

PRESENT: HON. THOMAS J. McNAMARA  
Acting Justice

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

GENERAL ELECTRIC COMPANY,

Petitioner,

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law & Rules of the State of New York

-against-

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,

Respondent.

DECISION and ORDER  
Index No. 2109-00  
RJI No. 01-00-ST0819

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NEW YORK STATE  
COMMITTEE ON  
OPEN GOVERNMENT

GENERAL ELECTRIC COMPANY,

Petitioner,

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law & Rules of the State of New York

-against-

NEW YORK STATE DEPARTMENT OF LAW,

Respondent.

Index No.: 2648-00  
RJI No.: 01-00-ST0885

(Supreme Court, Albany County, Special Term June 16, 2000)

(Acting Justice Thomas J. McNamara, Presiding)

APPEARANCES: Harold N. Iselin, Esq.  
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(Attorneys for Petitioner)  
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General Electric Company v NYS DEC  
General Electric Company v NYS DOL

Albany, New York 12201

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Office of the Attorney General  
Elizabeth A. Grisaru, Esq. and  
Katherine Hudson, Esq., Assistant Attorneys General  
(Attorneys for Respondents)  
The Capitol  
Albany, New York 12224

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McNamara, J.

Petitioner brought these proceedings pursuant to CPLR Article 78 to review determinations by respondents denying portions of petitioner's requests under the Freedom of Information Law (FOIL).

On February 22, 1999 petitioner sent a written request pursuant to Public Officers Law Article 6 (§84, et seq.; FOIL) to the Department of Environmental Conservation (DEC) asking the agency to make available for inspection and copying the agency file for General Electric's Fort Edward plant. In its initial response the agency partially denied the application and identified 434 documents which DEC determined to be exempt under the provisions of FOIL. In the response the agency also claimed that documents on the computer hard drive of Kevin Farrar, an engineering geologist in the DEC Division of Environmental Remediation, were exempt. An appeal of the initial response was made to the agency FOIL appeals officer for release of the Farrar records and 18 of the 434 other documents. Seventeen of the eighteen other documents were found to be properly withheld as were 34 of the documents comprising the Farrar records. Subsequent to the filing of the

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petition here, certain of those documents were made available to petitioner and the dispute has been narrowed to a single document prepared by Kevin Farrar.

The Freedom of Information Law unequivocally opens to the public for inspection all agency records unless the record falls within one of the exemptions enumerated in the statute (Matter of Gould v New York City Police Dept, 89 NY2d 267; Public Officers Law §87[2]). Exemptions are to be narrowly construed to ensure maximum access (Matter of Fink v Lefkowitz, 47 NY2d 567) and the agency bears the burden of proving that an exemption applies (Public Officers Law §89[4][b]).

In denying access to the remaining Farrar document DEC maintains that it is a document which FOIL specifically exempts as inter-agency and intra-agency materials which are not statistical or factual tabulations or data, instructions to the staff that affect the public, final agency policy or determinations, or external audits (Public Officers Law §87[2][g]).

The document is described by Mr. Farrar as two pages of hypothetical scenarios, and calculations based on those hypotheticals, devised to test the usefulness of two approaches to remediate PCB contamination at the Fort Edward site. In his role as project manager for the Fort Edward site, Mr. Farrar had responsibility for drafting the proposed remedial action plan (PRAP) which is the agency's recommended strategy for remedying the PCB contamination at the site. According to Mr. Farrar, the document at issue was prepared in the preliminary stages of drafting the PRAP based on hypothetical scenarios he created. He avers, however, that he determined that the two approaches were not useful and were not thereafter considered in preparing the PRAP.

Petitioner argues that the document contains calculations which are objective factual data and

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therefore, not exempt as inter-agency or intra-agency materials (Public Officers Law §87(2)(g)(i)). The argument is based on the presence in the document of calculations concerning the quantities of PCB's potentially discharged to the Hudson River from Fort Edward bank sediment.

The terms factual tabulations and factual data though not defined in the statute have been interpreted to mean statements of objective information in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (Matter of Gould v New York City Police Dept, 89 NY2d 267; Matter of Weston v Sloan, 84 NY2d 462). The meaning of the term is discerned from the purpose underlying the intra-agency exemption, which is to protect the deliberative process of the government by ensuring that persons in an advisory role are able to express their opinions freely to agency decision makers (Matter of Gould v New York City Police Dept., supra at 276). The reasoning behind the protection of opinions from disclosure is that the inherent dangers involved in releasing non-final recommendations which may be based on reasoning rejected, or never adopted, by the final decision maker will not only impinge on the agency's pre-decisional process, but mislead the public (Matter of David v Lewisohn, 142 AD2d 305).

