

**Brooklyn Legal Servs. v New York City Taxi &
Limousine Commn.**

2020 NY Slip Op 33417(U)

October 19, 2020

Supreme Court, New York County

Docket Number: 151161/2020

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

INDEX NO. 151161/2020

BROOKLYN LEGAL SERVICES,

Plaintiff,

MOTION DATE 10/25/2020

MOTION SEQ. NO. 001

- v -

THE NEW YORK CITY TAXI AND LIMOUSINE
COMMISSION, BILL HEINZEN, CHRISTOPHER WILSON

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 11, 13, 14, 15, 20
were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner
Brooklyn Legal Services (motion sequence number 001) is denied, and the proceeding is
dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Taxi & Limousine Commission
shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Brooklyn Legal Services (BLS) seeks to compel respondent New York City Taxi & Limousine Commission (TLC) to comply with a Freedom of Information Law (FOIL) request (motion sequence number 001). For the following reasons, the petition is denied.

FACTS

On November 08, 2019, BLS submitted a FOIL request to the TLC for:

“The number of TLC driver license applications flagged for fitness review during each of the following years: 2015, 2016, 2017, 2018, and 2019 [and].

“The number of fitness review decisions issued by the TLC regarding driver license applications during the following years: 2015, 2016, 2017, 2018, and 2019.”

See verified petition, exhibit A.

On December 24, 2019, the TLC submitted a response that provided the numbers of TLC driver license applications that had been flagged for fitness review during 2015, 2016, 2017, 2018, and 2019 (6521 in total), and the number of fitness review decisions that it had issued in each of those years (4895 in total).¹ *Id.*

On August 15, 2019, BLS submitted a second FOIL request to the TLC for all “records or portions thereof pertaining to (or containing) . . . fitness interview decisions regarding TLC driver license applications made from 05/01/15 up until the present date.” *See* verified petition, exhibit B. On August 28, 2019, the TLC denied that FOIL request on the ground that “[t]he disclosure of fitness interview decisions would result in the release of confidential information regarding TLC-licensee applicants.” *Id.*, exhibit C. On September 24, 2019, BLS filed an

¹ TLC employee Alison Hartwell, the agency’s Executive Director of Driver Licensing and Fitness Review, averred that “during the fiscal years of 2015 through 2019, TLC issued 4,663 fitness interview decisions.” *See* verified answer, Hartwell affirmation, ¶ 12.

administrative appeal of the TLC's denial. *Id.*, exhibit D. On October 4, 2019, the TLC issued a final decision denying that appeal. *Id.*, exhibit E. In that decision, the TLC's General Counsel and Commissioner for Legal Affairs (GC) found as follows:

"Categories enumerated within Section 89 (2) of the Public Officers Law

"As per the appeal, 'the TLC's August 28, 2019 decision did not claim that any category of personal privacy exceptions enumerated within Section 89 (2) of the FOIL would be violated by disclosure of the records requested, redacted as requested by BLS.' Section 89 (2) (b) states that 'an unwarranted invasion of personal privacy includes, but shall not be limited . . .' (emphasis added). The Fitness Review' Unit decisions, although they do not correspond exactly to the limited enumerated categories in the POL, include applicant's personal information, which raise privacy concerns should they be disclosed. Given that, as per the POL, the application of the relevant exception is not solely limited to those enumerated categories, the TLC is still within its duty to prevent private applicant information from being released.

"Privacy Exemption - § 87 (2) (b) and 89 (2) (b)

"The appeal argues that under Section 89 (2) (c) (i) of the POL, 'disclosure of a record shall not be considered an unwarranted invasion of personal privacy when identifying details are deleted.' This would apply if the mere redaction of personal identifiers were to be enough to safeguard the applicants' personal privacy. In this instance, it is not. Fitness Review Unit's decisions delve into the applicant's criminal history and driving records in such detail that, when paired with publicly available information, could result in the exposure of the applicant's identity. Therefore, BLS's request for all identifying information to be redacted to alleviate privacy concerns is not possible.

