

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF ALBANY

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In the Matter of the Application of  
 NEWSDAY, INC., and DAVID ZINMAN,  
 Petitioners,

-against-

MEMORANDUM DECISION  
 Index No. 3406-91

NEW YORK STATE DEPARTMENT OF HEALTH,  
 COMMISSIONER of the New York State  
 Department of Health, DONALD  
 MACDONALD, Records Access Officer  
 of the New York State Department of  
 Health, and PETER SLOCUM, Records  
 Access Appeals Officer of the New  
 York State Department of Health,  
 Respondents.

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(Supreme Court, Albany County, Special Term, August 9, 1991)  
 (RJI No. 0191-ST3036)  
 (JUSTICE HAROLD J. HUGHES, Presiding)

APPEARANCES:

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Hon. Robert Abrams  
 Attorney General of New York State  
 Attorney for Respondents  
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HUGHES, J.:

The petition will be granted.

The corporate petitioner publishes Newsday and New York  
 Newsday, and the individual petitioner is one of its reporters.  
 On December 4, 1990, the Department of Health issued a press  
 release announcing the result of its study of the death rates of  
 cardiac surgery patients in New York hospitals. Thirty hospitals

provided heart surgery data from operations performed by 126 cardiac surgeons. The names and individual mortality rates of each of the surgeons were reported to the participating hospitals, and the press release stressed that the reason for disseminating this information was:

"Patients and referring physicians are expected to use this information to assist them in making decisions on the choice of institutions for cardiac procedures. Patients should be able to obtain from their doctor or hospital:

1. The performance history of each hospital.
2. The performance record of individual surgeons.
3. The risk of mortality for patients based on their individual risk factors."

Reporter Zinman made a FOIL request to the Department for the release of the patient mortality rankings of the individual surgeons comprising the study. The request was denied upon the ground that disclosing the information would violate the Personal Privacy Protection Law (Public Offices Law Article 6-A) as an unwarranted invasion of the physicians' personal privacy. That determination was affirmed upon an administrative appeal. On May 14, 1991, the New York State Committee on Open Government issued an advisory opinion concluding that the information should be disclosed since it concerned professional activity licensed by the State, and there is a substantial public interest in the disclosure. The opinion pointed out the apparent inconsistency of releasing the physicians names to the hospitals and encouraging cardiologists to discuss with their patients the performance of

individual cardiac surgeons, while at the same time determining that releasing the information to the general public constituted a unwarranted invasion of the surgeons' personal privacy. The Department's position is set forth at paragraph 8 of the affidavit of Peter Slocum, sworn to July 22, 1991, at follows:

"8. Release of the data to the petitioners was determined to be an 'unwarranted' invasion of privacy because of the potential that the data would be misunderstood and misused by the public, resulting in significant adverse impact upon the physicians identified by the data, with little public benefit".

In other words, the State must protect its citizens from their intellectual shortcomings by keeping from them information beyond their ability to comprehend. Following the Department's position to its logical end, it appears that if members of the public were more intelligent, it would be in the public interest to disclose this information. The duty of administrators to release to the population the records of its government cannot be dependent upon the administrators' assessment of the population's intelligence. Instead, the policy of this State set forth in Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen, 69 NY2d 246, 252, as follows:

"It is settled that FOIL is based on the overriding policy consideration that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (Matter of Fink v Lefkowitz, 47 NY2d 567, 571). Indeed, in enacting FOIL, the Legislature specifically declared "that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article." (Public Officers Law § 84.) We have held, therefore, that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted

maximum access to the records of government".

Under FOIL, the agency has the burden of establishing that disclosure would constitute an unwarranted invasion of personal privacy (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 109 AD2d 92, 94, affd 67 NY2d 562). The case of the Matter of Buffalo Broadcasting Co. v New York State Dept. of Correctional Servs., 155 AD2d 106, is instructive upon the question of whether the agency has met that burden. In that case, the Court, at page 111, stated as follows:

"Application of the privacy exemption from FOIL disclosure requires a balancing of the subject person's expectation of privacy against the statutory policy favoring the right of the public to information concerning the operations of government (Matter of Dobranski v Houper, 154 AD2d 736, 738). In our view, an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility, as respondents' claim of total exemption of the videotapes on privacy grounds necessarily implies. As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution".

Here, assuming for the sake of argument that the actions of a physician in his professional capacity are personal for the purposes of FOIL and the Personal Privacy Protection Law, the issue becomes whether a surgeon operating in a hospital has a legitimate expectation that the results of his surgery will be withheld from the public. He or she does not. A surgeon's work is often monitored by video recording, and is subject to constant peer review. Government agencies, such as the respondent, are always looking over the surgeon's shoulder. Insurance companies have a continuing interest in surgical outcomes. No doctor subject to

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such scrutiny could have any reasonable expectation that the government would withhold from its citizens the patient mortality rate of the doctor. Furthermore, even if there was a legitimate privacy expectation, the interest of the public outweighs it. The Department of Health recognized such by releasing the information to the hospitals so that patients, as consumers, could make a more intelligent decision about which cardiac surgeon to choose. The same public interest compels that the information be made available to the rest of the State.

Submit judgment.

Dated: October 15, 1991