). Here, the significance of the effective date upon our analysis of the reach of the subject provisions is further obscured because the Legislature explicitly designated prospective or retroactive application for other provisions of the Act not at issue here (L. 1996, ch. 635, § 90). Under the circumstances, the proviso that the subject provisions were ***584** to "take effect immediately" contributes little to our understanding of whether retroactive application was intended on the issue presented.

It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it (*see, Jacobus v. Colgate,* 217 N.Y. 235, 240, 111 N.E. 837 [Cardozo, J.] ["It takes a clear expression of the

legislative purpose to justify a retroactive application"]; *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 ["the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"]). An equally settled maxim is that "remedial" legislation or statutes governing procedural matters should be applied retroactively (*see, Matter of OnBank & Trust Co.,* 90 N.Y.2d 725, 730, 665 N.Y.S.2d 389, 688 N.E.2d 245; *Becker v. Huss Co., supra,* 43 N.Y.2d, at 540, 402 N.Y.S.2d 980, 373 N.E.2d 1205).

However, such construction principles are merely navigational tools to discern legislative intent. Classifying a statute as "remedial" does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to "supply some defect or abridge some superfluity in the former law" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 321). As we have cautioned, "General principles may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available" (*Shielcrawt v. Moffett, supra,* 294 N.Y., at 189, 61 N.E.2d 435; *see also,* ***969 *Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 730, 665 N.Y.S.2d 389, 688 N.E.2d 245; *Becker v. Huss Co., supra,* 43 N.Y.2d, at 540, 402 N.Y.S.2d 980, 373 N.E.2d 1205). **981 To that end, we turn to legislative history to steer our analysis.

It is clear that one of the key purposes of the Act was the legislative modification of *Dole v. Dow Chem. Co.* (30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288) insofar as that case related to third-party actions against employers. That intention was repeatedly expressed by all sides during the legislative debates and is included in the official statement of intent (*see,* L. 1996, ch. 635, § 1 ["It is the further intent of the legislature to create a system which protects injured workers and delivers wage replacement benefits in a fair, equitable and efficient manner, while reducing time-consuming bureaucratic delays, and repealing *Dole* liability except in cases of grave injury."]). In *Dole,* this Court examined the share of losses to be apportioned between joint tortfeasors. Notwithstanding which tortfeasor was sued by an injured plaintiff, this Court concluded that the defendant, if found liable, could recover a proportionate share from a joint tortfeasor. **585 As we stated, "where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party" (*Dole v. Dow Chem. Co., supra,* 30 N.Y.2d, at 148–149, 331 N.Y.S.2d 382, 282 N.E.2d 288; *see also, Raquet v. Braun,* 90 N.Y.2d 177, 182, 659 N.Y.S.2d 237, 681 N.E.2d 404). Such equitable principles are codified in article 14 of the CPLR.

In *Dole,* the plaintiff was the employee of the third-party defendant so no recovery could be had against the employer by the employee or "anyone otherwise entitled to recover damages * * * on account of such injury or death" under Workers' Compensation Law § 11. Nevertheless, we extended our reasoning concerning the apportionment of liability to allow contribution or indemnification from an employer even though the employer could not have been liable directly to a plaintiff who had chosen to sue the joint tortfeasor. It was this part of the decision that proved most controversial.

> With the recent passage of the Act, the Legislature endeavored to clarify and restore "the force of 'exclusive remedy' (or 'no fault') provisions. Specifically, amendments would protect employers and their employees from other than contract-based suits for contribution or indemnity by third parties (such as equipment manufacturers which have been deemed liable for causing employees injuries or deaths)—in effect, repealing the doctrine of *Dole* " (Assembly Mem in Support, 1996 McKinney's Session Laws of N.Y., at 2562).

Memoranda issued contemporaneously with the passing and signing of the Act provided that "the exclusive remedy" would be "restored and reinforced" (*id.,* at 2565; *see also,* Governor's Approval Mem, 1996 McKinney's Session Laws of N.Y., at 1915). In an analysis of retroactive application, we have found it relevant when the legislative history reveals that the purpose of new legislation is to clarify what the law was always meant to say and do (*see, Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245). However, labeling the legislation as "remedial" in this regard is not dispositive in light of other indicators of legislative intent.

For example, legislators made declarations during floor debates that conclusively state that the Act was not intended to be applied retroactively (231 A.D.2d, at 109, 661 N.Y.S.2d 293). Moreover, a report entitled "New York State Assembly Majority Task Force **586 on Workers' Compensation Reform" explicitly states (at 25) that the provisions would apply only to "accidents that occur [after the effective] date forward," and was "not intended to limit the rights of parties to a lawsuit filed after the law takes effect, but involving a claim arising from an accident that occurred before the law took effect." Although these averments "may be accorded

some weight in the absence of more definitive manifestations of legislative purpose" (*Schultz v. Harrison Radiator Div. Gen. Motors Corp.,* 90 N.Y.2d 311, 318, 660 N.Y.S.2d 685, 683 N.E.2d 307), such indicators of legislative intent must be cautiously ***970 **982** used (*see, Woollcott v. Shubert,* 217 N.Y. 212, 221, 111 N.E. 829 ["statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes"]). As the Supreme Court has noted:

> "it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other" (*United States v. Freight Assn.,* 166 U.S. 290, 318, 17 S.Ct. 540, 550, 41 L.Ed. 1007).

On the same footing are statements contained in the Governor's Memorandum issued with the signing of the Act. In it, the Governor states his view that the legislation was intended to be retroactive (1996 McKinney's Session Laws of N.Y., at 1912 ["(o)f primary importance is the retroactive repeal" of *Dole*]). The Governor further stated that:

> "This new system, which takes effect immediately, is enacted with the specific intent of maximizing savings in workers' compensation premiums through its application to all cases currently pending in the courts of our State wherein the primary action has neither been settled nor reduced to judgment" (*id.,* at 1913).

Although postenactment statements of the Governor may be examined in an analysis of legislative intent and statutory purpose (*see, e.g., Crane Neck Assn. v. New York City/Long Is. County Servs. Group,* 61 N.Y.2d 154, 472 N.Y.S.2d 901, 460 N.E.2d 1336 [relying upon gubernatorial memoranda]; *see also,* Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History,* 48 Ark. L. Rev. 239), such statements suffer from the same infirmities as those made during floor debates by legislators. ***587** Here, the reports and memoranda simply indicate that various people had various views.[2]

Importantly, we note that the initial draft of the Act expressly provided that it would apply to *"lawsuit[s] [that have] neither been settled nor reduced to judgment"* by the date of its enactment (231 A.D.2d, at 107, 661 N.Y.S.2d 293). That language does not appear in the enacted version. A court may examine changes made in proposed legislation to determine intent (*see, United States v. St. Paul, Minneapolis & Manitoba Ry. Co.,* 247 U.S. 310, 318, 38 S.Ct. 525, 528, 62 L.Ed. 1130; *Woollcott v. Shubert, supra,* 217 N.Y., at 221, 111 N.E. 829; *People v. Korkala,* 99 A.D.2d 161, 166, 472 N.Y.S.2d 310 ["rejection of a specific statutory provision is a significant consideration when divining legislative intent"]). Here, such evidence is consistent with the strong presumption of prospective application in the absence of a clear statement concerning retroactivity.

Appellant points to the general principle that legislation is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be avoided (*Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245; McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98[a]). In this regard, appellant argues that sections 87 and 88 of the Act would be rendered meaningless if the provisions concerning third-party contribution claims were not applied retroactively. We disagree.

Section 88 of the Act mandates an audit of all workers' compensation insurance carriers and the State Insurance Fund to determine "the value as of December 31, 1996 of any reduction in reserves, hereinafter referred to as the reserve adjustment, required to be established for losses or claims pursuant to section 1303 of the insurance law and, concerning the state insurance fund, section 88 of the workers' compensation law that result from the application" of the Act's provisions related to *Dole* liability (L. 1996, ch. 635, § 88[a]). Section 87 of the Act imposes a $98 million "special assessment" on all licensed ***971 **983** workers' compensation insurance carriers that is to be deposited in the general fund of the State (L 1996, ch. 635, § 87). There is nothing in the law itself indicating the reason ***588** for the assessment or the intent behind these sections of the Act.

Section 88 refers to "reserves * * * required to be established for losses or claims pursuant to section 1303 of the insurance law." The referenced provision states that:

> "[e]very insurer shall * * * maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, *whether reported or unreported,* which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims" (Insurance Law § 1303 [emphasis supplied]).

Plainly, the statute requires insurers to set aside "reserves" for losses or claims that have been incurred but not reported to the company. Such reserves are calculated

actuarially based upon a statistical analysis of the insurance company's loss experience (*see, Matter of Stewart v. Citizens Cas. Co.,* 23 N.Y.2d 407, 414–415, 297 N.Y.S.2d 115, 244 N.E.2d 690). Examined under the circumstances presented, workers' compensation carriers are required to maintain reserves for (1) reported and expected *Dole* losses on pending actions; and (2) anticipated *Dole* losses on claims already incurred but not yet reported or asserted. If the new amendments were applied prospectively, the second category of *Dole* losses would, by and large, never materialize and the reserves set aside to cover such claims would be reduced.

However, that "reduction" is mathematically related to monies already collected by carriers via the payment of premiums. The Legislature apparently decided that the State should receive such "reduction in reserves" rather than permit insurers to retain the monies. As noted in the "New York State Assembly Majority Task Force on Workers' Compensation Reform" report (at 31):

> "As a result of the changes in employer liability enacted (*Dole*), carriers would be collecting more premium than actuarial [*sic*] needed. As a result, the legislation provides that this money be returned to the State."

While the elimination of pending *Dole* claims might lead to a maximum reduction in insurance reserves, there is some reduction in reserves even upon a prospective application of the ***589** legislation. Thus, sections 87 and 88 of the Act would not be rendered meaningless in the absence of retroactive application. Indeed, it is impossible to determine from the record provided how the Legislature actually derived $98 million as the amount of the "special assessment." As for whether these accounting provisions necessitate the wholesale dismissal of pending *Dole* claims, we are reluctant to assume that the Legislature would choose such a vexing and circuitous means of conveying that intent.

We further note our agreement with the statement made by the Appellate Division in *Morales v. Gross* (230 A.D.2d 7, 657 N.Y.S.2d 711) that the "purpose of the subject provisions was to abolish most third-party actions so as to enhance the exclusivity of the Workers' Compensation Law, thereby reducing insurance premiums and decreasing the cost of doing business in New York" (*id.,* at 12, 657 N.Y.S.2d 711). An extensive subject of discussion in the floor debates surrounding the subject legislation was how employers of New York have been forced to pay the highest insurance premiums in the country due, in part, to the possibility of third-party contribution/indemnification claims.

Prospective application of the legislation would still accomplish the legislative purpose of reducing insurance premiums and workers' compensation costs for employers and, in that way, assist "our State's ability to attract and maintain businesses and jobs" (Governor's Approval Mem, 1996 McKinney's Session Laws of N.Y., at 1912). Current employers would presumably realize future savings through the elimination of *Dole* claims and the consequent reduction in insurance *****972 **984** premiums.[3] Moreover, prospective application still enables the payment of substantial sums to the State by insurance companies who have, indirectly, benefitted from the reduction of reserves.

That a statute is to be applied prospectively is strongly presumed and here, we find nothing that approaches any type of "clear" expression of legislative intent concerning retroactive application. Indeed, other than the Governor's statements, the direct evidence concerning retroactivity is either against that view or equivocal. Moreover, the discernible legislative purpose does not mandate a particular result. "In the end, it is in ***590** considerations of good sense and justice that the solution must be found" (*Matter of Berkovitz v. Arbib & Houlberg,* 230 N.Y. 261, 271, 130 N.E. 288 [Cardozo, J.]) in the specific circumstances of each case.

We conclude that, irrespective of the date of the accident, a prospective application of the subject legislation to actions by employees for on-the-job injuries against third parties filed after the effective date of the relevant provisions is eminently consistent with the overall and specific legislative goals behind passage of the Act.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

KAYE, C.J., and TITONE, BELLACOSA, LEVINE, CIPARICK and WESLEY, JJ., concur.

Order affirmed, etc.

All Citations

91 N.Y.2d 577, 696 N.E.2d 978, 673 N.Y.S.2d 966, 1998 N.Y. Slip Op. 04556

Footnotes

1 Not at issue is whether the plaintiff's injuries qualify as "grave" within the meaning of the newly amended Workers' Compensation Law § 11.

2 Under the circumstances, little weight should be accorded to the postpassage opinions of the Department of Insurance and the Workers' Compensation Board concerning the reach of the legislation (*see,* Mem of Workers' Compensation Board, Susan Gravlich, Secretary, dated Aug. 8, 1996, Bill Jacket, L. 1996, ch. 635, at 2; Letter of Department of Insurance, Edward Muhl, Superintendent, dated Aug. 9, 1996, Bill Jacket, L. 1996, ch. 635, at 8).

3 The Compensation Insurance Rating Board estimated that the change in employer liability will save employers approximately 3.2% in premium (*see,* Report of "New York State Assembly Majority Task Force on Workers' Compensation Reform", at 31).

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31 Misc.3d 296
Supreme Court, New York County, New York.

Michael MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL–CIO, on behalf of all represented employees in the City School District of the City of New York, Petitioner,
v.
BOARD OF EDUCATION OF the CITY SCHOOL DISTRICT OF the CITY OF NEW YORK and Joel I. Klein, as Chancellor of the City School District of New York, Respondents.

Jan. 10, 2011.

Synopsis

Background: Teachers union petitioned for an order directing Board of Education to redact and keep confidential the names of any teachers appearing in any Teacher Data Reports (TDRs) released the public. Various news organizations with pending Freedom of Information Law (FOIL) requests to release the TDRs moved to intervene.

Holdings: The Supreme Court, Cynthia S. Kern, J., held that:

teachers union had standing to challenge Department of Education's (DOE) determination to release TDRs, and

DOE's decision not to withhold unredacted TDRs was not arbitrary and capricious.

Petition denied.

Attorneys and Law Firms

****787** Strook Strook & Lavan LLP, New York City (Charles G. Moerdler and Alan Klinger of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York City (Jesse I. Levine and Mark Toews of counsel), for respondents.

Levin, Sullivan, Koch, Shulz LLP, New York City (David A. Shulz of counsel), for intervenors.

Opinion

CYNTHIA S. KERN, J.

***298** Petitioner seeks an order directing respondents to redact and keep confidential the names of any teachers that appear in any Teacher Data Reports ("TDRs") released to the public. Various news organization with pending FOIL requests to release the TDRs with the teachers' names included now move to intervene in this proceeding (the "Press Intervenors"). For the reasons set forth below, the Press Intervenors' motion to intervene is granted without opposition and the petition to redact the teachers' names is denied.

As an initial matter, this court is not making a *de novo* determination as to whether the TDRs with the teachers' names should be released. This petition has been filed under Article 78. The only question before this court is whether the decision by the Department of Education ("DOE") to release the TDRs in a form that discloses teachers' names was arbitrary and capricious under the law. This court is not passing judgment on the wisdom of the decision of the DOE, whether from a policy perspective or from any perspective, or whether the DOE had discretion under the law to make a different decision, nor is this court making any determination as to the value, accuracy or reliability of the TDRs. This court is deciding the only issue before it, the purely legal issue under Article 78 of whether the DOE's decision was without a rational basis, rendering it arbitrary and capricious.

The relevant facts are as follows. Beginning in the 2007–08 school year, the DOE launched a pilot program in which a ****788** student's predicted improvement on state tests is compared with the student's actual improvement. The comparison is then used to determine that child's teacher's "value added"—it attributes the gain or loss in test scores to the child's teacher while controlling for other factors that influence student achievement such as poverty and English-language learner status. Beginning on August 16, 2010 and continuing through October 27, 2010, the Press Intervenors made nine separate requests under the Freedom of Information Law ("FOIL") specifically requesting TDRs, including disclosure of teachers' names.

Previous FOIL requests for the TDRs had not explicitly requested the teachers' names. The DOE had responded to those previous requests by redacting teachers' names and releasing the redacted TDRs only. Upon learning that the DOE had determined that it would comply with these most recent FOIL requests in a manner that would disclose the teachers' names ***299** as requested, petitioner the United Federation of Teachers (the "UFT") commenced the instant petition.

This court finds that the UFT has standing to bring this proceeding to challenge the DOE's determination to release the records even though it is not the entity which requested the records pursuant to FOIL. FOIL does not explicitly address the issue of whether the subject of records may challenge their disclosure and there is no case law directly on point. However, the parties do not cite any case in which such a party was prohibited from bringing a proceeding. In fact, several courts have permitted such cases to go forward while declining to explicitly rule on the issue. *See Anonymous v. Board of Education for the Mexico Central School District,* 162 Misc.2d 300, 616 N.Y.S.2d 867 (Sup.Ct., Oswego Cty. 1994); *Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665 (1986). In *Verizon New York Inc. v. Mills,* 24 Misc.3d 1230(A), 2007 WL 6847312 (Sup.Ct., Westchester Cty., 2007), *aff'd,* 60 A.D.3d 958, 875 N.Y.S.2d 572 (2nd Dept.2009), the court held that a party will have standing to challenge the release of records of which it is the subject if it can establish that the administrative action will have a "harmful effect" on it and that it is within the "zone of interest" to be protected by the statute. *See* 24 Misc.3d 1230(A), 2007 WL 6847312 (*citing Dairylea Cooperative, Inc. v. Walkley,* 38 N.Y.2d 6, 377 N.Y.S.2d 451, 339 N.E.2d 865 (1975)).

In the instant case, this court holds that the UFT has standing to bring this proceeding. The UFT has established that the administrative action will have a harmful effect on it and that it is within the zone of interest encompassed by the statute. FOIL is intended to promote disclosure by government but also to protect the interests of parties who would be harmed by such disclosure if the subject records fall into one of the exceptions enumerated under FOIL. *See Dairylea,* 38 N.Y.2d 6, 377 N.Y.S.2d 451, 339 N.E.2d 865.

This court now turns to the substance of the UFT's petition. As discussed above, the only issue before the court in this Article 78 proceeding is whether the DOE was "arbitrary and capricious" in determining that the unredacted TDRs would be released because the names of individual teachers did not fall into any exception under FOIL. The question of whether this court would have made a *de novo* determination to release the teachers' names is not before this court. Under Article 78, this court may only determine whether the DOE's determination was "without sound basis in reason and ... taken without regard to the facts." ***300** *Pell v. Board of Education,* 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974). Whether an agency's ****789** determination to release records was arbitrary and capricious must be viewed in light of the fact that the burden of proving that the requested material is exempt from disclosure falls on the agency seeking to withhold that material. *See Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665 (1986).

FOIL mandates the disclosure of agency records unless they are subject to a specific exemption. See N.Y. Public Officers Law ("POL") § 87(2) ("Each agency *shall* ... make available for public inspection and copying all records, except ...") (emphasis added). While an agency *must* release records to which no exemption applies, it is within the agency's discretion whether to withhold records to which an exemption applies ("such agency *may* deny access to records or portion thereof that ... [exceptions listed]") (emphasis added). POL § 87(2). The potentially relevant exceptions in this case include "inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations of data" and items which, "if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." POL § 87(2)(g) and (b). The DOE determined that none of the relevant exceptions to disclosure under FOIL applied to the teachers' names on the TDRs and that, accordingly, the names would be released.

The DOE's determination that teachers' names were not subject to any of the aforementioned exemptions was not arbitrary and capricious. Regarding the exception for inter-agency or intra-agency materials that are not statistical or factual tabulations, the DOE could have rationally determined that, although the unredacted TDRs were intra-agency records, they are statistical tabulations of data which must be released. POL § 87(2)(g)(i). Such a determination is not arbitrary or capricious. The UFT's argument that the data reflected in the TDRs should not be released because the TDRs are so flawed and unreliable as to be subjective is without merit. The Court of Appeals has clearly held that there is no requirement that data be reliable for it to be disclosed. *See Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 277, 653 N.Y.S.2d 54, 675 N.E.2d 808 (1996). In *Gould,* the court held witness statements must be released under FOIL "insofar as [they] embod[y] a factual account of the

witness's observations," regardless of whether the witness's account ***301** was actually credible and/or correct. *Id.* As the court explained, " factual data ... simply means objective information, in contrast to opinions, ideas or advice ..." *Id.* at 276, 653 N.Y.S.2d 54, 675 N.E.2d 808. Therefore, the unredacted TDRs may be released regardless of whether and to what extent they may be unreliable or otherwise flawed.

The UFT's reliance on *Elentuck v. Green,* 202 A.D.2d 425, 608 N.Y.S.2d 701 (2nd Dept 1994), in which the court held that it was proper to withhold lesson observation reports, is misplaced. The court there held that lesson observation reports are not statistical or factual data as they consist solely of advice, criticisms, evaluations and recommendations prepared by the school's assistant principal. In the present case, unlike in *Elentuck,* the determination by the DOE that the TDRs are statistical data has a rational basis. Unlike lesson observation reports, which are individual opinions of a teacher's lesson, the unredacted TDRs are a compilation of data regarding students' performance.

The DOE could have also rationally determined that releasing the teachers' names was not an "unwarranted invasion of personal privacy". FOIL permits withholding records if disclosure would ****790** constitute "an unwarranted invasion of personal privacy" under POL § 89(2). POL § 87(2)(b). POL § 89(2) provides that "an unwarranted invasion of personal privacy includes, but shall not be limited to" various categories of data illustrated by a list of six items including employment, medical and credit histories, information that would be used for solicitation or fund-raising purposes, information that would result in economic or personal hardship or simply personal information that is not relevant to the work of the agency. The statute specifically states that the list is not comprehensive. The Court of Appeals has held that the proper test to determine whether the release of records which do not fall into any of the listed categories constitute an "unwarranted" invasion of personal privacy is a balancing test in which the "privacy interests at stake" are balanced against the "public interest in disclosure of the information." *The New York Times Co. v. City of New York Fire Dept.,* 4 N.Y.3d 477, 485, 796 N.Y.S.2d 302, 829 N.E.2d 266 (2005). "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive to a reasonable [person] of ordinary sensibilities." *Hoyer, Newcomer, Smiljanich and Yachunis, P.A. v. State of New York,* 27 Misc.3d 1223(A), 2010 WL 1949120 (Sup.Ct. New York Cty. 2010) (*citing* ***302** *Matter of Humane Society of U.S. v. Fanslau,* 54 A.D.3d 537, 863 N.Y.S.2d 519 (3rd Dept. 2008)); *Physicians Committee for Responsible Medicine v. Hogan,* 29 Misc.3d 1220(A), 2010 WL 4536802 at **7* (Sup.Ct. Albany Cty. 2010) (*citing same*).

Courts have repeatedly held that release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy. *See, e.g. Faulkner v. Del Giacco,* 139 Misc.2d 790, 529 N.Y.S.2d 255 (Sup.Ct. Albany Cty. 1988) (authorizing release of the names of prison guards accused of inappropriate behavior); *Farrell v. Village Board of Trustees,* 83 Misc.2d 125, 372 N.Y.S.2d 905 (Sup.Ct. Broome Cty. 1975) (authorizing disclosure of written reprimands of police officers, including names of the officers); *Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665 (1986) (authorizing release of report of sick days taken by individual police officer); *Anonymous v. Board of Educ. for Mexico Central School Dist.,* 162 Misc.2d 300 (Sup.Ct., Oswego Cty. 1994) (authorizing disclosure of settlement agreement between teacher and Board of Education resolving disciplinary charges); *Rainey v. Levitt,* 138 Misc.2d 962, 525 N.Y.S.2d 551 (Sup.Ct. N.Y. Cty. 1988) (authorizing disclosure of individuals' scores on civil service exam). In contrast, courts have held that releasing personal information such as birth dates and personal contact information such as email addresses of state employees would constitute such an unwarranted invasion of personal privacy. *See Hearst Corp. v. State of New York,* 24 Misc.3d 611, 627–28, 882 N.Y.S.2d 862 (Sup.Ct. Albany Cty. 2009) (finding privacy interest in birth dates outweighs public interest in disclosure); *Physicians Committee,* 29 Misc.3d 1220(A), 2010 WL 4536802 at **8* (finding privacy interest in personal contact data outweighs public interest in disclosure).

In the instant case, the DOE could have reasonably determined that releasing the unredacted TDRs would not be an "unwarranted" invasion of privacy since the data at issue relates to the teachers' work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives. *See, e.g. Faulkner,* 139 Misc.2d 790, 529 N.Y.S.2d 255; *Farrell,* 83 Misc.2d 125, 372 N.Y.S.2d 905; *Anonymous,* 162 Misc.2d 300, 616 N.Y.S.2d 867. In *Faulkner, Farrell* and *Anonymous,* the courts authorized ****791** release of information (reprimands, alleged misconduct, and a settlement of disciplinary charges, respectively) which would be potentially more damaging to the parties than simply poor job performance. *See Faulkner,* 139 Misc.2d 790, 529 N.Y.S.2d 255; *Farrell,* 83 Misc.2d 125, 372 N.Y.S.2d 905; *Anonymous,* 162 Misc.2d 300, 616 N.Y.S.2d 867. The data at issue here is ***303** more akin to that released in these cases than to the birth dates and

personal contact information sought in *Hearst Corp.,* 24 Misc.3d 611, 627–28, 882 N.Y.S.2d 862 and *Physicians Committee,* 29 Misc.3d 1220(A), 2010 WL 4536802. In addition, in this case, the DOE could have rationally determined that the public's interest in disclosure of the information outweighs the privacy interest of the teachers. The public has an interest in the job performance of public employees, particularly in the field of education. Educational issues, including the value of standardized testing and the search for a way to objectively evaluate teachers' job performance have been of particular interest to policymakers and the public recently. This information is of interest to parents, students, taxpayers and the public generally. Although the teachers have an interest in these possibly flawed statistics remaining private, it was not arbitrary and capricious for the DOE to find that the privacy interest at issue is outweighed by the public's interest in disclosure.

Finally, the UFT's argument that the DOE assured teachers that the TDRs were confidential means that they cannot be disclosed under FOIL is without merit. The UFT relies on a letter dated October 1, 2008 from Chris Cerf, a Deputy Chancellor at the DOE, who wrote to then-UFT-president Randi Weingarten that "In the event a FOIL request for [TDRs] is made, we will work with the UFT to craft the best legal arguments available to the effect that such documents fall within an exemption from disclosure." The UFT also cites information about the TDRs provided to teachers and principals, assuring teachers of their confidentiality and directing principals not to share the results with anyone other than the subject teacher. However, regardless of whether Mr. Cerf's letter constituted a binding agreement, "as a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records." *LaRocca v. Board of Educ. of Jericho Union Free School Dist.,* 220 A.D.2d 424, 427, 632 N.Y.S.2d 576 (2nd Dept. 1995) (*citation omitted*); *see also Washington Post Co. v. New York State Ins. Dept.,* 61 N.Y.2d 557, 565, 475 N.Y.S.2d 263, 463 N.E.2d 604 (1984); *Anonymous,* 162 Misc.2d at 303, 616 N.Y.S.2d 867. Accordingly, the DOE's assurances that the TDRs would remain confidential cannot shield them from disclosure.

For the aforementioned reasons, the UFT's petition seeking an order directing the DOE to redact teachers' names from the TDRs prior to release is denied. This constitutes the decision, judgment and order of the court.

All Citations

31 Misc.3d 296, 919 N.Y.S.2d 786, 265 Ed. Law Rep. 1206, 2011 N.Y. Slip Op. 21030

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72 Misc.3d 458
Supreme Court, Onondaga County, New York.

In the Matter of the Petition of NEW YORK CIVIL LIBERTIES UNION, Petitioner, v. CITY OF SYRACUSE and Syracuse Police Department, Respondents.

002602/2021
|
Decided on May 5, 2021

Synopsis
Background: Requester of public records filed an Article 78 petition seeking a mandamus order to compel city and city's police department to produce, inter alia, disciplinary records related to unsubstantiated complaints and open claims against officers, which the department refused to produce under requester's Freedom of Information Law (FOIL) request.

Holdings: The Supreme Court, Gerard J. Neri, J., held that:

neither city nor its police department were required to produce documents related to closed unsubstantiated complaints;

open claims fell under FOIL exemption category of information that would interfere with law enforcement investigations; and

city and its police department had a reasonable basis to deny FOIL request.

Petition denied.

Attorneys and Law Firms

****867** Caitlin Elizabeth Feeney, Esq., Michael Lacovara, Esq., Plaintiff

John G. Powers Esq., Defendant

Opinion

Gerard J. Neri, J.

****868 *459** On March 18, 2021, Petitioner New York Civil Liberties Union ("NYCLU") filed a Petition (NYSCEF Doc. No. 1) with a Notice of Petition (NYSCEF Doc. No. 2) seeking to compel Respondents to release certain documents pursuant to Public Officers Law ("Public O.") § 84 *et seq.*, commonly known as the Freedom of Information Law ("FOIL"), and are now seeking enforcement via Article 78 of the CPLR for an order of mandamus. The Parties requested a brief adjournment of the matter (NYSCEF Doc. No. 25), which was granted and the matter was placed on the Court's calendar for April 29, 2021 (NYSCEF Doc. No. 26). On April 14, 2021, Respondents answered the Petition (NYSCEF Doc. No. 36) and moved to dismiss the Petition (NYSCEF Doc. No. 27, *et seq.*).

Petitioner alleges that on September 15, 2020, it submitted a FOIL request to the Syracuse Police Department ("SPD") seeking, *inter alia*, disciplinary records, records relating to the use of force, records relating to stops/temporary detentions/field interviews, complaints about misconduct, immigration-related enforcement, Syracuse Citizen Review Board Records, records concerning diversity in ranks, and additional policies and agreements (the "FOIL Request", NYSCEF Doc. No. 5). On September 23, 2020, Respondents acknowledged receipt of the FOIL Request and stated that "our initial estimate is that the collection, review, and redaction of these records will require one (1) year from the date of this letter" (the "Acknowledgment", NYSCEF Doc. No. 6). In November 2020, the Parties met concerning the FOIL Request, whereat Respondent allegedly committed to a "rolling production of documents partially responsive to the Request" (*see* Petition, NYSCEF Doc. No. 1, ¶2). In a letter dated November 17, 2020, Respondents denied that portion of the FOIL Request seeking disciplinary records related to complaints not yet substantiated (NYSCEF Doc. No. 7). Petitioner alleges this denial is unlawful and is the focus of this proceeding (*see* Petition, NYSCEF Doc. No. 1, ¶3). Petitioner alleges Respondents' partial denial contravenes the plain language of the recent repeal of Civil Rights Law ("CRL") § 50-a (*ibid* at ¶6).

Petitioner notes that under FOIL, government records are "presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions

of Public O. ***460** § 87(2)" (*Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274–75, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996]). Petitioner asserts that the repeal of CRL § 50-a "commands the disclosure of all disciplinary records, regardless of status or disposition" (*see* Memorandum of Law, NYSCEF Doc. No. 3, p. 5). Petitioner alleges that the Legislature considered and rejected a narrower version of the CRL § 50-a repeal which would have limited the release of documents to substantiated claims (*see* S.4213). Petitioner notes that Public O. § 89 was also amended to create limited disclosure shields for certain personal information relative to police officers (*see e.g.* Public O. §§ 89(2-b) and 89(2-c)).

Petitioner argues that Respondents' interpretation of Public O. § 87(2)(b) would nullify the repeal of CRL § 50-a. Petitioner points to comments made during the debate of the bills it was proffered that the intent was specifically to look at the process, not just the results, of disciplinary proceedings (*see* NY Senate, Floor Debate, 243rd NY Leg., Reg. Sess. 1805-06 (June 9, 2020)). Petitioner further alleges that ****869** other courts have rejected Respondents' interpretation (*see Schenectady PBA v. City of Schenectady*, 2020 WL 7978093, at 4, 2020 N.Y Misc. LEXIS 10947, at 12-13 [Sup. Ct. Schenectady Cty. 2020].; *see also Buffalo Police Benevolent Ass'n., Inc. v. Brown*, 69 Misc.3d 998, 134 N.Y.S.3d 150, 154 [Sup. Ct. Erie Cty. 2020]). Petitioner urges the Court to grant the relief sought.

Petitioner further argues it is entitled to attorneys' fees. Petitioner notes 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, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall 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 and the court finds that the agency had no reasonable basis for denying access" (Public O. § 89(4)(c)).

Petitioner asserts that SPD has invoked a "personal privacy" exemption that was specifically rejected by the Legislature and therefore the denial was done without a reasonable basis.

***461** Respondents answered and generally denied (*see* Answer, NYSCEF Doc. No. 36). Respondents further move to dismiss the petition pursuant to CPLR §§ 7804(f) and 409(b) (NYSCEF Doc. No. 27, *et seq.*). Respondents assert that the repeal of CRL § 50-a did not result in a change of FOIL resulting in police officers being treated less favorably than other public employees (*see* Affirmation, NYSCEF Doc. No. 28, ¶¶3-4). Respondents note the repeal did not change, let alone mention Public O. § 87(2)(b), the personal privacy exemption (*ibid* at ¶5, *see also* L 2020, ch. 96). Respondents cite numerous cases where courts determined that Public O. § 87(2)(b) required unsubstantiated records to be shielded (*see Western Suffolk Bd. of Co-op. Educ. Servs. v. Bay Shore Union*, 250 A.D.2d 772, 773, 672 N.Y.S.2d 776 [Second Dept. 1998]; *LaRocca v. Bd. of Educ.*, 220 A.D.2d 424, 427, 632 N.Y.S.2d 576 [Second Dept. 1995]; *Santomero v. Board of Educ.*, 2009 WL 6860644 [Sup. Ct. Westchester Cty. 2009]; *Herald Company v. School District of City of Syracuse*, 104 Misc. 2d 1041, 430 N.Y.S.2d 460 [Sup. Ct. Onondaga Cty. 1980]). Respondents also point to an Advisory Opinion ("AO") from the Committee on Open Government which similarly found Public O. § 87(2)(b) affords public employees, including police officers, certain privacy protections in regards to "unsubstantiated and unfounded complaints" (*see* AO 19775, NYSCEF Doc. No. 31). Respondents also point to the floor debate of the repeal of CRL § 50-a which they claim supports their position (*see* Assembly Floor Debate, June 9, 2020, NYSCEF Doc. No. 29, pp. 60, 170, 176, & 211).

Respondents argue the cases cited by Petitioner are irrelevant to the issues at bar. The Committee on Open Government reviewed the same cases proffered by Petitioner and dismissed them as not being on point (*see* AO 17985, NYSCEF Doc. No. 32). Respondents urge the Court grant deference to the Committee on Open Government's interpretation of the relevant statutes (*see Forsyth v. City of Rochester*, 185 A.D.3d 1499, 129 N.Y.S.3d 220 [Fourth Dept. 2020]). Respondents proceed to distinguish the Petitioner's proffered cases from the facts at issue.

Respondents also argue that Petition failed to preserve the issue as they did not take an administrative appeal (*see Ayuso v. Graham*, 177 A.D.3d 1389, 1390, 114 N.Y.S.3d 547 [Fourth Dept. 2019]). Respondents ****870** allege that Petitioner only appeals two issues: a) ***462** whether the SPD's response was deficient because it did not fully articulate the reasons for the denial; and b) whether the repeal of CRL § 50-a mandated disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. Respondents argue any challenge to SPD's application of Public O. § 87(2)(b), outside of the Petitioner's argument concerning the repeal of CRL § 50-a, was waived.

Respondents argue that their denial of Petitioner's FOIL request was reasonable in light of Respondents' reliance on the opinion from the Committee on Open Government, thus, Petitioner is not entitled to an award of attorneys' fees and costs.

Petitioner replies and notes the singular issue before the Court concerns "SPD's categorical refusal to produce enforcement disciplinary records if those records relate to complaints that were not substantiated or remain open" (Memorandum of Law, NYSCEF Doc. No. 40, p. 1). Petitioner further asserts: "All the NYCLU seeks is to hold the SPD to the strictures of FOIL in a manner consistent with (a) the text and structure of the statute, (b) other recent court decisions, and (c) the "Advisory Opinion" that the SPD invokes repeatedly" (*ibid*). Petitioner asserts Respondents have taken an overbroad approach to Public O. §§ 87(2)(b) and 89(2) (*ibid* at p. 2). Petitioner relies on opinions from courts which are not binding upon this Court to substantiate their opinion (*see e.g. People v. Herrera*, No. CR-004539-20NA, 2021 WL 1247418, at *5 (N.Y. Dist. Ct. Apr. 5, 2021)). Petitioner argues that the privacy exceptions of Public O. § 87 do not exist in a vacuum but must be read in concert with Public O. § 89. Petitioner further argues that Public O. § 89 defines the scope of the privacy exception (Memorandum of Law, NYSCEF Doc. No. 40, p. 6).

Petitioner further argues that the cases cited by Respondents are irrelevant to the matter at hand and "misdirection" (*ibid* at. p. 7). Petitioner argues that *Herald Co. v. School Dist. of City of Syracuse* was decided based upon the exceptions in Public O. § 87(2)(a) and (g), not Public O. § 87(2)(b) (*ibid at p. 8*; *see also Herald Co.* at 1045-1047, 430 N.Y.S.2d 460). The court in *Herald Co.* specifically declined to "determine whether the records sought would constitute an unwarranted invasion of privacy if disclosed" (*Herald Co.* at 1047, 430 N.Y.S.2d 460). Petitioner also argues that the legislative intent of the repeal of ***463** CRL § 50-a was to open all records to public inspection, regardless of whether the claims were substantiated (*see Schenectady PBA*, *supra*). Petitioner prays this Court grant the requested relief.

The matter was heard virtually on April 29, 2021. The Parties reiterated their arguments and highlighted what they believed to be their strongest points. Petitioner denied that they waived any arguments as alleged by Respondents. Petitioner further noted the issue before the Court was the narrow question regarding the release of "unsubstantiated" records. Upon questioning by the Court, Petitioner acknowledged there were two categories, unsubstantiated and open claims, but that Petitioner generally believed both categories fell under the heading of unsubstantiated. Petitioner further argued that the Legislature defined what the privacy interests of the subject police officers were in Public O. § 89.

Respondents argued that the information protected under Public O. §§ 89(2-b), and 89(2-c) is the minimum an agency should redact, not a maximum. A point Petitioner later conceded: that Public O. § 89(2) was not an exhaustive list. Respondent further argued that the documents sought by Petitioner did not need to be itemized if they fell into a category of ****871** information protected by Public O. § 87, such as unsubstantiated claims against police officers.

Respondent analogized the release of unsubstantiated claims against police officers to the attorney and judicial grievance processes. Respondent noted that in both those instances, unsubstantiated attorney and judicial grievances are not publicly released. Respondent argues the same logic applies in that unsubstantiated claims are just that, unsubstantiated and that the potential injury to an individual's reputation outweighs the public's right to know.

Both Parties conceded that records related to unsubstantiated and open claims may fall into more than one category of protected information, as exemplified by *Herald Co.*

Discussion:
Petitioner seeks an order of the Court "directing Respondents to comply with its duty under FOIL to disclose copies of all law enforcement disciplinary records collected by the SPD, regardless of disposition, sought by Petitioner in the FOIL Request dated September 15, 2020" (*see* Petition, NYSCEF Doc. No. 1, p. 10). The subject matter of the Petition is focused on Respondents' ***464** November 17, 2020 denial letter (*see* Petition, NYSCEF Doc. No. 1, ¶3; *see also* Denial Letter, NYSCEF Doc. No. 7; *see also* Memorandum of Law, NYSCEF Doc. No. 40, p. 1). The documents denied fall into two categories: 1) matters which are "open"; and 2) closed matters which were not substantiated. Collectively, the Court considers these categories to be collectively "unsubstantiated" matters. Petitioner alleges that the repeal of CRL § 50-a means that both categories of documents are now open for public review.

CRL § 50-a allowed agencies to deny FOIL requests which sought personnel records of, *inter alia*, police

officers (*see generally NYCLU v. New York City Police Dept.*, 32 N.Y.3d 556, 94 N.Y.S.3d 185, 118 N.E.3d 847 [2018]). "Personnel records include documents relating to misconduct or rule violations by police officers" (*Matter of Columbia-Greene Beauty Sch., Inc. v. City of Albany*, 121 A.D.3d 1369, 1370, 995 N.Y.S.2d 340 [Third Dept. 2014]). CRL § 50-a was repealed effective June 12, 2020 (*see* L 2020, ch. 96). In the same law, the Legislature also defined "law enforcement disciplinary records" (*see* Public O. § 86(6)). The Legislature also provided that certain personal information must be redacted from any law enforcement disciplinary records which an agency releases (*see* Public O. §§ 87(4-a), 87(4-b), 89(2-b), and 89(2-c)). The repeal of CRL § 50-a made no other changes (*see* L 2020, ch. 96).

Public O. § 87(2)(b) exempts from disclosure any record or part of a record which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article" (Public O. § 87(2)(b)). As noted by Respondents, the disclosure of unsubstantiated complaints have been considered exempt as an invasion of personal privacy (*see e.g. LaRocca v. Board of Educ.*, 220 A.D.2d 424, 427, 632 N.Y.S.2d 576 [Second Dept. 1995]). This view is also held by the Committee on Open Government (*see* AO 19775, NYSCEF Doc. No. 31). The Committee on Open Government specifically states, "there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be *more* available than the records of other government employees" (*ibid*, *emphasis in original*).

The cases cited by Petitioner do not support its position. For example, in *Buffalo Police Benevolent Assn., Inc. v. Brown*, the issue to be determined was a temporary restraining order ***465** ("TRO") and ****872** other injunctive relief and such relief was denied as the petitioners had failed to exhaust their administrative remedies (*see Buffalo Police Benevolent Assn., Inc. v. Brown*, 69 Misc. 3d 998, 1001, 134 N.Y.S.3d 150 [Sup. Ct. Erie Cty. 2020]). While the court in *Buffalo Police Benevolent Assn.* declined to provide a "blanket prohibition", in the form of a TRO, on the disclosure of certain employment records, neither did it hold that the subject records should be disclosed wholesale:

> "Finally, it should be noted that the court's rulings do not mean that police disciplinary records — whether requested by the Buffalo Common Council or whether demanded by some other entity by some other method — shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including § 87(2)(b)" (*Buffalo Police Benevolent Assn.* at 1004-1005, 134 N.Y.S.3d 150).

Buffalo Police Benevolent Assn. does not purport to stand for the proposition that records must be released.

In *Schenectady PBA*, the court noted the repeal of CRL 50-a resulting in "access to law enforcement personnel records, including disciplinary history is now governed by FOIL alone" (*Schenectady PBA* at 10). However, our sister court in *Schenectady PBA* then goes against the previous decisions on unsubstantiated complaints by stating: "In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct" (*Schenectady PBA* at 12). The court in *Schenectady PBA* further relies on its interpretation of "legislative intent":

> "In our current times, our state lawmakers have seen fit to require disclosure of police personnel records, upon FOIL request, even when such records reflect no more than allegations. They, presumably, did so in the name of opening the door to transparency, and having done so, it would be palpably improper for this Court to close it. It strikes the Court that the legislature intended not just a change in law but, rather, a change in culture. It is the Court's function to enforce the current laws in ***466** a manner that reflects that intention" (*Schenectady PBA* at 15).

This Court respectfully disagrees.

Legislative intent is not something easily divined from the minds of dozens of legislators.

> "The traditional view is that an enacted text is itself the law. As the Supreme Court of the United States wrote in 1850: 'The sovereign will is made known to us by legislative enactment.' And it is made known in no other way. Or as an early-20th-century theorist put the point: '[w]henever a law is adopted, all that is really agreed upon is the words' " (Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, § 68 at p. 397, *citing Wheeler v. Smith*, 50 U.S. 55, 78, —— S.Ct. ——, 13 L.Ed. 44 [1850], and Josef Kohler, "Judicial Interpretation of Enacted Law," in *Science of Legal Method: Select Essays by Various Authors* 187, 196 (1917)).

Both sides have proffered examples from the legislative record which they purport to support their respective positions. All this Court can base its determination on is the final product: ***the law as enacted***.

The law clearly repealed CRL § 50-a (L 2020 ch. 96, § 1). The law also provided added definitions (*ibid*, § 2), as

well as providing certain items which must be redacted prior to release (*ibid*, §§ 3 and 4). ****873** What the law did not provide for was altering previously existing privacy considerations. The release of unsubstantiated claims have been previously found to be prohibited by Public O. § 87(2) as an unwarranted invasion of privacy (*see Matter of LaRocca supra*). When considering the repeal of CRL § 50-a through the lens of previous caselaw, the Court has no choice but to deny the request for an order releasing all unsubstantiated discipline records.

The Court further agrees with respondent in its analogy with attorney and judicial grievances. For example, Judiciary Law § 90(1) states in pertinent part: "all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential". The Court of Appeals in *Nichols v. Gamso,* 35 N.Y.2d 35, 38, 358 N.Y.S.2d 712, 315 N.E.2d 770 (1974) stated: ***467** "Internal judicial investigations of charges or complaints against judicial officers are confidential, and no authority, decisional or statutory, suggests otherwise. When, however, such charges or complaints are sustained and the determinations are made public by the court with jurisdiction of the charges, it may be an abuse of discretion, as a matter of public policy, absent compelling circumstances affecting the public interest, not to make available to public scrutiny so much of the record and proceedings as bear on the charges sustained". The logic is persuasive. Certainly there is no greater public interest in fairness and justice than our own courts and legal system which should also be weighted similarly among police officers' and other public employees' right to privacy including those other exemptions to disclosure under the Public Officers Law. Contrary to Petitioner's assertions, the repeal of CRL § 50-a does not require documents related to unsubstantiated claims against police officers to be released. Further, the public interest in the release of unsubstantiated claims do not outweigh the privacy concerns of individual officers.

Another point conceded by the Parties was that records related to unsubstantiated and open claims may also fall into other categories of restricted material. Public O. § 87(2)(e) restricts the release of information which would interfere with law enforcement investigations or judicial proceedings. Certainly open claims would fall into this category. Further, as relied upon in *Herald Co*., Public O. § 87(2)(g) precludes certain inter- and intra-agency documents which are not final determinations.

As the Court has denied the release of documents pursuant to FOIL, the request for attorneys fees and costs is moot. However, even had the Court granted the release of documents, the Respondents have demonstrated a reasonable basis to withhold the documents based upon the opinions of the Committee on Open Government and other relevant caselaw (*see* Public O. § 89(4)(c)). The foregoing constitutes the decision of the Court.

NOW, THEREFORE, upon reading and filing the papers and the arguments held on April 29, 2021 with respect to the Petition and Motion, and due deliberation having been had thereon, it is hereby

ORDERED, that the motion to dismiss made by Respondents City of Syracuse and Syracuse Police Department is ***468** hereby GRANTED; and it is further

ORDERED, that the Petition is DENIED in its entirety.

All Citations

72 Misc.3d 458, 148 N.Y.S.3d 866, 2021 N.Y. Slip Op. 21128

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42 Misc.3d 1215(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Nassau County, New York.

NEWSDAY LLC, Petitioner/Plaintiff,
v.
NASSAU COUNTY POLICE DEPARTMENT, Respondent/Defendant.

No. 8172/13.
|
Jan. 16, 2014.

Attorneys and Law Firms

David A. Schulz, Esq., Alia L. Smith, Esq., New York, attorney for plaintiff.

Carnell Foskey, Nassau County Attorney, Jeremy Zenilman, Deputy County Attorney, Mineola, attorney for defendant.

Opinion

DANIEL PALMIERI, J.

***1 The following papers were read on this proceeding/motion:**

Notice of Verified Petition and Petition, dated 7–2–13	**1**
Memorandum of Law in Support, dated 7–8–13	**2**
Answer and Objections in Point of Law, dated 10–30–13	**3**
Nassau County Police Department,	
Memorandum of Law, dated 10–30–13	**4**
Reply (Memorandum), dated 11–21–13	**5**

This special proceeding/action for relief pursuant to CPLR Article 78 and Public Officers Law §§ 84 *et seq.,* and CPLR 3001, is granted to the extent set forth in this Decision, Order and Judgment.

