

**Matter of Newsday, LLC v Suffolk County Dept. of
Public Works**

2012 NY Slip Op 30582(U)

February 28, 2012

Supreme Court, Suffolk County

Docket Number: 6621/2011

Judge: Paul J. Baisley

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
Application for a Judgment under Article 78 of the
CPLR and other relief by

NEWSDAY, LLC,

Petitioner,

-against-

THE SUFFOLK COUNTY DEPARTMENT OF
PUBLIC WORKS,

Respondent.
-----X

DECISION AND ORDER

INDEX NO.: 6621/2011
MOT. NO.: 001 MOT D

PETITIONER'S ATTORNEY:
LEVINE SULLIVAN KOCH
& SCHULZ, LLP
321 West 44th Street, Suite 510
New York, New York 10036

RESPONDENT'S ATTORNEY:
CHRISTOPHER M. GATTO, ESQ.
Suffolk County Attorneys Office
100 Veterans Memorial Hwy.
Hauppauge, New York 11788

In this Article 78 proceeding, the petitioner, publisher of Long Island's largest daily newspaper, challenges an appeal determination by the respondent dated October 27, 2010, and a second appeal determination by the respondent dated February 3, 2011, denying the petitioner's various requests pursuant to the Freedom of Information Law (Public Officers Law Article 6; hereinafter "FOIL") for documents, etc., relating to the construction of the new replacement Suffolk County correctional facility at Yaphank, New York.

According to the petition, planning for the jail replacement facility project, which is one of the largest public works projects ever undertaken by Suffolk County, began in 2003, with estimated costs exceeding \$285 million. Actual construction of the project began in 2007. In light of what the petitioner describes as the "intense interest" of Suffolk County taxpayers in the project, and as part of its ongoing coverage of the issue, the petitioner submitted to the respondent three separate FOIL requests seeking records relating to the selection of contractors and consultants, the awarding of contracts, and other communications concerning the construction of the new facility: the first, on June 11, 2010, and the second and third, on November 4, 2010.

The petitioner's first request sought access to "RFPs [requests for proposals], bidder lists, [and] rating sheets for all bidders on all aspects of the Jail Project in Yaphank." According to the respondent, on or about August 2, 2010, 145 pages of records were produced in response to the first request; the petitioner questioned the adequacy of the response. By letter dated August 26, 2010, the respondent denied the petitioner's first request with respect to all records not already provided, stating that the information requested in those records "is privileged and of a highly sensitive nature."

On September 23, 2010, the petitioner filed an administrative appeal from the August 26 letter denying its request, arguing, in its accompanying letter, that certain documents (namely, bid award recommendations concerning later phases of the project) provided subsequent to August 2 to petitioner by the Judicial Facilities Agency (“JFA”), the public authority overseeing the project, demonstrated that the respondent’s production was incomplete, and that the respondent was obligated to provide a specific explanation of the grounds for withholding any document not provided. The respondent subsequently requested in writing that the petitioner provide copies of the documents which it had received from the JFA, but the petitioner rejected the respondent’s request.

By letter dated October 27, 2010, the respondent, by Christopher M. Gatto, Esq. of the Office of the Suffolk County Attorney, denied the appeal, noting that after a diligent search, the respondent had disclosed to the petitioner all responsive documents, that the petitioner had failed to furnish the bid award recommendations provided by the JFA despite the respondent’s request, that absent such documentation, there was no basis to conclude that there were any responsive documents not previously provided, and that to the extent the petitioner’s request could be construed to include the plans and specifications for the jail, the requested documents were exempt from disclosure pursuant to Public Officers Law §87(2)(f), which permits denial of access to records which, if disclosed, could endanger the life or safety of any person.

The petitioner’s second and third requests followed. The second request sought access to “all backup documentation for rating sheets of bidders on the replacement jail facility at Yaphank; all RFQs [requests for quotes], RFEIs [requests for expressions of interest], and waivers; all bid evaluation memos, and all memos and correspondence issued in connection with the award of all contracts related to the project,” while the third request sought access to “all e-mails regarding the jail replacement facility project” and “all correspondence between Suffolk County and the New York State Commission of Corrections on the jail replacement facility.” By letter dated December 7, 2010, the respondent indicated that it was providing 12 pages of records in response to the second request and 98 pages of records in response to the portion of the third request concerning correspondence between Suffolk County and the New York State Commission of Corrections. As to the portion of the third request concerning e-mails, the respondent indicated that the request was under review and would be available “within the next few days.” The respondent also noted, without further specification, that “certain” records or portions of records requested were exempt from disclosure by application of Public Officers Law §87(2)(a), (f), and (g), and that the requests were denied to that extent. As to Public Officers Law §87(2)(a), which permits denial of access to records which are specifically exempted from disclosure by state or federal statute, the respondent determined that certain records or portions thereof were subject to the attorney-client or attorney work product privileges; the respondent also determined that certain records or portions thereof were subject to Public Officers Law §87(2)(g), which permits denial of access to records that are inter-agency or intra-agency materials but are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits, including but not limited to audits performed by the comptroller and the federal government.

