

STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

In the Application of
C.B. SMITH,

Petitioner,

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

-against-

THE COUNTY OF RENSSELAER, HENRY F.
ZWACK, As Rensselaer County Executive,
JACK MADDEN, and STEPHEN A. PECHENIK,
As Freedom of Information Officers,

Respondents.

Supreme Court Rensselaer County
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI #41-1224-97 Index No. 192505

Appearances: Lee, LeForestier & Hanft, P.C.
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DECISION/ORDER/JUDGMENT

OFFICE OF THE CLERK
DEC 21 10 35 AM '98
FRANK J. HERRICK

George B. Ceresia, Jr., Justice

Petitioner has commenced the above-captioned CPLR Article 78 proceeding pursuant to Public Officers Law ("POL") Article 6, the New York State Freedom of Information Law, commonly referred to as "FOIL".

It is settled law that FOIL is based on the overriding policy consideration that "the public is vested with an inherent right to know, and that official secrecy is anathematic to our form of government" (Matter of Fink v. Lefkowitz, 47 NY2d 567, 571). The Court of Appeals has repeatedly held that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government (see, Capital Newspapers v. Whalen, 69 NY2d 246, 252; Matter of Washington Post Co. v. New York State Ins. Dept., 61 NY2d 557, 564, Matter of Fink v. Lefkowitz, *supra*, p. 571; Matter of Citizens For Alternatives To Animal Labs, Inc. v Board of Trustees of the State University of New York, 92 NY2d 357 [October 22, 1998]).

All agency records are presumptively available for public inspection and copying, unless the documents in question fall

within one of the enumerated exemptions set forth in Public Officers Law § 87 (2) (see, Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of New York at Farmingdale, 87 NY2d 410, 417; Matter of Hanig v State of New York Dept. of Motor Vehicles, 79 NY2d 106, 109; Matter of Legal Aid Socy. of Northeastern N.Y. v New York State Dept. of Social Servs., 195 AD2d 150, 152). Blanket exemptions for particular types of documents are inimical to FOIL's policy of open government (see, Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 569). The exemptions available are to be narrowly construed, and "the agency seeking to prevent disclosure bears the burden of demonstrating the applicability of the particular exemption claimed" (Matter of Legal Aid Socy. of Northeastern N.Y. v New York State Dept. of Social Servs., supra, at 153; see, POL § 89 (4) (b); see, Matter of Hanig v State of New York Dept. of Motor Vehicles, supra, at 109). The agency at issue must "articulat[e] a particularized and specific justification for denying access" to the requested documents (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566; (Matter of Fink v Lefkowitz, 47 NY2d 567, 571; Gould v NYC Police Dept. 89 NY2d 267, 275 [1996])).

Generally speaking, an agency may withhold inter-agency or intra-agency records unless they are (i) statistical or factual tabulations; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; (iv) external audits, including but not limited to audits performed by the comptroller and the federal government. "Factual data [] simply means objective information , in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (Gould v NYC Police Dept., 89 NY2d 267, 277 [1996]).

"If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material" Gould v NYC Police Dept. 89 NY2d 267, supra, at p. 275 [1996], citing Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 133; Matter of Farbman & Sons v New York City Health & Hosps. Corp., supra, 62 NY2d, at 83). An in camera review of documents is not warranted, however, where no factual basis is presented to support the claimed exemptions and where no request has been made for such a review (see, Church of Scientology v State, 46 NY2d 906, supra,

pp. 907-908).

Respondents have raised an affirmative defense based upon the expiration of the four month statute of limitations (see, CPLR 217). The Court notes that the time to commence a CPLR Article 78 proceeding under FOIL commences to run upon denial of the administrative appeal (see, POL § 89 [4] [b]; Matter of Van Steenburg v Thomas, 242 AD2d 802, 803 [Third Dept., 1997]). Generally speaking, the statute of limitations does not commence to run with respect to an administrative determination until the aggrieved party is notified of the determination (see, Matter of Edmead v McGuire, 67 NY2d 714, 716; Matter of Hunt Bros. Contrs. v Glennon, 214 AD2d 817, 819; Matter of New York State Radiological Society v Wing, 244 AD2d 823, [Third Dept., November 26, 1997], not for lv to app denied, 92 NY2d 802 [June 9, 1998]; Church of Scientology v State, 46 NY2d 906, 908 [1979]). Moreover, "[w]hen a party [seeks dismissal] on the ground that [the proceeding] is barred by the statute of limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the statute of limitations ha[s] elapsed" (Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [Third Dept., 1990]). In this instance, respondents have failed to

submit supporting affidavits to establish when petitioner was served with the various FOIL determinations. All of the determinations fall within four months (see, CPLR 217) of the filing of the petition (October 22, 1998) other than the first, dated June 17, 1998, for which there is no affidavit of service. In the Court's view, respondents have failed to establish that the instant proceeding, commenced on October 22, 1997, is untimely¹.

