

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4

SUSTAINABLE SOUTH BRONX, INC.,

Petitioner,

-against-

MARTIN HORN, COMMISSIONER OF THE CITY
OF NEW YORK DEPARTMENT OF CORRECTION
and ROBERT C. LIEBER, PRESIDENT OF THE
NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION pursuant to CPLR Article
78,

Respondents.

DECISION/ORDER

Index. No. 110278/07

FILED
JAN 17 2008
NEW YORK
COUNTY CLERKS OFFICE

KIBBIE F. PAYNE, J.S.C.

In this article 78 proceeding, petitioner, Sustainable South Bronx, Inc. ("SSBX") seeks a judgment directing the New York City Economic Development Corporation (NYCEDC") (collectively "respondents") to provide a complete document production in response to SSBX's October 11, 2006 requests under the Freedom of Information law ("FOIL") and/or ordering the DOC and the NYCEDC to provide a complete written explanation of any redactions and documents withheld pursuant to any asserted FOIL exemptions and/or ordering an *in camera* review of materials that DOC and NYCEDC are withholding to determine whether such documents should be produced.

Respondents moved (mis-designated as a cross-motion) to

dismiss the petition, pursuant to CPLR 3212(a)(7), alleging petitioner has failed to state a cause of action on the grounds that petitioner has already received the requested relief.

Petitioner is a community organization concerned with environmental issues affecting South Bronx residents. On October 11, 2006, Legal Services for the City of New York-Bronx ("LSNY-Bronx"), acting on behalf of SSBX, submitted FOIL requests to DOC and NYCEDC seeking documents related to "Oak Point", a 27 acre parcel of land located in the Hunts Point section of the South. DOC seeks to acquire Oak Point in order to construct a correctional facility on the site.

This FOIL request sought disclosure and information: 1) concerning site selection for the proposed correctional facility; 2) all building plans, specifications and approvals; 3) any acquisition agreements and/or consent orders; 4) all documents regarding meetings, agreements and accords between DOC and NYCEDC regarding construction of the correctional facility; 5) all documents between DOC and other city agencies, councils and boards regarding the proposed facility and 6) all documents concerning public notices, hearings, meetings or other public participation by the DOC regarding construction of the facility.

On October 12, 2006 DOC acknowledged its receipt of the FOIL request and, on December 12, 2006, the DOC notified LSNY-Bronx that DOC would need at least three (3) months to gather the

records in the FOIL request. Thereafter, on February 5, 2007, DOC produced a 92 page "initial" partial production and stated that due to the volume of materials to be reviewed that it would need additional time, "to adequately assess all the department data." (Yoskowitz Aff., Ex. 5) On February 27, 2007, SSBX appealed DOC's February 5, 2007 response on the ground that DOC was required to provide access to the requested records within ten (10) business days of receipt of the request. SSBX also reminded DOC that the public scoping hearing regarding Oak Point was scheduled for April 16th and that public participation in the meeting was vital. On March 9, 2007, DOC produced its production of an additional 133 pages of documents. In its March 9 letter, the DOC indicated that:

Records or portions thereof have been withheld as to those items that constitute inter-agency or intra-agency materials that do not contain statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determination, or an external audit. Pub. Off. Law Section 87(2)(g). Additionally, certain records are protected by attorney client privilege under section 4504 of the CPLR, and thus are exempt from disclosure pursuant to Pub. Off. Law Section 87(2)(a). Lastly, certain records or portions thereof have been redacted as such materials, if disclosed, would impair present or imminent contract awards or collective bargaining negotiations. Pub. Off. Law Section 87(2)(c).

