

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Daniel R. Suhr,

Petitioner,

v.

New York State Department of Civil Service,

Respondent.

**MEMORANDUM OF LAW
IN SUPPORT OF
VERIFIED PETITION**

Index No. _____

FACTS

In this case, Petitioner sought certain basic payroll data from the New York State Department of Civil Service. (Exh. A). The New York State Department of Civil Service (Respondent or Department) provided much of the information but denied the request for home zip codes associated with the individual employees (Exh. B). The Department’s Appeals Officer denied Petitioner’s appeal (Exh. D).

APPLICABLE STANDARD OF REVIEW UNDER CPLR 78 AND THE FREEDOM OF INFORMATION LAW.

New York CPLR 7803 (3) provides in relevant part that a proceeding may be commenced against a body or an officer where “a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . . (CPLR 7803 [3]). New York’s Freedom of Information Law (FOIL) declares that “[a]ccess to [public] information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.” Public Officers Law § 84. “FOIL is based on a presumption of access to the records, and an agency . . . carries the burden of demonstrating that the exemption applies to the FOIL request.” *Matter of*

Data Tree, LLC v. Romaine, 9 NY3d 454, 462 [2007]. “[E]xemptions from disclosure are to be narrowly construed.” (*Allen Group, Inc v NY State Dept of Motor Vehicles*, 147 AD2d 856 [3d Dept 1989]).

Here, the New York State Department of Civil Service’s denial of Petitioner’s request for zip codes under FOIL was based upon an error of law, as explained below.

ARGUMENT

The Department based its denial on three authorities: New York Public Officers Law § 87 (2) (b), which precludes from disclosure the release of records which would constitute an unwarranted invasion of personal privacy, New York Public Officers Law § 89 (7), which protects from disclosure the home addresses of public employees, and Executive Order 183 (EO 183) which protects the personal privacy of public employees. (Exh. D & F).

The Department cites all three authorities to support the same conclusory allegation: “release of such information would constitute an unwarranted invasion of personal privacy.” (Exh. D). The Department’s denial makes three errors of law: (1) it is conclusory and provides no thoughtful justification or evidence; (2) it treats home zip codes the same as home addresses, though zip codes are different; providing home zip codes do not constitute an unreasonable invasion of privacy, at least not in this instance; and (3) an executive order cannot preempt a statutory right.

With respect to the first basis for its denial, conclusory statements are not sufficient to justify a decision to withhold or redact information. The public authority must make some thoughtful justification or offer evidence for the potential impact to privacy. “Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed” (*Jaronczyk v Mangano*, 121 AD3d 995, 996 [2d Dept 2014] quoting *Dilworth*

v Westchester County Dept. of Correction, 93 AD3d 722, 724 [2d Dept 2012]. “[A]n answer setting forth general denials and an affirmative defense which merely stated respondents’ conclusory allegation that the materials sought are exempt from disclosure, was inadequate to permit the conclusion that respondents sustained their burden of showing that the requested material fell within a statutory exemption.” *Allen Group, Inc.*, 147 AD2d at 856. Instead, a denying agency must provide some “proof that disclosing this information here would constitute an unwarranted invasion of personal privacy, such as causing economic or personal hardship.” (*Carnevale v City of Albany*, 68 AD3d 1290, 1292 [3d Dept 2009]).

In a case very similar to this one, the payroll office of the City of New York denied a request for individually correlated ages and zip codes of Board of Education employees, reasoning, “[t]he ages and zip codes of BOE employees is information that is personal in nature, reported in confidence to the BOE, and is not relevant to the work of the BOE.” The Appellate Division of the Supreme Court rejected that justification and found that it was “utterly devoid of any factual basis for these conclusions.” *Daily News v City of NY Office of Payroll Admin.*, 9 AD3d 308 [1st Dept 2004]. In our case, the Department provided a similarly thin response, stating only that disclosure would be an unreasonable invasion of privacy and the information “bear[s] no relation to their positions or official duties.” (Exh. F).

This Court should follow *Daily News*’ lead and reject such conclusory assertions. Here, the Department provided no reasoning or proof to show that a zip code is a protected part of a person’s private information, or that disclosing it would result in any sort of hardship. Rather, the Department gave the exact same sort of conclusory denial that was overturned in *Allen Group, Inc.* and numerous other cases. (*see* 147 A.D.2d at 856).

