

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 012574/2014

Return Date: 3-9-15

Cal. No.: 35-37

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ALEXANDER HAGAN, as President of and on behalf of
UNIFORMED FIRE OFFICERS ASSOCIATION,
LOCAL UNION NO. 854, I.A.F.F., STEPHEN
CASSIDY, as President of and on behalf of
UNIFORMED FIREFIGHTERS ASSOCIATION,
LOCAL 94, I.A.F.F., AFL-CIO, EDWARD BURKE, and
JOSEPH HENNELLY, individually, and on behalf of
those similarly situated,

Petitioners,

-against-

DECISION/ORDER

CITY OF NEW YORK, and BILL DE BLASIO, as
Mayor of the City of New York and NEW YORK CITY
FIRE DEPARTMENT, and DANIEL A. NIGRO, as
Commissioner of the New York City Fire Department
and as Chairman of the New York City Fire Pension
Fund,

Respondents.

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The following papers numbered 1 to 14 were read on this motion:

Papers:	Numbered
Notice of Petition/Petition	
Affidavits/Affirmations/Exhibits.....	1,2,3
Notice of Motion for Admission Pro Hac Vice	
Affidavits/Affirmations/Exhibits.....	4
Empire’s Notice of Motion to Intervene on Consent	
Proposed Answer, etc.....	5
Respondents’ Answer	
Affirmations/Affidavits/Exhibits/etc.....	6,7
Reply Affirmations/Affidavits/Exhibits.....	8,9,10,11
Other...(Sur-Reply, Affidavit, Opposition to Sur-Reply).....	12,13,14

Upon the foregoing papers, the motion and petition are decided as follows:

Petitioners commenced this CPLR article 78 proceeding seeking to enjoin the City of New York (the “City”) and the New York City Fire Department (“FDNY”) from disclosing information concerning certain FDNY retirees. The proceeding stems from a May 6, 2014 request for information made by the Empire Center for Public Policy (“Empire”)¹ under the Freedom of Information Law (“FOIL”) to the New York City Fire Department Pension Fund (the “Pension Fund”). Empire requested a list of the Pension Fund’s retired members for fiscal years 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013 and 2013-2014, and for each such retiree, the retiree’s last employer, gross retirement benefit for each calendar year, years of service (service credit), retirement date and date of commencement of retirement system membership.

The City and FDNY agreed to disclose all the requested information except for the names of the members of the Pension Fund who retired from law enforcement positions, namely fire marshals and supervising fire marshals, on the ground that disclosing the names of these individuals could endanger their lives and safety (Public Officers Law § 87[2][f]).

Petitioners subsequently commenced this CPLR article 78 proceeding seeking to enjoin the City and FDNY from releasing any of the requested information. Petitioners contend that disclosing the information would be an “unwarranted invasion of personal privacy”(Public Officers Law § 87[2][b]) and would violate New York City Administrative Code, Section 13-

¹Empire is a think tank whose purpose is to inform voters and policymakers about issues, including pension reform.

316(b)² since the Board of Trustees of the Pension Fund never voted to release the information. Empire filed a motion to intervene in the proceeding and maintains that under FOIL, all information that was requested must be disclosed and that there is no merit to the City's and the FDNY's position that disclosure of the names of retired marshals and supervising marshals is exempt from disclosure under Public Officers Law § 87[2][f]. Empire further maintains that disclosure of the requested information would not be an unwarranted invasion of personal privacy or a violation of New York City Administrative Code, Section 13-316(b). Empire's counsel also made a motion to have Gregory G. Katsas Esq. admitted *pro hac vice* to the Supreme Court of the State of New York, Kings County in order to have him argue and try this matter for Empire.

The motions and the petition are consolidated for disposition.

ANALYSIS:

The Motions:

CPLR 7802(d) provides for intervention in an article 78 proceeding and provides: “[t]he court ... may allow other interested persons to intervene.” Intervention lies in the “sound discretion of the court” (*White v. Incorporated Village of Plandome Manor*, 190 A.D.2d 854, 593 N.Y.S.2d 881 [2nd Dep' 1993], *leave to appeal denied*, 83 N.Y.2d 752, 633 N.E.2d 489, 611 N.Y.S.2d 134 [1994]). Having filed the FOIL requests under review, Empire has a clear interest in the proceeding. Accordingly, its unopposed motion to intervene is **GRANTED**. Empire's

²Administrative Code § 13-316 provides that the Board of Trustees shall be the head of the Pension Fund and that the Board shall make all determinations regarding the retirement of its members. Section 13-316(b) provides that the Board shall act by resolution “which shall be adopted by a vote of at least seven-twelfths” of the number of votes authorized to be cast.

unopposed motion to have Gregory G. Katsas Esq. admitted *pro hac vice* to the Supreme Court of the State of New York in order to argue and try this matter for Empire is **GRANTED**.

