

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of

INVESTIGATIVE POST, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

Index No. 802626/2022

Against

COUNTY OF ERIE,

Respondent.

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SIWEK, J.,

MEMORANDUM DECISION

Petitioner Investigative Post (“iPost”) commenced this special proceeding pursuant to Article 78 on March 7, 2022, challenging as unlawful, Respondent County of Erie’s (“County”) partial denial of a record request submitted by iPost to the County under the Freedom of

Information Law (“FOIL”) Article 6, N.Y. Pub. Off. Law §§84, *et seq.* on September 27, 2021. iPost seeks (1) a review of the County’s denial under Article 78 and Pub. Off. Law §89(4)(b); (2) an order directing the County to comply with its duty under FOIL and produce the requested records and (3) an award of reasonable attorney’s fees and litigation costs pursuant to N.Y. Pub. Off. Law §89(4)(c).

Background

The Freedom of Information Law (FOIL) Article 6, §§84-90 of the New York Public Officers Law provides the public with a right and a process to access records maintained by government agencies, with certain exceptions. According to its Verified Petition, iPost, a Buffalo based non-profit investigative reporting center, served a FOIL request on the County of Erie dated September 27, 2021, seeking copies of any and all engineering studies or assessments conducted in the last five years on the conditions of the professional football stadium in Orchard Park, New York that is currently called Highmark Stadium. (NYSCEF Documents ##1 and 3) On October 12, 2021, the County responded to the FOIL request and provided a redacted version of the report titled “Highmark Stadium Condition Study, 2020: Rough Draft Submission” (hereinafter referred to as “Condition Study”) (NYSCEF Document #4). The Condition Study was prepared by DiDonato Engineering & Architectural Professionals (DiDonato) at the behest of the County. In their response, the County redacted a significant portion of the Condition Study, citing three FOIL exemptions: (1) that as a critical piece of infrastructure... releasing details about the structure could endanger the life or safety of any person who enters the stadium; (2) impairment of an imminent contract award related to the ongoing negotiations with New

York State and the Buffalo Bills regarding the future of the football team in Erie County and (3) the inter/intra agency exemption given that the study is a draft and subject to change. (NYSCEF Document #4)

The next day, on October 13, 2021, iPost appealed the County's partial denial of its FOIL request and argued that the County's denial did not cite with any specificity, the state statutes or exemptions provided under FOIL the County relied upon to deny the request. (NYSCEF Document #5) iPost also challenged the County's contention that roughly 170 pages of the Condition Study withheld "contain(ed) absolutely no releasable information". iPost questioned how a report issued a year previously could be considered a "draft" and finally that ongoing negotiations with the Bills was irrelevant. (NYSCEF Document #5)¹

On November 5, 2021, the County's FOIL Appeals Officer, Daniel Meyer, responded to Petitioner's appeal, stating that the County would release (1) photographs in the study that are labeled as "general" and which display the public areas of Highmark Stadium, and (2) the charts that display expenses for particular projects to be done within the Highmark Stadium. (NYSCEF Document #6) Meyer noted that "[t]hese additional releases of images and information from the report do not violate either safety or contracting concerns". (NYSCEF Document #6) The County attached a redacted copy of the Condition Study to this response. (NYSCEF Document #6)

On November 8, 2021, Meyer responded to a November 5, 2021 email from iPost regarding the County's response to their appeal. (NYSCEF Documents ##7, 8) Meyer explained

¹ Following the initial FOIL request, the negotiations between New York State and the Buffalo Bills were completed, and the County dropped exemptions #2 and #3, relying only upon the life/safety exemption.

that portions of the Condition Study, if left unredacted, would reveal structural elements currently unknown to the public, and, if released “could create and invite an opportunity for threat to public safety with privileged records and information that fall under the FOIL’s public safety exemption” (NYSCEF Document #8). Further, Meyer indicated that the information was being redacted as part of Erie County’s “continued efforts to observe and share any pre-operational planned activity by terrorist organizations or agents and to help deter terrorist attacks and detect any possible preparations for such attacks”. (NYSCEF Document #8)