This is a hybrid proceeding for relief under the Freedom of Information Law ("FOIL"), set forth in Article 6 of the Public Officers Law, §§ 84–90, and for related declaratory and mandamus relief. Petitioner/plaintiff Newsday LLC ("Newsday" or "petitioner") asserts that the respondent/defendant Nassau County Police Department ("NCPD" or "respondent") has violated FOIL by consistently failing to respond properly to legitimate requests for information and documents. It seeks not only a vacatur of denials for certain information, but also a declaration by the Court that NCPD has engaged in a pattern and practice of refusing to obey the law, and a judgment in mandamus directing the NCPD to do what it is bound to do under FOIL. It also seeks a related

direction ordering respondent, in effect, to certify to the Court annually that it is in compliance with the statute.Finally, petitioner seeks to recoup its costs, including legal fees, expended in its efforts to obtain the information sought.

The specific FOIL requests and the responses by NCPD that sparked this litigation shall be summarized, in the order in which they appear in the petition.

The first, dated October 4, 2012, was a request for each "Field name" for each data field within an "incident tracking" system maintained by respondent. The request defined "Field name" as the label or identification of an element of a computer database, and would include a subject heading such as a column header, data dictionary, or record layout. By letter dated January 15, 2013, NCPD denied the request pursuant to Public Officers Law § 87(2)(e)(i) and § 87(2)(e)(iv) and 87(2)(f), stating that "disclosure of that information could impede or interfere with pending and/or future investigation. It would reveal the method by which the [NCPD] conducts investigations and non-routine investigative procedures. Additionally, disclosure could also jeopardize the safety of our officers." No further elaboration or reasons were given.

Newsday took an administrative appeal from this "Field name" denial on February 13, 2013. Thomas V. Dale, Commissioner of Police, upheld the denial by letter dated March 7, 2013, stating that "Information gathering and the means by which the NCPD classifies that information is an integral part of investigations ... your request ... is again denied." Commissioner Dale cited the same reasons found in the initial denial, without further comment.

***2** The second Newsday request is dated January 15, 2013. That request was for "arrest reports, police reports, case reports and any other publically releasable documents" involving four criminal cases, identified by the name of the person charged. This "four criminal cases" request was denied by letter dated February 21, 2013, the NCPD officer issuing the denial stating that it was based on Public Officers Law § 87(2)(b), "which exempts from disclosure records, which constitute an unwarranted invasion of personal privacy". There was no additional statement of reasons given.

Petitioner took an internal administrative appeal from this denial on March 22, 2013. By letter dated May 15, 2013, Thomas C. Krumpter, First Deputy Commissioner of Police, denied the appeal. He stated that "any records relating to the above named [four] individuals would not be provided without an authorization from those individuals or from an individual involved in the incident. New York State Public Officers Law § 87(2)(b), exempts from disclosure records which constitute an unwarranted invasion of personal privacy. In furtherance of [that section], it is the policy of this Department not to release records relating to an investigation unless it is requested or authorized by a person involved in the incident. Further, your request is denied as the disclosure ... could identify confidential sources or information relating to criminal investigations and could reveal non-routine investigative techniques. Therefore your request is also denied pursuant to Public Officers Law §§ 87(2)(e)(iii) and 87(2)(e)(iv)." A final reason for the denial was § 87(2)(f), which provides that the governmental agency may withhold information which, if disclosed, "would endanger the life or safety or any person."

The third Newsday request is dated February 15, 2013, and requested records indicating all monetary payments to confidential informants/cooperating witnesses from 2008 to 2012, including, if possible, date and method of payment, rather than an annual total, including ancillary paid expenses such as meals, housing and transportation. The request specifically noted that "we are clearly not seeking information that identifies individuals, simply the amount of public money that's gone to informants and cooperating witnesses."

By letter dated February 26, 2013 NCPD denied access to records regarding these confidential informant payments ("CI payments"), stating that it was doing so pursuant to Public Officers Law § 87(2)(e)(iii) and (iv) and § 87(2)(f), because "the release of this information would endanger the safety of certain individuals and would reveal confidential information relating to criminal investigations and disclose investigative techniques and procedures." Upon administrative appeal, which petitioner initiated on March 28, 2013, First Deputy Commissioner Krumpter upheld the denial by letter dated April 19, 2013, citing the same reasons and adding that release would interfere with pending investigations, citing Public Officers Law § 87(2)(e)(i).

***3** The fourth request concerned a widely reported case in which Leatrice Brewer was accused of the 2008 killing of her own children. By letter dated April 25, 2012, petitioner requested all documents related to this defendant, her home in New Cassel, logs and radio dispatches directed to her home, and GPS tracking data related to patrol vehicles dispatched to her home for the hour before and three hours after any calls for services to her location. Newsday explained that its request was based on its assertion that the police had been called to her home prior to the time she killed her children.

The request for the Brewer records was denied by way of a form dated May 1, 2012, which had checked as the reasons for denial under the Public Officers Law 1) the need for authorizations from persons involved in the incident (citing § 87(2)(b)), 2) exposure of criminal investigative technique or procedure (citing § 87(2)(e)(iv), and, regarding E911 records, County Law § 308(4) [barring release of records of calls made to an E911 system except to governmental agencies/departments or private providers of medical or emergency services]. Upon Newsday's administrative appeal of May 22, 2012, Deputy County Attorney Brian Libert, serving as the FOIL appeals officer for this appeal, remanded the request to NCPD "so that it may specifically identify and enumerate documents in its possession and articulate any exemption it may have as to a particular record." Letter dated June 22, 2012.

On remand, NCPD again denied the request by way of letter from Detective Sergeant Israel Santiago, dated July 20, 2012. The reasons were 1) that the request for "all documents" did not reasonably describe the specific documents being sought, 2) unwarranted invasion of personal privacy (citing Public Officers Law § 87(2)[b]), 3) County Law § 308(4), and 4) that the release of GPS tracking data could impede or interfere with pending an/or future investigation, reveal methods of investigation and could jeopardize officer safety (citing Public Officers Law §§ 87(2)(e)(i) and (2)(e)(iv) and (2)(f)).

Upon administrative appeal after remand, by letter dated September 20, 2012, NCPD notified Newsday that the County Attorney had requested that NCPD reconsider its second denial and, as a result, NCPD was producing documents, but redacted "in order to prevent an unwarranted invasion of personal privacy of certain individuals." Those records that were produced were, in fact, redacted, obscuring such items as addresses where incidents involving Brewer occurred, and the names and other persons involved, including witnesses and those suspected of criminal behavior.

In addition to the privacy exemption, NCPD's transmittal letter explained that additional redactions of information had been made regarding "dispatch logs, radio transmissions, etc. to Brewer's home(s)" pursuant to County Law § 308(4) and Public Officers Law § 87(2)(a), which permits an agency to withhold information if it is "specifically exempted from disclosure by state or federal statute." As noted above, County Law § 308(4) bars a general release of records of calls made to an E911 system. Finally, the letter explained that GPS tracking data was again denied on the ground that disclosure could impede or interfere with pending or future investigations, reveal investigative techniques and jeopardize officer safety.

***4** Newsday challenged the redactions in an administrative appeal by letter dated January 29, 2013. It asked for unredacted pages so it might know the scene of an incident, Brewer's address and occupation, witnesses, arrestees or suspects regarding criminal incidents (not all of which concerned the killing of the children), persons against whom Brewer had an order of protection, and the name of a DSS/CPS [Department of Social Services/Child Protective Services] employee assigned to look into a matter. Newsday also challenged whether all documents concerning Brewer were produced, whether or not redacted. The appeal was denied by letter from Deputy County Attorney Libert dated April 3, 2013.

The fifth and final request addressed in this proceeding was dated August 21, 2012 and sought the names of all sworn officers in the police department. The parties have resolved this request, albeit not without complaint from petitioner that it took more than a year to do so. Accordingly, the Court will not address it, except as it concerns the fee request.

As is made clear in the legislative declaration, the Freedom of Information Law is intended to open the workings of government to the public, including through a free press, which is cast as the pubic's representative for that purpose. Public Officers Law § 84. To effect this purpose, the statutory scheme is comprehensive and at its core presumes that governmental records are available for review. It thus places the burden on a resisting agency or department to explain how a given request for records fits under one of the statutory exemptions (Public Officers Law § 89(4)[b]), which are to be narrowly construed to provide maximum access to the public. *See, e.g., Matter of Gould v. New York City Police Department,* 89 N.Y.2d 267 (1996); *Matter of Capital Newspapers v. Whalen,* 69 N.Y.2d 246 (1987).

Relatedly, the department or agency must provide in support of a denial particular and specific justification for its action. *Matter of Fink v. Lefkowithz,* 47 N.Y.2d 567 (1979); *Matter of Flores v. Fischer,* 110 AD3d 1302 (3d Dept.2013); *Matter of Madera v. Elmont Public Library,* 101 AD3d 726 (2d Dept.2012). Conclusory or speculative assertions that certain records fall within a statutory exemption are insufficient; evidentiary support is needed. *Matter of Porco v. Fleischer,* 100 AD3d 639 (2d Dept.2012); *Matter of Dilworth v. Westchester County Dept. of Correction,* 93 AD3d 722 (2d Dept.2012); *Matter of Madera, supra; see also Washington Post Co. v. New York State Ins. Dept.,* 61 N.Y.2d 557 (1984).

Further, given the arguments made on this proceeding, it is worth noting that, as a general matter in Article 78 review, a court should not evaluate arguments and proof that were not raised or presented at the administrative level. *Matter of Molloy v. New York City Police Dept.,* 50 AD3d 98, 100 (1st Dept.2008); *Matter of Graziano v. Coughlin,* 221 A.D.2d 684, 686 (3d Dept.1995). Nevertheless, the Court will address such arguments here, both because of the alleged potential effect of release on the confidentiality rights of third parties (*Matter of Rose v. Albany County Dist. Attorney's Office,* 111 AD3d 1123 [3d Dept.3013]), citing, *inter alia, Matter of Johnson Newspaper Corp. v. Stainkamp,* 61 N.Y.2d 958 [1984]), and because petitioner has commenced a hybrid proceeding that blurs the line between Article 78 and a declaratory judgment action. In any event, these arguments do not change the result.

***5** In view of the foregoing well-established law, it is apparent to this Court that the denial of access to the records requested was not adequately supported by the respondent, and that the petition should be granted for that reason, to the extent indicated.

In denying the "field names" records NCPD provided no explanation or proof that disclosure of this information would have the consequences that would fall within the stated statutory exemptions. Rather, it did no more than restate the statutory language. Although a Public Officers Law § 87(2)(e)(i) exemption might shield data if a specific investigation were ongoing (*Matter of Lesher v. Hynes,* 19 NY3d 57 [2012]), there is no such claim here. With regard to the reference to Public Officers Law § 87(2)(f), there is no explanation as to how any person's life or safety would be endangered.

In his affidavit submitted on this proceeding, First Deputy Commissioner Krumpter also states that release "could potentially" give away specific knowledge of how respondent's record management system is structured, and that an individual with sufficient technical knowledge could "reverse engineer" the system. He states that based upon conversations with members of respondent's Information Technology Unit ("ITU"), "all records could be exposed if hacked into." It is claimed that release would give rise to a substantial likelihood that violators (*i.e.,* criminals) could evade detection by tailoring their conduct in anticipation of avenues of inquiry.

However, while these statements are made upon the affiant's "training and experience as First Deputy Commissioner", he does not claim to be an information technology expert, and the obviously hearsay statements attributed to ITU personnel are inadmissible. Before a court could accept them, these contentions clearly require expert proof of how a security breach could occur if the requested data were released, and none is offered. The absence of such proof is particularly conspicuous here since ITU personnel are employees of NCPD. Under these circumstances, this Court cannot find that the respondent has shown that the "field names" information in the incident tracking system as sought by petitioner falls within Public Officers Law § 87(2)(e)(iv), as claimed. Thus, resort to this exemption is inadequate.

Deputy Commissioner Krumpter further asserts that release would violate respondent's obligation to the vendor of the software it uses in its incident tracking system, would permit disclosure of protected trade secrets, and that the vendor thus would sustain an injury to its competitive position, Public Officers Law § 87(2)(d). These claims are unsupported by proof and thus constitute no more than conclusions and speculation, which are insufficient. There is no statement from the unnamed vendor, let alone persuasive evidence, demonstrating how release of the information would cause an injury to its competitive interests. Accordingly, it must be rejected. *See Matter of Markowitz v. Serio,* 11 N.Y.2d 43, 50 (2008). The records shall be produced.

***6** The second FOIL request, for the "four criminal cases" documents, was resisted primarily on the basis of the "unwarranted invasion of personal privacy" exemption, Public Officers Law § 87(2)(b), as more specifically defined in section 89(2)(b). That is restated here, although not further argued. In any event, it is without merit. The latter statute defines this protection as extending to seven categories of information. While the statute provides that such an invasion of privacy is not limited to this list, respondent relies on no more than its own policy, stated to be "in furtherance of" this section, not to release records without an authorization from the individuals involved in the incident. Without more, this is patently inadequate. There is no reference to any of the seven categories, nor to any other specific explanation as to how this could lead to an "unwarranted invasion" of personal privacy. Respondent also failed to address section 89(2)(c)(i), which provides that disclosure shall not constitute such an invasion of privacy when identifying details are deleted, which clearly was not considered.

On this proceeding, however, the emphasis is on the stated fact that each of these arrests was the result of undercover investigations. Krumpter states that it is the position of NCPD, in effect, that any document related to undercover investigations should not be produced because disclosure could lead to the identification of undercover

officers, thereby putting them at risk. Newsday does not disagree that NCPD should be able to protect the identities of such officers, but argues that information leading to their identification can be redacted. Krumpter's response is "If any redaction were performed it would be so expansive as to render the records completely meaningless."

Unlike his arguments regarding the records tracking system/field headings, Krumpter's statements about the criminal investigations records carry the weight of his position and experience. However, on the present record the Court cannot evaluate his contention that redaction cannot be performed without eviscerating the records in their entirety, and his statement, standing alone, is insufficient as a reason for withholding all documents.

Agencies of government may be required to produce records that contain both information that may be withheld under a statutory exemption and other information that is not so protected, with redaction of the former. *See, Schenectady County Society for Prevention of Cruelty to Animals v. Mills,* 18 NY3d 42 (2011). A blanket refusal based on the "mixed" nature of requested documents cannot be countenanced. *Id.* Accordingly, respondent is directed to produce the requested documents, redacted to protect the names of undercover officers.

This is without prejudice to petitioner's later request for an *in camera* comparison of the unredacted documents to the redacted copies should petitioner believe that the redactions were not made in good faith, and were unnecessary to protect undercover officers' identities. The Court will retain jurisdiction to that extent, including jurisdiction to award costs and fees should those redactions be challenged and the Court ultimately agree with petitioner that redactions were unnecessarily excessive or wholly unnecessary for their stated purpose. It is in the first instance the respondent's task to review and determine what records are responsive to the request, and to make those redactions that are necessary, and it cannot shift that initial responsibility on to the courts.

***7** That branch of the petition that concerns the third request, payments to confidential informants/cooperating witnesses, must yield a similar result. The statement that the records sought are highly sensitive, are protected even within NCPD itself, and that disclosure would pose an actual risk to the lives of the individuals involved, including undercover officers (Krumpter Aff., at 8), is unsupported by any detail as to why and how records of payments to unidentified informants could result in the identification of such persons and the resultant risk. Nor is there any assertion that an open investigation might be compromised by these records, or an explanation of how law enforcement techniques would be revealed.

Importantly, respondent does not provide any reason as to why a careful redaction of details regarding such payments, revealing only the payment information requested, still would fail to protect the individuals involved and would lead to a disclosure of identities. Although respondent correctly cites authority to the effect that even the possibility that safety could be compromised can be a sufficient grounds for withholding records (*Matter of Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police,* 218 A.D.2d 494 [3d Dept.1996]), there still must be a showing of such possibility, and here there is nothing but conclusory statements. Accordingly, the petition is granted as to this request. Respondent may redact information deemed necessary to protect the identity of persons it considers vulnerable, and to protect confidential law enforcement techniques or ongoing investigations. The Court will retain jurisdiction to hear a challenge to such redactions, including jurisdiction to award costs and fees should those redactions be challenged and the Court ultimately agree with petitioner that redactions were unnecessarily excessive or wholly unnecessary for their stated purposes.

The Brewer requests, fourth on Newsday's list, have devolved from the initial objection and reconsideration to whether the redacted documents ultimately received constitute an adequate response. The Court has recited above the history leading to the production because it contains the seeds of the respondent's response, and thus are important as a basis for understanding the redactions.

Initially, the Court rejects respondent's resort to County Law § 308(4). That section shields only those records of calls made to an emergency 911 system, not all 911 records generally. As exemptions are to be narrowly construed (*Matter of Gould v. New York City Police Department,* 89 N.Y.2d 267, *supra*), NCPD was not entitled to redact or withhold records except those which were of the calls themselves. Records of a municipality's own dispatches which may have resulted from those calls therefore would have to be produced, and redaction could be made only to the extent that the logs or other records contained actual call content.

Further, given the undisputed notoriety and public interest in the Brewer case, respondent's reliance on a line of cases denying on privacy grounds inmates' access to witness information that concerned only their own matters is misplaced. This includes *Matter of Bellamy v. New York City Police Dept.,* 87 AD3d 874 (1st Dept.2011), the

key case upon which respondent relies in its memorandum, where privacy issues clearly were secondary to concerns about the personal safety of persons interviewed during the investigation of petitioner's own criminal case.

***8** As there is no showing of safety concerns in the Brewer matter and, with regard to privacy, no demonstration that revealing the names would fall within one of the examples of "unwarranted invasion of personal privacy" set forth in Public Officers Law § 89(2)(b), the Court must balance public interest against more generalized privacy concerns. *Matter of New York Times Co. v. City of N.Y. Fire Dept.,* 4 NY3d 477, 485 (2005); *see also Mulgrew v. Board of Educ. of the City School Dist. of the City of New York,* 87 AD3d 506 (1st Dept.2011). In the present case, the undisputed public interest favors disclosure.

The Court also notes that in its opposing memorandum respondent presents supporting arguments only with regard to third parties, addressed in the preceding paragraph, and the identification of a CPS/DSS worker involved in a matter affecting Brewer's family. As to the latter, this must be disclosed as it concerns the performance of a public employee in his or her job, which is of legitimate public interest generally, as well as in this particular case. *Mulgrew, supra.* There is no cogent argument made in favor of redacting many of the other details petitioner seeks, such as incident scene, Brewer's address and occupation, information regarding the deceased children, and damage to vehicles. Other than 911 call content, the only redaction that may be supportable involves a party who was the subject of an order of protection obtained by Brewer, which might have been sealed. *See* CPL 160.50. In that case, the Court would agree that all information contained therein should be withheld, but the respondent would be bound to state that it was in fact sealed. Otherwise, it must provide the information.

To the extent respondent relied on those sections of FOIL that refer to interference with pending or future investigations, revealing investigative techniques, or compromising officer safety, there has been no showing as to how production of the records sought would cause the negative effect cited. The Court therefore cannot find that an exemption under the statute has been satisfied.

Accordingly, that branch of the petition that concerns the Brewer records is granted, and unredacted copies of the records previously served on petitioner are to be turned over to petitioner, with the possible exception of the order of protection information, and 911 call content, as set forth above.

The Court declines petitioner's invitation to speculate as to the existence of other records that were not produced at all, and to direct NCPD to supplement its response with any documents responsive to petitioner's original request, if yet not revealed. However, the Court will retain jurisdiction of this aspect of the matter, as it has with regard to the other elements of the case that are not as of yet fully resolved, and considers it respondent's duty to produce any records it later may find that must be disclosed under the present decision. This is consistent with and akin to the ongoing duty of disclosure imposed on all parties to litigation under the Civil Practice Law and Rules. *See* CPLR 3101(h).

***9** Those branches of the petition/complaint that seek declaratory and mandamus relief are denied.

The "pattern and practice" petitioner wishes the Court to declare as being in violation of FOIL—respondent's use of form denials, lack of particularized justifications, and untimely responses to administrative appeals—are grounded on the five NCPD responses discussed here. To declare violations based upon the Court's findings essentially is redundant, and violations also can be redressed by the assessment of costs and fees pursuant to section 89(4)(c), discussed below. Further, if Newsday feels an advisory opinion on the issue is warranted, it is free to seek one from the Committee on Open Government, pursuant to Public Officers Law § 89(1)(b). That is what the statute currently provides. Petitioner is asking the Court either to engraft new forms of relief onto the existing statutory scheme, which is a legislative task, or, in effect, to recognize a new cause of action based on federal law it cites in its memorandum.

As to the latter, establishing a new cause of action is best left to the appellate courts, especially our Court of Appeals, as such a determination "is largely a question of policy" (*Donohue v. Copiague Union Free School Dist.,* 47 N.Y.2d 440, 445 (1979) [Wachtler, J., concurring] and can have both "foreseeable and unforeseeable consequences ..." *Caronia v. Philip Morris USA, Inc.,* 22 NY3d 439, 2013 WL 6589454, quoting *Madden v. Creative Servs.,* 84 N.Y.2d 738, 746 (1995). This Court therefore concludes that it would be inappropriate to recognize the claim advanced by petitioner.

Accordingly, that branch of the petition that seeks declaratory relief in the form stated in the notice of petition is denied, and the Court instead declares that the existing statute provides for all the relief currently available to the petitioner. *See Matter of New York Times*

Co. v. City of New York Police Dept., 103 AD3d 405 (1st Dept.2013).

The Court also concludes that mandamus is unavailable here. "[T]he extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought." *See, e.g., Matter of Henrius v. Honoroff,* 111 AD3d 828 (2d Dept.2013). There is no clear legal right to have respondent annually certify to the Court that it is obeying FOIL's directives regarding the provision of sufficiently particularized reasons for denying requests, and to timely respond to administrative appeals. Although Newsday, as a requester under FOIL, has a right to a timely response in accord with the statute, the petitioner did respond, albeit imperfectly, and thus it appears to the Court that the issue here is how it performed its duties rather than whether it refused to do so in the first instance. *See Klostermann v. Cuomo,* 61 N.Y.2d 525, 540 (1984); *see also Matter of New York Times Co. v. City of New York Police Dept., supra* [review of FOIL determination does not provide for mandamus relief].

***10** Finally, that branch of the petition that is for an award of costs and attorney's fees pursuant to Public Officers Law § 89(4)(c) is granted. That section provides that an award may be made where the petitioner has "substantially prevailed," and where 1) the governmental agency had no reasonable basis for denying access to the requested documents/information, or 2) failed to respond to initial requests or appeals within the statutory time periods prescribed by section 89((3)(a) and (4)(a). Such an award, however, remains addressed to the discretion of the reviewing court. *Matter of Maddux v. New York State Police,* 64 AD3d 1069 (3d Dept.2009).

In this case the petitioner has substantially prevailed, as this Court has not upheld any of the denials of access issued by the respondent and has directed remedial action. Further, in almost all cases there was no reasonable basis for the denials, and in several instances respondent did not articulate any reason, let alone a reasonable one, in support of its stated position. In the Brewer case, respondent continued to resist even after the County Attorney granted Newsday's appeal. Further, several responses to requests and appeals were beyond the statutory periods. In addition, the material sought was of interest to the general public, as it concerned the functioning of its police and related services, and interest to the public is a factor that has been noted by appellate courts in determining whether an award should be made. *See Matter of Grace v. Chenango County,* 256 A.D.2d 890 (3d Dept.1998).

The overall record therefore is such that an award is appropriate. *See Matter of Legal Aid Society v. New York State Dept. of Corrections and Community Supervision,* 105 AD3d 1120 (3d Dept.2013). Accordingly, respondent shall pay the reasonable costs, including reasonable attorney's fees, incurred by petitioner after the initial denials by respondent, as such expenses pertain to all its requests for documents and information described in this decision, at both the administrative appeals and court levels, excepting those costs and fees associated with the "sworn officers" requests. The latter is excepted because the parties resolved that matter, and the Court will not discourage such settlements by having NCPD remain liable for petitioner's expenses notwithstanding what appears to be a good-faith effort to resolve the issue. In so finding, however, the Court notes that there may be circumstances where even an ultimate resolution will not shield respondent from such payments.

As no affirmation of services or other proof is offered by petitioner or its counsel regarding the proper amount of fees, a hearing is required.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed by petitioner at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing on February 18, 2014, at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or to appear as directed may be deemed an abandonment of the claim for costs and fees giving rise to the hearing.

***11** This directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

In sum, the petition is granted as follows: 1) the "field names" must be produced; 2) the documents responsive to the "four criminal cases" request must be produced, with redactions deemed necessary by NCPD, subject to the Court's continuing jurisdiction to hear a further proceeding under this index number regarding that production and those redactions; 3) the records responsive to the "confidential informants" payments request are to be produced, with redactions deemed necessary by NCPD, subject to the Court's continuing jurisdiction to hear a further proceeding under this index number regarding that production and those redactions; 4) the "Brewer" material must be produced without the redactions found in the present record, excepting so much

thereof that contains information found in a sealed record, and records of 911 call content; and 5) costs and fees are awarded as expended in the pursuit of the records described in items 1–4 of this paragraph, and the amount thereof shall be established in a hearing.

Respondent shall serve on petitioner all records directed to be produced within 30 days of the date of this Order, unless further extended by agreement of the parties or by Court direction.

All other requests for relief are denied.

This shall constitute the Decision, Order and Judgment of this Court.

All Citations

42 Misc.3d 1215(A), 984 N.Y.S.2d 633 (Table), 2014 WL 258558, 42 Media L. Rep. 1144, 2014 N.Y. Slip Op. 50044(U)

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26 N.Y.3d 98
Court of Appeals of New York.

The PEOPLE of the State of New York, by Eric T. SCHNEIDERMAN, Attorney General for the State of New York, et al., Respondents,
v.
SPRINT NEXTEL CORP. et al., Appellants.

Oct. 20, 2015.

Synopsis
Background: Relator brought qui tam action pursuant to New York False Claims Act (FCA), alleging that wireless telecommunications service provider failed to collect or pay state sales taxes on portion of flat-rate monthly access charges for wireless voice services which provider treated as unbundled charges for interstate and international calls. State intervened and filed superseding complaint, and provider later filed motion to dismiss for failure to state a cause of action or based on time bar. The Supreme Court, New York County, O. Peter Sherwood, J., 41 Misc.3d 511, 970 N.Y.S.2d 164, granted the motion in part and denied it in part. Provider appealed. The Supreme Court, Appellate Division, 114 A.D.3d 622, 980 N.Y.S.2d 769, affirmed and certified a question.

Holdings: The Court of Appeals, Lippman, C.J., held that:

all of provider's receipts were subject to sales tax;

sales tax statute was not preempted by federal Mobile Telecommunications Sourcing Act (MTSA);

Attorney General stated a claim under FCA; and

retroactive application of amended FCA did not violate Ex Post Facto Clause.

Affirmed; certified question answered.

Stein, J., filed an opinion dissenting in part.

Attorneys and Law Firms

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OPINION OF THE COURT

Chief Judge LIPPMAN.

****657 *105** We hold that: (1) the Tax Law imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge; (2) the statute is unambiguous; (3) the statute is not preempted by federal law; (4) the Attorney General's (AG) complaint sufficiently pleads a cause of action under the New York False Claims Act (FCA) (State Finance Law § 187 *et seq.*); and (5) the damages recoverable under the FCA are not barred by the Ex Post Facto Clause of the United States Constitution.

In 1989, the United States Supreme Court held that the dormant Commerce Clause of the Federal Constitution limited the states' authority to tax interstate telephone calls. A telephone call was taxable only if it originated or terminated within the state and was charged to an in-state billing or service address (*see Goldberg v. Sweet,* 488 U.S. 252, 256 n. 6, 263, 109 S.Ct. 582, 102 L.Ed.2d 607 [1989]).

The *Goldberg* rule was easy to apply to landline telephones, which had fixed physical locations. But the next decade saw "an explosion of growth in the wireless telecommunications industry" (H.R. Rep. 106–719, 106th Cong., 2d Sess. at 7, reprinted in 2000 U.S. Code Cong. & Admin. News at 509), and states and service providers struggled to adapt the *Goldberg* nexus requirement to mobile telephone calls. States developed differentmethods ***106** to determine which mobile calls to tax. As a result, some mobile telephone calls were subject to taxation by multiple jurisdictions (H.R. Rep. 106–719, 106th Cong, 2d Sess. at 7–8, reprinted in 2000 U.S. Code Cong. & Admin. News at 509).

A further complication was introduced as mobile carriers began to sell flat-rate voice plans that charged a fixed monthly price for access to a nationwide network, as opposed to charging calls by the minute, regardless of where the calls were placed or received. These flat-rate plans made it "virtually impossible to determine the portion of th[e] price charged for individual calls, each of which may be subject to tax by a different jurisdiction," and thus "impossible to determine the amount of revenues to which each of the various state and local transaction taxes should be applied" (S. Rep. 106–326, 106th Cong., 2d Sess. at 2).

Congress responded by enacting the Mobile Telecommunications Sourcing Act (MTSA) (4 USC § 116 *et seq.*) The MTSA establishes a uniform "sourcing" rule for state taxation of mobile telecommunications services: the only state that may impose a tax is the state of the customer's "place of primary use"—either a residential or primary business address, as selected by the customer (4 USC §§ 117[b]; 124[8]).

*****161 **658** The New York Legislature responded to the MTSA in 2002 by enacting multiple amendments to the Tax Law that clarified and amended the State's treatment of mobile telecommunications services. Under the preexisting law that was enacted in 1965, New York did not tax any interstate or international calls. As relevant here, the 2002 amendments implemented a new set of rules—specifically, those applicable to voice services sold through flat-rate plans.

Another legislative amendment, this one from 2010, led directly to the issues posed by this litigation. The FCA provides for enforcement by both the AG (in civil enforcement actions) and private plaintiffs on behalf of the government (in "qui tam civil actions"), and the AG has the right to intervene and file a superceding complaint in a qui tam action (State Finance Law § 190 [1], [2], [5]). The Act provides for the imposition of treble damages and civil penalties against violators (*id.* § 189[1]).

The FCA applies to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to" the government (*id.* § 189[1][g]). The statute provides that a ***107** defendant acts "knowingly" when defendant has "actual knowledge" of a record's or statement's truth or falsity or "acts in deliberate ignorance" or "reckless disregard" of its truth or falsity (*id.* § 188[3][a]).

As originally enacted, the New York FCA did not apply to false tax claims. But, in 2010, the legislature amended it to cover "claims, records, or statements made under the tax law" in certain circumstances (L. 2010, ch. 379, § 3, codified at State Finance Law § 189[4][a]). The amendment was designed to "provide an additional enforcement tool against those who file false claims under the Tax Law," and thus "deter the submission of false tax claims" while also "provid[ing] additional recoveries to the State and to local governments" (Letter from St. Dept. of Tax & Fin., Aug. 4, 2010 at 2, Bill Jacket, L. 2010, ch. 379 at 13).

Sprint is a wireless telecommunications service provider that does business in New York, and it sells wireless "flat-rate" plans that include a certain number of minutes of talk time for a fixed monthly charge. After the Tax Law amendments were enacted in 2002, Sprint paid sales tax on all of its receipts from its flat-rate plans.

In 2005, however, Sprint began a nationwide program of "unbundling" charges within these flat-rate monthly

plans. Specifically, Sprint unbundled the portion of the fixed monthly charge that it attributed to intrastate mobile voice services, and did not collect taxes on the portion that it attributed to interstate and international calls. For the tax years at issue, the percentage of the fixed monthly charge on which Sprint collected sales tax ranged from 71.5% to 86.3%. Sprint did not separately state on customers' bills the charges for interstate and international voice services included in the flat-rate plan.

On March 31, 2011, Empire State Ventures, LLC, filed suit against Sprint under the New York FCA. On April 19, 2012, the AG filed a superceding complaint, which converted the relator's action into a civil enforcement action by the AG.

The AG's complaint, as relevant here, alleges that section 1105(b)(2) of the Tax Law "requires the payment of sales taxes on the *full amount* of fixed periodic charges for wireless voice services sold by companies like Sprint to New York customers." It further alleges that section 1111 (*l*) permits wireless providers to "treat separately for sales tax purposes certain components of a bundled charge ****659 ***162** for mobile telecommunication ***108** services, so long as the charges are *not* for voice services." The complaint asserts that Sprint violated the Tax Law by failing to collect sales tax on the portion of its flat-rate charge that was attributable to interstate and international voice services. It further alleges that Sprint's decision to unbundle its plans sold for a fixed monthly charge "was driven by its desire to gain an advantage over its competitors by reducing the amount of sales taxes it collected from its customers and, thereby, appearing to be a low-cost carrier." According to the AG, the percentages of the flat-rate charges that Sprint allocated to interstate and international calls were completely arbitrary.

In support of its allegations that Sprint knowingly submitted false tax statements, the AG cites a Tax Department guidance memorandum published before the 2002 amendments became effective, which states that the sales tax is to be applied in the manner that the AG now advocates. The AG points out that Sprint adhered to this guidance until July 2005, when it changed its tax practices. Interestingly, Sprint did not seek a tax refund for the 2002–2005 tax years in which it paid those taxes.

The AG further alleges that Sprint also disregarded the statements of a Tax Department field auditor and enforcement official advising Sprint in 2009 and 2011, respectively, that its sales tax practice was illegal, and that it disregarded the fact that the other major wireless carriers, unlike Sprint, did not break their fixed monthly charges for voice services into intrastate and interstate subparts for sales tax purposes, but instead collected and paid sales tax on the full fixed periodic charge for voice services.

As relevant to this appeal, the complaint's causes of action are all based on the same underlying contention that Sprint knowingly violated the Tax Law, engaged in fraudulent or illegal acts pursuant to Executive Law § 63(12), and submitted false documents to the State pursuant to the FCA. The AG requests civil penalties and treble damages for each of the false tax documents submitted to the State.

Sprint moved to dismiss the complaint for failure to state a cause of action under CPLR 3211. As relevant here, Supreme Court denied the motion, holding that the Tax Law unambiguously imposes a tax on receipts from every sale of mobile telecommunications services that are voice services sold for a fixed periodic charge (*see* ***109** *People v. Sprint Nextel Corp.,* 41 Misc.3d 511, 970 N.Y.S.2d 164 [Sup.Ct., N.Y. County 2013]). Moreover, even if the Tax Law permitted Sprint to exclude from taxable receipts a portion of its fixed monthly mobile voice charge to account for interstate and international calls, the Tax Law also required Sprint to use an objective, reasonable, and verifiable standard for identifying the nontaxable components of the charge—but the complaint alleges that Sprint failed to comply with this requirement by using "arbitrary" figures that were "not related to any customer's actual usage" (*id.* at 515, 970 N.Y.S.2d 164). The court also concluded that the complaint "alleges in great detail" how Sprint knowingly submitted false tax statements to the Tax Department, in violation of the FCA (*id.* at 516, 970 N.Y.S.2d 164). Supreme Court further held that New York's Tax Law does not conflict with the federal MTSA, and rejected Sprint's assertion that the Ex Post Facto Clause of the United States Constitution bars retroactive application of the FCA penalties and damages.

The Appellate Division unanimously affirmed the denial of Sprint's motion to dismiss (114 A.D.3d 622, 980 N.Y.S.2d 769 [1st Dept.2014]). The Court held that the ****660 ***163** AG's complaint adequately alleges that Sprint violated the FCA, Executive Law § 63(12), and the Tax Law "by knowingly making false statements material to an obligation to pay sales tax pursuant to Tax Law § 1105(b)(2)" (*id.* at 622, 980 N.Y.S.2d 769). In addition, the Court rejected Sprint's claim that the Tax Law is preempted by the MTSA, and its claim that retroactive application of the FCA would be unconstitutional. The Appellate Division then certified the following question to this Court: "Was the order of the Supreme Court, as affirmed by ... this Court, properly made?"

In *Matter of Helio, LLC,* 2015 WL 4192425, 2015 N.Y. City Tax LEXIS 8 (N.Y.St.Div. of Tax Appeals DTA No. 825010, July 2, 2015), the New York Tax Appeals Tribunal held that the language of Tax Law § 1105(b) is unambiguous, and imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge. We agree.

Section 1105(b) of the Tax Law provides that tax should be paid on:

> "(1) [t]he receipts from every sale, other than sales for resale, of the following: ... (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications ***110** service the receipts from the sale of which are subject to tax under paragraph two of this subdivision ...
>
> "(2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services."

The subject of the present dispute is the meaning of the phrase "or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision" (Tax Law § 1105[b][2]). Sprint contends that this language excepts from sales tax its bundled charges from interstate and international calls. The AG, on the other hand, asserts that all mobile calls are subject to tax under subdivision (b)(2), unless they are separately stated on the customer's bill.

First, subdivision (b)(1) does not affect the taxability of all mobile voice services under subdivision (b)(2) because (b)(2) is a specific provision under section 1105 which applies only to the sale of mobile telecommunications, whereas (b)(1) applies to telephony and telegraphy generally. "Whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 238).

Here, the plain language of the statute subjects to tax all "voice services" that are "sold for a fixed periodic charge" (Tax Law § 1105[b][2]). Sprint does not contest that the services at issue are such services. No part of subdivision (b)(2) differentiates between intrastate or interstate and international voice service. The statute also taxes "any other services ... taxable under subparagraph (B)" (*id.*). Sprint's interpretation of the statute would make superfluous the words "voice services, or any other" in subdivision (b)(2) (*see Leader v. Maroney, Ponzini & Spencer,* 97 N.Y.2d 95, 104, 736 N.Y.S.2d 291, 761 N.E.2d 1018 [2001] ["meaning and effect should be given to every word of a statute"]). The phrase "any other services that are taxable under subparagraph (B)" must refer to ****661 ***164** services other than " voice services." Accordingly, it is unambiguous that Tax Law § 1105(b)(2) imposes taxation on ***111** all voice services sold for a fixed periodic charge, including the interstate and international calls at issue here.

This interpretation of the statute is bolstered by Tax Law § 1111 (*l*) (2), which provides special rules for computing receipts from the sale of mobile telecommunications. This section allows for the separate accounting of bundled services which are non-taxable, if the provider can provide "an objective, reasonable and verifiable standard for identifying each of the components of the charge"—but specifically applies only if it is "*not a voice service* " (Tax Law § 1111 [*l*] [2] [emphasis added]).

Next, Sprint asserts that such an interpretation of the Tax Law is preempted by the MTSA. This argument is unavailing. Sprint cites 4 USC § 123(b) for the presumption that taxes may not be applied to interstate and international calls which are bundled with intrastate calls where the service provider can reasonably identify charges not subject to the tax. Section 123(b) provides:

> "*If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation* and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business" (emphasis added).

This bundling provision expressly opens by respecting and incorporating state authority, rather than restricting it. Section 123(b) anticipates disaggregation only of charges "not otherwise subject ... to [state] taxation." Because the Tax Law imposes a tax on the entire amount of the fixed monthly charge for voice services, there is no exemption for any interstate and international component that would even trigger section 123(b)'s exception here. However, no provision of the MTSA prohibits the taxation of interstate

and international mobile calls. In fact, Congress eliminated this distinction in light of advances in mobile telecommunications technology. Section 117(b) of the MTSA allows for the taxation of "*[a]ll charges for mobile telecommunications services* ... subject[ ] ***112** to tax ... by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through." Accordingly, the AG's interpretation of the Tax Law is not preempted by the federal MTSA.

As to the AG's cause of action under the FCA, in order to be liable under the FCA, a party must knowingly make a false statement or knowingly file a false record. The FCA defines "knowingly" to mean "that a person, with respect to information: (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information" (State Finance Law § 188[3][a]).

Sprint asserts that there is a reasonable interpretation of the Tax Law that does not subject bundled interstate and international calls to sales tax and, thus, there can be no knowingly false record or statement, and no valid FCA claim. This is not the stuff that a CPLR 3211 dismissal is made of. Even assuming there could be such a reasonable interpretation in the face of this unambiguous statute, it cannot shield ****662 ***165** a defendant from liability if, as the complaint alleges here, the defendant did not in fact act on that interpretation (*see United States ex rel. Oliver v. Parsons Co.,* 195 F.3d 457, 463 [9th Cir.1999]). Otherwise, "[a] defendant could submit a claim, knowing it is false or at least with reckless disregard as to falsity ... but nevertheless avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements" (*id.* at 463 n. 3). Sprint will have to substantiate in further proceedings that it actually held such reasonable belief and actually acted upon it.

Sprint argues that in *Helio,* DTA No. 825010, upon the taxpayer's defeat at the Tax Appeals Tribunal on the issue of taxability of bundled interstate and international mobile telecommunications services, the Department of Taxation and Finance imposed only minimum interest because the audit report stated that "reasonable cause existed" for the taxpayer's position. 2015 WL 4192425, *9, 2015 N.Y. City Tax LEXIS 8. But here, the AG alleges that Sprint, which is a much larger service provider, did not act in good faith and that it did not rely on what it now calls "its reasonable interpretation of the statute" when it made its decision to alter its tax practices. Importantly, although the Tax Appeals Tribunal stated that Helio's similar position was reasonable, that case did not ***113** involve the level of deception and fraud alleged on the part of Sprint here.

Nevertheless, the AG has a high burden to surmount in this case. The FCA is certainly not to be applied in every case where taxes were not paid. Further, notice of a contrary administrative position alone is not nearly enough to prove fraud or recklessness under the FCA. There can be no doubt the AG will have to prove the allegations of fraud, that Sprint knew the AG's interpretation of the statute was proper, and that Sprint did not actually rely on a reasonable interpretation of the statute in good faith. But, given the complaint's allegations about the agency guidance and industry compliance with the AG's position, Sprint's payment of the proper amount of sales tax between 2002 and 2005, Sprint's undisclosed reversal of its practices in 2005, and the explicit warnings that Sprint received from the Tax Department, the AG has stated a cause of action for a false claim. On a CPLR 3211 motion to dismiss, the Court accepts facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines whether the facts as alleged fit within any cognizable legal theory (*Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). It is premature to dismiss this complaint on such a motion. The AG is entitled to discovery, and there are factual issues that must be fleshed out in further proceedings.

We also hold that retroactive application of the FCA is not barred by the Ex Post Facto Clause of the United States Constitution (U.S. Const., art. I, § 10). In analyzing whether such application of the statute is barred by the U.S. Constitution, we must first consider whether the legislature intended the FCA to establish "civil" proceedings, and if so, whether it is "so punitive either in purpose or effect as to negate the State's intention to deem it civil" (*Smith v. Doe,* 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 [2003] [internal quotation marks, brackets and citations omitted]). The FCA provides that a person who

> "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same; shall be liable to the state ... for a civil penalty of not less than six thousand ****663 ***166** dollars and not more than twelve thousand dollars" plus treble damages (State Finance Law § 189[1][h]).

***114** To assess whether the FCA is punitive, we look to seven factors highlighted by the United States Supreme

Court "to determine whether an Act ... is penal or regulatory in character" (*Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 9 L.Ed.2d 644 [1963]). These include:

> "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned" (*id.* at 168–169, 83 S.Ct. 554).

The balance of the factors here weighs in favor of permitting retroactive application. The penalty scheme does not impose an affirmative disability or restraint, and monetary penalties like those imposed by the FCA have not "historically been viewed as punishment" (*United States ex rel. Bilotta v. Novartis Pharms. Corp.,* 50 F.Supp.3d 497, 544 [S.D.N.Y.2014] [internal quotation marks omitted]).

Although this Court previously stated that the FCA's penalty and damage scheme serves the aims of punishment, retribution, and deterrence (*State of N.Y. ex rel. Grupp v. DHL Express [USA], Inc.,* 19 N.Y.3d 278, 286–287, 947 N.Y.S.2d 368, 970 N.E.2d 391 [2012]), federal courts have determined that the FCA's provision imposing "treble damages carries a compensatory, remedial purpose alongside its punitive and deterrent goals" (*Kane ex rel. United States v. Healthfirst, Inc.,* 120 F.Supp.3d 370, 399, 2015 WL 4619686, *22 [S.D.N.Y., Aug. 3, 2015, No. 11 Civ 2325(ER)]; *see also Bilotta,* 50 F.Supp.3d at 545–546; *United States ex rel. Colucci v. Beth Israel Med. Ctr.,* 603 F.Supp.2d 677, 683 [S.D.N.Y.2009]). As a result, the penalty and damages scheme of the FCA "does not compel a conclusion that the statute is penal" (*Bilotta,* 50 F.Supp.3d at 546).

Also, the FCA does not regulate conduct that was already a crime, and the penalty scheme may be rationally connected to the nonpunitive purposes of allowing the government to be made whole (*see Cook County v. United States ex rel. Chandler,* 538 U.S. 119, 130–132, 123 S.Ct. 1239, 155 L.Ed.2d 247 [2003]). Finally, given the compensatory, nonpunitive aims of the statute, the penalties are not unduly excessive.

***115** As the United States Supreme Court stated in *Smith,* "only the clearest proof will suffice" to "transform what has been denominated a civil remedy into a criminal penalty" (538 U.S. at 92, 123 S.Ct. 1140 [internal quotation marks and citations omitted]). Here, while the treble damages to be imposed are severe, Sprint's arguments do not outweigh the *Mendoza–Martinez* factors that weigh in favor of retroactive application, nor do they amount to the "clearest proof" required by *Smith.* Therefore, the retroactive application of the FCA does not trigger the Ex Post Facto Clause of the United States Constitution.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

STEIN, J. (dissenting in part).

In my view, Tax Law § 1105(b)(2) is an ambiguous statute. Given the procedural ****664** *****167** course the People have charted here, we are required to interpret any ambiguity in favor of Sprint, as the taxpayer, for the purpose of resolving Sprint's motion to dismiss. Because the Attorney General cannot establish that Sprint's tax filings were actually false in light of this ambiguity, the complaint's principal allegation—that Sprint violated the Tax Law by failing to collect sales tax due on interstate mobile voice services based upon its purportedly erroneous interpretation of the applicable statute—must fail and cannot form the basis of a cause of action pursuant to the False Claims Act, Executive Law § 63(12) or Tax Law article 28. Therefore, I respectfully disagree with the majority insofar as its affirmative answer to the certified question is premised upon its conclusion that the complaint adequately alleges fraud by claiming "that Sprint knew the AG's interpretation of the statute was proper, and that Sprint did not actually rely on a reasonable interpretation of the statute in good faith" (majority op. at 113, 21 N.Y.S.3d at 165, 42 N.E.3d at 662). To the contrary, the complaint has not sufficiently alleged a violation of the Tax Law on this basis in the first instance, let alone a knowing, fraudulent or "bad faith" violation.

However, while the complaint does not set forth viable claims arising out of Sprint's interpretation of the statute, it does adequately allege actual falsity and illegality based upon the method used by Sprint in calculating the portion of its fixed monthly charges that were attributable to interstate mobile voice services. Accepting as true the complaint's assertions that Sprint's calculation of those charges was essentially ***116** arbitrary—and, therefore, that Sprint's tax filings bore no rational relation to the

amount of interstate mobile calls that were actually made—the complaint sufficiently alleges that Sprint violated the Tax Law, engaged in persistent fraud and illegality under Executive Law § 63(12) and knowingly made or used false records within the meaning of the False Claims Act. Thus, although I would answer the certified question in the negative—the orders below were not properly made—I would partially affirm the Appellate Division order insofar as it allowed the action to proceed on that narrow ground.

I.

Tax Law § 1105(b)(2) is ambiguous because it lends itself to more than one plausible or reasonable interpretation (*see Matter of Golf v. New York State Dept. of Social Servs.*, 91 N.Y.2d 656, 662–663, 674 N.Y.S.2d 600, 697 N.E.2d 555 [1998]). The language that the majority holds to be unambiguous reads as follows:

> "[T]here is hereby imposed and there shall be paid a tax of four percent upon: ...
>
> "[t]he receipts from every sale of mobile telecommunications service provided by a home service provider ... that are voice services, or any other services that are taxable under [subdivision (b)(1)(B)], sold for a fixed periodic charge (not separately stated), whether or not sold with other services" (Tax Law § 1105[b][2]).

The subparagraph referenced therein, Tax Law § 1105(b)(1)(B), subjects to tax

> "[t]he receipts from every sale ... of ... telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under [subdivision (b)(2)]."