With respect to the second basis for its denial, the Department treats home zip code as though it is the same as home address. Yet this is not the case. In an advisory opinion issued on August 28, 2012 addressing the status of zip codes, the New York Committee on Open Government opined that “the items denied are not home addresses, but rather are zip codes, and in my view, there is a distinction between the two. There have been numerous instances in which it has been advised that zip codes pertaining to government employees and others must be disclosed.” (Comm on Open Govt FOIL-AO-18959 [2012]) (Exh. H).

A zip code is only part of the address; it is insufficient by itself to provide the information necessary to contact the employee. (*See Bauder v. City of Pittsburgh*, Penn. Office of Open Records Final Determination AP 2017-0499, at 9-11, holding that zip code by itself is not protected under the exception for home address) (Exh. I). (*See also Gov’s Office of Admin. v. Pennsylvanians for Union Reform*, 105 A.3d 61, 69 [Pa. Commw. Ct. 2014], holding that home county by itself is not part of protected home address).

The Department asserts without evidence that disclosure of home zip codes would lead to an unreasonable invasion of privacy. Given the ubiquity of address information, from phone books to the Internet, there is no reason to think that a person’s zip code is especially secret or confidential information, or that its disclosure will lead to economic or personal hardship. One cannot steal another’s identity with just a zip code.

As for the third and final basis for its denial, in addition to citing statutory authorities, the Department cites Governor Cuomo’s Executive Order 183 (Exh. G), which prohibits state agencies from disclosing the home addresses of public employees. First, as explained above, home zip codes are different from home address. Second, an executive order cannot take precedence over a citizen’s statutory rights under FOIL.

When there is a conflict between a statute and an executive order, the order must give way and the statute must prevail (*Rapp v Carey*, 44 NY2d 157 [1978]). New York has a well-developed doctrine on the executive's powers to issue executive orders, founded on a fundamental respect for the separation-of-powers. The Court of Appeals has consistently divided executive orders into two categories: (1) those that "conflicted with the Legislature's intent and negated the statute it purported to administer," (*Johnson v Pataki*, 91 NY2d 214, 226 [1997]); and (2) those that "creat[ed] a new procedural, administrative mechanism, such as a task force or consumer board, to better implement a legislative policy." (*Bourquin v Cuomo*, 85 NY2d 781, 787 [1995]).

This order falls in the first category: it does not facilitate legislative policy; it undermines it. In enacting FOIL, the Legislature mandated maximum transparency for the public, subject only to narrowly construed exceptions. (*See Madeiros v NY Educ Dept.*, 30 NY3d 67, 73 [2017]). If this information is disclosable under the FOIL, then it must be disclosed unless there is a constitutional or statutory bar that prevents disclosure. (*See M. Farbman & Sons, Inc. v NYC Health & Hosps. Corp.*, 62 NY2d 75, 79-80 [1984]). An order restricting such access is thus "at odds with existing legislative policy" and must be struck down. (*Subcontractors Trade Assn v Koch*, 62 NY2d 422, 429 [1984]; *see also Under 21, Catholic Home Bureau for Dependent Children v New York*, 65 NY2d 344, 359 [1985]). A governor simply cannot amend a statute by issuing an executive order that conflicts with its mandates; this is not the constitutional process for lawmaking.

CONCLUSION

CPLR 7803(3) provides for the review of determinations that are affected by an error of law. Here, the Department premised its denial of information sought under FOIL on the fact that the release of the zip codes sought by Petitioner would constitute an invasion of the subjects'

personal privacy. This conclusion was based on Respondent's misapplication of the New York Public Officer's law as protecting zip codes, and was also partially founded on an Executive Order, which lacks the authority upon which Respondents, in error, presumed it to have. Petitioner's position, however, is supported by numerous New York authorities, including authority in which the court determined the very nature of zip codes and required their release. (*Daily News*, 9 AD3d at 308). Petitioner therefore requests that this Court declare that Respondent made an error of law in withholding the information requested, that the denial be overturned and that the records be released.

Dated: 25 Oct 2009

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