

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
Application of TRI-STATE PUBLISHING  
COMPANY, a Division of OTTAWAY  
NEWSPAPERS, INC.,

DECISION AND ORDER

Petitioner,

-against-

Index No. 7498-91

CITY OF PORT JERVIS, COMMUNITY  
DEVELOPMENT AGENCY OF PORT JERVIS,  
SALLY T. MARTINEZ, Executive  
Director of the Community Development  
Agency of Port Jervis,

Respondents.

-----X  
LaCAVA, J.

In this Article 78 proceeding, Petitioner Tri-State Publishing Company ("Tri-State") seeks an order directing Respondents City of Port Jervis and Community Development Agency of Port Jervis ("CDA") and its Executive Director to comply with the provisions of the Freedom of Information Law ("FOIL"; Public Officers Law article 6) and declaring that the determination denying access to certain CDA records was illegal and contrary to law. Petitioner also seeks attorney's fees in the amount of \$5,000.00.

Petitioner is the publisher of the Tri-State Gazette, a daily newspaper of general circulation in and around the City of Port Jervis. It has published numerous articles in connection with Respondents' administration of the United States Department of Housing and Urban Development Section 8 Housing Program

("Section 8") in Port Jervis. Essentially, the program provides rent subsidies to those in financial need. Respondents distribute over 1.5 million dollars a year in Section 8 subsidies to landlords of the approximately 250 living units covered by the program.

In April, 1991 Petitioner requested various Port Jervis related Section 8 records from the U.S. Department of Housing and Urban Development ("HUD") under the federal FOIL (5 USC 552). In response, Petitioner received a letter dated May 10, 1991 stating that the Federal Privacy Act prohibits HUD from disclosing information on individuals and families. It noted, however, that absent state or local laws and regulations, the restriction was not binding upon the local public housing authorities. Thereafter by letter dated May 21, 1991 HUD disclosed only limited information in the form of a computer printout. Indicating that information on properties leased and rental voucher participating families was not available from HUD, Petitioner was referred to CDA for such information.

By letter dated May 21, 1991 counsel for the CDA, Bavoso, Fox & Coffill, requested that the the Committee on Open Government render an opinion on whether it was proper to release the information requested. An opinion was issued on June 3, 1991. The Executive Director wrote, in part:

From my perspective, a disclosure that permits the public [to] determine the general

income level of a participant in such a program based upon income eligibility would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Therefore, insofar as the records sought include the names, addresses or other identifying details pertaining to tenants in Section 8 housing, I believe that those items may be withheld or deleted, as the case may be, from the Agency's records.

Assuming that disclosure of the identities of landlords and the figures indicating the amounts that they are paid, essentially as government contractors, would not reveal the names, addresses or other identifying details pertaining to tenants, I believe that those items would be available under the Freedom of Information Law after the appropriate deletions have been made to protect tenants' privacy.

By letter dated June 12, 1991 Petitioner filed a formal FOIL request with CDA for copies of the desired records. The records access officer for the CDA denied the request except to the extent previously granted by HUD. Petitioner appealed the determination to the CDA chairman, Chairman Biondi. He affirmed the determination by letter dated August 2, 1991.

The records sought include those containing the

"[a]ddresses and property owners names of dwellings units in the U.S. Department of Housing and Urban Development, Section 8 Housing Subsidy Program between January 1, 1990 and June 12, 1991." Additionally, Petitioner seeks the following:

For each of the above specified units the following additional information: address; property owner name; identification of buildings as one, two, or multifamily dwellings - if multifamily, number of total units in dwelling and number of those which are Section 8; number of bedrooms in each unit; date property owner became participant in rent subsidy program for each unit; total monthly rent for each unit; amount of monthly subsidy for each unit; total amount paid in calendar year 1990 to owners for each unit.

In affirming the record access officer's denial of Petitioner's FOIL request, CDA Chairman Biondi stated the following in his August 2, 1991 letter:

1. Much of the information that you have requested and detailed in page 1 of your July 15, 1991 correspondence is not a specific record kept by the Agency. The Agency is not obligated to create records for you that it does not keep in the ordinary course of its business.

2. The release of names and addresses of landlord and tenant participants in the program is certainly an unwarranted invasion of personal privacy. The release of the property owners' names and addresses and/or the names and addresses of the tenants obviously could easily lead to an identification of the tenant or tenants at those properties listed. I do not see how disclosures of this information would not reveal information identifying tenants in a

community of our size. A review of the tax rolls, which are public information, would reveal the properties owned by a particular landlord, particularly if the landlord's address was also known to the entity or individual reviewing the tax rolls and a visit to the property or properties could easily identify the tenant or tenants.

. . .

It is my understanding that there is no documentation in the current files of the Port Jervis Community Development Agency which lists the landlord without the name of the tenant/client and the addresses of the property. This includes computer records.

In addition, Chairman Biondi explained that "Agency personnel have for years promised confidentiality to participants in the Program . . . [and] has struggled for years to open up housing opportunities for income eligible families without creating a stigma of being 'low income'."

While denying certain information, Chairman Biondi did agree to disclosure "[i]f there is an actual list kept by the Agency of the size of the dwelling; the number of bedrooms; the number of occupants; and an aggregate amount for monthly rentals and subsidies paid."

Herein Petitioner does not dispute that there exists privacy interests which ought to be protected. In fact, it specifically states that it does not desire to obtain the names of those residing in Section 8 housing. It contends, however, that the names of tenants can be redacted from the records prior

to disclosure to avoid any unwarranted invasion of personal privacy.

Respondent argues that the release of the landlord's names would, in a community the size of Port Jervis, lead to the identification of Section 8 beneficiaries. It asserts that they do not have any lists or records of landlords alone. All include the names of corresponding tenants.