Foil Requests Dated June 6, 1997 and June 13, 1997:

By letters dated June 6, 1997 and June 13, 1997, petitioner requested the following:

1. The statement issued to the news media by the county attorney's office on 5/5/97 concerning the allegations against Dirk Van Ort, the former 911 Public Education Coordinator.
2. Any and all correspondence to or from Rensselaer County from the N.Y. State Retirement office concerning the retirement and status of Dirk Van Ort Jan. 1, 1996 to date.

¹The Court notes that respondents' answer did not raise as an affirmative defense the failure of the petitioner to exhaust his administrative remedies.

3. All of the 26 bi weekly payroll certifications for 1996 for Dirk Van Ort, 911 Public Education Coordinator.

4. Any and all letters or correspondence to or from Dirk Van Ort and Rensselaer County January 1, 1996 to date including but not limited to the correspondence seeking repayment for work not performed.

5. Any correspondence relevant to the county's determining when Mr. Van Ort was not available for work while he was in fact paid which in turn resulted in the letter referenced in item 4 being sent to Van Ort.

The respondent apparently complied with item number 1. The petitioner received the following response dated June 17, 1997 with respect to items numbered 2 through 5:

Items numbers 2 through 5 - These requests are denied on FOIL opinion No. 10050:

"In situations in which a person is the subject of allegations or questions involving impropriety or misconduct, and those questions have not been determined or do not result in disciplinary action, it has been held that records relating to those allegations or questions may be withheld on the grounds that disclosure would constitute an unwarranted invasion of personal privacy."

POL § 87 (2) (f) permits an agency to deny access to records on grounds that disclosure will endanger the life or safety of any

person. Under POL § 89 (2) (b), an unwarranted invasion of privacy includes, but shall not be limited to:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.

POL § 89 (2) (c) provides:

Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

- i. when identifying details are deleted;
- ii. when the person to whom a record pertains consents in writing to disclosure.

It is well settled that judicial review of an administrative determination is limited to the grounds invoked by the administrative agency (Matter of Scherbyn v BOCES, 77 NY2d 753, 758-759; Matter. of Hennekens v. State Tax Commn. of State of

N.Y., 114 AD2d 599, 600 [Third Dept., 1985]; Matter of Trump-Equitable Fifth Ave. Co. V Gliedman, 57 NY2d 588, 593; Matter of New York Times Company v New York State Department of Health, 243 AD2d 157 [Third Dept., June 25, 1998]).

"[R]ecords regarding the days worked, leave taken with or without pay, and leave accrued by employees are by their very nature relevant to the day-to-day operations of the agency" (Matter of Buffalo News v Buffalo Municipal Housing Authority, 163 AD2d 830, 831 [Fourth Dept., 1990]). The Court is of the view that item number 3, 26 bi weekly payroll certifications of 1996 for Dirk Van Ort, are properly disclosable under FOIL. They constitute "factual data" (see, Gould v NYC Police Dept., supra) and do not represent an unwarranted invasion of Mr. Van Ort's personal privacy (see, Matter of Buffalo News v Buffalo Municipal Housing Authority, supra).

With respect to items 2, 4 and 5 the Court notes that respondents in denying the FOIL request rely upon a blanket exemption. As previously stated, it is well established that the use of generalized blanket exemptions as the sole basis for denying a FOIL request is, as a matter of law, insufficient (see, Matter of

Capital Newspapers Div. of Hearst Corp. v Burns, supra, at p. 569; Gould v NYC Police Dept. supra, p. 275). In this instance, respondent's denial is not "particularized" or "specific" with respect to what documents, or what portions of the documents, are exempt from disclosure and for what reasons (see, Gould v NYC Police Dept. supra, p. 275).

. Apart from the foregoing, but of equal significance, respondents have not submitted to the Court (pursuant to CPLR 7804 [c]), factual affidavits to establish (1) the existence and specific application of the exemption asserted in respondent's denial to the documents at issue; and (2) the existence and application of the myriad affirmative defenses contained in respondent's answer. Absent factual affidavits, the Court is left with no basis upon which it may evaluate either respondent's determination denying petitioner access to the records or respondent's affirmative defenses.

