Matter of Rauh v De Blasio
2017 NY Slip Op 30552(U)
March 21, 2017
Supreme Court, New York County
Docket Number: 157525/2016
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 157525/2016
RAUH, GRACE
vs
DE BLASIO, BILL
Sequence Number : 001
ARTICLE 78

PART 6

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 13

Answering Affidavits — Exhibits _____ | No(s). 50-68

Replying Affidavits _____ | No(s). 69-83

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/21/17

JBL
_____, J.S.C.
JOAN B. LOBIS, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 6

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In the Matter of

GRACE RAUH, TWC NEWS AND LOCAL PROGRAMMING LLC, YOAV GONEN, and NYP HOLDINGS, INC.,

Petitioners-Plaintiffs,

Decision & Order

-against-

Index No. 157525/2016

BILL DE BLASIO, in his official capacity as Mayor of the City of New York; and the OFFICE OF THE MAYOR OF THE CITY OF NEW YORK,

Respondents-Defendants,

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

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JOAN B. LOBIS, J.:

Petitioner[1] Grace Rauh (Rauh) is a political reporter for the cable news station, NY1, which is owned and operated by petitioner TWC News and Local Programming LLC. Petitioner Yoav Gonen (Gonen) is an investigative reporter and the City Hall Bureau Chief for the New York Post, which is published by petitioner NYP Holdings, Inc. In this article 78 proceeding, petitioners seek, pursuant to the New York State Freedom of Information Law (FOIL) (Public Officers Law § 84, et seq.), copies of correspondence that respondent Mayor Bill de Blasio (de Blasio or the Mayor), and senior members of his administration, conducted with Jonathan Rosen (Rosen) and members of Rosen's public relations firm, BerlinRosen, Ltd. (Berlin/Rosen), from January 1, 2014 until April

[1]Although this is a hybrid action-proceeding, for clarity the Court refers to the parties as "petitioners" and "respondents" rather than "petitioners-plaintiffs" and "respondents-defendants." The papers are not entirely consistent in this regard.

3, 2015.[2]

Rauh alleges that in their first response to her February 2015 request, respondents sent Rauh 24 email chains that they deemed responsive, many of which were allegedly duplicative. The accompanying letter stated: "[t]he responsive records are attached. Please note that some responsive material has been redacted in part or withheld in entirety as exempt from disclosure pursuant to Public Officers Law § 87 (2) (b) and (g)." Letter to Grace Rauh from Kiren Gopal, Special Advisor to the Counsel, Records Access Officer, dated August 7, 2015. The letter also stated that the City would continue to search for additional responsive documents and expected to make a further determination before October 9, 2015. On April 1, 2016, respondents sent Rauh an additional letter indicating that, although more documents responsive to her request had been identified, they were being withheld pursuant to Public Officers Law § 87 (2) (g). Rauh was informed that she could appeal the determination. Rauh appealed from that second letter denying additional documents.

Four months after making his FOIL request, Gonen received a similar response, attaching some records, and indicating that others had been redacted in part, or withheld in their entirety, as exempt under Public Officers Law § 87 (2) (b) and (g). That letter also indicated that the search for additional documents would continue, and that a determination as to whether additional responsive documents existed would likely be made by November 6, 2015. In May 2016, Gonen

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[2] Rauh submitted her FOIL request on or about February 18, 2015, seeking correspondence between the Mayor, and senior members of his administration, and Rosen. On April 3, 2015, Gonen submitted a nearly identical request, but also included in his request communications to or from any and all employees of Rosen's public relations firm, BerlinRosen. Gonen's request encompassed a slightly longer period of time than Rauh's, i.e., between January 1, 2014 and April 3, 2015.

appealed from what he characterized as a de facto denial of his FOIL request.

In response to her appeal, Rauh received a letter stating:

> "Acting as a consultant to the Mayor, Mr. Rosen's aim was to advance the Mayor's governmental agenda and thus the interests of the people of New York. Accordingly, the 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."

Letter to Grace Rauh from Henry T. Berger, Records Appeal Officer, dated May 13, 2016 at 2-3. Gonen received a similar letter in response to his appeal.

