SUPREME COURT, SUFFOLK COUNTY

NYLJ, SEPTEMBER 29, 1998

MATTER OF SAGAPONACK HOMEOWNERS ASSOC. v. TOWN OF SOUTHAMPTON *QDS:82302334* — By letter dated July 6, 1998, the petitioner, Twomey, Latham, Shea & Kelley, LLP, a law firm, (hereinafter the "Firm") submitted a formal request under the Freedom of Information Law (FOIL) to the Building Department of the Town of Southampton to obtain copies of all of the building plans submitted in connection with an application by the Blue Turtles Corp. (Rennert) for a building permit. By letter dated July 15, 1998 the Chief Building Inspector agreed to prepare such copies subject to the execution of a hold harmless affidavit. By letter dated July 21, 1998 the Firm objects to the condition of executing a hold harmless affidavit; states that this is tantamount to a denial of the FOIL request without justification, and appeals the denial. By letter dated July 31, 1998 the Town Attorney advises the Firm that given the Building Inspector's legitimate concerns regarding the potential for economic injury to the competitive position of the copyright holder, should the architectural plans be reproduced or misused, the hold harmless condition to the release of the plans was reasonable, the refusal to sign the agreement is grounds for denial of the FOIL request and the appeal is denied.

On August 10, 1998 an Order to Show Cause was presented to this Justice for signature. After a conference with counsel for the petitioners and a Deputy Town Attorney this Court directed service of the Order to Show Cause upon Blue Turtles Inc. and Ferguson, Murray and Shamamian, Architects. Upon the August 13th oral argument of the within application these entities appeared by counsel, and by stipulation, Ferguson, Murray & Shamamian, Architects, Ferguson, Murray & Rattner, Architects, Ira Rennert and Blue Turtles Inc. were added as party respondents to this proceeding. Further papers were submitted to the Court through August 25th.

The Freedom of Information Law (FOIL) expresses this State's strong commitment to open government and public accountability and imposes a broad standard of open disclosure upon the agencies of the government (see Matter of Capital Newspapers Div. v. Burns, 67 NY2d 562, 505 NYS2d 576 [1986]; Matter of M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp., 62 NY2d 75, 476 NYS2d 69 [1984]). The statute enacted in furtherance of the public's vested and inherent "right to know" affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government, thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities (see Matter of Capital Newspapers Div. v. Burns, 67 NY2d 562, supra; Matter of Fink v. Lefkowitz, 47 NY2d 567, 419 NYS2d 467 [1979]; Public Officers Law §84). It has been said that the judicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government, thereby holding the governors accountable to the governed (see Matter of Fink v. Lefkowitz, 47 NY2d 567, supra).

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To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see Matter of Capital Newspapers Div. v. Burns, 67 NY2d 562, supra; Public Officers Law §87[2]). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see Matter of Capital Newspapers Div. v. Burns, 67 NY2d 565, supra; Matter of M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp., 62 NY2d 75, supra).

As noted above, in correspondence with the Firm prior to the commencement of this proceeding the Chief Building Inspector and the Town Attorney did not raise a FOIL exemption to copying, but merely sought the execution of a hold harmless affidavit as a condition for such copying as a protection against possible misuse of the architectural plans received. In opposition to the within proceeding, however, the Town respondents assert as an exemption to access to records, that the records are trade secrets or are maintained for the regulation of commercial enterprise which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise (Public Officers Law §87[2][d]). Additionally, although not specifically asserted as grounds for denial of access, the Town respondents made reference to two grounds raised by counsel for the applicant in January, 1998 correspondence. First, that the records, if disclosed, would constitute an unwarranted invasion of personal privacy (Public Officers Law §87[2][b]; §89[2]). Second, that the records, if disclosed, would endanger the life or safety of any person (Public Officers Law §87[2][f]).