Echoing the words of the Court of Appeals:

The record [] is wholly insufficient to sustain the refusal to disclose the materials sought by petitioner under the provisions of the Freedom of Information Act (Public Officers Law, art 6). In support of the

denial of access, the [] officials have tendered only references to sections, subdivisions and subparagraphs of , the applicable statute and conclusory characterizations of the records sought to be withheld. There is no tender of any factual basis on which to determine whether the materials sought either fell outside the scope of mandated disclosure [] or come within the exceptions specified in subdivision 2 of present section 87 of the Public Officers Law []. Nor is there any justification for remittal for *in camera* inspection. The parties resisting disclosure made no request for such inspection. Indeed, the record contains no predicate on which an application therefor might have been based.

Church of Scientology v State (46 NY2d 906, supra, pp. 907-908)

In view of the foregoing, and by reason of the absolute failure of respondents to demonstrate that the records are exempt under any provision of the Public Officers Law (which, again, was respondents' burden) the Court finds that the petition must be granted and the records must be disclosed.

Foil Request Dated June 25, 1997:

Petitioner's letter dated June 25, 1997 requested the following:

1. Copies of any and all long distance phone bills January 1, 1996 to date made by all extensions in county executive Henry Zwack's office. Such records should be complete listing the number called, time and date, etc.

2. Copies of any and all cellular phone call bills made by any and all cell phones used by the county executive January 1, 1996 to date. Again, such records should be complete listing the number called, the time and date, etc.

3. Any records which reflect reimbursement to Rensselaer County by the county executive for and all personal calls made on these phones, January 1, 1996 to date.

There is no evidence in the instant record that the respondent issued either a written denial of the FOIL request or a written appeals decision. The Court is again mindful that in reviewing an agency determination, it is limited to consideration of the grounds enunciated by the agency in its original determination (Matter of Scherbyn v Wayne-Finger Lakes Bd of Coop. Educ. Serv., supra; Matter of Hennekens v. State Tax Commn. of State of N.Y., supra; Matter of Trump-Equitable Fifth Ave. Co. V Gliedman, supra; Matter of New York Times Company v New York State Department of Health, supra). Where a determination is made without sound basis in reason, or is made without regard to the facts or law, the determination is deemed to be irrational (see, Matter of Pell v. Bd. of Educ. 34 NY2d 222 , 231 [1974]). In this instance, it

appears that the FOIL request, denied without a written determination, is irrational as a matter of law.

The problem, once again, is further compounded by the absence of the submission by respondents of supporting affidavits pursuant to CPLR 7804 (c). For all of the reasons mentioned by the Court in its discussion of items "2", "4" and "5" of the FOIL requests dated June 6, 1997 and June 13, 1997, the Court finds that respondents have failed in their burden to establish that the records are exempt. The petition must therefore be granted and the records must be disclosed.

Foil Request dated June 26, 1998:

Petitioner's letter dated June 26, 1998 requested the following:

1. A copy of any and all documents in the possession of the county executive's office, regardless of date, which establishes an "On call, as needed" classification for any county employees.
2. A copy of any civil service classification of so called "On Call as Needed" employees.
3. A copy of any record declaring Dirk Van Ort or the position he held as Public

Education Coordinator for E 911 as "On call as Needed" employee status.

4. Any and all records which identify the names and titles of all county employees now or within the last two years who hold or have held the status of "On Call as Needed" for their employment status.

In a response dated July 14, 1997 respondent advised petitioner that the request was denied "due to the fact that it may interfere with an ongoing investigation of the District Attorney and deprive a person of a right to an impartial adjudication". While an exemption is provided under POL § 87 (2) (e) with regard to a law enforcement investigation, as previously mentioned herein, respondents have not submitted supporting affidavits under CPLR 7804 (c) to establish the elements of the exemption under this subdivision. Nor would this exemption necessarily be applicable to all of the records requested. Moreover, the Court is of the view that these items are properly disclosable under FOIL under the "factual data" exception to POL § 87 (2) (g) (see, Gould v NYC Police Dept., supra) and do not represent an unwarranted invasion of employee personal privacy (see, Matter of Buffalo News v Buffalo Municipal Housing Authority, supra). The Court finds that the petition must be granted and the documents must be produced.

FOIL Request Dated July 7, 1997:

Petitioner's July 7, 1997 letter requested "a copy of the tape which recorded transmissions and dispatch of an "intercept" to meet the Berlin Volunteer Ambulance carrying patient Leo Fisette, a heart attack victim. The incident took place during the month of June 1997." Respondent denied the request on July 11, 1997 under County Law § 308 (4), which recites:

Records, in whatever form they may be kept, or calls made to a municipalities E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services.

