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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

ESTATE OF ANDREA REBELLO by Administrator NELLA REBELLO and ROTH & ROTH, LLP,

Petitioner(s),

-against-

THOMAS DALE COMMISSIONER NASSAU COUNTY POLICE DEPARTMENT, NASSAU COUNTY POLICE DEPARTMENT, EDWARD MANGANO and COUNTY OF NASSAU,

Respondent(s).

Index No. 11906/13

Motion Submitted: 12/20/13
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

In a proceeding pursuant to CPLR Article 78, the petitioners Estate of Andrea Rebello, by her administrator, Nella Rebello and Roth & Roth, LLP, move for an order, *inter alia*, compelling the various respondents to produce stated documents and materials pursuant to the Freedom of Information Law (***Public Officers Law, Art., 6***)

On May 17, 2013, an armed intruder entered an off-campus residence near Hofstra University and held several of the residents hostage at gun point, demanding money and valuables (Pet., ¶¶ 19-21). The police were later summoned and one of the responding officers allegedly entered the home alone (Pet., ¶¶ 19-20). The petitioners herein, Estate of

Andrea Rebello and Roth & Roth, LLP, et., al ["the petitioners"], contend that the officer confronted the intruder in the house and fired some eight shots, one of which struck Rebello in the head, causing her death. According to the petitioners, the intruder was also killed, but apparently never discharged his weapon (Pet., ¶ 19).

Thereafter, in June and July of 2013, the petitioners filed a series of requests for information and documents with some nine different County agencies pursuant to the "Freedom of Information Law" (*e.g.*, ***Public Officers Law § 84, et., seq.***)(Pet.,¶¶ 26-47; Exhs., "A"-"D", "F", "R"). Specifically, the petitioners' largely similar FOIL requests were filed with, *inter alia*, the County of Nassau, The Nassau County Comptroller's Office and the Nassau County Police Department ["the NCPD"].

Among other things, the various requests sought: sprint reports; 911 calls; police radio communications; police and crime victim reports; EMS transmissions; any relevant video recordings or photos; the shooting officer's identity; the medical examiner's file; "911" training manuals and related materials; information as to whether a so-called "Commissioner's Procedural Order 7-95" pertaining to "Hostage/Barricade Incidents," was in effect at the time of the incident; and, *inter alia*, the investigative file from the Homicide Squad regarding the shooting (Pet., ¶¶ 26, 27, 30, 44; 82-83).

Subsequently, the designated FOIL officers for the various agencies, including the NCPD, the County of Nassau, and the Comptroller's office, denied the petitioners' requests, and/or alternatively, apprised the petitioners that their notices would be transferred to the appropriate agencies in whose custody the requested documents were reposed, primarily the NCPD (Pet., ¶¶ 29, 31-33, 41, 44). In issuing its initial denials, the NCPD advised the petitioners that the Police were conducting an investigation into the shooting, and that in light of that investigation, certain statutory FOIL exemptions were therefore applicable, including those conferred by Public Officers Law § 87[2][e][i] relating to, *inter alia*, ongoing law enforcement investigations (*e.g.*, Pet., Exh., "O" ***see also, Public Officers Law § 87[2][a], 2[e][iv], 2[g]; County Law § 308***). The petitioners later filed final appeals from the various agency denials, which appeals were then either denied, or granted in part (Pet., ¶¶ 26, 40-41; 45-46). However, to the extent that certain documents and/or redacted materials were provided, the petitioners contend the materials produced were non-responsive to the requests made; improperly redacted; and/or otherwise legally insufficient (Pet., ¶ 46-47; 48-49).

In September of 2013, the petitioners commenced the within proceeding pursuant to, *inter alia*, CPLR Article 78, alleging in sum that the denials issued were arbitrary, capricious and violated applicable disclosure requirements imposed by the Freedom of Information Law (***Public Officers Law, Art. 6***). The petition also alleges that the respondents failed to produce, upon request so-called document, "subject matter" lists pursuant to Public Officers

Law § 87[3][c] (Pet., ¶¶ 66-73). In pertinent part, Public Officers Law § 87[3][c] provides that, "[e]ach agency shall maintain: . . . a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available under this article" (Pet., ¶¶ 66-68).