On February 9, 2022, counsel for iPost wrote to FOIL Appeals Officer Meyer requesting that the County release the Condition Study “in full”, asserting that the County had not met its required burden under FOIL to justify the redactions because the County had not made a “particularized showing of the danger to life and safety that would result from the report’s release”, nor had the County explained why “redactions are necessary to a study that reflects similar types of information as – and a similar level of detail as - a publicly available condition assessment of Highmark Stadium completed in 2019”². (NYSCEF Document #9) On February 15, 2022, the County Attorney wrote to iPost’s counsel and proposed that in an effort to avoid litigation, the County would allow counsel for iPost or its representative to inspect an unredacted copy of the Study. (NYSCEF Document #10) The County suggested this would give iPost (1) an opportunity to determine which information iPost believes should be released pursuant to FOIL; (2) better insight into the County’s rationale for withholding the information and (3) an opportunity to more clearly articulate why the County is wrong to withhold the information. (NYSCEF Document #10) According to its Petition, iPost’s counsel spoke to the County and

² Referring to New Era Field Facility Condition Assessment, dated February 8, 2019.

indicated that iPost would consider the County's offer but that it intended to file this Petition on March 7, 2022, to preserve its rights as to the FOIL request, and it did so.

On March 14, 2022, the Court held a conference with counsel, and an agreement was reached to hold this Petition in abeyance pending iPost's inspection of the unredacted copy of the Condition Study. On March 25, 2022, iPost inspected an unredacted copy of the study³. On March 29, 2022, counsel for the parties conferred via telephone relative to the County's justification for the redactions, and the County agreed to review the document again but declined to release the unredacted Condition Study without a Court order. On March 31, 2022, iPost published a news story about its analysis of the redacted study (NYSCEF Document #17)

On April 12, 2022, the Court received a joint letter from counsel indicating that notwithstanding efforts made by both sides to resolve the dispute, iPost maintained its position that it was entitled to a hard copy of the unredacted report because the County could not meet its burden to justify the redactions under the public safety exemption. (NYSCEF Document #16) The letter confirmed that the County, in refusing to produce an unredacted copy of the report, was relying only upon the public safety exemption. The County served its verified Answer with exhibits on May 4, 2022 (NYSCEF Documents ##18-22)

The parties agreed to a briefing schedule, and the matter was returnable before the Court on May 19, 2022. In advance of the scheduled return date, the Court arranged a conference at which time the Court further adjourned the return date to a date to be cooperatively selected by

³ Conditions of the inspection included a prohibition against photocopying or photographing the Condition Study.

the Court and counsel after the Court received a copy of the most recent Condition Study Report⁴ for *in camera* review, along with a privilege log prepared by the County. After receipt of the privilege log, counsel for Petitioner was afforded an opportunity to re-inspect the Condition Study with the County's privilege log, thereby permitting Petitioner to respond to the privilege log. The Court confirmed the adjournment and the above procedures by letter dated May 18, 2022 (NYSCEF Document #25).

On May 27, 2022, the County submitted the affirmation of First Assistant County Attorney Toth, the affidavit of Daniel J. Neaverth, Jr., Commissioner of the Erie County Department of Homeland Security and Emergency Services (NYSCEF Document #27), a redacted Condition Study (NYSCEF Document #28) and privilege or redaction log (NYSCEF Document #29)⁵. Thereafter counsel for Petitioner inspected the privilege log and the revised redactions to the updated draft of the Study and then submitted a letter in further support of its position (NSYCEF Document #30) and iPost's categorization and commentary on the privilege log (NYSCEF Document #31).

The County identifies seven subcategories of redacted material.

- i. Photographs of areas of the stadium not accessible to members of the public;
- ii. Photographs that depict areas of deterioration within the stadium that may be in a public area but are not readily apparent to a casual observer;

⁴ During the call, Assistant County Attorney Toth indicated an updated version of the Condition Study was available.

⁵ The County noted that the Condition Study is a "living document" subject to regular changes, thus, the redacted version produced with the privilege log is updated from the initial production.

