Matter of Huseman v New York City Dept. of Educ.
2016 NY Slip Op 30959(U)
May 25, 2016
Supreme Court, New York County
Docket Number: 151019/16
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

JESSICA HUSEMAN,

Petitioner,

Index No. 151019/16

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

DECISION/ORDER

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :____

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	4

Petitioner Jessica Huseman commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law & Rules ("CPLR") and CPLR § 3001 challenging respondent New York City Department of Education's ("DOE") denial, both actual and constructive, of petitioner's request for certain information under the Freedom of Information Law ("FOIL"). For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is an education reporter at The Teacher

Project based at the Columbia Journalism School in New York City. On or about June 11, 2015, petitioner filed a FOIL request with the DOE seeking data from the Special Education Call Center between 2012 and 2015, specifically, (a) the names of schools about which parents complained; (b) the names of school administrators or teachers named in the complaints; (c) the nature of the complaints; and (d) the action taken by the district to address the complaints (hereinafter referred to as the "First Request"). On or about June 18, 2015, the DOE sent petitioner a letter acknowledging receipt of the First Request, assigned FOIL reference number F11,422, and stated that it anticipated providing petitioner with a response to the request by approximately July 17, 2015. On or about July 17, 2015, the DOE sent petitioner a letter stating that it required additional time to respond substantively to the First Request and that petitioner would receive a response by approximately August 14, 2015. By letter dated September 14, 2015, the DOE provided petitioner with a response to the First Request and attached one responsive record, specifically, an excel file pertaining to 3-1-1 calls regarding special education complaints and containing the following fields: school District Bureau Numbers, opened date, status, SR resolution, SE source, topic and sub-topic. The letter stated that "access to more detailed information is denied pursuant to [the Family Educational Rights and Privacy Act (FERPA)] and to Public Officers Law §87(2)(a)."

On or about June 11, 2015, petitioner filed another FOIL request with the DOE seeking purchase records for schools purchasing instructional technology (including laptops, tablets and Smart Boards), including the name of the school, the product purchased and the itemized cost of each product (hereinafter referred to as the "Second Request"). On or about June 18, 2015, the DOE sent petitioner a letter acknowledging receipt of the Second Request, assigned FOIL

reference number F11,402, and stated that it anticipated providing petitioner with a response to the request by approximately July 17, 2015. On or about July 17, 2015, the DOE sent petitioner a letter stating that it required additional time to respond substantively to the Second Request and that petitioner would receive a response by approximately August 14, 2015.

On or about July 1, 2015, petitioner filed another FOIL request with the DOE requesting (a) the NYC DOE database of employees currently on paid and unpaid leave; (b) the database of NYC DOE investigations, open and closed, from the 2014-2015 school year to present; (c) copies of all employee settlement agreements from January 2014 to present; and (d) a list of all employees in the 2014-2015 school year who received bonuses and the amount they received (hereinafter referred to as the "Third Request"). By letter dated July 9, 2015, the DOE acknowledged receipt of the Third Request, assigned FOIL reference number F11,472, and stated that it anticipated providing petitioner with a response to the request by approximately August 6, 2015. Thereafter, by letters dated August 6, 2015, September 3, 2015, October 2, 2015, December 3, 2015, January 6, 2016 and February 4, 2016, the DOE notified petitioner that it required additional time to respond substantively to the Third Request, with the final letter extending the DOE's time to respond until March 4, 2016.

On or about September 18, 2015, petitioner appealed DOE's denial in part of the First Request noting that the DOE had failed to provide the names of school administrators about which parents complained, the nature of the complaints and the action taken by the district to address the complaints. Additionally, in the same appeal, petitioner appealed the DOE's alleged constructive denial of the Second Request and the Third Request. By letter dated October 7, 2015, the DOE's General Counsel Courtenaye Jackson-Chase denied petitioner's appeal of the