The argument that the calculations are objective data not subject to exemption is rejected. The portion of the document containing the scenarios devised by Mr. Farrar clearly represents part of the deliberative process of the agency in preparing the PRAP and the contents are hypothetical not factual. The calculations, therefore, must also be termed hypothetical rather than factual as they have no meaning except when related to the hypothetical scenarios. Release of either the scenarios or the calculations would only serve to provide insight into the deliberative process and defeat the reason

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for the protection afforded by the exemption (see, Matter of David v Lewisohn, 142 AD2d 305).

The FOIL request to the Department of Law (DOL) was made on October 29, 1999 and sought all documents relating to communications between the DOL and the United States Environmental Protection Agency (EPA) relating to PCBs in the Hudson River during the period from January 1, 1999 to the date of the request. The request was denied in full on multiple grounds. Petitioner appealed the denial and was provided with 429 pages of records though the initial denial was adhered to for certain other documents. Subsequent to the filing of the petition in this matter additional documents were provided and presently the dispute has been narrowed to two documents. One is a letter from an assistant attorney general in the DOL to attorneys at EPA and the United States Department of Justice (DOJ). The other is a memorandum from the same assistant attorney general to attorneys for the DOJ. Both documents concern litigation then being contemplated by the New York State Attorney General against GE over dredging and navigation problems resulting from the presence of PCBs in Upper Hudson River and the Champlain Canal. Respondent has raised four bases for denying the request for these documents: specifically exempted by state statute (Public Officers Law §87[2][a]; attorney work product [CPLR 3101]), law enforcement purposes (Public Officers Law §87[2][e]), inter-agency material (Public Officers Law §87[2][g]) and collateral estoppel.

The second, third and fourth bases for exempting the documents at issue were not raised in the initial letter rejecting the request or in the determination of the subsequent appeal. Respondent maintains that an Article 78 proceeding brought to review a determination made under FOIL requires

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a de novo review of the matter and therefore, permits new grounds to be asserted for withholding the documents.

It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency (Matter of Aronsky v Board of Educ. Community School Dist. No. 22 of City of N.Y., 75 NY2d 997, certiorari to review; Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, mandamus to review) though the rule is not applied where the nature of the proceeding under Article 78 is akin to mandamus to compel (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 162 AD2d 967, revd on other grounds, 77 NY2d 753). Determining the nature of the proceeding, therefore, is necessary to resolving the issue of whether respondent may assert an exemption for the first time here.

In a proceeding in the nature of mandamus to compel, petitioner must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief (see, CPLR 7803 [1]; Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753). In a proceeding in the nature of mandamus to review, however, a court examines an administrative action involving the exercise of discretion (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753). Discretionary acts involve the exercise of reasoned judgment which could typically produce different acceptable results while a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result (Tango v Tulevech, 61 NY2d 34, 41).

Although an agency has no discretion under the statute and must grant access to non-exempt

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material, it does not follow that an Article 78 proceeding involving a request under FOIL is in the nature of mandamus to compel as the agency may withhold the documents if one of the statutory exemptions apply (Public Officers Law §87). In determining whether any of the exemptions apply an agency relies on the judgment of, in this instance, the agency records access officer and if that determination is administratively appealed, the judgment of the agency records access appeals officer. The determination of whether one of the exemptions applies clearly involves an exercise of reasoned judgment which, as the determinations regarding the initial request and the appeal show, can produce different results. That exercise of discretion places the Article 78 proceeding challenging such a determination in the fold of mandamus to review. Accordingly, the law enforcement exemption and the claim of inter-agency material, raised for the first time here, will not be considered.

Respondent also maintains that documents need not be released because as provided by Public Officers Law §87[2][a], there is a specific exemption under state statute: the attorney work product privilege in CPLR 3101. The attorney work product privilege exists primarily to protect from disclosing to party adversaries the attorney's mental thought process in determining the significance of evidence and the strategies and arguments he has developed in preparing a case for trial (Matter of Grand Jury Subpoenas, 142 Misc 2d 229). The documents at issue here fit within the parameters of the privilege.

Though sharing the work product with a third party waives the privilege, there is an exception referred to in the case law as the common interest privilege. The common interest privilege has been applied mostly in criminal cases and largely in situations involving the attorney-client privilege.

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However, the exception has also been applied in civil cases (see e.g., Parisi v Leppard, 172 Misc.2d 951) and where the attorney work product privilege is at issue (see e.g., People v Calandra, 120 Misc.2d 1059, rev'd on other grounds 164 AD2d 638). The reason for extending the privilege is that a party and his counsel may expect that confidences will be kept in communications with another if the purpose of the communication is to share information in furtherance of a common legal strategy (see, People v Osorio, 75 NY2d 80).