- iii. Narratives that described with detail structural elements of different portions of the stadium including descriptions of joists, concrete formations, foundations, masonry, roofing construction and materials;
- iv. Narratives that describe security, fire suppression systems, electrical circuits and capacity;
- v. Portions of charts that correspond with redacted narratives;
- vi. Detailed descriptions of seat and railing anchors and foundations;
- vii. Schematic diagram

Neaverth's credentials in the areas of Security and Homeland Security, including Enhanced Threat and Risk Assessment, Sport Event Risk Management, are set forth in his affidavit. His responsibilities include risk assessments, and ongoing review and planning for terrorist threats. The Neaverth affidavit states:

The Federal Bureau of Investigation has stated with no uncertainty that NFL stadiums remain a target of opportunity... exposure of detailed critical infrastructure data with the ease of a simple open source internet search would be contrary to our efforts, bordering on reckless and potentially a rear view after action red flag...

Having had a chance to review the document in question including rationale for redacted information, I find the redacted information consistent with best practices. Any information providing a blueprint on a critical infrastructure soft targets[sic], inclusive of photo's[sic] and narrative whereby that information is exposing access/egress, security enhancements, fire suppression, electrical circuits, gate access or areas designated as inaccessible to the public are red flags in our current threat environment. Details on these items if not redacted could potentially result in exploitation of said systems and services. Furthermore, release of redacted information specific to structural vulnerabilities including detailed schematics should not be release[sic] for public consumption regardless of intent... Redaction in this case is consistent with Department of Homeland Security identification of sports stadiums as key assets and critical infrastructure/key resource sector ... and the NFL's highly regarded Best Practices Guide. (NYSCEF Document #27 at ¶¶6 and 7)

In Neaverth's professional opinion, "appropriate steps" have been taken to assure the balance between FOIL and essential protection of this critical infrastructure soft target, with the ultimate goal of protecting the safety of attendees and staff at the stadium. *Id.*

Contentions of the Parties

iPost's Contentions

iPost argues that the County has not met its burden to support the redactions from the Condition Study based upon the public safety exemption. iPost principally relies on *Physicians Committee for Responsible Medicine v. Hogan*, where the court rejected an agency's attempt to withhold the names of animal research scientists basis of a "history of violence by extremists[.]" 29 Misc. 3d 1220(A), 2010 WL 4536802, at *3-4 (Sup. Ct., Albany Cty. Nov. 3, 2010). In *Hogan*, the Court determined that disclosure was required because the agency "fail[ed] to demonstrate a non-speculative causal connection between the release of responsive records and the possibility of danger to life or safety[.]" *Id.* iPost criticizes the County's stated rationale for the redactions, namely "because the information that remains redacted has been defined as something that would publicly reveal structural elements currently unknown to the public[.]" release of which "could create and invite an opportunity for a threat to public safety with privileged records and information that fall under FOIL's public safety exemption"; "that the information that has been redacted is being done so as part of Erie County's continued efforts to observe and share any pre-operational planned activity by terrorist organizations or agents and to help deter terrorist attacks and detect any possible preparations for such attacks." iPost argues

that these articulated reasons fail to demonstrate the necessary non-speculative causal connection to justify redaction discussed in *Hogan*. iPost argues that the County's overtures and willingness to permit it to inspect the entire unredacted Study do not fulfill its obligations under FOIL.

iPost maintains that the Condition Study reflects "a routine facility condition assessment", of the type readily available online concerning other professional sports stadiums. Further, iPost argues that there is a mismatch between what the County suggests it redacted and what is actually redacted. iPost argues that it does not seek sensitive building blueprints or building specifications but rather a "run of the mill facility condition assessment" and that the failure of the County to set forth the particularized risk of harm militates in favor of full disclosure of the Condition Study.

