

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. MELISSA A. CRANE

J.S.C.

PRESENT: _____

PART 15

Index Number : 156486/2018

EMPIRE CENTER FOR PUBLIC

vs

NEW YORK CITY POLICE PENSION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

or _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

The Motion is Decided in Accordance with the Accompanying Decision and Order

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

Dated: 8-26-2019

[Signature] J.S.C. HON. MELISSA CRANE

- 1. CHECK ONE: [X] 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: IAS PART 15

-----X
In the Matter of

EMPIRE CENTER FOR PUBLIC POLICY

Petitioner,

Index No.: 156486/2018

-against-

Mot. Seq. No. 001

NEW YORK CITY POLICE PENSION FUND,

Respondent,

For a Judgment Under Article 78 of the Civil Practice Law
and Rules

-----X
MELISSA A. CRANE, J.S.C.:

Petitioner, Empire Center for Public Policy (“Empire Center” or “petitioner”), brings this Article 78 proceeding for an Order directing respondent, New York City Police Pension Fund (“PPF” or “respondent”), to disclose the names of retired police officer pension members.

Petitioner wants to be able to share the information with the public with an eye to preventing pension abuse, including instances of “double-dipping.”¹ Respondent opposes the petition and claims an exemption under Public Officers Law “POL” § 87(2)(f), that disclosure could endanger the life or safety of the NYPD retirees. Respondent also argues that this proceeding is time-barred, because petitioner failed to seek judicial review of a prior FOIL request.

Facts

Petitioner’s self-described mission is to inform “taxpayers and policymakers about public issues such as the economy, taxes, spending, public employment issues including pension

¹ “Double-dipping” means to draw a pension from one government department while working for another. Under Retirement and Social Security Law § 211, government retirees who return to work for the government are subject to an earnings limit. Once a retiree earns up to the limit allowed, their pension payments stop for that year.

reform, energy policy, health care and education” (see McDonald Memo of Law in Support of Petition, p.4). To accomplish its mission, petitioner operates a public website called SeeThroughNY.net. The website provides the public with access to pension benefit information of state employees. Petitioner routinely makes FOIL requests for pension benefit information for government employees to educate the public about how state and local taxes are spent.

On May 6, 2014, petitioner made its first Freedom of Information Law (“FOIL”) request. The 2014 request sought, for each PPF retiree: (1) the name; (2) last employer; (3) gross retirement benefit for each fiscal year; (4) amount of service credit; (5) retirement date; and (6) membership date, for fiscal years 2008 through 2014 (Richter Aff, Def Memo of Law in Support, p. 3). In response to the 2014 FOIL request, respondent provided petitioner with the requested data with the retirees’ names redacted. In its partial denial, respondent argued that disclosure of the names could endanger the life or safety of its members. Petitioner then filed an administrative appeal challenging respondent’s application of POL § 87(2)(f). In a September 2014 letter, respondent declined to disclose its members names. Respondent again relied on the life or safety exemption, POL § 87(2)(f) (Ex. 7, p. 2). Respondent also noted that petitioner had four months from the September 2014 letter to commence an Article 78 proceeding (*id.*). However, petitioner never commenced a special proceeding in the following four months to challenge respondent’s partial denial.

Three years later, petitioner made another FOIL request on February 12, 2018. This time, petitioner sought information from respondent for the 2017 fiscal year. This proceeding stems from petitioner’s 2017 FOIL request. The 2017 request sought, for each PPF retiree: (1) the name; (2) last employer; (3) gross retirement benefit; (4) amount of service credit; (5) retirement date; and (6) membership date (Pet ¶ 8). On February 20, 2018, respondent acknowledged

petitioner's FOIL request (Pet ¶ 9). On March 6, 2018, respondent responded to petitioner's request (Pet ¶ 10). Respondent emailed a spreadsheet to petitioner that include the retirees' retirement date, service years, appointment date, and yearly and monthly benefit amounts (*id.*). However, respondent did not include a personal identifier for the retirees, like a name or membership number (Pet ¶ Ex C). Respondent based its name redactions on POL § 87(2)(f). Respondent asserted that "there are privacy and safety concerns with respect to retired law enforcement personnel that are simply not present with respect to civilian civil servants" (*id.*). On March 6, 2018, petitioner appealed respondent's partial denial of its FOIL request (Pet ¶ 13). Respondent denied the petitioner's appeal, again asserting that disclosure of the redacted names could endanger the life or safety of its members (Pet ¶ 14).