The respondents have answered, denied the material allegations of the petition and interposed various affirmative defenses, including the first affirmative defense, which asserts that further disclosure is unwarranted because an ongoing investigation is currently being conducted by the police department (Ans.,¶ 13).

By order to show cause dated October, 2013, the petitioners now move for an order, *inter alia*: (1) compelling the respondents to produce the documents and materials requested in their various demands; and (2) requiring them to produce and/or establish subject matter lists pursuant to Public Officers Law § 87[3][c].

Notably, counsel for the respondents has advised that in the spirit of cooperation and pursuant to FOIL, on December 4, 2013, the NCPD forwarded additional documents to the petitioners; namely, what the respondents have described as "an expansive set [of] documents related to 911 Operator Training" (Libert Aff., ¶¶ 26-27; Exh., "A").

Although in their underlying, administrative FOIL denial notices, the respondents invoked several exemption grounds (*e.g.*, ***Public Officers Law § 87[2][a], 2[e][iv], 2[g]; County Law § 308***), in their opposing submissions, the respondents now rely exclusively upon the "investigation" exemption contained in Public Officers Law § 87[2][e][I], *i.e.*, no additional exemption theories have been advanced in their memorandum of law or their opposing affidavit and/or attorney's affirmation (*e.g.*, Libert Aff., ¶ 25; Israel Aff.,¶¶ 3-5 *see also*, Resp's Mem. of Law, 4-7). The respondents have, however, alternatively requested that the Court conduct an *in camera* review of the requested materials before ordering any disclosure (Libert Aff., ¶ 28; Resp; Mem of Law, p. 5).

In support of the foregoing exemption claim, the respondents have attached the five-paragraph affidavit of Det. Sgt. Israel Santiago, Commanding Officer of the NCPD's Legal Bureau. In his affidavit, Det. Santiago states that he has spoken to other unnamed members of the Department, "and based on these conversations, I know that the investigation being conducted by the Homicide Squad is an active investigation and is not complete" (Santigao Aff., ¶¶ 3-4). Santiago further contends that any further disclosure at this time "would interfere with the open and ongoing police investigation and would impede the ability of the NCPD to complete the homicide investigation", since the "Homicide Squad needs to take further action in relation to the evidence in order to close its investigation" (Santigao Aff., ¶ 4).

Upon the papers submitted, the order to show cause and petition should be granted to the extent indicated below.

"'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'" (***Matter of Alderson v New York State College of Agriculture and Life Sciences at Cornell University***, 4 NY3d 225, 230 [2005], *citing* ***Matter of Newsday Inc. v. Sise***, 71 NY2d 146, 150 [1987], *cert denied* 486 US 1056 [1988]; *see also,* ***Matter of Harbatkin v New York City Department of Records and Information Services***, 19 NY3d 373, 379-380 [2012]; ***Matter of Fappiano v New York City Police Dept.***, 95 NY2d 738, 746 [2001]; ***Matter of Gould v New York City Police Dept.***, 89 NY2d 267, 274 [1996]).

An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that '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 Buffalo News, Inc. v Buffalo Enterprise Development Corporation***, 84 NY2d 488, 492[1994][citations omitted]).

Accordingly, "[w]hen faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" (***Matter of Beechwood Restorative Care Center v Signor***, 5 NY3d 435, 440 [2005]; *see also* ***Public Officers Law §§ 87[2], 89[3]***; ***Matter of Lesher v Hynes***, 19 NY3d 57, 64 [2012]). "Put another way, in the absence of specific statutory protection for the requested material, the Freedom of Information Law compels disclosure, not concealment" (***Matter of Westchester Rockland Newspapers v Kimball***, 50 NY2d 575, 580 [1980]).