iPost also argues that the public safety exemption does not apply to information that is already public such as details about the stadium's design, construction and infrastructure. *Grabell v. N.Y.C. Police Dep't.*, 139 A.D.3d 477, 479 (1st Dep't 2016) (affirming trial court order directing NYPD to disclose reports regarding health and safety effects of vans equipped with backscatter X-ray technology because release would not endanger public safety where information about these safety risks "[wa]s already widely available to the public"); *Physicians Comm. for Resp. Med. v. Hogan*, 2010 WL 4536802 at *4-6 (rejecting agency's reliance on public safety exemption "given the plethora of information already available to the public about the subject researchers and their use of animals in research"); see also *Committee on Open Government ("COOG") Advisory Opinion 43 FOIL-AO-13550* (Aug. 14, 2002) ("If records have been previously disclosed to the public, it would be difficult in my view for an agency to

prove that disclosure of the records could now or in the future endanger life or safety. That would be particularly so if records have been made available via the internet.”).

iPost argues that the public has unrestricted access to several reports and other materials relative to the condition of Highmark Stadium and the estimated cost of renovating it, as well as potential locations for a new stadium and associated costs and other financial and practical considerations, including a 2019 facility condition assessment which iPost argues contains the same kinds of information that iPost now seeks in this FOIL request. Inasmuch as iPost argues that the 2019 Study appears to mirror the 2021 Study in substance, methodology, scope and level of detail, “it is nonsensical that one is fully available to the public and the other is mostly redacted”. (See Memorandum of Law, NYSCEF Document #11 at pages 12 and 13) Lastly, iPost argues that given the equal “plethora of information” available to the public about the stadium, it would be inappropriate to use the County's invocation of the public safety exemption to “cordon off from public scrutiny” details underlying stadium discussions that should be public. See, *Physicians Committee v. Hogan, supra*. iPost attacks the County's attempts to circumvent the “public information carve out” first by arguing that the decision of another agency to release information should not be binding on the County and that the 2019 Study is either so similar to the current Study to render this Petition essentially unnecessary or so dissimilar to establish that structural information is only in the DiDonato Study (2021/22). Finally, iPost presents an argument that its March 30, 2022 article summarized and often directly quoted from the unredacted version of the Study it was permitted to review, thus placing much of the redacted material into the public domain.

The County's Contentions

In its Verified Answer to the Petition, the County argues that the release of structural and engineering information about a public building could present a serious security concern and urges the Court to recognize that the Department of Homeland Security identifies sports stadiums as “critical infrastructure within the commercial facilities sector”. (NYSCEF Document #18 at ¶17) The County argues that Highmark Stadium is a critical piece of infrastructure and, as such, could be a target for terrorist activity, either domestic or international. *Id.* Therefore, the County argues that the public dissemination of architectural and structural elements of a building could endanger life or safety of any person.

The County also notes the statutory language of the health and safety exemption and use of the word “could” when assessing whether disclosure might endanger the life or safety of any person. N.Y. Pub. Off. L. §87(2)(f). In 2003, the statute was amended to change the term “would” to “could”, thus indicating a more permissive analysis. The statute now provides

2. 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:
 - (f) if disclosed could endanger the life or safety of any person. (N.Y. Pub. Off. L. §87(2)(f). (emphasis added)

The County cites opinions from the Committee on Open Government relative to the public safety exemption and its potential application to restrict access to information regarding public buildings. See FOIL-AO-18986 (2012). With respect to the burden of specificity necessary to invoke the public safety exemption, the County maintains that it need only demonstrate a possibility of endangerment to invoke the exemption, citing *Bellamy v. New York City Police*

Department, 87 A.D. 874, 875 (1st Dep't 2011) (quoting *Matter of Connelly v. New York Guard*, 175 A.D.2D 372 (3d Dep't 1996) aff'd, 20 N.Y.3d 1028 (2013); *Williamson v. Fisher*, 116 A.D.3d 1169 (3d Dep't 2014); *Burns v. Cook*, 189 A.D.3d 826 (2d Dep't 2020); FOIL-AO-13550 (2002). The County argues that Petitioner's position is unreasonable and would set a dangerous precedent leading to disclosure of structural and architectural information of all public buildings in New York.