Applying the canon of construction that a provision of a statute that applies to a specific situation will override a general ****665 ***168** provision, the majority concludes that subdivision (b)(1)(B) applies to telephony and telegraphy, generally, whereas subdivision (b)(2) applies specifically to the sale of "mobile telecommunications" (majority op. at 110, 21 N.Y.S.3d at 163, 42 N.E.3d at 660). The majority and the Attorney General read subdivision (b) (2) as providing for the ***117** taxation of "every sale of mobile telecommunications service ... that are voice services ... sold for a fixed periodic charge" (Tax Law § 1105[b][2]) (whether interstate or intrastate) and also allowing for the taxation of "other services that are taxable under [subdivision (b)(1)(B)]" (*id.; see* majority op. at 110, 21 N.Y.S.3d at 163, 42 N.E.3d at 660). The majority concludes that "it is unambiguous that Tax Law § 1105(b)(2) imposes taxation on all voice services sold for a fixed periodic charge, including the interstate and international calls at issue here" because, to read the statute otherwise, "would make superfluous the words 'voice services, or any other' in subdivision (b)(2)" (majority op. at 110–111, 21 N.Y.S.3d at 163–64, 42 N.E.3d at 660–61.) The majority's interpretation of the statute is unquestionably appealing in its simplicity. Under that reading, subdivision (b)(2) provides that mobile voice services are always taxable unless separately stated, regardless of whether they are interstate or intrastate, and the subdivision (b)(1)(B) limitation on taxation of interstate services does not govern mobile voice services at all.

While I cannot disagree that such interpretation is reasonable, I note that even the Attorney General concedes that subdivision (b)(1)(B), which differentiates between interstate and intrastate services, continues to exempt certain mobile voice services from taxation. Specifically, the Attorney General acknowledges that "[t]o be sure, (b)(2) itself provides that (b)(1)(B)' s tax rule persists for certain types of mobile service charges" and, therefore, "interstate mobile *calls* ... that are not sold for a flat fee, but instead [are] 'separately stated' " (emphasis added) remain taxable under subdivision (b)(1)(B). Similarly, the Attorney General's complaint explains that, "[f]or overage minutes that are charged to customers on a per-minute usage basis, Sprint and other wireless carriers are required to collect and pay New York state and local sales taxes *only when such calls are intrastate, and are not required to collect and pay them on such calls that are interstate* " (emphasis added). Thus, although the majority notes that "[n]o part of subdivision (b)(2) differentiates between intrastate or interstate and international voice service" (majority op. at 110, 21 N.Y.S.3d at 163, 42 N.E.3d at 660), the Attorney General concedes that some interstate mobile voice services remain nontaxable under subdivision (b)(1)(B), and the statutory differentiation between intrastate and interstate service persists for such services.

Accepting the Attorney General's concession that the limitation on interstate taxation in (b)(1)(B) continues to apply to at least some mobile voice services, I would hold that Sprint has ***118** plausibly read the language in dispute—"voice services, or any other services that are

taxable under [subdivision (b)(1)(B)]" (Tax Law § 1105[b][2])—as incorporating the (b)(1)(B) rule for both voice services and any other mobile services. Ultimately, the Attorney General reads subdivision (b)(2) as taxing all mobile voice services that are sold for a fixed periodic charge, while applying the (b)(1)(B) rule to other types of mobile telecommunications services, whereas Sprint reads the language at issue just slightly more broadly as applying the (b)(1)(B) rules to mobile "voice services, or any other [mobile] services" (Tax Law § 1105[b][2]). Under Sprint's interpretation, the purpose of subdivision (b)(2) is to **666 ***169 expressly provide that services that are taxable under subdivision (b)(1)(B)—text messaging, intrastate voice services, etc.—remain taxable even if bundled with nontaxable services. That reading of this less-than-clear statutory text—while perhaps not the most logical interpretation—is not unreasonable as a matter of law, particularly in light of the relatively small gap that exists between the parties' interpretations.

Similarly, Tax Law § 1111 (*l*) (2) can be read in more than one reasonable manner. That section provides that certain enumerated categories of untaxed *nonvoice* services, which are bundled with taxable services, are subject to sales tax unless the provider uses "an objective, reasonable and verifiable standard for identifying" and quantifying the amount of each component charge (Tax Law § 1111 [*l*] [2]). The parties are in agreement that the statute applies only to nonvoice services. Applying the *expressio unius est exclusio alterius* canon of statutory construction (*see Matter of Jewish Home & Infirmary of Rochester v. Commissioner of N.Y. State Dept. of Health,* 84 N.Y.2d 252, 262, 616 N.Y.S.2d 458, 640 N.E.2d 125 [1994]), the Attorney General argues that the legislature's creation of an exception from the general rule for the category of nonvoice services would imply that the category of voice services was not to be excluded from the general rule. That interpretation certainly is reasonable, and reading section 1111 (*l*) (2) together with section 1105(b)(2) supports the Attorney General's assertion that the legislature intended to make all bundled voice services taxable, without permitting carriers to exclude the interstate portion as nontaxable. However, Sprint's alternative construction of section 1111 (*l*) (2) is also reasonable. Sprint argues that the focus of section 1111 (*l*) (2) is on nonvoice services and that the purpose of that section is to enumerate the services—such as Internet access—that *119 are also nontaxable, in addition to interstate voice services. Under Sprint's view, there is no need to include interstate voice services in the section 1111 (*l*) (2) list because they are already exempt from taxation under section 1105(b)(1)(B).

In short, both the Attorney General and Sprint have advanced reasonable interpretations of the statutory language and, because that language is susceptible of more than one reasonable interpretation, it is inherently ambiguous. Indeed, the only other court to consider Sprint's tax strategy under section 1105(b) deemed the "legal concepts at issue" here "murky" (*Louisiana Mun. Police Employees' Retirement Sys. v. Hesse,* 962 F.Supp.2d 576, 589 [U.S.Dist.Ct., S.D.N.Y.2013]).[1] I recognize that the shareholders' derivative action with which that decision was concerned is distinguishable and involves a completely different body of law from that before us and, further, that the District Court expressly declined to rule on whether Sprint's interpretation of the statute was "reasonable" (*id.* at 590 n. 7). Notwithstanding those distinctions, I agree with the District Court that the legal concepts at issue here—as well as the statutory language—are murky at best, and I cannot join the majority decision holding that Tax Law § 1105(b) is unambiguous.

II.

A finding that the statute is ambiguous has implications in the Tax Law context **667 ***170 that are not present in other procedural contexts. Inasmuch as Sprint is not seeking a tax exemption but, arguing instead, that the "transaction or event is [not] subject to taxation" in the first instance (*Matter of Grace v. New York State Tax Commn.,* 37 N.Y.2d 193, 196, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975]), the tax statute at issue "must be narrowly construed and ... any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (*Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.,* 80 N.Y.2d 657, 661, 593 N.Y.S.2d 974, 609 N.E.2d 514 [1993]). In contrast, if this case had proceeded through the usual administrative process and the same arguments were before us in the *120 context of a CPLR article 78 proceeding involving a challenge to a Tax Department audit and assessment, we could "defer to" the Tax Department as "the governmental agency charged with the responsibility for administration of [a] statute in [a] case[ ] where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, and the agency's interpretation is not irrational or unreasonable" (*Matter of New York State Superfund Coalition, Inc. v. New York State Dept. of Envtl. Conservation,* 18 N.Y.3d 289, 296, 938 N.Y.S.2d 266, 961 N.E.2d 657 [2011]

[internal quotation marks and citations omitted]; *see Lorillard Tobacco Co. v. Roth,* 99 N.Y.2d 316, 323, 756 N.Y.S.2d 108, 786 N.E.2d 7 [2003]).

Here, however, the Tax Department is not before us as a party. Therefore, we cannot defer to its interpretation. Instead, the Attorney General has chosen to pursue Sprint in an action in which its interpretation of the statute is not entitled to deference and we are bound to resolve all ambiguities in Sprint's favor, at least for the limited purpose of determining whether the complaint states a claim and, consequently, whether the courts below were correct in partially denying Sprint's motion to dismiss.[2] In turn, resolving the ambiguity in Sprint's favor and adopting its interpretation necessarily means that the complaint fails to adequately allege that Sprint's tax returns were false simply because Sprint did not report receipts from the interstate component of its mobile voice services for sales tax purposes.

III.

As explained in *United States ex rel. Oliver v. Parsons Co.,* 195 F.3d 457, 461 (9th Cir.1999), *cert. denied* 530 U.S. 1228, 120 S.Ct. 2657, 147 L.Ed.2d 272 (2000), ***121** upon which the majority relies, the complaint must adequately allege three elements in order to state a cause of action under the False Claims Act: (1) that Sprint filed the tax records at issue, (2) that those records were actually false—i.e., that Sprint made a false statement or filed a false record because it incorrectly stated ****668 ***171** the amount of sales tax owed under Tax Law § 1105(b)—and (3) that Sprint acted knowingly in doing so. Due to the procedural posture of this action, a conclusion that the statute is ambiguous precludes a showing of actual falsity, the second element of the False Claims Act cause of action, as a matter of law. That is, if the statute is ambiguous, our precedent requires that we interpret it in Sprint's favor in this plenary action, as explained above; and, if the statute is interpreted in Sprint's favor, the complaint fails to adequately allege that Sprint's tax filings were based upon an incorrect interpretation of the statute and, therefore, were actually false. For the same reason, the complaint has not sufficiently stated a claim under Executive Law § 63(12) and Tax Law article 28 to the extent that those causes of action are based upon allegations that Sprint knowingly relied upon an unreasonable interpretation of Tax Law § 1105(b).

Actual falsity is a threshold element of a False Claims Act cause of action (*see Parsons,* 195 F.3d at 461). Actual falsity does not relate to Sprint's mental state; rather, the statutes' "meaning is ultimately the subject of judicial interpretation, and it is [Sprint's] compliance with these [statutes], as interpreted by this [C]ourt, that determines whether its [tax strategy] resulted in the submission of a 'false claim' under the Act" (*Parsons,* 195 F.3d at 463). In other words, "while the reasonableness of [Sprint's] interpretation of the applicable [statutes] may be relevant to whether it *knowingly* submitted a false claim, the question of 'falsity' itself is determined by whether [Sprint's] representations were accurate in light of the applicable law," as construed by the Court for the purpose of determining whether the complaint states a cause of action (*id.* [emphasis added]).

The complaint alleges that Sprint's sales tax filings were false because Sprint "asserted [therein] that it owed less in sales taxes [on interstate voice services] than it really did" based upon an alleged misinterpretation of Tax Law § 1105(b). However, because the statute is ambiguous and its ambiguities must be resolved in Sprint's favor, the complaint fails to adequately allege *any* misinterpretation, regardless of whether ***122** Sprint acted knowingly, recklessly or with deliberate ignorance. Stated differently, the complaint does not identify any tax filings that satisfy the element of "falsity," in relation to Sprint's interpretation of the statute. Because the complaint does not adequately plead this threshold element, we need not reach the question on which the majority focuses, i.e., whether the complaint sufficiently alleges that Sprint acted "knowingly" in making its purportedly false statements.

IV.

That said, the determinations of the courts below should be affirmed, in part, on a different ground. As the Attorney General argues, even if the statutes at issue must be interpreted in this proceeding as permitting Sprint to exclude from its taxable receipts the portion of its flat-rate plans attributable to interstate mobile voice services, the complaint contains other allegations—sufficient to survive a motion to dismiss—that Sprint's tax forms were false in another respect. Specifically, the complaint alleges that the arbitrary deduction that Sprint applied to its receipts from interstate mobile voice services did not, in fact, reflect the interstate calls of Sprint's customers.

The complaint sets forth detailed assertions that Sprint calculated the portion of its calls that were interstate by arbitrarily applying a percentage used to calculate an unrelated federal surcharge at times, but that Sprint did not modify its allocations when the federal government changed the percentage used to calculate ****669 ***172** the surcharge, nor did Sprint consistently adhere to the percentage allocations. In that regard, the Attorney General contends that Sprint did not even attempt to identify the interstate component of its mobile voice services, much less adhere to the disaggregation requirements set out in federal and state law and, thus, it violated the Tax Law in the manner in which it allocated the percentage of its fixed monthly charges that was attributable to interstate mobile voice service. On this appeal, which involves a CPLR 3211 motion to dismiss,

> "[w]e accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ... [because] the criterion is whether the proponent of the pleading has a cause of action, not whether [it] has stated one" (***123** *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994] [internal quotation marks and citations omitted]).

While plaintiffs may not have expressly pleaded any claims based on Sprint's failure to use an objective standard as required by state and federal laws addressing the proper unbundling of its fixed monthly charges, the allegations to support such a claim are set forth in the complaint and establish that plaintiffs have viable causes of action under the False Claims Act, Executive Law § 63(12) and Tax Law article 28.

V.

In sum, Tax Law § 1105(b)(2) is ambiguous because it can be reasonably interpreted in more than one manner and, inasmuch as it is a tax statute, section 1105(b)(2) must be interpreted in Sprint's favor for purposes of determining whether the complaint adequately states a cause of action. If Sprint's interpretation is deemed correct, as it must be, the complaint necessarily fails to state a cause of action by asserting that Sprint filed false returns simply by virtue of the fact that the returns are consistent with that interpretation (whether Sprint believed the interpretation to be correct or not). Therefore, the causes of action under the False Claims Act, Executive Law § 63(12) and Tax Law article 28 cannot be sustained on the basis of the Attorney General's allegation that Sprint misinterpreted the Tax Law. Those causes of action could, however, proceed on the limited basis that Sprint's tax forms were knowingly false, illegal and violative of the Tax Law because Sprint's arbitrary method of calculating its deduction did not have any rational connection to the amount of interstate calls actually made by Sprint's customers. Accordingly, I would answer the certified question in the negative and would modify the Appellate Division's order by dismissing so much of the False Claims Act, Executive Law and Tax Law causes of action that were based upon Sprint's purportedly erroneous interpretation of Tax Law § 1105(b), and insofar as modified, would affirm the order allowing the claims to proceed on the narrow ground set forth in this opinion.

Judges PIGOTT, ABDUS–SALAAM and FAHEY concur; Judge STEIN dissents in part in an opinion; Judge RIVERA taking no part.

Order affirmed, with costs, and certified question answered in the affirmative.

All Citations

26 N.Y.3d 98, 42 N.E.3d 655, 21 N.Y.S.3d 158, 2015 N.Y. Slip Op. 07574

Footnotes

1 That case involved a derivative action commenced by Sprint's shareholders against its directors, alleging that they breached their fiduciary duties and wasted corporate assets by permitting Sprint to adopt the tax policy at issue here, which the shareholders alleged was clearly in violation of New York law. The District Court granted the directors' motion to dismiss for failure to state a claim.

2 Resolution of the statutory ambiguities in Sprint's favor is necessary only because the Attorney General has chosen to file a

superseding complaint in this whistleblower action, rather than await the conclusion of the more typical administrative process. An acknowledgment of the facial ambiguities in the statute by this Court need not prevent the Tax Department from applying its expertise to the detailed labor of fitting tax filings into the language of Tax Law § 1105(b)(2) (*see Lorillard,* 99 N.Y.2d at 323, 756 N.Y.S.2d 108, 786 N.E.2d 7) in other matters proceeding through the administrative pipeline, such as *Matter of Helio, LLC,* 2015 WL 4192425, 2015 N.Y. City Tax LEXIS 8 (N.Y.St.Div. of Tax Appeals DTA No. 825010, July 2, 2015). Nor would such acknowledgment require the Tax Department to grant refunds to other wireless carriers who adopted the interpretation advanced by the Attorney General and, therefore, collected and remitted sales tax on the receipts from all interstate mobile voice services.

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71 Misc.3d 559
County Court, New York,
Erie County.

The PEOPLE of the State of New York
v.
Desean COOPER, Defendant.

00853-2020
|
Decided on February 23, 2021

Synopsis
Background: Defendant was indicted and charged with criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. The People attempted to file a certificate of compliance, and the defense objected on the basis that they had not received all the police disciplinary records related to the six officers involved in the case.

Holdings: The County Court, Susan M. Eagan, J., held that:

disciplinary records of law enforcement witnesses were subject to discovery and the People were required to provide those records, and thus, the certificate of compliance was invalid;

the court lacked jurisdiction to issue an order directing police department to produce law enforcement disciplinary records; and

certificate of compliance was invalid, and thus, did not stop counting of days for speedy trial purposes.

Ordered accordingly.

Attorneys and Law Firms

****807** HON. JOHN J. FLYNN, Erie County District Attorney, Sean B. Bunny, Esq., Appearing for the People

Brittanylee Penberthy, Esq., Appearing for the Defendant

Opinion

Susan M. Eagan, J.

***560** This case raises issues surrounding the People's discovery obligations relating to police disciplinary records, what must be disclosed, and to what extent, if any, the disclosure of police disciplinary records impacts the People's ability to effectively enter a declaration of readiness.

The defendant was arraigned before this court on December 1, 2020 on an indictment charging Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law 265.03(3) and Criminal Possession of a Weapon in the Third Degree, in violation of Penal Law 265.02(3). The People did not file a certificate of compliance at that time. At a pretrial conference on December 16, 2020, the People attempted to file a certificate of compliance and declare ready. The defense objected on the basis that they had not received all the police disciplinary records as it relates to the six officers involved in the case and what they had received was a summary card that was two years old. The People responded they had provided the defense with what they had physically received from the Buffalo Police Department (BPD), acknowledged the existence of other disciplinary records that had not yet been turned over but argued that they had a "flow of information" established with the Buffalo Police and that satisfied their discovery obligation. The Court did not accept the People's declaration of readiness pending a resolution of this issue, adjourned the matter and asked the parties to further explore this issue, consistent with CPL 245.35(1). The matter was adjourned until January, at the People's request.
On January 6, 2021, the People indicated that they had not received any further records from BPD, they reasserted their readiness, arguing that the records sought were administrative records that were not in the People's physical possession, and reiterated their position that they had established a flow ***561** of information and were in compliance with their discovery obligations. The Defense continued their objections. It was not clear to the Court as to what efforts had been made to resolve the issue. Given the novel nature of this question, the Court asked the parties to provide written submissions concerning their arguments.

On February 3, 2021, during oral argument, the Defense argued that under CPL 245.20 (1)(k) and the repeal of Civil Rights Law 50-a the People are required to provide the defense with the police disciplinary records as

automatic discovery and cannot affectively declare ready until those records are provided. Additionally, the Defense noted that the People are required to provide more than a summary of the records.

The People argued that their discovery obligations are limited to the subject matter of this case including their obligation as it relates to impeachment material and disciplinary records. By extrapolation, if any police disciplinary record did not relate to the subject matter of this case it was not discoverable. They reiterated their position that if there is other impeachment material that's contained in the disciplinary records that they are not in physical possession of, they are not deemed to be in possession of it until they actually have it, as long as they are maintaining ****808** the flow of information under 245.55(1). The People then described the "flow of information" that they have been working to establish with all law enforcement agencies in the County and especially BPD. Acknowledging that while BPD had provided disciplinary records for 50 officers in the department, they had not been fully responsive to the People's requests as it relates to the department as a whole and this case in particular, the People asked the court to exercise its authority to assist them in complying with their discovery obligations by issuing an order directing BPD to provide the records. Further, the People argue that "invalidating" their declaration of readiness is unwarranted since the Defendant has not shown any prejudice.

NY Civil Rights Law 50-a

As enacted in 1976, NY Civil Rights Law 50-a, made all police, among other public officers, personnel records confidential and not subject to inspection or review without the express written consent of such police officer, except as may have been mandated by lawful court order. One of the purported purposes ***562** at the time of its enactment was "to prevent criminal defense attorneys from using these records in cross-examinations of police witnesses during criminal prosecutions" (2019 NY S.B. 8496). Effective June 12, 2020, the Legislature repealed Civil Rights Law 50-a. The Legislature's purpose in repealing 50-a was the belief that enactment and subsequent application since 1976 served to undermine the public policy goals of the *Freedom of Information Law* (FOIL), (Public Officers Law 84-89), of "mak[ing] government agencies and their employees accountable to the public" (2019 NY S.B. 8496). FOIL "is rooted in a presumption favoring access to all agency records, ... The theory is that 'public records belong to the public.' " (*Schenectady Police Benev. Ass'n v. City of Schenectady*, 2020 WL 7978093, at 3 [N.Y. Sup. Ct. Dec. 29, 2020]). By repealing 50-a the Legislature made police personnel records public records open to inspection and review by the public, individually and collectively (Public Officer's Law 84).

While doing so, the Legislature further modified FOIL to include specific definitions of what type of records are considered disciplinary records and added protections to prevent the release of sensitive or private information. In relevant part, Public Officers Law 86 defines the following terms;

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and ***563** any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed ****809** as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

Section 89 of the Public Officers Law limits disclosure of personal information such as medical or credit histories, home addresses, personal phone numbers, emails, social security numbers, the use of employee assistance programs, mental health services, substance abuse services and any technical infractions, as that term is defined above. Pursuant to Public Officers Law § 87(4-b), such information may be redacted prior to providing the records to a requesting party. Each agency was given 60 days from the enactment of the legislation to promulgate uniform rules and regulations consistent with the legislation to ensure availability of the records. Accordingly, each agency had until August 12, 2020 to establish their procedures for making the records available.

As it relates to the use of the unredacted information in the cross examination of a law enforcement officer, the Legislature explicitly noted that the Courts are capable of setting appropriate limits and determining admissibility (2019 NY S.B. 8496).

The People's Discovery Obligations and Trial Readiness

CPL 245.10 establishes that the People shall act with diligence and good faith in providing "automatic" discovery to the ***564** defense in a timely manner. CPL 245.20 delineates a lengthy but non-exhaustive list of items and categories of information that the People are required to provide, without the need for a demand from the defense, when such items and information "are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20[1]). A prosecutor is required to make a diligent and good faith effort to ascertain the existence of discovery material and make it available to the defense even when the information is not in the prosecutor's physical possession and control. "All items and information related to the prosecution of a charge in the possession of any New York State or local police or law enforcement agency shall be deemed to be in possession of the prosecution" (CPL 245.20[2]).

The statute contemplates instances where information has not been timely disclosed and imposes additional and continual discovery duties on the People. "Article 245 envisions two situations in which nondisclosure may arise: (1) when the "prosecution subsequently learns of additional material or information which it would have been under a duty to disclose had it known of it at the time of a previous discovery obligation or discovery order," (*CPL* 245.60), and (2) "when, despite the People's diligent and reasonable inquiries to obtain material subject to required disclosure, they identify some particular items they have not yet acquired" (*People v. Adrovic*, 69 Misc. 3d 563, 572, 130 N.Y.S.3d 614 [Crim. Ct., Kings County 2020], and *People v. Quinlan*, 2021 WL 474940 [N.Y. City Crim. Ct. Jan, 29, 2021]). When such circumstances arise, the People are required to "expeditiously notify the other party and disclose the additional material and information," (CPL 245.60), or "are required to move, upon good cause shown, for an extension of time to comply with their discovery obligations (245.70 [2])." (*Quinlan*, at 3).In both instances ****810** the materials referenced are **subsequently** identified or acquired.

To facilitate the People's continuing discovery obligation CPL 245.55 requires the creation a flow of information. A prosecuting agency must be able to establish sufficient communication for compliance such that a flow of information has been created between the prosecutor and the police "sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offense charged," including impeachment material of a prosecution witness (CPL 245.55[1]).

***565** While the discovery statute was specifically designed with a presumption in favor of disclosure (CPL 245.20[7]) it also recognizes a legitimate need by the prosecution to protect sensitive information or individuals from disclosure and allows the People to decline making disclosure of such information by seeking a protective order pursuant to CPL 245.70 (*See also,* CPL 245.20[5]). CPL 245.30 and 245.35(4) allow the parties to seek the Court's assistance in obtaining discoverable material that requires preservation, special access or may necessitate the use of the Court's authority to carry out the goals of the discovery statute.

Once the People have met their discovery obligation, they are required to certify their compliance. "The certificate of compliance shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided." (CPL 245.50[1]). If following the filing of the initial certificate of compliance the People subsequently learn of additional material subject to disclosure, the People shall file a supplemental certificate identifying the additional material and information provided. (CPL 245.50[1])

Upon the filing of a valid certificate of compliance the People may declare readiness for trial. Pursuant to CPL 30.30(5), the Court is required to make an inquiry on the record as to the prosecution's "actual" readiness. In making this inquiry, the court must consider any objections made by the defense regarding the prosecution's compliance with discovery. Absent any individualized exceptional circumstances, if the Court determines that the prosecution has not satisfied their discovery obligations, the statement of readiness is not valid for speedy trial purposes (CPL 245.50[3]).

Law enforcement disciplinary records and the People's discovery obligation

This case turns on the issue of what constitutes the People's possession of material and what is known to the People. The Court in *People v. Quinlan, supra*, considered these issues in the context of a motion pursuant to CPL 30.30 seeking dismissal of a charge on speedy trial grounds. In interpreting the same statutes references above, the court found that the "language is clear and unambiguous: regardless of whether the People ***566** have *actual* possession of discoverable material and information from law enforcement, such material and information is statutorily *deemed* to be in the People's possession" (*Quinlan*, at 4). Compliance with the discovery statute " 'requires disclosing 'all known' materials, as well as affirming that due diligence has been exercised to ascertain the existence of any other materials' " (*Quinlan*, at 3 (citing *People v. Adrovic*, 69 Misc. 3d 563, 572, 130 N.Y.S.3d 614 [Crim. Ct., Kings County 2020]; *see also* CPL 245 [50] [1])). In order for the People to file a valid certificate of compliance "they must actually turn over all known material and information" (****811** People v. Quinlan, 2021 WL 474940, at 3 [N.Y.City Crim.Ct. Jan. 29, 2021].In other words, the People may not withhold known material and information subject to automatic discovery and expect the court to accept a certificate of compliance and statement of readiness. Considering these concepts in the context of the repeal of 50-a and the People's discovery obligation, it is undisputed that police personnel records are in the possession of the police. Therefore, possession of the records is imputed to the People.

In this case, the People suggest that their discovery obligation as it relates to police personnel records is limited to the subject matter of the charges or the case file. This Court does not believe that to be a sound interpretation of the plain language of the statute or the legislative intent of the statute. CPL 245.20(1)(k)(iv) specifically delineates and codifies the People's obligation as it relates to categories of information commonly known as *Brady/Giglio* material; information favorable to the defendant and material tending to impeach the character or testimony of a prosecution witness at trial (*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 [1963]), *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 [1972]. Pursuant to CPL 245.20(1)(k)(iv), "all evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case that tends to: ... (iv) impeach the credibility of a testifying prosecution witness ... shall be disclosed." The People have a duty to disclose this information "whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information" (CPL 245.20[1][k][iv]).The law does not allow for this information to be filtered by subject matter or by the People's assessment of its credibility or usefulness.

Since the repeal of 50-a, ***567** "any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee" is, with specific statutorily dictated redactions, subject to review, inspection and discovery (Public Officers Law 86[6]).

" 'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature' " *(Schenectady Police Benev. Ass'n v. City of Schenectady, supra* at 6 (citing, *Majewski v. Broadalbin-Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998] quoting *Tompkins v. Hunter,* 149 N.Y. 117, 43 N.E. 532 [1896])). The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available. The definition of "law enforcement disciplinary records" is expansive and inclusive. It does not distinguish between unfounded, exonerated, substantiated or unsubstantiated. Indeed, there is no indication that any of these terms are used with any uniformity between law enforcement agencies and across the State. Additionally, the definition of "law enforcement disciplinary records" is a non-exhaustive list referencing "any record created in furtherance of a law enforcement disciplinary proceeding"

(Public Officers Law 86[6], *see also,* ****812** *Buffalo Police Benevolent Association, Inc. v. Brown,* 69 Misc. 3d 998, 134 N.Y.S.3d 150 [Sup. Ct., Erie County October 9, 2020]).This law was repealed to specifically allow for the information to be available in the cross examination of police witnesses. Any impeachment material relative to a prosecution witness must be disclosed. When the prosecution witness is a law enforcement officer that information includes the officer's disciplinary records. Once disclosed, the full and appropriate use of the information and ***568** its admissibility is subject to further debate and discussion before the court as a *motion in limine* before trial.

The People have candidly acknowledged that there are other disciplinary records in this case that have not yet been disclosed to the defense but have argued that they are in compliance with their discovery obligations because they are not in physical possession of the records and have established a flow of information with BPD. However, as discussed above the language of the statute is clear and unambiguous, possession of police records is imputed to the People regardless of their actual possession. The People are required to disclose "all known" material. The fact that they know this material exists but have not physically obtained the records and made them available to the defense impedes the People's ability to file a valid certificate of compliance and enter a declaration of readiness that the court is able to accept.

Accordingly, this court concludes that the BPA disciplinary records of the People's law enforcement witnesses, are subject to discovery and the People must provide those records. Moreover, given the expansive definition of law enforcement disciplinary records, providing the defense with summaries of the records will not suffice, the entire record, subject to statutorily approved redactions, must be provided.

The People have made an oral request for the court's assistance in complying with their discovery obligations by the issuance of an order directing BPD to produce the records. This Court is aware of law enforcement's reticence in disclosing these records and the obstacles this presents for the People. Indeed, the Buffalo Police Benevolent Association, Inc. and others unsuccessfully filed for declaratory and injunctive relief immediately after the repeal of 50-a to block the release of the records (*Buffalo Police Benevolent Association, Inc. v. Brown, supra*). While this court is willing to exercise its authority pursuant to CPL 245.35(4) to effectuate the goals of the discovery statute, the court lacks jurisdiction to issue such an order at this time. "A court has no power to grant relief against an individual or entity not named as a party and not properly summoned before the court" (*Hartloff v. Hartloff,* 296 A.D.2d 849, 849, 745 N.Y.S.2d 363 [4th Dept. 2002], CPLR 5015 [a][4]).

There has been a suggestion by the People in this case that as public records, the police disciplinary records are equally available to the Defense and that the People should not bear the burden of producing them. This ignores the mandatory language of the discovery statute requiring automatic discovery ***569** without the need for a defense demand. Additionally, as records in the police possession are deemed in the possession of the prosecution, requiring the defense to make a formal demand for the records by a FOIL request, subpoena or court order shifts the People's discovery burden to the defense. Moreover, this Court is aware that FOIL requests in this County to a number of law enforcement agencies have largely gone unanswered which frustrates the legislature's intent and places the burden on the defense to initiate enforcement proceedings.

Finally, the People have argued that the striking of their declaration of ****813** readiness is an extreme sanction. As a point of order, this is not a case of striking the People's readiness, rather it is matter of whether the Court has accepted the People's certificate of compliance and statement of readiness pursuant to CPL 30.30(5). "[T]he People's trial readiness is now directly tied to meeting their discovery obligations, 'such that discovery compliance is a condition precedent to a valid announcement of readiness for trial' " (*People v. Quinlan, supra* at 3). The record in this case reflects that the Court has not yet accepted the People's statement of readiness pending their response to this discovery issue. Given that the People have not disclosed all known disciplinary records, they have not met the condition precedent; therefore their certificate of compliance is invalid and does not stop the speedy trial clock.

All Citations

71 Misc.3d 559, 143 N.Y.S.3d 805, 2021 N.Y. Slip Op. 21039

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71 Misc.3d 1205(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
This opinion is uncorrected and will not be published in the printed Official Reports.
District Court, New York,
Nassau County, First District.

The PEOPLE of the State of New York, Plaintiff,
v.
Carlos HERRERA, Defendant.

CR-004539-20NA
|
Decided on April 5, 2021

Attorneys and Law Firms

For the People: Madeline Singas, Nassau County District Attorney

Attorney for Defendant: Robert J. Brunetti

Opinion

Andrew M. Engel, J.

***1** Papers Submitted:

Amended Notice Motion 1

Affirmation in Support 2

Affirmation in Opposition 3

Reply Affirmation 4

On November 6, 2020, during a conference of this matter among the People, defense counsel and the court, an issue arose concerning the disciplinary records of the arresting and assisting officer in this matter, Officer Robert Galgano and Officer Daniel Concannon. At the conclusion of that conference, the matter was adjourned to December 17, 2020, for the People to provide the Defendant with the officers' disciplinary records and for a further conference.

On December 17, 2020, the People provided the Defendant with information regarding civil lawsuits which have been brought against one or both of the officers. At that time, the People indicated that they would not be providing the Defendant with the disciplinary records previously discussed, expressing the opinion that they had no legal obligation to turn them over to defense counsel. The parties were then provided with a motion schedule, so that their respective positions could be reduced to writing and submitted to the court for a determination.

On December 30, 2020, rather than move to compel the People to provide the disciplinary records in issue, the Defendant filed a motion seeking to have the court issue a subpoena duces tecum for the production of the disciplinary records of Officers Galgano and Concannon by the Nassau County Police Department ("NCPD"). This motion was served on the Office of the District Attorney of Nassau County and on the Office of the Nassau County Attorney ("County Attorney"), on behalf of the NCPD, Officer Galgano and Officer Concannon. Neither the People, the NCPD nor Officers Galgano or Concannon opposed the Defendant's motion.

On February 3, 2021 this court issued a Decision and Order granting the Defendant's unopposed motion and issued a subpoena duces tecum directing the NCPD to produce at the Nassau County District Court, on February 19, 2021, the following items:

> 1. in accordance with Public Officers Law §§ 86, 87 and 89, all disciplinary records, civilian complaints, investigations and Internal Affairs Bureau records pertaining to any investigation of Police Officer Robert Galgano, Shield No. 2774, and
>
> 2. in accordance with Public Officers Law §§ 86, 87 and 89, all disciplinary records, civilian complaints, investigations and Internal Affairs Bureau records pertaining to any investigation of Police Officer Daniel Concannon, Shield # 308.

Following the issuance of that subpoena, defense counsel advised the court that the shield numbers previously provided to the court by defense counsel were incorrect and asked that the subpoena be corrected to reflect the officers' present status and serial numbers. On February 9, 2021 the court issued the corrected subpoena, directing the NCPD to produce at the Nassau County District Court, on February 19, 2021, the following items:

> 1. in accordance with Public Officers Law §§ 86, 87 and 89, all disciplinary records, civilian complaints, investigations and Internal Affairs Bureau records

pertaining to any investigation of Det. Robert Galgano, Serial No. 9555, and

***2** 2. in accordance with Public Officers Law §§ 86, 87 and 89, all disciplinary records, civilian complaints, investigations and Internal Affairs Bureau records pertaining to any investigation of Det. Daniel Concannon, Serial No. 9556.

On or about February 17, 2021, following the service of the subpoena dated February 9, 2021, the County Attorney filed a motion seeking an order, *inter alia*, quashing the subpoena duces tecum. On that same date, the County Attorney filed an amended set of motion papers. The Defendant has filed opposition to this motion; and, the County Attorney has filed his reply to that opposition. The District Attorney's office has taken no position herein.

The County Attorney seeks an order, quashing the subpoena duces tecum. In the alternative the County Attorney asks the court to conduct an *in camera* inspection of the subpoenaed records, to limit the scope of production to "substantiated" internal investigations, and to direct the Defendant and his attorney to not publicly share the law enforcement records at issue.

The court would first note that the Defendant's motion seeking the subpoena at issue, the court's issuance of that subpoena and the present motion would have been completely unnecessary had the District Attorney's office and the NCPD complied with the very clear mandates of CPL §§ 245.55(1), 245.20(1)(k)(iv) and 245.20(2) which provide:

> CPL § 245.55(1) - The district attorney and the assistant responsible for the case, ..., shall endeavor to ensure that a flow of information is maintained between the police and other investigative personnel and his or her office sufficient to place within his or her possession or control **all material and information** pertinent to the defendant and the offense or offenses charged, including, but not limited to, any evidence or information discoverable under paragraph (k) of subdivision one of section 245.20. (emphasis added)
>
> CPL § 245.20(1)(k)(iv) - 1. The prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, **all items and information** that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including but not limited to: (k) **All evidence and information**, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: ... (iv) impeach the credibility of a testifying prosecution witness ... Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article. (emphasis added)
>
> CPL § 245.20(2) - The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.

***3** The court would further note that CPL § 245.20(7) provides, "There shall be a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article."

There have been a number of published decisions addressing the manner in which the People may comply with their affirmative discovery obligations, when it comes to compliance with CPL § 245.20(1)(k)(iv). Some of these decisions require more of the People, some require less. They all require the People to do something. For example, in *People v. Akhlaq*, 2021 WL 1047074, 2021 NY Slip Op. 21060 (Sup. Ct. Kings Co. 2021), the court found "providing impeachment information culled from personnel files of testifying police witnesses" to be sufficient. In *People v. Suprenant*, 2020 WL 5422819, 2020 NY Slip Op. 20227 (City Ct. Glens Falls 2020) the court found "the People's discovery obligation is satisfied where they disclose the existence of the officer's disciplinary records and either produce copies of the records or cause the materials or information to be made available to defense counsel." In *People v. Randolph*, 69 Misc 3d 770, 132 N.Y.S.3d 726 (Sup. Ct. Suffolk Co. 2020) the court found that "files involving allegations that have been determined to be exonerated or unfounded are not required to be provided as part of automatic discovery[,]" leaving substantiated and unsubstantiated files which must be produced. In *People v. Cooper*, 2021

WL 728983, 2021 NY Slip Op. 21039 (County Ct. Erie Co. 2021) the court found that:

> the definition of 'law enforcement disciplinary records' is a non-exhaustive list referencing 'any record created in furtherance of a law enforcement disciplinary proceeding' (Public Officers Law 86[6], *see also*, *Buffalo Police Benevolent Association, Inc. v. Brown*, 69 Misc 3d 998 [Sup Ct, Erie County October 9, 2020]).... When the prosecution witness is a law enforcement officer that information includes the officer's disciplinary records.

Notwithstanding this range of options initially available to the People, at least until there is some appellate authority addressing these issues, the People herein chose to do nothing, which is far from diligent good faith, reasonable under the circumstances.

Turning to the substance of this motion, contrary to the position taken by the County Attorney, the subpoena is neither "overbroad" nor "nebulous." (*Bergstrom Affirmation* 2/17/21, ¶ 8) As indicated hereinabove, the subpoena requires, "in accordance with Public Officers Law §§ 86, 87 and 89," the production of "all disciplinary records, civilian complaints, investigations and Internal Affairs Bureau records pertaining to any investigation[s] of Det. Galgano [and Det. Concannon.]"

Public Officers Law § 86(4) provides that:

> " 'Record' means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

***4** " 'Agency' means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." Public Officers Law § 86(3)

Public Officers Law § 86(6) defines "Law enforcement disciplinary records" as:

> any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
>
> (a) the complaints, allegations, and charges against an employee;
>
> (b) the name of the employee complained of or charged;
>
> (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
>
> (d) the disposition of any disciplinary proceeding; and
>
> (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

" 'Law enforcement disciplinary proceeding' "means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency[;]" Public Officers Law § 86(7); and, "Law enforcement agency:"

> means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

In this light, it is clear that there is nothing vague or unreasonably expansive about the items subject to the subpoena. The subpoena, in fact, directs the production of nothing more, or less, than that to which the Defendant would be entitled pursuant to a FOIL request.

The County Attorney's objection to the issuance of the subpoena, because the Defendant has allegedly failed to demonstrate that the items sought are material and relevant to the present criminal prosecution, is equally without merit. With the enactment of Article 245 of the Criminal Procedure Law, effective January 1, 2020, the Defendant no longer has an obligation to make a demand or demonstrate the need for items subject to the People's new automatic discovery obligations, as set forth in CPL §§ 245.10 and 245.20(1)(a-u). *See*: *People v. Villamar*, 69 Misc 3d 842, 132 N.Y.S.3d 593, (Crim. Ct. NY Co. 2020); *People v. DeMilio*, 66 Misc 3d 759, 117 N.Y.S.3d 830 (County Ct. Dutchess Co. 2020); *People v. Lobato*, 66 Misc 3d 1230(A), 122 N.Y.S.3d 492 (Crim. Ct. Kings Co. 2020)

As indicated hereinabove, CPL 245.20(1)(k)(iv) specifically mandates the disclosure of, "All evidence and information, including that which is known to police or other law enforcement agencies acting on the

government's behalf in the case, that tends to: ... impeach the credibility of a testifying prosecution witness....” *See also*: *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972) These items must be disclosed “regardless of whether the prosecutor finds the information to be ‘material’ or ‘credible.’ ” *People v. Suprenant, supra.* That the People have chosen to shirk their responsibility in this regard herein, does not prevent the Defendant from seeking the disclosure of this material *via* subpoena.

***5** The court further declines the entreaty of the County Attorney to limit the NCPD's production of the subpoenaed material to “substantiated” law enforcement records. Contrary to the County Attorney, *People v. Randolph, supra.* did not limit disclosure of the requested records to “substantiated” allegations of misconduct. That court, in fact, found that “substantiated” and “unsubstantiated” claims of misconduct may be the subject of impeachment at hearing and/or trial. Moreover, while this court appreciates the logic the *Randolph, id.* decision, this court finds the decision in *People v. Cooper, supra.* more persuasive. As noted therein:

> The legislative intent in repealing 50-a[1] was to make law enforcement disciplinary records fully available. The definition of ‘law enforcement disciplinary records’ is expansive and inclusive. It does not distinguish between unfounded, exonerated, substantiated or unsubstantiated. Indeed, there is no indication that any of these terms are used with any uniformity between law enforcement agencies and across the State. Additionally, the definition of “law enforcement disciplinary records” is a non-exhaustive list referencing “any record created in furtherance of a law enforcement disciplinary proceeding” (Public Officers Law 86[6], *see also Buffalo Police Benevolent Association, Inc. v. Brown*, 69 Misc 3d 998 [Sup Ct, Erie County October 9, 2020]).

Similarly, the court finds no reason, at this stage, to conduct an *in camera* review of the material in question, to determine what the Defendant may see and what he may not. “Once disclosed, the full and appropriate use of the information and its admissibility is subject to further debate and discussion before the court as a *motion in limine* before trial.” *People v. Cooper, supra.*; *See also*: *People v. Randolph, supra.*

Likewise, the County Attorney provides no justifiable reason why the court should direct the Defendant and his attorney to not publicly share the information they receive in response to the subpoena. The movant's reliance on *Fowler-Washington v. City of New York*, 2020 WL 7237683 (E.D. NY 2020) is misplaced. The limited protective order issued therein was based upon the Federal Rules of Civil Procedure and not CPL Article 245 or New York's Public Officers Law. The court therein specifically recognized “the scope of discovery under Federal Rule of Civil Procedure 26 is likely much broader than New York's Freedom of Information Law, and so Plaintiff here will have access to more documents than he would as a member of the public, even after the repeal of Section 50-a.” Moreover, the court made clear that:

> the protective order does not restrict the sharing of information that would be publicly available following repeal of Section 50-a.... Furthermore, the protective order specifically allows that any record produced to Plaintiff need not be kept confidential if it was ... ‘otherwise publicly available.’ (Protective Order ¶ 3.) Thus, if Plaintiff is correct, that all of the relevant records should now be public following the repeal of Section 50-a, he may obtain them through New York's process for obtaining such records, and they will no longer be considered confidential under the protective order.

The County Attorney's privacy concerns should be allayed by limitations on disclosure as set forth in Public Officers Law § 87, particularly subparagraphs 4-a and 4-b, which provide:

> 4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.
>
> ***6** 4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

In turn, Public Officers Law § 89(2-b) and (2-c) provided, in pertinent part:

> 2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:
>
> (a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer,

peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

Pursuant to Public Officers Law § 86(9):

'echnical infraction' means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

Finally, the County Attorney's request for a protective order, pursuant to CPL § 245.70, is untimely, having been raised for the first time in their reply papers, *See*: *Ritt v. Lenox Hill Hospital*, 182 AD2d 560, 582 N.Y.S.2d 712 (1st Dept. 1992) ["As we view it, the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"]. It shall not be considered by the court and is, nevertheless, substantively without merit.

***7** Accordingly, the motion to quash is denied in its entirety; and, it is hereby

ORDERED, that, on or before May 14, 2021, the Nassau County Police Department shall produce the records which are the subject of the subpoena duces tecum dated February 9, 2021.

This constitutes the decision and order of the court.

All Citations

Slip Copy, 71 Misc.3d 1205(A), 142 N.Y.S.3d 791 (Table), 2021 WL 1247418, 2021 N.Y. Slip Op. 50280(U)

Footnotes

1 Civil Rights Law § 50-a

71 Misc.3d 1214(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
This opinion is uncorrected and will not be published in the printed Official Reports.
Criminal Court, City of New York, Bronx County.

The PEOPLE of the State of New York
v.
Juan PEREZ, Defendant.

2019BX024675
|
Decided on April 8, 2021

Attorneys and Law Firms

For the People: Stephanie McCarthy, Esq., Assistant District Attorney, Bronx District Attorney's Office, 198 East 161st Street, Bronx, NY 10451

For the Defendant: Masooma Javaid, Esq., The Legal Aid Society - Bronx County, Criminal Defense Practice, 260 East 161st Street, 10th Floor, Bronx, NY 10451

Opinion

Jeanine R. Johnson, J.

***1** By Notice of Motion, filed November 27, 2020, Defendant moves to deem the Prosecution's Certificate of Compliance (hereinafter "COC") filed, February 25, 2020 invalid pursuant to Criminal Procedure Law (hereinafter "CPL") §§ 245.20(1) and 245.50(1) and for the Court to dismiss the accusatory instrument pursuant to CPL §§ 30.30 and 210.20(1)(g).

Having reviewed the Defendant's moving and reply papers, the People's Affirmation in Opposition and sur-reply and the relevant documents in the official court file, this Court finds the People's February 25, 2020 COC invalid but due to special circumstances and an unreasonable delay by the Defendant denies the Defendant's Motion to Dismiss.

RELEVANT PROCEDURAL BACKGROUND
Defendant was charged by criminal complaint and arraigned on September 14, 2019, with, Operating a Motor Vehicle while under the influence of Alcohol or drug in violation of Vehicle and Traffic Law (hereinafter "VTL") §§§ 1192(3); 1192(2) and 1192(1).

On January 14, 2020, the People filed an Automatic Disclosure Form (hereinafter "ADF") pursuant to CPL § 245.20(1). On February 25, 2020, the People filed their COC, Disclosures and Statement of Readiness (hereinafter "SOR"). On November 27, 2020, the Defendant filed the instant motion. On December 11, 2020, the People filed their Affirmation in Opposition. On December 18, 2020, the Defendant filed a Reply to the People's Affirmation. On January 22, 2021, the People filed their Sur-Reply.

RELEVANT STATUTES
CPL § 30.30(1)(b). Speedy trial. Time limitations.

> (1) Except as otherwise provided in subdivision three, a motion made under paragraph (e) of subdivision one of § 170.30 or paragraph (g) of subdivision one of section 210.20 must be granted where the people are not ready for trial within:
>
> (b) ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony.

CPL § 170.30(1)(e). Motion to dismiss information, simplified information, prosecutor's information or misdemeanor complaint.

> (1) After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that:
>
> (e) The defendant has been denied the right to a speedy trial.

CPL § 245.20(1)(k)(s). Timing of discovery.

(1) Initial discovery for the defendant. The prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including but not limited to:

(k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

***2** (s) In any prosecution alleging a violation of the vehicle and traffic law, where the defendant is charged by indictment, superior court information, prosecutor's information, information, or simplified information, all records of calibration, certification, inspection, repair or maintenance of machines and instruments utilized to perform any scientific tests and experiments, including but not limited to any test of a person's breath, blood, urine or saliva, for the period of six months prior and six months after such test was conducted, including the records of gas chromatography related to the certification of all reference standards and the certification certificate, if any, held by the operator of the machine or instrument. The time period required by subdivision one of section 245.10 of this article shall not apply to the disclosure of records created six months after a test was conducted, but such disclosure shall be made as soon as practicable and in any event, the earlier of fifteen days following receipt, or fifteen days before the first scheduled trial date.

CPL §§ 245.50(1) and (3). Certificates of compliance; readiness for trial.

(1) By the prosecution. When the prosecution has provided the discovery required by subdivision one of section 245.20 of this article, except for discovery that is lost or destroyed as provided by paragraph (b) of subdivision one of section 245.80 of this article and except for any items or information that are the subject of an order pursuant to section 245.70 of this article, it shall serve upon the defendant and file with the court a certificate of compliance. The certificate of compliance shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.60 of this article, a supplemental certificate shall be served upon the defendant and filed with the court identifying the additional material and information provided. No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances; but the court may grant a remedy or sanction for a discovery violation as provided in section 245.80 of this article.

