

*In the matter of* Catskill Alliance Heritage Alliance Inc. v  
State of New York.

PRESENT: HON. THOMAS J. McNAMARA  
Acting Justice

*2009 WL 105097 (N.Y. App. 3 Dept.),  
Township of 2009 N.Y. Sup. Ct. 61068 (U)  
(2009).*

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

In the Matter of the Application of  
CATSKILL ALLIANCE HERITAGE ALLIANCE, INC.,

Petitioner,

-against-

THE OFFICE OF THE GOVERNOR OF THE STATE  
OF NEW YORK, THE OFFICE OF THE ATTORNEY  
GENERAL OF THE STATE OF NEW YORK, NEW  
YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION,

Respondents.

**JUDGMENT**

Index No.: 1141-09  
RJ1 No. 01-09-ST9940

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES:    Bond, Schoeneck & King, PLLC  
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McNamara, J.

This special proceeding was brought to compel respondents to provide material in response to a number of requests for information made pursuant to the Freedom of Information Law (FOIL;

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Public Officers Law art. 6). The requests were made to the Department of Environmental Conservation, the Office of the Governor and the Office of the Attorney General and concern records related to a September, 2007 Agreement in Principal having to do with a project known as the Bellayre Resort at Catskill Park. Motions to dismiss were resolved by a previous decision and order which also required respondents to submit for *in camera* review documents responsive to the various requests. A review of the documents has been completed and the parties have been afforded the opportunity to present arguments regarding the applicability of exemptions claimed by respondents.

“Under Public Officers Law § 87 (2), all agency records are open to the public unless specifically exempted by statute” and “[s]uch ... exemptions are to be narrowly construed” (*Matter of Stein v New York State Dept. of Transportation*, 25 AD3d 846, 847 [2006], citations omitted). “In order 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’” (*Matter of Data Tree, LLC v Romaine*, 9 N.Y.3d 454, 462-63 [2007], quoting *Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]).

In addition to submitting documents for *in camera* review, each respondent provided a log listing each of the responsive documents withheld. The logs also provide a description of each document and the statutory exemptions relied on by the particular respondent.

The log provided by the Office of the Attorney General lists 25 documents and in each instance the respondent claims the document is exempt because, among other things, it is inter-agency or intra-agency material not otherwise subject to release (Public Officers Law section 87[2][g]). Each document was reviewed and was found to be inter-agency or intra-agency material

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not otherwise subject to release.

The log provided by the Office of the Governor lists six documents. The respondent claims that the first three documents are exempt under Public Officers Law section 87(2)(d) in that they are documents submitted to the agency by a commercial enterprise which, if disclosed, would cause substantial injury to the competitive position of the enterprise. The documents address the price of, and terms for, acquiring certain parcels of land involved with the underlying project. Respondent, however, has not offered any explanation as to how release of the documents would cause substantial injury to the competitive position of any enterprise. Moreover, it does not appear from any of the papers submitted that acquisitions involve a competitive process. Consequently, the documents should be released. The remaining three documents constitute inter-agency or intra-agency material and were properly withheld by respondent.

The log submitted by the Department of Environmental Conservation (DEC) is more voluminous than the other two; containing over 2000 documents. The exemptions claimed include: exempted from disclosure by state or federal statute (Public Officers Law section 87[2][a]); disclosure would impair present or imminent contract awards (Public Officers Law section 87[2][c]); inter-agency material (Public Officers Law section 87[2][g]) and examination questions or answers which are requested prior to final administration of such questions (Public Officers Law section 87[2][h]).

In those instances where an exemption is claimed because disclosure is elsewhere exempted by statute, respondent DEC relies on CPLR 3101(c) [attorney work product], CPLR 4503(a) [attorney client privilege] and CPLR 4547 [settlement negotiations] as providing statutory

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exemptions.

The attorney work product exemption is very narrowly construed and covers only materials prepared by an attorney, acting as an attorney, which contain his or her analysis and strategy (*Salzer v Farm Family Life Insurance Co.*, 280 AD2d 844, 846 [2001]). The attorney client privilege applies, in this instance, to communications between the agency's counsel, or counsel in the Attorney General's office, and agency employees, made for the purpose of facilitating the rendering and obtaining of legal advice or services (see *Matter of Morgan v New York State Dept. of Envtl. Conservation*, 9 AD3d 586, 587 [2004]).

Respondent has not provided a separate factual basis, such as an affidavit, to support the claims of attorney work product or attorney client privilege. Moreover, review of the documents where these exemptions are claimed does not provide a clear showing that the documents are work product or were made for the purpose of rendering or obtaining legal advice. Thus, these claimed exemptions are, in all instances, improperly asserted though some other claimed exemption may shield the release of a given document.

