

profit-72m-in-luxury-condo-deal/; Greg B. Smith, *Exclusive: AG Investigating Nursing Home Operator to See if It Misled Health Officials Before It Turned Bedford-Stuyvesant Property into Luxury Condos*, N.Y. DAILY NEWS, Apr. 7, 2016, <http://www.nydailynews.com/new-york/ag-probing-nursing-home-turned-condos-bed-stuy-article-1.2592560>.

4. While the New York State Department of Health (“DOH”) must approve any plans for a facility to close in advance of its closure, it is unclear whether the DOH was apprised of the Allure Group’s plan to change these not-for-profit nursing homes into lucrative residential properties before the Allure Group’s plans had been implemented.

5. Because the DOH apparently exercised little or no oversight of the Allure Group as it converted these nursing homes to private residences, MFY requested records regarding closure and bed reduction at facilities owned or operated by the Allure Group, community reaction to those plans, and the DOH’s communications with the Allure Group about those plans. MFY’s Request sought to uncover how the DOH was—or was not—enforcing its own rules to protect residents in state-licensed facilities.

6. Although FOIL mandates disclosure of these records unless a specific FOIL exemption applies, the DOH issued blanket denials of both MFY’s original request and subsequent appeal with no particularized justification for its denials. No legitimate exemption to disclosure exists in this case, and the DOH has utterly failed to carry its heavy burden of demonstrating the applicability of any such exemption. Accordingly, the DOH must be compelled to provide MFY with the requested records.

PARTIES

7. Petitioner, MFY, is a not-for-profit law firm founded in 1963. MFY’s mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. MFY does this by providing the highest quality direct civil legal assistance,

conducting community education and building partnerships, engaging in policy advocacy, and bringing impact litigation. MFY is located within New York County at 299 Broadway, 4th Floor, New York, NY 10007.

8. Respondent, DOH, is a public officer subject to the requirements of FOIL. The DOH is located in Albany County at Corning Tower, Empire State Plaza, Albany, NY 12237. However, the DOH's Metropolitan Area Regional Office, which oversees nursing home enforcement activities in New York City, is located in New York County at 90 Church Street, New York, NY 10007.

JURISDICTION AND VENUE

9. This petition is brought against the DOH pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR").

10. This petition is timely under CPLR § 217(1) because it was brought within four months of January 9, 2017, the date that the DOH denied MFY's appeal of the denial of its original request.

11. This Court has jurisdiction under sections 7801 *et seq.* of the CPLR to review decisions made by the DOH.

12. Venue lies in New York County pursuant to CPLR §§ 505(a), 506(b), and 7804(b). The DOH Metropolitan Area Regional Office is located in New York County, and material events giving rise to the official action complained of took place in New York County.

FACTS

13. Since 1963, MFY has been a leader in representing New York City's most vulnerable residents by providing free legal assistance in housing, consumer rights, government benefits, and employment matters. *About MFY*, MFY LEGAL SERVICES, INC., <http://www.mfy.org/about/about-mfy/> (last visited May 8, 2017); *Our Work*, MFY LEGAL

SERVICES, INC., <http://www.mfy.org/> (last visited May 8, 2017). In its work to bring justice to the city's most vulnerable, MFY consults with and litigates on behalf of those who reside in nursing homes across the five boroughs. *Nursing Home Residents Project*, MFY LEGAL SERVICES, INC., <http://www.mfy.org/projects/nursing-home-residents-project/> (last visited May 8, 2017).

14. Rivington House, formerly at 45 Rivington St., New York, NY, served as a non-profit hospice care facility for patients with AIDS or HIV on Manhattan's Lower East Side for more than 20 years. The Allure Group reportedly purchased Rivington House in 2015 for \$28 million, paid New York City \$16.15 million to remove deed restrictions that required the property be used as a non-profit health care facility, and subsequently sold the property to a condominium developer for \$116 million. *See* J. David Goodman, *How New York Allowed Gentrification for \$16 Million*, N.Y. TIMES, Mar. 30, 2016, available at <https://www.nytimes.com/2016/03/31/nyregion/nursing-homes-sale-to-condo-developer-raises-questions-for-city.html>.