(3) Trial readiness. Notwithstanding the provisions of any other law, absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of section 30.30 of this chapter until it has filed a proper certificate pursuant to subdivision one of this section.

CPL § 245.60. Continuing duty to disclose.
If either the prosecution or the defendant subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this article had it known of it at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery under this article. This section also requires expeditious disclosure by the prosecution of material or information that became relevant to the case or discoverable based on reciprocal discovery received from the defendant pursuant to subdivision four of section 245.20 of this article.

DISSCUSSION

Certificate Of Compliance
The Defendant moves to have the People's COC dated February 25, 2020, and SOR, declared invalid due to the People's failure to turn over all Civil Compliant Review Board (hereinafter "CCRB") and NYPD Internal Affairs Bureau (hereinafter "IAB") records relating to the officers in the case; and, for failing to timely disclose the records of inspection, calibration or repair of machines used to perform tests. The People argue they complied with their discovery obligations in February 2020 when they provided all substantiated personnel police records, and calibration and field inspection unit reports (hereinafter "FIUR") that they were aware of. The People further assert that the reports provided in October 2020 (two notes between highway officers regarding out of service incidents) corroborate information initially disclosed rather than offer new information.

***3** Article 245 of the CPL requires the People to openly provide a non-exhaustive list of discovery materials including, but not limited to, impeachment, exculpatory and mitigating evidence or information known to the police or other law enforcement agencies; and, a year of records of calibration, certification, inspection, repair or maintenance of machines used to perform scientific tests and experiments in VTL cases. See CPL § 245.20(1)(k), (s) and (7). The Prosecution, with limited exception, is required to "make a diligent, good faith effort to ascertain the existence of material or information discoverable under 245.20(1) and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control." CPL § 245.20(2); see People v Porter, 2020 NY Slip Op 20362 (Crim Ct Bronx County 2020) [People must provide the entirety of any substantiated records to comply with their discovery obligation].

Some trial courts have held unfounded or exonerated personnel claims against police officers are not required to be produced because they lack impeachment value. See People v Davis, 70 Misc 3d 467 (Crim Ct Bronx County 2020); People v Randolph, 69 Misc 3d 770 (Sup Ct Suffolk County 2020); People v Lustig, 68 Misc 3d 234 (Sup Ct Queens County 2020); People v Knight, 69 Misc 3d 546 (Sup Ct Kings County 2020). Trial courts vary on whether the People's discovery obligation is satisfied by providing a summary of disciplinary action in lieu of a full record and attendant materials. See People v Suprenant, 69 Misc 3d 685 (Glens Falls City Court 2020) [People met discovery obligation by disclosing the existence of disciplinary records and directing the police to provide copies to defense counsel]; People v Gonzalez, 68 Misc 3d 1213(A) (Sup Ct Kings County 2020); People v Davis, 70 Misc 3d 467 (Crim Ct Bronx County 2020); People v Lustig, 68 Misc 3d 234 (Sup Ct Queens County 2020); People v Knight, 69 Misc 3d 546 (Sup Ct Kings County 2020); Cf. People v Porter, 2020 NY Slip Op 20362 (Crim Ct Bronx County 2020) [to comply with discovery requirement, the People must provide substantiated records in their entirety]; People v Randolph, 69 Misc 3d 770 (Sup Ct Suffolk County 2020); People v Rosario, 2020 NY Slip Op 20322 (County Ct Albany County 2020).Additionally, the trial courts diverge regarding whether substantiated personnel records alone suffice to comply with discovery obligations. See People v Davis, 70 Misc 3d 467 (Crim Ct Bronx County 2020) [the People have no duty to disclose the unsubstantiated allegations of misconduct under new discovery statute]; People v Gonzalez, 68 Misc 3d 1213(A) (Sup Ct Kings County 2020); Cf. People v Cooper, 2021 NY Slip Op 21039 (Erie County Ct 2021) [the People are required to provide substantiated and unsubstantiated allegations for compliance with discovery obligations]; People v Randolph, 69 Misc 3d 770 (Sup Ct Suffolk County 2020). This Court finds the recent decision in People v Herrera, supra, most elucidative and sound. In reliance upon People v Cooper, (2021 NY Slip Op 21039 [Erie County Ct 2021]) the court in People v. Herrera reasoned that:

> "the legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available. The definition of 'law enforcement disciplinary records' is expansive and inclusive. It does not distinguish between unfounded, exonerated, substantiated or unsubstantiated. Indeed, there is no indication that any of these terms are used with any uniformity between law enforcement agencies and across the State. Additionally, the definition of 'law enforcement disciplinary records' is a non-exhaustive list referencing 'any record created in furtherance of a law enforcement disciplinary proceeding' (Public Officers Law § 86[6], see also Buffalo Police Benevolent Association, Inc. v Brown, 69 Misc 3d 998, 134 N.Y.S.3d 150 [Sup Ct, Erie County October 9, 2020])." People v Herrera, 2021 NY Slip Op 50280(U), 5 (Nassau Dist Ct, April 5, 2021).

***4** The greatest quest in American democracy, to provide equal protection and due process under the law as guaranteed by the 14th Amendment of the U.S. Constitution requires, among a litany of challenges, that members of law enforcement be subject to public scrutiny in the way they exercise their official duties. Moving New York State along the path in that quest, towards equity, transparency, and accountability was the main thrust of the Legislature's intent when codifying Brady in the 2020 discovery reform and subsequently repealing section 50-a of the Civil Rights Law. Brady v Maryland, 373 US 83

(1963). The legislative transcript of the debate on the issue is replete with remarks detailing the majority's position - that the transparency sought could not be achieved without disclosing both substantiated and unsubstantiated records. In fact, the main sponsor of the Assembly Bill, Mr. O'Donnell stated, "if you don't include 'unsubstantiated claims', [ ] that information will be filed away by the NYPD as [...] if it never existed." NY Assembly Debate on Assembly Bill A10611, June 9, 2020 at 219. This Court finds the Eastern District of New York District Court's decision in Fowler-Washington v City of New York instructive as well. That court held, "by repealing Section 50-a, the State of New York has legislatively required that police officers' personnel records should be available to the public [ ] [and] if police personnel records are available to the public, they are certainly available to civil rights plaintiffs if relevant to the litigation under [Federal Rule of Civil Procedure 26]." Fowler-Washington v. City of New York, 2020 U.S. Dist. LEXIS 184364, 8 [E.D.NY Oct. 5, 2020]. This Court reasons that the right of a criminal defendant, who faces the loss of personal liberty, to such information is undoubtedly consistent with a civil rights plaintiffs' entitlement to same.

CPL 30.30

The top count of the accusatory instrument is an unclassified misdemeanor requiring that the People be ready for trial within ninety days of commencement of the criminal action. CPL § 30.30(1)(b). Successful motions under CPL § 30.30 must demonstrate the existence of an unexcused delay in excess of the statutory maximum. See People v Santos, 68 NY2d 859 (1986). The People are considered ready for trial when there is no legal impediment to trying their case and the People communicate their actual readiness in open court or serve written notice of readiness to the court and defense counsel. See People v Brown, 28 NY3d 392 (2016); People v Kendzia, 64 NY2d 331 (1995). When the People are in a post-readiness posture, the People are only charged with the time requested for an adjournment. See People v Cortes, 80 NY2d 201 (1992); People v Pierre, 8 AD3d 201 (1st Dept 1992). Under CPL § 30.30(4)(a), proceedings concerning defendant, including pre-trial motions, toll the speedy trial clock. See People v Bruno, 300 AD2d 93 (1st Dept 2002); People v Veras, 48 Misc 3d 1227(A) (Crim Ct Bronx County 2015). The People are given a reasonable period to prepare following the court's decision on motion papers. CPL § 30.30(4)(a); see People v Davis, 80 AD3d 494 (1st Dept 2011); People v Wells, 16 AD3d 174 (1st Dept 2005). The People's "failure to declare readiness within the statutory time limit will result in dismissal of the prosecution unless the People can demonstrate that certain time periods should be excluded." People v Price, 14 NY3d 61, 63 (2010).

Prior to January 1, 2020 there was a presumption that a statement of readiness was truthful and accurate. See People v Sibblies, 22 NY3d 1174 (2014). Post January 1, 2020, no such presumption exists under the new discovery scheme. In fact, pursuant to CPL § 245.50(1), the People are now required to file a certificate confirming their exercise of due diligence in fulfillment of their discovery obligations as a condition precedent to being deemed ready for trial. Although, the newly enacted May 2020 statute allows the Court to consider an individualized finding of special circumstances when deciding trial readiness, the previous statute indicated exceptional circumstances which this Court finds instructive and comparable. CPL § 245.50(3) Exceptional circumstances have been found where a necessary witness was not available due to a medical reason or some circumstance outside the control of the prosecutor. See People v Goodman, 41 NY2d 888 (1977) (unavailability of complainant for medical reasons); People v McLeod, 281 AD2d 325 (1st Dept 2001) (exceptional circumstances found where police officer was disabled due to arm cast).

The Defendant argues this matter should be dismissed due to the invalidity of the February 2020 COC and the lapse of statutory time at one hundred four (104) days. The People maintain the validity of their February 2020 COC and SOR and assert sixty-three (63) days chargeable.

***5** I) Law Enforcement Personnel Records

The Defendant contends the summary Central Personnel Indexes (hereinafter "CPI") provided by the People in February 2020 regarding Officers Savastano, Comiskey, Weiglen and Boho, and additional IAB details provided via email on November 30, 2020 are insufficient to meet the discovery obligations of CPL 245.20(1)(k). Defendant contends that the People must turn over all CCRB and IAB personnel records for all officers involved herein, including any underlying documents.

The People assert, inter alia, prior to filing their COC on February 25, 2020, they provided all substantiated CPI's in full, not summary form, and no substantiated CCRB records or lawsuits exist for the officers herein. They further maintain that they are not required to provide

records of unsubstantiated, unfounded or exonerated claims. The People assert the additional IAB memoranda provided on November 30, 2020 should not invalidate their February COC/SOR as it was filed in good faith and based on information available to them at the time. The People believe their burden was unchanged by the repeal of section 50-a of the Civil Rights Law.

The People are mistaken in their position regarding unsubstantiated records. This Court agrees with the Defendant and directs the People to disclose the full substantiated and unsubstantiated personnel records, in their possession, for all officers herein to comply with their discovery obligation. This Court finds the IAB memoranda provided by the People on November 30, 2020 was properly disclosed pursuant to their continuing obligation under to CPL § 245.60. However, the People are forewarned that withholding of same by law enforcement agencies cannot excuse the People of their discovery obligation. This Court finds the February 24, 2020 COC invalid with respect to law enforcement personnel records.

II) Calibration Reports

The Defendant asserts the People did not provide calibration reports for six months prior to and six months after being used in the instant matter. The People assert no calibration was done within the six-month window after use in the instant matter. This Court finds the February 24, 2020 COC valid with respect to calibration reports.

III) Field Inspection Unit Reports

The Defendant asserts the People did not provide documentation regarding a malfunction in the Intoxilyzer on July 25, 2019 and August 2, 2019 until October 30, 2020, after speedy trial time had elapsed. The People contend they were unaware of the two documents and two notes between highway officers regarding the malfunction when they filed their February COC. They contend the documents serve to corroborate the initial disclosure because Defendant had already been noticed that the machines had been taken out of service during the summer of 2019. Therefore, this Court finds the February 24, 2020 COC valid with respect to field inspection unit reports as the People properly adhered to their continuing duty to disclose information pursuant to CPL § 245.60.

IV) Calculation Of Time

***6** September 14, 2019 - October 30, 2019 (0 days chargeable)
On September 14, 2019, the Defendant was arrested and arraigned in Part AR3 of the Bronx Criminal Court. The People were ready, and Defendant was released on his own recognizance. He was represented by Masooma Javaid, Esq. The matter was adjourned to AP4 on October 30, 2019 for response and decision. See People v Bruno, 300 AD2d 93 (1st Dept 2002); People v Veras, 48 Misc 3d 1227(A) (Crim Ct Bronx County 2015).

October 30, 2019 - December 5, 2019 (0 days chargeable)
On October 30, 2019, the matter was heard in AP4. The Court ordered 1194/Mapp/Huntley/Wade/Dunaway/Atkins/Odum/Ingle hearings and adjourned the matter to AP4 on January 5, 2020 for hearings and trial. See People v Davis, 80 AD3d 494 (1st Dept 2011); People v Wells, 16 AD3d 174 (1st Dept 2005).

December 5, 2019 - January 6, 2020 (13 days chargeable)
On December 5, 2019, the case was heard in Part AP4. The People were not ready and requested December 13, 2019. The assigned ADA was on trial, thus unavailable. The Court adjourned the case to AP4 on January 6, 2020 for hearings and trial. See People v Cortes, 80 NY2d 201 (1992); People v Pierre, 8 AD3d 201 (1st Dept 1992).

January 6, 2020 - February 18, 2020 (43 days chargeable)
On January 6, 2020, the case was heard in Part AP4. The People were not ready and were directed to file an SOR. The matter was adjourned to February 18, 2020 for hearings and trial.

On January 14, 2020, The People filed an Automatic

Disclosure Form.

February 18, 2020 - March 19, 2020 (7 days chargeable)
On February 18, 2020, the case was heard in AP4. The People were not ready. The matter was adjourned to AP4 on March 19, 2020 for hearings and trial.

On February 25, 2020, the People filed a COC and SOR.

March 19, 2020 - June 18, 2020 (0 days charged)
On March 19, 2020, the matter was calendared in AP4. The matter was administratively adjourned to June 18, 2020, due to the public health crisis of COVID-19, pursuant to an administrative order issued by Chief Judge Lawrence K. Marks dated March 16, 2020.

On March 20, 2020, pursuant to Executive Order 202.8 issued by New York State Governor Andrew Cuomo, and subsequent extensions, CPL § 30.30 was suspended through October 4, 2020.

June 18, 2020 - September 18, 2020 (0 days chargeable)
On June 18, 2020, due to the ongoing public health crisis, the matter was again administratively adjourned to September 18, 2020.

September 18, 2020 - October 22, 2020 (0 days chargeable)
On September 18, 2020, due to the ongoing public health crisis, the matter was again administratively adjourned to October 22, 2020.

October 22, 2020 - November 10, 2020 (0 days chargeable)
On October 22, 2020, the matter was heard in AP4. The Defendant waived CPL § 30.30 time to submit a pre-pleading information. The matter was adjourned to AP4 on November 10, 2020 for possible disposition.

November 10, 2020 - January 14, 2021 (0 days chargeable)
On November 10, 2020, the matter was heard in AP4. The Defendant requested a CPL § 30.30 motion schedule. The Court ordered the Defendant to file their motion by November 30, 2020 and the People's response by December 11, 2020. The matter was adjourned to Part AP4 on January 14, 2021 for this Court's decision. See People v Bruno, 300 AD2d 93 (1st Dept 2002); People v Veras, 48 Misc 3d 1227(A) (Crim Ct Bronx County 2015).

***7** On November 27, 2020, the Defendant filed the instant motion.

On December 11, 2020, the People filed their Affirmation in Opposition.

On December 18, 2020, the Defendant filed a Reply to the People's Affirmation.

January 14, 2021 - March 15, 2021 (0 days chargeable)
On January 14, 2021, the matter was heard in AP4. The Court ordered the People to file their sur-reply by January 22, 2021. The matter was adjourned to March 15, 2021 for decision.

On January 22, 2021, the People filed their Sur-Reply.

CONCLUSION
This Court finds the People's February 25, 2020 COC to be invalid due to incomplete disclosure of law enforcement personnel records. However, this Court finds special circumstances exist due to the public health crisis which warrant excludable time. Similar to previous findings of exceptional circumstances COVID-19 is a circumstance, out of the control of the Prosecution. The People are ordered to provide all substantiated and unsubstantiated law enforcement personnel records and file a new COC and SOR to be deemed in compliance and

ready for trial. The People may redact all legally permissible information. CPL § 245.20(6); Public Officers Law § 89(2)(b). Although the Defendant informally made the Court and the People aware of an objection via email in August 2020, no official record was made in open court or documentation filed until November 2020. In view of the foregoing, this Court finds a total of sixty-three (63) days chargeable to the People. Consequently, Defendant's Motion to Dismiss pursuant CPL §§ 30.30(1)(b) and 170.30(e), and for a hearing in the alternative is denied.

This constitutes the Decision and Order of the Court.

All Citations

Slip Copy, 71 Misc.3d 1214(A), 144 N.Y.S.3d 332 (Table), 2021 WL 1705783, 2021 N.Y. Slip Op. 50374(U)

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161 A.D.3d 120
Supreme Court, Appellate Division, First Department, New York.

In re Grace RAUH, et al.,
Petitioners–Respondents,
v.
Bill DE BLASIO, etc., et al.,
Respondents–Appellants.

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Index 157525/16
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ENTERED: MAY 1, 2018

Synopsis

Background: Reporters brought article 78 proceeding seeking to compel mayor's office to produce communications with outside consultants under Freedom of Information Law (FOIL), and for attorney fees. The Supreme Court, New York County, Joan B. Lobis, J., 2017 WL 1091765, granted petition. Mayor's office appealed.

Holdings: The Supreme Court, Appellate Division, Singh, J., held that:

consultant was hired by private organization, not a government entity, so communications were not protected by inter-agency exemption, and

reporters were entitled to attorney fees under FOIL.

Affirmed.

****17** Respondents appeal from the judgment (denominated a decision and order) of the Supreme Court, New York County (Joan B. Lobis, J.), entered March, 23, 2017, granting the petition brought pursuant to CPLR article 78 to compel respondents to disclose documents requested by petitioners pursuant to the Freedom of Information Law to the extent of directing respondents to produce all withheld responsive records, granting attorney's fees, and referring the matter to a special referee to hear and report on the amount of attorney's fees to be awarded.

Attorneys and Law Firms

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing, Devin Slack and John Moore of counsel), for appellants.

Akin Gump Strauss Hauer & Feld, LLP, New York (Douglass B. Maynard, Estela Diaz and Jessica Oliff Daly of counsel), for Grace Rauh, TWC News and Local Programming LLC, respondents.

Davis Wright Tremaine LLP, New York (Jeremy A. Chase and Elizabeth A. McNamara of counsel), for Yoav Gonen and NYP Holdings, Inc., respondents.

David Friedman, J.P., John W. Sweeny, Jr., Ellen Gesmer, Cynthia S. Kern, Anil C. Singh, JJ.

Opinion

SINGH, J.

***122** At issue on this appeal is whether communications between respondents Mayor Bill de Blasio and/or the Office of the Mayor of the City of New York and outside consultants that were not retained by a government agency fall within the statutory exemption for inter-agency and intra-agency materials under New York State's Freedom Of Information Law (Public Officers Law § 87[2][g]). We agree with Supreme Court that the communications are not exempt and that attorney's fees should be awarded because petitioners substantially prevailed in this article 78 proceeding and the Office of the Mayor lacked a reasonable basis for withholding its communications.

This proceeding arises from two FOIL requests seeking correspondence exchanged between the Mayor and/or certain members of his administration and various private consultants, including Jonathan Rosen, a principal of BerlinRosen, Ltd. BerlinRosen was retained by the Campaign for One New York (CONY), a nonprofit organization created by the Mayor's campaign in December 2013, between his initial election as Mayor and his January 1, 2014 inauguration. In 2016, it was reported that CONY was shutting down and would not be participating in the Mayor's 2017 reelection campaign as it had achieved its goals, advocating for the Mayor's policy agenda.

The First FOIL Request

On February 18, 2015, petitioner Grace Rauh, a reporter at NY1 News, submitted a FOIL request to respondent Office of the Mayor of the City of New York (the Office of the Mayor) seeking "copies of correspondence that Mayor de Blasio and/or senior members of his administration conducted with Jonathan Rosen in the [M]ayor's first year in office."

On August 7, 2015, and April 1, 2016, the Office of the Mayor stated that records responsive to that request were being disclosed, while others were being withheld pursuant to Public Officers Law § 87(2)(g), which generally exempts "inter-agency or intra-agency materials" (the agency exemption).

****18** On April 29, 2016, petitioner Rauh appealed from the partial denial of her request, and sought a "more detailed" explanation of why the withheld records were exempt from FOIL. The Office ***123** of the Mayor denied Rauh's appeal on or about May 13, 2016, finding that the withheld records were covered by the agency exemption.[1]

The Second FOIL Request

On April 3, 2015, petitioner Yoav Gonen, a reporter for the New York Post, requested "a copy of any and all email communications to or from Mayor de Blasio—using his city-issued or private email account[s]—and any and all employees in the Mayor's Office, to or from Jonathan Rosen or any and all employees of BerlinRosen, between Jan. 1, 2014 and April 3, 2015."

On August 7, 2015 the Office of the Mayor stated that responsive records were being disclosed, while other records were being withheld pursuant to the agency exemption, and extended the time to search for additional responsive records to November 6, 2015.

On May 22, 2016, Gonen appealed from the partial denial of his FOIL request. The Office of the Mayor responded, by letter dated June 10, 2016, that further responsive records were being provided, but "some responsive materials ha[d] been redacted in part or withheld in entirety" pursuant to the agency exemption.

On June 16, 2016, Gonen appealed from the decision to withhold some responsive documents, arguing that the agency exemption is inapplicable because "Rosen is a member of the public not paid by the administration and, as such, his and his firm's communications with and advice to the [M]ayor's [O]ffice should be provided under [FOIL]."

On June 30, 2016, the Office of the Mayor denied Gonen's appeal on the same grounds as in the previous appeal. Petitioners brought this article 78 proceeding in September 2016, seeking disclosure of all responsive records being withheld. Alternatively, petitioners sought an in camera review of ***124** the records to determine the applicability of the agency exemption. Petitioners also requested attorney's fees.

In November 2016, the Office of the Mayor disclosed more than 1,500 pages of previously withheld communications between respondents and BerlinRosen, and stated that the Office of the Mayor had by that point disclosed "all responsive email communications with Jonathan Rosen and BerlinRosen which involve[d] any other client of BerlinRosen." Respondents estimated to have disclosed over 18,000 pages of responsive records and offered to turn over the remaining records for an in camera review.

Supreme Court granted the petition, without conducting an in camera inspection and ordered respondents to disclose "all previously withheld correspondence that the Mayor and senior members of his administration conducted with Jonathan Rosen and any and all employees of BerlinRosen, Ltd., between January 1, 2014 and April 3, 2015." The court reasoned that in order to be covered by the agency exemption, the outside consultants "must be formally ****19** retained by the agency that they were advising." Supreme Court also found that "respondents did not have a reasonable basis for considering the correspondence with Rosen and his public relations firm to be covered by the inter-agency or intra-agency exemption" and granted petitioners' request for attorney's fees.

Respondents argue that in finding that CONY was not a governmental agency, Supreme Court erred in limiting its inquiry to "a formalistic analysis where a practical, functional inquiry" would have been more appropriate. Respondents urge that the focus of the inquiry should be a review of the consultant's function as opposed to what entity paid the consultant. While CONY was not a governmental agency, it worked with the Office of the Mayor to promote the Mayor's agenda. BerlinRosen was retained by CONY to provide consulting services to promote the Mayor's policy agenda.

This argument is without merit. At the outset we emphasize that "[t]he Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.,* 4 N.Y.3d 225, 230, 792 N.Y.S.2d 370, 825 N.E.2d 585 [2005]). Access to records of ***125** governmental agencies may be withheld if they fall within one of the enumerated exemptions of Public Officers Law § 87(2).

However, the Court of Appeals instructs that FOIL is to be "liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation,* 18 N.Y.3d 652, 657, 944 N.Y.S.2d 429, 967 N.E.2d 652 [2012]; *Matter of Buffalo News v. Buffalo Enter. Dev. Corp.,* 84 N.Y.2d 488, 492, 619 N.Y.S.2d 695, 644 N.E.2d 277 [1994]; *Matter of Russo v. Nassau County Community Coll.,* 81 N.Y.2d 690, 697, 603 N.Y.S.2d 294, 623 N.E.2d 15 [1993]; *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932 [1987]). "When reviewing the denial of a FOIL request, a court ... is to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure" (*Matter of New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 158, 892 N.Y.S.2d 377 [1st Dept. 2010]; *see also Matter of Town of Waterford,* 18 N.Y.3d at 657, 944 N.Y.S.2d 429, 967 N.E.2d 652).

The exemption relevant to this appeal provides that a governmental agency may deny access to records that are inter-agency or intra-agency materials (Public Officers Law § 87[2][g][2]). The purpose behind the exemption is to "permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure" (****20** *Matter of New York Times Co. v. City of N.Y. Fire Dept.,* 4 N.Y.3d 477, 488, 796 N.Y.S.2d 302, 829 N.E.2d 266 [2005]).

It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by the governmental agency (*Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985] [records may be considered intra-agency material when prepared by an outside consultant retained by agency]; *see also Matter of Town of Waterford,* 18 N.Y.3d at 658, 944 N.Y.S.2d 429, 967 N.E.2d 652 [declining to extend the inter- and intra-agency ***126** exemption to a federal agency collaborating with the Department of Environmental Conservation because the federal agency "was not retained by the DEC and [did] not function as its employee or agent"]; *Matter of Hernandez v. Office of the Mayor of the City of N.Y.*, 100 A.D.3d 555, 955 N.Y.S.2d 7 (1st Dept. 2012), *lv denied* 21 N.Y.3d 854, 2013 WL 1831622 [2013] [Office of the Mayor required to disclose emails to or from a former nominee for New York City School Chancellor where the nominee "was not an agent of the City since she had not yet been retained as Chancellor"]; *Matter of Tuck–It–Away Assoc., L.P. v. Empire State Dev. Corp.*, 54 A.D.3d 154, 163, 861 N.Y.S.2d 51 [1st Dept. 2008] *affd sub nom. West Harlem Bus. Group v. Empire State Dev. Corp.,* 13 N.Y.3d 882, 893 N.Y.S.2d 825, 921 N.E.2d 592 [2009] [exemption does not apply to a retained outside consultant where "consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant"]).

Respondents seek to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency. This attempt expands the agency exemption and closes the door on government transparency. Requiring an agency to retain an outside consultant to protect its communications comports with the fundamental principle that FOIL exemptions should be "narrowly interpreted so that the public is granted maximum access" to public records (*see Matter of Town of Waterford,* 18 N.Y.3d at 657, 944 N.Y.S.2d 429, 967 N.E.2d 652). Accordingly, we find that the communications between the respondents and BerlinRosen should be disclosed.

Next, turning to the issue of attorney's fees, Supreme Court granted petitioners attorney's fees under an earlier enactment of Public Officers Law § 89(4)(c), which provided that the court "may assess" attorney's fees and costs. The court providently exercised its discretion in granting attorney's fees.

We note that during the pendency of this appeal, the Legislature amended the provision which now provides that the court "*shall* 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 and the court finds that the agency

had no reasonable basis for denying access" ***127** (Public Officers Law § 89[4][c][ii] [emphasis added][3]). The language of the statute is mandatory and not precatory, if the statutory requirements are met (*see* McKinney's Consolidated Laws of NY, Book 1, Statutes § 171, Comment at 334 [1971 ed] ["where the word 'may' appearing in an act was ****21** changed to 'shall', the court would construe the amendment as being mandatory"]). Significantly, this evinces an unmistakable legislative intent that attorney's fees are to be assessed against an agency when the other party has substantially prevailed and the agency had no reasonable basis for denying access.

Here, there is no dispute that the petitioner has substantially prevailed (*see Matter of Madeiros v. New York State Educ. Dept,* 30 N.Y.3d 67, 78–81, 64 N.Y.S.3d 635, 86 N.E.3d 527 [2017]). Both in this appeal and in Supreme Court, the respondents have been directed to produce the documents requested by petitioners on the ground that the agency exemption does not apply.

Based on the substantial body of law discussed above, respondents had no reasonable basis to withhold the documents. Indeed, after the proceeding had commenced and more than a year after the FOIL requests were made, respondents produced approximately 1500 pages of previously withheld documents. These documents include examples of the Mayor and Mr. Rosen discussing issues important to BerlinRosen's private clients. The documents are the types of communications that the FOIL meant to make available to the public. Respondents' attempts to withhold these communications run counter to the public's interest in transparency and the ability to participate on important issues of municipal governance.

Accordingly, the judgment (denominated a decision and order) of the Supreme Court, New York County (Joan B. Lobis, J.), entered March, 23, 2017, granting the petition brought pursuant to CPLR article 78 to compel respondents to disclose documents requested by petitioners pursuant to the Freedom of Information Law, to the extent of directing respondents to produce all withheld responsive records, granting attorney's fees, and referring the matter to a special referee to hear and report on the amount of attorney's fees to be awarded, should be affirmed, without costs.

All concur

Judgment (denominated a decision and order), Supreme Court, New York County (Joan B. Lobis, J.), entered March, 23, 2017, affirmed, without costs.

Opinion by Singh, J. All concur.

Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

All Citations

161 A.D.3d 120, 75 N.Y.S.3d 15, 2018 N.Y. Slip Op. 03115

Footnotes

1 In relevant part, a letter dated May 13, 2016, from the Office of the Mayor to Rauh regarding the FOIL request states, "[T]he advice Mr. Rosen offered was part of the deliberative process. The withheld documents relate to communications in which Mr. Rosen was not acting on behalf of any clients nor interests they represent. In these particular communications Mr. Rosen's advice represents solely the interests of the Mayoralty and the City. As such, he meets that test and his advice is protected under the exemption. I therefore find that the determination to withhold the documents as exempt under the inter- and intra-agency exemption was correct and deny your appeal."

2 Public Officers Law § 87(2)(g) provides that a governmental agency may deny 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."

[3] The Legislature also removed the need for parties to show that the record was of "clearly significant interest to the general public" (L.2006, c. 492, § 1, eff.Aug. 16, 2006).

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(b) on the original record, in which event, state whether the appendix method is being used, or leave to prosecute the appeal on the original record was granted by the court or by statute.

The statement shall be prefixed to the papers constituting the record on appeal. A copy of this statement shall be filed with the clerk at the time the record on appeal is filed.

Credits

(L.1962, c. 308. Amended 1964 Jud.Conf.Proposal No. 10; 1966 Jud.Conf.Proposal No. 3; L.1974, c. 433, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Richard C. Reilly

Mr. Reilly notes that Commentaries for this section were previously prepared by Professor David Siegel. See the Preface for an explanation of the relationship between Professor Siegel's Commentaries and the present ones.

C5531:1. Statement Describing Action.

CPLR 5531 requires the record to contain as a prefix certain data offering a complete procedural history of the case, and a copy of the prefixed statement must be filed with the appellate clerk when the record is filed. These, in any event, are the requirements of the CPLR. The practitioner must satisfy any requirement, or additional requirement, found in the rules of the particular appellate court.

The statement also serves as a source of statistical data on the business of the courts, for use by the Office of Court Administration and others.

In several instances, as other Commentaries have advised, it may be sound practice to serve a separate notice of appeal from several different orders, or from both an order and a judgment, when the circumstances are such that the appellant is not certain which of the papers is the proper one to appeal. See, e.g., Commentaries C5512:1 on CPLR 5512 and C5517:1 on CPLR 5517. When this is done the statement should identify all of the orders or judgments technically appealed from. See item 6 on the CPLR 5531 list.

It has also been pointed out that there are three distinct methods recognized for prosecuting the appeal. See the General Commentary on Perfecting the Appeal, following the text of CPLR 5525. The statement should identify which of these methods is being used. Item 7 on the CPLR 5531 list so requires.

If the appeal is on a full record, it will probably be based on the particular appellate court's rules authorizing this method, since the CPLR does not provide for it directly. See CPLR 5528(a)(5). If the appeal is based on the original record, it may be because the appendix method is being used, which usually entails the use of the original

record to back up the appendix, or it may be because special leave has been granted by the appellate court, perhaps even dispensing with an appendix, to recognize the exigencies of a particular case or the limited resources of a given party.

LEGISLATIVE STUDIES AND REPORTS

This rule is taken from rule 234 of the rules of civil practice. In the Fourth Report to the Legislature, the Revisers state that this rule makes provision for the statement required by rule 234. It requires the same information, however, it is to be attached to the briefs, rather than the record, because of the change in the practice substituting an appendix to the brief for the printed record on appeal. See rules 5526, 5528 and 5529. Under rule 234 of the rules of civil practice a duplicate is filed with the clerk in every case, and under this rule two copies of the statement are required to be filed with the clerk where no briefs are filed.

The final draft of this rule included the words “or incorporated at the beginning thereof” to clarify the meaning of the rule.

Official Reports to Legislature for this rule:

4th Report Leg.Doc. (1960) No. 20, p. 236.

5th Report Leg.Doc. (1961) No. 15, p. 675.

6th Report Leg.Doc. (1962) No. 8, p. 544.

Notes of Decisions (1)

McKinney’s CPLR Rule 5531, NY CPLR Rule 5531
Current through L.2022, chapters 1 to 571. Some statute sections may be more current, see credits for details.

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18 N.Y.3d 42
Court of Appeals of New York.

In the Matter of SCHENECTADY COUNTY SOCIETY FOR the PREVENTION OF CRUELTY TO ANIMALS, INC., Respondent, v. Richard P. MILLS, as Commissioner of Education of the State of New York, Appellant.

Oct. 25, 2011.

Synopsis
Background: Article 78 proceeding was brought to review determination of the Department of Education partially denying Freedom of Information Law (FOIL) request for names and street addresses of all licensed veterinarians and veterinary technicians located in particular county. The Supreme Court, Albany County, Eugene P. Devine, J., dismissed, and petitioner appealed. The Supreme Court, Appellate Division, 74 A.D.3d 1417, 904 N.Y.S.2d 512,reversed, and Department appealed.

The Court of Appeals, Smith, J., held that Department was required to comply with request, even if it could not distinguish a licensee's business address from a residential address in its computer files.

Affirmed.

Attorneys and Law Firms

***280** Eric T. Schneiderman, Attorney General, Albany (Frank K. Walsh, Barbara D. Underwood and Andrew D. Bing of counsel), for appellant.

Tully Rinckey, PLLC, Albany (Mathew B. Tully, Greg T. Rinckey, Steven L. Herrick, Constantine F. DeStefano, Scott T. Dillon, Andrew L. McNamara and Michael W. Macomber of counsel), for respondent.

OPINION OF THE COURT

SMITH, J.

**1195 *45 We hold that an agency responding to a demand under the Freedom of Information Law (FOIL) may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.

Petitioner sent an e-mail to the Education Department, asking for the names and addresses of veterinarians and veterinary technicians licensed by the Department in Schenectady County. The Department replied that it would provide a list of names, and the city and state portions of the addresses, but would not provide street addresses because "[i]t is not public information for us to provide home addresses for a licensed professional and thats [*sic*] what we have on file." Petitioner responded: "What about business address?," and the Department replied: "No[t] everyone has provided us with a business address."

Petitioner then formally requested the list of names and addresses under FOIL. The Department again offered to provide names and cities, but repeated its refusal to provide street addresses, explaining: "As our computerized files are currently configured, we are unable to distinguish a licensee's business address from a residential address." After an unsuccessful administrative appeal, petitioner began this proceeding to require that the list be produced. Petitioner specifically sought only "a photocopy of the requested list with names of licensed professionals and their business addresses."

Supreme Court dismissed the petition. The Appellate Division reversed, with two Justices dissenting, and granted the petition (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v. Mills,* 74 A.D.3d 1417, 904 N.Y.S.2d 512 [3d Dept.2010]). The Department appeals as of right, pursuant to CPLR 5601(a), and we affirm.

The Department argues that disclosure of licensees' home addresses "would constitute an unwarranted invasion of personal privacy" and so is not required by FOIL **1196

(Public Officers Law § 87[2][b]; § 89[2], [2–a]). But we do not need to address this claim, because petitioner is not seeking home addresses, only business addresses, and the Department makes no claim that the business addresses are private.

*****281** It seems obvious to us that, if the Department does not want to supply home addresses, it should simply delete them from ***46** the list. It says that its computer database does not distinguish between home and business addresses, but it does not claim that it would be hard to find out, by communicating with the licensees, which addresses are homes and which are businesses. This should not be a burdensome task, because the number of licensed veterinarians and veterinary technicians in Schenectady County is unlikely to be very large; it was represented at oral argument that the number is 72.

It is true that FOIL generally does not require an agency to create a new record (Public Officers Law § 89[3][a] ["Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity" with specified exceptions]). But there is a difference between creating a new record and redacting an existing one. Courts deciding FOIL issues often order redaction when a record contains both exempt and nonexempt information (*e.g. Matter of Data Tree, LLC v. Romaine,* 9 N.Y.3d 454, 464, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007] [noting that "even when a document subject to FOIL contains ... private, protected information, agencies may be required to prepare a redacted version with the exempt material removed" (citing Public Officers Law § 89[2][c][i])]; *Matter of New York Times Co. v. City of N.Y. Fire Dept.,* 4 N.Y.3d 477, 482–483, 796 N.Y.S.2d 302, 829 N.E.2d 266 [2005]; *Matter of Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse,* 65 N.Y.2d 294, 491 N.Y.S.2d 289, 480 N.E.2d 1071 [1985]). In responding to petitioner's FOIL request, the Department had the choice of producing the existing record in full or removing the information that it did not want to produce and that petitioner did not demand. It cannot refuse to produce the whole record simply because some of it may be exempt from disclosure.

We are at a loss to understand why this case has been litigated. It seems that an agency sensitive to its FOIL obligations could have furnished petitioner a redacted list with a few hours' effort, and at negligible cost. Instead, lawyers for both sides have submitted briefs and argued the case in three courts, demanding the attention of 13 judges, generating four judicial opinions and resulting in a delay in disclosure of almost four years. It is our hope that the Department, and other agencies of government, will generally comply with their FOIL obligations in a more efficient way.

Accordingly, the order of the Appellate Division should be affirmed with costs.

***47** Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ, PIGOTT and JONES concur.

Order affirmed, with costs.

All Citations

18 N.Y.3d 42, 958 N.E.2d 1194, 935 N.Y.S.2d 279, 39 Media L. Rep. 2649, 2011 N.Y. Slip Op. 07476

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120 A.D.3d 503
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of STONEWALL CONTRACTING CORP., appellant, v. NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, respondent.

Aug. 6, 2014.

Synopsis

Background: Contractor brought article 78 proceeding to challenge determination of New York City School Construction Authority, which disqualified contractor from bidding, contracting, and subcontracting on any future project of the Authority for a period of five years. The Supreme Court, Queens County, Pineda–Kirwan, J., denied contractor's petition and dismissed proceeding. Contractor appealed.

Holding: The Supreme Court, Appellate Division, held that Authority's determination was not irrational, arbitrary and capricious, or affected by an error of law.

Affirmed.

Attorneys and Law Firms

****27** Rich, Intelisano & Katz, LLP, New York, N.Y. (Victor Rivera, Jr., ****28** Daniel E. Katz, and Trista L. Watson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York, N.Y. (Francis F. Caputo and Bob Bailey of counsel), for respondent.

MARK C. DILLON, J.P., L. PRISCILLA HALL, SANDRA L. SGROI and BETSY BARROS, JJ.

Opinion

***503** In a proceeding pursuant to CPLR article 78 to review a determination of the New York City School Construction Authority dated April 13, 2011, which, inter alia, disqualified the petitioner from bidding, contracting, and subcontracting on any future project of the New York City School Construction Authority for a period of five years, the petitioner appeals, as limited by its brief, from so much of a judgment of the Supreme Court, Queens County (Pineda–Kirwan, J.), entered June 11, 2012, as, upon a decision of the same court entered March 20, 2012, denied the petition and dismissed the proceeding.

***504** ORDERED that the judgment is affirmed insofar as appealed from, with costs.

Judicial review in this CPLR article 78 proceeding is limited to whether the challenged determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see Matter of Classic Realty v. New York State Div. of Hous. & Community Renewal,* 2 N.Y.3d 142, 146, 777 N.Y.S.2d 1, 808 N.E.2d 1260; *Matter of Scherbyn v. Wayne–Finger Lakes Bd. of Coop. Educ. Servs.,* 77 N.Y.2d 753, 757, 570 N.Y.S.2d 474, 573 N.E.2d 562; *cf. Abiele Contr. v. New York City Sch. Constr. Auth.,* 91 N.Y.2d 1, 8, 666 N.Y.S.2d 970, 689 N.E.2d 864). Contrary to the appellant's contention, the challenged determination of the New York City School Construction Authority was not irrational, arbitrary and capricious, or affected by an error of law (*cf. Matter of Pile Found. Constr. Co., Inc. v. New York City Dept. of Envtl. Protection,* 84 A.D.3d 963, 964, 921 N.Y.S.2d 903).

The petitioner's remaining contentions are without merit.

Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding.

All Citations

120 A.D.3d 503, 992 N.Y.S.2d 27, 308 Ed. Law Rep. 450, 2014 N.Y. Slip Op. 05646

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26 N.Y.3d 440
Court of Appeals of New York.

In the Matter of Ricardo SUAREZ et al., Appellants, v. Melissa WILLIAMS et al., Respondents.

Dec. 16, 2015.

Synopsis
Background: Paternal grandparents commenced proceeding seeking primary physical custody of child. The Family Court, Onondaga County, Michele Pirro Bailey, J., granted joint custody to grandparents and father. The Supreme Court, Appellate Division, Centra, J.P., 128 A.D.3d 20, 5 N.Y.S.3d 759, reversed. Grandparents were granted leave to appeal.

The Court of Appeals, Stein, J., held that mother voluntarily relinquished care and control of her child for more than 24 months, even though she had regular contact with him, and thus extraordinary circumstances existed so that grandparents had standing to seek custody of the child based on an extended disruption of mother's custody.

Reversed and remitted.

Attorneys and Law Firms

***618** Linda M. Campbell, Syracuse, for Ricardo Suarez and Laura Suarez, appellants.

Patrick J. Haber, Syracuse, Attorney for the Child.

Melvin & Melvin, PLLC, Syracuse (Christopher M. Judge and Elizabeth A. Genung of counsel), for Melissa Williams, respondent.

OPINION OF THE COURT

STEIN, J.

**916 *444 This custody dispute between a child's mother and paternal grandparents concerns the interpretation and application of Domestic Relations Law § 72(2) and this Court's decision in *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976). We hold that grandparents may demonstrate standing to seek custody based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents. Hence, we reverse and remit to the Appellate Division for consideration of issues raised, but not reached, by that Court.

***619 *445 **917 I.

The child at issue here (born 2002) lived with his paternal grandparents, beginning when he was less than 10 days old and continuing until he was almost 10 years old. The child's father moved out of state in 2004 and has had visitation since then. The child's mother lived approximately 12 miles from the grandparents for the child's first few years, until the grandparents moved the mother (and her daughters from a previous relationship) into a trailer that the grandparents purchased and situated in a trailer park across the street from their residence, so she would be close to the child. In a 2006 proceeding in which the grandparents were not involved, the child's parents obtained a consent order awarding the parents joint legal custody, with primary physical custody to the mother. Nevertheless, the reality of the family's situation did not change; the child continued to reside with the grandparents. Also in 2006, the grandparents moved to an adjoining county. Due to the distance between their homes, the mother had less contact with the child until late 2008, when the grandparents again helped her move closer to them. The grandparents evidently kept the mother informed of the child's activities almost daily. In addition, the mother saw the child regularly including, at times, weekly overnight visits and vacations. In 2010, the mother began a relationship with a new boyfriend, and

they gradually began making plans to live together. In 2012, after the father sought custody from the mother and a termination of his child support payments to her,[1] she refused to return the child to the grandparents after a visit, relying on the 2006 custody order granting her primary physical custody. At that time, the mother told the grandparents that they had had the child for many years, it was her "turn now," and they could no longer see him.

As a result, the grandparents commenced this proceeding seeking primary physical custody of the child.[2] Following a 10–day hearing, Family Court found that the mother was generally not credible and that "the [g]randparents' version of where the child lived since birth is the substantiated and more accurate representation of reality" (50 Misc.3d 990, 999, 2013 N.Y. Slip Op. 23478, *5, 23 N.Y.S.3d 533, 539 [2013]). The court found that there had been an extended disruption of ***446** custody between the mother and the child, and that the mother voluntarily relinquished care and control of him to the grandparents—through three written documents and through her behavior—and concluded that this amounted to extraordinary circumstances. The court then considered the child's best interest and granted joint custody to the grandparents and the father, with primary physical custody to the grandparents and visitation to each parent.

The Appellate Division reversed and dismissed the grandparents' petition (128 A.D.3d 20, 5 N.Y.S.3d 759 [4th Dept.2015]). Specifically declining to disturb Family Court's credibility determinations, the Appellate Division found the situation to be akin to joint custody, with the grandparents having primary physical custody and the mother having visitation. Nevertheless, the Court held that the grandparents failed to demonstrate extraordinary circumstances, in light of the mother's presence in the child's life, even though he was primarily living with the grandparents. Thus, the Court concluded that the ****918 ***620** grandparents lacked standing to seek custody and dismissed their petition. This Court granted the grandparents leave and a stay pending appeal (25 N.Y.3d 1063, 11 N.Y.S.3d 547, 33 N.E.3d 504 [2015]).

II.

In the seminal case of *Matter of Bennett v. Jeffreys,* we created a two-prong inquiry for determining whether a nonparent may obtain custody as against a parent (*see* 40 N.Y.2d at 546–548, 387 N.Y.S.2d 821, 356 N.E.2d 277). First, the nonparent must prove the existence of "extraordinary circumstances" such as "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time" (*id.* at 546, 387 N.Y.S.2d 821, 356 N.E.2d 277), "or other like extraordinary circumstances" (*id.* at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277). If extraordinary circumstances are established such that the non-parent has standing to seek custody, the court must make an award of custody based on the best interest of the child (*see id.* at 548, 387 N.Y.S.2d 821, 356 N.E.2d 277).

Consistent with that case, Domestic Relations Law § 72(2) contains a specific example of extraordinary circumstances. Originally, Domestic Relations Law § 72 addressed only grandparent visitation. However, in recognition of the important role of grandparents and the increasing number of grandparents raising their grandchildren, the legislature amended the statute in 2003 to include a second subdivision, pertaining to custody (*see* L. 2003, ch. 657, § 2; *Matter of* ***447** *Carton v. Grimm,* 51 A.D.3d 1111, 1112 n., 857 N.Y.S.2d 775 [3d Dept.2008], *lv. denied* 10 N.Y.3d 716, 862 N.Y.S.2d 337, 892 N.E.2d 403 [2008]). That subdivision provides that "[w]here a grandparent ... of a minor child ... can demonstrate to the satisfaction of the court the existence of extraordinary circumstances, such grandparent ... may apply to family court [for custody]," and the court "may make such directions as the best interests of the child may require, for custody rights for such grandparent ... in respect to such child. *An extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance* " (Domestic Relations Law § 72[2][a] [emphasis added]). The statute then defines "extended disruption of custody" to

> "include, but not be limited to, a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months" (Domestic Relations Law § 72[2][b]).

The legislative intent, as stated in the bill enacting this amendment, was "to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren," but was "in no way intended to limit the state of the law as it relates to the ability of any third party to obtain standing in custody proceedings" against a birth parent (L. 2003, ch. 657, § 1). The sponsors' memoranda articulate the purpose of the bill as being "[t]o define an extraordinary circumstance

with respect to the legal rights of certain grandparents who wish to petition the court for custody of their grandchildren" (Senate Introducer Mem. in Support, 2003 N.Y. Senate Bill S4224A; Assembly Sponsor's Mem., 2003 N.Y. Assembly Bill A8302B; *see Matter of Carton,* 51 A.D.3d at 1113, 857 N.Y.S.2d 775). The sponsors emphasized that the bill specifically ****919 ***621** states that it is not intended to overrule existing case law relating to third parties obtaining standing in custody cases (*see* Senate Introducer Mem. in Support, 2003 N.Y. Senate Bill S4224A; Assembly Sponsor's Mem., 2003 N.Y. Assembly Bill A8302B). In addressing the law as it existed before the amendment, the sponsors stated that the "[c]urrent statute does not specifically grant grandparents standing to petition the court for custody ***448** of their grandchildren[,] nor does [it] give specific guidance to the court in regard to extraordinary circumstances as they might apply to children who have resided with their grandparents" (Senate Introducer Mem. in Support, 2003 N.Y. Senate Bill S4224A; Assembly Sponsor's Mem., 2003 N.Y. Assembly Bill A8302B).

Although the mother contends otherwise, the statute is entirely consistent with *Matter of Bennett v. Jeffreys,* in that it requires that grandparents prove the existence of extraordinary circumstances in order to demonstrate standing when seeking custody against a child's parent. Indeed, the budget report on the bill indicates that it "simply clarifies in statute that grandparents specifically can petition for custody" (Budget Rep. on Bills, Bill Jacket, L. 2003, ch. 657 at 5). Thus, the purpose of the statute is plain—it creates a clear path, or procedural mechanism, for grandparents to obtain standing when seeking custody (*see Matter of E.S. v. P.D.,* 8 N.Y.3d 150, 157, 831 N.Y.S.2d 96, 863 N.E.2d 100 [2007]; *Matter of Wilson v. McGlinchey,* 2 N.Y.3d 375, 380, 779 N.Y.S.2d 159, 811 N.E.2d 526 [2004]; *see also Debra H. v. Janice R.,* 14 N.Y.3d 576, 597, 904 N.Y.S.2d 263, 930 N.E.2d 184 [2010]). The statute does not create new rights for grandparents, but merely clarifies a method by which grandparents may exercise those rights, and defines an alternative type of extraordinary circumstance applicable only to grandparents—specifically, an extended disruption of custody—in view of their special status (*see Matter of Tolbert v. Scott,* 15 A.D.3d 493, 495–496, 790 N.Y.S.2d 495 [2d Dept.2005]).[3]

III.

Domestic Relations Law § 72(2) sets forth three "elements" required to demonstrate the extraordinary circumstance of an "extended disruption of custody," specifically: (1) a 24–month separation of the parent and child, which is identified as "prolonged," (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household. Regarding the third element, inasmuch as both Family Court and the Appellate Division found that the child primarily lived with ***449** the grandparents for almost 10 years, and that factual finding is supported by the record, we may not disturb it (*see Matter of E.S.,* 8 N.Y.3d at 158, 831 N.Y.S.2d 96, 863 N.E.2d 100; *Matter of Gabrielle HH.,* 1 N.Y.3d 549, 550, 772 N.Y.S.2d 643, 804 N.E.2d 964 [2003]). Consequently, only the first two elements are seriously in dispute here.

The mother argues that the separation of the parent and child must be nearly complete and that the parent must relinquish *all* care and control, with little or no contact between the parent and child, in order for the first two elements to be established. She contends that no prolonged separation occurred here because ****920 ***622** she had regular contact with the child. She also contends that she did not relinquish care and control because she cared for the child on regular visits, including overnights and vacations, and because the grandparents obtained, and acted with, her permission when making decisions about him.[4]

Contrary to the mother's contention, a lack of contact is not a separate element under the statute. Indeed, there is no explicit statutory reference to contact or the lack thereof. Rather, the quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required "prolonged" period of time. Indeed, some Appellate Division cases have identified a variety of factors for courts to consider in determining whether extraordinary circumstances exist, such as "the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the biological parent allowed such custody to continue without trying to assume the primary parental role" (*Matter of Bevins v. Witherbee,* 20 A.D.3d 718, 719, 798 N.Y.S.2d 245 [3d Dept.2005]; ***450** *see Matter of Curless v. McLarney,* 125 A.D.3d 1193, 1195, 4 N.Y.S.3d 666 [3d Dept.2015]; *Matter of Aida B. v. Alfredo C.,* 114 A.D.3d 1046, 1048, 980 N.Y.S.2d 601 [3d Dept.2014]; *Matter of Marcus CC. v. Erica BB.,* 107 A.D.3d 1243, 1244, 967 N.Y.S.2d 503 [3d Dept.2013], appeal dismissed 22 N.Y.3d 911, 975

N.Y.S.2d 731, 998 N.E.2d 394 [2013]; *Matter of Michael G.B. v. Angela L.B.,* 219 A.D.2d 289, 294, 642 N.Y.S.2d 452 [4th Dept.1996]). All of these factors are components of the totality of the circumstances for the court to consider, and also relate to the enumerated elements under the statute.

It would be illogical to construe the statute to mean that, in order to establish an extended disruption of custody, the grandparent must demonstrate that the parent had no contact with the child for 24 months. If that were the case, the statute would be superfluous or redundant of the extraordinary circumstances specifically enumerated in *Matter of Bennett v. Jeffreys.* Indeed, the level of contact between the parent and child is relevant to several different categories of extraordinary circumstances under that case. For example, *Matter of Bennett v. Jeffreys* refers to abandonment as an extraordinary circumstance (*see* 40 N.Y.2d at 546, 387 N.Y.S.2d 821, 356 N.E.2d 277). Pursuant to Social Services Law § 384–b (5), abandonment occurs—in the context of a complete termination of parental rights—when a parent evinces an intent to forgo parental rights and obligations as manifested by a failure to visit the child and communicate ****921 ***623** with the child or guardian. This Court has held that, for purposes of determining whether extraordinary circumstances exist to demonstrate standing to seek custody of a child, the definition of abandonment does not differ from the traditional definition (*see Matter of Dickson v. Lascaris,* 53 N.Y.2d 204, 209, 440 N.Y.S.2d 884, 423 N.E.2d 361 [1981]). Similarly, *Matter of Bennett v. Jeffreys* refers to persistent neglect as a variety of extraordinary circumstances (*see* 40 N.Y.2d at 546, 387 N.Y.S.2d 821, 356 N.E.2d 277). Persistent neglect requires proof that the parent "failed either to maintain *substantial,* repeated and continuous *contact* with a child or to plan for the child's future" (*Matter of Ferguson v. Skelly,* 80 A.D.3d 903, 905, 914 N.Y.S.2d 428 [3d Dept.2011] [emphasis added], *lv. denied* 16 N.Y.3d 710, 2011 WL 1584758 [2011]; *see* Social Services Law § 384–b [7]). Thus, where a parent has no significant contact with his or her child for 24 months, the avenues of persistent neglect or abandonment presumably would be available under *Matter of Bennett v. Jeffreys*, even without the benefit of Domestic Relations Law § 72(2).

In view of the foregoing, if we interpret the definition of "extended disruption of custody" under Domestic Relations Law § 72(2) to mean that the parent must not have had any ***451** contact, or at least any significant contact, with the child for at least 24 months, then this statutory ground of extraordinary circumstances would essentially be eviscerated, or at best redundant and unnecessary. This would contravene the legislative purpose, and would be contrary to the well-established rule that courts should not interpret a statute in a manner that would render it meaningless (*see Matter of Brown v. Wing,* 93 N.Y.2d 517, 523, 693 N.Y.S.2d 475, 715 N.E.2d 479 [1999]; *Matter of Industrial Commr. of State of N.Y. v. Five Corners Tavern,* 47 N.Y.2d 639, 646–647, 419 N.Y.S.2d 931, 393 N.E.2d 1005 [1979]). Consequently, to give meaning to the separate statutory avenue of establishing standing, Domestic Relations Law § 72(2) must be available for a grandparent even if the parent has had some contact with the child during the requisite 24–month period. To hold otherwise would not only conflict with the legislature's intent, but would also deter grandparents from promoting a relationship between the parent and the child while the child resides with them, contrary to this state's public policy of encouraging and strengthening parent-child relationships.[5] While courts must determine on a case-by-case basis whether the level of contact between the parent and child precludes a finding of extraordinary circumstances, it is sufficient to show that the parent has permitted—as reflected in the statutory designation of the particular extraordinary circumstance at issue—an "extended disruption of *custody* " (Domestic Relations Law § 72[2][a] [emphasis added]).

For essentially the same reasons, a parent need not relinquish *all* care and control of the child. Even if the parent exercises some control over the child—for example during visitation—a parent may still, as a general matter, have voluntarily relinquished care and control of the child to the grandparent to the extent that the grandparent is, in essence, acting as a ****922 ***624** parent with primary physical custody. The key is whether the parent makes important decisions affecting the child's life, as opposed to merely providing routine care on visits.

Here, the mother argues that the grandparents were only acting with her permission when making decisions regarding ***452** the child. She concedes that she signed three documents, each giving the grandparents permission to make such decisions, including medical and educational decisions, without any time limitation, but contends that the documents prove that she retained ultimate control over all decisions. Family Court concluded that the documents, and the mother's conduct, showed that she relinquished her authority and responsibility to make the decisions. The Appellate Division, on the other hand, concluded that the grandparents relied on the mother's permission (128 A.D.3d at 25, 5 N.Y.S.3d 759). In our view, Family Court's interpretation of the documents, and their implications here, is more accurate. The grandparents obtained the documents because there was no custody

order giving the grandparents the legal right to make such decisions, although the child was in their physical custody a majority of the time, and they needed to be prepared for all types of situations. Nevertheless, the mother freely signed over virtually all decision-making rights indefinitely—she did not limit the permission to times when she was unavailable—demonstrating her intent that the grandparents "permanently assume the parental responsibility" of caring for the child (*Matter of Michael G.B.,* 219 A.D.2d at 294, 642 N.Y.S.2d 452).

As for the parties' conduct, the grandparents spoke with the mother almost daily about the child. The mother claims that they did so to seek her permission before making decisions about the child. However, the evidence is more consistent with Family Court's conclusion that the grandparents made all decisions about the child and merely kept the mother informed of the decisions that they had made or were about to make. For example, the mother and her boyfriend testified that, at least as early as 2011, she wanted to enroll the child in a school in the district where she lived, rather than the district of the grandparents' residence. The grandparents desired to keep the child in their district, where he had always attended school. The mother did not make any change in the child's school enrollment until the summer of 2012, after this proceeding had commenced. In addition, the mother could have expressly revoked her written permission, or specifically limited the authorization to making medical decisions in emergency situations, but she never did so. Instead, her conduct, and that of the grandparents, supports Family Court's finding that "in reality [the mother] relinquished her parental control and decisionmaking authority in writing and in practice to the ***453** [g]randparents" (50 Misc.3d 990, 1006, 2013 N.Y. Slip Op. 23478, *10, 23 N.Y.S.3d 533, 544 [2013]).

Furthermore, while there arguably may have been a reason for the mother to refrain from seeking physical custody during the time that she was caring for her own ailing parents, that situation did not arise until 2006, several years after the child began living with the grandparents. Additionally, although one of the mother's parents died and the other went into a nursing home in 2009, the mother allowed the grandparents to continue raising the child thereafter and she did not seek physical custody of him until 2012. No reasonable explanation was provided for her failure to attempt to gain physical custody after 2009 (*see Matter of Michaellica Lee W.,* 106 A.D.3d 639, 639–640, 965 N.Y.S.2d 504 [1st Dept.2013]).[6]

*****625 **923** In sum, the evidence more closely comports with Family Court's finding that the mother voluntarily relinquished care and control of the child for more than 24 months, even though she had regular contact and visitation with him (*see Matter of Curless,* 125 A.D.3d at 1196, 4 N.Y.S.3d 666; *Matter of Battisti v. Battisti,* 121 A.D.3d 1196, 1197–1198, 993 N.Y.S.2d 804 [3d Dept.2014]; *see also Matter of Marcus CC.,* 107 A.D.3d at 1244, 967 N.Y.S.2d 503). The mother allowed the grandparents to assume control over, and responsibility for the care of, the child while he resided with them for a prolonged period of years, during which she assumed the role of a noncustodial parent in virtually every way (*see Matter of Traci M.S. v. Darlene C.,* 37 A.D.3d 1083, 1084, 829 N.Y.S.2d 353 [4th Dept.2007]). Where, as here, the mother has effectively transferred custody of the child to the grandparents for a prolonged period of time, the circumstances rise to the level of extraordinary, as required ***454** under our law to confer standing upon the grandparents to petition the courts to formally obtain legal custody.

We reiterate that the conferral of standing, through the demonstration of extraordinary circumstances, is only the first step of the inquiry where a nonparent seeks custody against a parent. The second step addresses the best interest of the child. Here, Family Court found that it was in the child's best interest to remain in the primary physical custody of the grandparents. However, inasmuch as the Appellate Division did not reach that question, it must do so on remittal.

In conclusion, the grandparents established their standing to seek custody of the child by demonstrating extraordinary circumstances, namely an extended disruption of the mother's custody, in accordance with *Matter of Bennett v. Jeffreys* and Domestic Relations Law § 72(2). Accordingly, the Appellate Division order should be reversed, without costs, and the matter remitted to that court for further proceedings in accordance with this opinion.

Chief Judge LIPPMAN and Judges PIGOTT, RIVERA, ABDUS–SALAAM and FAHEY concur.

Order reversed, without costs, and matter remitted to the Appellate Division, Fourth Department, for further proceedings in accordance with the opinion herein.

All Citations

26 N.Y.3d 440, 44 N.E.3d 915, 23 N.Y.S.3d 617, 2015 N.Y. Slip Op. 09231

Footnotes

1 Although the father was regularly paying child support to the mother, she did not provide the grandparents with any money for the child's care.

2 The father withdrew his custody petition against the mother and supported the grandparents' petition.

3 To the extent the grandparents and attorney for the child argue that the Appellate Division decision could be read as finding the statute to be unconstitutional, we note that the statute's constitutionality was not challenged in either that Court or Family Court. Moreover, our reading of the Appellate Division decision leads us to conclude that the constitutional issue was not addressed therein. Thus, that issue is not before us.

4 The mother also erroneously argues that the standard for extraordinary circumstances requires the parent to engage in gross misconduct or utter irresponsibility. This Court has used such language, but we did so in a case decided almost 20 years before Domestic Relations Law § 72(2) was enacted. That case involved a mother who had turned her child over to potential adoptive parents after agreeing to an adoption—which would have resulted in a permanent termination of all parental rights—and, soon thereafter, changed her mind and tried to regain care and control of her child (*see Matter of Male Infant L.,* 61 N.Y.2d 420, 427, 474 N.Y.S.2d 447, 462 N.E.2d 1165 [1984]). The language requiring gross misconduct or utter irresponsibility should not be taken out of context to further heighten the standard for establishing standing in all nonparent custody cases, where the parents—although potentially being deprived of custody—otherwise retain their parental rights.

5 Here, the grandparents called the mother nearly every day to keep her updated on the child's activities. They also brought the mother and her daughters on family vacations, invited them to family holiday gatherings, and relocated them twice. This conduct, primarily initiated by the grandparents, kept the mother in closer contact with the child. It would be incongruous to then deny the grandparents standing based on their efforts at facilitating that contact.

6 For purposes of determining extraordinary circumstances, this situation can be distinguished from those in which a parent has a compelling reason to allow a nonparent to assume custody for a more limited and defined period of time. For example, no extraordinary circumstances were found where a father asked a grandfather to assume custody while the father "got [his] life together," after which the father completed substance abuse treatment, anger management, and parenting classes and obtained steady employment—all while continuously attempting to maintain contact with the children—before he tried to regain custody (*see Matter of Ferguson v. Skelly,* 80 A.D.3d 903, 904–905, 914 N.Y.S.2d 428 [3d Dept.2011], *lv. denied* 16 N.Y.3d 710, 2011 WL 1584758 [2011]). Similarly, it may be necessary for a single parent who is enlisted in the military to cede custody while deployed. In such situations, a parent can enter into an agreement memorializing a period of temporary custody, or can include limiting language in written authorizations—unlike the authorizations here, which explicitly stated that they were "open and ongoing" and had "no expiration date."

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4 N.Y.3d 477
Court of Appeals of New York.

In the Matter of THE NEW YORK TIMES COMPANY et al.,
Appellants–Respondents,
and
Catherine T. Regenhard et al.,
Intervenors–Appellants,
v.
CITY OF NEW YORK FIRE DEPARTMENT, Respondent–Appellant.

March 24, 2005.

Synopsis
Background: Newspaper and journalist brought Article 78 proceeding against New York City Fire Department challenging department's denial of requests made pursuant to Freedom of Information Law (FOIL) for materials related to the September 11, 2001 attacks on the World Trade Center, and for audio tapes and transcripts of 911 calls. The Supreme Court, New York County, Richard Braun, J., denied victims' family members leave to intervene, and directed disclosure of redacted interviews and 911 tapes. Appeal was taken. The Supreme Court, Appellate Division, 3 A.D.3d 340, 770 N.Y.S.2d 324,affirmed as modified, and leave to appeal was granted.

Holdings: The Court of Appeals, R.S. Smith, J., held that:

FOIL's privacy exception applied to tapes and transcripts of calls made to Department's 911 emergency service;

communications between Department dispatchers and other Department employees were subject to disclosure;

FOIL's privacy and intra-agency exceptions did not apply to tapes and transcripts of interviews conducted by Department with firefighters; and

FOIL's law enforcement exception did not apply to records that United States Department of Justice claimed would possibly be used in upcoming trial of suspected terrorist.

Affirmed as modified.

Rosenblatt, J., filed dissenting opinion.

Attorneys and Law Firms

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Michael A. Cardozo, Corporation Counsel, New York City (John Hogrogian, Lawrence S. Kahn, Pamela Seider Dolgow and Marilyn Richter of counsel), for respondent-appellant.

Norman Siegel, New York City, and Kramer Levin Naftalis & Frankel LLP (Thomas H. Moreland, Ilyssa B. Sena and Jennifer Jones of counsel) for intervenors-appellants.

***482 **267 OPINION OF THE COURT**

R.S. SMITH, J.

The issue here is whether the New York City Fire Department is required by the Freedom of Information Law (FOIL) to disclose tapes and transcripts of certain conversations that occurred on and shortly after September 11, 2001. Supreme Court and the Appellate Division held that FOIL ***304 **268** requires disclosure of some, but not all, of the materials in dispute. We affirm most of the rulings below, but we modify the Appellate Division's order in two respects.

Facts and Procedural History

Some four months after the September 11 attacks on the World Trade Center, Jim Dwyer, a New York Times reporter, requested "various records" from the Fire Department. In the two requests that are still disputed, he asked for:

> "All transcripts of interviews conducted by the department with members of the FDNY concerning the

> events of Sept. 11, 2001. (These might be called 'oral histories.') ...
>
> "Any and all tapes and transcripts of any and all radio communications involving any FDNY personnel on Sept. 11, starting from 8:46 AM."

The Fire Department denied the first of the above requests, and also denied the second in large part. As a result, three categories of tapes and transcripts are now at issue. They contain: (1) calls made on September 11 to the Department's 911 emergency service; (2) calls made on the same day on the Fire Department's internal communications system, involving Department dispatchers and other employees, which are referred to as "dispatch calls"; and (3) "oral histories," consisting of interviews with firefighters in the days following September 11.

The New York Times and Dwyer brought this CPLR article 78 proceeding to compel disclosure. Later, family members of eight men who died at the World Trade Center were permitted to intervene in support of the Times's and Dwyer's position. No family member of anyone else killed in the September 11 attacks has appeared on either side.

Supreme Court ordered disclosure of tapes and transcripts containing: (1) the 911 calls, to the extent that the words recorded are those of public employees and of the eight men whose ***483** survivors sought disclosure, but redacted to delete the words of other people who called 911; (2) the dispatch calls, redacted to delete the opinions and recommendations of Fire Department employees; and (3) the oral histories, redacted to delete opinions and recommendations and the "personal expressions of feelings" of the interviewees. The Appellate Division affirmed these rulings, except that it ordered the "personal expressions of feelings" in the oral histories disclosed. We granted both sides' motions for leave to appeal.

In this Court, the Times, Dwyer and the intervenors seek disclosure of all materials in all three categories. The Fire Department asks us to affirm the Appellate Division's order with two exceptions: It asks us to "reinstate" Supreme Court's ruling by authorizing the redaction from the oral histories of "passages recounting moments of high emotion and revealing personal details," and it asks that disclosure be denied as to six records said by the United States Department of Justice to be possible exhibits in the impending federal criminal trial of Zacarias Moussaoui, who is alleged to have had a role in the September 11 attacks.

We now affirm the Appellate Division's order with two modifications: (1) we direct that the entire oral histories be disclosed, except for specifically-identified portions that can be shown likely to cause serious pain or embarrassment to an interviewee; and (2) we direct that the Department of Justice be given a chance to demonstrate that disclosure of the six potential exhibits would interfere with the Moussaoui case, or would deprive either the United States Government or Moussaoui of a fair trial.

*****305 **269** Discussion

FOIL requires state and municipal agencies to "make available for public inspection and copying all records," subject to 10 exceptions (Public Officers Law § 87[2]). Here, the Fire Department relies on three of those exceptions—the "privacy," "law enforcement" and "intra-agency" exceptions. To the extent they are relevant here, these exceptions permit agencies to

> "deny access to records or portions thereof that:
>
> ...
>
> "(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of ***484** subdivision two of section eighty-nine of this article;
>
> ...
>
> "(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; ...
>
> "(g) are inter-agency or intra-agency materials which are not:
>
> "i. statistical or factual tabulations or data; [or]
>
> "ii. instructions to staff that affect the public." (*Id.*)

The Fire Department contends that the privacy exception applies to the portions of the 911 calls that are in dispute; that the intra-agency exception applies to the disputed portions of the dispatch calls; and that both these exceptions apply to portions of the oral histories. The Department also contends that the law enforcement

exception applies to the six potential exhibits at the Moussaoui trial, but it does not identify those six exhibits or say which categories they belong to. Thus, we first consider the application of the privacy and intra-agency exceptions to each category of materials, and then discuss the law enforcement exception.

A. The 911 Calls

The Fire Department does not now oppose disclosure of the words spoken in the 911 calls by 911 operators, or by the eight men whose families are seeking disclosure. Thus, the only issue before us is whether the disclosure of words spoken by other callers would constitute an "unwarranted invasion of personal privacy." Supreme Court and the Appellate Division both held that it would, and, in view of the extraordinary facts in this case, we agree.

We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim "privacy" for experiences and feelings that are not their own. We think this argument contradicts the common understanding of the word "privacy."

Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ***485** ones who have died. It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead (*cf. National Archives and Records Admin. v. Favish,* 541 U.S. 157, 124 S.Ct. 1570, 158 L.Ed.2d 319 [2004]).

*****306 **270** The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be "unwarranted" within the meaning of FOIL's privacy exception. Public Officers Law § 87(2)(b), which creates the privacy exception, refers to section 89(2), which contains a partial definition of "unwarranted invasion of personal privacy," but section 89(2)(b) is of little help here; it says only that "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to" six specific kinds of disclosure. None of the six is relevant to this case, and so we must decide whether any invasion of privacy here is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information.

The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller—or the caller, if he or she survived—might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.

We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different. First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the September 11 callers were part of an event that has received ***486** and will continue to receive enormous—perhaps literally unequalled—public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case—more than in almost any other imaginable—that, if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent.

We acknowledge that not everyone will have the same reaction to disclosure of the 911 tapes. The intervenors in this case, whose husbands and sons died at the World Trade Center, favor disclosure. They may feel, as other survivors may also, that to make their loved ones' last words public is a fitting way to allow the world to share the callers' sufferings, to admire their courage, and to be justly enraged by the crime that killed them. This normal human emotion is no less entitled to respect than a desire for privacy. Recognizing this, the Fire Department does not challenge the lower courts' rulings that the words of the eight relatives of the intervenors be disclosed, and has assured us that it will honor similar requests made in the future by the families of other September 11 callers. That

commitment must be kept. Surviving callers who want disclosure are also entitled to it (Public Officers Law § 89[2][c][ii]). But the privacy interests of those family members and surviving callers who do not want disclosure nevertheless remain powerful.

On the other hand, there is a legitimate public interest in the disclosure of these 911 calls. In general, it is desirable that the public know as much as possible about the terrible events of September 11. And ***307 **271** more specifically, as the Times and Dwyer point out, the public has a legitimate interest in knowing how well or poorly the 911 system performed on that day. The National Commission on Terrorist Attacks Upon the United States, which had access to the tapes and transcripts at issue here, identified significant flaws in the system's performance (9/11 Commission Report, at 286–287, 295, 304, 318, available on the Internet at < http://www.9–11commission.gov>, cached at < http://www.courts.state.ny.us/reporter/webdocs/fullreport.pdf>), and more public scrutiny might make these problems better understood. But the parties seeking disclosure here do not request only particular calls that may be relevant to this subject; they seek complete disclosure of all the 911 calls.

We are not persuaded that such disclosure is required by the public interest. Those requesting it have not shown that the information ***487** that will be disclosed under our ruling—including the words of the 911 operators, and of callers whose survivors seek, or who themselves seek, disclosure—will be insufficient to meet the public's need to be informed. We conclude that the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.

B. The Dispatch Calls

The dispatch calls are communications within the Fire Department; the only participants in the calls were Department dispatchers and other Department employees. The tapes and transcripts of these calls are therefore "intra-agency materials," and are protected from disclosure by Public Officers Law § 87(2)(g) unless they fit within one of two exclusions from the intra-agency exception: the exclusions for "statistical or factual tabulations or data" (§ 87[2][g][i]) and for "instructions to staff that affect the public" (§ 87[2] [g][ii]). We interpreted the first of these exclusions in *Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 277, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996], where we said that "[f]actual data ... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (citations omitted). Here, Supreme Court and the Appellate Division ordered that the dispatch calls be disclosed to the extent they consist of factual statements or instructions affecting the public, but that they be redacted to eliminate nonfactual material—i.e., opinions and recommendations. This is, in our view, a straightforward and correct application of the statute as we interpreted it in *Gould.*

The parties seeking disclosure argue otherwise, relying on cases in which we have characterized the intra-agency exception as being applicable to " 'deliberative material,' i.e., communications exchanged for discussion purposes not constituting final policy decisions" (*Matter of Russo v. Nassau County Community Coll.,* 81 N.Y.2d 690, 699, 603 N.Y.S.2d 294, 623 N.E.2d 15 [1993], citing *Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985]). In *Russo* and *Xerox,* however, we were concerned with materials that were arguably not "intra-agency" at all—in *Russo,* films shown by a public college to its students, and in *Xerox,* a report prepared for a public agency by an outside consultant. In deciding that the films were not intra-agency materials, and that the report was, we relied on the facts that the films were not used by the college as part of an internal decision-making process, while the ***488** report was used for just that purpose. Neither case implies that materials that fit ***308 **272** squarely within the plain meaning of " intraagency"—in this case, tapes and transcripts of internal conversations about the agency's work—are not within the scope of the intra-agency exception to FOIL.

The parties seeking disclosure also rely on our reference in *Gould* to "the consultative or deliberative process of government decision making" (81 N.Y.2d at 277, 598 N.Y.S.2d 149, 614 N.E.2d 712). But we used those words in *Gould* simply to define the scope of the "factual data" exclusion from the intra-agency exception; we spoke of "objective information, in contrast to" exchanges that were part of "the consultative or deliberative process." (*Id.*) *Gould* does not hold, as the parties seeking disclosure seem to suggest, that the intra-agency exception shields from disclosure only formal, lengthy or profound policy discussions.

The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure (*see Xerox,* 65 N.Y.2d at 132, 490 N.Y.S.2d 488, 480 N.E.2d 74, citing *Matter of Sea Crest*

Constr. Corp. v. Stubing, 82 A.D.2d 546, 549, 442 N.Y.S.2d 130 [2d Dept. 1981]). This purpose applies not only to comments made in official policy meetings and well-considered memorandums, but also to suggestions and criticisms offered with little chance for reflection in moments of crisis. A Fire Department dispatcher who believes that a rescue operation is being badly handled should feel free to say so without the concern that a tape of his or her remarks will be made public.

C. The Oral Histories

The record here leads us to conclude, subject to the qualification discussed below, that the oral histories are not protected from disclosure by either the privacy or the intra-agency exception. We infer from the record that the oral histories were exactly what their name implies—spoken words recorded for the benefit of posterity—and that the Department intended, and the people interviewed for these histories understood or reasonably should have understood, that the words spoken were destined for public disclosure. If this inference is correct, the privacy exception obviously has no application here. Nor does the intra-agency exception apply where, though agency employees are speaking to each other, the agency and the employees understand and intend that a tape of the conversation will be made public. The point of the intra-agency exception, as we ***489** explained above, is to permit the internal exchange of candid advice and opinions between agency employees. The exception is not applicable to words that are intended to be passed on verbatim to the world at large.

The record evidence about the purpose and origin of the oral histories comes largely from an affidavit submitted by a representative of the Fire Department. The affidavit adopts the title "oral histories," previously used in Dwyer's request, to identify these materials, and says that after September 11 the Fire Department decided "to promptly record the recollections of Fire Department personnel who were present at the World Trade Center site on that day." These recollections, the affidavit says, were collected for two purposes: "to be an invaluable historical record, in addition to assisting in any investigations or assessments of the incident."

The Fire Department's affidavit also says that all interviewees "were assured that the interviews would be held in complete confidence." This statement, if true, would be highly relevant to this case—but it was later acknowledged to be in error. The parties stipulated that the Fire Department *****309 **273** "has withdrawn its claim that each of these interviews ('oral histories') with Fire Dept. personnel was recorded with a promise of confidentiality to the interviewee, since it has come to the [Department's] attention that only some interviews included such a promise." After the stipulation, the Fire Department made no attempt to substantiate even the claim that "some" interviewees were promised confidentiality. The Department does not now rely on the existence of any such promise.

While the record is less clear than it might be, it establishes that the interviews were intended as an "historical record"—which implies that the interviews would be disclosed to the public. If that is the case, they should not be protected from disclosure merely because they also were, as the Fire Department says, intended to be used in "investigations or assessments." The record does not show that any interviewee was given a promise of confidentiality or led to believe that his or her words would be kept secret. Thus, the best inference is that the Department intended, and the interviewees knew or should have known, that the words spoken in the interviews would become a public record. If this is not true the burden was on the Department—which is in possession of the relevant facts—to prove otherwise (*see Matter of Newsday, Inc. v. Empire State Dev. Corp.,* 98 N.Y.2d 359, 362, 746 N.Y.S.2d 855, 774 N.E.2d 1187 [2002]; *Matter of Mantica v. New* ***490** *York State Dept. of Health,* 94 N.Y.2d 58, 61, 699 N.Y.S.2d 1, 721 N.E.2d 17 [1999]). The Department has not met that burden.

This logic leads to the conclusion that all of the oral histories are discloseable under FOIL. We add one qualification, however, because we are given pause by the Fire Department's insistence that "the oral histories contain numerous statements which are exceedingly personal in nature, describing the interviewees' intimate emotions such as fears, concern for themselves and loved ones, and horror at what they saw and heard." If indeed some firefighters made such statements in what they were led to believe was a private setting, it may be unfair to invade their privacy based solely on the inadequacy of the evidence the Department has submitted. We therefore direct that the Department be given an opportunity, on remand, to call to Supreme Court's attention specific portions of the oral histories which, in the Fire Department's view, would cause serious pain or embarrassment to interviewees if they were disclosed. Supreme Court should then consider, following an in camera inspection if necessary, whether those portions of the oral histories are subject to the privacy exception, taking into account any further evidence that may be submitted on the question of whether the interviewees thought the interviews were private.

following an in camera inspection if necessary, whether the potential exhibits are subject to the law enforcement exception to FOIL.

D. The Law Enforcement Exception

As to the six unidentified tapes and/or transcripts which the United States Department of Justice has said it intends to use in evidence at the trial of Zacarias Moussaoui, the issue is whether they were "compiled for law enforcement purposes" and whether their disclosure would either "interfere with law enforcement investigations or judicial proceedings" or would "deprive a person of a right to a fair trial or impartial adjudication." We agree with the courts below that, on this record, there is no showing that disclosure would interfere with the Moussaoui trial or cause any unfairness.

The materials in issue are already in the Justice Department's possession, and have been made available to Moussaoui; thus their public disclosure would not give the equivalent of discovery to either side in the ***310 **274** criminal case. Theoretically, their disclosure before Moussaoui's jury is selected might create some prejudice among potential jurors. But the items cannot, by their nature, contain anything specifically relating to Moussaoui; they relate to the September 11 events generally. Potential jurors are already exposed to an enormous mass of publicly available information ***491** about the events of September 11—most of which obviously will not be offered in evidence at the Moussaoui trial. In this context, it is hard to see how the public disclosure of six items that the jury will see at trial anyway could have any significant effect on the federal court's ability to impanel an impartial jury.

In short, the record would justify affirming the Appellate Division's ruling that the law enforcement exception does not apply to the records in issue. Once again, however, we qualify our conclusion, because we are mindful of the enormous importance to the public interest of an orderly and fair trial for Moussaoui. The federal court has shown some concern about pretrial publicity; it has entered an order, binding on the parties to the Moussaoui case—though not, of course, on the Fire Department or the Times—prohibiting disclosure of "discovery materials" produced by the prosecutors to Moussaoui and his counsel. It may be that there is some good reason, not apparent from the record before us, why the disclosure of the six potential exhibits at issue here would create problems in the criminal case, and it can do no harm for the Department of Justice to have an opportunity to point out such a good reason to Supreme Court. If such a submission is made, Supreme Court should decide, in light of the additional information submitted and

Conclusion

Accordingly, the order of the Appellate Division should be modified to the extent described in this opinion, and, as modified, affirmed, without costs.

ROSENBLATT, J. (dissenting in part).

I disagree with the majority only with respect to the 911 calls. The Freedom of Information Law (FOIL) requires more disclosure. The public is well aware of the function of the 911 system and the sort of information it is designed to relay. Ordinarily, there is no reasonable expectation of privacy in a call to 911, and the full contents are generally subject to disclosure under FOIL.[1]

Here, because of the unique nature of the attack, the Court ***492** has ordered disclosure of words spoken by the operators, while deleting the words of the callers. There is, of course, a need to balance the competing public and private interests. On the side of full disclosure lies the public's interest in a complete and coherent ***311 **275** account of what happened on September 11, 2001. FOIL's goal of making information public is inhibited when only half the conversation is divulged. The value of a response is compromised when the words that prompt the response are deleted. In some instances, the thrust of an incomplete communication can be inferred or constructed; in others it will be incoherent or even misleading.

The public interest supports disclosure broader than the Court has allowed. September 11th is a date burned in the minds of Americans, an event in which our security was profoundly violated. Precisely because of the importance of the September 11th attacks, Americans deserve to have as full an account of that event as can be responsibly furnished. Indisputably, the 911 tapes would shed light on the effectiveness of the City's disaster response. In turn, the City (and other municipalities) may adopt response plans that take into account the lessons of September 11th. This will surely save lives in the event of future disasters or emergencies. Indeed, the public report of the National Commission on Terrorist Attacks Upon the

United States found various inadequacies in the City's 911 system and clearly found value in reviewing the 911 tapes (*see* 9/11 Commission Report, at 286–296, available on the Internet at < http://www.9–11commission.gov>, cached at < http://www.courts.state.ny.us/reporter/webdocs/fullreport.pdf>).

Balanced against disclosure is FOIL's narrow exception for an "unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]; § 89[2] [b]). I agree with the Court that those who suffered the loss of loved ones could be traumatized by the disclosure of tapes that identify victims and contain dramatic, highly personal utterances different from ordinary 911 calls. Not every call, however, falls into that category. But for their connection with September 11th, many of the calls in question ***493** are ordinary 911 calls: people reporting factual information and seeking help.[2] Notably, the City has not provided any affidavits from survivors or victims' family members suggesting that disclosure of 911 tapes, or any other material sought, would violate their privacy. The record contains only the opposite: affidavits from nine intervenors, family members who want full disclosure. Nevertheless, I do not challenge the majority's assumption that full disclosure would cause considerable anguish to many victims' families.

Even so, the goals of privacy and openness can both be met by additional, limited disclosure. I would expand the majority's ruling and release a written transcript of the callers' side of the 911 conversations.[3] The City could redact everything that would identify nonofficial callers in calls that have some unusually personal component, such as an expression of dying wishes to be relayed to family members, as opposed to the ordinary reporting of crime scene facts. With such calls, the City should, however, be allowed to withhold any utterance that would by name or other means identify the caller. The public interest would be served by meaningful disclosure, while the grieving families and *****312 **276** friends of the callers would be spared the agony of having their personal lives and emotions thrust into the public realm.

My final thought relates to the performance of the firefighters, police officers and others who spearheaded the rescue efforts. It may well be that the 911 transcripts reveal imperfections or mistakes amid the chaos. This, however, is no reason to withhold the transcripts. On the contrary, they will give the public the clearest picture of how the first responders reacted, and that picture should be as comprehensive as possible. The revelation of any deficiencies on the part of the departments or their personnel is essential to improving and enhancing lifesaving procedures. Of course, no one can rightly expect perfection and exquisite orderliness in the face of an attack as horrific as this one. Exposing mistakes may prove discomforting, but this ***494** will pale in the face of the unforgettable heroics that we will always associate with September 11th. For every person critical of an error or omission, ten thousand voices will rise up in praise of the firefighters, police officers and others who risked life and limb in the line of duty.

Judges G.B. SMITH, GRAFFEO and READ concur with Judge R.S. SMITH.

Judge ROSENBLATT dissents in part in a separate opinion in which Chief Judge KAYE and Judge CIPARICK concur.

Order modified, without costs, by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

All Citations

4 N.Y.3d 477, 829 N.E.2d 266, 796 N.Y.S.2d 302, 33 Media L. Rep. 1535, 2005 N.Y. Slip Op. 02357

Footnotes

1 Other courts considering the availability of 911 calls under FOIL have uniformly required their disclosure, and the majority appears to be in agreement in the ordinary case (*see* majority op at 484, 796 N.Y.S.2d at 305, 829 N.E.2d at 269). In *State ex rel. Cincinnati Enquirer v. Hamilton County,* 75 Ohio St.3d 374, 377–378, 662 N.E.2d 334, 337 [1996], the Ohio Supreme Court held that there was no expectation of privacy in a 911 call and, accordingly, ordered the release of 911 tapes under that state's version of FOIL. It further held that the tapes became public records at the moment they were made and that their content was irrelevant (*see* 75 Ohio St.3d at 378, 662 N.E.2d at 337). In accord are *Meredith Corp. v. City of Flint* (256 Mich.App. 703, 708–709, 671 N.W.2d 101, 104–105 [2003]), *Asbury Park Press v. Lakewood Twp. Police Dept.,* 354 N.J.Super. 146, 161, 804 A.2d 1178, 1187 [Ocean County 2002] and *Brazas v. Ramsey,* 291 Ill.App.3d 104, 106–107, 224 Ill.Dec. 915, 682 N.E.2d 476, 477–478 [2d Dist. 1997], *appeal denied* 174 Ill.2d 555, 227 Ill.Dec. 2, 686 N.E.2d 1158 [1997].

2 The 9/11 Commission, for instance, cites the testimony of a person who called 911 from the 31st floor of the South Tower and complained that he had been put on hold multiple times before deciding on his own to flee the building (*see* 9/11 Commission Report, *supra,* at 295).

3 *See generally New York Times Co. v. National Aeronautics & Space Admin.,* 920 F.2d 1002 (D.C.Cir.1990) (where the majority remanded for a balancing test to determine whether a complete transcript or tapes must be disclosed under the federal Freedom of Information Act [5 USC § 552]).

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103 A.D.3d 495
Supreme Court, Appellate Division, First Department, New York.

In re Michael P. THOMAS, Petitioner–Appellant,
v.
NEW YORK CITY DEPARTMENT OF EDUCATION, et al., Respondents–Respondents.

Feb. 19, 2013.

Synopsis

Background: Public school teacher petitioned for Article 78 review of a decision of city's department of education to deny teacher's request for information, under Freedom of Information Law (FOIL), regarding investigation of his allegation that school violated terms of No Child Left Behind Act. The Supreme Court, New York County, Geoffrey D. Wright, J., denied petition and dismissed proceedings. Teacher appealed.

The Supreme Court, Appellate Division, held that underlying complaint involved important public interest, thus requiring remand for in camera review of requested information.

Reversed and remanded.

Attorneys and Law Firms

****30** Hagan, Coury & Associates, Brooklyn (Paul Golden of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

MAZZARELLI, J.P., ANDRIAS, DeGRASSE, RICHTER, CLARK, JJ.

Opinion

***495** Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 9, 2012, denying the petition seeking to compel respondents to disclose documents requested by petitioner pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the proceeding reinstated, and the matter remanded for an in camera inspection of the requested documents to determine if redaction could strike an appropriate balance between personal privacy and public policy interests, and whether respondents otherwise assert applicable FOIL exemptions.

Petitioner is a public school teacher employed by the Manhattan Center for Science and Mathematics (MCSM), which allegedly receives funds under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA), reauthorized as the No Child Left Behind Act of 2001 (20 USC § 6301 *et seq.*). In August 2010, pursuant to the "No Child Left Behind Written Complaint and Appeal Procedures" adopted by the New York State Education Department, petitioner filed a complaint against the administrators of MCSM alleging that: "1. the [school's] 2009–2010 Comprehensive Educational Plan (CEP) was not developed with the involvement of parents and other members of the school community as required by Section 1114(b)(2)(B)(ii) of Title I, Part A of the ESEA; 2. required components of a schoolwide program that address the needs of at-risk students were not implemented as required by Section 1114(b)(2) and Section 1118 of Title I, Part A of the ESEA; 3. ***496** Title I funds were misappropriated ****31** and were not used to implement the components of a schoolwide program as required by Section 1114(b)(2)(A)(ii) of Title I, Part of the ESEA; and 4. the 2010–2011 CEP did not exist as required by Section 1114(b)(2)(B)(ii) of Title I, Part A of the ESEA."

Respondent New York City Department of Education (DOE) referred the complaint to its Office of Special Investigations (OSI). After OSI found the allegations to be unsubstantiated, petitioner filed a FOIL request seeking the investigative report and related documents.

DOE's Central Record Access Officer (CRAO) denied the FOIL request pursuant to Public Officers Law § 87(2)(b) on the ground that all of the OSI records were exempt from disclosure because they related to unsubstantiated allegations of misconduct and their release would constitute an unwarranted invasion of the personal privacy of the employees in question. Respondent Michael Best, General Counsel of DOE, denied petitioner's administrative appeal, finding that the CRAO's determination fell "well within the bounds" of

the Committee on Open Government's published advisory opinions denying FOIL requests in the context of unsubstantiated complaints, and that redaction of identifying details would not protect the personal privacy of the subject individuals because petitioner filed the underlying complaint and therefore knew the identity of the persons whose details he would have DOE delete.

The No Child Left Behind Written Complaint and Appeal Procedures expressly contemplate FOIL requests for Investigative Reports, stating as follows: "Does the State Education Department maintain a record of all complaints/appeals? Yes. Copies of correspondence, related documents, investigative reports, and summary reports involved in the complaint/appeal resolution will be maintained by the State Education Department for five years. Records will be made available to interested parties in accordance with the provisions of the New York State Freedom of Information Law (Public Officers Law Sections 84–89)."

Pursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § 87(2) (*see Matter of Fappiano v. New York City Police Dept.,* 95 N.Y.2d 738, 746, 724 N.Y.S.2d 685, 747 N.E.2d 1286 [2001]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v. State of N.Y. Dept. of Motor Vehs.,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 [1992]).

Public Officers Law § 87(2)(b) permits an agency to deny access ***497** to a document, or portion of a document, if disclosure "would constitute an unwarranted invasion of personal privacy." "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities" (*Matter of Beyah v. Goord,* 309 A.D.2d 1049, 1050, 766 N.Y.S.2d 222 [3d Dept. 2003] [internal quotation marks omitted]).

"Public Officers Law § 89(2)(b) says that an unwarranted invasion of personal privacy includes, but shall not be limited to seven specified kinds of disclosure. In a case, like this one, where none of the seven specifications is applicable, a court must decide whether any invasion of privacy ... is unwarranted by balancing the privacy interests at stake against the public interest in [the] disclosure of the information" (*Matter of Harbatkin v. New* ****32** *York City Dept. of Records & Info. Servs.,* 19 N.Y.3d 373, 380, 948 N.Y.S.2d 220, 971 N.E.2d 350 [2012] [internal quotation marks omitted]). However, the section does not create a blanket exemption. Public Officers Law § 89(2)(c)(i) provides that "[u]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision: ... when identifying details are deleted."

The federal No Child Left Behind Act of 2001 (the NCLB) states as follows: "The purpose of this subchapter [20 USC § 6301 *et seq.*] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state [*sic*] academic assessments" (20 USC § 6301). Based on the theory that poverty and low scholastic achievement are closely related, Subchapter I, Part A, of the NCLB, titled "Improving Basic Programs Operated by Local Educational Agencies," provides federal grants-in-aid to support compensatory education for disadvantaged children in low-income areas.

Petitioner's FOIL request sought the investigation report relating to his complaint against the administrators of MCSM, alleging that, in violation of the ESEA, the school's CEP was not developed with the involvement of parents and other members of the school community, that required components of the CEP were not implemented, and that Title I funds were misappropriated. Issues involving the expenditure of education funds and the quality of education, and why a government agency determined that a complaint concerning a violation of federal law relating thereto is allegedly unsubstantiated, are of significant public interest.

***498** Despite this significant public interest, respondents denied the FOIL request in its entirety, with respondent Best citing a published advisory opinion of the Committee on Open Government, which states that "records related to unsubstantiated allegations of misconduct are not relevant to job performance and, therefore, disclosure constitutes an unwarranted, not a permissible, invasion of personal privacy" (FOIL–AO–10399 [October 31, 1997]; *see also* FOIL–AO–12005 [March 21, 2000]). Acknowledging this policy, Supreme Court affirmed, stating in part that "[s]o long as the subject matter is quasi criminal in nature, as is the claim here, then the entire file of the investigation and the resulting findings, should be regarded as beyond the reach of [FOIL]."

However, advisory opinions issued by the Committee on Open Government "are not binding authority, but may be considered to be persuasive based on the strength of their reasoning and analysis" (*Matter of TJS of N.Y., Inc. v. New York State Dept. of Taxation & Fin.,* 89 A.D.3d 239,

242, 932 N.Y.S.2d 243 n. [3d Dept. 2011]; *see also Matter of Buffalo News v. Buffalo Enter. Dev. Corp.,* 84 N.Y.2d 488, 493, 619 N.Y.S.2d 695, 644 N.E.2d 277 [1994]). There is no statutory blanket exemption for investigative records, even where the allegations of misconduct are "quasi criminal" in nature or not substantiated, and the ability to withhold records under FOIL can only be based on the effects of disclosure in conjunction with attendant facts (*see Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 275, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996]["[B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government"]). Indeed, the Committee for Open Government has issued "advisory opinions regarding agencies' obligations under FOIL and has concluded, ****33** inter alia, that unless exempted under FOIL, the DOI [New York City Department of Investigation] must reveal the names of DOI employees who conducted an investigation once it has concluded (FOIL–AO–9399), communications between the DOI and the Department of State are subject to disclosure (FOIL–AO–4766), 'closing memoranda' prepared by the DOI as a result of an investigation are presumptively accessible to the public (FOIL–AO–9399), and the DOI must disclose all written documents, including reports and memoranda if sought pursuant to a FOIL request (FOIL–AO–3656)" (*Murphy v. City of New York,* 2008 N.Y. Slip Op. 31926[U], 2008 WL 2789093 [Sup. Ct., N.Y. County 2008] [DOI has no duty to ensure the confidentiality of its investigative reports, but, as a matter of law, is obligated to make available for public inspection all documents not specifically exempted under FOIL], *affd.* 59 A.D.3d 301, 874 N.Y.S.2d 407 [1st Dept. 2009]).

For example, FOIL–A–9399, cited in *Murphy,* dealt with a ***499** request by the Daily News for closing memoranda prepared by the DO. The advisory opinion explained that "if a final determination identifies a person who is the subject of a charge or allegation and the determination is that the charge or allegation has no merit, I believe that an applicant would have the right to obtain the substance of the determination, following the deletion of personally identifiable details. The Daily News may be interested not only in those cases in which charges have been substantiated, but also those in which the charges are found to have been without merit, perhaps as a means of attempting to ascertain more fully how DO operates and carries out its official duties."

This reasoning applies equally to petitioner's FOIL request for OSI's investigative report and related documents. As the Legislature declared in Public Officers Law § 84, "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

FOIL–AO–10399, on which respondents rely, does not require otherwise. In that advisory opinion, which pertains to the disclosure of records related to an incident of alleged sexual harassment, the Committee stated as follows: "It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy" (internal citations omitted).