(Yoskowitz Aff. Ex. 8)

On April 3, SSBX appealed DOC's March 9, 2007 response

requesting that DOC provide a chart listing each document DOC withheld and each portion of a document it redacted with basic information about those documents so that SSBX could evaluate whether the documents had been properly withheld. Six days later on April 9, 2007, DOC responded finally denying the appeal. In that final determination DOC described the documents it was withholding pursuant to Public Officer Law Section 87 (2) (g) [pre-decisional inter and intra agency materials] as:

letter and email communications, notes from the files of Department personnel, discussion documents, draft ULURP, EIS and fair Share Analysis as well as underlying deliberative and analytical materials. Public disclosure of these... materials would adversely affect the governmental deliberative process...

In addition, the agency refused to provide the requested list, stating:

The Department is not required to produce a more detailed list than the description above of the records that have been examined and determined to be exempt under the Freedom of Information Law. This position has been upheld by the New York State Committee on Open Government in numerous opinions.

In the same determination, DOC additionally withheld preliminary and draft requests for proposal and procurement related materials asserting that the disclosure of such materials would impair present or imminent contract awards (Public Officer Law Section 87[(2)[c])). DOC also withheld other documents claiming that the material was protected by the attorney client

or work product privilege under Public Officer Law Section 87[(2)[a)] (see *Yoskowitz Aff. Ex. 12*)

The FOIL request to NYCEDC was quite similar to petitioner's document request made to DOC. In this October 11, 2006 request SSBX sought all documents from the last ten years that NYCEDC generated regarding 1) concerning site selection for the proposed correctional facility; 2) building plans, specifications and approvals; 3) documents concerning any acquisition agreements and/or consent orders; 4) documents regarding meetings, agreements and accords between NYCEDC and DOC regarding construction of the correctional facility; 5) documents between NYCEDC and other city agencies, councils and boards regarding the proposed facility and 6) documents concerning public notices, hearings, meetings or other public participation by the NYCEDC regarding the acquisition of Oak Point and construction of a correctional facility anywhere in the Bronx.

On October 12, 2007 NYCEDC acknowledged receipt of the request and, thereafter, by letter dated March 6, 2007 NYCEDC forwarded a number of documents¹, advising petitioner's attorney that NYCEDC had withheld or redacted certain documents that it determined were exempted from disclosure pursuant to Public Officer Law Section 87(2)(c), as information that would impair present or imminent contract awards, and Public Officer Law

¹It appears that NYCEDC initially responded to SSBX's request on November 9, 2006 but that SSBX did not receive the correspondence.

Section 87(2)(g), inter or intra agency materials that are not statistical tabulations, instructions to staff that affect the public or final agency policy determination or audits. On April 18, 2007 SSBX formally appealed the March 6, 2007 response. On June 14, 2007 NYCEDC finally determined the appeal maintaining it was "not required to produce a detailed list identifying with specificity each document withheld under FOIL." (Yoskowitz Aff. Ex. 21) NYCEDC did produce some additional documents along with the final determination letter but indicated that it was withholding additional documents pursuant to Public Officer Law Section 87 (2)(g) as predecisional inter and intra agency documents, notes, communications with NYCEDC's consultants, and draft *ULURP*, *EIS* and Fair Share Analysis documents, disclosure of which would adversely affect the deliberative process. NYCEDC also withheld drafts of procurement related materials and requests for proposals pursuant to Public Officer Law Section 87(2)(c) which exempts documents from disclosure if such disclosure would impair present and imminent contract awards. Additionally, NYCEDC withheld documents asserting attorney client privilege. (Public Officer Law Section 87 [2][a])

In support of the petition, SSBX argues that the productions are inadequate and inconsistent because respondents produced substantially more documents in response to virtually identical requests by other parties in a different lawsuit (Britestarr Homes, Inc. v City of New York, 07/05020 (Bankr. D. Conn., files

Apr. 11, 2007) According to petitioner, that bankruptcy proceeding concerns the same issues that inform SSBX's FOIL request-the City's plan to build a prison at Oak Point.

Moreover, they contend that respondents have failed to provide particularized and specific justifications or factual information about the documents being withheld and that respondents have not established that they are properly withholding documents pursuant to the inter-agency/intra agency, present or imminent contract awards and/or attorney-client privilege or work product exemptions. Finally, SSBX argues that the court should conduct an *in camera* review to determine whether the withheld documents must be produced.