First Request holding that data fields containing the content of complaints and the resolution actions taken by the DOE were exempt from disclosure under POL § 87(2)(a) and FERPA because the data fields "are replete with student-specific information." With respect to the names of staff identified in the complaints, Ms. Jackson-Chase held that access to names could not be provided because "no 'staff member' data field exists for the DOE to extract." By separate letter also dated October 7, 2015, Ms. Jackson-Chase denied petitioner's appeal of the alleged constructive denial of the Second Request and the Third Request. Specifically, Ms. Jackson-Chase stated that the Central Records Access Officer ("CRAO") had extended the reasonable approximate date by which petitioner's requests would be determined and had explained that "additional time was needed due to the volume and complexity of the requests received and processed" as well as "to determine whether any records or portions thereof would be subject to redactions permitted under Public Officers Law §87(2)." Further, Ms. Jackson-Chase held that petitioner's Second Request and Third Request had not been constructively denied because "the CRAO's efforts to respond to the request within the applicable time limitations were ongoing, which [petitioner was] informed of most recently in the October 2, 2015 correspondence"; the requests "involve records that contain sensitive information, and must be carefully reviewed for potential redactions" and the requests "involve records of multiple DOE offices, and potentially extensive data extraction." However, Ms. Jackson-Chase directed the CRAO to respond to petitioner's request "as expeditiously as possible."

Also on September 18, 2015, petitioner filed another FOIL request with the DOE seeking copies of all e-mailed communication to or from the CRAO's office regarding the First Request, the Third Request and another FOIL request filed on July 1, 2015 assigned FOIL reference

number F11,741 (hereinafter referred to as the "Fourth Request"). By letter dated September 25, 2015, the DOE acknowledged receipt of the Fourth Request, assigned FOIL reference number F11,648, and stated that it anticipated providing petitioner with a response to the request by approximately October 26, 2015. By letter dated October 26, 2015, the DOE notified petitioner that it required additional time to respond substantively to the Fourth Request and that petitioner would receive a response by approximately November 24, 2015.

On or about January 22, 2016, petitioner appealed the alleged constructive denial of the Fourth Request. By letter dated January 28, 2016, the DOE notified petitioner that her request had not yet been denied, that the DOE required additional time to respond substantively to the request and that petitioner would receive a response by approximately February 5, 2016. By letter dated February 5, 2016, the DOE denied petitioner's appeal of the alleged constructive denial of the Fourth Request on the ground that it had not been constructively denied because the CRAO provided petitioner "with a reasonable approximate date by which [her] request would be determined, most recently to today, February 5." Also by letter dated February 5, 2016, the DOE notified petitioner that it required additional time to respond substantively to the Fourth Request "due to the volume and complexity of requests we receive and process, and to determine whether any records or portions thereof will be subject to redactions permitted under Public Officers Law §87(2)" and that petitioner would receive a response by March 7, 2016.

Petitioner now brings the instant petition pursuant to Article 78 of the CPLR and CPLR § 3001 seeking to challenge the DOE's denial of her appeals: (a) declaring that the DOE acted unlawfully in withholding from petitioner documents or portions of documents that are not properly exempt from disclosure under FOIL; (b) vacating, overruling and prohibiting the

enforcement of the final administrative decisions dated October 7, 2015; (c) directing the DOE to provide petitioner with access to all non-exempt documents or portions of documents requested; and (d) awarding petitioner her costs and attorneys' fees pursuant to POL § 89(4)(c).

As an initial matter, that portion of the petition which seeks a declaration pursuant to CPLR § 3001 that the DOE acted unlawfully in withholding from petitioner documents or portions of documents that are not properly exempt from disclosure under FOIL must be denied as procedurally improper. The First Department has held that "to the extent [an Article 78] petitioner[] seek[s] hybrid FOIL and declaratory relief [pursuant to CPLR § 3001], [petitioner was] required to serve a summons in addition to the notice of petition, and a combined petition/complaint." *Matter of New York Times Co. v. City of N.Y. Police Dept.*, 103 A.D.3d 405, 407 (1st Dept 2013). Here, as petitioner has only served a notice of petition along with her verified petition for relief pursuant to Article 78 of the CPLR, she is not entitled to declaratory relief under CPLR § 3001.