The existence of properly exempt information on a record does not ipso facto exempt the entire document. Where a record contains disclosable and exempt information, generally the record should be disclosed absent the exempt data which may and should be redacted. Therefore, whether no records exist with a landlord's name which do not also contain a tenant's name is no basis to deny disclosure of the records if they are otherwise disclosable.

The Court recognizes 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 [citations omitted]" (Matter of Capital Newspapers v Whalen, 69 NY2d 246, 252). Additionally, there is no requirement that an applicant establish "need, good faith or legitimate purpose" for the records sought (Matter of Farbman v NYC Health and Hospitals Corp., 62 NY2d 75, 80) and the "burden of demonstrating that requested material is exempt from disclosure rests on the agency" (id.)

The legislature has seen it fit to provide for a privacy exemption to disclosure (Public Officers Law §§87[2][b]; 89[2]). Here, Petitioner does not dispute that the names of the involved tenants should not be disclosed. The only issue then is to what extent Respondents may withhold otherwise disclosable records on the grounds that they contain certain information which might lead to the identities of the recipients of government housing assistance and, thus, violate their privacy interests.

Where Section 8 housing is identified by an address relating to a single family dwelling, the identity of the tenant would be easily ascertainable. Similarly, where the address relates to a multiple dwelling in which all units are Section 8 units, the identities of the residents are readily available. Only to the extent that the locations of such units and the identities of such tenants not be disclosed would the privacy interests of Section 8 recipients be protected. A hybrid situation exists where a landlord owns one or more multiple dwellings where less than all units in each building are Section 8 units. In such a case it may reasonably be said that a subsidized tenant's identity would not be readily ascertainable. Therefore, the Court reaches the following conclusions.

To the extent records exist which contain the names of landlords who own one or more multiple dwellings not all the units of which are Section 8 units, Respondents are directed to

disclose the name of such landlord, the address of the multiple dwelling, the number of total units in the dwelling and number of which are Section 8, the aggregate number of Section 8 one, two and three bedroom apartments, the date each landlord became a participant in the rent subsidy program, the total monthly rent for each unit, the amount of monthly subsidy for each unit, and the aggregate amount of Section 8 money received by the landlord per building.

To the extent records exist which contain the names of landlords who own single family Section 8 dwellings or multiple family residences all the units of which are Section 8 units, the Court directs that the name of the landlord, the number of such total units owned, whether such units are single family dwellings, or one, two or three bedroom apartments, the date that the landlord became a participant in the rent subsidy program, the total monthly rent for each such single family residence or for the units in each multiple dwelling, the amount of monthly subsidy for each unit, and the aggregate amount of Section 8 money received by the landlord per building be disclosed with the unit locations and names of tenants redacted.

While certain of the information ordered disclosed could indirectly permit an astute and industrious individual to research the identity of Section 8 recipients, the speculative likelihood and remoteness of this occurrence especially in light of the statement of Petitioner that it is not interested in the

names of the recipients, must be balanced against the presumption in favor of disclosure (Public Officers Law §§84, 87 [2]).

This disclosure shall be in addition to any prior records Respondents have already agreed to disclose but have yet to make available to Petitioner.

While the Court's determination might necessitate the redaction of certain information from any released records, it is in no way intended to nor can it require Respondents to "prepare any record not possessed or maintained" (except to the extent provided for in the Public Officers Law which, it is noted, is inapplicable here (Public Officer Law §89[3], Gannett Co., Inc. v County of Monroe, 59 AD2d 309, affd 45 NY2d 954). Therefore, to the extent that these records exist, Respondents are directed to make them available, as redacted, within fifteen days of Petitioner's service of a copy of this Decision and Order upon them.

"Counsel fees are recoverable in a FOIL proceeding only if three criteria have been met: (1) the solicitor of information 'substantially prevailed', (2) the agency from which the information was sought 'lacked a reasonable basis in law' for withholding it, and (3) the information was of 'clearly significant interest to the general public' (Public Officers Law §89[4][c])" (Matter of Wurster v LeFevre, 52 AD2d 810, 811).

"However, even if all these requirements are met, an award of counsel fees is still discretionary . . . (Matter of Powhida, 147

AD2d 236, 238).

Petitioner's application for attorneys fees is denied. Although the Court finds merit to the Petition to the extent indicated above, Respondents' determination to withhold records to protect the identities of low income tenants was not without reasonable basis in law notwithstanding the Court's determination that certain records should be released as redacted. Additionally, the Court is not persuaded that the raw data sought is of clearly significant interest to the general public (Id.). The Court further notes that this proceeding followed Respondents' apparent good faith effort to comply with the requirements of FOIL while protecting the privacy interests of participants in the Section 8 program. Toward that end Respondents consulted with counsel who, in turn, sought the opinion of the Committee on Open Government.

Accordingly, the petition is granted to the extent indicated herein without costs or attorney's fees. The records, as redacted, shall be made available within thirty days of Petitioner's service of a copy of this Decision and Order upon Respondents.

The foregoing constitutes the Opinion, Decision and Order of the Court.

The Court has considered the following papers in this proceeding:

1. Notice of Petition, Petition and attached exhibits dated August 21, 1991.
2. Answer to Petition dated October 23, 1991.
3. Affidavit in Opposition and attached exhibits dated October 23, 1991.
4. Respondents' Memorandum of Law.
5. Petitioner's Memorandum of Law.

Dated: White Plains, New York  
March 4, 1992



JOHN R. LaCAVA, A.J.S.C.

TO:  
Sluzar & Harter  
Attorneys for Petitioner  
2706 East Main Street  
Endwell, New York 13760  
  
Bavoso, Coffill & Davis  
Attorneys for Respondents  
19 East Main Street  
P.O. Box 3139  
Port Jervis, New York 12771