

Exhibit 17

NYSCEF DOCUMENT ID

COMMITTEE ON OPEN GOVERNMENT

COMMITTEE MEMBERS RECEIVED NYSCEF: 04/17/2019

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March 4, 2019

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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Moritz:

I have received your letter in which you requested an advisory opinion on behalf of Reclaim the Records (RTR), a not-for-profit entity that “advocates for greater transparency and access to archival, genealogical and vital records.”

On February 7, RTR submitted a request to the New York City Department of Health and Mental Hygiene (DOHMH) for “one complete set of the digital scans that DOHMH previously made of all New York City Death certificates issued between and including 1949 and 1968.” On February 11, DOHMH denied the request based on §§87(2)(a) and 89(2)(b) of the Freedom of Information Law (FOIL).

The response to the request denying access cited various provisions of the New York City Health Code. Specifically, it is asserted that:

“Administrative Code § 17-169 and Health Code §§ 3.25 and 207.11 make death records confidential and restrict access to these records beyond certain classes of specified people”. There is no provision in the Health or Administrative Code for releasing ‘uncertified’ death certificates at any point in time. Health Code § 207.21 makes death records public 75 years after death. Thus, these records are protected by the applicable law and by FOIL § 87(2)(a)” [emphasis in original].

It was also asserted that:

“The records you seek include information on persons still living such as next of kin. Pursuant to the privacy provisions of FOIL §§ 87(2)(b) and 89(2)(b), it would therefore be an unwarranted invasion of these person’s privacy to release these death certificates.”

In this regard, I offer the following comments.

As a general matter, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (m) of the Law.

From my perspective, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of FOIL, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under FOIL [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, the state's highest court, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Therefore, a local enactment, such as a municipal code, cannot confer, require or promise confidentiality. This not to suggest that the records sought must be disclosed; rather, I am suggesting that the records may be withheld in accordance with the grounds for denial appearing in FOIL, and that any local enactment inconsistent with that statute would be void to the extent of any such inconsistency.

I note, too, that in a decision involving a claim of confidentiality based on a section of the New York City Health Code, it was determined that the provision at issue "is not a state or federal statute, thus this exemption in Public Officers Law §87(2)(a) is inapplicable" [Berger v. New York City Department of Health and Mental Hygiene, Supreme Court, Queens County, December 13, 2013).

Second, the extent to which the records must be disclosed is dependent on their content and the effects of disclosure. As suggested in the response, §§87(2)(b) and 89(2)(b) are pertinent. Both indicate that records may be withheld insofar as disclosure would constitute "an unwarranted invasion of personal privacy". The quoted phrase is, in my opinion, indefinable, for society's views regarding privacy are evolutionary and constantly changing. There are generational distinctions concerning privacy, and two equally reasonable people may differ concerning the nature of personally identifiable information that should or should not be disclosed.

The Court of Appeals dealt with issues involving the privacy of the deceased and their surviving family members for the first time in New York Times Company v. City of New York Fire Department [4 NY3d 477 (2005)]. The records in question involved 911 tape recordings of persons who died during the attack on the World Trade Center on September 11, 2001, and the decision states that:

"We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer

living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim ‘privacy’ for experiences and feelings that are not their own. We think this argument contradicts the common understanding of the word ‘privacy’.”

“Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones who have died. It is normal to be appalled if intimate moments in the life of one’s deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private affairs of the dead (cf. Nat’l Archives and Records Admin. V. Favish, 541 US 157 [2004])” (id., 305).

Based on the foregoing, it is clear that there may be an interest in protecting privacy in consideration of the deceased, as well as family members. Nevertheless, the ensuing question involves the content of records, and whether the information is so intimate or personal that disclosure would result in an “unwarranted” invasion of privacy. As stated by the Court:

“The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be ‘unwarranted’ within the meaning of FOIL’s exception” (id., 306).

In its focus on the nature of the calls, it was found that:

“The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller – or the caller, if he or she survived – might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.

“We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different.

“First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the September 11 callers were part of an event that has received and will continue to receive enormous - - perhaps literally unequalled - - public attention. Many millions of people have reacted, and will react, to the callers’ fate with horrified fascination. Thus it is highly likely in this case - - more than in almost any other imaginable - - that, if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to

deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent” (id.).

Based on the guidance offered by the Court of Appeals, the extent to which the contents of records are indeed intimate and personal is the key factor in ascertaining whether disclosure would result in an unwarranted invasion of personal privacy. From our perspective, the fact of a death is itself not intimate. However, to the extent that the records include information that “would ordinarily and reasonably be regarded as intimate, private information”, it has been held that disclosure would constitute an unwarranted invasion of personal privacy [see Hanig v. Department of Motor Vehicles, 79 NY2d 106, 112 (1992)].

The fact of a death is generally not a secret. We read obituaries announcing deaths, and often those notices include information concerning the life of the deceased, as well as names of family and friends. Frequently, too, they refer to the cause of death. In consideration of those realities, the question involves whether or the extent to which the records at issue may properly be withheld.

When an agency denies access to records, and the denial is challenged via the initiation of an Article 78 proceeding, unlike other such proceedings in which the petitioner has the burden of proving that the agency acted unreasonably or failed to carry out a legal duty, the agency has the burden of proof when the proceeding involves a denial of access under FOIL. The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

“To ensure maximum access to government records, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption’ (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, ‘[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld’ (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)” [89 NY2d 267, 275(1996)].

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

“...to invoke one of the exemptions of section 87(2), the agency must articulate ‘particularized and specific justification’ for not disclosing requested documents (Matter of Fink v. Lefkowitz, *supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., *supra*, 62 N.Y.2d, a83, 476 N.Y.S.2d 69, 464 N.E.2d 437)” (id.).

In Daily News v. City of New York Office of Payroll Administration [9 AD 3d 308 (2004)], one of the issues involved portions of records that included the ages of public employees. In short, both the Supreme Court and the Appellate Division determined that the agency did not meet the burden of proof and could not demonstrate to the courts' satisfaction how and why disclosure would result in an unwarranted invasion of personal privacy. In contrast is the decision rendered in Hearst Corporation v. Office of the State Comptroller [882 NYS2d 862 (2009)], which dealt in part with the disclosure of public employees' dates of birth. The court found that disclosure that item, unlike disclosure of their ages, would constitute an unwarranted invasion of privacy. A name coupled with a date of birth, which is akin to a unique identifier, i.e., a social security number, might be used as a link to obtain a variety of other items pertaining to an individual, some of which may be intimate or private.

I note that the courts have found that "speculation" concerning the potentially harmful effect of disclosure sought to be avoided via the assertion of an exception to rights of access is insufficient to justify a denial of access. In Markowitz v. Serio [11 NY3d 43 (2008)], the Court of Appeals determined that the possibility of harm that is "theoretical" is inadequate, and that an agency "cannot merely rest upon a speculative conclusion that disclosure might potentially cause harm" (*id.*, 50).

Here, the possibility that disclosure includes the names of living persons, such as next of kin, is real. However, whether disclosure of those names would, in the opinion of a court in every instance rise to the level of an *unwarranted* invasion of personal privacy is unknown. I could only conjecture regarding the outcome that could be reached by a court, and I choose not to do so.

Notwithstanding the foregoing, I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

cc: Chari Anhouse <canhouse@health.nyc.gov>
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