The Statutory Framework:

The starting point for any FOIL inquiry is that the public has the right to know and it is the burden of the government to justify the denial of access (*Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007]). Thus, “[i]n a proceeding pursuant to CPLR article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption” (*Baez v. Brown*, 124 A.D.3d 881, 1 N.Y.S.3d 376, 379 [2nd Dep’t 2015], citing Public Officers Law § 89[5][e], [f]; *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 885, 893 N.Y.S.2d 825, 921 N.E.2d 592 [2009]; *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462–463, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007]; *Matter of Fappiano v. New York City Police Dept.*, 95 N.Y.2d 738, 746, 724 N.Y.S.2d 685, 747 N.E.2d 1286 [2001]; *Matter of Verizon N.Y., Inc. v. Mills*, 60 A.D.3d 958, 959, 875 N.Y.S.2d 572 [2nd Dep’t 2009]). “The oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency’s determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable” (*Capital Newspapers Div. of Hearst Corp. v. Burns*, 109 A.D.2d 92, 94, 490 N.Y.S.2d 651, 653 [3rd Dep’t 1985]).

The entity resisting disclosure must articulate a particularized and specific justification for denying access to the requested information (*Baez*, 1 N.Y.S.3d at 379 [citations omitted]). “Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed” (*Dilworth v. Westchester County Dept. of Correction*, 93 A.D.3d

722, 724, 940 N.Y.S.2d 146, 149 [2nd Dep't 2012]). Moreover, exemptions from disclosure “are to be narrowly interpreted so that the public is granted maximum access to the records of government” (*Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d at 462, 849 N.Y.S.2d 489, 880 N.E.2d 10).

Public Officers Law § 87(2)(f).

FDNY and the CITY have not met their burden of demonstrating that disclosure of the names of the retired fire marshals and supervising fire marshals is exempt under Public Officers Law § 87(2)(f), which exempts from disclosure materials that, “if disclosed[,] could endanger the life or safety of any person.” Respondents point out that many of the retired fire marshals and supervising fire marshals whose names have been requested acted as law enforcement officers during their careers and effected many arrests. Respondents contend that if the names of these individuals are made public, those individuals individual who have been arrested could easily ascertain, through the internet, the current address of the fire marshal or supervising fire marshal who made the arrest and then seek retribution against the fire marshal or supervising fire marshal and possibly his or her family. Respondents further contend that it is well known that retired law enforcement officers, such as retired marshals and supervising fire marshals, are likely to own firearms and that disclosure of their names would make them targets of individuals seeking to secure a firearm.

The Court rejects both of these arguments for the same reasons they were rejected in *Matter of New York Veteran Police Assn. v. New York City Police Dept. Art. I Pension Fund*, 92 A.D.2d 772, 773, 459 N.Y.S.2d 770 [1st Dep't 1983], *revd. on other grounds* 61 N.Y.2d 639, 471 N.Y.S.2d 851, 459 N.E.2d 1288 [1983]). In *Matter of New York Veteran Police Assn.*, the

petitioner filed a FOIL request for disclosure of the names and addresses of all retirees of the New York City Police Department (“NYPD”) who were currently receiving pensions and annuities. NYPD and the lower Court denied the request partly on the ground that such disclosure might endanger the lives and safety of these individuals. In rejecting this argument and directing that the names and addresses of the retired officers be disclosed, the Appellate Division, First Department stated:

The only point raised by respondents which could feasibly support their non-disclosure is the defense that such disclosure might endanger the lives of the retired police officers. However, such a contention is without support in the record below and is bolstered completely by speculation. As noted, the requested information had been made available to petitioner up until 1978 and no incident has been set forth by respondents involving danger to an officer from such disclosure.

