

<b>Matter of Windham v City of New York Police Dept.</b>
2013 NY Slip Op 32431(U)
October 7, 2013
Sup Ct, New York County
Docket Number: 100200/13
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

EA  
D/10/13  
E

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

Windham, Graham

Plaintiff(s),

- v -

N.Y.P.D.

Defendant(s).

INDEX NO. 100200/2013  
MOTION DATE 8/27/13  
MOTION SEQ. NO. 003  
MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion for

Art. 78 Petition

PAPERS NUMBERED

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

See M.S.001 1-12

Answering Affidavits - Exhibits \_\_\_\_\_

13-21

Replying Affidavits \_\_\_\_\_

22-23

Cross-Motion: [ ] Yes [  ] No

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
*Order + Interim Judgment*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

RECEIVED  
OCT 10 2013  
IAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

Dated: 10/7/13

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

Check one: [ ] FINAL DISPOSITION

[  ] NON-FINAL DISPOSITION

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

-----X

In the Matter of the Application of

GRAHAM WINDHAM

Petitioner,

Index No. 100200/13

For a Judgment under Article 78 of the  
Civil Practice Law and Rules

**Decision, Order, and Judgment**

-against-

CITY OF NEW YORK POLICE  
DEPARTMENT, and RAYMOND KELLY,  
in his official capacity as COMMISSIONER  
of the CITY OF NEW YORK POLICE  
DEPARTMENT,

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Respondents.

-----  
**JOAN B. LOBIS, J.S.C.:**

Petitioner Graham Windham, a non-profit social-services organization, brings this Article 78 proceeding to direct Respondents New York City Police Department and Raymond Kelly to disclose public records, pursuant to the Freedom of Information Law ("FOIL"), New York Public Officers Law Section 84 et seq., concerning the death of one of Graham Windham's legal wards, referred to herein as A.W. Respondents request that the Court deny the petition and dismiss the proceeding. For the following reasons the motion is granted as specified herein.

Graham Windham is a non-profit organization that provides foster care and developmental services to youth and families. Between 2006 and January 30, 2012, Graham Windham provided foster care services for A.W., and, as of 2010, Graham became A.W.'s legal guardian. On January 30, 2012, A.W. and another youth had an altercation with an off-duty police

officer in which the two attempted to rob the officer. The officer shot and killed A.W. The other youth was arrested the following day.

By letters dated February 3, 2012, March 30, 2012, and May 24, 2012, Graham Windham submitted FOIL requests for information relating to A.W.'s death. By letter dated May 31, 2012, the NYPD denied Petitioner's requests "on the basis of Public Officers Law section 87(2)(e)(i) as such records/information, if disclosed, would interfere with law enforcement investigations or judicial proceedings." On June 28, 2012, Petitioner appealed the decision, arguing that the vague nature of the denial did not support the conclusion reached by the NYPD and that the NYPD is not prohibited from providing redacted documents. On September 28, 2012, the NYPD denied Petitioner's appeal, stating that the disclosure sought would interfere with a matter in King's County Family Court, and, therefore, disclosure was barred by Family Court Act section 381.3. The NYPD asserted that the records concerned the performance of a police officer, the disclosure of which was barred under Civil Rights Law Section 50-a, as they are used to evaluate the performance of a police officer in connection with continued employment or promotion. NYPD further stated that disclosure would create an unwarranted invasion of privacy, endanger the life or safety of a person, and identify confidential information relating to a criminal investigation, in violation of New York Public Officers Law Sections 87 & 89. In March 2013, due to Respondents' default, this Court ordered the Respondents to supply Petitioner with records responsive to its request. On May 1, 2013, the decision was vacated upon Respondents' motion.