Respondent maintains that the State of New York and the federal government have a common legal interest in cleanup of PCB's in the Hudson River. If so, the attorney work product privilege is not waived by release of the documents to attorneys of the federal government involved in PCB cleanup enforcement. In accordance with its responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, 42 USC §9601, *et seq.*) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP, 40 CFR Part 300), EPA has been conducting an environmental investigation of the Hudson River PCBs Superfund Site (Site). The Site is on the National Priorities List which was established pursuant to 42 USC §9605. As the lead agency for the Site, EPA is required under the NCP to develop its proposed remedial action plan in conjunction with the State and to ensure meaningful and substantive participation by the State. The circumstances make clear the federal government has a common legal interest with the State in remediating PCB contamination of the Hudson River. Given their common legal interest, the State did not waive the attorney work product privilege by sharing legal strategies with attorneys for the federal government.

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The petitions are dismissed and the motion to dismiss or to consolidate is denied as moot.

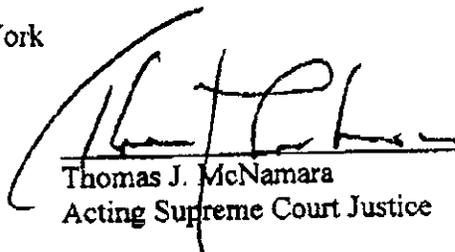
This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to respondent's attorney.

The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.  
ENTER.

Dated: Saratoga Springs, New York  
September 14, 2000

  
Thomas J. McNamara  
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition (Index No.: 2109-00) dated April 10, 2000.
2. Verified Petition sworn to the 20<sup>th</sup> day of March, 2000 with exhibits annexed.
3. Petitioners Memorandum of Law in Support dated May 5, 2000.
4. Respondent DEC's Notice of Motion to Dismiss or to Consolidate dated May 31, 2000.
5. Affirmation of Elizabeth A. Grisaru, Esq., dated May 31, 2000 with exhibits annexed.
6. Respondent's Memorandum of Law in support dated May 31, 2000.
7. Reply Affidavit of Harold N. Iselin, Esq., sworn to the 9<sup>th</sup> day of June, 2000 with exhibits annexed.
8. Petitioner's Memorandum of Law in Opposition dated June 9, 2000.
9. Affirmation of Elizabeth A. Grisaru, Esq., dated June 15, 2000 with exhibits annexed.
10. Respondent's Rely Memorandum of Law dated June 15, 2000.
11. Notice of Petition (Index No.: 2648-00) dated May 3, 2000
12. Verified Petition sworn to the 3<sup>rd</sup> day of May, 2000 with exhibits annexed.
13. Respondent's Consolidated Answer and Objections in Point of Law (Index Nos.: 2109-00 and 2648-00) dated July 17, 2000 with exhibits annexed.

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14. Affirmation of Paul Simon, Esq., dated July 13, 2000 (Index Nos.: 2109-00 and 2648-00).
15. Affidavit of Michael J. O'Toole, Jr. sworn to the 14<sup>th</sup> day of July, 2000 with exhibits annexed (Index Nos.: 2109-00 and 2648-00).
16. Affirmation of Charles J. Sullivan, Jr., Esq., dated July 12, 2000 (Index Nos.: 2109-00 and 2648-00).
17. Affidavit of Susan J. Dubois sworn to the 14<sup>th</sup> day of July, 2000 (Index Nos.: 2109-00 and 2648-00).
18. Affidavit of Ruth L. Earl sworn to the 14<sup>th</sup> day of July, 2000 (Index Nos.: 2109-00 and 2648-00).
19. Affidavit of Steven Jay Sanford sworn to the 17<sup>th</sup> day of July, 2000 (Index Nos. 2109-00 and 2648-00).
20. Affirmation of Dietrich L. Snell, Esq., dated July 14, 2000 (Index Nos.: 2109-00 and 2648-00).
21. Affirmation of Paul Simon, Esq., dated July 13, 2000 with exhibits annexed (Index Nos.: 2109-00 and 2648-00).
22. Affirmation of Thomas B. Litsky, Esq., dated July 12, 2000 (Index Nos.: 2109-00 and 2648-00).
23. Respondent's Memorandum of Law dated July 17, 2000, corrected July 19, 2000 with exhibits annexed (Index Nos.: 2109-00 and 2648-00).
24. Petitioner's Reply Memorandum of Law in Support of Verified Petitions dated August 1, 2000 (Index Nos.: 2109-00 and 2648-00).
25. Affidavit of Michael S. Elder sworn to the 1<sup>st</sup> day of August, 2000 with exhibits annexed (Index Nos.: 2109-00 and 2648-00).
26. Affidavit of Kevin L. Farrar sworn to the 3<sup>rd</sup> day of August, 2000 (Index Nos.: 2109-00 and 2648-00).
27. Respondent's Reply Memorandum of Law dated August 8, 2000.