

SUPREME COURT : COUNTY OF NEW YORK
IAS PART 51

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In the matter of the applicatin of

INNER CITY PRESS/COMMUNITY ON THE MOVE,
INC.,

Petitioner,

for a judgment pursuant to Article 78 of
the Civil Practice Law and Rules,

- against -

Index 126653/93

THE NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and DAVID
DINKINS as Mayor of the City of New York,

Respondents.

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STECHEK, J.:

In this Article 78 proceeding, petitioner seeks to compel production of unredacted documents pursuant to the Freedom of Information Law (FOIL) [Public Officers Law, sec. 84, et seq.] and Uniform Rules and Regulations for All City Agencies Pertaining to the Administration of FOIL (Uniform Rules) [Title 43 RCNY, sec. 1.01, et seq.]. Petitioner also seeks (1) a prospective declaration that respondents must make available documents relating to the transfer of buildings by the City of New York (City), pursuant to the Urban Development Area Act (UDAA) [General Municipal Law, sec. 690-698], which mandates hearings for public comment on proposed transfers; (2) that the Mayoral hearing, scheduled for Novemer 10, 1993, be held in abeyance until petitioner has had time to inspect the requested documents; and (3) reasonable attorneys' fees, pursuant to POL, sec. 89, for prosecuting this proceeding.

Respondent has produced some of the requested documents for

in camera review, claiming that various exemptions from disclosure under FOIL justify the redactions made. Respondents also contend that petitioner has failed to exhaust administrative remedies and that certain documents sought were never requested. Respondent opposes the imposition of attorneys' fees on the grounds that (1) the requests made by petitioner were so voluminous that it was impossible to comply within the time limits set by FOIL and the Uniform Rules; ^{and} (2) the urgent need for low cost public housing overrides petitioner's interest in exercising its rights under FOIL and its right to public comment under the UDAA.

The petitioner is a non-profit organization that attempts to express the needs and views of low income and homeless persons with respect to quality, affordable housing. The respondents are the City Department of Housing Preservation and Development (HPD) and Mayor David Dinkins.

This proceeding concerns four FOIL requests made to HPD by petitioner in preparation for a public hearing concerning the transfer by the City of four sites pursuant to the UDAA. The UDAA, GML sec 694, provides that approval of such transfers must be preceded by "a public hearing held on due notice." There is a Mayoral hearing concerning the four sites scheduled for November 10, 1993.

The four sites are designated by respondents as Brooklyn Site 11E and Bronx Sites 12A, 12B and 12C.

On September 9, 1993, petitioner delivered a request to HPD's Records Access Officer for the following documents:

(a) all records submitted in response to a certain Request for Proposals (RFP) to participate in the so-called "Vacant Buildings Program" (VBP) Round 12, by the person(s) or

entit(ies) selected as of this date by HPD to develop and/or own (hereafter "the developer") the site described in that RFP as 988 and 992 Boston Road, block 2622, lots 2 and 4, respectively (hereinafter, "the site");

(b) all other records submitted by the developer concerning or related to its participation in VBP, Round 12, at the site;

(c) all records prepared or compiled by HPD to evaluate the developer's qualifications for selection to participate in VBP, Round 12, at the site.

For your information, we need these records in order to prepare testimony for the UDAA-mandated Mayoral public hearing regarding the disposition of this site, Site 12A of HPD's Vacant Buildings Program.

On September 20, 1993, an identical request was delivered to HPD's Records Access Officer with respect to the other three sites.

According to respondents' answer, para. 39, p.10, these requests were given the following numbers by HPD:

Site 12A - Request 284-93

Site 12B - Request 295-93

Site 12C - Request 292-93

Site 11E - Request 294-93

The Uniform Rules, sec. 1-05, require that the agency grant or deny a FOIL request within five business days of its receipt. Subsection (d) provides that if the agency is unable to make a determination within five business days because of "unusual circumstances," it shall acknowledge receipt of the request, in writing, within the five days, stating the approximate date, not to exceed ten business days from the acknowledgement, when the response will be made. "Unusual circumstances" include the need to collect voluminous records "which are demanded in a single request" (emphasis supplied) and "(a)ny other circumstances in

which the agency is unable, by the exercise of due diligence, and acting in good faith, to comply with the time limits set forth in this subdivision.*

HPD timely wrote to petitioner with respect to the 12A site (Request 284-93), ^{the 12B site (Request 295-93),} and the 11E site (Request 294-93), that it needed more time to respond. HPD failed to respond to the request relating to site 12C.*

Assuming HPD's good faith in not responding within five days, a dubious assumption at best, given the dearth of material produced, the written response requesting more time would extend the time to respond until September 29 for site 12A and October 11 for sites 12B and 11E.