The court next turns to that portion of the petition seeking to vacate, overrule and prohibit the enforcement of the DOE's final administrative decision denying petitioner's appeal of the partial denial of her First Request. Pursuant to POL § 87(2), an agency must make requested records available unless they fall under a specific exemption identified in the statute. "Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly. *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008). "To meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm." *Id.*

Indeed, "[a]s the part[y] seeking the exemption, the [agency is] charged with the burden of proving [its] entitlement to it, meaning that [it] must demonstrate that the [records] 'fall[] squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.'" *Id.* at 50-51, citing *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-63 (2007)(internal citations omitted). Pursuant to POL § 87(2)(a), "an agency may deny access to records or portions thereof that: (a) [a]re specifically exempted from disclosure by state or federal statute."

Here, respondent has denied access to the records sought in the First Request based on FERPA which allegedly prohibits their disclosure. Access to education records of students and specifically to personally identifiable information of students and their families is governed by FERPA, 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. Part 99. Specifically, FERPA prohibits the disclosure of such records, absent written consent from the parent of the student, a subpoena or court order, or the applicability of some other exception. *See* 20 U.S.C. § 1232g. The statute further provides that federal funds for educational programs shall be withheld from a school district that violates FERPA. *See* 20 U.S.C. § 1232g(b)(2). The United States Department of Education ("USDOE") has emphasized that "FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students." 73 Fed. Reg. 74,806, 78,834 (Dec. 9, 2008). Although FERPA's implementing regulations include a de-identification provision which permits an educational agency such as the DOE to release education records without consent after removal of all personally identifiable information, it also requires the educational agency to make "a reasonable determination that a student's identity is not personally identifiable, whether through

single or multiple releases, and taking into account other reasonably identifiable information." 34 C.F.R. § 99.31(b). In the context of determining whether records constitute personally identifiable information, and if so, how to de-identify such records, the USDOE has indicated that "[t]he simple removal of nominal or direct identifiers, such as name and SSN (or other ID number) does not necessarily avoid the release of personally identifiable information." 73 Fed. Reg. 74,806, 74,831. Indeed, FERPA's regulations define "personally identifiable information" broadly to encompass not only a student's name, address, date of birth, but also information that is linkable to a specific student that would allow a "reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3.

In the instant proceeding, this court finds that the DOE has demonstrated that the records sought in the First Request fall squarely within the FOIL exemption under POL § 87(2)(a) as they are prohibited from being turned over under FERPA. The DOE denied petitioner's appeal as to her First Request explaining as follows:

> In light of the US DOE's extensive data suppression guidance, I find that the CRAO's decision to withhold the nature of the specific complaints as well as the DOE's resolution action is not only consistent with FERPA, but required by it because, based on my understanding, the data fields containing this information are replete with student-specific information. De-identification is not possible given FERPA's stringent definition of personally identifiable information, and the fact that the data in question involves numerous school communities, making it unfeasible to distinguish specifically what is known in a given school community and what is not known.

Joseph Baranello, the DOE's CRAO and an attorney in the DOE's Office of the General Counsel, has affirmed that all of the detailed narratives sought by petitioner in the First Request contain direct personal identifiers such as student and parent names, dates of birth, student ID

numbers, home addresses and home phone numbers. Additionally, Mr. Baranello affirms that redacting these personal identifiers from the narratives would be insufficient to satisfy FERPA's standards because the complaints that petitioner seeks all relate to special education and describe potentially unique combinations of student disabilities and educational services, especially since the data identifies the particular school to which each complaint relates. For example, Mr. Baranello affirms that many of the complaints at issue in this proceeding concern situations in which a student has received a new or different diagnosis, necessitating new or different educational and related services. Because a specific set of special education services at a specific school can be unique, a reasonable member of the school community could read such a detailed narrative and identify the student by the services described, thereby learning private information about the student's disability status without the student's consent, in violation of FERPA. Mr. Baranello also affirms that even in situations where the services described in a complaint are not unique but merely uncommon, the detailed narratives frequently contain other information that, in combination, would allow a reasonable member of the school community to identify the student with reasonable certainty, including information regarding the student's grade level, the names of the student's teacher and other service providers and whether the student has siblings at the school.