This proceeding, challenging the withholding of documents based on Public Officers Law § 82 (2) (g), which exempts certain inter-agency and intra-agency materials, was filed by petitioners on or about September 7, 2016.[3] It is uncontested that, approximately two-and-a-half months after the proceeding was initiated, respondents delivered an additional quantity of documents to petitioners, estimated by them to be approximately 1500 pages. Respondents continued to withhold an unknown number of additional documents on the same basis as before. In December 2016, respondents apparently announced that, going forward, they would no longer claim a privilege with respect to future emails between the Mayor's administration and unpaid outside advisors. *See "De Blasio Ends Challenge to Disclosing Emails From 'Agents of the City,'"* New York Times, December 6, 2016 A25; "*De Blasio Says 'Going Forward' He Won't Hide Conversations With Private Consultants*," Observer, December 4, 2016, annexed to second affirmation of Jessica Oliff

[3] Petitioners are not challenging the redaction of information by respondents based upon personal privacy pursuant to Public Officers Law § 87 (2) (b).

Daly, exhibits K & L.

It is undisputed that Rosen is a co-founder of the public relations firm BerlinRosen; that he advised de Blasio during his campaign for mayor and after he was elected; and that, in addition to advising de Blasio, Rosen and his firm have represented numerous clients in the public and private sector, including private real estate developers who conduct business before city agencies, and whose interests may be impacted by city policies, such as zoning matters. In addition, BerlinRosen was retained by the Campaign for One New York, a non-profit corporation, and not a governmental agency, which was established to advance the Mayor's policy agenda, but which apparently has dissolved or is in the process of dissolving. *See* "*Nonprofit Linked to Mayor de Blasio Is Closing*," New York Times, March 18, 2016, annexed to second affirmation of Jessica Oliff Daly, exhibit I.

FOIL was enacted by the Legislature in 1977. The Legislative Declaration with respect to the enactment of FOIL states, as follows:

> "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.
>
> * * *
>
> "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."

Public Officers Law § 84.

Because of the importance of making governmental records available to the public,

> "[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). 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. As [the Court of Appeals] has stated, [o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld."

Gould v. New York City Police Dep't, 89 N.Y.2d 267, 274-275 (1996)(internal quotation marks and citations omitted). Where an agency is asserting an exemption limiting availability, not only does it bear the burden of showing that the record withheld falls within a specified exemption, it must articulate "a particularized and specific justification for denying access." Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986).

Respondents contend that the correspondence sought by petitioners is exempt from disclosure under Public Officers Law § 87 (2) (g), which exempts:

> "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."

Public Officers Law § 87 (2) (g).

Petitioners contend that because Rosen is a private citizen, albeit a trusted advisor of the Mayor, he is not covered by the inter-agency or intra-agency deliberative privilege. Petitioners argue that although in some circumstances outside consultants may be covered by the inter-agency or intra-agency exemption, to be covered they must be formally retained by the agency that they are advising. See Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133 (1985)(materials prepared by "outside consultants retained by [the agency]" may be covered by the deliberative privilege). In contrast, where the consultant has not been formally retained, the deliberative privilege does not apply. For example, where the office of the mayor sought to assert the deliberative privilege in connection with emails between the office and the candidate that the mayor was considering for appointment as the New York City Schools Chancellor, the exemption was rejected by the courts, because the candidate had not been formally retained by the City, and was merely a private citizen "with interests that may have diverged from those of the City." See Hernandez v. Office of the Mayor of the City of N. Y., 100 A.D.3d 555, 556 (1st Dep't 2012).

Respondents contend that petitioners are improperly erecting a monetary test to determine whether the deliberative privilege applies. Petitioners do cite, among other decisions, the formal advisory opinion of the Committee on Open Government (COG), which responded in the negative to an inquiry submitted by the Village Voice, as to "whether a person who is not employed by, paid by, or retained by the City of New York can be considered an agent of the City such that his or her communications with the Mayor would properly be exempt from disclosure under FOIL." See Advisory Opinion of Committee on Open Government, Department of State, dated August 3, 2016 at 1, annexed to affirmation of Jessica Oliff Daly, exhibit A. Although COG's opinion does mention

paid compensation as one possible factor in determining whether a consultant can be considered an agent of the city, it is not the only factor mentioned by COG. More importantly, petitioners' argument does not focus on the question of payment, nor do the cases on which petitioners rely. Rather the focus of their argument is on whether the person that is the subject of the FOIL request was formally retained or hired by the governmental agency.

