

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of:

TJS OF NEW YORK, INC.,

Petitioner,

Decision & Judgment

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

-against-

**NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE and ROBERT
L. MEGNA, as Commissioner of the New York
State Department of Taxation and Finance,**

Defendants.

**Motion Return Date: Albany County Special Term, June 18, 2010
RJI No.: 01-08-ST8796
Index No. 3480-08**

Justice Robert A. Sackett, Presiding.

**Appearances: Law Offices of Barry Leibowicz
Attorney for Petitioner
111 Great Neck Road
Great Neck, New York 11021
By: Barry Leibowicz, Esq.**

**Hon. Andrew Cuomo
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
By: Douglas Goglia, Esq.**

Sackett, J.:

Petitioner commenced this CPLR article 78 proceeding after its FOIL request was denied by the respondents in relation to an assessment of outstanding sales tax, interest and penalties in the amount of \$732,300.71 for lap dances at petitioner's adult entertainment club. In a Decision and Judgment dated August 11, 2008, this Court determined, in part, that the petitioner was entitled to copies of records produced in an electronic format. In January 2010, the petitioner moved for an order of contempt pursuant to New York Judiciary Law § 756 and CPLR § 5104 for respondents' failure to comply with the directives of this Court and to produce the Audit Framework Extension (AFE) software program that is utilized in audits by the respondents. In a Stipulation dated May 17, 2010, the parties and the Court agreed that petitioner's motion for contempt was withdrawn and converted to a motion to compel respondents to produce the AFE software program pursuant to petitioner's FOIL request of December 20, 2007.

The petitioner's attorney alleges he is entitled to receive a copy of respondent's AFE software audit program so he can install it in his computer to analyze comparison files within the AFE system which may disclose fraudulent activity at the Department of Tax and Finance. The petitioner alleges there are no protections in the AFE program against alteration or backdating of documents by respondent's employees without leaving a trace. Petitioner contends the respondents agreed to provide him with a copy of the AFE program but later reneged. Petitioner's attorney alleges the respondents offered to provide him use of the AFE program at its Albany office but he declined the offer. The petitioner maintains the respondents have failed to comply with the Decision and Judgment of this Court and should be compelled to provide the AFE software program.

In opposition to the motion to compel, the respondents allege the AFE program was designed to provide tools for auditors to perform their audit duties while using their assigned laptop computers when on a field audit outside the office or when working on an audit in the respondent's office. The respondents contend the AFE program provides many comprehensive audit tools which allow auditors to manage and track their audit inventory, maintain taxpayer information for each audit, calculate tax, reconcile books and tax returns, generate letters informing taxpayers the audit is complete and the amount of tax due. The AFE system also produces forms that are available on the internet and forms that are available only to Tax & Finance personal. The AFE program allows the

auditors to calculate the correct tax that is due and to determine the amount of any refund.

The respondents oppose the release of the AFE program and contend an individual with access to this audit program could perpetrate a fraud on an unsuspecting taxpayer. The respondents claim the AFE program could be used to create a letter notifying the taxpayer of an audit and then impersonate a Tax & Finance auditor. The respondents claim a fraudulent audit would reveal taxpayers' books and records and other confidential information including trade secrets. The respondents maintain information obtained in an audit is protected pursuant to Tax Law § 1146. It is a crime for an auditor to wilfully divulge tax return and audit information. A taxpayer, with the expectation of secrecy, would disclose financial information to the auditor that he or she would not otherwise disclose. The respondents claim if the public attains the AFE program, taxpayers could fabricate documents, obtain a waiver affecting the statute of limitations, falsify sales tax information and misappropriate a taxpayer's refund. Tax & Finance alleges the disclosure of the AFE audit program would undermine the security of the Department of Tax & Finance and the taxpayers of the State of New York.

Pursuant to CPLR 3124, it is well established that disclosure provisions are to be liberally construed and a trial court is afforded broad discretion in managing disclosure. (*Am. Assoc. of Bioanalysts v New York State Dept. of Health*, 12 AD3d 868 [2004]; *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998]). CPLR § 3101(a) requires full disclosure of all evidence material and necessary for the prosecution or defense of an action, regardless of the burden of proof (*Weber v Ryder TRS, Inc.*, 49 AD3d 865 [2008]; *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]).

