SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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Application of

Index Number:

ALEX MORGAN BELL

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against- AFFIRMATION

IN SUPPORT OF

CITY OF NEW YORK, PETITION

NEW YORK CITY POLICE DEPARTMENT,   
WILLIAM BRATTON, Commissioner in his

Official capacity,

Respondents.

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ELISA BARNES, an attorney duly licensed to practice law before the courts of this state, hereby affirms as follows under penalty of perjury pursuant to CPLR 2106:

I am the attorney for Alex Bell, petitioner herein, and as such I am fully familiar with the facts and proceedings heretofore has herein. I submit this affirmation in support of petitioner’s verified petition for an order pursuant to CPLR Section 7806:

1. Petitioner is a resident of the City and State of New York and is over eighteen years of age. Petitioner seeks this data for non-commercial purposes.
2. Petitioner has exhausted all administrative remedies.

APPLICATION FOR WRIT OF MANDAMUS TO COMPEL DISCLOSURE

1. Respondents improperly denied petitioner’s request for data on the grounds of Public Officer Law Section 87 (2)(a) referencing Civil Rights Law Section 50-a and Public Officer Law Section 87 (2)(e). Neither claimed exemption from the Department’s duty of broad public disclosure has merit.

4. Public Officer Law Section 87 (2) (a) provides that

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:  
  
     **(**a)are specifically exempted from disclosure by state or federal statute

Public Officer Law Section 87 (2)(a)(McKinney’s 2016)

1. The state statute relied on for their exemption is Civil Rights Law Section 50-a, which exempts from public disclosure “all personnel records used to evaluate performance toward continued employment or promotion”.
2. Nothing in petitioner’s request for aggregate, non-personally identifiable data can affect the performance evaluation for continued employment for any employee. Again the information requested is demographic, aggregate residency data, not specific information for individual employees.
3. A plain language reading of the statute does not support respondents’ position; neither does the legislative history offer any justification for the instant rejection. See Prisoner’s Legal Services v. New York State Dep’t of Corrections, 73 N.Y.2d 26, 31-32 (1988) (“the legislative purpose underlying section 50-a …was the same: to protect the officers from the use of records –including unsubstantiated and irrelevant complaints of misconduct—as a means for harassment and reprisals and for purposes of cross-examination by plaintiff’s counsel during litigation” citations omitted)
4. As the Court of Appeals has repeatedly held: there must be a showing that the requested information "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 576 (1986). The party objecting to disclosure bears the burden of proving the applicability of the exemption. Matter of Data Tree LLC v. Romaine, 9 N.Y.3d 454, 463 (2007).
5. Respondents also rely on Public Officers Law Section 87 (2)(e) to support their denial of petitioner’s request. Section 87 (2) (e) provides 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:

\* \* \*

     (e)are compiled for law enforcement purposes and which, if disclosed, would:  
  
         i.interfere with law enforcement investigations or judicial proceedings;  
  
         ii**.**deprive a person of a right to a fair trial or impartial adjudication;  
  
         iii**.**identify a confidential source or disclose confidential information relating to a criminal investigation; or  
  
         iv**.**reveal criminal investigative techniques or procedures, except routine techniques and procedures;

Public Officers Law Section 87 (2)(e) (McKinney’s 2016)

1. This claimed ‘law enforcement’ exemption fails, first, for the same reason as the claimed personnel records privacy exemption, and second because the request obviously has nothing to do with any investigatory, judicial or other procedure relating to law enforcement activity, other than that it has been made to the New York Police Department. Petitioner’s request is for aggregate demographic employee information and not disclosure of individual law enforcement proceedings, trials, confidential sources or information or investigatory techniques and procedures.
2. The NYPD’s rejection based on plainly inapposite exemptions must be reversed and the information requested produced immediately. As the Court of Appeals has held: “blanket exemptions for certain types of documents are inimical to FOIL’s policy of open government.” Gould v. New York City Police Department, 89 N.Y.2d 267, 275 (1996).

12. Nor can respondents claim that the production of this information is onerous or that such data does not exist in the form requested. Public Officer Law Section 89 (3) requires the production of data:

When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

Public Officer Law Section 89 (3)(a) (McKinney’s 2016)

1. Petitioner requests attorneys fees and court costs in an amount to be determined by the court as a result of respondents’ improper denial of petitioner’s request. Instead of complying with petitioner’s proper FOIL request, and after an appeal wherein the request was explained, respondents issued a boiler-plate denial ostensibly designed simply to discourage such requests and to require the engagement of counsel to prepare a petition to compel production which should have been made as a matter of course.

WHEREFORE, it is respectfully requested that an order be issued pursuant to CPLR 7806:

* 1. mandating respondent to comply with Public Officer Law Section 84 et seq. and the regulations promulgated thereunder, and to produce the aggregate, non-identifiable employee (a) residency data by precinct requested by petitioner within 10 days of the date of the order, and
  2. for an order granting petitioner attorneys fees and court costs in an amount to be determined by the court, pursuant to Public Officer Law Section 89 (4) (c)(i) because respondents had no reasonable basis for denying petitioner’s request;
  3. and for such other and further relief as this court may deem just and proper.

Dated: January 2016

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ELISA BARNES