As to the Petitioner's argument that much of the redacted information is available from a wide array of sources, the County argues: (1) that the 2019 Condition Study is clearly different from the current Study; (2) the County, in the interest of public safety, should not be bound by the decisions of other unrelated agencies and entities that released the 2019 Study; and (3) iPost fails to set forth with the required specificity a comparison of the redacted material to the 2019 Study and how and where it is available.

DECISION

"To promote open government and public accountability," the FOIL law "imposes a broad duty on government to make its records available to the public." "All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law §87(2)." *Matter of Gould v New York City Police Dept.*, 89 N.Y.2d 267, 274 (1996) (citing N.Y. Pub. Off. L. §84). The express policy underlying FOIL is "[t]he people's right to know the process of governmental decision-making and to

review the documents and statistics leading to determinations” because “government is the public’s business[.]” *Gould*; N.Y. Pub. Off. L. §84.

“FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.” *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987); *Pennington v. Calabrese*, 2002 WL 31885409, at *2 (Sup. Ct., Erie Cty. Nov. 25, 2002), *aff’d*, 771 N.Y.S.2d 422 (4th Dep’t 2004) “While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL.” *Hanig v. State Dept. of Motor Vehs.*, 79 N.Y.2d 106, 110 (1992).

New York Public Officers Law §87(2)(f) sets forth the public safety exemption to FOIL and provides as follows:

2. 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:
 - (f) if disclosed could endanger the life or safety of any person. (N.Y. Pub. Off. L. §87(2)(f).

In order to withhold any portion of a record under a FOIL exemption, the agency must articulate “particularized and specific justification for not disclosing requested documents.” *Id.* See, *Gould v. N.Y.C. Police Dep’t.*, 89 N.Y.2d at 277; see also *Mack v. Howard*, 91 A.D.3d 1315, 1316 (4th Dep’t 2012). The public safety exemption requires a particularized showing and must be based on more than mere speculation. *Pennington, supra*. “If the court is unable to

determine whether withheld documents fall squarely within the scope of the asserted exemption”, an *in-camera* inspection is warranted. *Id.*

We agree with iPost that the County bears the burden of demonstrating that disclosure of the redacted material invokes the public safety exemption. N.Y. Pub Off. L. §89(4)(b) (agency shall have the burden of proving that such record falls within the provisions of an exemption) *Gould, supra*. We find that the County need only demonstrate a possibility of endangerment in order to invoke the public safety exemption. *Matter of Bellamy v. New York City Police Department*, 87 A.D.3d 874, 875 (1st Dep’t 2011); *Stronza v. Hoke*, 148 A.D.2d 900, 901 (3d Dep’t 1989); *Rankin v. Metropolitan Transportation Authority*, 2010 NY Slip Op 32161. An agency is not required to prove that a danger to a person’s life or safety will occur if the information is made public.” *Stronza, supra* at 901. Instead “there need only be a possibility that such information would endanger the lives or safety of individuals” *Id.*; see also *Bellamy* at 875, *aff’d* at 20 N.Y.3d 1028 (2013) (agency need only demonstrate a possibility of endangerment in order to invoke life/safety exemption); *Johnson v. New York City Police Department*, 257 A.D.2d 343 (1st Dept 1999) (certain information, by its very nature could endanger the lives or safety of individuals if it were released in an unredacted form); *Flowers v. Sullivan*, 149 A.D.2d 287 (2d Dep’t 1989) (respondent properly invoked life safety exemption to disclosure of details of electrical, security and transmission systems of correctional facility where disclosure might impair effectiveness of the systems and compromise the safe and successful operation of the prison); *Matter of Nalo v. Sullivan*, 125 A.D.2d 311 (2d Dep’t 1986).