In bringing this special proceeding, petitioner claims that Respondents' denial fails to articulate a particularized and specific justification for Respondents' claimed exemptions. Petitioners claim that the NYPD has not met its burden under the exemptions of New York Public Officers Law including 1) to show that disclosure would interfere with the alleged judicial proceedings as required Section 87(2)(e)(i); 2) to show that records reveal confidential sources or information under Section 87(2)(e)(iii); 3) to provide a specific and particularized justification for denying access beyond an allegation as required by Section 87(2)(f); 4) to show that Section 87(2)(a) applies because New York Civil Rights Law Section 50-a does not provide a blanket exemption to all records concerning the performance of a police officer; 5) to show that Section 87(2)(a) and Family Court Act Section 381.3 apply as they provide no factual support for the existence of an ongoing family proceeding; and 6) Section 89(2)(b) to prove that the records fit one of Section 89(2)(b)'s six enumerated categories for exemption.

Respondents offer eight defenses under the New York Public Officers Law including 1) Section 87(2)(e)(i) exempts disclosure as disclosure would interfere with an ongoing judicial proceeding; 2) Section 87(2)(a) exempts disclosure as documents requested were used to evaluate the performance of police officers toward continued employment or promotion and thus fall within the broad rule of confidentiality enunciated by New York Civil Rights Law Section 50-a; 3) Section 87(2)(a) exempts records withheld from public inspection under state statute - Family Court Act Section 381.3; 4) Section 87(2)(f) exempts documents that could endanger the life or safety of individuals that assisted in the investigation of the alleged robbery; 5) Section 87(2)(e)(iii) exempts disclosure of documents that are compiled for law enforcement purposes and reveal confidential

criminal investigative techniques and procedures; 6) Sections 87(2)(b) and 8(2)(b) exempt disclosure as disclosure would constitute an unwarranted invasion of privacy to the police officer whose records are requested; 7) Section 87(2)(e)(iv) exempts disclosure as documents were compiled for law enforcement purposes and reveal non-routine criminal investigative techniques and procedures; 8) Respondents claim that the Petitioner has failed to join a necessary party pursuant to New York Civil Rights Law Section 50-a which requires express written consent of subject police officers.

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). The agency withholding disclosure bears the burden of proving the exception applies. Mulgrew v. Bd. of Educ., 87 A.D.3d 506, 507 (1st Dep't 2011). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2013); see also County of Westchester v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes).

Under FOIL, "government records are 'presumptively open,' statutory exemptions are 'narrowly construed,' and the City must articulate a 'particularized and specific justification' for nondisclosure." N.Y. Civ. Liberties Union v. Schenectady, 2 N.Y.3d 657, 661 (2004) (citing Gould

v. N.Y. City Police Dep't, 89 N.Y.2d 267, 274 (1996)). The agency seeking to prevent disclosure has the burden to establish the applicability of an exemption. Gould, 89 N.Y.2d at 275 (citing Hanig v. Dep't of Motor Vehicles, 79 N.Y.2d 106, 109 (1992)). Withholding disclosure requires that “the material requested falls squarely within the ambit of one of these statutory exemptions.” Gould, 89 N.Y.2d. at 275 (citing Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979)). New York Public Officers Law Section 87(2) states that “[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records” unless they fall under one of the Section 87(2) exemptions.

First, this Court considers Respondents’ defense invoking New York Public Officers Law Section 87(2)(e)(i). Under Section 87(2)(e)(i), exempt documents include those compiled for law enforcement purposes and which, if disclosed, would “interfere with law enforcement investigations or judicial proceedings[.]” In analyzing 87(2)(e)(i), the Court of Appeals has held that an “agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law Section 89(4)(b) to articulate a factual basis for the exemption.” Leshner v. Hynes, 19 N.Y.3d 57, 66-67 (2012). The New York Court of Appeals has held that “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” Gould, 89 N.Y.2d at 275 (citing Fink, 47 N.Y.2d at 571). This burden requires identifying the types of documents, their general content, and the risk associated with that type of content. The Respondents have not identified the documents, content, or risks. They have not articulated a factual basis for the exemption.

Next, the Court considers the Respondents' claim that New York Civil Rights Law Section 50-a bars the disclosure of the requested records. Section 50-a establishes that, without a lawful court order, personnel records used to evaluate performance toward continued employment or promotion "shall be considered confidential and not subject to inspection or review without the express written consent of such police officer." Nondisclosure of personnel records relevant to promotion or continued employment should be "limited to the extent reasonably necessary to effectuate the purposes of New York Civil Rights Law Section 50-a--to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer." Daily Gazette Co. v. Schenectady, 93 N.Y.2d 145, 157-58 (1999); see also Prisoners' Legal Servs v. Dep't of Correctional Servs. 73 N.Y.2d 26 (1998). To fall under this exemption, the NYPD must "demonstrate a substantial and realistic potential of the requested material for the abusive use against the officer ... ." Daily Gazette, 93 N.Y.2d at 159.

