Matter of Visiting Nurse Serv. of NY Home Care v New York State Dept. of Health
2012 NY Slip Op 32975(U)
November 28, 2012
Sup Ct, Albany County
Docket Number: 1689-12
Judge: George B. Ceresia Jr
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
VISITING NURSE SERVICE OF NEW YORK HOME CARE,

Petitioner,

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

-against-

NEW YORK STATE DEPARTMENT OF HEALTH; NIRAV R. SHAH, M.D. M.P.H., in his official capacity as Commissioner of the New York State Department of Health; ROBERT LOCICERO, in his official capacity as Records Access Officer, New York State Department of Health; and JONATHAN KARMEL, in his official capacity as Records Access Appeals Officer, New York State Department of Health,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-12-ST3519 Index No. 1689-12

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Petitioner Visiting Nurse Service of New York Home Care challenges respondents' denial pursuant to the Freedom of Information Law (FOIL) of some of the records petitioner requested and seeks both copies of the records and attorneys' fees.

Petitioner, a home health agency that provides services to Medicaid beneficiaries, was the subject of an audit by the New York State Office of the Medicaid Inspector General ("OMIG"), an independent office within respondent New York State Department of Health. On April 19, 2011, petitioner's counsel submitted a six-page "letter" to OMIG stating that petitioner intends to challenge the sample OMIG used in its audit. Petitioner requested that OMIG provide petitioner with information and documents. The requested material was described in a complexly detailed list of 20 types of information and documentation.

OMIG does not answer discovery demands as part of the audit process and respondent treated petitioner's April 19, 2011 correspondence as a FOIL request. On May 2, 2011, respondent acknowledged petitioner's request. By correspondence dated May 26, 2011, respondent advised petitioner that respondent needed an additional twenty days to respond.

On June 13, 2011, respondent provided petitioner's counsel with documents in response to petitioner's request. These included two documents containing explanations of OMIG's sampling process and supplemented the copy of OMIG's random sample generating computer program, which constitutes OMIG's "sampling methodology" and had previously been sent to petitioner. On July 6, 2011, petitioner filed an eight-page letter appealing respondent's alleged denial of access and treated all twenty of its types of records, documents and information as having been denied.

On July 18, 2011, respondent supplemented its response to petitioner's request by providing petitioner with a copy of the database containing the universe of petitioner's own claims from which OMIG made its sample using the previously supplied sample generating computer program. On August 11, 2011, respondent provided a further set of supplemental responses in which it responded to the items contained in petitioner's April 19, 2011 correspondence by asserting that OMIG did not have records that met most of petitioners' requests, releasing some documents, and explaining that the remaining documents were exempt from disclosure pursuant to FOIL. Petitioner submitted a revised FOIL appeal on

September 7, 2011 and on September 20, 2011 respondent made its final determination determining that the withheld documents are exempt from disclosure.

FOIL, which is codified in Public Officers Law at Article 6, was enacted to foster the public's "inherent right to know" the workings of government by shedding light on government decision making (Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 416 [1995]; Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]). 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, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence, and abuse (see, Public Officers Law § 84; Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 416 [1995]; Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]; Matter of Tartan Oil Corp. v State of New York Dept., of Taxation & Fin., 239 AD2d 36, 38 [3d Dept., 1998]). Judicious use of the provisions of the law can be a remarkably effective device in holding the governors accountable to the governed (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]).

Under FOIL, records in the possession of a public agency are presumed to be available for public inspection and copying unless they fall within one of the specific exceptions established in Public Officers Law § 87(2) (Matter of Markowitz v Serio, 11 NY3d 43, 50-51 [2008]; Matter of Gould v New York City Police Department, 89 NY2d 267, 274 [1996];

Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of NY at Farmingdale, 87 NY2d 410, 417-418 [1995]; Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]; Matter of Troy Sand and Gravel Co. Inc. v New York State Dept., of Transp, 277 AD2d 782, 784 [3d Dept., 2000]) or another statute establishes a clear legislative intent to establish and preserve confidentiality of the records (Matter of Capital Newspapers Div. v Burns, 67 NY2d 562, 567 [1986]; Matter of M. Farbman v New York City Health & Hosps. Corp., 62 NY2d 75, 81 [1984]; Matter of Collins v New York State Div. of Parole, 251 AD2d 738, 738 [3d Dept., 1998]; Matter of Wm. J. Kline & Sons Inc. v County of Hamilton, 235 AD2d 44, 46 [3d Dept., 1997]). FOIL is to be liberally construed in favor of the public and its exemptions narrowly interpreted to effectuate maximum public access to government records (Matter of Washington Post Co. v New York State Ins. Dept., 61 NY2d 557 [1984]; Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]). That burden is not met by an agency's simply invoking an exemption without articulating a "particularized and specific justification" for non-disclosure (Matter of Markowitz v Serio, 11 NY3d 43, 50-51 [2008]; Matter of Gould v New York City Police Department, 89 NY2d 267, 275 [1996]); Matter of New York Times Co. v New York State Dept., of Health, 243 AD2d 157 [3d Dept., 1998]; Matter of Johnson v New York City Police Dept., 257 AD2d 343 [1st Dept., 1999]) and also demonstrating the applicability of a specific statutory exemption (Matter of Daily Gazette Co. v City of Schenectady, 93 NY2d 145

[1999]; Matter of M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp., 62 NY2d 75 [1984]).