"The facts as laid out in *Gallogy* are not analogous to the situation at hand. In *Gallogy*, an NYPD sergeant sought to obtain copies of his own personnel file. *Matter of Gallogy v City of New York*, 51 Misc 3d 296 (Sup Ct, NY County 2016). BLS's request for all Fitness Interview Decisions is not on behalf of one applicant seeking access to his own personal information. BLS seeks the entire universe of Fitness Review Unit decisions, which would lead to the disclosure of numerous decisions containing personal details of applicants' criminal and driving history.

"The appeal further argues that criminal convictions and accident reports are either public information or available under FOIL, 'once personally identifying information was redacted.' Similarly, the Driver Privacy Protection Act (18 U.S.C. Sections - 2725) defines personal information as not including 'vehicular accidents, driving violations, and driver's status.' Though criminal convictions are public, the discussion of those records in a conversation with answers to various questions asked by the TLC Fitness Review Unit employees, which are recited in the decisions, are not part of the public record. Fitness Interview Reports not only discuss convictions, accident reports or driver's status, they also include, but are by no means limited to, details of applicant's arrests, pleas, rehabilitation or lack thereof, parole, behavioral tendencies, education, as well as personal, and at times emotional, reflections. Disclosure of any of this information would be offensive and objectionable to a reasonable person.

“Public Interest

“Finally, there is a public interest in analyzing the Fitness Review Unit decisions, however there is an even greater interest in protecting against an invasion of Taxi & Limousine Commission applicants’ privacy, which may result if the Fitness Review Unit decisions were disclosed with only the applicants’ name and license numbers redacted.

“For the foregoing reasons, I find your appeal dated September 24, 2019 to be unpersuasive and hereby affirm the [denial] decision.”

Id., exhibit E.

The TLC asserts that the GC’s denial properly applied the governing disclosure exemptions. *See* verified answer, ¶¶ 54-72.

Nevertheless, BLS commenced this Article 78 proceeding on January 31, 2020. *See* verified petition. Shortly thereafter, the COVID-19 national pandemic forced the court to suspend most of its operations indefinitely. The TLC ultimately submitted an answer on May 20, 2020. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court’s role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is “without sound basis in reason, and in disregard of the facts.” *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference.

Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 231-232.

Here, BLS presents its argument that the TLC's final decision was arbitrary and capricious in the form of assertions that the GC did not identify proper statutory bases for exempting BLS's FOIL request from disclosure. *See* petitioner's mem of law at 4-12. The court finds that these assertions are incorrect and will review each of them in turn in the following portion of this decision. However, the court also notes that BLS supplements each of its arguments with a seemingly innocuous assertion that the TLC could have simply granted the FOIL request, but redacted the materials that it produced, since this is generally permitted even where there is a statutory exemption to disclosure. This assertion is misleading, however, since it ignores the fact that the TLC found that redaction would be ineffective in the case of BLS's particular FOIL request.

As is clear from the portion of the TLC decision quoted above, the GC specifically found that BLS's request: (a) was overly voluminous; and (b) sought reports which would reveal a wide range of protected information if they were disclosed – even with the personal identifiers redacted. The court finds that the GC's findings were reasonable. The administrative record shows that BLS's FOIL request contemplated the disclosure of an estimated 4,663 fitness interview decisions. *See* verified petition, exhibit A; verified answer, Hartwell affirmation, ¶ 12. Further, the Appellate Division, Third Department, recently upheld the trial court's denial of a similar, non-specific FOIL request for 50 years of marriage license records, observing that “it is precisely because no governmental purpose is served by public disclosure of certain personal information about private citizens that the privacy exemption’ exists.” *Matter of Hepps v New York State Dept. of Health*, 183 AD3d 283, 293 (3d Dept 2020), quoting *Matter of Federation of*

N.Y. State Rifle & Pistol Clubs v New York City Police Dept., 73 NY2d 92, 97 (1989). In performing the balancing of interests analysis that is part of all FOIL requests, the Third Department particularly found that the “[p]etitioners have not shown that the requested disclosure is required to serve the public interest . . . , [whereas the] respondent has persuasively demonstrated that such disclosure ‘would be offensive and objectionable to a reasonable person of ordinary sensibilities’ whose personal, marital information would be disclosed and published.” *Matter of Hepps*, 183 AD3d at 290, quoting *Matter of Ruberti, Girvin & Ferlazzo v New York State Div. of Police*, 218 AD2d , 498, 494 (3d Dept 1996).