The Court of Appeals has emphasized that "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (***Matter of Capital Newspapers Div. of Hearst Corp. v Burns***, 67 NY2d 562, 566 [1986]; *see,* ***Matter of Data Tree, LLC v Romaine***, 9 NY3d 454, 462–463 [2007]).Wholly "blanket"-type statements and/or "[c]onclusory assertions that certain records fall within a statutory exemption," are insufficient to sustain an agency's burden with respect to a FOIL exemption (***Matter of Dilworth v Westchester County Dept. of Correction***, 93 AD3d 722, 724 [2d Dept 2012]; *see,* ***Matter of Konigsberg v Coughlin***, 68 NY2d 245, 250-251 [1986]; ***Matter of Madera v***

Elmont Public Library, 101 AD3d 726, 727 [2d Dept 2012]).

With respect to an investigation exemption, Public Officers Law § 87[2][e][i] excludes from the reach of a FOIL disclosure notice, those records "compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings" (***Pittari v Pirro***, 258 AD2d 202, 204 [2d Dept 1999]; *see*, ***Matter of Lesher v Hynes, supra***; ***Matter of Fink v Lefkowitz***, 47 NY2d 567, 572 [1979]; ***Matter of Legal Aid Society. v New York City Police Dept.***, 274 AD2d 207, 213 [1st Dept 2000]).

In ***Matter of Lesher v Hynes, supra***, the Court of Appeals recently construed Public Officers Law § 87[2][e][i] and discussed an agency's burden upon invoking that exemption. Guided by reference to relevant federal case law (*e.g.*, ***NLRB v Robbins Tire & Rubber Co.***, 437 US 214, 228-229 [1978]; 5 USC § 552[a]), the *Lesher* Court ultimately concluded that the involved agency, the Kings County District Attorney's Office, had sustained its FOIL exemption burden. In so holding, the Court determined that a "document-by-document" showing of interference with an investigation would not be required under Public Officers Law § 87[2][e][I] (***Matter of Lesher v Hynes, supra***). Rather, and provided that a qualifying, law enforcement or court proceeding existed, an agency could permissibly demonstrate its entitlement to the investigation exemption by: (1) identifying general or so-called "generic" document description categories, as opposed to "document-by-document" descriptions, (***Matter of Legal Aid Society. v New York City, supra***, 274 AD2d 207, 213); and (2) thereafter describing "the generic risks posed by disclosure of these categories of documents" (***Matter of Lesher v Hynes, supra***, 19 NY3d at 67-68; *see also*, ***Matter of Whitley v New York County District Attorney's Office***, 101 AD3d 455 [1st Dept 2012]; ***Matter of Legal Aid Society. v New York City, supra***, 274 AD2d 207, 213; ***Pittari v Pirro, supra***, 258 AD2d 202, 205). The Court cautioned, however, that "not . . . every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there" (***Matter of Lesher v Hynes, supra***, 19 NY3d at 67-68).

Moreover, despite this lessened, "generic" standard of particularity, an "agency must still fulfill its burden under Public Officers Law § 89[4][b] to articulate a factual basis for the exemption" (***Matter of Lesher v Hynes, supra***, 19 NY3d at 67). Relatedly, vague allegations and/or attorney affirmations alone, will not suffice since, "evidentiary support is needed" (***Matter of Dilworth v Westchester County Dept. of Correction***, 93 AD3d 722, 724 [2d Dept 2012]; ***Newsday LLC v Nassau County Police Dept.***, 2014 NY Slip Op 50044 [Supreme Court, Nassau County 2014] *see also*, ***Matter of Washington Post Co. v New York State Ins. Co.***, 61 NY2d 557, 567 [1984]; ***Matter of Madera v Elmont Public Library, supra***, 101 AD3d 726, 727; ***Matter of Loevy & Loevy v New York City Police Dept.***, 38 Misc3d 950, 954-955 [Supreme Court, New York County 2013]; ***Windham v City of New***

York Police Department, 2013 NY Slip Op 32418 [Supreme Court, New York County 2013]). In sum, the applicable "burden requires identifying the types of documents, their general content, and the risk associated with that type of content" (***Windham, supra***, at 7; *see*, ***Matter of Lesher v Hynes, supra***).

