

Matter of Luongo v Records Access Appeals Officer
2017 NY Slip Op 31142(U)
May 24, 2017
Supreme Court, New York County
Docket Number: 160232/2016
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

In the Matter of JUSTINE CUONGO

INDEX NO. *160232/2016*

Petitioner,

MOTION DATE

- v -

MOTION SEQ. *001*

*Records Access Appeals Officer
NYC PD*

Respondent.

The following papers were read on this Article 78 petition.

NYSCEF
PAPERS NUMBERED *1-35*

- Notice of Petition/ Order to Show Cause – Affidavits – Exhibits _____
- Answering Affidavits – Exhibits _____
- Replying Affidavits _____

**MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER**

Dated: *May 24, 2017*
~~2016~~

JBL

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
NEW YORK COUNTY: IAS PART 6**

-----X

In the matter of the Application of

JUSTINE LUONGO, Attorney In-Chief,
Criminal Defense Practice, The Legal Aid
Society,

Petitioner,

Index No. 160232/2016

-against-

Decision and Order

RECORDS ACCESS APPEALS OFFICER,
New York City Police Department

Respondent.

-----X

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

Petitioner brings this article 78 proceeding seeking an order directing the New York City Police Department (NYPD) to produce documents containing NYPD administrative summaries. The NYPD posted this information publicly for approximately forty years in compliance with Public Officers Law Sections 86-90, the Freedom of Information Law (FOIL). Respondent opposes the petition, arguing that New York State Civil Rights Law Section 50-a (50-a) bars requests for the documents. For the reasons set forth below, the petition is denied.

On May 9, 2016, Legal Aid filed a FOIL request for all "Personnel Orders" such as those that are hung outside the ante-room of the Deputy Commissioner of Public Information from January 1, 2011 to the present. The Orders contain summaries of employment updates for both officers and civilian employees of the NYPD, including transfers, promotions, retirements, and disciplinary dispositions. On May 27, 2016 the NYPD denied Legal Aid's request. Respondent

stated the decision was based on Public Officers Law Section 87(2)(e), which protects records “compiled for law enforcement purposes,” and on 87(2)(a), which pertains to personnel records that are exempt from FOIL disclosure under Civil Rights Law Section 50-a. It also noted it would no longer make personnel orders available to the press going forward, regardless of its past policy of public disclosure. On June 8, 2016, Legal Aid appealed and NYPD reaffirmed its denial.

Petitioner argues that the Orders are not personnel records under the plain text or legislative purpose of 50-a. She states FOIL must be interpreted to grant the public maximum access to government records and therefore exceptions must be narrowly interpreted. She alleges that the orders in question are merely summaries listing employment updates and outcomes of officer disciplinary proceedings that are not contained in the officers’ files. Because the disciplinary hearings themselves do not constitute personnel records, she asserts, summaries of their outcomes cannot be protected. If respondent bars limited summary information of police officer disciplinary dispositions from release, nearly all information regarding police discipline will be barred. To qualify for exemption under 50-a, she argues, the NYPD must show that the Orders are used to evaluate performance toward continued employment or promotion. She states that the NYPD’s position is contrary to the legislative intent in enacting 50-a “to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action.” Further, as the NYPD made this information available for so many years, she contends that it cannot now change its interpretation of the law without explaining why its prior interpretation was incorrect.

Even if the Orders are personnel records, petitioner states, they should still be released unless respondent demonstrates that nondisclosure is necessary to prevent a substantial and realistic potential use of information in the records in litigation to degrade, embarrass, harass, or impeach the integrity of police officers. She argues that respondents have not demonstrated the information was used this way during the decades it was available to the public. Finally, she argues that NYPD denied her request based on the false legal premise that 50-a imposes an affirmative obligation to keep records secret.

