

## SUPREME COURT, NEW YORK COUNTY

NYLJ, JULY 16, 2002

**MATTER OF WEST 41ST STREET REALTY LLC, v. NEW YORK STATE URBAN DEVELOPMENT**—Petitioner West 41st Street Realty LLC ("petitioner") commenced this petition under Article 78 to challenge a determination by respondent New York State Urban Development Corporation d/b/a Empire State Economic Development Corporation ("ESDC") whereby ESDC refused to turn over certain documents requested of it under the New York State Freedom of Information Law ("FOIL"). Public Officers Law ("POL") §84, et seq. In addition to the documents, petitioner seeks attorneys fees and its costs in bringing this action. The petition is granted in part for the reasons below.

Petitioner, as its name suggests, is in the real estate business. On October 11, 2001, its attorneys requested broad categories of material from ESDC under FOIL regarding Site 8 South of the 42nd Street Development Land Use and Improvement Project ("Site 8 South"). The 42nd Street Development Land Use and Improvement Project ("Project") is the redevelopment of Times Square undertaken by ESDC of which Site 8 South is a significant part.

The Project's modus operandi is for the State of New York, through ESDC, to condemn midtown property around Times Square. The ESDC negotiates a long-term lease with a private developer whereby the developer finances ESDC's purchase of the site (title remains with ESDC), and the property is leased to the developer to build on it. Site 8 South is the most recent part of the Project to be announced, and more sites will be developed in the future.

In October 2001, ESDC was in the process of negotiating contracts with respect to the purchase and lease of Site 8 South. In response to the October 11 FOIL request, it released some documents to petitioner but refused access to others. By a letter dated November 11, 2001, ESDC's records officer told petitioner's attorney that certain records would not be released pursuant to POL §87(2)(c), because, if disclosed, they would impair a present or imminent contract award; and some were withheld under POL §87(2)(g) on the ground that they were inter-agency or intra-agency materials that may be exempted from disclosure.

On November 14, 2001, ESDC's directors made a determination and findings regarding the acquisition of Site 8 South. This determination was published November 28 and 29, 2001, and a copy was mailed to petitioner's attorney. The planned acquisition involved a partnership between ESDC, the New York City Economic Development Corporation, the New York Times Company ("Times") and Forest City Ratner Companies ("FCR"), which is a private company engaged in real estate development. It envisaged the erection of a building to be used by the Times as its new headquarters.

The venture was finalized on December 12, 2001 when the parties signed a lease, called a Land Acquisition and Development Agreement ("LADA"), and related documents, nearly all of which were released. A document not released is a letter from David A. Thurm of the New York Times Company to ESDC and addressed to ESDC, 42nd Street Development Corporation and the New York Times Building LLC, dated December 12, 2001 ("December 12 Letter"). The December 12 Letter is prominently marked "confidential", and it states that it sets forth assumptions and calculations used by the parties with respect to the LADA, and that the assumptions and calculations are based on confidential and proprietary information pertaining to the Times' ongoing business. The writer further states that "we would expect you to hold this letter and its contents strictly confidential, and not to disclose the same to any third party ... without the prior written consent" of the Times.

In January 2002, ESDC made available approximately seven thousand pages of documents regarding the Site 8 South transaction. Material it withheld was identified in an exemption log.

Petitioner commenced this proceeding in its own name on February 14, 2002. By the time oral argument was held, disclosure of only three specific categories of documents were disputed: Documents from the files of ESDC's general counsel regarding lease negotiations that were copied to or received from private entities; documents submitted to the Court for in camera review from the files of Wendy Leventer, an ESDC employee; and the December 12 Letter, which also was submitted for in camera review.

### Discussion

FOIL directs that each State agency shall make available for public inspection all records, subject to several exemptions. POL §87(2). The Court of Appeals articulated the standard to be applied in considering a request for access to government documents under FOIL as follows:

All records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held 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.

Buffalo News, Inc. v. Buffalo Enterprise Develop. Corp., 84 NY2d 488, 492 (1994) (citations omitted). "FOIL's declared purpose of ensuring open government (see Public Officers §84) requires giving its disclosure provisions an expansive interpretation." Matter of Newsday, Inc. v. Empire State Development Corp., \_\_\_ NY2d \_\_\_, N.Y.L.J., June 14, 2002, p. 18, 19. An agency's determination to not disclose records pursuant to a FOIL request may be challenged in an Article 78 proceeding. CPLR 7803(1).

Exemptions to disclosure under FOIL are set forth in POL §87(2)(a)-(j). As relevant here, an agency may deny access to records, or portions thereof, that (i) if disclosed would impair present or imminent contract awards (POL §87(2)(c)), (ii) are trade secrets or are submitted to an agency by a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise (POL §87(2)(d)), or (iii) are inter-agency or intra-agency materials which are not statistical or factual data or final agency policy or determinations (POL §§87(2)(g)(i) and 87(2)(g)(iii)).

