Matter of Adam D. Perlmutter, P.C. v New York City Police Dept.
2013 NY Slip Op 32532(U)
October 17, 2013
Sup Ct, New York County
Docket Number: 100220/13
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C. Justice

PART 36

The Law Offices of Adam D. Perlmutter, P.C.

-v-

New York City Police Dept et al.

INDEX NO. 100220/13

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to 4, were read on this motion to/for Article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits (+ memo) | No(s). 1, 2

Answering Affidavits — Exhibits (+ memo) | No(s). 3

Replying Affidavits (memo) | No(s).

interim order dated 5/8/13

Upon the foregoing papers, it is ordered that this ~~motion is~~ Article 78 proceeding is granted in accordance with the attached memorandum decision.

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

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).

Dated: 10-17-13

DORIS LING-COHAN 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: **PART 36**

In the Matter of
THE LAW OFFICES OF ADAM D. PERLMUTTER, P.C.,

Petitioner,

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

-against-

NEW YORK CITY POLICE DEPARTMENT, and RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department,

Respondents.

INDEX NUMBER 100220/2013
Motion Sequence 001

DECISION, ORDER & JUDGMENT

DORIS LING-COHAN, J.:

Petitioner, the Law Offices of Adam D. Perlmutter, petitions this court for a judgment, pursuant to CPLR Article 78, compelling respondents to produce documents requested in petitioner's Freedom of Information Law (FOIL) request, dated August 30, 2012.

Factual Background

Petitioner is a New York City-based law firm that, among other matters, handles criminal and civil litigation concerning impaired driving of a motor vehicle and driving under the influence (DUI). Respondent New York City Police Department (NYPD) uses breathalyzer machines to determine a subject's blood alcohol level. A subject may not voluntarily substitute a blood or urine sample. A blood or urine test may be administered at NYPD's discretion. *See* Petition, exhibit A, Highway District Intoxilyzer 5000EN I.D.T.U. Procedure Guide at 9. Statutory penalties in New York City are based on the breath test readings. *See* Vehicle and Traffic Law §§ 1192 and 1195.

According to the petition, NYPD maintains 28 Intoxilyzer 5000EN model machines (Intoxilyzer) in six police precincts around the city, and at NYPD's laboratory. Petition, ¶¶ 15-

16. A subject arrested for DUI is taken to one of these locations for testing. *Id.* at ¶18. The Intoxilyzer uses infrared spectrophotometry, where the alcohol content of a breath sample is measured by the passage of infrared light through it. *Id.* at ¶19.

On August 30, 2012, petitioner, pursuant to FOIL, requested "copies of all calibration and maintenance records for all Intoxilyzer 5000EN machines owned or maintained by the NYPD for the last five years (beginning January 2008 until the present)," Petition, exhibit T. On September 20, 2012, defendants denied the FOIL request as disclosure "would interfere with law enforcement investigations or judicial proceedings", citing New York's Public Officers Law ("POL") §87(2)(e)(i). *Id.*, Exhibit V. Petitioner appealed, in a letter dated September 25, 2012. *Id.*, exhibit W. Petitioner's appeal was denied on December 3, 2012. *Id.*, Exhibit Y. The parties took no further action until the filing of the instant petition on January 30, 2013.

Legal Standards

In this Article 78 proceeding, the question is raised as to "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." CPLR 7803 (3). "Judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious. The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result." *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dept 1998) (citation omitted); *see also Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 429 (1st Dept 2011) ("It is not the role of the court to weigh the desirability of the proposed action or to choose among alternatives, resolve disagreements among experts, or to substitute its judgment for that of the agency"), *affd* 19 NY3d 922 (2012).

FOIL, New York's Public Officers Law § 84 et seq., provides for "access to the records of government." It covers

> "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."

Public Officers Law § 86 (4).

Certain limits are placed on disclosure, such as shielding collective bargaining negotiations, confidential law enforcement investigations, and trade secrets. *See e.g.* Public Officers Law §§ 87 (2) (c), (2) (d) and (2) (e) (iii). Public Officers Law §87(2), cited to by respondent in its denial letter [Petition, Exh. V], specifically states in pertinent part, as follows:

> [e]ach 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:
>
> (e) are compiled for law enforcement purposes and which, if disclosed, would:
>
> (i) interfere with law enforcement investigations or judicial proceedings.

The public agency has the burden of proving that the requested record falls within the listed exceptions. Public Officers Law § 89 (4) (b). The public agency is required to either produce the requested record, deny the 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," within five days of receipt of the request. Public Officers Law § 89 (3) (a).

