No Oral Argument Requested

Case No. 525746

New York Supreme Court

Appellate Division—Third Department

POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE, INC.,

Appellant,

– against –

STATE OF NEW YORK, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF EMPIRE CENTER FOR PUBLIC POLICY

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Albany County Index Nos. 4349-15, 4350-15, 4351-15 and 4218-15

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

Preliminary Statement

This Court previously remanded this matter to the Supreme Court review *in camera* records entirely withheld from disclosure by the Respondents. Respondents withheld resumes, applications, and correspondence of job applicants because disclosure would be unwarranted invasions of personal privacy. This Court correctly determined that the records should be disclosed with certain personally identifying information redacted.

Upon review, the Supreme Court determined that no amount of redacting could avoid unwarranted invasions of personal privacy. The court erred in determining what may be "unwarranted" in the context of the job application records requested. It further erred in determining that no amount of information could be redacted without causing unwarranted invasions of personal privacy.

To be consistent with the intent and purpose of New York's Freedom of Information Law (FOIL), the job application records should have been released in their entirety. This Court previously concluded that Respondents could redact certain specifically identifying information from the records. But those redactions should be as limited as possible—to information such as names, social security

numbers, telephone numbers, and home addresses, and not education and work histories.

The Interest of the Amicus

The Empire Center for Public Policy, Inc. is an independent, non-partisan, non-profit think tank based in Albany, New York.

Empire Center seeks to make New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and *accountable* government. Empire Center promotes New York creating new opportunities for an informed and engaged citizenry. Empire Center informs taxpayers and policymakers about public issues such as the economy, taxes, spending, public employment issues including pension reform, energy policy, health care and education.

To accomplish its mission, Empire Center, among other things, operates a web portal–"SeeThroughNY.net"–through which taxpayers can share, analyze and compare data from counties, cities, towns, villages, school districts and public authorities throughout New York. Empire Center also seeks to give New Yorkers a clearer view of how their state and local taxes are spent.

In 2014, SeeThroughNY.net published data dating back more than 15 years covering over 7,000 post-retirement earnings waivers under Section 211 of the Retirement and Social Security Law submitted by state and local agencies. Empire Center obtained those records through FOIL requests. As of mid-2014, there were 665 active 211 waivers on file with New York government agencies. An overwhelming majority of those waivers were for retired law enforcement personnel.

Empire Center continues to obtain and to post the 211 waiver information on SeeThroughNY.net to shed light on waiver details so that taxpayers and elected officials can evaluate whether the 211 waiver law is working in the public's interest. As at least one elected official has recognized, 211 waivers may hinder agencies from engaging in proper workforce succession planning and tapping into a larger workforce labor pool (Sponsor's Mem, 2014 NY Senate Bill S2964). In addition to promoting "double-dipping," widespread 211 waiver use distorts New York's labor market by reducing job and promotional opportunities for younger workers (*id.*). Thus, New Yorkers have a vested interest in 211 waivers that Empire Center uncovers on their behalf.

Argument

FOIL empowers the public's right to know, and discourages government secrecy, through broad access to agency records, so that the public can root out abuse and hold its officials accountable (*Matter of Friedman v. Rice*, 30 NY3d 461, 475 [2017]). "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Newsday, Inc. v. Sise*, 71 NY2d 146, 150 [1987], cert. denied 486 US 1056, 108 S Ct 2823, 100 L Ed 2d 924 [1988]).

"The people's right to know the process of government decision-making and to review documents and statistics leading to determinations is basic to our society" (Public Officers Law § 84). "[G]overnment is the public's business and ... the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of [FOIL] (*id.*).

Excepting records from disclosure under FOIL is permissive. "[W]hile an agency is permitted to restrict access to those records

falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562, 567 [1986]).

POINT I

A. Disclosing the Applicant Records Is Not an Unwarranted Invasion of Privacy

Under Section 212 of the state Retirement and Social Security Law, state and local government retirees under 65 who return to work for the government are subject to an earnings limit, which means their pension payments are halted after the limit is reached in any given year (Retirement and Social Security Law § 212). "[Section] 211 waivers of the earnings limit for retirees who are younger than 65 can be approved for no more than two years at a time, based on a written request from the retiree's prospective employer. But such waivers can be—and often are—renewed repeatedly" (Empire Center for Public Policy, *NY's Early Retiree Back-to-Work Waive*, https://www.empirecenter.org/wp-content/uploads/2014/11/Waivers110814.pdf at 1 [last accessed April 30, 2018]).

In 2008, the Legislature enacted a series of reforms designed to tighten the 211 waiver process (Retirement and Social Security Law § 211, as amended by L 2008, ch 640). Prospective employers are required to "prepare a detailed recruitment plan" for positions in which they seek to temporarily place early retirees. A 211 waiver application also must demonstrate that:

- the employment is in the best interest of government; and either
- there is an urgent need for his or her services as a result of an unplanned, unpredictable, unexpected vacancy and sufficient time is not available to recruit a qualified individual and that such hiring shall be deemed as non-permanent rather than a final filling of such position; or
- the prospective employer has undertaken extensive recruitment efforts and has determined that there are no available, qualified non-retirees.

(*Id*. § 8).

The New York Department of Civil Service describes the 211 waiver policy as follows:

> The state policy reflected in section 211 recognizes that 211 waivers play an important role in New York's workforce management, *in the law enforcement arena* as well as for filling other jobs such as nurses and school bus

> drivers. There are legitimate needs for hiring retirees including * * * the absence of non-retirees with the experience or qualifications required to perform the necessary government functions. While not a substitute for hiring and retaining new workers, in some cases hiring retirees may be necessary.