Petitioner claims that the Court is obliged to order release of the documents because respondent allegedly failed to sufficiently identify the documents and contents of the documents that were withheld and to provide a particularized and specific justification for withholding them. Respondent was not obliged at the administrative level to provide sufficient information regarding the contents of each of the documents to allow petitioner to know what the documents contained and/or determine for itself whether or not respondent's determination is reasonable. FOIL does not require agencies either at the administrative level or in the course of Article 78 proceedings to reveal so much detail about the documents' contents that they are withholding as to effectively release the documents. In camera inspection of documents is the means by which such issues are properly resolved (Matter of Bass Pro, Inc v Megna, 69 AD3d 1040, 1041 [3d Dept., 2010]; Matter of Miller v New York State Dept. of Transp., 58 AD3d 981, 983-984 [3d Dept., 2009]).

Respondent was also not obliged at the administrative level to articulate a particularized and specific justification for denying access to each of the records and demonstrate the applicability of the FOIL exemption. At the administrative level, the agency is only required to provide a written description of the withheld documents and the reasons for denying access to a record (Matter of Bass Pro, Inc v Megna, 69 AD3d 1040, 1041 [3d Dept., 2010]; Matter of Miller v New York State Dept. of Transp., 58 AD3d 981, 982 [3d

Dept., 2009]; Matter of Kaufman v New York State Dept. of Envtl. Conservation, 289 AD2d 826, 827 [3d Dept., 2001]; see Public Officers Law § 89[4][a]). Respondent met that burden in this case by generally describing the documents that were being denied and identifying the statutory basis for respondent's denial.

It is in the Article 78 proceeding that the agency must demonstrate that the withheld material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (Matter of Markowitz v Serio, 11 NY3d 43, 50-51 [2008]; Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462-463 [2007]). Agencies may meet their burden of doing so by submitting the documents in question for in camera inspection (Matter of Bass Pro, Inc v Megna, 69 AD3d 1040, 1041 [3d Dept., 2010]; Matter of Miller v New York State Dept. of Transp., 58 AD3d 981, 982 [3d Dept., 2009]).

Turning to the first group of records that respondent withheld, respondent has submitted for in camera inspection records that were withheld based upon respondent's assertion that they are intra-agency materials that contain no information that must be released and are therefore exempt pursuant to Public Officers Law § 87(2)(g). The intra-agency and inter-agency exemption broadly exempts all intra-agency and inter-agency pre-decisional materials from disclosure unless the material or portions of the material falls within one of four specific types of excepted information: "statistical or factual tabulations or data," "instructions to staff that affect the public," "final agency policy or determinations" or "external audits, including but not limited to audits performed by the comptroller and the

federal government" (Public Officers Law § 87(2)(g)(i) through (iv); Tuck-It-Away Associates, L.P. v Empire State Development Corp., 54 AD3d 154, 166 [1st Dept., 2008]; Matter of Morgan v New York State Dept., of Envtl. Conservation, 9 AD3d 586, 587 [3d Dept., 2004]; Matter of David v Lewisohn, 142 AD2d 305, 307 [3d Dept., 1988]; Matter of Dunlea v Goldmark, 54 AD2d 446, 448 [3d Dept., 1976], affd 43 NY2d 754 [1977]).

The Court does not agree with petitioner's claim that the records of communications between respondent's employees must be released unless respondent demonstrates that each communication was "deliberative." Although "inter-agency or intra-agency materials" is not specifically defined under FOIL, records of communications among agency employees are not presumptively available to the public. The purpose of FOIL's intra-agency exemption is to foster the open exchange of ideas by permitting public employees to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure (The New York Times Co. v City of NY Fire Dept., 4 NY3d 477, 487 [2005]). Communication is routinely conducted using methods such as e-mail messages and attachments, voicemails, text messages, and recorded conversations, all of which capture the actual communication. Even phone calls generate a record that the conversation took place. Everyday communications between agency employees consist of much more than just deliberative exchanges, thus most communications would fall outside the intra and inter-agency exemption pursuant to petitioner's interpretation. By giving every member of the public the equivalent of subpoena power to scrutinize nearly all records of communication

among agency employees, petitioner's interpretation turns FOIL's intra and inter-agency exemption on its head and subverts the statutory purpose of promoting communications within and between agencies.