With these principles in mind, and cognizant of the requirements that statutory exemptions must be "narrowly interpreted," and established with "evidentiary" support (***Matter of Data Tree, LLC v Romaine, supra***, at 462; ***Matter of Dilworth v Westchester County Dept. of Correction, supra***, at 724), the Court agrees that the respondents have failed to demonstrate their entitlement to a statutory exemption predicated upon Public Officers Law § 87[2][e][i]).

Here, the respondents' principal evidentiary submission, the one-and-a half page affidavit supplied by Det. Sgt. Santiago, is conclusory and contains virtually no descriptive facts upon which the Court can meaningfully weigh the viability of the claimed exemption (*see*, ***Newsday LLC v Nassau County Police Department, supra***, at 9; ***Matter of Loevy & Loevy v New York City Police Department, supra***, at 954-955 *cf.*, ***Matter of Lesher v Hynes, supra; Whitley v New York County District Attorney's Office, supra***). Apart from the unelaborated assertion that they are "investigating the shooting," the respondents have not described precisely what sort of investigation they are currently conducting, thereby complicating the task of assessing precisely what risks, if any, would ensue upon release of the requested materials.

More fundamentally, while properly framed, "generic" descriptions and statements may suffice (***Whitley v New York County District Attorney's Office, supra,*** at 455), the statements provided by, *inter alia*, Det. Santiago are not even sufficiently detailed to qualify as generically descriptive in content (*see* ***Newsday LLC v. Nassau County Police Department, supra***, at 9). In ***Lesher***, (***supra***), the Court of Appeals sustained an investigation exemption, but only because the District Attorney was able to articulate a series of concrete factual statements relating to specific document categories and then describe the relevant harm disclosure might create. More particularly, and upon upholding the exemption claim in *Lesher*, the Court relied on the fact that the District Attorney had "identified for Supreme Court the categories of records that he sought to withhold on the basis of the exemption, which included "correspondence with the United States Department of State "consist[ing] of crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements"; and (2) also "identified the generic harm that disclosure would cause – *i.e.*, [that] disclosure would necessarily interfere with law enforcement proceedings because the correspondence was "replete with information about the crimes committed," and so its release posed an obvious risk of prematurely tipping the District Attorney's hand" (***Matter of Lesher v Hynes, supra***, at 67-68).

At bar, however, Det. Santiago has not identified or referenced any document categories; nor has he articulated how the disclosure of the requested documents would impact upon whatever investigation the NCPD is currently conducting (***Newsday LLC v Nassau County Police Deparatment, supra***; ***Windham v City of New York Police Department, supra***; ***Matter of Loevy & Loevy v New York City Police Dept., supra***). Rather, his affidavit merely asserts in substance, that "the Homicide Squad needs to take further action in relation to the evidence in the order to close its investigation" (Santiago Aff., ¶ 5) – a circular statement which does not even generically identify the harm which would allegedly flow from disclosure of the documents or stated categories of documents. It bears noting that the largely oblique manner in which Det. Santiago's affidavit has been worded, also suggests that he lacks personal knowledge of the pending investigation, since he states only that he has engaged in certain conversations with unidentified members of the NCPD concerning the investigation, and that based upon these conversations, he "knows" that the investigation has not been completed (*see,* Santiago Aff.,¶¶ 4-5)(*cf.*, ***Matter of Madera v Elmont Public Library, supra***, at 727; ***DeLuca v. New York City Police Department***, 261 AD2d 140 [concrete next step in investigation consisting of interview of injured officer sufficient basis upon which to deny petition for disclosure]).

The respondents alternatively argue that, even if the Court rejects their exemption claim, it should conduct an *in camera* examination of the materials before any release is finally directed (Ans.,¶ 16; 4th Aff. Def.]).

Neither the petitioners, nor respondents, have provided the seven listed items that were disclosed by respondents, but were, according to petitioners, allegedly "incomplete and improperly redacted without particularization or specific justification" (Pet., ¶ 88). Thus, the Court cannot determine whether those items were improperly redacted. Accordingly, petitioners are directed to provide the listed items to this Court on or before March 31, 2014, and respondents are directed to provide unredacted copies of same on or before that same date, in order that this Court may conduct an *in camera* inspection to determine the propriety of the redactions allegedly made by respondent.

That branch of the motion which is for an order compelling the respondent NCPD to, *inter alia*, provide responses to the petitioners' FOIL requests for "subject matter" lists, is granted to the extent that the respondents shall either produce the requested lists, or provide a clear statement indicating whether, in fact, they have been maintained (***Marino v Bodner***, 9 Misc3d 1105 (A) [Supreme Court, New York County, 2005]).

The Court disagrees that the list requests are "non justiciable" because the petitioners are allegedly required to show some sort of special standing or specific injury attributable to non-disclosure of the lists (Resp., Mem. of Law 7-9; Ans., ¶ 14 [2nd Aff. Def.]). Indeed,

"because FOIL has made full disclosure by public agencies a public right, the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions" (***Matter of Capital Newspapers Div. of Hearst Corp. v Burns, supra***, at 566-567 *see also*, ***Matter of Data Tree, LLC v Romaine, supra***, at 463; ***Matter of Fappiano v New York City Police Dept., supra***, at 748 [standing under FOIL is "as a member of the public"] *cf.*, ***Matter of Marino v Morgenthau***, 1 AD3d 275 [1st Dept 2003]; ***Matter of Allen v Strojnowski***, 129 AD2d 700 [2d Dept 1987]).

The respondents further assert, and have interposed an affirmative defense alleging, that County Executive Edward Mangano has been redundantly named as a party to the proceeding in his official capacity only (Resp. Brief at 9-11; Pet.,¶ 15; Ans.,¶ 13 [3rd Aff. Def.]). In general, claims against public officials in their official capacities, *i.e.*, so-called "official capacity" claims, are instituted in order to facilitate the commencement of an action "against the entity of which the public officer is an agent" (*see,* ***Matter of Kaczmarek v Conroy***, 218 AD2d 97, 101 [3d Dept 1995]; ***Rini v Zwirn***, 886 F Supp 270, 281 [EDNY 1995]; ***Orange v County of Suffolk***, 830 F Supp 701, 707 [EDNY 1993]; *see also,* ***Goldberg v Town of Rocky Hill***, 973 F2d 70, 73 [2nd Cir 1992]; ***Bristol v Queens County***, 2013 US Dist LEXIS 38673 [EDNY 2013]; ***Guzman v Jacobson***, 1999 U.S. Dist LEXIS 201 [EDNY 1999]). Accordingly, it has been held that "[w]here the governmental entity can itself be held liable for damages as a result of its official policy, a suit naming the legislators in their official capacity is redundant" (***Rini v Zwirn, supra***, at 281; ***Matter of Kaczmarek v Conroy, supra***, at 101).

Here, the naming of County Executive Mangano in his official capacity is the functional equivalent of a proceeding against the County of Nassau, the real party in interest (***Rini v Zwirn, supra***). Under these circumstances, the Court agrees that the County Executive's inclusion as a named-party to the proceeding is redundant within the meaning of the foregoing case law, and accordingly, the petition is dismissed insofar as asserted against him (***Matter of Kaczmarek v Conroy, supra***). The Court notes, in this respect, that the petitioners' counsel has not addressed the relevant case law cited by the respondents (*see* Roth Reply Aff., 22-23).

Lastly, although the petitioners' order to show cause requests an award of statutory counsel fees and costs (Order to Show Cause, decretal ¶ 5), their supporting papers advise that they are not, at this juncture, formally requesting an award of fees, but instead, are "putting the respondents on notice" that they intend to later request that relief if they prevail on their application (Roth [Main] Aff., ¶ 93; Roth [Reply] Aff., at 21).

The Court has considered the respondents' remaining contentions and concludes that they are insufficient to defeat the petitioners' motion to the extent indicated above.

The foregoing constitutes the Order of this Court.

Dated: March18, 2014
Mineola, N.Y.

Karen V. Murphy
J. S. C.