In opposition to the petition and in support of the motion to dismiss, respondents contend that SSBX's claims are moot because respondents have produced all of the responsive non-exempt records pursuant to the FOIL request; that SSBX is not entitled to a detailed list or chart of documents that respondents are withholding or redacting and that an *in camera* review is not warranted because respondents have established that the withheld records are properly exempt from disclosure under FOIL.

Respondents further assert that their responses to the FOIL requests were different in the bankruptcy proceeding because plaintiff in that proceeding sought different types and categories of records; the FOIL request in the bankruptcy

proceeding was dated approximately eight months later than SSBX's request and encompassed more and different records and that the rules governing discovery in the bankruptcy proceeding require broader disclosures than the rules that govern a FOIL request. Respondents also argue that the document productions are different because the FOIL requests in the bankruptcy proceeding was addressed to the City of New York not just DOC and NYCEDC.

It is well settled that "All government records are...presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of the Public Officers Law Section 87(2)" (In Gould v New York City Police Department, 89 NY2d 267, 274-275 (1996)). To ensure maximum access to government documents, the Court of Appeals has reminded municipalities that the 'statutory exemptions are narrowly constructed and the city must articulate a particularized and specific justification for nondisclosure (see Matter of New York Civil Liberties Union v City of Schenectady, 2 NY3d 657, 660). Consequently the burden rests upon the agency claiming the exemption to disclosure to demonstrate that the requested material indeed qualifies for exemption. "[O]nly where materials falls squarely within the ambits of one of these statutory exemptions may disclosure be withheld" (Matter of Fink v Lefkowitz, 47 NY2d 567, 571) "If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of

representative documents and order disclosure of all nonexempt, appropriately redacted material" (Matter of Gould v New York City Police Dept., supra, 89 NY2d at 275 citations omitted).

With respect to respondents' claims for disclosure exemption for attorney client privilege and attorney work product respondents have failed to establish sufficient basis to warrant nondisclosure. Not a scintilla of information regarding the documents that respondents withheld or redacted has been presented to demonstrate that the materials fall into the attorney work product or attorney client privilege exemption. It is impossible for the court to determine whether the withheld documents are, in fact, privileged. Not all communications between attorney and client are privileged. (Priest v. Hennessy, 51 NY2d 62) and the burden of providing all the elements of privilege rests with the party asserting it. (Id at 69). Indeed, the courts have recognized that there are numerous types of communications with council that fall outside of any privilege (see, Orange County Publ'ns, Inc. v. County of Orange, 168 Misc 2d 346, 354). Respondents' conclusory assertion of privilege, without more, is insufficient to meet its burden of establishing that documents are exempt from disclosure pursuant to Public Officer Law Section 87(2)(a).

Similarly, respondents assertion of a work product exemption is without support. "Not every manifestation of a lawyer's labors enjoys the absolute immunity of work product. (Hoffman v.

Ro-San Manor, 73 AD2d 207, 211) "The exemption should be limited to materials that reflect...legal research, analysis, conclusions, legal theory or strategy." (Id) Here again, respondents conclusory assertion that some documents should be exempted based on work product privilege, without more, is insufficient to establish that the documents are exempt from disclosure pursuant to Public Officer Law Section 87(2)(a).

In asserting the impairment or imminent exemption, DOC indicated that it withheld preliminary and draft requests for proposals along with procurement related materials that have not yet been issued or completed because the disclosure would impair present or imminent contract awards. Similarly, NYCEDC cited Public Officer Law Section 87(2)(c) as its reason for withholding "preliminary and draft procurement related materials, including drafts of requests for proposals, all of which have not been issued."