The TLC’s GC made the same finding in the October 4, 2019 final decision. *See* verified petition, exhibit E. BLS argued that “[t]he public, advocates for drivers, and those with criminal records have a strong interest in knowing that TLC licensing decisions concerning individuals with criminal records who are attempting to re-enter the workforce are made based on fair standards and in compliance with existing law.” *See* petitioner’s memo of law at 10. However, BLS fails to explain either how its FOIL request will advance this interest, or why it outweighs driver’s license applicants’ interests in personal privacy. Therefore, like the Third Department in *Matter of Hepps*, the court concludes that the respondent TLC’s FOIL denial was rationally based on the evidence in the administrative record, and that it comported with the governing law. The court now turns to BLS’s statutory arguments.

First, BLS argues that “the requested records are not ‘confidential records’ and [therefore] do not trigger the exception to disclosure [set forth in] Public Officers Law [POL] § 87 (2) (a).” *See* petitioner’s mem of law at 4. The cited portion of that statute provides that:

“Each 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 (a) *are specifically exempted from disclosure by state or federal statute; . . .*”

POL § 87 (2) (a) (emphasis added).

The TLC responds that it “properly invoked the federal Driver's Privacy Protection Act (‘DPPA’) [18 USC § 2721 (a)] which prohibits disclosure of ‘personal information’ about any person obtained by an authorized agency in connection with a motor vehicle record.” *See* verified answer, ¶¶ 54-57. BLS replies that this argument is improper because the TLC “did not ‘properly invoke the DPPA’ as they claim in their Verified Answer.” *See* petitioner’s reply mem at 1-2. However, BLS’s assertion is plainly belied by both the above-cited paragraphs from the TLC’s answer and by the text of the TLC’s final decision, which plainly included the GC’s consideration of the DPPA. *See* verified answer, ¶¶ 54-57; exhibit E. Therefore, the court rejects BLS’s assertion.

The scant case law involving FOIL requests in the context the DPPA focused particularly on the statute’s protection against disclosing drivers’ social security numbers. *See e.g., Mount v PulsePoint, Inc.*, 2016 WL 5080131 (SD NY 2016); *Meyerson v Prime Realty Servs., LLC*, 7 Misc 3d 911 (Sup Ct NY County 2005). However, the DPPA’s protections plainly apply to far more material. 18 USC § 2721 (a) (1) forbids the disclosure of “personal information,” which 18 USC § 2725 (3) defines as:

“information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.”

18 USC § 2721 (a) (2) forbids the disclosure of “highly restricted personal information,” which 18 USC § 2725 (4) defines as “an individual's photograph or image, social security number, medical or disability information.” The court finds that that these DPPA provisions set forth the federal rules pertaining to certain driver’s license “records . . . that . . . are specifically exempted from disclosure by . . . federal statute.” As such, the items described in the DPPA are

plainly among the material protected from disclosure by POL § 87 (2) (a). The court here notes that BLS's extremely broad FOIL request for "all records or portions thereof pertaining to (or containing) . . . fitness interview decisions regarding TLC driver license applications made from 05/01/15 to date" was plainly *not* tailored to exclude the types of driver's license information that the DPPA protects from disclosure.

Further to that topic, the DPPA does permit the limited disclosure of "personal" and "highly restricted personal" information, but only:

"for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of . . . the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act . . . , the Clean Air Act . . . and certain regulations promulgated by the US Secretary of Transportation."

18 USC § 2721 (b).

The DPPA also permits the limited disclosure of "personal" and "highly restricted personal" information for the following 14 authorized purposes:

- (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
- (2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.
- (3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only--
 - (A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
 - (B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.
- (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

- (5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.
 - (6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.
 - (7) For use in providing notice to the owners of towed or impounded vehicles.
 - (8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.
 - (9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.
 - (10) For use in connection with the operation of private toll transportation facilities.
 - (11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.
 - (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.
 - (13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.
 - (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.”
- 18 USC § 2721 (b) et seq.