Here, the underlying complaint pertains to MCSM's administrators' performance of their official duties when using and applying federal funds, and in constructing and implementing the CEP. Accordingly, this matter should be remanded to the article 78 court for an in camera inspection of the documents to determine if redaction could strike an appropriate balance between personal privacy and public interests and which material could be properly disclosed (*see Matter of Molloy v. New York City Police Dept.,* 50 A.D.3d 98, 100–101, 851 N.Y.S.2d 480 [1st Dept. 2008]; *Kwasnik v. City of New York,* 262 A.D.2d 171, 691 N.Y.S.2d 525 [1st Dept. 1999]). The court ***500 **34** should also determine whether portions of the documents may be exempt from disclosure as intra- or inter-agency records that are not statistical or factual data (Public Officers Law § 87[2][g]; *see generally Matter of Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 275, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996]).

All Citations

103 A.D.3d 495, 962 N.Y.S.2d 29, 291 Ed. Law Rep. 402, 2013 N.Y. Slip Op. 01026

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3 E.H. Smith 117
Court of Appeals of New York.

TOMPKINS et al.
v.
HUNTER et al.

April 7, 1896.

Synopsis
Appeal from supreme court, general term, Fifth department.

Action by Charles M. Tompkins and others against Charles Hunter, the First National Bank of Penn Yan, and another, to have a conveyance by the first to the second named defendant set aside as in fraud of plaintiffs, and for other relief. From a judgment of the general term (28 N. Y. Supp. 1132) affirming a judgment in favor of defendants (24 N. Y. Supp. 8), plaintiffs appeal. Affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.
A transfer by an insolvent of all his property to one of several of his creditors, to be applied to the payment of a bona fide debt, is valid, not being a general assignment for the benefit of creditors, within the meaning of Laws 1887, c. 503, providing that, in all general assignments of the estates of debtors for the benefit of creditors, no preference shall be valid, except to the amount of one-third of the value of the assigned estate. 28 N. Y. Supp. 1132, affirmed.

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Harris and ***118** John T. Knox, for respondents.

Opinion

MARTIN, J.

On and prior to April 19, 1890, Charles Hunter was engaged in business as a grocer and produce dealer in the village of Penn Yan, N. Y. The plaintiffs obtained judgments against him, and issued executions thereon, which were returned unsatisfied before the commencement of this action. The judgments were for debts which had accrued before the 19th of April, 1890. On that day Hunter had determined to discontinue his business, and proposed to the president of the First National Bank of Penn Yan to sell and convey to the bank all his property, real and personal, not exempt from levy and sale on execution, in payment of his liabilities to it, so far as it was sufficient for that purpose. This proposition was accepted, and on the 21st day of the same month Hunter conveyed to the bank all his real estate by deed, and transferred to it, by a bill of sale, all his personal property not exempt from levy and sale upon execution, including all the debts which were due or owing ***119** to him. The bank received this property at the agreed price of $21,790.70, applied that sum upon the debts of Hunter, and surrendered to him his notes therefor, except as to an overdraft for a small amount, and the sum of $1,636.33, which was applied in part payment of a note for a larger amount. The negotiations between Hunter and the bank, ****533** which preceded the execution of the deed and bill of sale, had reference to a sale by him to it of the property therein described, and the transfers made by him were intended as an absolute sale and transfer thereof by Hunter to the bank in payment and satisfaction of his indebtedness to it to the extent of the value of the property transferred. The price agreed to be paid was the full value of the property. The bank immediately took and continued in the possession of the property. The defendant Hunter did not make, and at no time contemplated making, any general assignment for the benefit of his creditors. The negotiations which resulted in the execution of the deed and bill of sale, as well as the deed and bill of sale, were made in good faith, and only with a view to the sale of his property by Hunter to the bank in payment of his indebtedness. When the negotiations for the purchase and sale of this property took place between the bank and Hunter, the latter had determined to discontinue his business, to give up the dominion of his property to the bank in payment of his liabilities to it so far as it would go, and so stated to its president. Hunter was at the time insolvent, and the president of the bank knew his financial condition.

This action was in the nature of a creditors' bill, and was brought to set aside the conveyances made by the defendant Hunter to the defendant the First National Bank of Penn Yan. The alleged grounds of action were: (1) That the conveyances and transfers mentioned were made and received with an intent to hinder, delay, and defraud the creditors of the defendant Hunter; (2) that they were

made as a part of a collusive and fraudulent conspiracy to prevent the collection of the plaintiffs' judgment; and (3) that they were, and each was, intended as a fraud upon or evasion of chapter 466 of ***120** the Laws of 1877, as amended in 1887, and were given and received with an intent to give the bank an unlawful preference. On the trial the sole ground relied upon by the plaintiffs was that these conveyances effected a preference, which is forbidden by the general assignment act, and were void, so far, at least, as the property transferred exceeded the value of one-third of all the property owned by Hunter at that time. The court, however, held that they did not constitute a preference forbidden by that act, but were valid, and directed a judgment dismissing the plaintiffs' complaint, with costs.

The appellants strenuously insist that the statute of 1887 was intended, and should be construed, to include any and every transfer or conveyance made by an insolvent debtor, entirely independent of the question whether he, at the time or subsequently, made or intended to make a general assignment for the benefit of his creditors, and hence that both the trial court and the general term erred in holding that the conveyances in question were valid. The appellants argue that the act of 1887 is a remedial statute, which should be reasonably construed to accomplish its intended purpose; and that its purpose is to prohibit an insolvent debtor from preferring his creditors to an amount in excess of one-third of his estate, although no general assignment is made or contemplated. The substance of their claim is that this act should be construed as in the nature of a bankrupt law, and so as to apply to the estate of an insolvent debtor, without regard to the character of the transfer made. The statute, so far as material to this question, is as follows: 'In all general assignments of the estates of debtors for the benefit of creditors hereafter made any preferences created therein * * * shall not be valid except to the amount of one-third in value of the assigned estate left after deducting, etc. * * *' Laws 1887, c. 503. That this act should receive a reasonable construction, and one which will accomplish its intended purpose, there can be no manner of doubt. Thus, at the threshold of this examination, ***121** it becomes necessary to ascertain its real purpose and effect. In determining that question, it is proper to consider the condition of the law upon the subject when the amendment of 1887 was passed, and thus ascertain the mischief or defect it was designed to remedy. At common law, as it existed before there was any statute on the subject in this state, an insolvent debtor possessed the right to make a voluntary assignment for the benefit of his creditors, and to prefer such of them as he deemed best, without any limitation or restriction whatever. The first statute in this state which related to this class of assignments was passed in 1860. Laws 1860, c. 348. It was several times amended, and, as amended, remained in force until 1877, when a new and somewhat more comprehensive act was passed, and that of 1860, as amended, was repealed. Laws 1877, c. 466. Neither of these statutes in any way limited or restricted the right of an insolvent debtor to prefer such of his creditors as he desired. The first and only direct limitation of that right is contained in the amendment of 1887. The statutes of 1860 and 1877 recognized the right of a debtor to make such an assignment, provided the manner in which it should be executed, established a course of procedure for carrying into effect and enforcing the trust thereby created, but did not contain any substantive law. In 1884 the statute of 1877 was amended by adding a new section creating a preference in favor of employés for their wages, and in 1887 the amendment in question was enacted. Prior to the amendment of 1887, an insolvent debtor had the right to sell and transfer the whole or any portion of his property to one or more of his creditors in payment of, or to secure, his debts, when that was his honest purpose, although the effect of the sale or transfer would be to place his property beyond the reach of other ****534** of his creditors, and render their debts uncollectible. Murphy v. Briggs, 89 N. Y. 446, 452; Knapp v. McGowan, 96 N. Y. 75, 86; Paper Co. v. O'Dougherty, 36 Hun, 79, affirmed 99 N. Y. 673; Williams v. Whedon, 109 N. Y. 333, 337, 16 N. E. 365; ***122** Bank v.Williams, 128 N. Y. 77, 28 N. E. 33; McNaney v. Hall, 86 Hun, 415, 419, 33 N. Y. Supp. 518. That right existed at common law as an incident to the right of property. It was as complete and perfect as the right to acquire and enjoy it. Indeed, it was upon the principle that a person might acquire, enjoy, and dispose of his property that his right to make a general assignment rested. While the law was in this condition, the legislature amended the general assignment act, which, as its title indicates, was a statute that related solely to voluntary assignments, and to no other transactions or conveyances. It had then become usual for debtors making general assignments to prefer creditors to an extent that was deemed inequitable and unjust, and it was to prevent that mischief that the amendment of 1887 was passed. That act did not, in terms, include any conveyance or transfer other than a general assignment. When it was passed, the character of such an assignment was well understood. There is a broad and well-defined distinction between such an assignment and a deed or bill of sale. The former is a transfer by a debtor of his property to another in trust to sell, convert it into money, and distribute the proceeds among his creditors. It implies a trust, and contemplates the intervention of a trustee. The others import an absolute sale and transfer of the title, to be held and enjoyed by the purchaser without any attending trust. As the nature of such an assignment was then as well understood as that of any other particular form of

conveyance or transfer, it is manifest that it was the purpose of the statute to limit the right of an insolvent debtor to dispose of his property only to cases where he made a general assignment for the benefit of his creditors, and it is not reasonable to suppose that the legislature intended to include in that act any other conveyance or transfer. If it had, such conveyances or transfers would have been mentioned in the statute, or it would have contained some such general provision to that effect as exists in relation to insolvent corporations. Laws 1892, c. 688, § 48.

In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words ***123** employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add to or take away from that meaning. Newell v. People 7 N. Y. 1, 97; McCluskey v. Cromwell, 11 N. Y. 593, 601; People v. Woodruff, 32 N. Y. 355, 364; Estate of Miller, 110 N. Y. 216, 222, 18 N. E. 139. In the case of People v. Woodruff it was said: 'It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of an act, rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen.' Again, in Estate of Miller, where it was contended that the reason and equity of a statute brought within its operation certain parties not mentioned in it, it was said: 'If that be so, it constitutes no reason for controlling its language, although it might seem that the legislature would have provided for such a case had their attention been directed to it.' It is not the duty of courts to disregard the plain words of a statute, even in favor of what may be termed an 'equitable construction,' in order to extend it to some supposed policy not included in the act. Karst v. Gane, 136 N. Y. 316, 321, 32 N. E. 1073. As this statute changed the common law as it existed when it was passed, it will be held to abrogate it only so far as the clear import of the language absolutely requires. Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. 354. Applying these rules to the construction of the statute under consideration, it follows that its plain words cannot be disregarded, or its effect extended beyond the clear import of the language employed. This statute has none of the attributes of a general bankrupt law, under which a debtor may be compelled to assign his property for the benefit of his creditors. No such law exists in this state as to an individual debtor. If he makes an assignment, he may prefer his creditors only to the extent of one-third of his estate. If he makes none, then it is obvious that the statute of 1887 has no application, and he may dispose of his property as he sees fit to secure or pay his honest ***124** debts. If he cannot be compelled to assign, and does not do so voluntarily, we find no law which prohibits him from selling and conveying his property for that purpose. The language of this act indicates a purpose to prohibit a debtor from preferring his creditors beyond the limit mentioned, if he attempts to create such preference in a particular and specified manner, but indicates no purpose to otherwise deprive him of his property or limit his control over it. In other words, the law applies to the method of transfer, and not to the property of the debtor, either while it remains in his hands or when it has been conveyed otherwise than by a voluntary assignment. If the contention of the appellants was sustained, its practical result would be to prevent an insolvent debtor from paying his debts except to the extent of one-third of the value of his property, and to impound the remainder in his hands until some vigilant creditor should reach it by legal process, which would, to some extent, constitute a suspension of his right of property in two-thirds of his estate. It is clear that such was not the object or purpose of the statute. ****535**

The amendment of 1887 has been several times considered by this court. In Berger v. Varrelmann, 127 N. Y. 281, 27 N. E. 1065, where a debtor confessed judgment in favor of a creditor in contemplation of making an assignment for the benefit of his creditors, the confession of judgment having been a mere instrumentality employed to give preference to a particular creditor in excess of the limitation of the statute, and the creditor having had knowledge of the fact, and the purposes of the confession, the Second division held that it was void under the statute of 1887. The same doctrine was held in Spelman v. Freedman, 130 N. Y. 421, 29 N. E. 765. This court subsequently recognized the correctness of those decisions upon the ground that in each case the confession of judgment was a part of a plan or scheme which included the making of a general assignment, and was to be construed as a part of it, and, hence, was within the prohibition of the assignment act. Manning v. Beck, 129 N. Y. 1, 29 N. E. 90; Bank v. Seligman, 138 N. Y. 435, 34 N. E. 196; Abegg v. Bishop, 142 N. Y. 286, 36 N. E. 1058. In the Manning ***125** Case this court held that a creditor who had procured a bill of sale from an insolvent debtor in payment of and as security for an honest and subsisting debt, in ignorance of any intention upon the part of the debtor to thereafter make an assignment, could hold the property transferred, although it exceeded one-third of the assets of the vendor. In discussing the question in that case, Peckham, J., said: 'But the statute does not, and was not intended to, prevent a creditor from obtaining payment of, or a security (and thereby a preference) for, his debt, even from an insolvent debtor.' In further discussing the question, he adds: 'The debtor might also neglect to make an assignment, and then it would look as if the acts of preference would be

legal. The statute of 1887, at any rate, does not cover such a state of facts, and we do not feel at liberty to enlarge its provisions by construction so as to bring such facts within the condemnation of the statute. If it be thought good policy so to do, the legislature, and not this court, is the body to which application should be made to effect such change in the law.' In Bank v. Seligman, 138 N. Y. 435, 445, 34 N. E. 196, the debtors made an assignment, giving certain creditors preference in excess of one-third of their estate, and allowed other creditors to obtain judgments upon offers and acceptances. In discussing the effect of the judgments, Andrews, C. J., said: 'The judgments and executions constituted, and could constitute, no preference under the act of 1887. If no assignment had been made, the judgments could not have been assailed by the other creditors.' We are unwilling to extend the doctrine of the Berger and Spelman Cases so as to include a case like this. To do so would be to apply the statute to a case not included within its language or apparent purpose. Such a construction would greatly extend the effect of the statute, would doubtless include many cases where its application would be inequitable and unjust, and would tend to disarrange and unsettle many transactions which are anthorized under the law as it is now supposed to exist. It is manifest that neither the letter nor the spirit of the act of 1887 renders it applicable to a case like this. It is ***126** the province of this court to construe statutes, but not to enact them. If, for any reason, public policy requires a law prohibiting insolvent debtors from securing or paying their creditors, or that shall limit the amount or proportion of their property which shall be devoted to that purpose, the legislature, and not this court, must be relied upon for its enactment. As there is no claim here that the transfers by Hunter to the bank were made with an intent to hinder, delay, or defraud the creditors of the former, and void under the statute relating to that subject (2 Rev. St. p. 137, §§ 1–8), or that they were void for any reason other than because in contravention of the statute of 1887, it follows, both upon principle and authority, that the judgment in this case should be upheld.

The learned counsel for the appellants earnestly urges that the case of White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309, should be regarded as high, if not a controlling, authority upon this question. We do not deem it necessary to discuss that case, further than to say that it was considered by this court, in the Manning Case, that the statute involved in that case was held to be unlike ours, and that the White Case was not then followed by this court. It may, however, be observed that the statute of Illinois relating to assignments for the benefit of creditors was under consideration in the White Case, that the decision in that case was based upon a decision of the highest court of that state, and was asserted to be in accordance with it. An examination of the later cases in the state of Illinois discloses that its courts do not construe the statute as it was construed in the White Case, but expressly decline to be controlled by that decision. Weber v. Mick, 131 Ill. 520, 23 N. E. 646; Farwell v. Nilsson, 133 Ill. 45, 24 N. E. 74. Upon the question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors, the decisions of its highest court are regarded as of controlling authority in the courts of the United States. Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013. As it is manifest, from the decisions of the highest court of the state of Illinois, that the decision in the White Case was based upon a misapprehension of the ***127** former decisions in that state as to the effect of the statute, the White Case has little weight as an authority upon the question involved in this case.

We are of the opinion that the statute of ****536** 1887 has no application to the facts in this case, and that the judgment of the general term should be affirmed, with costs. All concur, except HAIGHT, J., not sitting. Judgment affirmed.

All Citations

3 E.H. Smith 117, 149 N.Y. 117, 43 N.E. 532

846 Fed.Appx. 25
This case was not selected for publication in West's Federal Reporter.

United States Court of Appeals, Second Circuit.

UNIFORMED FIRE OFFICERS ASSOCIATION; Uniformed Firefighters Association of Greater New York; Police Benevolent Association of the City of New York, Inc., Correction Officers' Benevolent Association of the City of New York, Inc., Sergeants Benevolent Association, Lieutenants Benevolent Association, Captains Endowment Association, Detectives' Endowment Association,
Plaintiffs-Appellants-Cross-Appellees,
v.
Bill De BLASIO, In His Official Capacity as Mayor of the City of New York, City of New York, New York City Fire Department, Daniel A. Nigro, in His Official Capacity as the Commissioner of The Fire Department of the City of New York, New York City Department of Corrections, Cynthia Brann, In Her Official Capacity as the Commissioner of The New York City Department of Corrections, Dermot F. Shea, in His Official Capacity as the Commissioner of The New York City Police Department, New York City Police Department, Frederick Davie, in His Official Capacity as the Chair of the Civilian Complaint Review Board, Civilian Complaint Review Board, Defendants-Appellees, Communities United for Police Reform, Intervenor-Defendant-Appellee-Cross-Appellant.

No. 20-2789-cv(L), No. 20-3177-cv(XAP)
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February 16, 2021

Synopsis

Background: Uniformed officers' unions brought an action against city, its mayor, department of corrections, fire department, and police department, along with other city officials, arising from repeal of civil rights law, which for decades shielded law enforcement disciplinary records from public disclosure, and city's announcement that it intended to proactively publish certain types of disciplinary records and provide other records upon request. The United States District Court for the Southern District of New York, Katherine Polk Failla, J., 2020 WL 5640063, granted in part and denied in part unions' motion for preliminary injunction. Unions appealed.

Holdings: The Court of Appeals held that:

unions failed to demonstrate a likelihood of success on the merits of their claim that disclosure would violate provision collective bargaining agreement (CBA) requiring police department to remove from personnel folder investigative reports, which were classified exonerated or unfounded;

unions failed to demonstrate that officers would suffer irreparable harm absent injunction;

unions failed to demonstrate sufficiently serious questions on the merits of their constitutional claims;

balance of equities did not favor preliminary injunction; and

district court acted within its discretion in granting motion for preliminary injunction in aid or arbitration as it related to provision of CBA governing petitions for review for purpose of expunging a record of case in which an officer was charged with certain technical violations.

Affirmed.

***27** Appeal from an order of the United States District Court for the Southern District of New York (Katherine P. Failla, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

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PRESENT: AMALYA L. KEARSE, PIERRE N. LEVAL, RAYMOND J. LOHIER, JR., Circuit Judges.

***29 SUMMARY ORDER**

This appeal arises from the repeal of § 50-a of the New York Civil Rights Law, which for decades shielded law enforcement disciplinary records from public disclosure. Shortly after the repeal, New York City (the "City") announced its intention to proactively publish certain types of disciplinary records and provide other records upon request consistent with its obligations under New York's Freedom of Information Law (FOIL), N.Y. Pub. Off. Law §§ 84–90. Several unions (the "Unions") representing uniformed members of the New York City Police Department ("NYPD"), the New York City Fire Department ("FDNY"), and the New York City Department of Correction ("DOC") filed this action against the City, the NYPD, the FDNY, the DOC, the Civilian Complaint Review Board ("CCRB"), and their principal officers. The Unions moved to preliminarily enjoin any disclosure of allegations of misconduct against their members that are unsubstantiated, unfounded, or non-final, or that resulted in an exoneration or a finding of not guilty. The District Court (Failla, J.) denied the motion in substantial part, but granted a limited preliminary injunction in favor of the Unions, which we explain further below. The Unions appealed from the denial of their motion, and Communities United for Police Reform ("CPR"), which intervened in this case, cross-appealed from the District's Court's limited preliminary injunction. Another panel of this Court granted a stay of the District Court's order pending disposition of this appeal.

We assume the parties' familiarity with the underlying facts and prior record of proceedings, to which we refer only as necessary to explain our decision to affirm.

1. The Unions' Appeal: Preliminary Injunction in Aid of Arbitration

We review the District Court's order for abuse of discretion. See ***30** SG Cowen Sec. Corp. v. Messih, 224 F.3d 79, 81 (2d Cir. 2000).

Each of the Unions' collective bargaining agreements ("CBAs") contains an arbitration provision, and the Unions ask the Court to enjoin the NYPD's and the CCRB's planned disclosures pending adjudication of their claims in arbitration. Under New York law, which governs the CBAs, a court may issue a preliminary injunction in aid of arbitration if the movant demonstrates that (1) absent a preliminary injunction, an award in arbitration "may be rendered ineffectual," (2) the movant is likely to succeed on the merits of the claim to be arbitrated, (3) there is a "danger of irreparable harm" to the movant should preliminary relief be denied, and (4) the balance of the equities "tips in the petitioner's favor." Id. at 81–84.

Here, the Unions assert that the planned disclosures will violate two provisions common to all of their CBAs. The District Court denied the Unions' motion for a preliminary injunction only as it related to the first provision, which states that upon an officer's "written request to the Chief of Personnel," NYPD "will ... remove from the Personnel Folder investigative reports which, upon completion of the investigation are classified 'exonerated' and/or 'unfounded.' " App'x 1528. We agree with the District Court that this provision does not conflict with the planned public disclosures, substantially for the reasons set forth in the District Court's decision. Special App'x 19–21. Removal of such records from a personnel file, as called for by the CBAs, does not require eliminating them from all of the City's records. There is no contention that the City has failed to adhere to its obligation to remove the records from personnel files or has improperly considered them in connection with personnel decisions (such as promotion or termination). Moreover, to the extent that this claim implicates records that must be disclosed under FOIL, the NYPD cannot

bargain away its disclosure obligations. Matter of M. Farbman & Sons v. N.Y.C. Health & Hosps. Corp., 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 71, 464 N.E.2d 437 (1984). The District Court therefore acted within its discretion when it concluded that the Unions failed to demonstrate a likelihood of success on the merits in the arbitration of this claim. See SG Cowen, 224 F.3d at 84.

2. The Unions' Appeal: Preliminary Injunction Pending Resolution of Remaining Claims

"[D]istrict courts may grant a preliminary injunction where a plaintiff demonstrates irreparable harm and meets either of two standards: (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in the movant's favor." Trump v. Deutsche Bank AG, 943 F.3d 627, 635 (2d Cir. 2019) (quotation marks omitted), vacated and remanded on other grounds, —— U.S. ——, 140 S. Ct. 2019, 207 L.Ed.2d 951 (2020). We do not decide whether the Unions must satisfy one standard or the other here because we conclude that the District Court did not abuse its discretion under either standard.

A. Irreparable Harm

The Unions assert that law enforcement officers will have fewer employment opportunities in the future if records of the allegations against them that prove to be unfounded or unsubstantiated are disclosed, even though each record will reveal the outcome of the investigation. But the District Court noted that future employers were unlikely to be misled by ***31** conduct records that contained "dispositional designations" specifying that allegations of misconduct were unsubstantiated, unfounded, or that the accused officer was exonerated. See Special App'x 14–15. As the District Court also noted, despite evidence that numerous other States make similar records available to the public, the Unions have pointed to no evidence from any jurisdiction that the availability of such records resulted in harm to employment opportunities. Id. For these reasons, the District Court did not abuse its discretion when it determined that the asserted harm was speculative and that the Unions had failed to demonstrate on this record that the officers will suffer irreparable harm to their employment opportunities that cannot be remedied by an award of lost wages. In general, "irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment 'however severely they may affect a particular individual.' " Stewart v. INS, 762 F.2d 193, 199 (2d Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 92 n.68, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974)).

We also address the Union's more general assertion of heightened danger and safety risks to police officers. We fully and unequivocally respect the dangers and risks police officers face every day. But we cannot say that the District Court abused its discretion when it determined that the Unions have not sufficiently demonstrated that those dangers and risks are likely to increase because of the City's planned disclosures. In arriving at that conclusion, we note again that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers. See App'x 1035–36, 1163, 2140–42.

B. The Merits

The Unions also have not raised sufficiently serious questions on the merits of their claims. First, the Unions assert a "stigma-plus" claim under the Federal and New York State Constitutions. Under both federal and state law, stigma-plus claims require the plaintiff to adequately demonstrate an "injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), without adequate process." DiBlasio v. Novello, 344 F.3d 292, 302 (2d Cir. 2003); see Matter of Lee TT. v. Dowling, 87 N.Y.2d 699, 708, 664 N.E.2d 1243, 642 N.Y.S.2d 181, 187 (1996). The Unions fail to demonstrate that any officer will be deprived of a tangible interest or property right. We have held that diminished future employment opportunities resulting from a damaged reputation, as opposed to some independent legal detriment, are not sufficient. See Sadallah v. City of Utica, 383 F.3d 34, 38–39 (2d Cir. 2004).[1]

The Unions' equal protection claims fare no better. Because law enforcement officers are not a protected class for equal protection purposes, they must show that there is no rational and nondiscriminatory basis to treat their records differently from the records of other public employees. See Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 284 (2d Cir. 2015). Even the Unions recognize that "the unique responsibilities of law enforcement officers set them apart." Unions Br. 56. Because the public has a stronger legitimate interest in the disciplinary

records of law enforcement officers than in those of other public employees, the District Court correctly determined that there was a rational, ***32** nondiscriminatory basis for treating the two sets of records differently.

Next, the Unions contend that when officers entered plea agreements in disciplinary proceedings, those agreements implicitly incorporated § 50-a of the Civil Rights Law. Again, we disagree. The New York Court of Appeals has cautioned that a contract "does not transform all statutory requirements that may otherwise be imposed under [the governing] law into contractual obligations," and it has "decline[d] to interpret [a contract] as impliedly stating something which [the signatories] have neglected to specifically include." Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC, 31 N.Y.3d 1002, 1007, 98 N.E.3d 720, 74 N.Y.S.3d 805, 807–08 (2018) (quotation marks omitted). "[R]ead[ing] into ... contracts terms that do not exist based on then-existing statutory language, ... would protect against all changes in legislation, ... [and] severely limit the ability of state legislatures to amend their regulatory legislation." Am. Econ. Ins. Co. v. State of N.Y., 30 N.Y.3d 136, 154, 87 N.E.3d 126, 65 N.Y.S.3d 94, 107 (2017) (quotation marks omitted). The Unions do not point to any legislative history in support of their argument, or to any evidence that the parties to the plea agreements intended to incorporate § 50-a as the Unions suggest. Nor do the Unions argue that § 50-a "affect[s] the validity, construction, and enforcement" of the plea agreements. Id.

The Unions also argue that the City's decision to publish certain disciplinary records without individualized review is arbitrary and capricious under Article 78 of the New York Civil Practice Law and Rules. See N.Y. C.P.L.R. §§ 7801, 7803(3). Substantially for the reasons provided by the District Court in its order, we reject their argument. As the District Court observed, the City appears to still recognize those specific FOIL exemptions that are designed to protect against unwarranted invasions of personal privacy or endangering a person's safety. See N.Y. Pub. Off. Law § 87(2)(b), (f).

Alternatively, the Unions assert that it was arbitrary and capricious for the City to change without explanation its established practice of asserting that records relating to unsubstantiated allegations should be withheld under FOIL's exemption for documents whose disclosure would constitute an unwarranted invasion of privacy. See Unions Br. 48–51; Matter of Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 520, 488 N.E.2d 1223, 498 N.Y.S.2d 111, 115 (1985). But that practice, if it ever existed, appears to have ended no later than 2017. See App'x 1614, 1643. And any change in the CCRB's position was adequately explained by the Mayor's public remarks following the repeal of § 50-a. See Transcript: Mayor de Blasio Holds Media Availability, NYC.gov (June 17, 2020), available at https://www1.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-deblasio-holds-media-availability.

C. Balance of the Equities

As for the balance of the equities, the Unions argue that the equities favor a preliminary injunction because disclosure of information is permanent, while those who seek information will suffer only delay if an injunction is entered. We do not doubt the sincerity of the Unions' concerns. As several amici point out, however, delay for victims unable to obtain information about the status of their complaints is itself costly both for them and for various other stakeholders in the criminal justice system, see, e.g., Brief for Former Prosecutors as Amici Curiae Supporting Intervenor-Defendant-Appellee-Cross-Appellant 6–10, as well as the press, see Brief for The Reporters Committee for Freedom of the Press & 31 News Media Organizations ***33** as Amici Curiae Supporting of Intervenor-Defendant-Appellee-Cross-Appellant 15–21. Because the Unions' stated interests are counterbalanced by other important policies, the District Court did not abuse its discretion in determining that the balance of the equities does not tip in their favor.

3. CPR's Cross-Appeal

The District Court granted the Unions' motion for a preliminary injunction in aid of arbitration as it related to the second provision of the CBAs relevant to this appeal, Section 8.[2] Under Section 8, a police officer who has "been charged with a 'Schedule A' violation as listed in [the] Patrol Guide," proceeds to a disciplinary trial on such charge, and is not determined guilty may "petition the Police Commissioner for a review for the purpose of expunging the record of the case." App'x 1528. On its cross-appeal, CPR argues that the District Court's decision to enjoin the disclosure of these records was an abuse of discretion because the NYPD cannot bargain away its FOIL obligations. See CPR Br. 22–29, 70–73.[3] But on this record, we conclude that enforcing Section 8 would not affect those obligations. As the City notes, "Schedule A" lists "technical violations," City Br. 16, such as "[i]mproper uniform or equipment" and

"[r]eporting late for duty," N.Y. Police Dep't Patrol Guide 206-03 Schedule A (effective April 20, 2017). And under New York law, "a law enforcement agency may redact records pertaining to technical infractions ... prior to disclosing such records" pursuant to FOIL. N.Y. Pub. Off. Law § 89(2-c). Accordingly, we conclude that the District Court did not abuse its discretion in preliminarily enjoining disclosure of these records. If CPR can show that "Schedule A" violations include anything other than "[t]echnical infraction[s]" as defined by New York law, see N.Y. Pub. Off. Law § 86(9), it may move the District Court for appropriate relief, see Weight Watchers Int'l, Inc. v. Luigino's, Inc., 423 F.3d 137, 141 (2d Cir. 2005).

We have considered the Unions' remaining arguments and conclude that they are without merit. For the foregoing reasons, the District Court's order is AFFIRMED.

All Citations

846 Fed.Appx. 25

Footnotes

1 We assume, without deciding, that the protections provided by the New York State Constitution are equivalent to their federal counterparts, as no party has suggested otherwise.

2 The relevant provision appears in Section 8 of most, but not all, CBAs. Like the District Court, we refer only to its usual location for ease and clarity.

3 We are not persuaded by the Unions' contention that CPR lacks standing to appeal because it is not a signatory to the CBAs. CPR is injured by the injunction because it prevents the NYPD from fulfilling CPR's FOIL request for documents covered by this provision. CPR argues that the CBAs impermissibly deprive it of rights guaranteed by FOIL.

198 A.D.3d 504
Supreme Court, Appellate Division, First Department, New York.

Junmei ZHANG, Plaintiff-Respondent,
v.
The CITY OF NEW YORK, et al.,
Defendants-Appellants,
Acacia Network Housing et al.,
Defendants.

14371
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Index No. 157088/15
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Case No. 2021-01220
|
ENTERED October 14, 2021

Attorneys and Law Firms

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Decolator, Cohen & DiPrisco, LLP, Garden City (Carolyn M. Canzoneri of counsel), for respondent.

Gische, J.P., Moulton, González, Kennedy, Scarpulla, JJ.

Opinion

***504** Order, Supreme Court, New York County (Francis A. Khan, III, J.), entered November 9, 2020, which, inter alia, granted plaintiff's motion for leave to renew and reargue, and upon renewal and reargument, ordered the City defendants to produce certain police officer personnel and disciplinary records from the NYPD and the Civilian Complaint Review Board, and denied the cross motion seeking in camera inspection of any such records, unanimously affirmed, without costs.

The court did not abuse its discretion in granting plaintiff's motion for leave to renew and reargue and, upon renewal and reargument, granting the motion to compel production of the documents at issue without first requiring an in camera review (*cf. K.V. v. New York City Hous. Auth.,* 180 A.D.3d 533, 115 N.Y.S.3d 891 [1st Dept. 2020]; *Luna v. Brodcom W. Dev. Co. LLC,* 177 A.D.3d 516, 110 N.Y.S.3d 547 [1st Dept. 2019]). In its order granting renewal and reargument, the ***505** court explained that "its underlying determination that the records were not material and necessary to the claims asserted in the complaint" had been made "considering the confidentiality conferred by [New York Civil Rights Law] Section 50–a, the legislative history underlying the statute and the cases that confirmed and expanded the statutory privilege against disclosure," which was repealed shortly after the initial order denying the motion to compel was issued.

The court providently exercised its discretion in reconsidering that issue. Based on the liberal discovery standard set forth in CPLR 3101, without considering the confidentiality conferred by the now repealed Section 50–a, plaintiff demonstrated that the document requests seek records material to the claims pled in the complaint, which include claims against the City defendants for negligent noncompliance with statutory requirements that may be supported by evidence in the personnel and disciplinary records (*cf. Parkinson v. Fedex Corp.,* 184 A.D.3d 433, 434, 125 N.Y.S.3d 88 [1st Dept. 2020] ["The personnel files are not discoverable, as plaintiff has not asserted a cause of action for negligent hiring"]).

To the extent that the City defendants' argue that the officer was acting within the scope of his employment, and therefore plaintiff's claims of respondeat superior ****592** foreclose any claims based on negligent hiring, retention, or training, City defendants should have, but did not, move to dismiss these claims (*see generally Karoon v. New York City Tr. Auth.,* 241 A.D.2d 323, 324, 659 N.Y.S.2d 27 [1st Dept. 1997] [granting summary judgment dismissing claims of employer negligence based on respondeat superior]).

All Citations

198 A.D.3d 504, 152 N.Y.S.3d 591 (Mem), 2021 N.Y. Slip Op. 05659

End of Document

New York Official Reports

Unreported Disposition
42 Misc.3d 1215(A), 984 N.Y.S.2d 633 (Table),
2014 WL 258558 (N.Y.Sup.), 42 Media L.
Rep. 1144, 2014 N.Y. Slip Op. 50044(U)

***1** Newsday LLC, Petitioner/, Plaintiff,

v.

Nassau County Police Department,
Respondent/, Defendant.

8172/13
Supreme Court, Nassau County
Decided on January 16, 2014

CITE TITLE AS: Newsday LLC
v Nassau County Police Dept.

ABSTRACT

Records
Freedom of Information Law
Law Enforcement Records—Court declined to order respondent, in effect, to certify to court annually that it is in compliance with FOIL.

Newsday LLC v Nassau County Police Dept., 2014 NY Slip Op 50044(U). Records—Freedom of Information Law—Law Enforcement Records—Court declined to order respondent, in effect, to certify to court annually that it is in compliance with FOIL. (Sup Ct, Nassau County, Jan. 16, 2014, Palmieri, J.)

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OPINION OF THE COURT

Daniel Palmieri, J.

The following papers were read on this proceeding/motion:

Notice of Verified Petition and Petition, dated 7-2-13.....1

Memorandum of Law in Support, dated 7-8-13.....2

Answer and Objections in Point of Law, dated 10-30-13.....3

Nassau County Police Department,

Memorandum of Law, dated 10-30-13.....4

Reply (Memorandum),dated 11-21-13.....5

This special proceeding/action for relief pursuant to CPLR Article 78 and Public Officers Law §§ 84 *et seq.*,and CPLR 3001, is granted to the extent set forth in this ***2** Decision, Order and Judgment.

This is a hybrid proceeding for relief under the Freedom of Information Law ("FOIL"), set forth in Article 6 of the Public Officers Law,§§ 84-90, and for related declaratory and mandamus relief. Petitioner/plaintiff Newsday LLC ("Newsday" or "petitioner") asserts that the respondent/ defendant Nassau County Police Department ("NCPD" or "respondent") has violated FOIL by consistently failing to respond properly to legitimate requests for information and documents. It seeks not only a vacatur of denials for certain information, but also a declaration by the Court that NCPD has engaged in a pattern and practice of refusing to obey the law, and a judgment in mandamus directing the NCPD to do what it is bound to do under FOIL. It also seeks a related direction ordering respondent, in effect, to certify to the Court annually that it is in compliance with the statute.Finally, petitioner seeks to recoup its costs, including legal fees, expended in its efforts to obtain the information sought.

The specific FOIL requests and the responses by NCPD that sparked this litigation shall be summarized, in the order in which they appear in the petition.

The first, dated October 4, 2012, was a request for each "Field name" for each data field within an "incident tracking" system maintained by respondent. The request defined "Field name" as the label or identification of an element of a computer database, and would include a subject heading such as a column header, data dictionary, or record layout. By letter dated January 15, 2013, NCPD denied the request pursuant to Public Officers Law § 87(2)(e)(i) and § 87(2)(e)(iv) and 87(2)(f), stating that "disclosure of that information could impede or interfere with pending and/or future investigation. It would reveal the method by which the [NCPD] conducts investigations and non-routine investigative procedures. Additionally, disclosure could also jeopardize the safety of our officers." No further elaboration or reasons were given.

Newsday took an administrative appeal from this "Field name" denial on February 13, 2013. Thomas V. Dale, Commissioner of Police, upheld the denial by letter dated March 7, 2013, stating that "Information gathering and the means by which the NCPD classifies that information is an integral part of investigations... your request... is again denied." Commissioner Dale cited the same reasons found in the initial denial, without further comment.

The second Newsday request is dated January 15, 2013. That request was for "arrest reports, police reports, case reports and any other publically releasable documents" involving four criminal cases, identified by the name of the person charged. This "four criminal cases" request was denied by letter dated February 21, 2013, the NCPD officer issuing the denial stating that it was based on Public Officers Law § 87(2)(b), "which exempts from disclosure records, which constitute an unwarranted invasion of personal privacy". There was no additional statement of reasons given.

Petitioner took an internal administrative appeal from this denial on March 22, 2013. By letter dated May 15, 2013, Thomas C. Krumpter, First Deputy Commissioner of ***3** Police, denied the appeal. He stated that "any records relating to the above named [four] individuals would not be provided without an authorization from those individuals or from an individual involved in the incident. New York State Public Officers Law § 87(2)(b), exempts from disclosure records which constitute an unwarranted invasion of personal privacy. In furtherance of [that section], it is the policy of this Department not to release records relating to an investigation unless it is requested or authorized by a person involved in the incident. Further, your request is denied as the disclosure... could identify confidential sources or information relating to criminal investigations and could reveal non-routine investigative techniques. Therefore your request is also denied pursuant to Public Officers Law §§ 87(2)(e)(iii) and 87(2)(e)(iv)." A final reason for the denial was§ 87(2)(f), which provides that the governmental agency may withhold information which, if disclosed, "would endanger the life or safety or any person."

The third Newsday request is dated February 15, 2013, and requested records indicating all monetary payments to confidential informants/cooperating witnesses from 2008 to 2012, including, if possible, date and method of payment, rather than an annual total, including ancillary paid expenses such as meals, housing and transportation. The request specifically noted that "we are clearly not seeking information that identifies individuals, simply the amount of public money that's gone to informants and cooperating witnesses."

By letter dated February 26, 2013 NCPD denied access to records regarding these confidential informant payments ("CI payments"), stating that it was doing so pursuant to Public Officers Law § 87 (2)(e)(iii) and (iv) and § 87(2)(f), because "the release of this information would endanger the safety of certain individuals and would reveal confidential information relating to criminal investigations and disclose investigative techniques and procedures." Upon administrative appeal, which petitioner initiated on March 28, 2013, First Deputy Commissioner Krumpter upheld the denial by letter dated April 19, 2013, citing the same reasons and adding that release would interfere with pending investigations, citing Public Officers Law § 87(2)(e)(i).

The fourth request concerned a widely reported case in which Leatrice Brewer was accused of the 2008 killing of her own children. By letter dated April 25, 2012, petitioner requested all documents related to this defendant, her home in New Cassel, logs and radio dispatches directed to her home, and GPS tracking data related to patrol vehicles dispatched to her home for the hour before and three hours after any calls for services to her location. Newsday explained that its request was based on its assertion that the police had been called to her home prior to the time she killed her children.

The request for the Brewer records was denied by way of a form dated May 1, 2012, which had checked as the reasons for denial under the Public Officers Law 1) the need for authorizations from persons involved in the incident (citing § 87(2)(b)), 2) exposure of criminal investigative technique or procedure (citing § 87(2)(e)(iv), and, regarding E911 records, County Law § 308(4) [barring release of records of calls made to ***4** an E911 system except to governmental agencies/ departments or private providers of medical or emergency services]. Upon Newsday's administrative appeal of May 22, 2012, Deputy County Attorney Brian Libert, serving as the FOIL appeals officer for this appeal, remanded the request to NCPD "so that it may specifically identify and enumerate documents in its possession and articulate any exemption it may have as to a particular record." Letter dated June 22, 2012.

On remand, NCPD again denied the request by way of letter from Detective Sergeant Israel Santiago, dated July 20, 2012.. The reasons were 1) that the request for "all documents" did not reasonably describe the specific documents being sought, 2) unwarranted invasion of personal privacy (citing Public Officers Law § 87(2)[b]), 3) County Law § 308(4), and 4) that the release of GPS tracking data could impede or interfere with pending an/or future investigation, reveal methods of investigation and could jeopardize officer safety (citing Public Officers Law §§ 87(2)(e)(i) and (2)(e)(iv) and (2)(f)).

Upon administrative appeal after remand, by letter dated September 20, 2012, NCPD notified Newsday that the County Attorney had requested that NCPD reconsider its second denial and, as a result, NCPD was producing documents, but redacted "in order to prevent an unwarranted invasion of personal privacy of certain individuals." Those records that were produced were, in fact, redacted, obscuring such items as addresses where incidents involving Brewer occurred, and the names and other persons involved, including witnesses and those suspected of criminal behavior.

In addition to the privacy exemption, NCPD's transmittal letter explained that additional redactions of information had been made regarding "dispatch logs, radio transmissions, etc. to Brewer's home(s)" pursuant to County Law § 308(4) and Public Officers Law § 87(2)(a), which permits an agency to withhold information if it is "specifically exempted from disclosure by state or federal statute." As noted above, County Law § 308(4) bars a general release of records of calls made to an E911 system. Finally, the letter explained that GPS tracking data was again denied on the ground that disclosure could impede or interfere with pending or future investigations, reveal investigative techniques and jeopardize officer safety.

Newsday challenged the redactions in an administrative appeal by letter dated January 29, 2013. It asked for unredacted pages so it might know the scene of an incident, Brewer's address and occupation, witnesses, arrestees or suspects regarding criminal incidents (not all of which concerned the killing of the children), persons against whom Brewer had an order of protection, and the name of a DSS/CPS [Department of Social Services/Child Protective Services] employee assigned to look into a matter. Newsday also challenged whether all documents concerning Brewer were produced, whether or not redacted. The appeal was denied by letter from Deputy County Attorney Libert dated April 3, 2013.

The fifth and final request addressed in this proceeding was dated August 21, 2012 ***5** and sought the names of all sworn officers in the police department. The parties have resolved this request, albeit not without complaint from petitioner that it took more than a year to do so. Accordingly, the Court will not address it, except as it concerns the fee request.

As is made clear in the legislative declaration, the Freedom of Information Law is intended to open the workings of government to the public, including through a free press, which is cast as the pubic's representative for that purpose. Public Officers Law § 84. To effect this purpose, the statutory scheme is comprehensive and at its core presumes that governmental records are available for review. It thus places the burden on a resisting agency or department to explain how a given request for records fits under one of the statutory exemptions (Public Officers Law § 89(4)[b]), which are to be narrowly construed to provide maximum access to the public. *See, e.g., Matter of Gould v New York City Police Department,* 89 NY2d 267 (1996); *Matter of Capital Newspapers v Whalen*, 69 NY2d 246 (1987).

Relatedly, the department or agency must provide in support of a denial particular and specific justification for its action. *Matter of Fink v Lefkowithz,* 47 NY2d 567 (1979); *Matter of Flores v Fischer,* 110 AD3d 1302 (3d Dept. 2013); *Matter of Madera v Elmont Public Library,* 101 AD3d 726 (2d Dept. 2012). Conclusory or speculative assertions that certain records fall within a statutory exemption are insufficient; evidentiary support is needed. *Matter of Porco v*

*Fleischer,*100 AD3d 639 (2d Dept. 2012); *Matter of Dilworth v Westchester County Dept. of Correction,* 93 AD3d 722 (2d Dept. 2012); *Matter of Madera, supra; see also Washington Post Co. v New York State Ins. Dept.,* 61 NY2d 557 (1984).

Further, given the arguments made on this proceeding, it is worth noting that, as a general matter in Article 78 review, a court should not evaluate arguments and proof that were not raised or presented at the administrative level. *Matter of Molloy v New York City Police Dept.,* 50 AD3d 98, 100 (1st Dept. 2008); *Matter of Graziano v Coughlin,* 221 AD2d 684, 686 (3d Dept. 1995). Nevertheless, the Court will address such arguments here, both because of the alleged potential effect of release on the confidentiality rights of third parties (*Matter of Rose v Albany County Dist. Attorney's Office,* 111 AD3d 1123 [3d Dept.3013]), citing, *inter alia, Matter of Johnson Newspaper Corp. v Stainkamp,* 61 NY2d 958 [1984]), and because petitioner has commenced a hybrid proceeding that blurs the line between Article 78 and a declaratory judgment action. In any event, these arguments do not change the result.

In view of the foregoing well-established law, it is apparent to this Court that the denial of access to the records requested was not adequately supported by the respondent, and that the petition should be granted for that reason, to the extent indicated.

In denying the "field names" records NCPD provided no explanation or proof that disclosure of this information would have the consequences that would fall within the stated statutory exemptions. Rather, it did no more than restate the statutory language. ***6** Although a Public Officers Law § 87(2)(e)(i) exemption might shield data if a specific investigation were ongoing (*Matter of Lesher v Hynes,* 19 NY3d 57 [2012]), there is no such claim here. With regard to the reference to Public Officers Law § 87(2)(f), there is no explanation as to how any person's life or safety would be endangered.

In his affidavit submitted on this proceeding, First Deputy Commissioner Krumpter also states that release "could potentially" give away specific knowledge of how respondent's record management system is structured, and that an individual with sufficient technical knowledge could "reverse engineer" the system. He states that based upon conversations with members of respondent's Information Technology Unit ("ITU"), "all records could be exposed if hacked into." It is claimed that release would give rise to a substantial likelihood that violators (*i.e.,* criminals) could evade detection by tailoring their conduct in anticipation of avenues of inquiry.

However, while these statements are made upon the affiant's "training and experience as First Deputy Commissioner", he does not claim to be an information technology expert, and the obviously hearsay statements attributed to ITU personnel are inadmissible. Before a court could accept them, these contentions clearly require expert proof of how a security breach could occur if the requested data were released, and none is offered. The absence of such proof is particularly conspicuous here since ITU personnel are employees of NCPD. Under these circumstances, this Court cannot find that the respondent has shown that the "field names" information in the incident tracking system as sought by petitioner falls within Public Officers Law § 87(2)(e)(iv), as claimed. Thus, resort to this exemption is inadequate.

Deputy Commissioner Krumpter further asserts that release would violate respondent's obligation to the vendor of the software it uses in its incident tracking system, would permit disclosure of protected trade secrets, and that the vendor thus would sustain an injury to its competitive position, Public Officers Law § 87(2)(d). These claims are unsupported by proof and thus constitute no more than conclusions and speculation, which are insufficient. There is no statement from the unnamed vendor, let alone persuasive evidence, demonstrating how release of the information would cause an injury to its competitive interests. Accordingly, it must be rejected. *See Matter of Markowitz v Serio,* 11 NY2d 43, 50 (2008). The records shall be produced.

The second FOIL request, for the "four criminal cases" documents, was resisted primarily on the basis of the "unwarranted invasion of personal privacy" exemption, Public Officers Law § 87(2)(b), as more specifically defined in section 89(2)(b) . That is restated here, although not further argued. In any event, it is without merit. The latter statute defines this protection as extending to seven categories of information. While the statute provides that such an invasion of privacy is not limited to this list, respondent relies on no more than its own policy, stated to be "in furtherance of" this section, not to release records without an authorization from the individuals involved in the incident. Without more, this is patently inadequate. There is no reference to any of the seven ***7** categories, nor to any other specific explanation as to how this could lead to an "unwarranted invasion" of personal privacy. Respondent also failed to address section 89(2)(c)

(i), which provides that disclosure shall not constitute such an invasion of privacy when identifying details are deleted, which clearly was not considered.