In view of the specific statutory protection, even though the respondent County relied again upon a blanket exemption, which is insufficient as a matter of law, the Court will nevertheless conduct an in camera review of the tape for protection of the privacy interest of persons other than County employees or emergency personnel who may have called in to the 911 system. The Court directs that respondent make the tape (or tapes) available to the Court for in camera inspection, together with a written

transcript of the call (or calls).

FOIL request Dated July 22, 1997:

Petitioner's July 22, 1997 letter requested the following:

- 1) Time and attendance records for the Health Director, Janet Atwater, January 1, 1996 to date.

Petitioner also seeks in the July 22, 1997 letter an explanation by the County Executive with respect to the content of the records. As to the requested explanation from the County Executive, FOIL is clearly not applicable.

As previously commented herein, it appears that the time and attendance records are disclosable under FOIL under the "factual data" exception to POL § 87 (2) (g) (see, Gould v NYC Police Dept., supra) and do not represent an unwarranted invasion of employee personal privacy (see, Matter of Buffalo News v Buffalo Municipal Housing Authority, supra). Apart from the foregoing, for the reasons mentioned by the Court in its discussion of items "2", "4" and "5" of the FOIL requests dated June 6, 1997 and June 13, 1997, the Court finds that respondents have failed in their burden to

establish that the records are exempt. Accordingly, the Court finds that the time and attendance records must be produced.

FOIL Requests Dated September 8, 1997/September 16, 1997

On September 8, 1997 and September 16, 1997 petitioner made FOIL requests for the following records:

- . A copy of any and all records reflecting payments made to Rensselaer County, its boards, commissions, corporations or agencies by Periguine Development for the purchase of the old Van Rensselaer Manor, January 1, 1997 to date.

While there is no mention in the record of a written denial of these FOIL requests, it appears that the records were not produced. Respondents have not indicated what specific FOIL exemption would apply. For all of the reasons mentioned by the Court in its discussion of items "2", "4" and "5" of the FOIL requests dated June 6, 1997 and June 13, 1997, and its discussion of the FOIL request dated June 25, 1997, the Court finds that respondents have failed in their burden to establish that the records are exempt. The Court finds that the petition must be granted and the records must be produced.

Attorneys Fees

The petitioner has made a request for an award of counsel fees. As stated in Matter of Corvetti v Town of Lake Pleasant, 239 AD2d 841 [Third Dept., 1997]:

"It is well settled that [a] party may receive counsel fees in a FOIL proceeding when it is established that (1) the petitioner substantially prevailed, (2) the record requested was of "clearly significant interest to the general public", and (3) "the agency lacked a reasonable basis in law for withholding the record" * * * (Matter of Urac Corp. v Public Serv. Commn. of State of N.Y., 223 AD2d 906, 907, quoting Matter of Powhida v City of Albany, 147 AD2d 236, 238, quoting Public Officers Law § 89 [4] [c] [i], [ii] [citation omitted]). However, even if these elements are met, an award of counsel fees remains within the discretion of the court (see, Matter of Urac Corp. v Public Serv. Commn. of the State of N.Y., *supra*, at 907; see also, Public Officers Law § 89 [4] [c]).

Matter of Corvetti v Town of Lake Pleasant (supra, pp. 843-844)

It is evident from the foregoing that the petitioner has substantially prevailed and, upon the instant record, that the respondents did not have a reasonable basis to withhold the documents. It has not been established, however, that the records in question are of "clearly significant interest to the general

public". Under the circumstances, the Court finds that the application for attorneys fees must be denied.

Conclusion

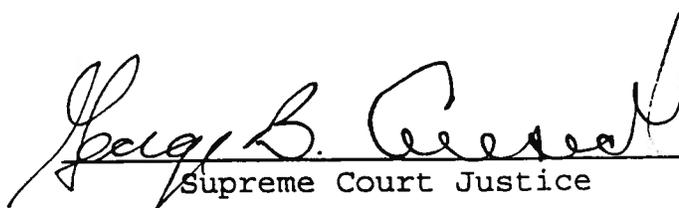
In accordance with the foregoing, within twenty (20) days of the date of entry and service hereof, all records referred to herein must be delivered to the petitioner, except in the case of the records pursuant to the FOIL request dated July 7, 1997, which must be delivered to the Court for in-camera inspection.

SO ORDERED and ADJUDGED!

This shall constitute the decision and order and judgment of the Court.

ENTER

Dated: Troy, New York
December 17, 1998


Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition, Petition and Exhibits
2. Answer dated February 2, 1998
3. Reply To Answer