The NYPD has not demonstrated that the requested information falls squarely within exemption. Graham Windham is not seeking the identities of any police officers, nor documents pertaining to individual punishments. See Daily Gazette., 93 N.Y.2d at 159. Furthermore, the Petitioner does not seek to use the information in litigation to degrade, embarrass, harass, or impeach the integrity of the officer. Respondents also claim that the procedure in Section 50-a requires the consent of the subject police officers; this procedure is only in place, however, if the documents in question are exempted by Section 50-a. Since the NYPD has not shown that this section applies to any particular document, then the procedure described in the statute is irrelevant.



Next, the Court addresses Respondents' argument that disclosure of documents is barred by Section 381.3 of the Family Court Act pursuant to New York Public Officers Law Section 87(2)(a). Section 87(2)(a) exempts documents from disclosure that "are specifically exempted from disclosure by state or federal statute." Section 381.3 of the Family Court Act states that "All police records relating to the arrest and disposition of any person under this article...shall be withheld from public inspection." The section allows for records to be opened, upon motion and for good cause shown, to a respondent or his parents or to a judge of a court in which a respondent was convicted of a subsequent crime. The purpose of this section is to protect the reputation of the youth subject to juvenile proceedings. People v. Hunter, 88 A.D.2d 321, 324 (2d Dep't 1982).

To prove that this exemption applies, the NYPD could easily have provided a list of documents used in the proceeding that relate to the reputation of the juvenile. This would not necessarily mean that the documents are all barred from disclosure. Some documents may be used in a proceeding but do not relate to an arrest or disposition of the juvenile subject to the proceeding. The NYPD has not provided a list of documents used in the proceeding. Furthermore, they have not shown that any records relate to the arrest or disposition of any person under Section 381.3 of the Family Court Act.

Next, the Court addresses Respondents' argument that under New York Public Officers Law Section 87(2)(f) the disclosure of documents is exempted as disclosure could endanger the life or safety of the individuals mentioned in the investigation. An agency need only demonstrate a possibility of endangerment to invoke this exemption. See Bellamy v. N.Y. City Police Dep't, 87

A.D.3d 874, 875 (1st Dep't 2011), aff'd, 20 N.Y.3d 1029 (2013); Exoneration Initiative v. N.Y. City Police Dep't, 966 N.Y.S.2d 825, 828 (New York County 2013). Neither courts nor legislature have issued a comprehensive prohibition on the disclosure of police records concerning information provided by witnesses. See Exoneration Initiative, 966 N.Y.S.2d at 828 (citing Johnson v. N.Y. City Police Dep't, 257 A.D.2d 343, 348 (1st Dep't 1999)). Though the NYPD need only show a possibility of endangerment, that showing cannot be accomplished with a bare assertion.

The NYPD has not articulated a factual basis for this exemption, instead it relies on its bare assertion that a strong possibility exists that disclosing information would endanger the safety of the detective involved in A.W.'s shooting, as well as those witnesses who spoke with investigators. This exemption, like all Section 87(2) exemptions, is to be narrowly interpreted to effectuate the purpose of FOIL. Whitfield v. Bailey, 80 A.D.3d 417, 419 (2011); see also Washington Post Co. v. N.Y. State Ins. Dep't, 61 N.Y.2d 557, 564 (1984). First, the NYPD has not shown how disclosure would endanger the detective involved in the shooting as his full name and actions have already been released and publicized in numerous media reports. Second, not all information, if disclosed, would endanger the safety or lives of witnesses. See Johnson, 257 A.D.2d at 349. For example, information that exonerates a criminal defendant, has no influence on a defendant's guilt, or casts the NYPD in a negative light would not present any apparent danger to a witness. Furthermore, any witnesses that have testified in proceedings would already be publicly known. The NYPD has not articulated a factual basis for this exemption.