Here, the Mayor is seeking to apply the inter-agency or intra-agency deliberative privilege to someone who is not part of the Mayor's office or that of any other city agency, and who has not been hired by the Mayor but is merely advising him on an informal basis. Moreover, as in Hernandez, where the deliberative privilege was rejected, Rosen is a private citizen whose private interests may diverge from those of the City in connection with his representation of his private clients, some of whom conduct business which may be impacted by city policies, such as zoning matters. Although respondents claim that none of the withheld documents relate to Rosen's private clients, that does not mean that Rosen and his consulting firm are free from such divergent interests. Clothing informal relationships such as that of Rosen and the Mayor with the inter-agency or intra-agency privilege impermissibly broadens the exception to FOIL, counter to the public interest in transparency in government.

For these reasons, the court concludes that correspondence between the Mayor and Rosen, who has not been formally retained by the Mayor or any other city agency, is not exempt

from disclosure under the inter-agency or intra-agency deliberative privilege under FOIL.[4]

Citing Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113 (1974), respondents argue that, nonetheless, they may withhold the remaining Rosen emails based upon the common-law privilege for official information, which may attach to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged." Id. at 117 (internal quotation marks and citation omitted).

There is no question that, in some contexts, such a common-law privilege exists governing certain governmental communications; however, as demonstrated by the cases relied on by respondents, that privilege normally comes into play in civil or criminal litigation, where government documents or correspondence are being sought pursuant to discovery principles, and not in a special proceeding brought pursuant to FOIL. See, e.g., Cirale, 35 N.Y.2d 113 (wrongful death action brought on behalf of persons who died as a result of a steampipe explosion); see also Matter of World Trade Ctr. Bombing Litig., 93 N.Y.2d 1 (1999)(action for damages by plaintiffs injured in World Trade Center Bombing alleging negligence by Port Authority); One Beekman Place v. City of New York, 169 A.D.2d 492 (1st Dep't 1991)(action challenging rezoning); Pinks v. Turnbull, 13 Misc. 3d 1204(A), 2006 NY Slip Op 51687(U)(Sup. Ct. N.Y. County 2006)(action for damages for alleged sexual abuse, in which documents were sought pursuant to both civil discovery and FOIL).

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[4] Obviously, if correspondence between the Mayor and Rosen is not exempt from disclosure, correspondence between the Mayor and employees of Rosen's public relations firm is not exempt, either.

As the Court noted in Cirale, where a private citizen is seeking government information in order to redress a private wrong in the course of private litigation, the litigant's need must be balanced against the overall harm to the public in disclosing the information. Thus, "[o]nce it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure." Cirale, 35 N.Y.2d at 118.

In one of the few such cases relied on by respondents in which the Court considered both the applicability of FOIL and the common law, the court noted that the documents sought would not be available under *either* FOIL or the common law. See One Beekman Place, 169 A.D.2d at 493.

In contrast to such civil litigation, in civil proceedings brought solely to obtain documents pursuant to FOIL, where disclosure is not sought merely for the personal interest of the private party but to uphold the interest of the public for government transparency, the Court of Appeals has specifically held that "the common-law [public] interest privilege cannot protect from disclosure materials which [FOIL] requires to be disclosed." Doolan v. Board of Coop. Educ. Servs., 2d Supervisory Dist. of Suffolk County, 48 N.Y.2d 341, 347 (1979); see also Daily News L.P. v. Giuliani (Application of Lewis), 1997 NY Misc LEXIS 750 (Sup. Ct. N.Y. County 1997). Furthermore, "FOIL expressly refers to statutory exemptions so that a common-law privilege is inapposite." Washington Post Co. v. New York State Ins. Dept., 61 N.Y.2d 557, 567 (1984).