15. Before flipping Rivington House, the Allure Group operated the facility as a nursing home, the Manhattan Center for Nursing and Rehabilitation, a DOH-licensed facility. *See* New York State Health Profiles, *Manhattan Center for Nursing and Rehabilitation*, https://profiles.health.ny.gov/nursing_home/view/150878 (last visited May 8, 2017).

16. Similarly, the Allure Group reportedly purchased the CABS Nursing Home in Brooklyn in June 2015 for \$15.6 million, operated the facility as the for-profit Nostrand Center for Nursing and Rehabilitation, displaced its residents, and employed contractors to convert it into a 241-unit apartment building. *See* Cindy Rodriguez, *Nursing Home Owner in de Blasio Investigations Flouted State Rules that Protect Patients*, WNYC, Aug. 29, 2016,

<http://www.wnyc.org/story/nursing-home-de-blasio-flouted-state-rules/>; Greg B. Smith, *Exclusive: AG Investigating Nursing Home Operator to See if it Misled Health Officials Before it Turned Bedford-Stuyvesant Property into Luxury Condos*, N.Y. DAILY NEWS, Apr. 7, 2016, <http://www.nydailynews.com/new-york/ag-probing-nursing-home-turned-condos-bed-stuy-article-1.2592560>.

17. Nursing home and assisted living facility operators are required to inform the DOH of any plan to close a facility immediately upon the operator's contemplation of a closure. State of New York Department of Health, *New York State Department of Health Office of Health Systems Management Facility Closure Plan Guidelines*, DAL 06-13 at 1 (Aug. 7, 2006), https://www.health.ny.gov/professionals/nursing_home_administrator/docs/dal_06-13_nursing_home_closure_guidelines.pdf ("DAL 06-13"); New York State Department of Health, *Facility Closure Plan Guidelines* (Mar. 2014), https://www.health.ny.gov/facilities/adult_care/dear_administrator_letters/acf_closure_guidelines.htm ("Facility Closure Guidelines"). A written closure plan must be submitted to the DOH for approval at least 90 days in advance of the planned closure of a nursing home. 10 NYCRR § 401.3(g); DAL 06-13 at 1. The DOH is obligated to approve plans to close or alter services at a nursing home facility or assisted living facility. DAL 06-13 at 1; Facility Closure Guidelines.

18. Substantial press attention and multiple governmental investigations have focused on New York City agencies' conduct in removing deed restrictions on the Rivington House property. *See, e.g.*, New York City Department of Investigation, *Examination of the City's Removal of the Deed Restriction at 45 Rivington Street in Manhattan* at 1 (July 14, 2016), http://www1.nyc.gov/assets/doi/downloads/pdf/2016/Jul16/pr22rivington_71416.pdf ("DOI Report") (finding senior City officials knew or should have known that lifting the deed

restriction on the Rivington House property would open it up to any use, including luxury housing); J. David Goodman, *How New York Allowed Gentrification for \$16 Million*, N.Y. TIMES, Mar. 30, 2016, <https://www.nytimes.com/2016/03/31/nyregion/nursing-homes-sale-to-condo-developer-raises-questions-for-city.html> (explaining the relative rarity of deed restriction removal); New York City Comptroller, *Report of the New York City Comptroller on the Sale of Two Deed Restrictions Governing Property Located at 45 Rivington Street* at 1 (Aug. 1, 2016), https://comptroller.nyc.gov/wp-content/uploads/documents/Rivington_Report_8-1-16.pdf (“Rivington House was allowed to slip away not so much because of poor City processes, but because of poor execution of those processes in a manner that undermined both public input and the interests of the City”); Cindy Rodriguez, *Nursing Home Owner in de Blasio Investigations Flouted State Rules that Protect Patients*, WNYC, Aug. 29, 2016, <http://www.wnyc.org/story/nursing-home-de-blasio-flouted-state-rules/> (“[A]ccording to a three-month investigation by WNYC, [90-day notice and the submission of a detailed closure plan] didn’t happen at CABS—or a second location owned by the Allure Group in Manhattan that was the subject of multiple investigations after the owner sold it to luxury housing developers.”); Greg B. Smith, *Exclusive: AG Investigating Nursing Home Operator to See if It Misled Health Officials Before It Turned Bedford-Stuyvesant Property into Luxury Condos*, N.Y. DAILY NEWS, Apr. 7, 2016, <http://www.nydailynews.com/new-york/ag-probing-nursing-home-turned-condos-bed-stuy-article-1.2592560> (“The nursing home operator under scrutiny for a deed-switch that turned a Lower East Side nursing home [the Rivington House] into luxury condos is now the subject of another investigation [by the Attorney General] in Brooklyn [at CABS Nursing Home.]”).