In recent years, the courts have clearly established that agencies are not obliged to demonstrate that particular records are "deliberative" in order to assert the intra and inter-agency exemption. FOIL's intra and inter-agency exemption is not limited solely to "deliberative material" or "lengthy or profound policy discussions" but also exempts suggestions and criticisms offered with little chance for reflection in moments of crisis (The New York Times Co. v City of NY Fire Dept., 4 NY3d 477, 487, 488 [2005]). The exemption covers materials that are clearly not "deliberative," such as dispatch calls between fire department dispatchers and fireman (The New York Times Co. v City of NY Fire Dept., 4 NY3d 477, 487 [2005]) and e-mails discussing the scheduling of meetings (Tuck-It-Away Associates, L.P. v Empire State Development Corp., 54 AD3d 154, 166 [1st Dept., 2008] affd. 13 NY3d 882 [2009]). Intra and inter-agency materials have been judicially construed to include all communications exchanged by agency employees including records of internal conversations about or in the course of the agency's work (The New York Times Co. v City of NY Fire Dept., 4 NY3d 477, 487, 488 [2005]; Matter of Bass Pro, Inc v Megna, 69 AD3d 1040, 1041-1042 [3d Dept., 2010]; Tuck-It-Away Associates, L.P. v Empire State Development Corp., 54 AD3d 154, 166 [1st Dept., 2008]; Matter of Mingo v New York State Div. of Parole, 244 AD2d 781, 782 [3d Dept., 1997]).

The Court has examined the e-mails that respondent has provided for in camera inspection and concludes that they are all intra-agency materials. They are all by and between respondent's employees. The next step, determining whether they were properly withheld, depends on whether they contain any "statistical or factual tabulations or data," "instructions to staff that affect the public," "final agency policy or determinations" or "external audits, including but not limited to audits performed by the comptroller and the federal government" (see Public Officers Law § 87 [2] [g] [i] through [iv], supra). Upon examining the material respondent presented, the Court concludes that there are no "statistical or factual tabulations," "instructions to staff that affect the public," "final agency policy or determinations" or "external audits, including but not limited to audits performed by the comptroller and the federal government."

"Factual data," the only remaining item, is all "objective information," excluding opinions, impressions, ideas, recommendations or advice exchanged as part of the consultative or deliberative process of government decision making (The New York Times Co. v City of New York Fire Dept., 4 NY3d 477, 487 [2005]; Matter of Gould v New York City Police Dept., 89 NY2d 267, 277 [1996]; Matter of Humane Socy. of U.S. v Brennan, 53 AD3d 909, 911 [3d Dept., 2008]). After examining the material for "factual data" or "objective information," the Court concludes that there is no factual data or objective information and therefore the e-mails were properly withheld in their entirety by respondent.

The Court turns next to the only remaining group of records at issue, "the actual audit samples utilized in audits of other Medicaid providers," which respondent withheld pursuant to Public Officers Law § 87(2)(e), FOIL's "law enforcement investigations" exemption. Respondent now asserts for the first time that petitioner did not actually request those records and has not included them within its petition in this proceeding. Respondent claims that it is therefore unnecessary for respondent to establish in this proceeding that those documents were properly withheld pursuant to FOIL.

The Court finds that respondent was correct at the administrative level when it concluded that the audit samples of other Medicaid providers fell within petitioner's request. Petitioner's request "t" applies to records pertinent to petitioner's own audit but also applies petitioner's requests "a" through "s" to records pertinent to other Medicaid providers' audits. Although respondent's change in its interpretation is suspect, the Court is unwilling to simply hold that respondent has failed to meet its burden and order release of all of the material.

Accordingly it is

ORDERED, that petitioner's petition for release of intra-agency documents is denied and dismissed, and it is further;

ORDERED, that within 30 days of this decision and order respondent prepare and file its defense of its refusal to release the audit samples of other Medicaid providers, and it is further;

ORDERED, that final consideration of petitioner's application for attorneys fees is deferred pending receipt of the respondent's response.

This shall constitute the Decision and Order of the Court. The original Decision and Order is returned to the attorney for the respondents. All papers except this Decision and Order are retained by the Court. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: November 28, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Amended Notice of Petition dated January 12, 2012;
2. Notice of Petition dated January 11, 2012;
3. Petition dated January 10, 2012, with exhibits annexed;
4. Memorandum of Law dated January 11, 2012;
5. Answer dated April 24, 2012;
6. Affidavit of Sarah Dasenbrock dated February 13, 2012, with exhibits annexed;
7. Memorandum of Law dated April 24, 2012;
8. Affidavit of Roy W. Breitenbach dated May 2, 2012.