NEW YORK LAW JOURNAL

Supreme Court, New York County

October 6, 1988

IA PART 10

Justice Shalnswit

FISHER & FISHER v. DAVISON — The primary issue here is one of first impression, and therefore requires a full exposition of the factual frameworkdefining the issue. The Freedom of Information Law is at the core of the proceedings.

The cardinal question is whether voluminous records and data, sought by a landlords' organization under the claimed authority of the Freedom of Information Law, can be withheld because the very nature of the landlords' organization per se establishes that the information sought is desired for a commercial purpose. A related question is whether the massive information sought threatens an unjustified intrusion into the privacy of numerous individuals.

The record on this motion can be concisely summarized.

Petitioner Fisher & Fisher, a law firm originally appearing pro se, but ultimately conceding that it was acting on behalf of a landlords' organization called the Rent Stabilization Association, applied, on January 7, 1988, to the New York City Department of Health, under the Freedom of Information Law ("Foil"), for the following information, within five days:

"1. Instructions given to and procedures followed by Department of Health inspectors carrying out window guards inspections, including all training manuals and materials.

2. Instructions given to and procedures followed by hearing officers of the Department of Health Administrative Tribunal with regard to hearings concerning violations of §131.15 of the Health Code, including all training manuals and materials.

3. All violations issued to either landlords or tenants for violations of §131.15 of the Health Code since July 1, 1986.

4. All hearing decisions issued by the Department of Health Adminstrative Tribunal in Proceedings concerning violations of §131.15 of the Health Code since July 1, 1986.

5. All decisions rendered after appeals from decisions of the Department of Health Administrative Tribunal concerning violations of §131.15 of the Health Code since July 1, 1986.

6. All letters sent to tenants since July 1, 1986, informing them of their obligations under §131.15 of the Health Code, and of the consequences of failing to comply with §131.15.

7. A list of all tenants to whom the letters referred to in request 6, above, were sent, if the same exists.

8. All press releases, speeches, and public documents or reports issued by the Department of Health with regard to window guards since January 1, 1984.

9. All opinions of counsel issued by or given to the Department of Health with regard to window guards.

10. All pleadings, motions, briefs and memoranda, judicial decisions, orders and judgments from any litigation ot which the Department of Health or any official or employee thereof acting in the course of employment, is a party, involving window guards."

The Department provided all of the information asked, except as follows:

"3. We have no capability of retrieving this information.

4. We have no capability of retrieving this information except as is available as a statistical summary, which is provided. * *

6 & 7. These requests are denied. Disclosure of this information would constitute an unwarranted invasion of personal privacy (Sections 87(2)(b) and 89(2)(b) of the Public Officers Law."

Petitioner appealed to the agency's Appeals Officer, contending that difficulty in retrieval is irrelevant, and that it was itself "prepared to visit the Health Department offices and sift through whatever files are required in order to isolate the documents we seek"; it added the statement "that this material is not sought for the purpose of any commercial or fundraising solicitation.

The appeal was denied, with the explanation that:

"The landlord is a party properly concerned with enforcement of Health Code Section 131.15 in his or her building and accordingly, is entitled to the information with regard to his or her tenants. You are not such a party. Therefore, you were properly denied access to the names and addresses of the tenants under Section 87(a)(b) and 89(2)(b) of the Public Officer's Law, as disclosure thereof would constitute an unwarranted invasion of personal privacy.

Items 3 and 4 of your original request were also correctly denied. Section 89(3) of the Freedom of Information Law does not require an agency to prepare any record not possessed nor maintained by it or to create any new filing system in order to locate and provide material sought under the law. In order to provide you with the material sought in these items of your request, where no docket/violation numbers and names and addresses are provided by you, would require the agency to prepare and maintain an entirely new record system."

Petitioner thereupon brought on this Article 78 proceeding, seeking essentially three types of documents:

(a) all letters sent to tenants by the Department seeking to have the tenant provide the landlord with information or access to the apartment, and a list of the names and addresses of the tenants receiving such letters.