The lease negotiation documents are identified in a stipulation made by counsel on April 8, 2002 when they appeared to argue the petition. Petitioner refers to this material as the "private party" documents because copies were distributed to private entities, including in some instances to the Times, FCR and their advisors. ESDC contends that these documents are not subject to disclosure because they do not reflect its final determination, rather they are "predecisional memoranda or other nonfinal recommendations" that were used in connection with the agency's deliberative process. See, Xerox v. Town of Webster, 65 NY2d 131 (1985). ESDC further contends that many of these documents are marked with handwritten notes of its counsel, and others are drafts of contracts that are "black-lined" to indicate revisions under consideration.

ESDC also argues that these documents are exempt from disclosure under POL §87(2)(c) because the Project consists of several stages, of which Site 8 South is just one, so disclosure of this material would impair future contracts regarding other sites. It relies upon advisory opinions issued by the Committee on Open Government ("Committee"), a governmental body established under POL §89(1)(b) with the specific charge of providing guidance to state agencies in complying with FOIL. In particular, ESDC points to the Committee's FOIL Advisory Opinion 5033 (March 28, 1988), wherein the Committee advised that certain draft leases prepared by the New York State Urban Development Corporation in connection with the Project were exempt from disclosure under POL §87(2)(c) because disclosure would impair an imminent contract. (No advisory opinion was sought in connection with the present dispute). In that case, however, disclosure was sought before the subject leases became final, and the agency was still in the process of negotiating terms. Although the agency claimed that it would be impaired from negotiating with private developers, regarding future Project sites, the Committee's opinion did not rely upon that representation in finding the draft leases exempt. Indeed, the reasoning in none of the advisory opinions submitted by ESDC compel a finding that drafts of leases distributed to an agency's negotiating adversaries are exempt under POL §87(2)(c) after the agreement is finalized.

This argument is unpersuasive because contracts regarding the other sites are not "imminent", and because the public's right to obtain information under FOIL regarding ESDC's activity should not be held in abeyance indefinitely for the time it will take the agency to complete this cross-decade project.

The lease negotiation documents, including "black-lined" drafts of contracts, that were shared with the Times, FCR, its real estate advisors or legal counsel should be made available to petitioner. Disclosure of this material will not impair current or imminent contracts, is not inter- or intra-agency material, and is not subject to any exemption relied upon by ESDC. Neither is the material attorney-client privileged or attorney work product, as ESDC argues, because it was communicated to the parties with whom ESDC negotiated the leases. Applying this criteria, the only document identified in the April 8 stipulation that would be exempt from disclosure is that numbered 1-69, an undated portion of a severance lease addressed to ESDC from an unknown source that qualifies as an inter-agency record because there is no showing that it was distributed outside the agency. All other material on the April 8 stipulation must be made available, subject only to the redaction of handwritten notes by ESDC personnel or its advisors.

Upon reviewing the documents submitted for in camera inspection from Ms. Leventer's file, it is apparent that they are primarily made up of inter-agency material that is not subject to disclosure. The documents identified on the "addendum to exemption log" as 6-2-a, 6-4-a, 6-4-b, 6-4-c, attachments 2a, 3a and 3c to 6-4-c, 6-6-a, 6-6-b, 6-6-c and 6-6-d are exempt from disclosure. Documents identified as attachments 1b, 1c, and 3b to 6-4-c, 6-4-d, 6-4-e and 6-6-e are not exempt and shall be made available to petitioner. According to counsel, the other documents identified on the "addendum to exemption log" have already been made available.

The most contentious document is the December 12 Letter. It contains information submitted by the Times. The letter states that the information is its confidential proprietary information, and this representation is accepted as accurate for the purposes of this proceeding, where the issue is ESDC's reasonable belief with respect to whether material is exempt under POL §87(2)(d). However, there is no showing that, if disclosed, the December 12 Letter would cause substantial injury to the competitive position of the Times. POL §87(2)(d). Therefore, the December 12 Letter must be made available to petitioner.

Finally, petitioner's request for attorney's fees and the legal costs of this proceeding is denied. The Court may exercise its discretion to award attorney's fees to a party seeking material under FOIL if that party clearly prevailed, the records involved clearly are

of significant interest to the general public, and the agency lacked a reasonable basis for withholding it. POL 89(4)(c)(1)-(III). The material sought is not of general interest to the public because the more than seven thousand pages of material that was released provided substantially all relevant information regarding the project. Petitioner sought this material in connection with its litigation in other actions in pursuit of its private interests (see, e.g., Matter of West 41st St. Realty LLC v. N.Y.S. Urban Development Corp., \_\_ AD2d \_\_, 2002 N.Y. App. Div. LEXIS 6603 [1st Dept. June 20, 2002] and Matter of West 41st St. Realty LLC v. City of New York, New York County Index No. 122765/01). Moreover, ESDC had a reasonable basis for withholding the material, and its reasoning is upheld in several instances herein. Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is granted to the extent that respondent ESDC shall provide access to records in accordance with the foregoing decision within 30 days of notice of entry hereof; and it is further

ORDERED and ADJUDGED that petitioner's claim for attorney's fees and legal costs is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly, without costs or disbursements.