19. But the public still has learned little about how the DOH—the agency that licenses and inspects nursing homes—has handled these closures. Despite the passage of years

since these deals took place, it remains unclear to what extent the DOH has sought to enforce its own regulations and policies to protect nursing home residents from facility operators.

20. Even more troubling, the DOH's failure to protect residents by approving closure plans that do not comply with state regulations appears to be a pattern. For example, in 2014, the DOH reportedly approved a closure plan for a Brooklyn assisted living facility that would have forced 120 seniors out of the facility in 90 days. *See Vivian Yee, Residents Sue to Halt Closing of Brooklyn Assisted-Living Home*, N.Y. TIMES, May 2, 2014, <https://www.nytimes.com/2014/05/03/nyregion/residents-sue-brooklyn-assisted-living-home-seeking-to-halt-its-closing.html>. Recent investigations have suggested that the DOH routinely under-enforces state nursing home regulations. New York State Office of the State Comptroller, Division of State Government Accountability, *Nursing Home Surveillance* at 1 (Feb. 2016), <https://www.osc.state.ny.us/audits/allaudits/093016/15s26.pdf> (“As a matter of policy, the [DOH] does not utilize the full array of enforcement actions available to it under both State law and CMS guidelines, choosing to not levy fines for well over 80 percent of the violations it cites.”).

21. Over one year ago, on March 25, 2016, MFY submitted a FOIL request for documents regarding the DOH's dealings with the Allure Group. MFY sought to determine when and how the DOH learned of the Allure Group's plans, what level of scrutiny it applied to the company's representations, and what actions it took to ensure compliance with state regulations or what penalties it imposed for non-compliance with state regulations. Specifically, MFY sought copies of

Records (as that term is defined in Public Officers Law § 86(4)) created, received, or sent on or after January 1, 2014 by the [DOH] regarding: (1) Any facility owned or operated by the Allure Group, its principals, agents, or assigns [(the “Allure Group”)] closing or

potentially closing; (2) A reduction in beds in any facility owned or operated by [the Allure Group]; (3) Closure plan(s) or requests for closure plan(s) for any facility owned or operated by [the Allure Group]; (4) Approval from the [DOH] to reduce the size or close any facility owned or operated by [the Allure Group]; [and] (5) Complaints received from residents, family members of residents, elected officials, or members of the public regarding a closure or potential closure of any facility owned or operated by [the Allure Group]

(collectively, the “Request”). Aff. of Daniel A. Ross ¶ 4, dated May 8, 2017 (“Ross Aff.”); Ex. A, Ross Aff. (“Ex. A”).

22. Daniel A. Ross, an attorney at MFY, spoke with Danielle Rysedorph, the Acting Records Access Officer (“RAO”) of the DOH, by telephone on April 1, 2016, regarding MFY’s request. Ms. Rysedorph memorialized their conversation by email that same day. Mr. Ross confirmed by email that the first and second categories of records requested sought any communication from the Allure Group to the DOH indicating an intent to close or consideration of closing or reduction of beds in a facility, and the fourth request sought DOH responses to those communications. Mr. Ross also indicated that he was particularly interested in the facilities located at (1) 45 Rivington St., New York, NY; (2) 270 Nostrand Ave., Brooklyn, NY; and (3) 810 St. Marks Ave., Brooklyn, NY (one of the Allure Group’s other facilities, around which rumors had circulated regarding a possible closure). Ross Aff. ¶ 5; Ex. B, Ross Aff. (“Ex. B”). Ms. Rysedorph followed both the telephone call and email with a letter, also dated April 1, 2016, acknowledging receipt of the Request and promising a response within twenty days. Ross Aff. ¶ 6; Ex. C, Ross Aff. (“Ex. C”).

