

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY****In the Matter of the Application of  
RICHARD J. MILLER, JR.,****Petitioner,****For a Judgment pursuant to Article 78  
of the Civil Practice Law and Rules****-against-****Decision & Judgment****NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,****Respondent.****Motion Return Date : Albany County Special Term, March 10, 2006  
(Fully Submitted April 14, 2006)****RJI No.: 01-06-ST6360****Index No.:96/06****Present: Robert A. Sackett, JSC****Appearances: Edward A. Stein, Esq.  
Co-counsel for petitioner  
16 North Main Street, #205  
New City, New York 10956****Morris & McVeigh, LLP  
Co-counsel for petitioner  
19 Dove Street  
Albany, New York 12210****Honorable Eliot Spitzer  
Attorney General of the State of New York  
Counsel for respondent  
The Capitol  
Albany, New York 12224  
By: Jeffrey M. Dvorin, Assistant Attorney General****Sackett, J.:**

Petitioner, a New York State resident, seeks a judgment annulling the determination of respondent denying access to certain records related to the Albany City Landfill which petitioner had requested pursuant to Public Officer's Law article 6, commonly known as the Freedom of Information Law (FOIL) and directing that access to and copying of all requested documents, not heretofore provided, be permitted; together with reasonable attorneys fees. Respondent opposes the petition. The proceeding was commenced prior to the

completion of petitioner's appeal of the Department's failure to disclose all requested documents.

After this proceeding was commenced, Administrative Law Judge Molly T. McBride, issued her appeal determination dated February 10, 2006 affirming withholding most of the undisclosed documents pursuant to the exemptions set forth in POL §87(2)(a) and (g) and directing disclosure of numerous documents, or portions thereof, as not privileged under any FOIL exemption. Accordingly, respondents have submitted the remaining undisclosed documents for in camera review by the Court.

Respondent received petitioner's FOIL application, dated July 15, 2005, on July 18, 2005. By letter dated July 25, 2005, respondent acknowledged the request and began the review process. On October 19, 2005 petitioner's counsel began to review, and designate for copying, the records made available by respondent; petitioner was informed that some records were being withheld as exempt. On November 17, 2005 and February 9, 2006, petitioner's counsel reviewed additional documents which had been made available after further review by respondent; on December 20, 2005 respondent also provided an additional 56 documents to petitioner's counsel by mail. Petitioner claims that respondent did not undertake a diligent search for the requested documents; and in failing to do so, respondent waived any exemptions it is entitled to under POL §87. Public Officer's Law §89(4)(b) states that failure to respond to a FOIL application in a timely manner constitutes a denial of the application. There is no provision requiring waiver of statutory exemptions. Furthermore, respondent argues that there were copious documents to review and determine whether they were exempt under the law, some 19 boxes of materials in all<sup>1</sup>, and that it undertook the review process as quickly as possible given the size of the job.

Petitioner also claims that he was initially told that the documents requested would be provided; he claims that this constituted a waiver of all statutory exemptions. However, the letter dated July 25, 2005 acknowledging petitioner's FOIL application states, "DEC staff are searching the files for the records and anticipate, but do not guarantee, providing you with all or some of the documents ...." Additionally, petitioner's argument that respondent did not provide a particularized reason for each claimed exemption is irrelevant as respondent has provided sufficient reasons in this proceeding and has provided the documents for in camera review (see Matter of Kaufman v NYS Department of Environmental Conservation, 289 AD2d 826, 827 [2001]).

All agency records are presumptively open to public review and copying unless specifically exempted by FOIL (see New York Association of Homes and Services for the Aging, Inc. v Novello, 13 AD3d 958 [2004]). Pursuant to FOIL an agency may deny access to records, or portions thereof, that are

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<sup>1</sup> More than 17 boxes were made available to petitioner; two boxes were provided to the Court for in camera review.

specifically exempt under state or federal statute, such as attorney-client communications pursuant to CPLR 4503(a) (POL 87[2][a]); or that are intra-agency or inter-agency materials which are not statistical or factual tabulations or data, instructions to staff which affect the public, final agency policy or determinations, or external audits (POL 87[2][g]). Exemptions are narrowly construed; and the agency seeking to prevent disclosure bears the burden of demonstrating the applicability of the particular exemption claimed (*see Lockheed Martin IMS Corp. v New York State Department of Family Assistance*, 256 AD2d 847, 849 [1998]).

The Court has reviewed the documents and finds that the documents withheld as exempt for the reasons stated by the Administrative Law Judge are properly exempted under POL 87(a) as privileged attorney-client communications pursuant to CPLR 4503(a) or under POL 87(g) as "predecisional, nonfinal discussion and recommendations by employees within and among agencies to assist decision makers in formulating a policy or determination (*see Matter of Xerox Corp. v Town of Webster*, *supra* at 132-133; *Matter of Morgan v New York State Dept. of Envtl. Conservation*, 9 A.D.3d 586, 587, 779 N.Y.S.2d 643 [2004]; *Matter of Mingo v New York State Div. of Parole*, *supra* at 782)" (*Matter of Stein v. New York State Dept. of Transp.*, 25 AD3d 846 [2006]). Accordingly, the petition, with the exception of the application for reasonable attorney's fees, is denied.

Finally, petitioner requests an award of reasonable counsel fees. "FOIL authorizes a court to award reasonable attorney fees and other litigation costs reasonably incurred in any case in which the requestor has substantially prevailed, provided that the court finds that: (1) the record involved was, in fact, of clearly significant interest to the general public; and (2) the agency lacked a reasonable basis in law for withholding the record (*see* POL § 89[4][c]). However, even if these elements are met, an award of counsel fees remains within the discretion of the Court (*see Matter of URAC Corp. v. Public Service Comm. of the State of New York*, 223 AD2d 906, 908 [1996])" (*Herald Co. Inc. v Feuerstein*, 3 Misc 3d 885, 898 [2004]). Although the petition is denied, the Court finds that an award of reasonable attorney's fees to petitioner is nevertheless warranted under the circumstances herein. Upon the instant record the Court finds that the records concerning the Albany Landfill were clearly of significant interest to the general public; and that while respondent eventually provided petitioner with all disclosable documents requested, respondent was so slow in responding to the application, that petitioner was required to commence this proceeding in order to conclude the review process. Even allowing for the number of documents which had to be reviewed by respondent, the Court finds that 12 weeks to provide the first set of documents and 15 and ½ weeks to provide the balance of the documents was so long as to constitute an unreasonable withholding of the disclosed documents. Under the circumstances, the Court finds that the application for reasonable attorney's fees and costs of this proceeding is granted; petitioner's attorney shall serve and file his affidavit of

attorney's services for this proceeding, on notice to respondent, within 15 days of receipt of a copy of this decision and order.

This constitutes the Decision and Judgment of this Court. All papers, including the original decision and Judgment, are being returned to the Attorney General who is not relieved from the provisions of CPLR 2220 regarding filing, entry and notice of entry.

**SO ORDERED.**

Dated: Monticello, New York  
June 21, 2006

ENTER

A handwritten signature in black ink, appearing to read 'R. A. Sackett', written in a cursive style. The signature is positioned above a horizontal line.

HON. ROBERT A. SACKETT, JSC

**Papers considered:**

Notice of petition and verified petition of Richard J. Miller dated January 6, 2006, affirmation of Edward A. Stein, Esq. dated January 5, 2006, and memorandum of law; verified answer dated February 23, 2006, affirmation of Louis A. Alexander, Esq. dated February 22, 2006, affidavit of Ann Lipinski dated February 22, 2006, and memorandum of law; reply of Edward A. Stein, Esq. dated March 8, 2006, and reply memorandum of law.