

Equality for Flatbush v New York City Police Dept.
2019 NY Slip Op 30243(U)
January 30, 2019
Supreme Court, New York County
Docket Number: 157787/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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EQUALITY FOR FLATBUSH, IMANI HENRY	INDEX NO.	<u>157787/2017</u>
Petitioners,	MOTION DATE	<u>002</u>
	MOTION SEQ. NO.	<u></u>

- v -

NEW YORK CITY POLICE DEPARTMENT, JAMES O'NEILL,
NYPD COMMISSIONER, in his Official capacity

**DECISION, ORDER &
JUDGMENT**

Respondents.

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The following papers, numbered <u>1,2</u> , were read on this application to/for	<u>Art.78</u>
Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s) <u>1</u>
Answering Affidavits - Exhibits	No(s) <u>2</u>
Replying	No(s) <u></u>

Respondents' cross-motion to dismiss the petition is granted and this proceeding is dismissed.

Background

This proceeding arises out of respondents' denial of Freedom of Information Law ("FOIL") requests dated May 30, 2017. Petitioners are The Flatbush for Equality Project, an organization that campaigns in favor of issues including affordable housing, anti-gentrification and police accountability in Brooklyn, New York and its executive director, Imani Henry. A volunteer for petitioner, Ms. Friedman, made the May 30 FOIL requests, and when making the requests she did not explicitly state that she was acting on behalf of petitioners in seeking the information.

Ms. Friedman made three specific records requests to respondents asking for the number and types of NYPD police officers, units, and personnel deployed to cover the 2016 J’ouvert Festival and West Indian Day Parade in the Crown Heights neighborhood of Brooklyn. In response to violence at these events, the NYPD has increased its police presence.

Petitioners claim they have an interest in obtaining the records requested by Ms. Friedman because they are relevant to the organization’s efforts to advance anti-police repression, affordable housing, and anti-gentrification community organizing. Petitioners maintain that the increased policing in the areas surrounding the events has led to “Broken Windows” policing and gentrification. The petitioners further allege that increased police presence in the leadup to the events has made the neighborhood less safe.

On June 12, 2017 respondents denied access to the information requested by Ms. Friedman based on POL § 87(2)(e)(iv). Petitioners, by their attorney, administratively appealed the determination. On July 28, 2017 the Appeals Officer denied the appeal. The Appeals Officer nonetheless provided petitioners with the aggregate number of police officers, including their ranks, assigned to both the J’ouvert Festival and the West Indian Day Parade. Respondents also provided the aggregate number of police officers, including all ranks, deployed for purposes other than the parade in the “North Flatbush” Brooklyn neighborhood for the requested time period of 8/29/16-9/5/16.

On August 31, 2017, petitioners commenced this proceeding to challenge respondents' determination denying petitioners access to the information sought by Ms. Friedman regarding the number and types of NYPD police officers, units, and personnel deployed.

Respondents cross-move to dismiss on the ground that petitioners fail to state a cause of action. They argue that the records were withheld because their release would reveal non-routine techniques or procedures and could endanger the life and safety of law enforcement officers and the public. Respondents also claim that petitioners lack standing to maintain the Article 78 proceeding.

Discussion

"All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions . . . [B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government. Instead, to invoke one of the exemptions of section 87(2), the agency must articulate [a] particularized and specific justification for not disclosing requested documents" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-75, 653 NYS2d 54 [1996] [internal quotations and citations omitted]).

"As a corollary to the legislative policy favoring full access to governmental records, we have interpreted the statutory exemptions set forth in section 87(2) of FOIL narrowly, imposing the burden upon the public agency to demonstrate that the material requested falls squarely within

the ambit of one of these statutory exemptions” (*Matter of Newsday, Inc v Empire State Dev. Corp.*, 98 NY2d 359, 362, 746 NYS2d 855 [2002] [internal quotations and citations omitted]).

As an initial matter, petitioners lack standing to bring this claim. POL § 89(4)(b) states that “a person denied access to a record in an appeal determination...may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.” Ms. Friedman is the individual who made the FOIL request in the first place and when doing so, she did not claim that she was filing the request on behalf of the petitioners. However, it does not matter in this case because even if Ms. Friedman had brought this case, or respondents had made the original request, respondents would still prevail on the merits because the request was properly denied.