23. Twenty-eight days later, on April 29, 2016, Ms. Rysedorph wrote to Mr. Ross that the DOH was “continuing to process” MFY’s Request and extending the deadline to respond to July 26, 2016. Ross Aff. ¶ 7; Ex. D, Ross Aff. (“Ex. D”). This was the DOH’s first of several

substantively identical notices of extension. Ross Aff. ¶¶ 8-9, 11; Ex. E, Ross Aff. (“Ex. E”), Ex. F, Ross Aff. (“Ex. F”); Ex. H, Ross Aff. (“Ex. H”).

24. On May 2, 2016, Mr. Ross telephoned Ms. Rysedorph’s office to discuss the Request. Although Mr. Ross was told that Ms. Rysedorph was out of the office that day, Ms. Rysedorph promptly returned his call. In their subsequent discussion, Mr. Ross emphasized that of the requested records, MFY prioritized the Allure Group’s closure plans and DOH’s responses to them. Ms. Rysedorph indicated that some of the materials responsive to the Request were more accessible than others. Mr. Ross believed at the end of their conversation that the DOH would make rolling productions between May 2, 2016 and July 26, 2016. Ross Aff. ¶ 8.

25. Within the next five months, Mr. Ross received two more letters from the DOH, dated July 26, 2016, and September 28, 2016, stating that it was “continuing to process” MFY’s Request and extending the date by which it would respond. Ross Aff. ¶¶ 8-9; Exs. E, F.

26. On October 26, 2016, Mr. Ross wrote to Ms. Rysedorph to highlight the then seven-month delay of the DOH’s response to MFY’s Request. Mr. Ross explained that MFY expected a complete production of records responsive to the Request by the DOH’s latest extension date, November 10, 2016, in the absence of which MFY would assume constructive denial of the Request and pursue an appeal. Ross Aff. ¶ 10; Ex. G, Ross Aff. (“Ex. G”).

27. On November 10, 2016, Mr. Ross received the fourth extension letter noting that the DOH was “continuing to process” MFY’s Request. Ross Aff. ¶ 11; Ex. H.

28. On November 25, 2016, eight months and four extension letters after MFY’s Request pursuant to FOIL, the DOH denied MFY’s Request in full by merely quoting exemptions from the POL and asserting their general applicability, without supportive reasoning or any indication of which exemptions applied to which responsive records. Ross Aff. ¶ 12; Ex.

I, Ross Aff. (“Ex. I”). Rosemarie Hewig, the new DOH Records Access Officer, wrote that MFY’s Request was denied pursuant to POL § 87(2)(e) as “‘information compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings.’” Ex. I at 1; POL § 87(2)(e). She added, “the type of records generally responsive to parts of your [Request] are subject to exemption from disclosure in entirety pursuant to [POL] § 87(2)(a), pursuant to 42 U.S.C. 1306 [and] 5 U.S.C. 552-A[;]” “[o]ther portions of records generally responsive to your request . . . are subject to exemptions from disclosure pursuant to [POL] § 87(2)(b), because, if disclosed, ‘would constitute an unwarranted invasion of personal privacy’ and [POL] § 87(2)(g), as ‘inter-agency or intra-agency materials.’” Ex. I at 2; POL §§ 87(2)(a), (b), & (g).

