

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
THE HEARST CORPORATION and JAMES M. ODATO,
Petitioners,

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

DECISION AND ORDER

-against-

Index No. 6107-09
RJI No. 01-09-ST0493

THE RESEARCH FOUNDATION OF STATE
UNIVERSITY OF NEW YORK,

Respondent.

(Supreme Court, Albany County, Special Term)

APPEARANCES:

Jonathan R. Donnellan, Esq.
Attorneys for Petitioners
(Eva M. Saketkoo, Esq., of Counsel)
Office of General Counsel
The Hearst Corp.
300 West 57th Street
New York, New York

Hinman Straub PC
Attorneys for Respondent
(James T. Potter, Esq., of Counsel)
121 State Street
Albany, New York 12207-1693

Connolly, J.:

Petitioners The Hearst Corporation and James M. Odatto challenge respondent The Research Foundation of State University of New York's denial of their Freedom of Information Law (FOIL) request for timesheets and other personnel information concerning Susan Bruno, a former employee of respondent. Pursuant to an earlier motion to dismiss, the Court has previously dismissed petitioners' claims regarding time sheet information for the year 2006.

FOIL, which is codified in Public Officers Law at Article 6, was enacted to foster the public's "inherent right to know" the workings of government (*Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 [1979]). FOIL promotes openness with respect to government operations (*Matter of Capital Newspapers v. Whalen*, 69 NY2d 246, 252 [1987]). Under FOIL, records in the possession of a public agency are presumed to be available for public inspection and copying unless they fall within one of the specific exceptions established in Public Officers Law § 87(2) (*Matter of Gould v. New York City Police Department*, 89 NY2d 267, 274 [1996]; *Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of NY at Farmingdale*, 87 NY2d 410, 417-418 [1995]; *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562, 566 [1986]; *Matter of Troy Sand and Gravel Co. Inc. v. New York State Dept., of Transp.*, 277 AD2d 782, 784 [3rd Dept., 2000]).

The sole basis of respondent's refusal to grant petitioners access to the documents in question is respondent's assertion that it is not an agency within the meaning of FOIL and therefore is not subject to FOIL. Petitioners argue that respondent is barred by the doctrine of collateral estoppel from relitigating the issue of whether respondent is subject to FOIL. Collateral estoppel is an equitable doctrine that rests on considerations of fairness and efficiency. Where a pending issue was previously raised, material to, and necessarily decided in a prior action in which the party to be estopped had a full and fair opportunity to litigate the issue, then fairness and efficiency dictate that the party should not be permitted to try the issue again (*Bansbach v. Zinn*, 1 NY3d 1, 10 [2003]; *Pinnacle Consultants v. Leucadia Natl. Corp.*, 94 NY2d 426, 431-432 [2000]; *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Olsson v. MacDonald*, 16 AD3d 1017, 1017 [3rd Dept., 2005]; *Pahl v. Grenier*, 279 AD2d 882, 883 [3rd Dept., 2001]). The party seeking the benefit of collateral estoppel has the initial burdens of establishing that the identical issue was necessarily decided in the prior action and is decisive in the present action. If those initial burdens are met, the

party attempting to defeat the application of collateral estoppel has the burden of establishing the absence of a full and fair opportunity to contest the prior determination (*D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

Petitioners have met their initial burden by presenting the March 26, 2007 Judgment of the Honorable Thomas J. McNamara in the case of *Matter of Dominick J. Siani v. The Research Foundation of the State University of New York, et al.*, Index No. 6976-06, in which respondent raised the same defense presented here and Judge McNamara, in a detailed analysis, determined that respondent is subject to FOIL and ordered respondent to provide petitioner with unredacted copies of requested documents. The issue of whether respondent is subject to FOIL was necessarily decided by Judge McNamara because there was no basis other than FOIL for ordering respondent to release the unredacted documents.

Petitioners having met their initial burden, it falls to respondent to demonstrate that it would be improper or inappropriate to apply collateral estoppel in this case. The Court rejects respondent's argument that collateral estoppel is inapplicable here because Judge McNamara's determination was purely on a question of law. Pure questions of law, such as whether an excess carrier must make a showing of actual prejudice when it seeks to avoid its coverage obligations because of late notice or interpretation of an unambiguous contract, are not subject to the doctrine of collateral estoppel, but mixed questions of law and fact are subject to discretionary collateral estoppel (*American Home Assur. Co. v. International Ins. Co.*, 90 NY2d 433, 440 [1997]; *Matter of McGrath v. Gold*, 36 NY2d 406, 411 [1975]; *Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 223 [1st Dept., 2006]; *Brown v. State of New York*, 9 AD3d 23, 27 [3rd Dept., 2004]). Respondent's own arguments regarding why it should not be held to be subject to FOIL, as well as Judge McNamara's analysis, demonstrate that the question of whether respondent is subject to FOIL is a mixed question

of law and fact that depends on analyzing statutes, case law, and the particular facts surrounding the creation and operation of respondent.

The Court rejects respondent's argument that it did not have a full and fair opportunity to contest the prior determination that it is subject to FOIL. Respondent provides no evidence regarding the arguments it made to Judge McNamara in *Siani* regarding FOIL. Even assuming for the purposes of the argument that respondent submitted no arguments regarding the applicability of FOIL to Judge McNamara, respondent has failed to provide any evidence that it was unaware of the issue or to explain why respondent did not have a full and fair opportunity to contest the determination that respondent is subject to FOIL.

