

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

THE HERALD COMPANY, MICHAEL F. MCANDREW and
MICHELLE BREIDENBACH,

Petitioners,

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

Index No. 4472-06
RJI No. 01-06-ST6880

-against-

NEW YORK STATE DEPARTMENT OF ECONOMIC
DEVELOPMENT, DONALD T. ROSS, in his official capacity as
Deputy Commissioner and General Counsel of the New York
State Department of Economic Development, and LISA M.
BONACCI, in her official capacity as Assistant Counsel and
Records Access Officer of the New York State Department of
Economic Development,

Respondents.

(Supreme Court, Albany County, Special Term)

DECISION, ORDER AND JUDGMENT

APPEARANCES:

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Leslie E. Stein, J.

Petitioners commenced this Article 78 proceeding pursuant to the Freedom of Information Law (FOIL) to compel the release of records within the control of the New York State Department of Economic Development (DED). Specifically, petitioners seek reversal of the March 15, 2006 and May 23, 2006 decisions of respondent DED which denied petitioners' FOIL requests. Requested is "Section D" data from the DED's 2003 Business Annual Report (BAR) regarding businesses participating in New York State's Empire Zones Program. In denying petitioners' requests, respondents cite both the "trade secret" exemption from disclosure contained in Public Officer's Law §87(2)(d) and the provisions of Article 9-A of the New York State Tax Law. Petitioners specifically seek to compel respondent to produce the Section D data and request an award of attorneys' fees. Respondent answered the petition, requesting that the petition be dismissed and raising the objection in point of law that the petition fails to state a cause of action.

The Freedom of Information Law ensures open government (*see Newsday v Empire State Dev.*, 98 NY2d 359, 362 [2002]) and "imposes a broad duty on government to make its records available to the public" (*Gould v NYC Police Dept.*, 89 NY2d 267, 274 [1996]). There is a presumption of discoverability subject only to the applicability of one or more of ten specifically enumerated statutory exemptions (*see Matter of Sunset Energy Fleet, LLC v New York State Department of Environmental Conservation*, 285 AD2d 865, 866 [2001]; Public Officers Law §87(2)). These exemptions are to be narrowly construed and the burden of proof rests with the government to prove the necessity of withholding records from the public (*see Gould v NYC Police Dept.*, *supra*, citing *Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109 [1992]).

The “trade secret” exemption allows for the protection of government documents which either constitute a trade secret or “are submitted to an agency by a commercial enterprise . . . [and] if disclosed would cause substantial injury to the competitive position of the subject enterprise” (Public Officers Law §87[2][d]). “A trade secret is defined as ‘any formula, pattern, process . . . or compilation of information that is not published or divulged and which gives an advantage over competitors who do not . . . have access to such data’ (6 NYCRR 616.7 [c] [2] [v]).” (*Sunset Energy Fleet L.L.C. v State Dep’t of Envtl. Conservation*, 285 AD2d 865, 867 [2001]). The policy behind Public Officers Law §87[2][d] is “to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York” (*Encore College Bookstores v Auxiliary Serv. Corp.*, 87 NY2d 410, 420 [1995]).

The Empire Zones Program provides tax incentives for new businesses that create economic opportunities in distressed urban areas (at the time the petition was filed there were 72 Empire Zones throughout the State). Businesses that qualify for benefits under the program are entitled to certain valuable tax advantages, including sales tax exemptions, real property tax credits and business tax credits. The real property tax credits are subsidized by the State. The alleged trade secret, Section D of the BAR, requires a Qualified Empire Zone Enterprise (QEZE) to detail the dollar value of each tax credit claimed over the course of a year.

Petitioners argue that the data in question is determined through a complex formula which reflects several aspects of a business’s operation and management and, therefore, is not singularly revealing. Petitioners further argue that even DED’s own regulations protecting

confidentiality do not mention Section D data. In addition, petitioners allege that some of the businesses involved have, themselves, provided petitioners with the data, indicating that they do not treat it as confidential.

Petitioners have also submitted an opinion from the Committee on Open Government which supports petitioner's argument that the BAR data is not exempt from disclosure as a matter of law. The Committee on Open Government is the State agency charged with administering the Freedom of Information Law. Therefore, its interpretation of the statute, if not irrational or unreasonable, should be upheld and deferred to by the Court (*see Kwasnik v City of New York*, 262 AD2d 171, 172 [1999]; *Miracle Mile Associates v Yudelson*, 68 AD2d 176, 181 [1979]; *Daily News Pub. Co. of Memphis, Tenn. v Office of Court Admin. of the State of NY*, 186 Misc 2d 424, 427 [2000]).

In defense of their refusal to relinquish Section D data, respondents assert that the data is valuable and that its publication would disadvantage businesses participating in the Empire Zone program. However, respondents offer no evidence in support of this assertion and fail to articulate how the disclosure of such information would disadvantage participating businesses. Nor have respondents demonstrated the likelihood of substantial competitive injury if the data is released. It is not sufficient as a matter of law to state that disclosure could disadvantage QEZEs (*see Sunset Energy Fleet L.L.C. v State Dep't of Env'tl. Conservation, supra*; *Encore College Bookstores v Auxiliary Serv. Corp., supra*).

Respondents further argue that, in accordance with Public Officers Law §89[5][b], disclosure of the Section D data will require them to individually request permission from over 10,000 businesses. This admittedly massive undertaking is not necessary. Public Officers Law

§89[5][b] requires notification by the State of the intention to disclose personal or professional information only to those persons who have sought an exception from the disclosure rules where such request for an exception has been granted. Therefore, unless participating businesses in the Empire Zones program have specifically made such requests and such exceptions have been granted, the DED possesses no duty to inform businesses participating in the program of their intent to disclose the information requested herein.

Furthermore, it is clear that the intent of section 202 of the New York State Tax Law is "to assure every taxpayer making returns that the information therein contained will remain confidential and will be used only for the purpose of computing his tax" (*Application of Manufacturers Trust Co.*, 269 AD 108, 113 [1945]), thereby facilitating "tax enforcement by encouraging taxpayers to make full and truthful declarations without fear that these statements will be revealed or used against them for other purposes" (*Tartan Oil Corp. v State Dep't of Taxation & Fin.*, 239 AD2d 36, 38-39 [1998]).

BAR data is provided directly to Empire State Development, an agency of DED. Empire State Development administers the Empire Zones Program in conjunction with the Department of Labor and the Department of Taxation and Finance. However, BARs are not tax returns and are not submitted directly to the Department of Taxation and Finance. Thus, the fact that the data set forth in the BARs may be derived from tax forms or may be compiled in the same manner as the information on the tax forms does not place such data within the protection of the confidentiality provisions of the Tax Law (*see* Tax Law §202, §697[e]; 26 USC 6103).

While determinations of state agencies within their area of expertise are afforded deference, this cannot hold true if their interpretation is "irrational, unreasonable [or] inconsistent

with the governing statute” (*Trump-Equitable Co. v Gliedman*, 62 NY2d 539, 545 [1984]).

Based upon the foregoing, the Court concludes that respondents’ determinations herein were inconsistent with the governing statute(s).

Finally, the Court notes that, under FOIL, attorney’s fees may be awarded to a petitioner if they have “substantially prevailed” and meet two conditions: (1) the requested records are “of clearly significant interest to the general public”, and (2) “the agency lacked a reasonable basis in law” for withholding the requested records” (*Beechwood Care Ctr. v Signor*, 5 NY3d 435, 441 [2005], citing Public Officers Law §89[4][c]). Requested records must be of “clear and significant interest” to the public, not merely of potential interest (*see Beechwood Care Ctr. v Signor, supra*). Even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court (*see Matter of Henry Schein, Inc. v Eristoff*, 2006 NY Slip Op 9983, 2 [2006]).

The Empire Zones Program involves a substantial amount of public funds, is somewhat controversial and is a state-wide program which financially affects both businesses and individuals. Therefore, the records sought herein are clearly of significant interest to the general public. However, petitioners have not demonstrated that respondents have failed to articulate “a reasonable basis in law” to justify their position. Notwithstanding this Court’s determination that respondents’ reliance on the trade secret exemption under FOIL and/or on the Tax Law was without merit, there is no evidence that such reliance was unreasonable or in bad faith. Specifically, petitioners’ allegations that respondents’ refusal to disclose the records sought was based upon their concern regarding the “political palatability” of such disclosure were unsubstantiated. Weighing respondents’ contention that the provisions of the Tax Law applied

and precluded them from disclosing the information, together with their concern that they might undermine the program by disclosing "private" information, as well as their concern relating to the potentially burdensome obligation to notify participants prior to disclosure, the Court finds that respondents' determination was not so unreasonable as to warrant an award of attorneys fees (see *Matter of Todd v Craig*, 266 AD2d 626 [1999]). Thus, petitioners' request for attorneys fees shall be denied.

Accordingly, it is hereby

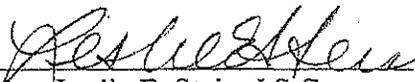
ORDERED and ADJUDGED, that the petition is granted to the extent that respondents' determinations dated March 15, 2006 and May 23, 2006 denying petitioners' requests for Section D of the Department of Economic Development's Business Annual Reports are hereby reversed; and it is further

ORDERED and ADJUDGED, that petitioners' request for attorneys fees is denied.

This shall constitute the Decision, Order and Judgment of the Court. All papers are returned to petitioners' attorneys, who are directed to enter this Decision, Order and Judgment without notice, and to serve respondents with a copy of the Decision, Order and Judgment with notice of entry.

So Ordered and Adjudged.

Dated: February 8, 2007
at Albany, New York


Leslie E. Stein, J.S.C.