On this proceeding, however, the emphasis is on the stated fact that each of these arrests was the result of undercover investigations. Krumpter states that it is the position of NCPD, in effect, that any document related to undercover investigations should not be produced because disclosure could lead to the identification of undercover officers, thereby putting them at risk. Newsday does not disagree that NCPD should be able to protect the identities of such officers, but argues that information leading to their identification can be redacted. Krumpter's response is "If any redaction were performed it would be so expansive as to render the records completely meaningless."

Unlike his arguments regarding the records tracking system/ field headings, Krumpter's statements about the criminal investigations records carry the weight of his position and experience. However, on the present record the Court cannot evaluate his contention that redaction cannot be performed without eviscerating the records in their entirety, and his statement, standing alone, is insufficient as a reason for withholding all documents.

Agencies of government may be required to produce records that contain both information that may be withheld under a statutory exemption and other information that is not so protected, with redaction of the former. *See, Schenectady County Society for Prevention of Cruelty to Animals v Mills,* 18 NY3d 42 (2011). A blanket refusal based on the "mixed" nature of requested documents cannot be countenanced. *Id.* Accordingly, respondent is directed to produce the requested documents, redacted to protect the names of undercover officers.

This is without prejudice to petitioner's later request for an *in camera* comparison of the unredacted documents to the redacted copies should petitioner believe that the redactions were not made in good faith, and were unnecessary to protect undercover officers' identities. The Court will retain jurisdiction to that extent, including jurisdiction to award costs and fees should those redactions be challenged and the Court ultimately agree with petitioner that redactions were unnecessarily excessive or wholly unnecessary for their stated purpose. It is in the first instance the respondent's task to review and determine what records are responsive to the request, and to make those redactions that are necessary, and it cannot shift that initial responsibility on to the courts.

That branch of the petition that concerns the third request, payments to confidential informants/cooperating witnesses, must yield a similar result. The statement that the records sought are highly sensitive, are protected even within NCPD itself, and that disclosure would pose an actual risk to the lives of the individuals involved, including undercover officers (Krumpter Aff., at 8), is unsupported by any detail as to why and how records of payments to unidentified informants could result in the ***8** identification of such persons and the resultant risk. Nor is there any assertion that an open investigation might be compromised by these records, or an explanation of how law enforcement techniques would be revealed.

Importantly, respondent does not provide any reason as to why a careful redaction of details regarding such payments, revealing only the payment information requested, still would fail to protect the individuals involved and would lead to a disclosure of identities. Although respondent correctly cites authority to the effect that even the possibility that safety could be compromised can be a sufficient grounds for withholding records (*Matter of Ruberti, Girvin & Ferlazzo P.C. v New York State Div. of State Police,* 218 AD2d 494 [3d Dept. 1996]), there still must be a showing of such possibility, and here there is nothing but conclusory statements. Accordingly, the petition is granted as to this request. Respondent may redact information deemed necessary to protect the identity of persons it considers vulnerable, and to protect confidential law enforcement techniques or ongoing investigations. The Court will retain jurisdiction to hear a challenge to such redactions, including jurisdiction to award costs and fees should those redactions be challenged and the Court ultimately agree with petitioner that redactions were unnecessarily excessive or wholly unnecessary for their stated purposes.

The Brewer requests, fourth on Newsday's list, have devolved from the initial objection and reconsideration to whether the redacted documents ultimately received constitute an adequate response. The Court has recited above the history leading to the production because it contains the seeds of the respondent's response, and thus are important as a basis for understanding the redactions.

Initially, the Court rejects respondent's resort to County Law § 308(4). That section shields only those records of calls made

to an emergency 911 system, not all 911 records generally. As exemptions are to be narrowly construed (*Matter of Gould v New York City Police Department,* 89 NY2d 267, *supra*), NCPD was not entitled to redact or withhold records except those which were of the calls themselves. Records of a municipality's own dispatches which may have resulted from those calls therefore would have to be produced, and redaction could be made only to the extent that the logs or other records contained actual call content.

Further, given the undisputed notoriety and public interest in the Brewer case, respondent's reliance on a line of cases denying on privacy grounds inmates' access to witness information that concerned only their own matters is misplaced. This includes *Matter of Bellamy v New York City Police Dept.,* 87 AD3d 874 (1st Dept. 2011), the key case upon which respondent relies in its memorandum, where privacy issues clearly were secondary to concerns about the personal safety of persons interviewed during the investigation of petitioner's own criminal case.

As there is no showing of safety concerns in the Brewer matter and, with regard to privacy, no demonstration that revealing the names would fall within one of the examples of "unwarranted invasion of personal privacy" set forth in ***9** Public Officers Law § 89(2)(b), the Court must balance public interest against more generalized privacy concerns. *Matter of New York Times Co. v City of NY Fire Dept.,* 4 NY3d 477, 485 (2005); *see also Mulgrew v Board of Educ. of the City School Dist. of the City of New York,* 87 AD3d 506 (1st Dept. 2011). In the present case, the undisputed public interest favors disclosure.

The Court also notes that in its opposing memorandum respondent presents supporting arguments only with regard to third parties, addressed in the preceding paragraph, and the identification of a CPS/DSS worker involved in a matter affecting Brewer's family. As to the latter, this must be disclosed as it concerns the performance of a public employee in his or her job, which is of legitimate public interest generally, as well as in this particular case. *Mulgrew, supra.* There is no cogent argument made in favor of redacting many of the other details petitioner seeks, such as incident scene, Brewer's address and occupation, information regarding the deceased children, and damage to vehicles. Other than 911 call content, the only redaction that may be supportable involves a party who was the subject of an order of protection obtained by Brewer, which might have been sealed. *See* CPL 160.50. In that case, the Court would agree that all information contained therein should be withheld, but the respondent would be bound to state that it was in fact sealed. Otherwise, it must provide the information.

To the extent respondent relied on those sections of FOIL that refer to interference with pending or future investigations, revealing investigative techniques, or compromising officer safety, there has been no showing as to how production of the records sought would cause the negative effect cited. The Court therefore cannot find that an exemption under the statute has been satisfied.

Accordingly, that branch of the petition that concerns the Brewer records is granted, and unredacted copies of the records previously served on petitioner are to be turned over to petitioner, with the possible exception of the order of protection information, and 911 call content, as set forth above.

The Court declines petitioner's invitation to speculate as to the existence of other records that were not produced at all, and to direct NCPD to supplement its response with any documents responsive to petitioner's original request, if yet not revealed. However, the Court will retain jurisdiction of this aspect of the matter, as it has with regard to the other elements of the case that are not as of yet fully resolved, and considers it respondent's duty to produce any records it later may find that must be disclosed under the present decision. This is consistent with and akin to the ongoing duty of disclosure imposed on all parties to litigation under the Civil Practice Law and Rules. *See* CPLR 3101(h).

Those branches of the petition/complaint that seek declaratory and mandamus relief are denied.

The "pattern and practice" petitioner wishes the Court to declare as being in violation of FOIL -- respondent's use of form denials, lack of particularized justifications, ***10** and untimely responses to administrative appeals -- are grounded on the five NCPD responses discussed here. To declare violations based upon the Court's findings essentially is redundant, and violations also can be redressed by the assessment of costs and fees pursuant to section 89(4)(c), discussed below. Further, if Newsday feels an advisory opinion on the issue is warranted, it is free to seek one from the Committee on Open Government, pursuant to Public Officers Law § 89(1)(b). That is what the statute currently provides. Petitioner is asking the Court either to engraft new forms of relief onto the existing statutory scheme, which is a legislative

task, or, in effect, to recognize a new cause of action based on federal law it cites in its memorandum.

As to the latter, establishing a new cause of action is best left to the appellate courts, especially our Court of Appeals, as such a determination "is largely a question of policy" (*Donohue v Copiague Union Free School Dist.,* 47 NY2d 440, 445 (1979) [Wachtler, J., concurring] and can have both "foreseeable and unforeseeable consequences..." *Caronia v Philip Morris USA, Inc.,* _ NY3d _, 2013 WL 6589454, quoting *Madden v Creative Servs.,* 84 NY2d 738, 746 (1995). This Court therefore concludes that it would be inappropriate to recognize the claim advanced by petitioner.

Accordingly, that branch of the petition that seeks declaratory relief in the form stated in the notice of petition is denied, and the Court instead declares that the existing statute provides for all the relief currently available to the petitioner. *See Matter of New York Times Co. v City of New York Police Dept.,* 103 AD3d 405 (1st Dept. 2013).

The Court also concludes that mandamus is unavailable here. "[T]he extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought." *See, e.g., Matter of Henrius v Honoroff,* 111 AD3d 828 (2d Dept. 2013). There is no clear legal right to have respondent annually certify to the Court that it is obeying FOIL's directives regarding the provision of sufficiently particularized reasons for denying requests, and to timely respond to administrative appeals. Although Newsday, as a requester under FOIL, has a right to a timely response in accord with the statute, the petitioner did respond, albeit imperfectly, and thus it appears to the Court that the issue here is how it performed its duties rather than whether it refused to do so in the first instance. *See Klostermann v Cuomo,* 61 NY2d 525, 540 (1984); *see also Matter of New York Times Co. v City of New York Police Dept., supra* [review of FOIL determination does not provide for mandamus relief].

Finally, that branch of the petition that is for an award of costs and attorney's fees pursuant to Public Officers Law § 89(4)(c) is granted. That section provides that an award may be made where the petitioner has "substantially prevailed," and where 1) the governmental agency had no reasonable basis for denying access to the requested documents/information, or 2) failed to respond to initial requests or appeals within the statutory time periods prescribed by section 89((3) (a) and (4)(a). Such an award, however, remains addressed to the discretion of the reviewing court. *Matter of Maddux v* ***11** *New York State Police,* 64 AD3d 1069 (3d Dept. 2009).

In this case the petitioner has substantially prevailed, as this Court has not upheld any of the denials of access issued by the respondent and has directed remedial action. Further, in almost all cases there was no reasonable basis for the denials, and in several instances respondent did not articulate any reason, let alone a reasonable one, in support of its stated position. In the Brewer case, respondent continued to resist even after the County Attorney granted Newsday's appeal. Further, several responses to requests and appeals were beyond the statutory periods. In addition, the material sought was of interest to the general public, as it concerned the functioning of its police and related services, and interest to the public is a factor that has been noted by appellate courts in determining whether an award should be made. *See Matter of Grace v Chenango County,* 256 AD2d 890 (3d Dept. 1998).

The overall record therefore is such that an award is appropriate. *See Matter of Legal Aid Society v New York State Dept. of Corrections and Community Supervision,* 105 AD3d 1120 (3d Dept. 2013). Accordingly, respondent shall pay the reasonable costs, including reasonable attorney's fees, incurred by petitioner after the initial denials by respondent, as such expenses pertain to all its requests for documents and information described in this decision, at both the administrative appeals and court levels, excepting those costs and fees associated with the "sworn officers" requests. The latter is excepted because the parties resolved that matter, and the Court will not discourage such settlements by having NCPD remain liable for petitioner's expenses notwithstanding what appears to be a good-faith effort to resolve the issue. In so finding, however, the Court notes that there may be circumstances where even an ultimate resolution will not shield respondent from such payments.

As no affirmation of services or other proof is offered by petitioner or its counsel regarding the proper amount of fees, a hearing is required.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed by petitioner at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing on February 18, 2014, at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to

file a Note of Issue or to appear as directed may be deemed an abandonment of the claim for costs and fees giving rise to the hearing.

This directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

In sum, the petition is granted as follows: 1) the "field names" must be produced; 2) the documents responsive to the "four criminal cases" request must be produced, with redactions deemed necessary by NCPD, subject to the Court's continuing jurisdiction to hear a further proceeding under this index number regarding that production and those redactions; 3) the records responsive to the "confidential informants" payments request ***12** are to be produced, with redactions deemed necessary by NCPD, subject to the Court's continuing jurisdiction to hear a further proceeding under this index number regarding that production and those redactions; 4) the "Brewer" material must be produced without the redactions found in the present record, excepting so much thereof that contains information found in a sealed record, and records of 911 call content; and 5) costs and fees are awarded as expended in the pursuit of the records described in items 1-4 of this paragraph, and the amount thereof shall be established in a hearing.

Respondent shall serve on petitioner all records directed to be produced within 30 days of the date of this Order, unless further extended by agreement of the parties or by Court direction.

All other requests for relief are denied.

This shall constitute the Decision, Order and Judgment of this Court.

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Dated: January 16, 2014E N T E R:

_____

Hon. Daniel Palmieri

J.S.C.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HONORABLE THOMAS RADEMAKER, JUSTICE

----------X TRIAL IAS/PART 21

In the Matter of the Application of

NEWSDAY LLC, **Index No. 601813/2021**

Petitioner(s),

For a Judgment pursuant to Article 78 of the CPLR,

Motion Seq. No.: 001
Motion Submitted: 11/01/2021

-against-

NASSAU COUNTY POLICE DEPARTMENT,

Respondent(s).

----------X

The following papers read on this motion:

Notice of Petition/Petition/Memorandum of Law/Exhibits.....X
Answer/Memorandum of Law in Opposition.....X
Memorandum of Law in Reply.....X

Petitioner, Newsday, LLC ("Petitioner") moves by Notice of Petition for a judgment pursuant to Civil Practice Law and Rules (CPLR) Article 78, CPLR 3001 and the Freedom of Information Law, Article Six of the New York Public Officer Law ("FOIL") for the following relief: a) vacating, overruling and prohibiting the enforcement of the final administrative decisions related to the Newsday FOIL Requests (as identified in the Petition) and directing Respondent Nassau County Police Department ("Respondent") to provide Petitioner with immediate access to

the records specified in those requests, b) directing Respondent to provide immediate access to the requested records specified in the Petitioner's FOIL requests, and requiring the Respondent to articulate "a valid, particularized, and non-speculative justification" for any redactions it makes thereto; and c) awarding Petitioner costs and attorneys' fees pursuant to Public Officers Law 89[4][c].

The central question herein is whether the New York State Legislative repeal of NYCRL § 50-a[1] on June 12, 2020, now requires the Respondent to provide documents pursuant to FOIL without limitation. The Court holds that it does not.

As acknowledged by both parties, the legislative intent of the repeal, *inter alia*, was to better serve the public interest by having law enforcement disciplinary records subject to the FOIL law (rather than Civil Rights Law § 50-a) to the same extent as records concerning other government officials. Petitioner acknowledges receipt of documents pursuant to their request but primarily takes issue with the redactions therein. In this regard, the Petitioner's reliance upon the repeal of Civil Rights Law § 50-a and the legislative intent behind same is misplaced.

As previously stated, the law now governing the subject records is the Public Officers Law. The exemptions in the FOIL law are numerous and clearly leave to an agency, department, or municipality the discretion to redact same. (Public Office Law § 87[2]) Applicable exemptions from disclosure under FOIL include, but are not necessarily limited to, disclosures which would constitute an unwarranted invasion of personal privacy, disclosures which would interfere with ongoing law enforcement investigations or judicial proceedings, those which would deprive a person of a right to a fair trial or impartial adjudication, identify a confidential source or disclose confidential information relating to a criminal investigation, reveal criminal investigative

techniques or procedure, except routine techniques or procedures, or if disclosure could endanger the life or safety of any person. (See Public Office Law §§ 87[2][b][e][i][ii][iii][iv] & [h]).

Additionally, it is within the discretion of the Committee on Public Access to Records to 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. (Public Officer Law §§ 89[2][a] & [b]).

While FOIL exemptions are to be narrowly read, they must, of course, be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL.(*Matter of Suhr v NY State Dept. of Civ. Serv.*, 193 AD3d 129, 130 [3d Dept 2021]).

In view of the repeal of Section 50-a of the Civil Rights Law and the provisions added to FOIL to address law enforcement agency disciplinary records, FOIL now requires that upon a request thereof, a law enforcement agency must review all records of complaints, whether or not substantiated, to determine rights of access. Courts considering Article 78 FOIL appeals make findings of fact that are specific to the records before it and should be careful to identify that each such determination of FOIL accessibility by other agencies looking at other records will be similarly fact-specific. (*See, e.g., Buffalo Police Benevolent Association v. Brown*, 69 Misc. 3d 998, 1004-1005 [Sup. Ct. Erie Co. 2020] ["Finally, it should be noted that the court's rulings do not mean that police disciplinary records . . . shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision is made by the Respondent police department in accordance with the provisions and exemptions set forth in the Public Officers Law, including § 87[2][b]."]; *Schenectady Police Benevolent*

Association v. City of Schenectady, 2020 N.Y. Slip Op. 34346[U] [Sup. Ct. Schenectady Co. Dec. 29, 2020] ["notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular FOIL requests outstanding as to Patrolman Pommer and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits"]). "Contrary to Petitioner's assertions, the repeal of CRL § 50-a does not require documents related to unsubstantiated claims against police officers to be released. Further, the public interest in the release of unsubstantiated claims do not outweigh the privacy concerns of individual officers."(*Matter of NY Civ. Liberties Union v City of Syracuse*, 72 Misc 3d 458, 467 [Sup Ct, Onondaga County 2021])

To say that the Legislature intended the settled exemptions of Public Officer Law §§ 84, et seq, to no longer exist as a result of a repeal of another law would be incorrect. Where an agency has determined that disclosure would result in an unwarranted invasion of personal privacy, among other reasons, the requested records may be withheld in their entirety. However, an agency or department seeking to prevent disclosure of records that would constitute an unwarranted invasion of personal privacy has an obligation to redact those invasive details and disclose the remainder of the records. (See Comm on Open Govt FOIL-AO-19805 [April 30, 2021]).

In sum, if the Legislature intended the settled exemptions of Public Officer Law to be repealed, then it could have specifically repealed same.

Based upon the foregoing, the remainder of Petitioner's contentions need not be addressed. Accordingly, Petitioner's motion for the relief sought is **DENIED** in its entirety and all other requested relief not specifically addressed herein is **DENIED.**

This constitutes the Decision and Order of the Court.

Dated: November 3, 2021
Mineola, N.Y.

Hon. Thomas Rademaker, J.S.C.

Rickner Pllc v. City of New York

Supreme Court of New York, New York County

May 25, 2022, Decided

INDEX NO. 157876/2021

Reporter
2022 N.Y. Misc. LEXIS 2233 *

RICKNER PLLC, Petitioner, - v - THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, Respondents.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: Reported at ***Rickner Pllc v. City of New York***, 2022 NYLJ LEXIS 1068 (May 25, 2022)

Prior History: *Rickner PLLC v. City of New York, 2021 N.Y. Misc. LEXIS 5614 (N.Y. Sup. Ct., Oct. 28, 2021)*

Core Terms

records, disclosure, arrest, documents

Judges: **[*1]** HON. WILLIAM PERRY, J.S.C.

Opinion by: WILLIAM PERRY

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this Article 78 proceeding, Petitioner Rickner PLLC seeks an order directing the City of New York and the New York City Police Department ("NYPD") to produce Internal Affairs Bureau ("IAB") records pertaining to the arrest of David A. Campbell on January 20, 2018. Respondents oppose the petition and cross-move to dismiss.

Background

On December 16, 2020, pursuant to the Freedom of Information Law ("FOIL"), Petitioner requested from the NYPD:

> any records relating in any way to the arrest of David A. Campbell on January 20, 2018 at approximately 10:20 p.m., the investigation that led to that arrest, and the subsequent prosecution in the case *The People of the State of New York v. David Campbell*, including but not limited to all audio and video, all body worn camera video, all arrest reports, all documents relating to the investigation of the underlying crime, all witness statements, and investigation reports, **[*2]** all forensic records, all documents relating to any injuries sustained by the arrestee, all documents related to any force used, and all documents relating to any injuries to any officers related to the arrest.
> (NYSCEF Doc No. 1, Petition, at ¶ 13.)

On April 20, 2021, NYPD closed the request and stated that it was "unable to locate records responsive to your request based on the information you provided." (NYSCEF Doc No. 4.) Petitioner appealed the denial and provided further information via email on the same date. (NYSCEF Doc No. 5.)

NYPD responded the next day, on April 21, 2021, providing "two (2) Complaint Reports, two (2) Aided Reports, one (1) SPRINT Report, one (1) Threat, Resistance or Injury Worksheet with Supervisor Assessment, and two (2) Arrest Reports." (NYSCEF Doc No. 6.) However, pursuant to Public Officers Law ("POL") *§ 87*, NYPD noted that it was withholding an IAB record because disclosure:

> (1.) would constitute an unwarranted invasion of

personal privacy [§ 87(2)(b)];

(2.) could endanger the life or safety of the officer and other named parties [§ 87(2)(b)]; and,

(3.) would reveal non-routine criminal investigative techniques or procedures [§ 87(2)(e)(iv)].

(NYSCEF Doc No. 6 at 2.)

Petitioner commenced this Article **[*3]** 78 proceeding on August 23, 2021 challenging the denial, on the basis that the June 12, 2020 repeal of Civil Rights Law ("CRL") § 50-a ("Personnel records of police officers, firefighters and correction officers") signaled the Legislature's intent of making law enforcement disciplinary records fully available. (Petition at ¶¶ 24-31.) Petitioner argues that NYPD has failed to establish specific entitlement to a FOIL exemption and that any personal privacy concerns could be resolved through redaction. (*Id.*)

In opposition, Respondents argue that the IAB record at issue in this case "discuss[es] an internal investigation about allegations against an NYPD officer that have never been substantiated." (NYSCEF Doc No. 13, Opposition, at ¶ 22.) In support, Respondents cite to caselaw holding that, even after the repeal of CRL § 50-a, "'the public interest in the release of unsubstantiated claims do not outweigh the privacy concerns of individual officers.' *See* New York Civil Liberties Union v City of Syracuse, 72 Misc 3d 458, 467, 148 N.Y.S.3d 866 [Sup Ct, Onondaga County, May 5, 2021]." (*Id.* at ¶ 19.)

Discussion

The policy underlying FOIL "is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public." (Matter of Johnson v New York City Police Dept., 257 AD2d 343, 346, 694 N.Y.S.2d 14 [1st Dept 1999]; *see also* Matter of Abdur-Rashid v New York City Police Dept., 31 NY3d 217, 224-25, 76 N.Y.S.3d 460, 100 N.E.3d 799 [2018] ["The statute is based on the **[*4]** policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government"].)

It is well settled that all records of a public agency, including police records, are presumptively open for public inspection and copying, and that the burden rests at all times on the government agency to justify any denial of access to records requested under FOIL. (*See* New York State Rifle and Pistol Assoc. v Kelly, 55 AD3d 222, 224, 863 N.Y.S.2d 439 [1st Dept 2008]; *New York Civil Liberties Union v New York City Police Dept., 20 Misc3d 1108[A], 866 N.Y.S.2d 93, 2008 NY Slip Op 51279[U] [Sup Ct, NY County 2008] see also* Gould v New York City Police Dept., 89 NY2d 267, 274, 675 N.E.2d 808, 653 N.Y.S.2d 54 [1996] [FOIL was enacted "[t]o promote open government and public accountability"].)

As set forth in the statute, FOIL involves a three-step process. After an agency initially receives a FOIL request, it must release the records or deny the request in writing. (POL § 89 [3] [a].) There is no requirement to specify the reasons for the denial. In the second step, upon receiving an appeal of an initial denial, the designated person in the agency must "fully explain in writing to the person requesting the record the reasons for further denial or provide access to the record sought." (POL § 89 [4] [a].) If the appeal is denied, the last step is the article 78 proceeding. "In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency **[*5]** involved shall have the burden of proving that such record falls within the provisions of such subdivision two." (POL § 89 [4] [b].)

In furtherance of FOIL's legislative policy favoring disclosure, "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566, 496 N.E.2d 665, 505 N.Y.S.2d 576 [1986].)

Here, NYPD has not met its burden to demonstrate that the requested material falls squarely within the exemptions relied on to justify withholding the records sought. As such, the court finds the IAB records at issue are subject to disclosure in furtherance of FOIL's underlying policy aims of promoting public inspection and governmental transparency.[1] "[I]f the legislature's

[1] This court notes that following the repeal of CRL § 50-a, other trial courts reviewing this issue have concluded that such records are not subject to disclosure. (*Compare* Gannett Co. v Herkimer Police Dept., 2022 N.Y. Misc. LEXIS 1694, 2022 WL 1281365, at *3 [Sup Ct, Oneida County, Apr. 28, 2022]; New York Civil Liberties Union v City of Syracuse, 72 Misc 3d at 467; *with* Puig v City of Middletown, 71 Misc 3d 1098, 1108, 147 N.Y.S.3d 348 [Sup Ct, Orange County, Apr. 7, 2021];

intent was to shield unsubstantiated [disciplinary] records it could have specified as such." (*New York Civil Liberties Union v New York City Dept. of Correction, 2022 N.Y. Misc. LEXIS 1741, 2022 WL 1156208, at *2 [Sup Ct, NY County, Apr. 19, 2022]*.) The court notes that *Public Officers Law §§ 87[4-a]* and *[4-b]* specifically direct law enforcement agencies to redact certain personal information in responding to requests for law enforcement disciplinary records. Moreover, Petitioner does not object to the redaction of personal **[*6]** information from the records as the statute explicitly requires that such personal information not be disclosed to the public.

NYPD's alternative grounds for withholding the IAB records (that disclosure could endanger the life or safety of an officer and would reveal investigative techniques) are entirely conclusory and do not establish entitlement to a FOIL exemption. (*See Loevy & Loevy v NYPD, 38 Misc 3d 950, 954-55, 957 N.Y.S.2d 628 [Sup Ct, NY County 2013]*.)

However, "[a]s the 2020 amendment is new to the law and the [Respondents have] shown a good faith basis in their belief that the disclosure sought by petitioner is not warranted, the Court declines to award attorney's fees in this matter." (*New York Civil Liberties Union, 2022 N.Y. Misc. LEXIS 1741, 2022 WL 1156208 at *2*.) Thus, it is hereby

ORDERED and ADJUDGED that the Petition is granted, and Respondents shall produce the relevant Internal Affairs Bureau records to Petitioner within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that Respondents shall redact the relevant portions of the Internal Affairs Bureau records in compliance with the above cited statutory provisions; and it is further

ORDERED that Petitioner's request for attorneys' fees is denied; and it is further

ORDERED that the cross-motion to dismiss is denied; and it is further **[*7]**

ORDERED that Petitioner shall serve a copy of this order with notice of entry upon all parties.

5/25/2022

DATE

/s/ William Perry

WILLIAM PERRY, J.S.C.

End of Document

*Schenectady Police Benevolent Assn. v City of Schenectady, 2020 N.Y. Misc. LEXIS 10947, 2020 WL 7978093, at *6 [Sup Ct, Schenectady County, Dec. 29, 2020]*.)

People v. Sprint Nextel Corp.

Court of Appeals of New York

September 9, 2015, Argued; October 20, 2015, Decided

No. 127

Reporter
26 N.Y.3d 98 *; 42 N.E.3d 655 **; 21 N.Y.S.3d 158 ***; 2015 N.Y. LEXIS 3471 ****; 2015 NY Slip Op 07574

[1] The People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York, et al., Respondents, v Sprint Nextel Corp. et al., Appellants.

Subsequent History: US Supreme Court certiorari denied by *Sprint Nextel Corp. v New York, 136 S Ct 2387, 195 L Ed 2d 762, 2016 US LEXIS 3552 (US, May 31, 2016)*

Prior History: Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered February 27, 2014. The Appellate Division affirmed an order of the Supreme Court, New York County (O. Peter Sherwood, J.; op *41 Misc 3d 511, 970 NYS2d 164 [2013])*, which had denied defendants' motion to dismiss the complaint in its entirety. The following question was certified by the Appellate Division: "Was the order of the Supreme Court, as affirmed by . . . this Court, properly made?"

People v Sprint Nextel Corp., 114 AD3d 622, 980 NYS2d 769, 2014 N.Y. App. Div. LEXIS 1363 (N.Y. App. Div. 1st Dep't, 2014), affirmed.

Disposition: Order affirmed, with costs, and certified question answered in the affirmative.

Core Terms

mobile, interstate, tax law, subdivision, sales tax, knowingly, taxation, cause of action, alleges, charges, telecommunications service, ambiguous, receipts, provider, monthly charge, intrastate, customers, falsity, reasonable interpretation, statutory interpretation, flat-rate, bundled, telephone, subject to tax, unambiguous, plans, taxes, telecommunications, nontaxable, wireless

Case Summary

Overview

HOLDINGS: [1]-The Appellate Division properly affirmed the denial of a mobile service provider's motion to dismiss because the Attorney General (AG) sufficiently pleaded a cause of action under the New York False Claims Act (FCA), *State Finance Law § 187 et seq.*, the plain language of *Tax Law § 1105(b)(2)* subjected to tax all voice services that were sold for a fixed periodic charge, including the interstate and international calls at issue, the Tax Law was not preempted by the Mobile Telecommunications Sourcing Act, *4 U.S.C.S. § 116 et seq.*, the AG was entitled to discovery, there were factual issues that had to be fleshed out, and the balance of the factors weighed in favor of permitting retroactive application where the FCA's penalty scheme did not impose an affirmative disability or restraint, and similar monetary penalties had not historically been viewed as punishment.

Outcome

Order affirmed and certified question answered affirmatively.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

Governments > Legislation > Interpretation

HN1[] Related Legal Issues, Taxation

The New York Tax Law imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge; the statute is unambiguous; and the statute is not preempted by federal law.

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Penalties

HN2[] Ex Post Facto Clause, Application & Interpretation

The damages recoverable under the False Claims Act, State Finance Law § 187 et seq., are not barred by the Ex Post Facto Clause of the United States Constitution.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN3[] Related Legal Issues, Taxation

The Mobile Telecommunications Sourcing Act (MTSA), 4 U.S.C.S. § 116 et seq. The MTSA establishes a uniform "sourcing" rule for state taxation of mobile telecommunications services: the only state that may impose a tax is the state of the customer's "place of primary use"—either a residential or primary business address, as selected by the customer. 4 U.S.C.S. §§ 117(b), 124(8).

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > General Overview

Governments > State & Territorial
Governments > Claims By & Against

Governments > Legislation > Statutory Remedies & Rights

Governments > State & Territorial
Governments > Employees & Officials

HN4[] Fraud Against the Government, False Claims

The False Claims Act, State Finance Law § 187 et seq., provides for enforcement by both the attorney general (AG) (in civil enforcement actions) and private plaintiffs on behalf of the government (in qui tam civil actions), and the AG has the right to intervene and file a superseding complaint in a qui tam action. State Finance Law § 190(1), (2), (5).

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Penalties

HN5[] False Claims, Penalties

The False Claims Act, State Finance Law § 187 et seq., provides for the imposition of treble damages and civil penalties against violators. State Finance Law § 189(1).

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Elements

HN6[] False Claims, Elements

The False Claims Act, State Finance Law § 187 et seq., applies to any person who knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government. State Finance Law § 189(1)(g). The statute provides that a defendant acts "knowingly" when the defendant has actual knowledge of a record's or statement's truth or falsity or acts in deliberate ignorance or reckless disregard of its truth or falsity. State Finance Law § 188(3)(a).

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > General Overview

HN7[] Fraud Against the Government, False Claims

The 2010 amendment to the False Claims Act, State Finance Law § 187 et seq., covers claims, records, or statements made under the tax law in certain circumstances, State Finance Law § 189(4). The

amendment was designed to provide an additional enforcement tool against those who file false claims under the Tax Law, and thus deter the submission of false tax claims while also providing additional recoveries to the State and to local governments.

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN8 **Sales Taxes, Imposition of Tax**

The language of Tax Law § 1105(b) is unambiguous, and imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN9 **Related Legal Issues, Taxation**

Tax Law § 1105(b) provides that a sales tax should be paid on: (1) the receipts from every sale, other than sales for resale, of the following; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; (2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN10 **Related Legal Issues, Taxation**

Tax Law § 1105(b)(1) does not affect the taxability of all mobile voice services under subparagraph (b)(2) because (b)(2) is a specific provision under § 1105 which applies only to the sale of mobile telecommunications, whereas (b)(1) applies to telephony and telegraphy generally.

Governments > Legislation > Interpretation

HN11 **Legislation, Interpretation**

See N.Y. Stat. § 238.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN12 **Related Legal Issues, Taxation**

The plain language of Tax Law § 1105(b)(2) subjects to tax all "voice services" that are "sold for a fixed periodic charge."

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN13 **Related Legal Issues, Taxation**

No part of Tax Law § 1105(b)(2) differentiates between intrastate or interstate and international voice service. The statute also taxes any other services taxable under subparagraph (B).

Governments > Legislation > Interpretation

HN14 **Legislation, Interpretation**

Meaning and effect should be given to every word of a statute.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN15 **Related Legal Issues, Taxation**

Tax Law § 1111(l)(2) provides special rules for computing receipts from the sale of mobile telecommunications. This section allows for the separate accounting of bundled services which are non-taxable, if the provider can provide an objective, reasonable, and verifiable standard for identifying each of the components of the charge, but specifically applies only if it is "not a voice service."

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN16 **Related Legal Issues, Taxation**

See 4 U.S.C.S. § 123(b).

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN17 **Related Legal Issues, Taxation**

The bundling provision of 4 U.S.C.S. § 123(b) expressly opens by respecting and incorporating state authority, rather than restricting it. Section 123(b) anticipates disaggregation only of charges not otherwise subject to state taxation. However, no provision of the Mobile Telecommunications Sourcing Act, 4 U.S.C.S. § 116 et seq., prohibits the taxation of interstate and international mobile calls. Congress eliminated this distinction in light of advances in mobile telecommunications technology.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Taxation

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

HN18 **Related Legal Issues, Taxation**

4 U.S.C.S. § 117(b) allows for the taxation of all charges for mobile telecommunications services subject to tax by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through.

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Elements

HN19 **False Claims, Elements**

In order to be liable under the False Claims Act (FCA), State Finance Law § 187 et seq., a party must knowingly make a false statement or knowingly file a false record. The FCA defines "knowingly" to mean that a person, with respect to information: (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information. State Finance Law § 188(3)(a).

Business & Corporate Compliance > ... > State & Local Taxes > Sales Taxes > Failure to File & Pay

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Elements

HN20 **State & Local Taxes, Failure to File & Pay Sales Taxes**

The False Claims Act (FCA), State Finance Law § 187 et seq., is certainly not to be applied in every case where taxes were not paid. Further, notice of a contrary administrative position alone is not nearly enough to prove fraud or recklessness under the FCA.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN21 **Motions to Dismiss, Failure to State Claim**

On a CPLR 3211 motion to dismiss, a court accepts facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines whether the facts as alleged fit within any cognizable legal theory.

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

HN22 **Ex Post Facto Clause, Application & Interpretation**

Retroactive application of the False Claims Act, State Finance Law § 187 et seq., is not barred by the Ex Post Facto Clause of the United States Constitution. U.S. Const. art. I, § 10.

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Penalties

HN23 **False Claims, Penalties**

The False Claims Act, State Finance Law § 187 et seq., provides that a person who knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same; shall be liable to the state for a civil penalty of not less than $6,000 and not more than $12,000 plus treble damages. State Finance Law § 189(1)(h).

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN24 **Ex Post Facto Clause, Application & Interpretation**

In an ex post facto context, to assess whether a statute is punitive, courts look to seven factors highlighted by the United States Supreme Court to determine whether the statute is penal or regulatory in character. These include: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

Governments > Legislation > Interpretation

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Penalties

Governments > Legislation > Types of Statutes

HN25 **Ex Post Facto Clause, Application & Interpretation**

In an ex post facto context, although the Court of Appeals of New York previously stated that the penalty and damage scheme of the False Claims Act (FCA), State Finance Law § 187 et seq., serves the aims of punishment, retribution, and deterrence, federal courts have determined that the FCA's provision imposing treble damages carries a compensatory, remedial purpose alongside its punitive and deterrent goals. As a result, the penalty and damages scheme of the FCA does not compel a conclusion that the statute is penal.

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > Penalties

HN26[] Ex Post Facto Clause, Application & Interpretation

In an ex post facto context, the False Claims Act, State Finance Law § 187 et seq., does not regulate conduct that was already a crime, and the penalty scheme may be rationally connected to the nonpunitive purposes of allowing the government to be made whole. Given the compensatory, nonpunitive aims of the statute, the penalties are not unduly excessive.

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN27[] Ex Post Facto Clause, Application & Interpretation

In an ex post facto context, only the clearest proof will suffice to transform what has been denominated a civil remedy into a criminal penalty.

Headnotes/Summary

Headnotes

Statutes — Federal Preemption — Sales Tax on Fixed Mobile Telecommunications Charges

1. Tax Law § 1105 (b) (2) unambiguously imposes a tax on all voice services sold for a fixed periodic charge, including interstate and international calls, and is not preempted by the Federal Mobile Telecommunications Sourcing Act (MTSA) (4 USC § 116 et seq.). The MTSA establishes a uniform "sourcing" rule for state taxation of mobile telecommunications services: the only state that may impose a tax is the state of the customer's place of primary use. The MTSA bundling provision expressly opens by respecting and incorporating state authority, rather than restricting it, and anticipates disaggregation only of charges "not otherwise subject . . . to [state] taxation." Because the Tax Law imposes a tax on the entire amount of the fixed monthly charge for voice services, there is no exemption for any interstate and international component that would trigger section 123 (b)'s exception.

Taxation — Sales and Use Taxes — Knowingly Making False Statements Material to Sales Tax Obligation

2. In a civil tax enforcement action, the People stated a cause of action under the New York False Claims Act (State Finance Law § 187 et seq.) by alleging that defendant wireless telecommunications service provider arbitrarily allocated a percentage of its flat-rate monthly charge to interstate and international calls, failed to collect sales tax on that portion of the charge, and "knowingly ma[de] . . . a false record or statement material to" its obligation to pay sales tax (State Finance Law § 189 [1] [g]). The complaint contained allegations about agency guidance and industry compliance with the Attorney General's position that Tax Law § 1105 (b) (2) requires the payment of sales taxes on the full amount of fixed periodic charges for wireless voice services, defendant's prior payment of the proper amount of sales tax and its undisclosed reversal of its practices, and explicit warnings that defendant received from the state tax department that defendant's sales tax practice was illegal.

Constitutional Law — Ex Post Facto Law — New York False Claims Act

3. Retroactive application of the New York False Claims Act (FCA) (State Finance Law § 187 et seq.) to impose damages and civil penalties against defendant wireless telecommunications service provider for "knowingly mak[ing] . . . a false record or statement material to" its obligation to pay sales tax with respect to the portion of its flat-rate monthly charge arbitrarily allocated to interstate and international calls (State Finance Law § 189 [1] [g]) was not barred by the Ex Post Facto Clause of the United States Constitution (US Const, art I, § 10). The penalty scheme does not impose an affirmative disability or restraint, and monetary penalties like those imposed by the FCA have not historically been viewed as punishment. Also, the FCA does not regulate conduct that was already a crime, and the penalty scheme may be rationally connected to the nonpunitive purposes of allowing the government to be made whole. Finally, given the compensatory, nonpunitive aims of the statute, the penalties are not unduly excessive.

Counsel: [**1]** *Williams & Connolly LLP*, Washington, D.C. (*Kannon K. Shanmugam,* of the District of Columbia bar, admitted pro hac vice*, Dane H.*

Butswinkas, of the District of Columbia bar, admitted pro hac vice, *David S. Blatt* of the District of Columbia bar, admitted pro hac vice, and *Kenneth J. Brown* of the District of Columbia bar, admitted pro hac vice, of counsel), and *Pillsbury Winthrop Shaw Pittman LLP*, New York City (*E. Leo Milonas* and *David G. Keyko* of counsel), for appellants. I. The Tax Law does not impose sales tax on interstate mobile voice services sold as part of a fixed monthly charge. (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 968 NE2d 967, 945 NYS2d 613*; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 609 NE2d 514, 593 NYS2d 974*; *Expedia, Inc. v City of N.Y. Dept. of Fin., 22 NY3d 121, 980 NYS2d 55, 3 NE3d 121*; *American Locker Co. v City of New York, 308 NY 264, 125 NE2d 421*; *Matter of Grace v New York State Tax Commn., 37 NY2d 193, 332 NE2d 886, 371 NYS2d 715*; *Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 828 NE2d 593, 795 NYS2d 491*; *Matter of Albano v Kirby, 36 NY2d 526, 330 NE2d 615, 369 NYS2d 655*; *Matter of Lloyd v Grella, 83 NY2d 537, 634 NE2d 171, 611 NYS2d 799*; *Matter of Belmonte v Snashall, 2 NY3d 560, 813 NE2d 621, 780 NYS2d 541*; *Matter of SIN, Inc. v Department of Fin. of City of N.Y., 71 NY2d 616, 523 NE2d 811, 528 NYS2d 524*; *Matter of Carey Transp. v Perrotta, 34 AD2d 147, 310 NYS2d 186*.) II. The Attorney General's interpretation of the Tax Law, if correct, would be preempted by the Federal Mobile Telecommunications Sourcing Act. (*Lee v Astoria Generating Co., L.P., 13 NY3d 382, 920 NE2d 350, 892 NYS2d 294*; *Pacific Capital Bank, N.A. v Connecticut, 542 F3d 341*.) III. The complaint fails to state a claim under the New York False Claims Act. (*United States ex rel. Pervez v Beth Israel Med. Ctr., 736 F Supp 2d 804*; *State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 943 NYS2d 36*; *United States ex rel. Ramadoss v Caremark Inc., 586 F Supp 2d 668*; *Safeco Ins. Co. of America v Burr, 551 US 47, 127 S Ct 2201, 167 L Ed 2d 1045*; *United States ex rel. Hixson v Health Mgt. Sys., Inc., 613 F3d 1186*; *Louisiana Mun. Police Employees' Retirement Sys. v Hesse, 962 F Supp 2d 576*; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 609 NE2d 514, 593 NYS2d 974*; *Smith v Doe, 538 US 84, 123 S Ct 1140, 155 L Ed 2d 164*; *United States v Ward, 448 US 242, 100 S Ct 2636, 65 L Ed 2d 742*; *Kennedy v Mendoza-Martinez, 372 US 144, 83 S Ct 554, 9 L Ed 2d 644*.)

Eric T. Schneiderman, Attorney General, New York City (*Steven C. Wu, Barbara D. Underwood* and *Won S. Shin* of counsel), for respondents. I. Sprint Nextel Corporation, Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc. failed to collect sales taxes owed on mobile voice service sold for fixed monthly charges and falsely stated their taxable receipts. (*Matter of Jewish Home & Infirmary of Rochester v Commissioner of N.Y. State Dept. of Health, 84 NY2d 252, 640 NE2d 125, 616 NYS2d 458*; *People v Velez, 19 NY3d 642, 975 NE2d 907, 951 NYS2d 461*; *Lorillard Tobacco Co. v Roth, 99 NY2d 316, 786 NE2d 7, 756 NYS2d 108*; *Matter of Greer v Wing, 95 NY2d 676, 746 NE2d 178, 723 NYS2d 123*; *Barnhart v Thomas, 540 US 20, 124 S Ct 376, 157 L Ed 2d 333*; *Matter of Chemical Specialties Mfrs. Assn. v Jorling, 85 NY2d 382, 649 NE2d 1145, 626 NYS2d 1*; *Matter of Fox v Board of Regents of State of N.Y., 140 AD2d 771, 527 NYS2d 651*, *72 NY2d 808, 529 NE2d 425, 533 NYS2d 57*; *Zanghi v Greyhound Lines, 234 AD2d 930, 651 NYS2d 833*; *Heard v Cuomo, 80 NY2d 684, 610 NE2d 348, 594 NYS2d 675*; *Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib., 19 NY3d 1058, 979 NE2d 1121, 955 NYS2d 795*.) II. Sprint Nextel Corporation, Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc. knowingly made false statements about their taxable receipts. (*Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 890 NE2d 184, 860 NYS2d 422*; *Polonetsky v Better Homes Depot, 97 NY2d 46, 760 NE2d 1274, 735 NYS2d 479*; *People v Greenberg, 21 NY3d 439, 994 NE2d 838, 971 NYS2d 747*; *Minnesota Assn. of Nurse Anesthetists v Allina Health Sys. Corp., 276 F3d 1032*; *United States v R& F Props. of Lake County, Inc., 433 F3d 1349*; *Overstock.com, Inc. v New York State Dept. of Taxation & Fin., 20 NY3d 586, 987 NE2d 621, 965 NYS2d 61*; *Matter of Spencer v Tax Appeals Trib. of State of N.Y., 251 AD2d 764, 674 NYS2d 158*; *Matter of Friesch-Groningsche Hypotheekbank Realty Credit Corp. v Tax Appeals Trib. of State of N.Y., 185 AD2d 466, 585 NYS2d 867*; *Oneida Nation of N.Y. v Cuomo, 645 F3d 154*.) III. The Ex Post Facto Clause does not bar retroactive application of the New York False Claims Act. (*Kellogg v Travis, 100 NY2d 407, 796 NE2d 467, 764 NYS2d 376*; *Smith v Doe, 538 US 84, 123 S Ct 1140, 155 L Ed 2d 164*; *Kennedy v Mendoza-Martinez, 372 US 144, 83 S Ct 554, 9 L Ed 2d 644*; *Hudson v United States, 522 US 93, 118 S Ct 488, 139 L Ed 2d 450*; *United States ex rel. Marcus v Hess, 317 US 537, 63 S Ct 379, 87 L Ed 443*; *Helvering v Mitchell, 303 US 391, 58 S Ct 630, 82 L Ed 917, 1938-1 C.B. 317*; *Stockwell v United States, 80 US 531, 20 L Ed 491*; *Kansas v Hendricks, 521 US 346, 117 S Ct 2072, 138 L Ed 2d 501*; *United States v Bornstein, 423 US 303, 96 S Ct 523, 46 L Ed 2d 514*; *Cook County v United States ex rel. Chandler, 538 US 119, 123 S Ct 1239, 155 L Ed*

2d 247.)

Reed Smith LLP, New York City (*Jack Trachtenberg, Adam P. Beckerink* and *Jennifer S. Goldstein* of counsel), for Institute for Professionals in Taxation, amicus curiae. I. The lower courts erroneously failed to consider whether Sprint Nextel Corporation, Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc.'s interpretation of the Tax Law was reasonable. (*United States, ex rel. Ramadoss v Caremark Inc., 586 F Supp 2d 668*; *United States ex rel. Wilson v Kellogg Brown & Root, Inc., 525 F3d 370*; *United States ex rel. Lamers v City of Green Bay, 168 F3d 1013*; *United States ex rel. Hopper v Anton, 91 F3d 1261*; *United States ex rel. Hixson v Health Mgt. Sys., Inc., 613 F3d 1186*; *United States v Basin Elec. Power Co-op., 248 F3d 781*; *United States ex rel. Oliver v Parsons Co., 195 F3d 457*; *United States ex rel. Hochman v Nackman, 145 F3d 1069*; *United States ex rel. K & R Ltd. Partnership v Massachusetts Hous. Fin. Agency, 456 F Supp 2d 46*, *530 F3d 980, 382 US App DC 67*.) II. The Supreme Court's failure to treat *Tax Law § 1105 (b)* as a tax imposition statute was erroneous and compounded its error in failing to consider the reasonableness of Sprint Nextel Corporation, Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc.'s conduct. (*Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 609 NE2d 514, 593 NYS2d 974*.) III. The Court should provide clear guidance regarding the application of the False Claims Act to tax matters to prevent future violations of the rights and privileges granted to taxpayers under the Tax Law. (*Ryan v New York State Dept. of Taxation & Fin., 63 AD3d 816, 880 NYS2d 520*.)