(Civil Service Commission Guidelines for Approval of Requests Pursuant to Retirement and Social Security Law Section 211, https://www.cs.ny.gov/commission/211guidelines.cfm [last accessed April 30, 2018])(emphasis added).

"According to Commission records, the overwhelming majority of section 211 waivers [under its jurisdiction] are granted to retired law enforcement personnel who have earned their pensions under the provisions of the applicable retirement system" (*id.*). Indeed, in 2014, Empire Center found that more than half of the active 211 waivers, 345 out of 665, applied to early retirees working in "investigator" job titles in state and local agencies (Empire Center at 3). Of 389 approved 211 waivers set to expire between May 1, 2018 and April 30, 2020, 92 are investigators for New York City district attorneys alone (SeeThroughNY.net).

For the same period, the SUNY system has three chiefs of police and one assistant chief of police employed under 211 waivers (*Id.*). The total pay for the chiefs of police under 211 waivers in 2016

ranged from $138,000 at SUNY Buffalo to $185,000 at SUNY Stony Brook (*id.*), in addition to pension benefits. New Yorkers have a right to know why they are paying each of those waiver recipients twice. The Appellant represents police officers in the SUNY Police Department comprising a subset of the New Yorkers who have a right to know why the 211 waivers in question here were necessary.

Among other things, a request for approval of a 211 waiver must include detailed written reasons why, after undertaking extensive recruiting efforts, there are no qualified non-retired persons to perform the job duties. And the entity responsible for approving the waiver must make a finding based on the evidence. Both the request and the finding are public records. Taxpayers, however, should also be able to examine the evidence underlying the finding.

The Retirement and Social Security Law makes clear that the 211 waiver process is a public one (Retirement and Social Security Law § 211 [6]). Law enforcement officers dominate 211 waivers such that the governor's signing memorandum that accompanied the 2008 amendments to Section 211 primarily discussed law enforcement personnel (Governor's Approval Mem, Bill Jacket, L 2008, ch 640 at 3). As such, applicants to the senior SUNY Police

Department positions at issue in this appeal could not have reasonably expected privacy when they submitted their employment applications.

Determining an unwarranted invasion of personal privacy requires measuring what would be offensive and objectionable to a reasonable person (*Matter of Dobranski v. Houper*, 154 AD2d 736, 737 [3d Dept 1989]). An agency must balance the presumption of public access with individual privacy (*id.*). At the same time, "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government (*Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen,* 69 NY2d 246, 252 [1987]). The balance tilts in favor of access when the information sought is a matter of public record (*Dobranski*, 154 AD2d at 738). Persons on statutory notice that their information will be part of a public record have no reasonable expectation of privacy (*Matter of Kwitny v. McGuire*, 102 Misc 2d 124, 126 [Sup Ct, NY County 1979]).

In *Kwasnik v. City of New York* (262 AD2d 171, 172 [1st Dept 1999]), the court held that FOIL favored "disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record." Here, the requested records

relate to applicants as opposed to employees, but the same analysis applies. The applicants' employment and education histories, by dint of the 211 waiver process and FOIL together, are public records that should be disclosed in their entirety.

POINT II

A. Appellant's Proposes a Redaction Plan for the Records That Is More Than Necessary

Appellant agrees that Respondents may redact names and addresses (and other specifically identifying information) of applicants. It, however, disagrees with the Respondents and the Supreme Court that the records cannot be adequately redacted. The Respondents and Supreme Court engage in speculation insufficient to support not disclosing the application records (*see, e.g., Matter of Legal Aid Socy. of Northeastern N.Y. v. New York State Dept. of Social Servs.*, 195 AD2d 150 [3d Dept 1993]).

If the records must be redacted beyond specifically identifying information, critical information regarding education, experience, and other qualifications can remain without directly identifying the applicant. The average taxpayer can get a sense of an applicant's qualifications from job titles (chief vs. patrolman), municipality type (city vs. village), and education level obtained (regardless of institution), with specific locations and years redacted. The essence

of an applicant's job duties and responsibilities can be conveyed from resume descriptions even if some redactions are required.

But such extensive redactions should not be necessary in this context. Regarding candidates who have been hired by an agency, the Committee on Open Government has opined:

> [I]f, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers.
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> * * *
>
> Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

(Comm On Open Govt FOIL-AO-7810 [1993], see also *Matter of Ruberti, Girvin & Ferlazzo v. New York State Div. of State Police*, 218 AD2d 494 [1996][disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy]). Thus, to best evaluate decisions public officials make regarding 211 waivers, the public should be entitled to more specific applicant employment and educational background than

Appellant requests in its Brief. The balance in this context weighs in favor of disclosure.

Nevertheless, even with the redaction scheme the Appellant proposes, a taxpayer may reasonably conclude that a 211 waiver was warranted if no applicant above a certain job title level in a comparably sized police force with supervisory experience had applied for a SUNY Chief of Police position. And the value of providing that information to the public outweighs speculation that an energetic and astute FOIL requestor could connect disparate pieces of work and school history information into a complete biographical sketch. Thus, at minimum, this Court should direct disclosure of the application records with redaction parameters requested by the Appellant.

Conclusion

The presumption of disclosure and balance of the public's interest versus the applicants' privacy weighs in favor of disclosure of the requested records in their entirety. Taxpayers have an important interest in ensuring the 211 waiver process is not abused. Law enforcement positions dominate 211 waivers, and the applicants for the subject SUNY police positions did not have reasonable

expectations of privacy when they applied. This Court correctly remanded this matter once before for *in camera* review to protect applicants' identities. The Court should now direct disclosure with the redactions requested by the Appellant.

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Respectfully submitted,

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