The only case cited by respondents that would appear to suggest that the public

interest privilege might bar disclosure of documents sought in the context of FOIL litigation, where the documents might be available under the statute, is Rodriguez v. Johnson, 66 A.D.3d 536 (1st Dep't 2009). There, the Court denied petitioner's application to compel disclosure of documents in the possession of the district attorney which pertained to the criminal prosecution of petitioner. The Court found that the district attorney had met his obligation under FOIL to search for documents, and had properly redacted portions of documents under the personal privacy exemption. In also ruling that the public interest privilege applied to the statements of two witnesses who talked with law enforcement personnel, it is unclear from the Court's one-paragraph opinion whether FOIL would have mandated the production of the statements, or whether the Court considered the ruling of the Court of Appeals in Doolan, which stated that the public interest privilege cannot protect from disclosure documents which would otherwise have been mandated to be produced under FOIL.

In any case, even assuming that the public interest privilege were to apply where FOIL otherwise would mandate the disclosure of documents, as the Court of Appeals indicated in Cirale, "[b]y our decision today, we do not hold that all governmental information is privileged or that such information may be withheld by a mere assertion of privilege. There must be specific support for the claim of privilege." 35 N.Y.2d at 118. Here, respondents argue only generally, in their brief, that "[t]hese discussions were understood to be held in the strictest of confidence and consisted of advice, opinions and recommendations and were no less deliberative than had they been conducted between and among employees of the Mayor's Office." Respondents' amended memorandum of law at 23. This statement merely asserts that respondents desired that the discussions be secret, and hardly constitutes the requisite specific support for the claim of privilege.

It certainly does not indicate why, in balancing the governmental interest in confidential information with the public's interest in disclosure, as embodied in the presumption of openness embodied by FOIL, a common-law public interest privilege should bar disclosure here.

This conclusion is strengthened by respondents' apparent decision, during the course of this litigation, to belatedly release an additional approximately 1500 pages of communications between Rosen, his firm BerlinRosen, and the Mayor, see petitioners' reply memorandum at 2, and their decision that, going forward, they would no longer claim a deliberative privilege with respect to emails between the Mayor's administration and unpaid outside advisors. See *"De Blasio Ends Challenge to Disclosing Emails From 'Agents of the City,'"* New York Times, December 6, 2016 at A25; "*De Blasio Says 'Going Forward' He Won't Hide Conversations With Private Consultants*," Observer, December 4, 2016, annexed to Second affirmation of Jessica Oliff Daly, exhibits K & L.

ATTORNEYS' FEES

Petitioners seek attorneys' fees pursuant to Public Officers Law § 89 (4) (c), which states that the court may award reasonable attorneys' fees and costs to a petitioner that has "substantially prevailed" over the agency where "i. the agency had no reasonable basis for denying access; or ii. the agency failed to respond to a request or appeal within the statutory time."

Here, there is no question but that petitioners have substantially prevailed, since the court is directing respondents to produce the documents requested by petitioners that are still being withheld by respondents.

Citing Miller v. New York State Dept. of Transp., 58 A.D.3d 981 (3d Dep't 2009), respondents argue that attorneys' fees should nonetheless be denied, because they had a rational basis for their position that the documents were exempt from disclosure as inter-agency or intra-agency documents. Looking to the language of the statute and based upon the case law discussed above, however, the court concludes 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. Furthermore, respondents' belated production of approximately 1500 additional documents, more than a year after petitioners submitted their FOIL requests and approximately two months after this proceeding was filed, and their apparent decision not to claim the exemption with respect to such correspondence in the future, only underscores the lack of a reasonable basis for denying access.

For all of the foregoing reasons, it is hereby

ADJUDGED that the petition of Grace Rauh, TWC News and Local Programming, LLC, Yoav Gonen, and NYP Holdings, Inc., is granted and respondents Bill De Blasio, in his official capacity as Mayor, and the Office of The Mayor of the City of New York, are directed to produce 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; and it is further

ORDERED that petitioners' request for attorneys' fees is granted, and the matter of

the amount of such fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the request for attorneys' fees be held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for petitioners shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[5] upon the Special Referee Clerk in the Motion Support Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: March 21, 2017

ENTER:

Joan B. Lobis, J.S.C.

[5] Copies of the Information Sheet are available in Rm. 119 at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedure" link).