FOIL promotes open government and public accountability and, therefore, "imposes a broad duty on government to make its records available to the public" (*Gould v New York City Police Dept.*, 89 NY2d 267 [1996]). Pursuant to FOIL, all records of a government agency are presumptively available to the public, unless the requested records fall within one of the enumerated exemptions set forth in the FOIL statute (*see Public Officers Law § 87 [2]*; *Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp.*, 87 NY2d 410 [1995]). The exemptions must be narrowly construed and the burden of demonstrating the applicability of a FOIL exemption rests squarely with the government agency (*Daily Gazette v. Schenectady*, 93 NY2d 145 [1999]; *Matter of Washington Post Co. v New*

York State Ins. Dept., 61 NY2d 557 [1984]). “So long as there is a clear legislative intent to establish and preserve confidentiality of records, a State statute need not expressly state that it is intended to establish a FOIL exemption” (*Wm. J. Kline & Sons, Inc. v County of Hamilton*, 235 AD2d 44 [1997]).

Respondents maintain the AFE computer software audit program is an exception to disclosure under FOIL pursuant to Public Officers Law § 87(2)(i). POL § 87(2)(i) provides:

“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 ...if disclosed, would jeopardize an agency’s capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems or infrastructures.”

Records stored in an electronic format are subject to FOIL (*Matter of Data Tree LLC v Romaine*, 9 NY3d 454 [2007]). Although the petitioner alleges the production of the AFE program would not be onerous or burdensome, it fails to properly address the security concerns of the Department of Tax & Finance and the affect upon taxpayers if the program is used for fraudulent or illegal purposes. POL § 87(2)(i) provides an adequate exception to the requirements of FOIL and the disclosure of the AFE program “would jeopardize an agency’s capacity to guarantee the security of its information technology assets”. The AFE program is subject to abuse if it is provided to persons who seek to utilize the program in a fraudulent manner. For example, a person could create forms and letters from Tax & Finance notifying unsuspecting taxpayers of an audit and then obtain confidential financial records. The perpetrator could use the AFE system to inform taxpayers that erroneous taxes were due as a result of the audit. The Committee on Open Government has found that a computerized data warehouse available online to only members of the state agency would comprise “a delivery system” and was not a record subject to FOIL (*see Committee Advisory Opinion*, FOIL-AT-12366, October 30, 2000).

Petitioner’s motion to compel is denied. The respondents have sustained their burden demonstrating that the requested information, the AFE software program, falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access. (*Humane Soc. of U.S. v Brennan*, 53 AD3d 909 [2008]). Moreover, while not controlling, the

Committee's formal opinions are viewed as authoritative in interpreting FOIL, (*Kwasnil v City of New York*, 262 AD2d 171 [1999]) and are entitled to deference so long as it is not irrational or unreasonable (*Brown v Goord*, 45 AD3d 930 [2007]). The denial of the FOIL request protects the taxpayers from the potential abuse of respondents' tax audit software program.

Petitioners application for attorney fees is also denied. Since the statutory prerequisites have not been met inasmuch as petitioner has not prevailed, it would be error, as a matter of law, for this court to utilize its discretion and award attorney's fees or costs to the petitioner (*see* Public Officers Law § 89 (4)(c); *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435 [2005]).

Therefore, it is

ORDERED that the motion to compel is denied.

This shall constitute the decision and order of the Court. The original Decision & Order and all papers are being forwarded to the Albany County Supreme Court Clerk for filing. Counsel is not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED.

Dated: Monticello, New York
August 18, 2010

ENTER



HON. ROBERT A. SACKETT, JSC

Papers considered:

Notice of Motion dated January 27, 2010; Affirmation of Barry Leibowicz, Esq. dated 27, 2010 with exhibits A-CC; Petitioner's Memorandum of Law dated January 26, 2010; Affidavit of Michael Rubinstein dated June 1, 2010 with exhibits A-I; Affirmation of Douglas J. Goglia, Esq. dated June 1, 2010 with exhibits A-J; Respondent's Memorandum of Law dated June 1, 2010; Affirmation of Barry Leibowicz, Esq. dated June 14, 2010 with exhibits A-M; Petitioner's Reply Memorandum of Law dated June 14, 2010.