In his January 7, 1998 letter to the Chief Building Inspector, counsel for the applicant states that Public Officers Law §87(2)(b) and (f) permit denial of public access to public records where disclosure would constitute an unwarranted invasion of personal privacy or endanger the life or safety of any person; that the Rennerts' personal residence will be a repository for valuable objects; that he would only furnish specifics on an in camera basis; that the building permit drawings would allow a third party with improper motives to obtain information about the Rennerts' residence that would place the Rennerts at risk of harm; and that the information contained on these plans would allow one to know the location that certain goods would be placed in the residence and the location of the master bedroom. Counsel then requested that the file receive an appropriate marking prohibiting public disclosure.

In his January 21, 1998 letter to the Chief Building Inspector, counsel for the applicant advises that he has spoken with Robert J. Freeman, Executor Director of the Committee on Open Government, and that he has been advised that the floor plans are exempt and not available for public disclosure or review pursuant to Public Officer Law §87(2)(f) as endangering the life or safety of any person and that because each page of the drawings is copyrighted, they fall within the scope of §87(2)(d).

In opposition to the within application the architect firms and the property owner argue that the documents are their property, are copyrighted and enjoy copyright protection; that should the Court grant the relief requested, there will be a general publication within the meaning of the copyright law; that once this general publication occurs the holder of the copyright loses the right to register the copyright unless such registration occurs within three months after the first publication, and that the holders of the copyright would have to expend monies to register the copyright earlier than they intended to do so, so as not to lose their competitive position. In this regard, the Court notes that the filing of architectural plans with permitting authorities does not constitute general publication (see Certified Engineering Inc. v. First Fidelity Bank, NA, 849 F.Supp 318 [1994]; East/West Venture v. Wurmfeld Assoc., 722 F.Supp 1064 [1989]). Further, as noted above the applicant through correspondence to the Chief Building Inspector requested and attempted to restrict the right of the general public to have access to the plans in the possession of the Building Department (see Certified Engineerin Inc. v. First Fidelity Bank, NA, 849 F.Supp 318, supra).

Additionally, they argue that the Public Officers Law §87(2)(f) exemption applies because access to the records or portions thereof would endanger the life or safety of Ira Rennert and his family, in that, the drawings include location of the bedrooms and allow for an understanding of the security and alarm system. During oral argument in response to the Court's inquiry as to whether the subject plans contain wiring diagrams showing the security system and/or the location of security camera devices, counsel stated that he did not know, but advised the Court that he knew that the "house is designed with a security dimension first and foremost". Counsel then gave the Court an example of this security dimension.

Although none of the parties have submitted any case authority relating to the effect of a copyright and federal copyright protection on a FOIL application, the petitioners have submitted the September 11, 1995 Advisory Opinion letter of Robert J. Freeman, Executive Director of the Committee on Open Government. Mr. Freeman states that the copyright act cannot be considered as a nondisclosure statute; that a record bearing a copyright could not be characterized as specifically exempted from disclosure by statute; that under 17 USC 107 a copyrighted work may be reproduced for purposes such as criticism, comment, news reporting, teaching, scholarship or research, and that the copyright law addresses the issue of reproduction for fair use including the effect of the use upon the potential market for or value of the copyrighted work (17 USC 107[4]).

After discussing the similarities between the federal Freedom of Information Act (FOIA) and New York's FOIL and the analysis of the Justice Department regarding FOIA and copyright protection, Mr. Freeman gave the opinion that if reproduction of copyrighted architectural plans and similar records would cause substantial injury to the competitive position of the holder of the copyright (§87[2][d]), it would appear that an agency could preclude reproduction of the work. Mr. Freeman then stated that if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under FOIL. Mr. Freeman then observed that the only other potential basis for withholding reproduction would involve records that include reference to alarms, security systems and the like because in those circumstances, it is possible that exemption (2)(f) — that disclosure would endanger the life or safety of any person — might be asserted. It would appear, therefore, that notwithstanding a claim of copyright that the Court's analysis remains focused on the FOIL exemptions.