DEC also claims that some of the documents are exempt because they were prepared for the purpose of furthering a settlement of the administrative permitting process. Though, as respondent argues, there is precedent for exempting from disclosure under FOIL information prepared for the purpose of settling litigation, there is no explicit statutory basis or case law which supports shielding settlement discussion related to a permitting process. More importantly, the rationale used to exempt settlement discussions in a litigation context does not apply here. When the government assumes the role of a litigant records prepared by the government solely with respect to its actual or

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contemplated status as a litigant are not records of governance which the Legislature, in enacting the FOIL, found should be open to public scrutiny (*Matter of Westchester Rockland Newspapers, Inc. v. Mosczydlowski*, 58 AD2d 234 [1977]). Though DEC has not described the permitting process beyond indicating that it is presided over by an administrative law judge from that agency, it appears that the permitting process involves matters of governance entrusted to DEC and therefore, in keeping with the Legislative purpose in enacting the FOIL, should be open to public view unless some other exemption applies.

As with the claims of exemption based on attorney work product and attorney client privilege, claims of exemption based on Public Officers Law section 87[2][c], impairment of present or imminent contract awards, respondent has not provided factual bases to support these claims and review does not support them.

In a large majority of instances respondent has asserted an exemption based on Public Officers Law section 87[2][g], inter-agency or intra-agency material. In most instances the exemption is properly asserted though in some instances the exemption is asserted where the document was circulated to individuals outside the 'agency' realm. Opinions and recommendations that would, if prepared by agency employees, be exempt from disclosure as intra-agency materials do not lose their exempt status simply because they involve the participation of an outside consultant (*Matter of Tuck-It-Away Assoc., L.P. v. Empire State Dev. Corp.*, 54 AD3d 154 [2008]). Here, again, respondent has failed to articulate a particularized and specific factual basis for the exemption and such is not apparent from a review of the documents. Consequently, in those instances where an intra-agency exemption is asserted but the document was circulated outside the 'agency' realm, the

claim of an exemption is rejected.

The exemption under Public Officers Law section 87[2][h]), examination questions or answers which are requested prior to final administration of such questions, is claimed in only one instance. That document, number 340, contains questions and answers for a public scoping session and clearly does not involve an examination.

For the reasons stated above, the only exemption found to apply to any of the withheld documents is the one for inter-agency or intra-agency material. Following is a list of the material, identified by Bates stamp number, which should be released to petitioner because upon *in camera* review, no claimed exemption has been found to apply:<sup>1</sup>

77	346	349	350-354	355-358
360	365-369	372	382-383	385
388	390	399-401	410	415-417
437	468	470	486	516-517
521	533-547	549-552	562-563	571-572
581	588	591-593	607	612
615-618	624	629	640	688-689
717-718	733	784	787	791
795	797	808	814	828
837	846	848	856-857	859
861	865-867	872	888	899*
900	905-906	912	916*	921
935*	936	937*	940	942-944
950	962-964	966	967-969	972-976
978	988-989	995	998	1001
1015-1016	1018	1020	1023	1025-1026
1027-1028	1030	1033-1034	1045	1046-1048
1065	1072			

\*Redact handwritten notes.

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<sup>1</sup>In a letter to the parties dated January 2010, the court identified a number of documents that were missing from the material submitted for *in camera* review by DEC. During the course of a conference, the respondent represented that the missing documents were ones that had previously been provided to petitioner. To the extent that any of those documents have not been provided to petitioner, respondent is directed to do so.

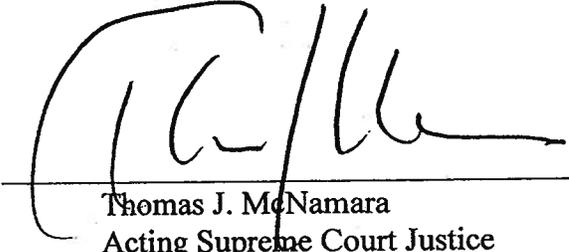
Petitioner has also requested an award of counsel fees. An award of counsel fees may be made in a FOIL proceeding where petitioner "has substantially prevailed" and when the agency "had no reasonable basis for denying access" to the records or documents in question (Public Officers Law § 89 [4] [c]). "[E]ven when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court" (*Matter of Henry Schein, Inc. v Eristoff*, 35 AD3d 1124, 1126 [2006]). Although respondent DEC is directed to release a fair number of documents, the vast majority of material withheld by the agency in response to the FOIL request was properly claimed to be exempt. Under the circumstances, an award of counsel fees is not justified.

This constitutes the judgment of the Court. The original judgment is returned to the attorney for petitioner. A copy of the judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this judgment and delivery of a copy of the judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: Saratoga Springs, New York  
March 5, 2010



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Thomas J. McNamara  
Acting Supreme Court Justice

Papers Considered:

1. Documents 1-6 listed in exemption log from the Office of the Governor;
2. Documents 1-25 listed in exemption log from the Office of the Attorney General;
3. Documents 16-1079 listed in the exemption log submitted by the Department of Environmental Conservation;
4. Letter from Robert H. Feller, Esq., dated January 25, 2010;
5. Letter from Adele Taylor Scott, Esq., dated January 25, 2010;
6. Letter from Robert H. Feller, Esq., dated February 1, 2010;
7. Letter from Adele Taylor Scott, Esq., dated February 1, 2010;
8. Letter from Robert H. Feller, Esq., dated February 3, 2010.