Failure of the agency to respond within the ten business day extension results in a constructive denial of the request and authorizes an appeal [Uniform Rules, sec 1-05(d)].

HPD failed to respond timely to any of the requests. HPD responded to the request regarding site 12B on October 13 and to the requests for sites 12A, 12C and 11E on October 12.

However, petitioner prematurely appealed, on October 1, from the constructive denial of the requests regarding sites 12B and 12E. The site 12A appeal was taken timely on October 4, after the ten business day extension expired on September 29.

*HPD submitted responses to two other FOIL requests asking for more time, but they did not bear the 292-93 number assigned to site 12C.

Petitioner also timely appealed the denial (by silence) of the site 12C request on October 1.

On October 26, 1993, the parties agreed to hold the Mayoral hearings in abeyance and to adjourn this proceeding, which HPD considered the appeals by petitioner (Answer, Exhibit H).

In its responses on October 12 and 13, HPD supplied redacted copies of 72 pages of documents. In its answer in this proceeding, apparently as a result of the administrative appeals, HPD supplied 35 more redacted pages and modified 25 of the redactions made in the 72 pages previously produced. All of these documents have been reviewed in camera.

The Court has been advised by letter, dated November 4, 1993, submitted after the return date, that respondent has more documents that are responsive to the FOIL requests, but that the parties have agreed to have them turned over after the rulings made herein so that redactions can be made in conformity with this opinion.

The FOIL statute "proceeds under the premise that the public is invested with an inherent right to know and that secrecy is anathematic to our form of government" [Matter of Fink v Lefkowitz, 47 NY2d 567, 571].

Documents requested under FOIL are presumptively subject to disclosure, unless they fall under an enumerated statutory exception [P.O.L. 87(2); Matter of Polansky v Regan, 81 AD2d 102, 105; Miracle Mile Assoc. v Yudelson, 68 AD2d 176]. The burden of proving an exemption is on the agency asserting it [P.O.L., sec. 89(4); Matter of Washington Post Co. v New York State Ins. Dep't.

61 NY2d 557, 566]. Public disclosure laws are liberally construed to allow maximum access and statutory exceptions are narrowly construed [Matter of Fink v Lefkowitz, supra; Miracle Mile Assoc. v Yudelson, supra].

POL, sec. 89(2), provides an exemption from disclosure of items that would constitute an "unwarranted invasion of personal privacy." Such records include employment or credit histories [Id. subsection (b)(i)] and items "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" [Id. subsection (b)(iv)]. Subject to the rules of "liberal" and "narrow" construction set forth above, a Court must balance the public's right to know and an individual's reasonable expectation of privacy to determine whether disclosure of a personal record is an "unwarranted invasion" [Dobranski v Houper, 154 AD2d 736]. Home addresses and social security numbers need not be supplied [Local 3, Int'l Brotherhood of Electrical Workers v NLRB, 845 F2d 1177].

I find that it was proper for respondent to redact, with respect to individuals involved in the selected developer entities, their social security numbers, home addresses, spouses' names, percentage interest in the entity selected, employment history and personal financial information unrelated to real estate owned, managed or developed by such individuals. Disclosure to the public of these personal details and credit information is unwarranted. The following documents have been redacted properly: Exhibit I, Pages 3, 5, 10, 12, 17 through 20,

22 through 26, 28, 34 through 43, 54, 55, 60, 68, 69, 70.

However, HPD improperly redacted information concerning other real estate owned, managed or developed by the individuals who own the entities selected for the sites to be transferred by the City. The public's right to know about the developers chosen outweighs the developers' privacy interest in disclosing other real estate projects they have been involved in. In Matter of Inner City Press/Community on the Move v HPD [Sup. Ct. NY Co., 1/26/93 (Arber, J.), Index 35882/92 (not officially reported)], a case involving these same parties and an identical FOIL request, it was held that HPD must disclose documents which pertain to "real estate holdings owned or managed by the developers." The Court stated that HPD was "over-stating the extent of the exemption to evade the plain meaning of FOIL."

The redactions in Exhibit I to the Answer contained in the developers' personal financial statements shall be modified as follows:

<u>Page #</u>	<u>Additional Material to be Disclosed</u>
21	Note E through end of Item 2
27	Note E through end of Item 2
29	Name of real estate, construction and development investments listed under "Assets"
30	Schedule of investments in closely held real estate corporations: names of corporate entities and title of schedule
31	Schedule of investments in real estate partnerships and rental properties: titles of schedules and names of partnerships and addresses of rental properties

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Asset: ARBAN HRE*

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IV Leaseholds: Location and
Type of Property and Title
In Name of Columns

Petitioner argues that it is entitled to the same information regarding the developers not selected by HPD for the sites as it is for the developers selected. However, petitioner's FOIL requests did not demand information concerning developers not selected. Accordingly, the Answer, Exhibit I, pages 7, 8, 15, 16, 52, and 71, were properly redacted to delete this information.

Respondents have redacted various documents to delete alleged intra-agency pre-decisional material, pursuant to POL, sec. 87(2)(g). The statutory exemption does not apply to "statistical or factual data" or "final agency policy or determinations." The exemption covers opinions, recommendations and advice intended to assist the decision maker [Miracle Mile Assoc., supra; Bray v Mar, 106 AD2d 311]. The purpose of the exemption is to facilitate candid discussion within the agency [Id.].

HPD properly redacted the following documents pursuant to this exception: Exhibit I to the Answer, page 14; Exhibit K to Respondents' Answer, pages 5 through 11 (Financial Feasibility Evaluation); and Document pages 28 through 35 (Ability to Finance Evaluation).

*The agency has not met its burden of proving whether this is or is not a real estate related investment.

The following documents should have been supplied because they contain a factual and/or statistical information:

Answer, Exhibit I

- Page 6 - Entire page, except for percentage interests of partners
- Page 33- Entire page, except for percentage interests of partners and H&D Committee Recommendation
- Page 56- Evaluation Worksheet, Ability to Finance, Entire page, except for percentage interests of partners and value of assets
- Page 57- Entire page, except material under "Approved By"
- Page 58- Entire page, except percentage interests of partners, the first and last sentences of the next to last paragraph, and the amount of assets in the second sentence of the last paragraph
- Page 59- Entire page, except last paragraph
- Page 67- Issues/Comments

Answer, Exhibit K

Page 13 through 15-

All but percentage interests of partners, value of assets, net worth and comments (note: there are two pages numbered 13)

Page 16 through 26

All but information with respect to developers not selected

Page 27

All but information about developers not selected and handwritten comments under the columns.

All documents called for in this decision and similar documents not previously supplied shall be provided to petitioner forthwith, redacted in conformity to this decision.

Attorneys' fees and other litigation costs reasonably incurred may be awarded in a proceeding to compel compliance with FOIL where the person seeking the records has substantially prevailed, the record involved was clearly of significant interest to the general public and the agency lacked a reasonable basis for withholding the record [POL, sec. 89(4)(c)].

This is such a case. Virtually all statistical and factual

data concerning the qualifications and other real estate holdings of the developers selected was withheld under the guise of a "pre-decisional" intra-agency exemption. HPD's disclosure deprived the public of the ability to evaluate factual data involved in the selection process, one of the very purposes underlying FOIL.

Respondents' contention that the need for housing overrides the need for public comment and access to government records (stated otherwise, "only we are pure and above oversight") is arrogant. It is contrary to the legislature's purpose in enacting FOIL and providing for public hearings under the UDAA. The agency has no right to look into the applicant's motives in making the demand; open government requires openness to all (see Matter of Westchester Rockland Newspapers v Kimball, 150 NY2d 575).

HPD's actions demonstrate an utter disregard for compliance with the time limits set by FOIL and the Uniform Rules. The records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all.

The request for prospective relief is denied. There is no justiciable controversy concerning future requests that might be made.

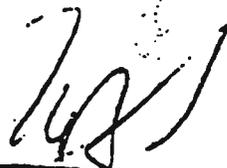
The respondents, as indicated above, shall forthwith provide the information herein directed. The respondents, Department of Housing Preservation and Development and the Mayor of the City of New York, are temporarily restrained from proceeding with any

public hearing with respect to Brooklyn site 11E and Bronx sites 12A, 12B and 12C until three business days after the materials required to be supplied have been supplied to the petitioner.

The disdain for the FOIL statute and the implementing regulations demonstrated in this case - documents and information withheld, the utter ignoring of time constraints forcing petitioner to bring this proceeding - and the fact that petitioner's success herein strongly outweighs the denials of its demands, entitles petitioner to reasonable attorneys fees and disbursements for this proceeding. A copy of this order shall be served on the IAS Legal Support Office of this Court, Room 311, for assignment to a referee to hear and report on the amount of reasonable fees and disbursements.

This memorandum is the decision, order and judgment of the Court and shall be so entered.

Dated: November 9, 1993



J.S.C.