Instead of presenting evidence relevant to that issue, respondent relies on unsworn conclusory statements and speculation contained in its memorandum of law. An affidavit or affirmation of an attorney who does not have personal knowledge of the facts, has no evidentiary value, and must be disregarded (*Zuckerman v. City of New York*, 49 NY2d 557, 560, 563 [1980]; *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 NY2d 496, 500 [1977]). In the absence of any showing of what respondent presented to Judge McNamara, counsel's speculation regarding possible ways that Judge McNamara could have decided the issues in petitioner's favor without addressing the question of respondent's being subject to FOIL must also be rejected.

The Court further rejects respondent's assertion that it should not be held subject to collateral estoppel because *Siani* was "moot" prior to the time that Judge McNamara issued his decision. No evidence has been provided to support that respondent even argued that the matter was moot prior to Judge McNamara's determination.

The Court also rejects the premise upon which respondent bases its claim that it did not have a full and fair opportunity to litigate the issue in *Siani*. Even assuming for the purposes of the

argument that respondent's interest in the redacted portions of the record was de minimis, respondent was defending its determination not to release the documents by claiming non-application of FOIL. Thus, that issue was also at stake in *Siani*. The Court concludes that respondent is barred by the doctrine of collateral estoppel from relitigating the issue of whether respondent is subject to FOIL.

FOIL is to be liberally construed in favor of the public and its exemptions narrowly interpreted to effectuate maximum public access to government records (*Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 NY2d 557 [1984]; *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 [1979]). That burden is not met by an agency's simply invoking an exemption without articulating a "particularized and specific justification" for non-disclosure (*Matter of Gould v. New York City Police Department*, 89 NY2d 267, 275 [1996]). Where a governmental agency seeks to avoid disclosure, it bears the burden of both articulating a particularized and specific justification for denying access to its records (*Matter of New York Times Co. v. New York State Dept., of Health*, 243 AD2d 157 [3rd Dept., 1998]; *Matter of Johnson v. New York City Police Dept.*, 257 AD2d 343 [1st Dept., 1999]) and demonstrating the applicability of a specific statutory exemption (*Matter of Daily Gazette Co. v. City of Schenectady*, 93 NY2d 145 [1999]; *Matter of M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 NY2d 75 [1984]). Respondent has set forth no specific basis, with the exception of that rejected above, for holding that the requested documents are exempt from disclosure. Thus, petitioners are entitled to all of the requested documents, with the exception of the 2006 timesheets.

Accordingly, the Court finds that petitioners have met their burden of proof in this proceeding.

As regards petitioners' request for attorneys fees and costs, a party may, in the Court's discretion, be awarded reasonable attorneys' fees and litigation costs pursuant to Public Officer's

Law § 89(4)(c) when the petitioner substantially prevailed and the agency had no reasonable basis for denying access. The question of whether the respondent had a reasonable basis for denying access to the documents is not answered in the negative simply because respondent was ultimately required to disclose documents (*Matter of Norton v. Town of Islip*, 17 AD3d 468, 469 [2nd Dept., 2005]; *Matter of Hopkins v. City of Buffalo*, 107 AD2d 1028, 1029 [4th Dept., 1985]). Collateral estoppel based on the *Siani* decision was an issue before the outset of this litigation. After carefully considering all of respondent's arguments against being collaterally estopped from denying that it is subject to FOIL, the Court finds that respondent had no reasonable basis for such denial. Petitioners are accordingly entitled to attorneys fees and costs for that portion of the within litigation attributable to the litigation of these issues, disposed of by virtue of the within determination.

In the exercise of the Court's discretion, and given the more reasonable (and legally substantial) basis for respondent's original motion to dismiss, the Court will not grant attorney's fees and costs to petitioner for that portion of the litigation which gave rise to respondent's motion to dismiss on such grounds, or on the fees and costs associated with such motion.

Therefore, it is hereby

ORDERED, that the petition is granted and respondent is directed to provide petitioners with immediate access to the records specified in petitioners' FOIL request with the exception of the 2006 timesheets; and it is hereby

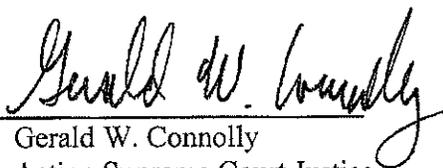
ORDERED, that petitioners file, on notice, affidavits setting forth their counsel fees and costs within 14 days of this decision and order; a hearing upon such fees will be scheduled thereafter.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for petitioners. The below referenced

original papers are being mailed to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry the Albany County Clerk.**

SO ORDERED.
ENTER.

Dated: September 17, 2010
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated July 15, 2009;
2. Petition dated July 10, 2009;
3. Affidavit of Eva M. Saketkoo dated July 15, 2009, with exhibits annexed;
4. Memorandum of Law dated July 15, 2009;
5. Answer dated February 5, 2010;
6. Affidavit of Catherine J. Kaszluga dated January 12, 2010, with exhibits annexed;
7. Memorandum of Law dated January 12, 2010;
8. Memorandum of Law dated July 12, 2010;
9. Transcript of Oral Argument dated July 14, 2010.