Within four months petitioner brought this special proceeding. After two party-stipulated adjournments of the return date of the motion, the court scheduled oral argument for February 21, 2019. After oral argument, the court took the case on submission due to the complicated statute of limitations and res judicata issues it presented.

Discussion

Petitioner asks this court for an Order (1) declaring that respondent acted unlawfully in failing to produce records in response to the FOIL request; (2) directing respondent to release the records; (3) directing respondent to produce to petitioner, within five days of the date of the order, the records requested in the petitioner's FOIL request; and (3) attorneys' fees and costs.

When an agency denies record access, the entity seeking the records may commence a special proceeding for judicial review of the denial of the FOIL request. The standard "affected by an error of law" applies to judicial review of FOIL requests rather than an "arbitrary and capricious" standard (*Mulgrew v Board of Educ of City School Dist of City of New York*, 87

Ad3d 506 [1st Dept 2011]). The Legislature enacted FOIL with a presumption of access to public records. “All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records” (*Hanig v State Dept of Motor Vehicles*, 79 NY2d 106, 108 [1992]).

Exceptions to disclosure must be narrowly construed. The burden rests on the agency to demonstrate that the requested material indeed qualifies for an exemption (POL § 89[4][b]). To invoke a POL § 87(2) exemption, the agency must articulate particularized and specific justification for not disclosing requested documents (*Gould v NYC Police Dept*, 89 NY2d 267 [1996]). “Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed” (*Dilworth v Westchester County Dept. of Corrections*, 93 AD3d 722 [2d Dept 2012]). POL § 87(2)(f) exempts materials that, if disclosed, could endanger the life or safety of any person. An agency needs to demonstrate a possibility of endangerment to invoke the life or safety exemption (*Bellamy v New York City Police Dept*, 87 AD3d 874, 875 [1st Dept 2011], *aff'd*, 20 NY3d 1028, 1029 [2013]).

Respondent first argues that the action is time barred because the FOIL request petitioner made in 2014 sought the same records as its FOIL request from 2018. Respondent asserts that petitioner cannot wait three years and then file a new FOIL request that seeks the same information it sought in 2014, without running into a statute of limitations bar. Respondent further argues that many retirees who received pensions from 2008-2014 were still receiving pensions in fiscal year 2017 (*id.* at 5).

A claimant must bring an Article 78 proceeding within four months from the agency determination (CPLR 217). New York courts have held that, if a claimant failed to seek judicial review of its initial FOIL request, a claimant cannot then seek judicial review of another FOIL

determination that seeks the same records (*see McBride v City of New York*, 284 AD2d 197, 850-851 [1st Dept 2001] [petitioner's additional requests for the same materials did not extend time to commence proceeding after respondent's denial of the first request]; *see also, Matter of Mendez v New York City Police Dept*, 260 AD2d 262, 262-263 [1st Dept 1999] [FOIL requests were duplicative, and properly dismissed as a belated attempt to seek judicial review of the denial of the first request]; *Corbin v Ward*, 160 Ad2d 596, 241 [1st Dept 1990] ["[T]he IAS court properly refused to consider the challenge to the second denial on the same ground, as this demand apparently constituted nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances."]; *Gooden v NYPD*, 52 Misc3d 1206[A] [New York County, Sup. Ct. 2016] [decades earlier FOIL request that sought the same information as current FOIL request, rendered time-barred the Article 78 proceeding on the current FOIL request]). Because respondent denied petitioner's FOIL request made in 2018 on the same grounds (i.e. the life or safety exemption (POL § 87[2][f]) that it denied the 2014 FOIL request, the claims are duplicative and therefore time-barred.

However, newer retirees, who received pensions in the 2017 fiscal year and, therefore, were not among those members who received pensions from 2008-2014, are not subject to the statute of limitations. With regard to FOIL requests, "there may be changes in circumstances, judicial precedents that could put an issue in a different light, an acquisition of records from other sources that might diminish an agency's capacity to justify a denial, or a change in one's financial ability to initiate a lawsuit" (Committee on Open Govt FOIL-AO-f9438 [1996]).

The different fiscal year provides a partial change in circumstances, but only as to new names, as these could not have been part of the original request. Although it is possible there are original retirees who have "double-dipped" since the 2014 request, petitioner does not point to

this as a possibility. Therefore, to the extent that petitioner seeks unredacted names of retirees that respondent did not withhold in response to the 2014 FOIL request, only those names are not subject to the statute of limitations.