Petitioner asserts that even if the records she sought in the First Request contain information that the DOE is prohibited from producing under FERPA, "DOE was required to redact that information, not withhold the entire data field." However, such assertion is without merit. "[A]n agency responding to a demand under the Freedom of Information Law (FOIL) may not withhold a record solely because some of the information in that record may be exempt

from disclosure. Where it can do so *without unreasonable difficulty*, the agency must redact the record to take out the exempt information." *Schenectady County Society for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 45 (2011) (emphasis added). *See also Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 464, 466 (2007)("even when a document subject to FOIL contains such private, protected information, agencies may be required to prepare a redacted version with the exempt material removed...If such information cannot be reasonably redacted from the electronic records, then such records may not be subject to disclosure under FOIL.") The First Department has held that an agency is not required to provide records in response to a FOIL request if the effort required to do so is unreasonable. *See New York Comm. for Occupational Safety and Health v. Bloomberg*, 72 A.D.3d 153 (1st Dept 2010)(ordering a hearing to determine whether an undue burden would be created by requiring the agency to respond to petitioner's request on the ground that "this case presents a situation where the volume of records is undisputedly large, and those records not only need to be retrieved and reproduced from a wide variety of sources, but redacted as well.") Additionally, pursuant to the POL, an agency may not deny a request for records on the ground that the redaction or production of same would be unreasonably burdensome if the agency is able to hire an outside service to accomplish the task. Indeed, pursuant to POL § 89(3)(a),

> An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article.

Here, even if the fields in the records requested in the First Request contain data that

could be produced subject to redaction without violating FERPA, the DOE has established that it is unable to do so without unreasonable difficulty because of the undue burden it would place on the agency and the extraordinary effort it would take. Mr. Baranello has affirmed that each of the approximately 2,900 records responsive to the First Request contains a detailed narrative of a complaint that must be redacted at least to some extent and that may need to be completely redacted in many cases. Further, Mr. Baranello affirms that a large number of the records also contain "notes" on the actions taken by the DOE employees to resolve the complaint which typically contain the text of e-mails sent or summaries of telephone calls or meetings conducted in the course of resolving a complaint and require significant redaction of student-specific information. Mr. Baranello affirms that in some cases, the notes also incorporate internal correspondence among DOE employees deliberating over the proper way to resolve a complaint and therefore constitute pre-decisional materials subject to FOIL's intra-agency exemption under POL § 87(2)(g). Additionally, Mr. Baranello affirms that in addition to the redaction of direct personal identifiers in these notes, the DOE would be required to compare the information in each detailed complaint narrative with the information in its associated notes to ensure that the combination of this information does not paint such a unique portrait that a reasonable member of the school community could identify the student with reasonable certainty. Mr. Baranello has estimated that it will take an average of approximately eight minutes to redact each of the approximately 2,900 records and their associated "notes" and that it would take approximately six extra minutes to compare the information available in each record to ensure that the redactions required by FERPA were performed, totaling 676 hours of work. Further, Mr. Baranello affirms that DOE cannot reasonably engage an outside professional service to provide

the extensive redaction required to produce the records sought by petitioner in the First Request as properly redacting the records requires an understanding of what constitutes an uncommon or unique combination of education services, such that removing direct personal identifiers is inadequate to protect the student's identity. Mr. Baranello asserts that an outside firm would lack sufficient familiarity with the DOE school system to know, for example, whether placement of a child in a class with no more than six students is common or uncommon at a particular school. Moreover, Mr. Baranello asserts that providing an outside firm with data containing information on medical diagnoses for thousands of students raises its own serious privacy concerns. Based on the foregoing, this court finds that the DOE has sufficiently established that it cannot redact the information prohibited from disclosure by FERPA without unreasonable difficulty and thus, the remaining records sought in the First Request are exempt from disclosure under FOIL.

The court next turns to that portion of the petition which seeks to vacate, overrule and prohibit the enforcement of DOE's final administrative decision denying her appeal of the alleged "constructive denial" of her Second Request, Third Request and Fourth Request. Pursuant to POL § 89(3)(a),

> Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.

Pursuant to 21 N.Y.C.R.R. § 1401.5(d),

> In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

"Public Officers Law § 89 (3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute." *Matter of New York Times Co. v. City of N.Y. Police Dept.*, 103 A.D.3d 405, 406-07 (1st Dept 2013). Additionally, administrative appeals of alleged constructive denials are premature when the respondent's efforts to respond to the request within the applicable time limitations are ongoing. *See Matter of Advocates for Children of New York, Inc.*, 101 A.D.3d 445 (1st Dept 2012).