At this juncture, the Court observes, as noted above, that in his January 21, 1998 letter to the Chief Building Inspector, counsel for the applicant indicates that he has spoken with Mr. Freeman and been advised that the floor plans are exempt pursuant to 87(2)(d) and (f). The Court notes, however, that the applicant has not furnished the Court with an Advisory Opinion letter further to this telephone conversation. The Court also notes that counsel has not apprised the Court as to what information was furnished to Mr. Freeman and which formed the basis of his telephonic "opinion".

The Court agreeing that there is no blanket FOIL exemption for documents merely because they are copyrighted, the Court will now address the exemptions raised by the respondents. With respect to the substantial injury to competitive position exemption (§87[2][d]), other than some general and conclusory comments from the holders of the copyright as to the competitive advantage being the ownership of the plans and how they will lose such competitive advantage if they do not register the plans within three months of first publication, these respondents have offered no particulars as to how reproducing the plans in whole or in part will harm their competitive position. There is no suggestion that any person or entity may be inclined to construct a 66,000 square foot residence or a 100,000 square foot complex. Additionally, there is no suggestion that any discrete portion of these plans is subject to utilization by another person or entity. There has been no indication of harm in the marketplace. With respect to the endangering the life or safety of any person exemption (§87[2][f]) again the respondents offer only conclusory comments regarding the location of bedrooms, valuable objects and security dimension.

The Court recognizes the possible significance of each of these exemptions, and the underlying public policy, and the Court will not determine the applicability of each of these exemptions upon the papers alone. A hearing, therefore, will be held on September 28, 1998, at which time the respondents may introduce testimony and documentary evidence to demonstrate the applicability of each of these exemptions. Given the public's "right to know", the presumption in favor of public inspection and copying, and that the exemptions are to be narrowly construed to provide maximum access, the party seeking to prevent disclosure carries a substantial burden. In this regard, the Court acknowledges that although the burden is on the agency seeking to prevent the reproduction of documents, in the case at bar, the real parties in interest are the architectural firms, Ira Rennert and Blue Turtles Inc. As such, the substantial burden noted above may be satisfied at the hearing by the Town respondents or the copyright holders or property owners.

Even if this Court ultimately determines that the subject architectural plans are exempt under §87(2)(d) and (2)(f) other issues will need to be addressed. Inasmuch as the fair use of a copyrighted work includes the use of copyrighted documents by experts in a legal proceeding (see Religious Technology Ctr. v. Wollersheim, 971 F.2d 364 [1992]; Jartech Inc. v. Clancy, 666 F.2d 403 [1982] cert den 459 US 879 reh den 459 US 1059 second pet reh den 463 US 1237; 17 USC 107) a hearing will need to be conducted for the purpose of establishing the parameters for the nature, purpose and extent of such use and the restriction on access to such materials are to be reproduced for purposes of litigation. In this way distribution of the reproduced portions of the architectural drawings will be to a limited class of persons for a limited purpose so as to constitute, a limited as opposed to a general publication, so as not to interfere with the copyright (see Academy of Motion Picture Arts and Sciences v. Creative House Promotion, Inc., 944 F.2d 1446 [1991]; White v. Kimmell, 193 F.2d 744 [1952]; RPM Management Inc. v. Apple, 943 F.Supp 837 [1996]). This hearing will also be conducted on September 28, 1998.

In this regard the Court observes that during the August 13th oral argument, the August 14th telephone conference call and the August 17th court conference, this Court repeatedly invited counsel to discuss the portion of the drawings and plans that the petitioner would need to have reproduced so as to enable their experts to prepare for the zoning proceedings and litigation and to explore a mechanism to accomplish this which would limit the number of persons who had access to these reproductions, and the uses to which such reproductions would be employed. Counsel did not, at that time, accept this Court's invitation with much enthusiasm. The Court suggests, at this juncture, that counsel should reconsider the Court's invitation inasmuch as what counsel may achieve without the Court's intervention, and what will be achieved with the Court's intervention after the hearings, may well be similar.

Short form order signed herewith.