Respondents' description of the documents being withheld based upon Public Officer Law Section 87(2)(c) is insufficient because it fails to provide the court with factual information about the documents or to explain the basic nature of the contractual or collective bargaining negotiations that would be affected if these documents were disclosed. (Verizon New York v Bradbury, 40 AD3d 1113, 1115 [Verizon failed to establish the specific harm it would suffer if the documents were disclosed]; Babigian v Evans, 104 Misc 2d 140, 143 ["Respondents contention

that the imminent collective bargaining negotiation would be impaired by release of the information sought is conclusory in nature. Respondent do not adequately support this contention and the information release would not appear to impair any negotiations.]; United Fed'n of Teachers v New York City Health and Hosps. Corp., 104 Misc 2d 623, 624-25 ["Respondents' arguments that disclosure...Would impair imminent contract awards or collective bargaining negotiations are wholly unsustainable....There has been no evidentiary showing made to buttress these contentions."]

As to that branch of motion seeking a nondisclosure exemption pursuant to Public Officer Law Section 87(2)(g) concerning Inter and Intra Agency Materials, the Court of Appeals wrote:

Opinions are recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker...in arriving at his decision.' Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers. (Xerox Corp. V. Town of Webster, 65 NY2d 131, 132)

This Court of Appeals' decision explained that while reports and documents might be exempt, "on this record-which contains only the barest description of them - we cannot determine whether the documents in fact fall within the scope of FOIL's exemption fro "intra-agency materials..." (Id at 133; see also, Church of

Scientology of New York v. State of New York, 46 NY2d 906, 907-908 [petitioner's request for documents was granted where the state tendered only references to the applicable statute and conclusory categorizations of records withheld without a factual basis on which to determine whether the exemption applied]; Daily News, L.P. v. City of New York Office of Payroll Admin., 9 AD3d 308 respondent did not satisfy its burden of demonstrating that the material qualified for an exemption because respondent provided no factual basis for its conclusion that the material was exempt]).

Similarly, as in Xerox, in this case respondents have provided "only the barest description" of the documents. The description do not contain factual information that would permit the court to determine whether all of the documents, in fact, fall within the Public Officer Law Section 87(2)(g) exemption for pre-decisional inter or intra agency material. Under these circumstances respondents' motion to dismiss must be denied.

Petitioner has demanded that respondents be required to prepare a list of charts describing, in detail, each record withheld and each redaction made is granted. In FOIL-AOL-11985 (March 9, 2000) The Executive Director of The Committee on Open Government opined:

I am also unaware of any provision of the Freedom of Information Law of judicial decisions that would require that a denial at the agency level identify every record withheld or include a

description of the reason for withholding each documents [sic]. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index"... While a final administrative determination must 'fully explain' the reasons for the denial, I note the agency's burden of justifying denial in a judicial challenge is clearly more stringent. (Emphasis added) (citations omitted)

The Executive Director then cited the Gould court's requirement that, in a judicial setting, the agency must articulate a "particularized and specific justification" for not disclosing the requested documents." (Gould v. New York City Police Department, supra, 89 NY2d at 275).

Accordingly, respondents are directed to prepare a list or chart for this court specifically identifying and describing the documents withheld which list shall include a statement of the exemption claimed and a particularized factual justification for the non-disclosure. If the court is unable,, from the list, to determine whether certain documents fall entirely within the scope of the asserted exemption it will conduct an in camera inspection of such documents and order disclosure if appropriate.

Accordingly, SSBX's petition is granted to the extent that, within 60 days of the date of service of this order with notice of entry, respondents are directed to deliver to this court, a list of all documents redacted and/or withheld pursuant to asserted FOIL exemptions, with a complete, specific,

particularized explanation for the redaction or non-disclosure.²

The foregoing constitutes the decision and order of the court.

DATED: January 15, 2008



KIBBIE F. PAYNE
J.S.C.

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²I note that the document production in the federal bankruptcy proceeding between different parties is not relevant to the issues before the court in this Article 78 proceeding and thereof I will not address SSBX's arguments based on *Britestarr Homes, Inc. V. City of New York*.