The court's close reading of these provisions compels it to conclude that BLS's FOIL request does not fall squarely within any of them². The court notes that the statute does not list “legal services providers” such as BLS among the various entities that are authorized to request the disclosure of protected driver's license information. Thus, the court holds that the TLC was correct to find that POL § 87 (2) (a) and the DPPA together afford an adequate statutory basis for the decision to deny BLS's FOIL request.

Next, BLS asserts that “the requested documents do not implicate the personal privacy exemption under Sections 87 (2) (a) and 89 (2) (b) of the FOIL.” *See* petitioner's mem of law at 4-9. The court rejected this argument with respect to POL § 87 (2) (a) for the reasons discussed in the preceding paragraph. POL § 89 (2) (b) provides that:

“An unwarranted invasion of personal privacy includes, but shall not be limited to:

² Although it does not bear the burden of proof, the court notes that BLS did not identify which DPPA category allegedly authorizes its FOIL request.

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
- vi. information of a personal nature contained in a workers' compensation record, except as provided by section 110-a of the workers' compensation law;
- vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or
- viii. disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws."

BLS repeats its previous assertion that the reports it seeks in its FOIL request may be safely "anonymized" by redaction so as to avoid the "unwarranted invasion of personal privacy" proscribed by POL § 89 (2) (b). *See* petitioner's mem of law at 4-9. The TLC answered that "[l]ike commutation petitions and pardon applications, TLC fitness interview decisions call for a broad range of detailed and highly personal information about a license applicant," which "implicate significant privacy concerns, the disclosure of which would unduly invade personal privacy." *See* verified answer, ¶ 65. The court agrees. The TLC's final decision found that:

"Though criminal convictions are public, the discussion of those records in a conversation with answers to various questions asked by the TLC Fitness Review Unit employees, which are recited in the decisions, are not part of the public record. Fitness Interview Reports not only discuss convictions, accident reports or driver's status, they also include, but are by no means limited to, details of applicant's arrests, pleas, rehabilitation or lack thereof, parole, behavioral tendencies, education, as well as personal, and at times emotional, reflections. Disclosure of any of this information would be offensive and objectionable to a reasonable person."

See verified petition, exhibit E.

These items are clearly among those that are exempted from disclosure by POL § 89 (2) (b). Thus, the court holds that the TLC was correct to find that POL § 89 (2) (b) provided another valid statutory basis for its decision to deny the FOIL request.

BLS next argues that “the strong public interest in reviewing TLC standards for licensure of applicants with criminals records strongly outweighs the risk to personal privacy of disclosure,” and that “even if some portions of certain decisions warrant further redaction, the TLC’s blanket denial of all portions of all decisions violates the FOIL.” *See* petitioner’s mem of law at 9-12. The court rejects this argument for the reasons stated at the beginning of this decision. *Matter of Hepps*, 183 AD3d at 290. The court is mindful that an agency’s policy not to disclose certain types of evidence under any circumstances when considering a FOIL request can constitute an improper “blanket denial” (or exemption). *See e.g., Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738 (2001); *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495 (1st Dept 2013). In this case, however, the TLC’s final decision did not constitute a “blanket denial” so much as a “blanket assertion” of the agency’s legal obligation to guard statutorily exempted material from release when there is no discernible public policy that supports its disclosure. Therefore, the court rejects BLS’s final argument. As a result, the court concludes that BLS’s Article 78 petition should be denied as meritless.

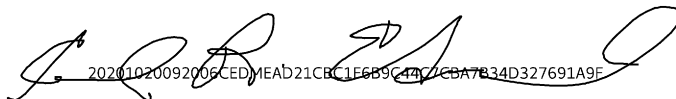
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Brooklyn Legal Services (motion sequence number 001) is denied, and the proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Taxi & Limousine Commission shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



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10/19/2020

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE