SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

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In the Matter of the Application of JULIE VAN NESS, in her capacity as Treasure of SHELTER REFORM ACTION COMMITTEE,

Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

Index No. 103410/97
Mot. Seq. No. 001

THE CENTER FOR ANIMAL CARE AND CONTROL and THE NEW YORK CITY DEPARTMENT OF HEALTH,

Respondents.

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DIANE A. LEBEDEFF, J.:

Petitioner, as a representative of the Shelter Reform Action Committee, an animal rights association, commenced an Article 78 proceeding asserting a denial of rights under the Freedom of Information Law (P.O.L. § 84, *et seq.*, hereinafter "FOIL") and the Open Meetings Law (P.O.L. § 100, *et seq.*). Respondent is the Center for Animal Care and Control, Inc. (the "Center"). In an interim order, the court denied a motion to dismiss, permitted amendment of the caption to read as set forth above, and approved the amended petition.

Briefly stated, this proceeding concerns access to records and meetings of the Center. The Center commenced operations in or about August of 1994, took on the role previously filled by the American Society for the Prevention

of Cruelty to Animals and assumed responsibility for animal care and control services in New York City under a contract with the The New York City Department of Health ("DOH"). The Center's general purposes are to take custody of seized animals, operate shelter facilities, accept owner-surrendered animals and provide euthanasia as necessary. The Center is a not-for-profit corporation with its four Board members appointed by the Mayor, with three New York City Commissioners also sitting as *ex officio* Board members. In 1977, the Center's operations were reviewed by the City Council's Committee on Contracts, chaired by Council member Kathryn E. Freed, and this examination resulted in an extensive report on the Center's background and operations entitled "Dying for Homes: Animal Care and Control in New York City."

Although the papers are voluminous, only limited disputes are actually presented. The facts are best described in relation to each issue as it is addressed.

First, the threshold issue is whether the Center is an "agency" subject to FOIL. On this specific topic, the State's Committee on Open Government issued a comprehensive advisory opinion reaching the conclusion that the Center was subject to FOIL (advisory opinion letter of Robert J. Freedman, Executive Director, dated February 3, 1995). The court adopts the impeccable reasoning set forth in that opinion letter which relied upon *Westchester News v. Kimball*, 50 N.Y.2d 575, 578-580 (1980), applying FOIL to a

"volunteer organization on which a local government relies for the performance of an essential public service," and *Buffalo News Inc. v. Buffalo Enterprises Corp.*, 84 N.Y.2d 488, 492 (1994), applying FOIL to a development agency which "channel[ed] public funds into the community and enjoys many attributes of public entities" (84 N.Y.2d at 492) and was "undeniably governmental" in purpose given that it was "created exclusively by and for the city," with a budget to be "submitted with its annual audited financial statements to the city ... for review" (84 N.Y.2d at 493). All such descriptions are applicable here. It matters not that the Center may receive some funding from private sources (*Russo v. Nassau County College*, 81 N.Y.2d 690, 698 [1993], county sponsored community college chartered under state law FOIL "agency" even though only partially funded by county and governed by its own board of trustees).

Parallel factors in the record support this determination (see also, generally, Annotation, What Constitutes an Agency Subject to Application of State Freedom of Information Act, 27 A.L.R.4th 742 [1984]). As noted, the government relies on the Center for the performance of an essential service and the City of New York exercises a great deal of control over its operations and financial affairs. The City has direct control over the composition of the Center's Board. The Center's contract of September 1, 1994, recites that the Center "undertook animal controls functions and duties on behalf of [DOH] and the

city" for a term through December 31, 1997, renewable at the city's option for another three-year term. Additionally, the Center submits reports to the city (contract, p. 11), provides detailed monthly financial reports (p. 8) and must secure prior written approval for all contracts and rental agreements (p. 10).

Second, the Center urges that it has voluntarily assumed the obligation to comply with FOIL, which renders this petition moot. This position is undermined by its request that the court rule upon the record access issues under FOIL. The court finds that the substantive question is not moot and reaches the threshold determination set forth above that FOIL does apply.

Third, as to FOIL relief, the court will consider the petition within the statutory framework. The petition poses a blanket prayer that the Center be directed to "make available its unredacted of animal intake, spaying, neutering, adopting and euthanasia for inspection and copying" by its members (amended petition, prayer for relief No. 1), without limitation to the documents actually requested. Article 78 relief is available based upon a request for records, a denial, and an administrative appeal of any denial (P.O.L. § 89 [4][b]), all of which are present here and which shall form the basis for the court's analysis.

Requested were approximately two years of records relating to animal intake, spraying, neutering, adoption and

euthanasia. In response, the Center stated that the documents "require[d] redaction" for the "voluminous" documents containing "private information about third parties." The Center stated the request appeared to cover over 200,000 pages, set forth a copying cost of $.25 per page, and asked for assurance of payment of the $50,000 before beginning copying.

The Committee, by a different writer, filed an administrative appeal. The author objected that no confidential information was in the records and asked for access to all original documents for inspection without photocopying. In relation to this appeal, the Center reiterated that its records contained "private information about third parties, including among other things, the name and addresses of those who have surrendered animals to the [Center], adopted animals or have been charged in cruelty cases" which information it "was not at liberty to provide" to the Committee.

If there is information which properly is to be disclosed because of personal privacy interests, such material requires redaction. It is an established policy that material which is redacted is available only in photocopied form (Advisory Opinion letter of Robert Freeman, Executive Director, Committee on Open Government, dated August 1, 1994, stating at page 3, "When accessible and deniable information must, of necessity, appear on the same page, the practice [of] preparing a redacted copy and

charging the established fee, in my opinion, is fully justifiable .... [unless] the design is intended to ensure that records cannot be inspected at no charge") and a complete document is properly photocopied when any portion thereof is redacted (*id.*, if "some aspects of a record, but not the entire record, may properly be withheld" then "I do not believe that an applicant would have the right to inspect the record").

Where there is photocopying, a charge of $.25 per page is permitted by statute unless the actual cost of copying is less (P.O.L. § 87 [1][a][iii]; see also, *Shotsky & Rappaport, P.C. v. Suffolk County*, 226 A.D.2d 339 [2d Dept. 1996], $20 fee for copies of police reports invalid; compare, *In the Matter of Scott v. New York State*, 186 A.D.2d 571 [2d Dept. 1992], hospital charge of $2 per page plus a $25 processing fee reasonable). An agency is also entitled to delay copying until "payment" or an "offer to pay" copying costs is made (P.O.L. § 89 [3]). Petitioner does not protest the design of the forms nor the basis of the $.25 per page requested charge.

This litigation was then commenced. Petitioner did not choose to limit its request to cover fewer documents nor obtain a smaller sample selection of such documents.

The bulk of the Center's material on animal intake, spraying, neutering and adoption and euthanasia would appear to be, in concept, "records" under FOIL (P.O.L. § 86 [4]) as they are "kept, held, filed, produced or reproduced" for New

York under contract terms. The parties having reached an impasse in relation to records, the court can address only those Center forms which have been submitted to the court.*

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* The forms submitted are as follows:

1. Intake Records:

(a) An "Animal Intake Form" is a slender summons-like document of three pages. The first bears a top space for a possible owner's signature and "ID #" and a bottom space for a possible adopter's name, address, and work and home telephone numbers. The second page has the same top portion, with the bottom two-thirds being notes regarding the animal. The third page contains spaces for Center notes, presumably about the animal, and a check-off list of items not regarding the owner.

(b) A "Police Intake Form" does contain information regarding the an owner's name and owner's full address, with the owner not necessarily being a defendant. If there has been a summons, desk appearance ticket or arrest, the form calls for the name of the defendant.

(c) A Form 18 and Form 18A card-sized forms bear spaces for a name , address, and home and work telephone numbers; with form 18 also providing space for "tag check" information of the owner's name, address and telephone number relevant to the "tag."

(d) An "Adoption Agreement" has multiple pages. The apparent first page contains the adopter's name, address, home and work numbers and a space for an identification document to be identified, with information as to the manner of payment, and a final signature line. the second page provides information on the spay/neuter program with the same personal information as appears on the first page. The third page is a spay/neuter certificate with the top to be completed by the veterinarian, but a bottom verification does contain a lengthy space after the words "Owned by."

(e) A two-age "Pre-Adoption Form" contains much personal information and does not appear to fall into the category of a "final disposition" record.

2. Disposition Records: Euthanasia information is contained on the final page of the "Animal Intake Form" described above. A "Holding Case Record" form does not appear to fall within the category of "final disposition" records requested.

3. Spay/Neuter Records: A "CACC Medical Record - Spay/Neuter" is one page and may contain an adopter's name, address and telephone number at the top and a signature of the adopter about in the lower middle of the page. The balance of the information concerns the animal. Other spay/neuter information is contained in the "Adoption Agreement" form described above.

As to the forms which fall within the request, this examination reveals that personal information is or may be contained on a number of the records. If personal information is not actually inscribed on any single document, then the form should be subject to inspection and the Center's privacy objection does not lie.

The proper treatment of personal information is the subject of flexibility because, although the statute lists certain private items, the list is not all inclusive (P.O.L. § 89 [2][(b], "An unwarranted invasion of personal privacy includes, but shall not be limited to" the items specifically listed therein, which section is referred to by P.O.L § 87 [2][b]). Indeed, as a general matter, where there is information regarding a particular person, "an agency may delete identifying details when it makes records available" unless contrary to guidelines promulgated by the committee on public access (P.O.L. § 89 [2][a]), which places on petitioner at least some burden to demonstrate that petitioner is entitled to obtain "identifying details" under such guidelines, which burden it does not meet (see *New York Times Co. v. New York State Dept. of Health*, 243 A.D.2d 157, 159-160 [3rd Dept. 1998], "Public Officers Law § 89 (2) plainly permits an agency to delete 'identifying details' from records made available by it to the public in order to prevent an unwarranted invasion of personal privacy, and the parties do not dispute that certain patient information, including but not limited to the patient's name, Social

Security number and/or address, constitutes identifying details subject to deletion").

As has been stated, "[w]hat constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities" which test "requires balancing the competing interests of public access and individual privacy. On the private end of the scale is the expectation of privacy accruing to the individual furnishing the information and the general need to protect against dissemination of personal information relating to that individual. The scale's public end includes the presumption that governmental records are to be available to public scrutiny, the judicial reluctance to broaden the narrow exceptions to disclosure, and concern as to whether the information contained in the document sought to be revealed is a matter of public record" (*Dobranski v. Houper*, 154 A.D.2d 736, 737 [3rd Dept. 1989]). A balancing of interests is appropriate because it is not urged that the information claimed to involve a privacy interest fits within a specific statutory exception (*Hanig v. State Dept. of Motor Vehicles*, 79 N.Y.2d 106, 112 [1992], "Once it is determined that the requested material falls within a FOIL exemption, no further policy analysis is required. It is enough that the Legislature has determined to classify the release of such information as an unwarranted invasion of personal privacy").

Case law has held that a wholesale disclosure of names and addresses can constitute an invasion of privacy and have

protected such information from disclosure under most circumstances (*Brownstone Publishers, Inc. v. New York City Dept. of Finance*, 150 A.D.2d [1st Dept. 1989], names of buyers and sellers of cooperative apartments excluded from information on apartments sought by publisher desiring to develop computerized database of property transfers; *Siegel, Fenchel & Peddy, P.C. v. Central Pine Barrens Joint Planning & Policy Com'n.*, -- A.D.2d --, 676 N.Y.S.2d 191 [2d Dept. 1998], tax certiorari and condemnation law firm denied access to list of names and addresses of property owners; *Harris v. City University of New York*, 114 A.D.2d 805, 806 [1st Dept. 1985], deletion of names and home addresses of faculty members permitted even though requested information was not sought for fund raising or solicitation; compare, *New York Teachers Pension Ass'n v. Teachers' Retirement System of City of N.Y.*, 71 A.D.2d 250 [1st Dept. 1979], app den 49 N.Y.2d 701 [1980]; see, *Westchester Rockland Newspapers, Inc. v. Kimball*, *supra*, policy sufficiently strong that award of lottery proceeds to those in need permitted redaction of such names although agency had not raised a personal privacy issue in denying access on the administrative level). Access is often denied if personal identifiers, such as a social security number, are on the form (see, generally, Note, Applying the Freedom of Information Act's Privacy Exemption to Requests for Lists of Names and Addresses, 204 Fordham L. Rev. 1033 [1990], and Flavio L. Komuves, We've Got Your Number: An Overview of Legislation and Decisions to Control

the Use of Social Security Numbers as Personal Identifiers, 16 J. Marshall J. Computer & Info. L. 529 [1998]).

In this instance, the name and other information of an owner or adopter are of less significance that the animal, the characteristics of which are set forth in many portions of the forms albeit not detailed above. Analysis of the spay/neuter program is even easier for that form bears the same identifying number as the corresponding adoption form. The petitioner's contention that it might be able to identify what adopted animals are subsequently surrendered by use of an adopter/owner's name is not demonstrated to be relevant to any use to which such data might be put nor supported by any statement that such a detailed analysis of 200,000 forms might actually be undertaken.

Additionally, although not critical to the result reached herein, the court observes that any individual providing personal information to the Center did so in the belief the person was dealing with a private charitable organization, unaware that such information might become a public record. Once any particular record is released, for example, there is no reason why it could not be posted on the petitioner's internet site, as have been the home addresses of Center officials. Considering all of the foregoing, the court finds the personal privacy objection well taken.

Accordingly, as limited to the forms presented and arguments raised, the court finds redaction of an owner or adopter's name and other identifying details, including such

person's signature, is proper except special treatment must be given any individual "Police Intake Form." On the "Police Intake Form" if there was a summons, desk appearance ticket or arrest, the name of the defendant would be a matter of public record (*People v. Pardo*, 92 Misc.2d 985, 987 [Sup. Ct. Bronx Co. 1978], citing *People ex rel. Lewisohn v. Court of General Sessions*, 96 App.Div. 201 [1904]) and no argument would support such redaction; moreover, the owner's address need not be redacted if the defendant is the owner, which status is noted on the form, for an address would appear in the public record even apart from the submission of this form by a police officer to the Center. No party addresses whether "tag" information, presumably registration of animal ownership, is information freely disclosable to the public and petitioner has not carried its burden on this item.

This conclusion disposes of the issue of access to the requested records. Because of the entirely informal nature of petitioner's organization, which has consistent changes in leadership, as documented in these papers, the Center is entitled to request prepayment of copying costs.

Fourth, as to those forms which will not require redaction, the Center must allow inspection of the original documents. The Center is not precluded from developing rules regarding reasonable access in view of the special circumstances described in the record. The Center's submissions document that one of the petitioner's co-chairs has been convicted of misdemeanor offensive acts against the

Center's staff on Center property, specifically of harassment in the second degree. The Center might wish to consult with the Committee on Open Government in the development of guidelines regarding access to its record, which is one of the mandates of that State agency (P.O.L. § 1 [b][i]).

Fifth, certain questions are raised in relation to Center board meetings. Given the board meetings are now open to the public, questions of access to such meetings under the Open Meeting Law are moot.

Petitioner also requested access to Board minutes. The content of minutes of meetings subject to the Open Meetings Law are prescribed by law and "shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon" (P.O.L. § 106 [1]). If there is an executive session, which may occur on a majority vote in relation to specific subjects only (P.O.L. § 105), the minutes shall include a "summary of any final determination" and the "vote thereon," and "need not include any matter not required to be made public by the freedom of information law" (P.O.L. § 106 [2]; see, generally, as to access to records of executive session, *Wm. J. Kline & Sons Inc. v. County of Hamilton*, 235 A.D.2d 44 [3rd Dept. 1997]; see, documents used discussed in executive session may be available under FOIL, *Town of Woodstock v. Goodson-Todman Enterprises, Ltd.*, 133 Misc.2d 12 [Sup. Ct. Ulster Co. 1986]). Minutes are to be made available to the public (P.O.L. § 106 [3]).

If a body "operated either in ignorance of the Open Meetings Law or in the belief they were not subject to it," the course of action is recognized to be "redaction thereof consistent with the provisions of the Freedom of Information law and the Open Meetings Law" (*Syracuse United Neighbors v. city of Syracuse*, 80 A.D.2d 984 [4th Dept. 1981]). It is noted that, after the amended petition was interposed, there was a tender of copying fees for the minutes and further review of the redactions. A final redacted set of minutes has been reviewed by the court, which redacts text related to the subjects of litigation, employment concerns, labor relations, contract negotiations, and attorney-client communications. The final redactions are found to have been proper. Sixth, petitioner requests counsel fees, which are denied. The largest portion of the legal effort concerned remedy to the original deficient pleading and cannot be laid at respondents' door. The bulk of the Center's privacy objections have been upheld. The court is not presented with any final legal argument in support of an award of fees on the three legal bases set forth in the amended petition and the court denies such fees in the exercise of its discretion (*Urac Corp. v. Public Service Commission*, 223 A.D.2d 906 [3rd Dept. 1996]).

Finally, three minor issues remain. The Department of Health's cross motion to dismiss is granted upon the basis that the amended petition seeks no relief as against it. The Center cannot properly argue that a prior FOIL petition

brought by another member of the same organization against the Department of Health precludes the instant FOIL claims, for that petition was against a different "agency" which maintained different records. The petitioner has submitted to this court a copy of a later request for documents not within the scope of the original or the amended petition and such requests are not properly before this court.

Based on the foregoing, the petition is granted to the extent set forth and otherwise denied. Because of the potentially immense number of documents involved and the unique history of relations between the petitioner's organization's leadership and respondent, petitioner is directed to advise the Center in writing of the records it desires to have copied and pay the charge, after which the Center shall have a reasonable time to redact and copy the records. As to records which petitioner is entitled to inspect, the Center shall have a reasonable time to identify such records for each will require examination on a document-by-document basis and the Center should be permitted to set such items aside for petitioner's inspection as the Center undertakes any requested copying process. Prior to commencing its document inspection, petitioner is directed to advise the Center in writing of the individuals who will undertake any inspection and of a proposed schedule for such inspections. Because the court has identified those specific areas of the forms which are to be redacted, an incamera review of such potentially massive amounts of material does

not appear necessary but the court stands ready to provide further procedural oversight and may be contacted by counsel should such become necessary.

The City's cross motion to dismiss is granted and the amended petition is dismissed as against it.

This decision constitutes the order of the court.

Dated: January 28, 1999

J.S.C.