Public Officers Law § 87(2)(e)(iv)

Public Officers Law § 87(2)(e)(iv) allows an agency to withhold access to records, which if disclosed, would “reveal criminal investigative techniques or procedures, except routine techniques and procedures.” Respondents argue that the disclosure of the records requested would reveal non-routine criminal investigative techniques or procedures because it would disclose NYPD’s tactical strategies and capabilities. For example, by revealing the types of NYPD officers deployed at an event, an individual could “modify their conduct to evade or undermine the NYPD’s response to public assemblies; thereby frustrating the purposes for which such techniques or procedures are employed” (Respondents’ Affirmation in Support of Cross-Motion to Dismiss ¶ 24). Respondents further allege that disclosure of records relating to past deployments, units

deployed, personnel and equipment utilized would reveal non-routine criminal investigative techniques by aiding “[t]hose wishing to take advantage of the movement of resources from one precinct to another, or overcome or plan around such tactical deployments in order to disrupt said events or inflict harm on members of the public attending these events or in precincts that might be perceived to have reduced manpower as a result of the deployment” (*id.* at ¶ 25).

Respondents correctly assert that providing the requested information would reveal non-routine criminal investigative techniques. The information petitioners request is related to the strategies and operational tactics of the NYPD in its policing efforts of these specific events; therefore, is non-routine and confidential. If the NYPD has developed or is developing a formula for policing that works, it need not disclose it to the public.

In response, Petitioners state that respondents should disclose the information requested because it routinely discloses records regarding the number and types of police officers, units, and personnel deployed in civil litigation. A FOIL request however, is certainly not equivalent to discovery in a civil litigation. Before a plaintiff in a civil litigation gets any discovery, it must get past the motion to dismiss phase. In litigation discovery, which is supervised by the court, a litigant must have asserted a cognizable claim before discovery can proceed. In FOIL, all that is needed is curiosity and a pen. When the FOIL request is denied, then the seeker of documents may ask the court to decide whether the respondent wrongly refused to provide the requested documents. The purposes and procedures are so different that to compare them is without merit.

Public Officers Law § 87(2)(f)

Public Officers Law § 87(2)(f) prohibits the dissemination of information compiled for law enforcement purposes that would endanger the life or safety of a person. The First Department has held that an agency citing this exemption “need only demonstrate a possibility of endangerment” (*Bellamy v New York City Police Dept.*, 87 AD3d 874, 875, 930 NYS2d 178 [1st Dept 2011] [internal quotations and citation omitted]). Respondents claim that revealing the requested information could allow members of the public to ascertain operation tactics and thereby “plot how to overcome the number of police officers deployed across a region” (Respondents’ Affirmation at ¶ 29).

Respondents correctly assert that revealing the information requested creates a safety issue. If information regarding NYPD operational tactics are revealed, individuals can employ countermeasures to circumvent the techniques of the NYPD, thereby posing a safety threat to both police officers and members of the public.

Attorneys’ Fees

Petitioners’ request for attorneys’ fees is denied. “A court may award a reasonable attorney’s fee and other litigation costs to a petitioner in a proceeding to review the denial of a FOIL request where the petitioner has ‘substantially prevailed’ in the proceeding, and ‘(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’” (*S. Shore Press, Inc. v Havemeyer*, 25 NYS3d 303, 304 [2d

Dept. 2016]; Public Officers Law § 89[4][c]). Petitioners have not substantially prevailed in this proceeding and are not entitled to attorneys’ fees.

In Camera Review

Petitioners’ requests for in camera review of the documents requested is denied.


Summary

Petitioners’ request for an order requiring respondents to comply with the May 30, 2017 FOIL request is denied. Petitioners’ requests for attorneys’ fees and in camera review of documents is denied. Respondents’ cross motion to dismiss the petition is granted.

Accordingly, it is hereby

ORDERED and ADJUDGED that respondents’ cross-motion is granted and the petition is dismissed. Judgment for respondent.

1.30.19
DATE


ARLENE P. BLUTH, J.S.C.
ARLENE P. BLUTH

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE