

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
THE HERALD COMPANY and MARK LIBSON,

Petitioners,

For a Judgment Pursuant to Article 78 of the CPLR

- against -

MEMORANDUM
DECISION

THE NEW YORK STATE LOTTERY, a Division of the New
York State Department of Taxation, JOHN D. QUINN,
as Director of The New York State Lottery, and
GEORGE J. YAMIN, as Freedom of Information Officer
of the New York State Lottery,

Respondents.

Supreme Court, Albany County Special Term, August 28, 1987

Justice Daniel H. Prior, Jr., Presiding

(#01-87-ST0944; Cal. #1)

APPEARANCES:

For the Motion:

Sabin, Bermant & Blau,
Attorneys for Petitioners.

In Opposition:

Hon. Robert Abrams,
Attorney General of the State of New York,
Attorney for Respondents,
Steven H. Schwartz, Esq., of Counsel.

PRIOR, J.:

Petitioners seek review of respondents Freedom of Information (FOIL) determination. Petitioners seek to annul sales figures by agent of the on line lottery agents in Onondaga County for the years 1981 to 1986.

The request was denied for a variety of reasons, including:

1. Competitive harm to the agents as commercial enterprises.
2. Unwarranted invasion of personal privacy.
3. Endangerment of life and safety by disclosure of successful agents as businesses dealing in large amounts of cash and they would be naturally targets for robbery.

Item 2: The lottery agents are business agents of the State. While sales relate to commissions and commissions relate to profits - the information is no more related to personal privacy than public employee salaries, successful contract bids, and most financial dealings with the State.

Items 1 and 3: are of more concern. However, upon analysis, substantial supporting evidence has not been provided to the Court in order to enable the Court to conclude the reasoning is not more speculative than demonstrated.

The remaining reasons are without significant merit and are insufficient to justify a refusal to release the subject information.

Relevant to the issue of the existence of records within the format requested by petitioner, FOIL does not require the creation of lists or records. However, if respondents are unwilling to generate such a list (particularly where same would not be a substantial task), they must grant access to those lists, records and documents which would specifically identify the information sought.

Rationally, it would appear to be a reasonable solution for respondents to generate such lists, as petitioners are willing to pay the reasonable cost of such generation, even if same does not currently exist in the format sought by petitioners.

Accordingly, the Court directs the parties to meet in a reasonable effort to reach an agreement in light of the Court's direction. Absent an agreement, the Court directs respondents to advise petitioners as to what types of records are available and necessary to review to glean the requested information and make copies available at reasonable cost as provided by Statute, or alternatively, at respondents option, provide a list of the subject vendors showing their annual sales of lottery tickets and winnings distributions for the subject years (or for the years 1984, 1985 and 1986, if petitioners will consent to same in light of the difficulties expressed).

Petitioner has demanded expenses and attorneys fees in this matter. The Court declines to so award as the Court concludes that, even while being unable to uphold respondents determination, respondents were not unreasonable and had a reasonable basis. The Court is unable to conclude the records were of clearly significant interest to the general public. The lottery tickets sales by year by vendor is not in itself particularly interesting, even if sought by a newspaper. Petitioners have failed to make any factual showing of general interest, making only a single conclusory allegation.

In any event, under the factual circumstances of the proceeding and considering the nature of the records sought, this Court concludes that as a matter of discretion, an award of attorneys fees and litigation costs would be inappropriate and same would be denied.

Papers to petitioners attorneys to submit Order on formal Notice of Settlement. A copy of this Decision shall be attached thereto. Prior to said submission, the

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Court would expect counsel to confer to work out an equitable solution and to agree upon the specific wording of the Order.

Dated: *November 6*, 1987 at
Albany, New York.

William C. H. ...
Justice of the Supreme Court