A denial of a record request may be appealed within thirty days, and the public agency "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." Public Officers Law § 89 (4) (a).

Discussion

Petitioner contends that respondents' responses to his FOIL request and his appeal of its denial were untimely under law. Public Officers Law § 89 (3) (a) requires the public agency to reply within five days, no matter whether it is granting, denying or furnishing a written acknowledgement of receipt and a statement of the approximate date when a final determination will be made. Here, respondents answered petitioner's August 30, 2013 request on September 20, 2012, 21 days from the request. The appeal was filed on September 25, 2012. The appeal was denied on December 2, 2012, 69 days later. Each time span was outside of the statutory guidelines.

Respondents do not dispute the length of time they took to respond to petitioner's FOIL request and his appeal of its denial. Rather, they assert that their "denial of Petitioner's FOIL request was lawful and proper in every respect and mandated by law." Amended Verified Answer (Answer), ¶ 108. This statement is incorrect in that the initial denial and the denial of the appeal were late under statute, and the responses made no effort to explain, or even acknowledge, respondents' conduct in this regard. However, a delay in responding to a FOIL request or an appeal of its denial is generally treated the same as a denial of the request or the appeal. *Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 406 (1st Dept 2013) ("The FOIL requester's statutory remedy for an untimely response or ruling is to deem the response a denial and commence a CPLR article 78 proceeding . . ."). Respondents' delays did not significantly prejudice petitioner, as the commencing of the instant Article 78 proceeding was not impeded.

Respondents' denial of the initial FOIL request stated that the "records/information, if disclosed would interfere with law enforcement investigations or judicial proceedings," insulating them under Public Officers Law § 87 (2) (e) (i). The denial of petitioner's appeal broadened the grounds for the denial to include protection of non-routine "criminal investigative

techniques or procedures," citing Public Officers Law § 87 (2) (e) (iv); protection of intra-agency records "contain[ing] preliminary data and information," citing Public Officers Law § 87 (2) (g) (i); and "disclosure to just one party would interfere with the ordinary course of court-supervised discovery and deprive other parties of their right to a fair trial or impartial adjudication in ongoing litigation," citing Public Officers Law § 87 (2) (e) (i) and (ii).

In support of their opposition to the instant petition, respondents submit affirmations from several prosecutors. Joseph A. McCormack (McCormack), chief of the Vehicular Crimes Bureau in the office of the District Attorney, Bronx County, correctly states that New York Criminal Procedure Law (CPL) § 240.20 (1) (k) requires a prosecutor to provide a criminal defendant only with the most recent calibration or inspection of the Intoxilyzer instrument along with the test results. Answer, exhibit P. McCormack contends that "records older than the most recent calibration and maintenance records," as requested, "would most likely be denied under Crim. Pro. Law § 240.20 (1) (k), if made in the context of a criminal proceeding." *Id.*, ¶ 10. Additionally, he claims that such disclosure "would clearly usurp the criminal court judge's authority to determine the scope of discovery in specific prosecutions then-pending and to be brought before the criminal court." *Id.*, ¶ 11. He estimates that there are approximately 1,000 criminal prosecutions in the Bronx involving the use of an Intoxilyzer that might, therefore, be interfered with, by disclosure of documents or information otherwise excluded by CPL § 240.20 (1) (k). Id., ¶¶ 15-16.

Jill Hoexter (Hoexter), an assistant district attorney in the office of the District Attorney, New York County, estimates that there are approximately 1,300 pending criminal prosecutions in Manhattan involving the use of an Intoxilyzer. Answer, exhibit Q, ¶ 6. Hoexter does not draw any conclusions about the possible impact of the instant petition on pending criminal

prosecutions. Adam Silberlight (Silberlight), an assistant district attorney in the office of the District Attorney, Richmond County, estimates that there are approximately 300 criminal prosecutions in Staten Island involving the use of an Intoxilyzer. Answer, exhibit R, ¶ 6. He also offers no opinion about the instant petition. Karen Rankin (Rankin), an assistant district attorney in the office of the District Attorney, Queens County, estimates that there are over 800 criminal prosecutions in Queens involving the use of an Intoxilyzer. Answer, exhibit S, ¶ 6. Rankin offers no opinion about the instant petition. Craig Esswein, an assistant district attorney in the office of the District Attorney, Kings County, estimates that there are over 700 criminal prosecutions in Brooklyn involving the use of an Intoxilyzer, without commenting on the instant petition. Answer, exhibit T, ¶ 6. Hoexter, Silberlight, Rankin and Esswein all have had substantial experience and responsibility in prosecuting crimes related to the operation of a motor vehicle following the consumption of alcohol. Unlike McCormack, these assistant district attorneys do not explicitly raise the issue of

> "interfere[nce] with the criminal courts' ability to manage the orderly conduct of their own cases and, in particular, would usurp the ability of criminal court judges to manage pre-trial discovery and would undoubtedly unnecessarily burden these courts with issues relating to the admissibility of documents which might otherwise have been unavailable through discovery."