(New York Veteran Police Ass'n v. New York City Police Dept. Article I Pension Fund, 92 A.D.2d at 773, 459 N.Y.S.2d 770 at 772).

In rejecting the argument that public disclosure of the names of the retired police officers would make them targets of unsavory individuals seeking to secure firearms, the Court cited, with approval, a case where pistol license applications were permitted to be inspected and the same argument of potential danger upon disclosure was made. In that case, the court stated:

[R]espondent argues that serious harm might ensue if the records were open to inspection. He speculates that criminals will spend their diurnal hours at police stations and county clerks' offices searching for likely 'targets' who may then be nocturnally attacked for their weapons or those valuables the weapons were carried to safeguard. This suggestion is at best speculative; the ordinary mugger may generally prefer the little old lady with a string handbag to the subject lethally armed with a loaded pistol. . . .

(*Veteran Police Ass'n*, 92 A.D.2d at 773, 459 N.Y.S.2d at 772, citing *Kwitny v. McGuire*, 102 Misc.2d 124, 125, 422 N.Y.S.2d 867 [1979], *aff'd* for reasons of Wallach, J., 77 A.D.2d 839, 432 N.Y.S.2d 149 [1st Dep't 1980], *aff'd* for reasons stated in op. of Wallach, J., 53 N.Y.2d 968, 441 N.Y.S.2d 659, 424 N.E.2d 546 [1981]).

Here, the record is devoid of any evidence substantiating petitioners' and respondents' claim that the retired fire marshals and supervising fire marshals could face danger if their names were made public. The petitioners and respondents failed to cite to any specific instances where someone who was arrested by any law enforcement officer attempted to locate and cause the officer harm upon seeing the officer's name in the public domain. 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. Similarly, the petitioners and respondents failed to cite to any instance where a retired law enforcement officer whose name was made public was targeted by someone for the purpose of stealing his firearm.

While an agency invoking Public Officers Law § 87(2)(f) "need only demonstrate a possibility of endanger[ment]" (*Matter of Bellamy v. New York City Police Dept.*, 87 A.D.3d 874, 875, 930 N.Y.S.2d 178 [1st Dep't 2011], *aff'd*, 20 N.Y.3d 1028, 960 N.Y.S.2d 343, 984 N.E.2d 317 [2013]; see *Matter of Hynes v. Fischer*, 101 A.D.3d 1188, 1190, 956 N.Y.S.2d 604 [3rd Dep't 2012]), the exemption may not be invoked, as here, on the basis of mere speculation that harm will result from the requested disclosure (*Mack v. Howard*, 91 A.D.3d 1315, 1316, 937 N.Y.S.2d 785 [4th Dep't 2012]; *Matter of New York Veteran Police Assn. v. New York City Police Dept. Art. I Pension Fund*, 92 A.D.2d at 773, 459 N.Y.S.2d 770). The court therefore rejects FDNY's and the City's contention that the names of the retired fire marshals and supervising fire marshals are

exempt from disclosure under Public Officers Law § 87(2)(f).

Public Officers Law § 87(2)(b) .

Public Officers Law § 87(2)(b) exempts from FOIL disclosure information which, “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.” Pursuant to Public Officers Law § 89(2)(b), “[a]n unwarranted invasion of personal privacy includes, but shall not be limited to” seven specified kinds of disclosure.³ Where, as here, the requested disclosure does not fall within any of these seven categories, this Court “must decide whether any invasion of privacy ... is ‘unwarranted’ by balancing the privacy interests at stake against the public interest in disclosure of the information” (*Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 N.Y.3d 477, 485, 796 N.Y.S.2d 302, 829 N.E.2d 266 [2005]; see also *Harbatkin v. New York City Dept. of Records and Information Services*, 19 N.Y.3d 373, 380, 971 N.E.2d 350, 352, 948 N.Y.S.2d 220, 222 [2012]).

In *Empire Center for New York State Policy v. New York State Teachers' Retirement System*, 23 N.Y.3d 438, 444, 15 N.E.3d 271, 272, 991 N.Y.S.2d 516, 517 [2014] Court of Appeals apparently conducted such a balancing analysis and concluded that the disclosure of the names of

³Public Officers Law § 89(2)(b) provides that “An unwarranted invasion of personal privacy includes, but shall not be limited to: I. disclosure of employment, medical or credit histories or personal references of applicants for employment; ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility; iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes; iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

the retired members of the New York State Teachers' Retirement System would not be an unwarranted invasion of personal privacy.