Here, the court finds that petitioner's petition seeking to vacate, overrule and prohibit the enforcement of the DOE's final administrative decision denying her appeal of the alleged "constructive denial" of her Second Request, Third Request and Fourth Request must be denied on the ground that the DOE had not yet constructively denied those requests by the time petitioner appealed and thus, the administrative appeals were premature. The DOE has established that it responded to the Second Request, Third Request and Fourth Request in accordance with the requirements of POL § 89(3)(a) and that there has been no denial, actual or constructive, of said requests. Indeed, the DOE has demonstrated, through the affidavit of Mr. Baranello, that its efforts to respond to the requests were ongoing and that petitioner prematurely appealed the alleged constructive denial of the requests. With regard to the Second Request, the DOE acknowledged receipt of the request within five business days after its receipt and notified

petitioner that a response to the request was anticipated by approximately July 17, 2015. Thereafter, the DOE extended its time to respond to the request until approximately August 14, 2015, which the court finds to be reasonable based on Mr. Baranello's affidavit in which he affirms that responding to the Second Request required collecting records from four different school years, for a wide variety of products, for every school in the DOE school system. Petitioner filed her appeal of the DOE's alleged constructive denial of said request in September 2015, less than a month after respondent stated that petitioner would receive a response to her request. With regard to the Third Request, the DOE acknowledged receipt of the request within five business days after its receipt and notified petitioner that a response to the request was anticipated by approximately August 6, 2015. Thereafter, by letters to petitioner, the DOE extended its time to respond to the request until approximately March 4, 2016, which the court finds to be reasonable based on Mr. Baranello's affidavit in which he states that responding to the Third Request required coordination among multiple DOE offices, including Human Resources, the Division of Teaching and Learning and the Office of the General Counsel and that the Third Request sought voluminous quantities of documents and data which required careful review and redaction, specifically with regard to the records that reveal private information about employees on medical leave. Although the DOE notified petitioner that she would likely receive a response by March 2016, petitioner appealed the alleged constructive denial of the Third Request in September 2015, while respondent's efforts to respond were still ongoing. With regard to the Fourth Request, the DOE acknowledged receipt of the request within five business days after its receipt and notified petitioner that a response to the request was anticipated by approximately October 26, 2015. Thereafter, by letters to petitioner, DOE

extended its time to respond to the Fourth Request, which the court finds to be reasonable based on Mr. Baranello's affidavit in which he states that the Fourth Request required the DOE to review many e-mails to determine whether certain statutory exemptions such as attorney-client privilege and intra-agency communications applied and to redact certain information from the communications. However, petitioner did not wait to receive a final response from the respondent before administratively appealing the alleged constructive denial of the request. Thus, it is clear that as the DOE's efforts to produce records or respond to petitioner's requests were ongoing, any administrative appeal based on respondent's alleged constructive denial of said requests is premature. Based on the record before the court, the amount of time respondent has already had to review and respond to petitioner's FOIL requests and respondent's assertion that it has already provided many responsive records and plans to respond to the remaining requests by May 13, 2016, this court directs respondent to provide petitioner with all records responsive to her outstanding requests, or, in the alternative, a letter denying said requests, in whole or in part, along with the basis for the denial, by June 30, 2016.

Any assertion that respondent had twenty days to provide petitioner with the records after it initially acknowledged her requests based on POL § 89(3)(a) is without merit. Specifically, POL § 89(3)(a) provides, in pertinent part, that:

> If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

"The 20-day period is triggered only when '[the] agency determines to grant a request in whole

or in part, and [when] circumstances prevent disclosure...within twenty business days from the date of the acknowledgement of the receipt of the request.'" *Matter of New York Times Co.*, 103 A.D.3d at 407. Here, the twenty day period does not apply because the DOE merely acknowledged the requests and notified petitioner that her requests were still being processed. Respondent never informed petitioner that her requests would be granted, in whole or in part; rather, respondent informed petitioner that it needed more time to respond to petitioner's requests because the records requested were so voluminous and that such a response could include the granting or denying of the requests.

Finally, that portion of the petition which seeks costs and attorneys' fees pursuant to POL § 89(4)(c) is denied as there is no basis for such relief at this time.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 5/25/16