McCormack affirmation, ¶ 16.

Respondents' key objection to disclosure of calibration and maintenance records for all of NYPD's Intoxilyzers is the potential interference with law enforcement investigations or judicial proceedings. Their argument follows a line of reasoning that seems very broadly based: Intoxilyzers are used in determining a suspect's blood alcohol level; criminal charges and penalties are tied to a suspect's blood alcohol levels; production of general information about Intoxilyzers interferes with criminal law enforcement, although information about a specific

instrument in a specific case does not. Respondents contend that this "generic determination" (Memorandum of Law at 2), is supported by several cases, citing, notably: *Matter of Pittari v Pirro*, 258 AD2d 202 (2d Dept 1999) (*Pittari*); *Matter of Legal Aid Socy. v New York City Police Dept.*, 274 AD2d 207 (1st Dept 2000) (*Legal Aid Society*); *Matter of Lesher v Hynes*, 19 NY3d 57 (2012) (*Lesher*).

Upon examination, the authority cited proves to be of limited use for respondents' purposes. When the defense attorney in the *Pittari* murder case sought essentially all records obtained in connection with the homicide investigation, the district attorney refused, claiming a blanket exemption under Public Officers Law § 87 (2) (e) (i). The trial court held that a district attorney may assert a blanket exemption under Public Officers Law § 87 (2) (e) (i) to all material compiled in connection with the investigation of a crime and the pending prosecution of that crime. The Second Department found, on appeal, that "it is apparent that FOIL disclosure of materials pertaining to the arrest and prosecution of a defendant in a pending criminal proceeding would interfere with the adjudication of the criminal proceeding." *Pittari*, 258 AD2d at 207.

When criminal defendants awaiting trial requested documents relating to their charges in *Legal Aid Society*, including complaint report worksheets, complaint follow-up reports, arrest reports, activity log entries and arrest photos, NYPD refused the requests, relying upon Public Officers Law § 87 (2) (e) (i), protecting material compiled in connection with the investigation of a crime, and Public Officers Law § 87 (2) (f), protecting material that, if disclosed would endanger the life or safety of a person. On appeal, the First Department affirmed the denial of the FOIL request. "We also agree with the Second Department's holding in *Pittari* that 'a generic determination' could be made that disclosure under FOIL of documents pertaining to a petitioner's arrest and prosecution would interfere with the pending criminal proceeding." *Legal*

Aid Society, 274 AD2d at 214.

Lesher's fact pattern differs significantly from these cases, because the petitioner had no connection to the underlying legal matter. Petitioner, an independent attorney and author, made a FOIL request in 1998 for records pertaining to the case in which, in 1984, a man accused of sexual abuse fled to Israel, beyond the reach of the United States's extradition power. The Kings County District Attorney provided materials, some with redactions. In 2007, petitioner made a second FOIL request in the matter for records from 1993 to the present. This time, the district attorney denied the request and the appeal on the grounds of Public Officers Law § 87 (2) (e) (i)-(iv), emphasizing interference with law enforcement investigations or judicial proceedings. The trial court granted the petition with some qualifications. On appeal, the Court of Appeals affirmed the Appellate Division's dismissal of the petition, stating that the "Appellate Division in *Pittari* and *Legal Aid Society* adopted the [blanket or generic exemption to a pending case] analysis when interpreting Public Officers Law § 87 (2) (e) (i), as do we." *Lesher*, 19 NY3d at 67. The Court of Appeals held that disclosure "posed an obvious risk of prematurely tipping the District Attorney's hand." *Id.* at 67-68. This was not an idle concern because the suspect faced an extradition proceeding in Israel when the second petition was filed. The District Attorney's denial of the FOIL request then subscribed to the law.

The subsequent determination by the Israel Supreme Court that barred extradition of the suspect was no reason to now decide otherwise, according to the Court of Appeals. However, it recognized that petitioner

> "is free to make another FOIL request for the correspondence and communications that he sought in this proceeding, based on the intervening Israeli judicial decision. If he is correct in his assessment of the decision's effect – a matter for the FOIL records access officer to consider in the first instance – there is, practically speaking, no longer any pending or potential law enforcement

> investigation or judicial proceeding with which disclosure might interfere. Public Officers Law § 87 (2) (e) (i) would not preclude release of the records."