While *Empire* is instructive, it is not determinative. The petitioner in *Empire* sought disclosure of only the names of retirees of New York State Teachers' Retirement System . Here, not only is Empire seeking disclosure of the names of certain retirees of the Pension Fund, it is also seeking disclosure of their gross retirement benefit for certain years, years of service (service credit), retirement date, date of commencement of retirement system membership and last employer. "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities" (*Thomas v. New York City Dept. of Educ.*, 103 A.D.3d 495, 497, 962 N.Y.S.2d 29, 31 [1st Dep't 2013], *citing*, *Matter of Beyah v. Goord*, 309 A.D.2d 1049, 1050, 766 N.Y.S.2d 222 [3d Dept. 2003] [internal quotation marks omitted]). While the court recognizes that most individuals would object to their pension information being made public, it would not be reasonable for a public employee to make such an objection. Public employees simply do not enjoy the same privacy rights as employees who work in the private sector. In *Capital Newspapers Div. of Hearst Corp. v. Burns*, 109 A.D.2d 92, 94, 490 N.Y.S.2d 651, 653 [3rd Dep't 1985], the Court stated that

Since tax dollars are spent to pay public employees, the public has a right to know certain facts relating to such employment. This is not to say that public employees do not have a right of privacy. However, the acceptance of public employment carries with it a realization that certain facts relating to such employment must be public knowledge. This includes, for example, a public employee's name, public office address, title and salary (Public Officers Law § 87[3][b]). This disclosure has, on occasion, been extended to former employees (*Matter of New York Teachers Pension Assn. v. Teachers' Retirement System of City of N.Y.*, 71 A.D.2d 250, 422 N.Y.S.2d 389, lv. denied 49 N.Y.2d 701, 426 N.Y.S.2d 1025, 403

N.E.2d 187; *Matter of Gannett Co. v. County of Monroe*, 59 A.D.2d 309, 399 N.Y.S.2d 534, affd. 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151)⁴.

While *Capital Newspapers Div. of Hearst Corp.* did not specifically address disclosure of pension information, the court sees no reason to treat such information differently for FOIL purposes.

Petitioners' concern that placing the requested information in the public domain would make FDNY retirees more susceptible to identity theft is not supported by the record. Empire correctly points out that similar information has been in the public domain for many years⁵ and petitioners have failed to cite to any specific instance where the disclosure of a person's salary or pension benefit was used for identity theft purposes.

Because the City and FDNY has failed to proffer more than conclusory assertions supporting their claims that disclosing the information requested by Empire would be an unwarranted invasion of personal privacy, they failed to meet their burden of demonstrating that the information is exempt from disclosure pursuant to Public Officers Law § 87[2][b] (*see* Public Officers Law § 89[5][e], [f]; *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 885, 893 N.Y.S.2d 825, 921 N.E.2d 592 [2009]; *Matter of Cook v. Nassau County Police Dept.*, 110 A.D.3d 718, 719, 972 N.Y.S.2d 638 [2nd Dep't 2013]).

⁴In this case, the Court granted petitioner's petition for the release of the names, job titles, and salary levels of certain County employees who had been terminated.

⁵Empire states that since 1883, the City has published the names and salaries of City employees in its yearly "Civil List." Empire further states that the City had previously made public the names and pension amounts of retirees in the FDNY Pension Fund for certain fiscal years as well as the names and salaries of New York City public employees for other fiscal years. Indeed, Empire maintains that it published this information on its website.

The Court has considered the other arguments against directing disclosure of the requested information, including the argument that such would violate New York City Administrative Code, Section 13-316(b), and find them to be without merit.

Accordingly, it is hereby

ORDERED that Empire's motion to intervene and the motion to have Gregory G. Katsas, Esq. admitted *pro hac vice* to the Supreme Court of the State of New York, Kings County in order to argue and try this matter for Empire are **GRANTED**; and it is further

ADJUDGED that the City and FDNY are directed to comply with Empire's FOIL request dated May 6, 2014 forthwith; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: April 2, 2015

 **HON. PETER P. SWEENEY, J.S.C.**

PETER P. SWEENEY, A.J.S.C.