29. FOIL presumes access to requested records and places the burden to assert the applicability of a statutory exemption on the denying agency. *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (N.Y. 2007). To deny disclosure, the agency “must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” *Id.* at 462-63 (citation omitted). If the agency fails to prove that an exemption applies, FOIL compels disclosure. *Id.*

30. Merely restating the statutory exemption does not meet the burden of particularity and specificity required by FOIL. *Chatham Towers Inc. v. New York City Office of Mgmt. & Budget*, 25 Misc. 3d 1243(A), at 2 (N.Y. Sup. Ct. 2009) (“[M]erely reiterating the terms of the statute in defense of nondisclosure is wholly insufficient to deny access to public documents. . . . ‘Blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.’” (citing *Gould v. New York City Police Dep’t*, 675 N.E.2d 808, 811 (N.Y. 1996)).

31. On December 23, 2016, MFY appealed the denial of its Request to the DOH's Records Access Appeals Officer ("RAAO"). On appeal, MFY asserted that the DOH had failed to provide sufficient bases for the exemptions it cited in denying the Request, and that even if the exemptions had been explained with adequate specificity, those exemptions did not support denial of the Request. Ross Aff. ¶ 13; Ex. J, Ross Aff. ("Ex. J").

32. By letter dated January 9, 2017, the RAAO, David J. Spellman, denied MFY's Request on appeal. Ross Aff. ¶ 14; Ex. K, Ross Aff. ("Ex. K"). The DOH stated, for the first time, that the Request was denied "*in full*" on the basis of POL § 87(2)(e), "referred to as the law enforcement exception." Ex. K at 1 (emphasis added). The DOH offered only that "disclosing these records at this time could substantially hamper the contemporaneous law enforcement activities of the various State agencies with jurisdiction in these matters." Ex. K at 1-2. The DOH asserted, again for the first time, that "*in the alternative*, the responsive records would have been *redacted and/or withheld in their entirety* through the application of POL §§ 87(2)(a), (b), and (g)." *Id.* at 2 (emphasis added). The DOH newly explained that pursuant to POL § 87(2)(b), it would have redacted the names and contact information of private citizens, but contradictorily concluded that, because "MFY was not requesting the type of information that the RAO would have redacted/withheld from records herein on these grounds[,] any such records . . . would have been nonresponsive." *Id.* The DOH contended, also for the first time, that under POL § 87(2)(g), it "would have redacted/withheld . . . opinions, ideas and advice that were exchanged exclusively either internally within DOH or with other New York State agencies." *Id.* Finally, the DOH stated that it no longer held responsive records that fell under New York Public Health Law § 2805-j through -l, entirely different statutes than those cited in its original denial of MFY's Request pursuant to POL § 87(2)(b), noting "[t]hat is why the RAO urged [MFY] . . . to

request these records from [the US Centers for Medicare and Medicaid Services].” *Id.* at 3. The DOH contended that the records were accessible in this way, despite having asserted two pages earlier that the requested records were withheld in their entirety on the basis of the “law enforcement exception.” *Id.* at 1-2.

33. On appeal, the DOH again failed to meet its obligation, pursuant to FOIL, to provide a specific justification for application of the exemptions it cites in support of non-disclosure of these records. *Data Tree, LLC v. Romaine*, 9 N.Y. 3d at 462-63.

CAUSE OF ACTION UNDER ARTICLE 78

34. Paragraphs 1 through 33 are incorporated herein.

35. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests when a determination is affected by an error of law.

36. MFY has a clear right under FOIL to the requested records.

37. The DOH has a mandatory obligation to disclose these records and has no basis in law or fact to withhold them.

38. MFY exhausted its administrative remedies with the DOH when its appeal of the DOH’s initial refusal to comply with FOIL was denied. *Ross Aff.* ¶¶ 13-14; Exs. J-K. Petitioner has no other remedy at law.

REQUESTED RELIEF

WHEREFORE, Petitioner seeks an order and judgment:

- (1) Pursuant to CPLR § 7806, compelling the DOH to comply with its duty under FOIL to provide the records sought by Petitioner in its Request dated March 25, 2016;
- (2) Pursuant to CPLR § 8601 and POL § 89(c)(i), awarding attorney’s fees and costs to Petitioner; and
- (2) Granting such other and further relief as the Court deems just and proper.

Dated: New York, NY
May 8, 2017

Respectfully Submitted,

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