Moreover, Justice Huff's 2010 decision is not law of the case. Respondent asserts that in 2010, petitioner made the same FOIL request for pension benefit information from respondent's retired police officer members for the years 2006 through 2009. Justice Huff denied Empire Center's petition and dismissed the proceeding (*see The Empire Center for New York State Policy v New York City Police Pension Fund* [Sup Ct, New York County 2010], Answer, ex. 1) under POL § 89(7) and POL § 89(2)(b). The Appellate Division later affirmed Justice Huff under POL § 89(7)'s privacy exemption (*see The Empire Center for New York State Policy v New York City Police Pension Fund*, 88 Ad3d 520 [1st Dept 2011]). Because the First Department based its affirmance on the privacy exemption, it never addressed whether respondent met its burden under the life or safety exemption, POL § 89(2)(b). Petitioner failed to appeal the appellate decision. Subsequently, in 2014, the Court of Appeals in its decision *New York State Policy v New York State Teachers Retirement System*, 23 NY3d 438 [2014] abrogated *Empire Center for New York State Policy v New York City Police Pension Fund*, 88 AD3d 520 [1st Dept 2011], under the privacy exemption only. Therefore, Justice Huff's decision is not law of the case.

In addition, the life or safety exemption does not apply. It is undisputed that petitioner does not seek the addresses of the retirees. However, respondent is concerned that releasing the names of retirees will enable anyone to discover the address of that retiree. This is likely true. Nevertheless, even if from 2016-2017, five retired NYPD officers fell victim to burglaries (Barreto Aff ¶15), nothing connects these burglaries to pension plan information. Prior to 2009,

petitioner regularly published law enforcement officers' pension information. In addition, NYC OpenGov has published payroll data online from 2015, including names of NYPD employees (Pet Reply Aff, p. 6). Respondent fails to show an uptick in incidents threatening the life or safety of retired police officers related to the disclosure of that information.²

On the other hand, petitioner's arguments for disclosing the retirees' names are compelling.³ Concerned taxpayers have played a crucial role in identifying pension abuse. In 2016, the press published several stories about former NYPD personnel abuse of disability pensions relying on information the public provided. Therefore, retiree names are of significant interest to the general public. Public employees do not enjoy the same privacy rights as private sector employees. Disclosure of police officer names would lead to a higher level of accountability, and would also discourage occurrences of pension "double-dipping."

The court has considered respondent's argument that a conflict exists between petitioner's FOIL request and the Penal Law. Under Penal Law § 400.00, firearm licensees may request that their names and addresses remain confidential if public disclosure may endanger the applicant. The 2013 amendment to the statute provides that an applicant may request his / her application information be withheld if "the applicant's life or safety may be endangered by disclosure because: (A) the applicant is an active or retired police officer..." (Penal Law § 400.00[5][b][i][A]). Penal Law § 400.00 is not a blanket exception to a FOIL request disclosure.

² *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011], *aff'd*, 20 NY3d 1028, 1029 [2013]), does not apply. That case involved a convicted murderer's FOIL request for police records containing the names and statements of confidential witnesses, who did not testify at trial. This case involves public employees, not people speaking to the police in secrecy about a gang-related homicide (*Hagen v City of New York*, index no. 012574/2014 [Kings Co, Sup Ct 2015, Macdonald Memo of Law, Appendix] ["One would think that if someone who had a grudge against a law enforcement officer, he or she would already know his or her name."]).

³ Petitioner does not dispute that respondent should redact the names of former undercover officers. Therefore, the names of this subset of retirees remains redacted.

Rather, the Penal Law applies only to a subset of public employees – private citizens who apply for a firearm license. The application process for a firearm license does not override the statutory presumption in FOIL requests to provide the public with access to information. Respondent still must demonstrate that the life or safety exemption applies.

Accordingly, it is

ORDERED that the court grants the Verified Petition, in part, as set forth in this decision; and it is further

ORDERED that respondent, New York City Police Pension Fund, shall provide petitioner, Empire Center for Public Policy, with the records, including unredacted names, of all retirees in the 2017 fiscal year, except for names that respondent has already withheld in response to petitioner's 2014 FOIL request for information related to fiscal years 2008-2014.

The unredacted names shall not include undercover police officers; and it is further

ORDERED that the court denies petitioner's request for attorneys' fees without prejudice. Petitioner did not produce invoices, statements, or any documents demonstrating the amount of fees incurred. However, the court grants petitioner the opportunity to make an application by motion for attorneys' fees within 30 days of the e-filed date of this order.

Dated: 8-26-2019

ENTER:



HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.