McDermott Will & Emery LLP, New York City (*Arthur R. Rosen* and *Lindsay M. LaCava* of counsel), for Council on State Taxation, amicus curiae. I. The application of the New York False Claims Act to cases involving legitimate differences in statutory interpretation—which, by definition, do not constitute "knowingly . . . false records or statements"—undermines the efficiency and fairness of state tax administration. (*United States ex rel. Hixson v Health Mgt. Sys., Inc., 613 F3d 1186*; *Matter of Consolidated Edison Co. of N.Y. v State Tax Commn. of State of N.Y., 24 NY2d 114, 247 NE2d 120, 299 NYS2d 142*; *New York State Cable Tel. Assn. v State Tax Commn., 59 AD2d 81, 397 NYS2d 205*; *Celestial Food of Massapequa Corp. v New York State Tax Commn., 98 A.D.2d 157, 470 NYS2d 90*, *63 NY2d 1020, 473 NE2d 737, 484 NYS2d 509*; *Matter of City of New York v New York State Tax Appeals Trib., 231 AD2d 267, 660 NYS2d 753*; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 609 NE2d 514, 593 NYS2d 974*; *Matter of Easylink Servs. Intl., Inc. v New York State Tax Appeals Trib., 101 AD3d 1180, 955 NYS2d 271*; *State of N.Y. ex rel. Grupp v DHL Express [USA], Inc., 19 NY3d 278, 970 NE2d 391, 947 NYS2d 368*; *People v Bank of N.Y. Mellon Corp., 40 Misc 3d 1232[A], 2013 NY Slip Op 51394[U], 977 NYS2d 668*; *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig., 789 F Supp 2d 935*.) II. Absent fraud-like or criminal conduct, the Department of Taxation and Finance is the only appropriate body to administer New York's taxes, particularly in situations such as this where an audit of appellants had already been commenced by the Department of Taxation and Finance. (*Ryan v New York State Dept. of Taxation & Fin., 63 AD3d 816, 880 NYS2d 520*; *Complete Auto Transit, Inc. v Brady, 430 US 274, 97 S Ct 1076, 51 L Ed 2d 326*; *Quill Corp. v North Dakota, 504 US 298, 112 S Ct 1904, 119 L Ed 2d 91*.)

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York City (*John G. Nicolich* and *Roger Cukras* of counsel), for Broadband Tax Institute, amicus curiae. I. The *Matter of Helio* (***2015*** WL 4192425, ***2015*** NY City Tax LEXIS 8 [Tax Appeals Tribunal, July 2, ***2015***, DTA No. 825010]) proceeding undercuts the Attorney General's position. II. The Attorney General overstates *Tax Law § 1105 (b)* and the significance of the Department of Taxation and Finance's technical memorandum. III. Unbundling is a well-accepted practice in the communications industry. (*Caprio v New York State Dept. of Taxation & Fin., 25 NY3d 744, 16 NYS3d 204, 37 NE3d 707*.)

Willens & Scarvalone LLP, New York City (*Jonathan A. Willens* of counsel), and *Taxpayers Against Fraud Education Fund*, Washington, D.C. (*Cleveland Lawrence III* and *Jacklyn N. DeMar* of counsel), for Taxpayers Against Fraud Education Fund, amicus curiae. I. Sprint Nextel Corporation, Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc.'s motion to dismiss on scienter grounds should be denied because the plaintiffs have alleged a knowing violation of the New York False Claims Act. (*United States ex rel. Pervez v Beth Israel Med. Ctr., 736 F Supp 2d 804*; *United States ex rel. Bilotta v Novartis Pharms. Corp., 50 F Supp 3d 497*;

State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 943 NYS2d 36; Visiting Nurse Assn. of Brooklyn v Thompson, 378 F Supp 2d 75; Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 890 NE2d 184, 860 NYS2d 422; United States v Incorporated Vil. of Is. Park, 888 F Supp 419; *United States v Bollinger Shipyards, Inc., 775 F3d 255*; United States ex rel. Osmose, Inc. v Chemical Specialties, Inc., 994 F Supp 2d 353; United States ex rel. Fox Rx, Inc. v Omnicare, Inc., 38 F Supp 3d 398; Lerner v Fleet Bank, N.A., 459 F3d 273.) II. Retroactive application of the tax fraud provision of the New York False Claims Act does not violate the Ex Post Facto provision of the US Constitution. (Smith v Doe, 538 US 84, 123 S Ct 1140, 155 L Ed 2d 164; *United States ex rel. Drake v NSI, Inc., 736 F Supp 2d 489*; Calder v Bull, 3 US 386, 1 L Ed 648, 3 Dall. 386; United States ex rel. Bilotta v Novartis Pharms. Corp., 50 F Supp 3d 497; United States ex rel. Augustine v Century Health Servs., Inc., 136 F Supp 2d 876; Graham County Soil and Water Conservation Dist. v United States ex rel. Wilson, 559 US 280, 130 S Ct 1396, 176 L Ed 2d 225; Seling v Young, 531 US 250, 121 S Ct 727, 148 L Ed 2d 734; Cook County v United States ex rel. Chandler, 538 US 119, 123 S Ct 1239, 155 L Ed 2d 247; United States v Halper, 490 US 435, 109 S Ct 1892, 104 L Ed 2d 487; State of N.Y. ex rel. Grupp v DHL Express [USA], Inc., 19 NY3d 278, 970 NE2d 391, 947 NYS2d 368.)

Cleary Gottlieb Steen & Hamilton LLP, New York City (*Lewis J. Liman* of counsel), for Chamber of Commerce of the United States of America, amicus curiae. I. The New York False Claims Act is reserved for cases of a knowingly false claim, statement or record and is not the proper mechanism for addressing interpretations of the Tax Law that are not objectively unreasonable. (New York State Socy. of Enrolled Agents v New York State Div. of Tax Appeals, 161 AD2d 1, 559 NYS2d 906; Gold v Morrison- Knudsen Co., 68 F3d 1475; Allison Engine Co. v United States ex rel. Sanders, 553 US 662, 128 S Ct 2123, 170 L Ed 2d 1030; Vermont Agency of Natural Resources v United States ex rel. Stevens, 529 US 765, 120 S Ct 1858, 146 L Ed 2d 836; United States v Neifert-White Co., 390 US 228, 88 S Ct 959, 19 L Ed 2d 1061; Rainwater v United States, 356 US 590, 78 S Ct 946, 2 L Ed 2d 996; State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 943 NYS2d 36, *19 NY3d 810, 975 N.E.2d 914, 951 N.Y.S.2d 468*; *Matter of Plato's Cave Corp. v State Liq. Auth., 68 NY2d 791, 498 NE2d 420, 506 NYS2d 856*; Safeco Ins. Co. of America v Burr, 551 US 47, 127 S Ct 2201, 167 L Ed 2d 1045; United States ex rel. Hixson v Health Mgt. Sys., Inc., 613 F3d 1186.) II. Allowing the Attorney General to use the New York False Claims Act's treble damages regime to combat objectively reasonable interpretations of the law would chill the rights of citizens to challenge the views of the State and undermine development of the law. (Marbury v Madison, 5 US 137, 2 L Ed 60; Matter of Council of City of N.Y. v Bloomberg, 6 NY3d 380, 846 NE2d 433, 813 NYS2d 3; Lorillard Tobacco Co. v Roth, 99 NY2d 316, 786 NE2d 7, 756 NYS2d 108; Matter of SIN, Inc. v Department of Fin. of City of N.Y., 71 NY2d 616, 523 NE2d 811, 528 NYS2d 524; Matter of Quotron Sys. v Irizarry, 48 NY2d 795, 399 NE2d 948, 423 NYS2d 918; New York State Cable Tel. Assn. v State Tax Commn., 59 AD2d 81, 397 NYS2d 205; American Net & Twine Co. v Worthington, 141 US 468, 12 S Ct 55, 35 L Ed 821; Trump Vil. Section 3, Inc. v City of New York, 24 NY3d 451, 999 NYS2d 822, 24 NE3d 1086; Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 609 NE2d 514, 593 NYS2d 974; Matter of Manhattan Cable Tel. v New York State Tax Commn., 137 AD2d 925, 524 NYS2d 889.) III. Retroactive liability under the New York False Claims Act is not compatible with the Ex Post Facto Clause. (Sanders v Allison Engine Co., Inc., 703 F3d 930; United States ex rel. Miller v Bill Harbert Intl. Constr., Inc., 608 F3d 871, 391 US App DC 165; United States v Rogan, 517 F3d 449; Landgraf v USI Film Products, 511 US 244, 114 S Ct 1483, 128 L Ed 2d 229; Cook County v United States ex rel. Chandler, 538 US 119, 123 S Ct 1239, 155 L Ed 2d 247; *Doe v Pataki, 120 F3d 1263*; Law v National Coll. Athletic Assn., 134 F3d 1438; United States ex rel. Bilotta v Novartis Pharms. Corp., 50 F Supp 3d 497; Louis Vuitton S.A. v Spencer Handbags Corp., 765 F2d 966.)

Heather C. Briccetti, *The Business Council of New York State, Inc.*, Albany, for The Business Council of New York State, Inc., amicus curiae. I. The False Claims Act is an extraordinary measure that requires knowing, reckless, or deliberately ignorant intent. (State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 943 NYS2d 36; United States ex rel. Gross v AIDS Research Alliance-Chicago, 415 F3d 601; Hopper v Solvay Pharms., Inc., 588 F3d 1318; United States ex rel. Clausen v Laboratory Corp. of Am., Inc., 290 F3d 1301; Hagood v Sonoma County Water Agency, 81 F3d 1465; United States ex rel. Hixson v Health Mgt. Sys., Inc., 613 F3d 1186; United States ex rel. Siewick v Jamieson Science & Eng'g, Inc., 214 F3d 1372, 341 US App. D.C. 459; Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib., 2 NY3d 249, 810 NE2d 864, 778 NYS2d 412.) II. The

plaintiffs' asserted position turns the False Claims Act on its head. (*Matter of Suburban Carting Corp. v Tax Appeals Trib. of State of N.Y., 263 AD2d 793, 694 NYS2d 211*; *Matter of Kourakos v Tully, 92 AD2d 1051, 461 NYS2d 540*; *Matter of Hwang v Tax Appeals Trib. of the State of N.Y., 105 AD3d 1151, 963 NYS2d 423*; *Matter of Lombard v Commissioner of Taxation & Fin., 197 AD2d 799, 602 NYS2d 972*; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657,609 NE2d 514, 593 NYS2d 974*; *Expedia, Inc. v City of N.Y. Dept. of Fin., 22 NY3d 121, 980 NYS2d 55, 3 NE3d 121*; *Matter of Grace v New York State Tax Commn., 37 NY2d 193, 332 NE2d 886, 371 NYS2d 715*; *American Locker Co. v City of New York, 308 NY 264, 125 NE2d 421*; *Matter of Gaied v New York State Tax Appeals Trib., 22 NY3d 592, 983 NYS2d 757, 6 NE3d 1113*.) III. The Attorney General's position is infeasible. (*Hesse v Sprint Corp., 598 F3d 581*; *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig., 789 F Supp 2d 935*.)

Judges: LIPPMAN, Chief Judge. Judges Pigott, Abdus-Salaam and Fahey concur. Judge Stein dissents in part in an opinion. Judge Rivera took no part.

Opinion by: LIPPMAN

Opinion

[*105] [657] [***160]** Chief Judge Lippman.

We hold that: (1) ***HN1***[↑] the Tax Law imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge; (2) the statute is unambiguous; (3) the statute is not preempted by federal law; (4) the Attorney General's (AG) complaint sufficiently pleads a cause of action under the New York False Claims Act (FCA) (*State Finance Law § 187 et seq.*); and (5) ***HN2***[↑] the damages recoverable under the FCA are not barred by the Ex Post Facto Clause of the United States Constitution.

In 1989, the United States Supreme Court held that the dormant *Commerce Clause of the Federal Constitution* limited the states' authority to tax interstate telephone calls. A telephone call was taxable only if it originated or terminated within the state and was charged to an in-state billing or service address (*see* **[****2]** *Goldberg v Sweet, 488 US 252, 256 n 6, 263, 109 S Ct 582, 102 L Ed 2d 607 [1989]*).

The *Goldberg* rule was easy to apply to landline telephones, which had fixed physical locations. But the next decade saw "an explosion of growth in the wireless telecommunications industry" (HR Rep 106-719, 106th Cong, 2d Sess at 7, reprinted in 2000 US Code Cong & Admin News at 509), and states and service providers struggled to adapt the *Goldberg* nexus requirement to mobile telephone calls. States developed different **[*106]** methods to determine which mobile calls to tax. As a result, some mobile telephone calls were subject to taxation by multiple jurisdictions (HR Rep 106-719, 106th Cong, 2d Sess at 7-8, reprinted in 2000 US Code Cong & Admin News at 509).

A further complication was introduced as mobile carriers began to sell flat-rate voice plans that charged a fixed monthly price for access to a nationwide network, as opposed to charging calls by the minute, regardless of where the calls were placed or received. These flat-rate plans made it "virtually impossible to determine the portion of th[e] price charged for individual calls, each of which may be subject to tax by a different jurisdiction," and thus "impossible to determine the amount of revenues to which each of the various state and local transaction taxes should be applied" (S Rep 106-326, 106th Cong, 2d Sess at 2).

Congress responded by enacting ***HN3***[↑] the **[****3]** Mobile Telecommunications Sourcing Act (MTSA) (*4 USC § 116 et seq.*) The MTSA establishes a uniform "sourcing" rule for state taxation of mobile telecommunications services: the only state that may impose a tax is the state of the customer's "place of primary use"—either a residential or primary business address, as selected by the customer (*4 USC §§ 117 [b]*; *124 [8]*).

[658] [***161]** The New York Legislature responded to the MTSA in 2002 by enacting multiple amendments to the Tax Law that clarified and amended the State's treatment of mobile telecommunications services. Under the preexisting law that was enacted in 1965, New York did not tax any interstate or international calls. As relevant here, the 2002 amendments implemented a new set of rules—specifically, those applicable to voice services sold through flat-rate plans.

Another legislative amendment, this one from 2010, led directly to the issues posed by this litigation. ***HN4***[↑] The FCA provides for enforcement by both the AG (in civil enforcement actions) and private plaintiffs on behalf of the government (in "qui tam civil actions"), and the AG has the right to intervene and file a superceding

complaint in a qui tam action (State Finance Law § 190 [1], [2], [5]). HN5[↑] The Act provides for the imposition of treble damages **[****4]** and civil penalties against violators (*id.* § 189 [1]).

HN6[↑] The FCA applies to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to" the government (*id.* § 189 [1] [g]). The statute provides that a **[*107]** defendant acts "knowingly" when defendant has "actual knowledge" of a record's or statement's truth or falsity or "acts in deliberate ignorance" or "reckless disregard" of its truth or falsity (*id.* § 188 [3] [a]).

As originally enacted, the New York FCA did not apply to false tax claims. But, HN7[↑] in 2010, the legislature amended it to cover "claims, records, or statements made under the tax law" in certain circumstances (L 2010, ch 379, § 3, codified at State Finance Law § 189 [4] [a]). The amendment was designed to "provide an additional enforcement tool against those who file false claims under the Tax Law," and thus "deter the submission of false tax claims" while also "provid[ing] additional recoveries to the State and to local governments" (Letter from St Dept of Tax & Fin, Aug. 4, 2010 at 2, Bill Jacket, L 2010, ch 379 at 13).

Sprint is a wireless telecommunications service provider that does business in New York, and it sells wireless "flat-rate" plans that include **[****5]** a certain number of minutes of talk time for a fixed monthly charge. After the Tax Law amendments were enacted in 2002, Sprint paid sales tax on all of its receipts from its flat-rate plans.

In 2005, however, Sprint began a nationwide program of "unbundling" charges within these flat-rate monthly plans. Specifically, Sprint unbundled the portion of the fixed monthly charge that it attributed to intrastate mobile voice services, and did not collect taxes on the portion that it attributed to interstate and international calls. For the tax years at issue, the percentage of the fixed monthly charge on which Sprint collected sales tax ranged from 71.5% to 86.3%. Sprint did not separately state on customers' bills the charges for interstate and international voice services included in the flat-rate plan.

On March 31, 2011, Empire State Ventures, LLC, filed suit against Sprint under the New York FCA. On April 19, 2012, the AG filed a superceding complaint, which converted the relator's action into a civil enforcement action by the AG.

The AG's complaint, as relevant here, alleges that section 1105 (b) (2) of the Tax Law "requires the payment of sales taxes on the *full amount* of fixed periodic charges for wireless voice **[****6]** services sold by companies like Sprint to New York customers." It further alleges that section 1111 (l) permits wireless providers to "treat separately for sales tax purposes certain components of a bundled charge **[**659]** **[***162]** for mobile telecommunication **[*108]** services, so long as the charges are *not* for voice services." The complaint asserts that Sprint violated the Tax Law by failing to **[3]** collect sales tax on the portion of its flat-rate charge that was attributable to interstate and international voice services. It further alleges that Sprint's decision to unbundle its plans sold for a fixed monthly charge "was driven by its desire to gain an advantage over its competitors by reducing the amount of sales taxes it collected from its customers and, thereby, appearing to be a low-cost carrier." According to the AG, the percentages of the flat-rate charges that Sprint allocated to interstate and international calls were completely arbitrary.

In support of its allegations that Sprint knowingly submitted false tax statements, the AG cites a Tax Department guidance memorandum published before the 2002 amendments became effective, which states that the sales tax is to be applied in the manner that the AG now advocates. The **[****7]** AG points out that Sprint adhered to this guidance until July 2005, when it changed its tax practices. Interestingly, Sprint did not seek a tax refund for the 2002-2005 tax years in which it paid those taxes.

The AG further alleges that Sprint also disregarded the statements of a Tax Department field auditor and enforcement official advising Sprint in 2009 and 2011, respectively, that its sales tax practice was illegal, and that it disregarded the fact that the other major wireless carriers, unlike Sprint, did not break their fixed monthly charges for voice services into intrastate and interstate subparts for sales tax purposes, but instead collected and paid sales tax on the full fixed periodic charge for voice services.

As relevant to this appeal, the complaint's causes of action are all based on the same underlying contention that Sprint knowingly violated the Tax Law, engaged in fraudulent or illegal acts pursuant to Executive Law § 63 (12), and submitted false documents to the State pursuant to the FCA. The AG requests civil penalties and treble damages for each of the false tax documents submitted to the State.

Sprint moved to dismiss the complaint for failure to state a cause of action under CPLR 3211. As relevant **[****8]** here, Supreme Court denied the motion, holding that the Tax Law unambiguously imposes a tax on receipts from every sale of mobile telecommunications services that are voice services sold for a fixed periodic charge (*see People v Sprint Nextel Corp., 41 Misc 3d 511, 970 NYS2d 164 **[*109]** [Sup Ct, NY County 2013]*). Moreover, even if the Tax Law permitted Sprint to exclude from taxable receipts a portion of its fixed monthly mobile voice charge to account for interstate and international calls, the Tax Law also required Sprint to use an objective, reasonable, and verifiable standard for identifying the nontaxable components of the charge—but the complaint alleges that Sprint failed to comply with this requirement by using "arbitrary" figures that were "not related to any customer's actual usage" (*id. at 515*). The court also concluded that the complaint "alleges in great detail" how Sprint knowingly submitted false tax statements to the Tax Department, in violation of the FCA (*id. at 516*). Supreme Court further held that New York's Tax Law does not conflict with the federal MTSA, and rejected Sprint's assertion that the Ex Post Facto Clause of the United States Constitution bars retroactive application of the FCA penalties and damages.

The Appellate Division unanimously affirmed the denial of Sprint's motion to dismiss (*114 AD3d 622, 980 NYS2d 769 [1st Dept 2014]*). The Court held that the **[**660]** **[***163]** AG's **[****9]** complaint adequately alleges that Sprint violated the FCA, Executive Law § 63 (12), and the Tax Law "by knowingly making false statements material to an obligation to pay sales tax pursuant to Tax Law § 1105 (b) (2)" (*id. at 622*). In addition, the Court rejected Sprint's claim that the Tax Law is preempted by the MTSA, **[4]** and its claim that retroactive application of the FCA would be unconstitutional. The Appellate Division then certified the following question to this Court: "Was the order of the Supreme Court, as affirmed by . . . this Court, properly made?"

In *Matter of Helio, LLC* (***2015*** N.Y. City Tax LEXIS 8, ***2015*** WL 4192425, NY St Tax Appeals Trib DTA No. 825010, July 2, ***2015***), the New York Tax Appeals Tribunal held that ***HN8***[↑] the language of Tax Law § 1105 (b) is unambiguous, and imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge. We agree.

HN9[↑] Section 1105 (b) of the Tax Law provides that tax should be paid on:

> "(1) [t]he receipts from every sale, other than sales for resale, of the following: . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications **[*110]** service the receipts from the sale of which are subject to tax under paragraph **[****10]** two of this subdivision . . .
>
> "(2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services."

The subject of the present dispute is the meaning of the phrase "or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision" (*Tax Law § 1105 [b] [2]*). Sprint contends that this language excepts from sales tax its bundled charges from interstate and international calls. The AG, on the other hand, asserts that all mobile calls are subject to tax under *subdivision (b) (2)*, unless they are separately stated on the customer's bill.

First, ***HN10***[↑] *subdivision (b) (1)* does not affect the taxability of all mobile voice services under *subdivision (b) (2)* because *(b) (2)* is a specific provision under *section 1105* which applies only to the sale of mobile telecommunications, whereas *(b) (1)* applies to telephony and telegraphy generally. ***HN11***[↑] "Whenever there is a general and a particular provision in the same statute, the general does not overrule **[****11]** the particular but applies only where the particular enactment is inapplicable" (McKinney's Cons Laws of NY, Book 1, Statutes *§ 238*).

[1] Here, ***HN12***[↑] the plain language of the statute subjects to tax all "voice services" that are "sold for a fixed periodic charge" (*Tax Law § 1105 [b] [2]*). Sprint does not contest that the services at issue are such services. ***HN13***[↑] No part of *subdivision (b) (2)* differentiates between intrastate or interstate and international voice service. The statute also taxes "any other services . . . taxable under subparagraph (B)" (*id.*). Sprint's interpretation of the statute would make superfluous the words "voice services, or any other" in

subdivision (b) (2) (*see* Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 104, 761 NE2d 1018, 736 NYS2d 291 [2001] [**HN14**[↑] "meaning and effect should be given to every word of a statute"]). The phrase "any other services that are taxable under subparagraph (B)" must refer to **[**661] [***164]** services other than "voice services." Accordingly, it is unambiguous that Tax Law § 1105 (b) (2) imposes taxation on **[*111]** all voice services sold for a fixed periodic charge, including the interstate and international calls at issue here.

This interpretation of the statute is bolstered by **HN15**[↑] Tax Law § 1111 (l) (2), which provides special rules for computing receipts from the sale of mobile telecommunications. This section allows for the separate **[****12]** accounting of bundled services which are non-taxable, if the provider can provide "an objective, reasonable and verifiable standard for identifying each of the components of the charge"—but specifically applies only if it is "*not a voice service*" (Tax Law § 1111 [l] [2] [emphasis added]).

Next, Sprint asserts that such an interpretation of the Tax Law is preempted by the MTSA. This argument is unavailing. Sprint cites 4 USC § 123 (b) for the presumption that taxes may not be applied to interstate and international calls which are bundled with intrastate calls where the service provider can reasonably identify charges not subject to the tax. Section 123 (b) provides:

> **HN16**[↑] "*If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation* and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business" (emphasis added).

HN17[↑] This bundling provision expressly opens by respecting **[****13]** and incorporating state authority, rather than restricting it. Section 123 (b) anticipates disaggregation only of charges "not otherwise subject . . . to [state] taxation." Because the Tax Law imposes a tax on the entire amount of the fixed monthly charge for voice services, there is no exemption for any interstate and international component that would even trigger section 123 (b)'s exception here. However, no provision of the MTSA prohibits the taxation of interstate and international mobile calls. In fact, Congress eliminated this distinction in light of advances in mobile telecommunications technology. **HN18**[↑] Section 117 (b) of the MTSA allows for the taxation of "*[a]ll charges for mobile telecommunications services* . . . subject[ ] **[*112]** to tax . . . by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through." Accordingly, the AG's interpretation of the Tax Law is not preempted by the federal MTSA.

As to the AG's cause of action under the FCA, **HN19**[↑] in order to be liable under the FCA, a party must knowingly make a false statement or knowingly file a false record. The FCA defines "knowingly" to mean "that **[****14]** a person, with respect to information: (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information" (State Finance Law § 188 [3] [a]).

Sprint asserts that there is a reasonable interpretation of the Tax Law that does not subject bundled interstate and international calls to sales tax and, thus, there can be no knowingly false record or statement, and no valid FCA claim. This is not the stuff that a CPLR 3211 dismissal is made of. Even assuming there could be such a reasonable interpretation in the face of this unambiguous statute, it cannot shield **[**662] [***165]** a defendant from liability if, as the complaint alleges here, **[5]** the defendant did not in fact act on that interpretation (*see United States ex rel. Oliver v Parsons Co., 195 F3d 457, 463 [9th Cir 1999]*). Otherwise, "[a] defendant could submit a claim, knowing it is false or at least with reckless disregard as to falsity . . . but nevertheless avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements" (*id. at 463 n 3*). Sprint will have to substantiate in further proceedings that it actually held such reasonable belief and actually acted upon it.

Sprint argues that in *Helio* **[****15]** (DTA No. 825010), upon the taxpayer's defeat at the Tax Appeals Tribunal on the issue of taxability of bundled interstate and international mobile telecommunications services, the Department of Taxation and Finance imposed only minimum interest because the audit report stated that "reasonable cause existed" for the taxpayer's position (**2015** WL 4192425, *9, **2015** NY City Tax LEXIS 8). But here, the AG alleges that Sprint, which is a much larger service provider, did not act in good faith and that it did not rely on what it now calls "its reasonable

interpretation of the statute" when it made its decision to alter its tax practices. Importantly, although the Tax Appeals Tribunal stated that Helio's similar position was reasonable, that case did not **[*113]** involve the level of deception and fraud alleged on the part of Sprint here.

[2] Nevertheless, the AG has a high burden to surmount in this case. ***HN20***[↑] The FCA is certainly not to be applied in every case where taxes were not paid. Further, notice of a contrary administrative position alone is not nearly enough to prove fraud or recklessness under the FCA. There can be no doubt the AG will have to prove the allegations of fraud, that Sprint knew the AG's interpretation of the statute was proper, and **[****16]** that Sprint did not actually rely on a reasonable interpretation of the statute in good faith. But, given the complaint's allegations about the agency guidance and industry compliance with the AG's position, Sprint's payment of the proper amount of sales tax between 2002 and 2005, Sprint's undisclosed reversal of its practices in 2005, and the explicit warnings that Sprint received from the Tax Department, the AG has stated a cause of action for a false claim. ***HN21***[↑] On a *CPLR 3211* motion to dismiss, the Court accepts facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]*). It is premature to dismiss this complaint on such a motion. The AG is entitled to discovery, and there are factual issues that must be fleshed out in further proceedings.

[3] We also hold that ***HN22***[↑] retroactive application of the FCA is not barred by the Ex Post Facto Clause of the United States Constitution (*US Const, art I, § 10*). In analyzing whether such application of the statute is barred by the US Constitution, we must first consider whether the legislature intended the FCA to establish "civil" proceedings, and if so, whether it is "so punitive either in purpose **[****17]** or effect as to negate the State's intention to deem it civil" (*Smith v Doe, 538 US 84, 92, 123 S Ct 1140, 155 L Ed 2d 164 [2003]* [internal quotation marks, brackets and citations omitted]). ***HN23***[↑] The FCA provides that a person who

> "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same; shall be liable to the state . . . for a civil penalty of not less than six thousand **[**663]** **[***166]** dollars and not more than twelve thousand dollars" plus treble damages (*State Finance Law § 189 [1] [h]*). **[*114]** ***HN24***[↑]

To assess whether the FCA is punitive, we look to seven factors highlighted by the United States Supreme Court "to determine whether an Act . . . is penal or regulatory in character" (*Kennedy v Mendoza-Martinez, 372 US 144, 168, 83 S Ct 554, 9 L Ed 2d 644 [1963]*). These include:

> "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned" **[****18]** (*id. at 168-169*).

The balance of the factors here weighs in favor of permitting retroactive application. The penalty scheme does not impose an affirmative disability or restraint, and monetary penalties like those imposed by the FCA have not "historically been viewed as punishment" (*United States ex rel. Bilotta v Novartis Pharms. Corp., 50 F Supp 3d 497, 544 [SD NY 2014]* [internal quotation marks omitted]).

HN25[↑] Although this Court previously stated that the FCA's penalty and damage scheme serves the aims of punishment, retribution, and deterrence (*State of N.Y. ex rel. Grupp v DHL Express [USA], Inc., 19 NY3d 278, 286-287, 970 NE2d 391, 947 NYS2d 368 [2012]*), federal courts have determined that the FCA's provision imposing "treble damages carries a compensatory, remedial purpose alongside its punitive and deterrent goals" (*Kane ex rel. United States v Healthfirst, Inc., 120 F Supp 3d 370, **2015** US Dist LEXIS 101778, *69, **2015** WL 4619686 [SD NY, Aug. 3, **2015**, No. 11 Civ 2325 (ER)*]; *see also Bilotta, 50 F Supp 3d at 545-546*; *United States ex rel. Colucci v Beth Israel Med. Ctr., 603 F Supp 2d 677, 683 [SD NY 2009]*). As a result, the penalty and damages scheme of the FCA "does not compel a conclusion that the statute is penal" (*Bilotta, 50 F Supp 3d at 546*).

Also, ***HN26***[↑] the FCA does not regulate conduct that was already a crime, and the penalty scheme may be

rationally connected to the nonpunitive purposes of allowing the government to be made whole (*see* *Cook County v United States ex rel. Chandler, 538 US 119, 130-132, 123 S Ct 1239, 155 L Ed 2d 247 [2003]*). Finally, given the compensatory, nonpunitive aims of the statute, the penalties are not unduly excessive.

[*115] As the United States Supreme Court stated in *Smith*, ***HN27***[⬆] "only the clearest proof will suffice" to "transform what **[****19]** has been denominated a civil remedy into a criminal penalty" (*538 US at 92* [internal quotation marks and citations omitted]). Here, while the treble damages to be imposed are severe, Sprint's arguments do not outweigh the *Mendoza* factors that weigh in favor of retroactive application, nor do they amount to the "clearest proof" required by *Smith*. Therefore, the retroactive application of the FCA does not trigger the Ex Post Facto Clause of the United States Constitution.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Dissent by: STEIN (In Part)

Dissent

Stein, J. (dissenting in part). In my view, *Tax Law § 1105 (b) (2)* is an ambiguous statute. Given the procedural **[**664]** **[***167]** course the People have charted here, we are required to interpret any ambiguity in favor of Sprint, as the **[6]** taxpayer, for the purpose of resolving Sprint's motion to dismiss. Because the Attorney General cannot establish that Sprint's tax filings were actually false in light of this ambiguity, the complaint's principal allegation—that Sprint violated the Tax Law by failing to collect sales tax due on interstate mobile voice services based upon its purportedly erroneous interpretation of the applicable statute—must fail and cannot form the basis of a cause **[****20]** of action pursuant to the *False Claims Act*, *Executive Law § 63 (12)* or *Tax Law article 28*. Therefore, I respectfully disagree with the majority insofar as its affirmative answer to the certified question is premised upon its conclusion that the complaint adequately alleges fraud by claiming "that Sprint knew the AG's interpretation of the statute was proper, and that Sprint did not actually rely on a reasonable interpretation of the statute in good faith" (majority op at 113). To the contrary, the complaint has not sufficiently alleged a violation of the Tax Law on this basis in the first instance, let alone a knowing, fraudulent or "bad faith" violation.

However, while the complaint does not set forth viable claims arising out of Sprint's interpretation of the statute, it does adequately allege actual falsity and illegality based upon the method used by Sprint in calculating the portion of its fixed monthly charges that were attributable to interstate mobile voice services. Accepting as true the complaint's assertions that Sprint's calculation of those charges was essentially **[*116]** arbitrary—and, therefore, that Sprint's tax filings bore no rational relation to the amount of interstate mobile calls that were actually made—the complaint sufficiently **[****21]** alleges that Sprint violated the Tax Law, engaged in persistent fraud and illegality under *Executive Law § 63 (12)* and knowingly made or used false records within the meaning of the False Claims Act. Thus, although I would answer the certified question in the negative—the orders below were not properly made—I would partially affirm the Appellate Division order insofar as it allowed the action to proceed on that narrow ground.

I.

Tax Law § 1105 (b) (2) is ambiguous because it lends itself to more than one plausible or reasonable interpretation (*see* *Matter of Golf v New York State Dept. of Social Servs., 91 NY2d 656, 662-663, 697 NE2d 555, 674 NYS2d 600 [1998]*). The language that the majority holds to be unambiguous reads as follows:

> "[T]here is hereby imposed and there shall be paid a tax of four percent upon: . . .
>
> "[t]he receipts from every sale of mobile telecommunications service provided by a home service provider . . . that are voice services, or any other services that are taxable under [subdivision *(b) (1) (B)*], sold for a fixed periodic charge (not separately stated), whether or not sold with other services" (*Tax Law § 1105 [b] [2]*).

The subparagraph referenced therein, *Tax Law § 1105 (b) (1) (B)*, subjects to tax

> "[t]he receipts from every sale . . . of . . . telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy **[****22]** and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under [subdivision

(b) (2)]."

Applying the canon of construction that a provision of a statute that applies to a specific situation will override a general **[**665] [***168]** provision, the majority concludes that subdivision *(b) (1) (B)* applies to telephony and telegraphy, generally, whereas subdivision *(b) (2)* applies specifically to the sale of "mobile telecommunications" (majority op at 110). The majority and the Attorney General read subdivision *(b) (2)* as providing for the **[*117]** taxation of "every sale of mobile telecommunications services . . . that are voice services sold for a fixed periodic charge" (*Tax Law § 1105 [b] [2]*) (whether interstate or intrastate) and also allowing for the taxation of "other **[7]** services that are taxable under [subdivision *(b) (1) (B)*]" (*id.; see* majority op at 110). The majority concludes that "it is unambiguous that *Tax Law § 1105 (b) (2)* imposes taxation on all voice services sold for a fixed periodic charge, including the interstate and international calls at issue here" because, to read the statute otherwise, "would make superfluous the words 'voice services, or any other' in subdivision *(b) (2)*" (majority op at 110-111.) The majority's interpretation **[****23]** of the statute is unquestionably appealing in its simplicity. Under that reading, subdivision *(b) (2)* provides that mobile voice services are always taxable unless separately stated, regardless of whether they are interstate or intrastate, and the subdivision *(b) (1) (B)* limitation on taxation of interstate services does not govern mobile voice services at all.

While I cannot disagree that such interpretation is reasonable, I note that even the Attorney General concedes that subdivision *(b) (1) (B)*, which differentiates between interstate and intrastate services, continues to exempt certain mobile voice services from taxation. Specifically, the Attorney General acknowledges that "[t]o be sure, *(b)(2)* itself provides that *(b)(1)(B)*'s tax rule persists for certain types of mobile service charges" and, therefore, "interstate mobile *calls* . . . that are not sold for a flat fee, but instead [are] 'separately stated' " (emphasis added) remain taxable under subdivision *(b) (1) (B)*. Similarly, the Attorney General's complaint explains that, "[f]or overage minutes that are charged to customers on a per-minute usage basis, Sprint and other wireless carriers are required to collect and pay New York **[****24]** state and local sales taxes *only when such calls are intrastate, and are not required to collect and pay them on such calls that are interstate*" (emphasis added). Thus, although the majority notes that "[n]o part of subdivision *(b) (2)* differentiates between intrastate or interstate and international voice service" (majority op at 110), the Attorney General concedes that some interstate mobile voice services remain nontaxable under subdivision *(b) (1) (B)*, and the statutory differentiation between intrastate and interstate service persists for such services.

Accepting the Attorney General's concession that the limitation on interstate taxation in *(b) (1) (B)* continues to apply to at least some mobile voice services, I would hold that Sprint has **[*118]** plausibly read the language in dispute—"voice services, or any other services that are taxable under [subdivision *(b) (1) (B)*]" (*Tax Law § 1105 [b] [2]*)—as incorporating the *(b) (1) (B)* rule for both voice services and any other mobile services. Ultimately, the Attorney General reads subdivision *(b) (2)* as taxing all mobile voice services that are sold for a fixed periodic charge, while applying the *(b) (1) (B)* rule to other types of mobile telecommunications services, whereas **[****25]** Sprint reads the language at issue just slightly more broadly as applying the *(b) (1) (B)* rules to mobile "voice services, or any other [mobile] services" (*Tax Law § 1105 [b] [2]*). Under Sprint's interpretation, the purpose of subdivision *(b) (2)* is to **[**666] [***169]** expressly provide that services that are taxable under subdivision *(b) (1) (B)*—text messaging, intrastate voice services, etc.—remain taxable even if bundled with nontaxable services. That reading of this less-than-clear statutory text—while perhaps not the most logical interpretation—is not unreasonable as a matter of law, particularly in light of the relatively small gap that exists between the parties' interpretations.

Similarly, *Tax Law § 1111 (l) (2)* can be read in more than one reasonable manner. That section provides that certain enumerated categories of untaxed *nonvoice* services, which are bundled with taxable services, are subject to sales tax unless the provider uses "an objective, reasonable and verifiable standard for identifying" and quantifying the amount of each component charge (*Tax Law § 1111 [l] [2]*). The parties are in agreement that the statute applies **[8]** only to nonvoice services. Applying the *expressio unius est exclusio alterius* canon of statutory construction (*see Matter of Jewish Home & Infirmary of Rochester v Commissioner of N.Y. State Dept. of Health, 84 NY2d 252, 262, 640 NE2d 125, 616 NYS2d 458 [1994]*), the **[****26]** Attorney General argues that the legislature's creation of an exception from the general rule for the category of nonvoice services would imply that the category of voice services was not to be excluded from the general rule. That interpretation certainly is reasonable, and reading *section 1111 (l) (2)*

together with section 1105 (b) (2) supports the Attorney General's assertion that the legislature intended to make all bundled voice services taxable, without permitting carriers to exclude the interstate portion as nontaxable. However, Sprint's alternative construction of section 1111 (l) (2) is also reasonable. Sprint argues that the focus of section 1111 (l) (2) is on nonvoice services and that the purpose of that section is to enumerate the services—such as internet access— **[*119]** that are also nontaxable, in addition to interstate voice services. Under Sprint's view, there is no need to include interstate voice services in the section 1111 (l) (2) list because they are already exempt from taxation under section 1105 (b) (1) (B).

In short, both the Attorney General and Sprint have advanced reasonable interpretations of the statutory language and, because that language is susceptible of more than one reasonable interpretation, it is inherently ambiguous. Indeed, the only other court **[****27]** to consider Sprint's tax strategy under section 1105 (b) deemed the "legal concepts at issue" here "murky" (Louisiana Mun. Police Employees' Retirement Sys. v Hesse, 962 F Supp 2d 576, 589 [US Dist Ct, SD NY 2013]).[1] I recognize that the shareholders' derivative action with which that decision was concerned is distinguishable and involves a completely different body of law from that before us and, further, that the District Court expressly declined to rule on whether Sprint's interpretation of the statute was "reasonable" (id. at 590 n 7). Notwithstanding those distinctions, I agree with the District Court that the legal concepts at issue here—as well as the statutory language—are murky at best, and I cannot join the majority decision holding that Tax Law § 1105 (b) is unambiguous.

II.

A finding that the statute is ambiguous has implications in the Tax Law context **[**667] [***170]** that are not present in other procedural contexts. Inasmuch as Sprint is not **[****28]** seeking a tax exemption but, arguing instead, that the "transaction or event is [not] subject to taxation" in the first instance (Matter of Grace v New York State Tax Commn., 37 NY2d 193, 196, 332 NE2d 886, 371 NYS2d 715 [1975]), the tax statute at issue "must be narrowly construed and . . . any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 661, 609 NE2d 514, 593 NYS2d 974 [1993]). In contrast, if this case had proceeded through the usual administrative process and the same arguments were before us in the **[*120]** context of a CPLR article 78 proceeding involving a challenge to a Tax Department audit and assessment, we could "defer to" the Tax Department as "the governmental agency charged with the responsibility for **[9]** administration of [a] statute in [a] case[ ] where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, and the agency's interpretation is not irrational or unreasonable" (Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation, 18 NY3d 289, 296, 961 NE2d 657, 938 NYS2d 266 [2011] [internal quotation marks and citations omitted]; *see* Lorillard Tobacco Co. v Roth, 99 NY2d 316, 323, 786 NE2d 7, 756 NYS2d 108 [2003]).

Here, however, the Tax Department is not before us as a party. Therefore, we cannot defer to its interpretation. Instead, the Attorney General has chosen to pursue Sprint in an action in which its interpretation of the statute is not **[****29]** entitled to deference and we are bound to resolve all ambiguities in Sprint's favor, at least for the limited purpose of determining whether the complaint states a claim and, consequently, whether the courts below were correct in partially denying Sprint's motion to dismiss.[2] In turn, resolving the ambiguity in

[1] That case involved a derivative action commenced by Sprint's shareholders against its directors, alleging that they breached their fiduciary duties and wasted corporate assets by permitting Sprint to adopt the tax policy at issue here, which the shareholders alleged was clearly in violation of New York law. The District Court granted the directors' motion to dismiss for failure to state a claim.

[2] Resolution of the statutory ambiguities in Sprint's favor is necessary only because the Attorney General has chosen to file a superseding complaint in this whistleblower action, rather than await the conclusion of the more typical administrative process. An acknowledgment of the facial ambiguities in the statute by this Court need not prevent the Tax Department from applying its expertise to the detailed labor of fitting tax filings into the language of Tax Law § 1105 (b) (2) (*see* Lorillard, 99 NY2d at 323) in other matters proceeding through the administrative pipeline, such as *Matter of Helio, LLC* (**2015** WL 4192425, **2015** NY City Tax LEXIS 8 [NY St Div of Tax Appeals DTA No. 825010, July 2, **2015**]). Nor would such acknowledgment require the Tax Department to grant refunds **[****30]** to other wireless carriers who adopted the interpretation advanced by the Attorney General and, therefore, collected and remitted sales tax on the receipts from all interstate mobile voice services.

Sprint's favor and adopting its interpretation necessarily means that the complaint fails to adequately allege that Sprint's tax returns were false simply because Sprint did not report receipts from the interstate component of its mobile voice services for sales tax purposes.

III.

As explained in *United States ex rel. Oliver v Parsons Co. (195 F3d 457, 461 [1999]*, *cert denied 530 US 1228, 120 S Ct 2657, 147 L Ed 2d 272 [2000]*), **[*121]** upon which the majority relies, the complaint must adequately allege three elements in order to state a cause of action under the False Claims Act: (1) that Sprint filed the tax records at issue, (2) that those records were actually false—i.e., that Sprint made a false statement or filed a false record because it incorrectly stated **[**668] [***171]** the amount of sales tax owed under *Tax Law § 1105 (b)*—and (3) that Sprint acted knowingly in doing so. Due to the procedural posture of this action, a conclusion that the statute is ambiguous precludes a showing of actual falsity, the second element of the False Claims Act cause of action, as a matter of law. That is, if the statute is ambiguous, our precedent requires that we interpret it in Sprint's favor in this plenary action, as explained above; and, if the statute is interpreted in Sprint's favor, the complaint fails to adequately allege that Sprint's tax filings were based upon an incorrect interpretation of the statute and, therefore, **[****31]** were actually false. For the same reason, the complaint has not sufficiently stated a claim under *Executive Law § 63 (12)* and *Tax Law article 28* to the extent that those causes of action are based upon allegations that Sprint knowingly relied upon an **[10]** unreasonable interpretation of *Tax Law § 1105 (b)*.

Actual falsity is a threshold element of a False Claims Act cause of action (*see Parsons, 195 F3d at 461*). Actual falsity does not relate to Sprint's mental state; rather, the statutes' "meaning is ultimately the subject of judicial interpretation, and it is [Sprint's] compliance with these [statutes], as interpreted by this [C]ourt, that determines whether its [tax strategy] resulted in the submission of a 'false claim' under the Act" (*Parsons, 195 F3d at 463*). In other words, "while the reasonableness of [Sprint's] interpretation of the applicable [statutes] may be relevant to whether it *knowingly* submitted a false claim, the question of 'falsity' itself is determined by whether [Sprint's] representations were accurate in light of the applicable law," as construed by the Court for the purpose of determining whether the complaint states a cause of action (*id.* [emphasis added]).

The complaint alleges that Sprint's sales tax filings were false because Sprint "asserted [therein] that it owed less in **[****32]** sales taxes [on interstate voice services] than it really did" based upon an alleged misinterpretation of *Tax Law § 1105 (b)*. However, because the statute is ambiguous and its ambiguities must be resolved in Sprint's favor, the complaint fails to adequately allege *any* misinterpretation, regardless of whether **[*122]** Sprint acted knowingly, recklessly or with deliberate ignorance. Stated differently, the complaint does not identify any tax filings that satisfy the element of "falsity," in relation to Sprint's interpretation of the statute. Because the complaint does not adequately plead this threshold element, we need not reach the question on which the majority focuses, i.e., whether the complaint sufficiently alleges that Sprint acted "knowingly" in making its purportedly false statements.

IV.

That said, the determinations of the courts below should be affirmed, in part, on a different ground. As the Attorney General argues, even if the statutes at issue must be interpreted in this proceeding as permitting Sprint to exclude from its taxable receipts the portion of its flat-rate plans attributable to interstate mobile voice services, the complaint contains other allegations—sufficient to survive a motion to **[****33]** dismiss—that Sprint's tax forms were false in another respect. Specifically, the complaint alleges that the arbitrary deduction that Sprint applied to its receipts from interstate mobile voice services did not, in fact, reflect the interstate calls of Sprint's customers. The complaint sets forth detailed assertions that Sprint calculated the portion of its calls that were interstate by arbitrarily applying a percentage used to calculate an unrelated federal surcharge at times, but that Sprint did not modify its allocations when the federal government changed the percentage used to calculate **[**669] [***172]** the surcharge, nor did Sprint consistently adhere to the percentage allocations. In that regard, the Attorney General contends that Sprint did not even attempt to identify the interstate component of its mobile voice services, much less adhere to the disaggregation requirements set out in federal and state law and, thus, it violated the Tax Law in the manner in which it allocated the percentage of its fixed monthly charges that was attributable to interstate mobile voice service. On this appeal, which involves a *CPLR 3211* motion to dismiss,

"[w]e accept the facts as alleged in the complaint as

> true, accord **[****34]** plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . [because] the criterion is whether the proponent of the pleading has a cause of action, not whether [it] has stated one" (*Leon v Martinez, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972* **[11] [*123]** [1994] [internal quotation marks and citations omitted]).

While plaintiffs may not have expressly pleaded any claims based on Sprint's failure to use an objective standard as required by state and federal laws addressing the proper unbundling of its fixed monthly charges, the allegations to support such a claim are set forth in the complaint and establish that plaintiffs have viable causes of action under the False Claims Act, *Executive Law § 63 (12)* and *Tax Law article 28*

V.

In sum, *Tax Law § 1105 (b) (2)* is ambiguous because it can be reasonably interpreted in more than one manner and, inasmuch as it is a tax statute, *section 1105 (b) (2)* must be interpreted in Sprint's favor for purposes of determining whether the complaint adequately states a cause of action. If Sprint's interpretation is deemed correct, as it must be, the complaint necessarily fails to state a cause of action by asserting that Sprint filed false returns simply by virtue of the fact that the returns are consistent with **[****35]** that interpretation (whether Sprint believed the interpretation to be correct or not). Therefore, the causes of action under the False Claims Act, *Executive Law § 63 (12)* and *Tax Law article 28* cannot be sustained on the basis of the Attorney General's allegation that Sprint misinterpreted the Tax Law. Those causes of action could, however, proceed on the limited basis that Sprint's tax forms were knowingly false, illegal and violative of the Tax Law because Sprint's arbitrary method of calculating its deduction did not have any rational connection to the amount of interstate calls actually made by Sprint's customers. Accordingly, I would answer the certified question in the negative and would modify the Appellate Division's order by dismissing so much of the False Claims Act, Executive Law and Tax Law causes of action that were based upon Sprint's purportedly erroneous interpretation of *Tax Law § 1105 (b)*, and insofar as modified, would affirm the order allowing the claims to proceed on the narrow ground set forth in this opinion.

Judges Pigott, Abdus-Salaam and Fahey concur; Judge Stein dissents in part in an opinion; Judge Rivera **[****36]** taking no part.

Order affirmed, with costs, and certified question answered in the affirmative.

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