Id. at 68.

Lesher, one of the latest and the most authoritative rulings in this subject area, still addresses the generic or blanket exemption for *specific* potential law enforcement investigations or judicial proceedings, akin to the other cases cited, and many other similar ones. The instant petition, by contrast, is unrelated to any potential law enforcement investigation or judicial proceeding, that is, any identifiable, specific or known potential law enforcement investigation or judicial proceeding. Rather, it addresses test equipment used day-in and day-out to measure suspects' blood alcohol content, which may, thereby, exonerate suspects or, at least, deter any criminal prosecution on the grounds of driving under the influence. In essence, respondents' reasoning that if an examination of NYPD's Intoxilyzers leads to their abandonment, or a dramatic change in their use, then there might, arguably, be interference with potential law enforcement investigations or judicial proceedings.

However, petitioner's position is bolstered by the dicta in *Lesher* that opens the door to disclosure when there is "no longer any pending or potential law enforcement investigation or judicial proceeding with which disclosure might interfere." *Id.* There are admittedly no pending specific law enforcement investigations or judicial proceedings at issue in this petition, unlike *Pittari* and *Legal Aid Society*. The several thousand pending cases referenced by the various prosecutors above would not be disturbed by granting this petition, since the suspects/defendants involved already have the right to the most pertinent Intoxilyzer information particular to their case, under CPL § 240.20 (1) (k).

Assuming the petition is granted and a wealth of information regarding the Intoxilyzers is

made public, there are two outcomes: all equipment proves to be accurate and well-maintained; or, not all equipment proves to be accurate and well-maintained. The first outcome will not interfere with law enforcement investigations or judicial proceedings; it may even have the salutary effect of bolstering confidence in the handling of DUI cases. The second outcome, the discovery of faulty or defective equipment, can only be in the public interest in preventing improper prosecutions. Such an outcome should not be the sort that a public agency cites to, in order to protect its records from disclosure. That would be an arbitrary and capricious determination, and fail under CPLR 7803 (3).

Respondents' expressed concern as to potentially burdening/hampering criminal court judges with the effects of such FOIL disclosure is misplaced as such disclosure, in fact, may reduce the number of applications for disclosure. Further, rulings on whether such disclosed materials are admissible would not "burden" criminal court judges in most cases, as the governing evidentiary rules are clear. In any event, the effect of such disclosure is too speculative to bar the disclosure of the records sought.

For the reasons above, the petition is granted, and defendants shall comply with the FOIL disclosure request of August 30, 2012, within 30 days of receipt of a copy of this order. Petitioner's request for an award of attorneys' fees in its favor is granted, as permitted by Public Officers Law §89(4)(c), as respondent failed to timely respond to petitioner's FOIL request. *See Matter of Legal Aid Society v. New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120 (3rd Dept 2013); *In the Matter of New York Civil Liberties Union v. City of Saratoga Springs*, 87 AD3d 336 (3rd Dept 2011). The court notes that respondents failed to supply case law in support of their argument that legal fees should be denied because petitioner law firm appeared in this proceeding *pro se*.

Accordingly, it is

ORDERED and ADJUDGED that the Petition is granted, and defendants shall comply with the FOIL disclosure request of August 30, 2012, concerning all calibration and maintenance records for all Intoxilyzer 5000EN machines owned or maintained by the NYPD for the last five years (beginning January 2008 until the present), within 30 days of receipt of a copy of this order with notice of entry; and it is further

ORDERED that, with respect to attorneys' fees, within 60 days of entry of this decision/order, petitioner is directed to submit an accounting of its costs/attorneys' fees, by affidavit/affirmation, setting forth the hours expended, normal hourly rate charged, years of experience of counsel etc, and respondents are directed to review such accounting and, should they agree with such costs/fess, reimburse petitioner for such costs/fees, within 30 days from receipt of the accounting; alternatively, within 30 days of receipt of the accounting, respondents shall provide petitioner, by affidavit/affirmation, specific reasons for their disagreement within such accounting . If the parties are unable to agree on the amount of the costs/fees, the parties shall *meet and confer to resolve such issue*. If unable to resolve within 30 days of their meeting, either side shall file a motion to determine such costs/fees, with a copy of this order attached, within 150 days of entry of this order, which, upon final submission, may be referred to a Special Referee to hear and determine, in accordance with CPLR 4317(b)[1]; and it is further

ORDERED that within 30 days of entry of this order, petitioner shall serve a copy upon respondents, with notice of entry.

DATED: October 17 , 2013

Doris Ling-Cohan, J.S.C.

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[1] Failure to comply may be deemed a waiver or default on this claim, as appropriate.