We find that the County has met its burden and sufficiently stated the basis for the redactions throughout the course of the parties’ discussions and negotiations relative to releasing

the unredacted portions of the Condition Study. The exemption was specifically referenced in the County's initial response on October 12, 2021 and has been the basis for continued denials since that time. The submission of the Neaverth affidavit, in conjunction with the privilege log, supports the redactions, demonstrates the possibility of endangerment and meets the burden on the County. We note the First Department's decision in *Grabell v. New York City Police Dept.*, 139 A.D.3d 477 (1st Dep't 2016) where an affidavit of the Deputy Commissioner of Counterterrorism articulated a "particularized and specific justification" for not disclosing the records. Our *in camera* review confirms the same. The Neaverth affidavit provides the same sufficient basis and justification for the redactions.

While iPost's reasons for seeking disclosure of the redacted material are laudable, it has been noted that where records are found accessible under FOIL, they should be made equally available to any person, regardless of one's status or interest or the intended use of the records. Therefore, disclosure in this instance would permit disclosure to a different individual who might not share the same intent. *M. Farbman and Sons v. New York City Health and Hospitals*, 62 N.Y.2d 75 (1984). Recent events in Buffalo and elsewhere in the United States and throughout the world have only heightened awareness of both domestic and foreign terrorism and the associated public safety and security concerns⁶. Here, the Court has been presented with an affidavit of an individual knowledgeable in Homeland Security and facility threat assessments which demonstrates the possibility of endangerment and supports the redactions based upon the public safety exemption. Thus, the County has met its burden on this question.

⁶ See e.g. [Buffalo shooting | 10 dead, 13 shot | wgrz.com](#)

As to iPost's argument that much of the redacted documentation containing structural details has already been made public through the 2019 Study and other documents, iPost argues that the public information carve out applies to documents already available to the public through a "wide array of sources". See, *Hogan; Grabell*.

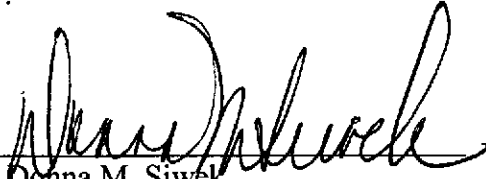
iPost has had an opportunity to review the unredacted Study both in March and after the submission of the privilege log, but has failed to sufficiently articulate what redacted information is already in the public domain in order for the Court to assess the viability of this assertion. The Court does not view this as an improper shifting of the burden inasmuch as the County has met its burden, and it would be incumbent on iPost to demonstrate where such information is already available. Even assuming iPost identified substantially similar information which has already been made public, having accepted the County's particularized and specific justification for the application of the life/safety exemption, and the possibility of endangerment, the Court is not inclined to disregard the exemption to permit release of information the County legitimately identified as protected from disclosure.

The Court further finds iPost's argument that because it published direct quotes from the unredacted version of the Condition Study it reviewed on March 25, 2022 unpersuasive. The County's decision to permit that review cannot now be used as an additional basis to rely upon the public information carve out.

As to the request for attorneys' fees pursuant to Public Officers Law §89(4)(c)(i), we note the Fourth Department's decision in *Mack v. Howard*, 91 A.D.3d 1315 (4th Dep't 2012). There, Petitioner sought numerous videotapes from the Erie County Holding Center but abandoned his request for all but one of the videotapes. In denying Petitioner's request for attorney's fees, the

Fourth Department wrote “even assuming, arguendo, that Respondents had no reasonable basis for failing to disclose the videotape, it cannot be said that petitioner substantially prevailed in this proceeding inasmuch as he established his entitlement to only one of the numerous videotapes requested in the petition.” In the case at bar, and in following the Fourth Department’s holding in *Mack*, it cannot be said that Petitioner substantially prevailed so as to support an award of fees pursuant to §89(4)(c). Moreover, there has been no showing that the County failed to respond to the request or appeal within the statutory time. To the contrary, the dialogue between iPost representatives or their counsel evidence a consistent, timely discussion of the issues, including the opportunity to review and report on the unredacted Study. Therefore, in our discretion, the request for attorney’s fees and litigation costs is denied.

This is the Decision of the Court. Counsel are directed to agree on the form and content of an order and upload the agreed upon order to NYSCEF.



Hon. Donna M. Siwek
Justice of the Supreme Court

Dated: July 5, 2022