(b) all hearing decisions issued by the Department's Administrative Tribunal.

(c) all notices of violation issued for violation of §131.15 of the Health Code.

Respondents, in addition to denying petitioner's allegations, raised as affirmative defenses:

"(1) petitioner seeks names and addresses of the tenants to whom the Department's Window Falls Prevention Office has written letters. Names and addresses are exempt from production under §87(2)(b) and §89(2)(b)(iii) of the Public Officers Law unless the requestor can prove that it will not use the information for commercial purposes. Petitioner, who is apparently acting for an organization of landlords, has failed to establish that neither it nor the organization are going to use the information for financial advantage against tenants. Accordingly, the information is exempt from disclosure; (2) decisions of the Administrative Tribunal are records of a municipal court, and therefore exempt from Foil under §85 of the Public Officers Law, and (3) Notices of Violations and decisions of the Administrative Tribunal contain names and addresses of tenants and other individuals and are therefore exempt from production, as in (1) above .

In reply, petitioner contended that it "... seeks to obtain information ... as an effective tool for exposing waste, negligence and abuse on the part of government officers."

Petitioner does not deny respondents' statement that there are over 9000 Notices of Violation for the period sought by petitioner, stored by the address of the building, that 2000 letters have been sent to tenants, and that the Administrative Tribunal has had a total docket of over 30,000 cases in that same period.

Sec. 87(2)(b) of the New York Public Officers Law states, in pertinent part:

"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: * * *

b. if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eightynine of this article * * *

e. are complied for law enforcement purposes and which, if disclosed, would

i. interfere with law enforcement investigations or judicial proceedings.

Sec. 89(2)(b) reads:

"An unwarranted invasion of personal provacy includes, but shall not be limited to: * * *

iii. sale or release of lists of names and address if such lists would be used for commercial or fund-raising purposes"

(1) Petitioner's allegation that it does not intend to use the names and addresses it seeks "for commercial purposes" cannot withstand scrutiny. The landlords' group involved is openly seeking this information for its own benefit — and that benefit is, by definition, commercial — however principled and highminded its clients are in petitioner's eyes. Indeed, even if this were not so, and landlords had indeed no commercial purpose, their request could still be denied because tenants are entitled to personal privacy — apart from the specific language of FOIL — as against an organization seeking to advance the interests of landlords.

Accordingly, letters sent to tenants, notices of violation, and hearing decisions — all including names and addresses of tenants and individuals appearing at hearings — were properly held exempt from disclosure.

(2) Respondents are correct that the Administrative Tribunal should not have to interrupt its work — speedily processing health code violations cases — to respond to massive Foil requests like this one.

Sec. 558(e) of the New York Charter, authorizing the Tribunal, provides that:

"* * * an administrative tribunal established by the board of health to enforce the provisions of the health code shall have the power to enforce its final decision and orders imposing pecuniary penalties as if they were money judgments, without court proceedings, in the manner described herein. After four months from the issuance of such a final decision and order by such board of tribunal a copy of such decision and order shall be filed in the office of the clerk of any county within the city * * *. Upon such filing, such county

clerk shall enter and docket such decision and order in the same manner and with the same effect as a money judgment. Upon such entry and docketing, such decision and order may be enforced as provided in article fifty-two of the civil practice law and rules."

The tribunal provides classic adversarial hearings, including the right to counsel, present evidence, and cross-examinewitnesses. Sec. 86.3 of Foil defines "judiciary" as "the courts of the state, including any municipal or district court, whether or not of record."

(3) Finally, petitioner's claim that it is entitled to see the records in question merely as a taxpayer (New York Charter, Sec. 1114) begs the question. No one is denying petitioner's right to see public records generally, or any of these dockets for which it has an index number.

Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons, subserves a commercial purpose outside the concerns of the Freedom of Information Law, and would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy. All in all, respondents were abundantly justified in decining to issue the directives sought by petitioner. The court will not disturb respondents' determination on the record now presented.

Settle judgment.