In its answer, respondent argues that the Orders the very sort of records that the Court of Appeals found the legislature intended to keep confidential under 50-a. It states that whether a document qualifies as a personnel record depends upon its nature not its physical location. Respondent states that the records at issue in this case pertain to misconduct or rules violations and by their nature carry a substantial potential for embarrassing, harassing, or impeaching use and thus fall squarely within the broad rule of confidentiality established by 50-a. Accordingly, respondent contends, it has borne its burden of demonstrating that the Personnel Orders are exempt from disclosure under FOIL. Additionally, respondent argues that the requested records are not subject to disclosure because petitioner has neither joined the officers who are the subjects of the personnel orders as necessary parties to this proceeding nor provided them the requisite notice that their records are being sought.

On March 21, 2017 the Court heard oral argument on the case and marked the petition fully submitted. On March 30, 2017 the First Department rendered a decision in Luongo v. Records Access Officer, Civilian Complaint Review Board, No. 100250/15, 2017 WL 1173617

(1st Dep't Mar. 30, 2017) (Luongo I). Luongo I involved an appeal from Justice Alice Schlesinger's determination that petitioner was entitled to summaries of Civilian Complaint Review Board (CCRB) records in connection with a police officer's involvement in Eric Garner's arrest and death. Justice Schlesinger found that information as to "whether the CCRB substantiated complaints against [the officer] and if so, whether there were any related administrative proceedings and those outcomes, if any" did not constitute personnel records. She held that even if the summaries were personnel records, they could be disclosed without posing the risk of harassment to the officer that 50-a aimed to prevent. The First Department reversed, holding that the summary of records constituted protected personnel records, that prior disclosure of the records did not dictate disclosure, that the prior release of results of disciplinary actions did not dictate disclosure, and that non-disclosure was warranted to protect the officer's safety. This Court gave the parties in the instant action until April 7, 2017 to submit additional memorandums in response to that decision.

Petitioner points out that the Court in Luongo I clearly states that 50-a does not restrict an agency from granting access to records within any of the statutory exceptions. Therefore, she states, contention that 50-a prohibits them from providing the requested orders is error of law. Additionally, she argues, Luongo I establishes that respondent must show how the orders impact the promotion or retention of officers before they are considered personnel records. She argues that, unlike in Luongo I, there is no finding that the records in question here are actually used in officer promotion. Petitioner distinguishes her request here from the summary of records from Luongo I. Further, petitioner states that in Luongo I there was considerable evidence to support a substantial potential that the information would be used in an abusive manner. Petitioner reiterates

that the summaries she requests have been published for decades and respondent does not identify any incidents of abuse. She states that the First Department relies heavily on the separate FOIL exemption in Public Officers Law Section 87(2)(f), which permits an agency to deny access to records that, if disclosed, would endanger the life or safety of any person.

Respondent argues that Luongo I and another case decided by the First Department on the same day, New York Civil Liberties Union v. New York City Police Dep't, No. 102436/2012, 2017 N.Y. App. Div. LEXIS 2448 (1st Dep't March 30, 2017), support its position that the records are exempt from disclosure under 50-a. It states that all of petitioner's arguments were rejected by the First Department. It contends that the question is not whether respondent could voluntarily disclose the personnel orders, and that 50-a specifically states that personnel records can only be disclosure by court order or with the express written consent of the officer.

As respondent points out, the First Department explicitly rejected petitioner's arguments that respondent has waived nondisclosure under 50-a by making the information available in the past. Though there are some factual distinctions between this case and Luongo I, I am constrained by the First Department's holding to deny the petition. Like documents in Luongo I, the administrative summaries listing disciplinary dispositions "are clearly of significance to superiors in evaluating police officers' performance." Luongo I at 6. Contrary to petitioner's contention that respondent failed to demonstrate a substantial potential for the records to be used to harass officers if disclosed, the First Department found that by its nature this information carries the potential for exploitation. Further, contrary to petitioner's argument, respondent must

demonstrate a possibility rather than a past history of endangerment. Id. at 8. The Court has considered the remainder of the parties' arguments and they do not change the outcome.

Therefore, it is

ORDERED that the petition is denied.

Dated: *May 24, 2017*

ENTER:



JOAN B. LOBIS, J.S.C.