Next, in their answer, Respondents claim that New York Public Officers Law Section

87(2)(e)(iii) exempts FOIL disclosure because the requested documents are compiled for law enforcement purposes and reveal confidential criminal investigative techniques and procedures. This exemption applies when documents compiled for law enforcement purposes “identify a confidential source or disclose confidential information relating to a criminal investigation.” This exemption does not apply to “confidential investigative techniques and procedures,” as the plain language of the exemption indicates. Section 87(2)(e)(iv), on the other hand, provides exemptions for non-routine investigative techniques and procedures. Even under Section 87(2)(e)(iii), the agency must “meet its burden to establish that the material sought is exempt from disclosure.” Cornell Univ. v. N.Y. Police Dep’t, 153 A.D.2d 515, 517 (1989). The NYPD must provide a “factual predicate - other than the fact that the passerby was questioned in the context of a murder investigation” to give rise an inference of an assumed promise. Exoneration Initiative, 966 N.Y.S.2d at 829. Respondents do not claim that there is a confidential source named in the documents, or could be identified through statements made in the documents, and there is no claim that confidential information is present in the documents.

Under Section 87(2)(e)(iv), exempted documents include those which, if disclosed, would “reveal criminal investigative techniques or procedures, except routine techniques and procedures.” To determine if investigative techniques are “non-routine,” the agency must show that the disclosure of records would give rise to the likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel. Fink, 47 N.Y.2d at 572. Respondents have merely made bare assertions to establish the applicability of the exemption. Instead of assertions, the NYPD should have at least provided

descriptions of the documents.

Finally, Respondents invoke New York Public Officers Law Sections 87(2)(b) and 89(2)(b), claiming that disclosure would constitute an unwarranted invasion of privacy. Section 87(2)(b) exempts disclosures that would be a violation of personal privacy under Section 89(2)(b). Section 89(2)(b) provides a number of exemptions. Respondents specifically cite to Section 89(2)(b)(i) which states that the unwarranted invasion of personal privacy includes “disclosure of employment, medical or credit histories or personal references of applicants for employment.” Employment history is not well defined by statute or case law, but courts have excluded a number of employment related documents from this exemption including intra-agency materials, charges brought against employees, redacted performance evaluations and appraisals, disciplinary charges, agency decisions regarding charges, and penalties. See LaRocca v. Bd. of Educ., 220 A.D.2d 424, 425-6 (1995); Kwasnik v. New York, 262 A.D.2d 171 (1st Dep’t 1999); Obiajulu v. Rochester, 213 A.D.2d 1055 (1995); Buffalo News v. Buffalo Mun. Hous. Auth., 163 A.D. 830, 831-32 (1990); New York 1 News v. Office of the President of Borough of Staten Island, 231 A.D.2d 524, 525-26 (1996). No other provision of Section 89(2)(b) mentions employment records. Section 87(2)(b) does not bar any of the requested records.

The NYPD has failed to show that any of the claimed exemptions apply to the documents requested by Graham Windham. Due to the Respondents’ bare assertions, the Court is unable to determine whether some documents are validly exempt. The New York Court of Appeals has held that “[i]f 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.” Gould, 89 N.Y.2d at 275; see also Xerox Corp. v. Webster, 65 N.Y.2d 131, 133 (1985).

Accordingly, it is ORDERED that the petition is granted; and it is

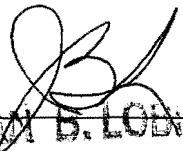
ORDERED that Respondents shall supply Graham Windham with all non-exempt records responsive to its request within 30 days of the date of this decision, order and judgement; and it is further

ORDERED that all other requested records shall be supplied to the Court for *in camera* inspection within 30 days of the date of this decision, order, and judgement; and it is further

ORDERED that the NYPD shall provide a log detailing the types of documents, contents, risks associated with the documents, and specific exemption relied upon to the court for *in camera* inspection in conjunction with the records.

Dated: October 7, 2013

ENTER:

  
 \_\_\_\_\_  
 JOAN B. LOBIS, J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).