On January 5, 2011, the petitioner filed an administrative appeal from the portion of the December 7 letter denying its requests. The petitioner contended that the respondent had failed to make the requisite particularized showing for any record alleged to be exempt, and that as to any information legitimately exempt from disclosure, the respondent was still required to turn over the documents with any such information redacted. The petitioner also noted that despite the

respondent's representations to the contrary, it had not received 12 of the 110 pages which were to have been produced, nor had it received any of the e-mails which were to have been produced "within the next few days." The respondent subsequently produced an additional one-page record in response to the second request and 136 pages of documents – many of them redacted emails – in response to the third request. By letter dated January 11, 2011, the petitioner advised that, notwithstanding the further production of records, it was adhering to its position regarding the exemptions "supposedly applicable to documents or portions thereof not provided."

By letter dated February 3, 2011, the respondent, by Christopher M. Gatto, Esq., denied petitioner's second appeal, relying exclusively on the applicability of the statutory exemptions cited in the December 7 letter. This proceeding followed.

In its petition, the petitioner alleges that the respondent violated its statutory obligations in responding to the FOIL requests by failing to conduct an adequate search for the requested documents, failing to produce documents whose disclosure was required, improperly redacting certain documents provided, and failing to set forth particularized justifications for those documents not provided. In addition to the Article 78 relief requested, the petitioner seeks an award of its costs and attorneys' fees pursuant to Public Officers Law §89(4)(c).

As part of its answering papers, the respondent annexes an "Index of Documents Withheld or Redacted," which purports to identify each of the documents withheld by date, type, and description, and which states the nature of the exemption claimed for each such document, but which does not reveal the author or recipient of any document.

Following service of the petitioner's reply, the respondent requested and obtained leave to submit a supplemental affirmation, in which it alleges that certain documents provided by the petitioner for the first time in its reply – documents previously requested by the respondent for the sole purpose of aiding its search for responsive records but which the petitioner had refused to provide – clarified the scope of the petitioner's requests and led to the discovery of hundreds of pages of additional responsive records, which it has since disclosed. It appears that the respondent has now disclosed a total of some 600 pages of records in response to the petitioner's several requests.

Under FOIL, all records of a public agency are presumptively open to public inspection, without regard to the need or purpose of the applicant (*Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 808 NYS2d 568 [2005]).

FOIL provides the public with broad "access to the records of government" (Public Officers Law §84). * * * An agency must "make available for public inspection and copying all records" unless it can claim a specific exemption to disclosure (*see* Public Officers Law §87[2]; §89[3]). However, the exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government * * *.

(*Matter of Data Tree v Romaine*, 9 NY3d 454, 462, 849 NYS2d 489, 493-494 [2007]). Within five business days of the receipt of a request, an agency must either make the requested records available, deny the request, or acknowledge receipt of the request with a statement indicating the approximate date when a determination will be made (Public Officers Law §89[3][a]). If a FOIL request is

denied, the agency must show that the requested information “falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578 [1986]). While typically an agency action is reviewed under an “arbitrary and capricious” standard, a court must apply a far different rule when reviewing the denial of a FOIL request – it is “to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure” (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158, 892 NYS2d 377, 380 [2010]).

Here, in response to the petitioner’s claim that the respondent failed to conduct an adequate search for the requested documents and failed to produce documents whose disclosure was required, Christopher Gatto, Esq., the respondent’s FOIL appeals officer, asserts in his supplemental affirmation that the respondent “conducted an exhaustive search for records requested,” and that it “fully complied with its FOIL obligations by at all times endeavoring to comply with petitioner’s requests, locating and turning over hundreds of pages [of] non-exempt responsive records, and claiming specific exemptions for records that have been withheld and/or redacted.” The Court finds this assertion insufficient (*see Matter of De Fabritis v McMahon*, 301 AD2d 892, 754 NYS2d 117 [2003]). When an agency is unable to locate a record properly requested under FOIL, Public Officers Law §89(3) requires the agency to “certify that it does not have possession of such record or that such record cannot be found after diligent search.” While the statute does not specify the manner in which the agency must so certify – and it has been noted that neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 730 NYS2d 768 [2001]) – the respondent’s assertion herein falls short of meeting the statutory requirement (*cf. id.*; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 653 NYS2d 54 [1996]; *Matter of New York Envtl. Law & Justice Project v City of New York*, 286 AD2d 307, 730 NYS2d 285 [2001]; *Matter of Ahlers v Dillon*, 143 AD2d 225, 532 NYS2d 22 [1988]). Had the respondent satisfied the requirement, the petitioner would have been obligated to articulate a “demonstrable factual basis” to support its contention that the additional requested documents existed and were within the respondent’s control (*Matter of Gould v New York City Police Dept.*, *supra* at 279, 653 NYS2d at 60); as it is, the petitioner need not do so. Instead, the Court finds that the petitioner is entitled to judgment directing the respondent to once again review its files and to disclose any additional records in its possession which are responsive to the petitioner’s requests; as to any additional record not disclosed, the respondent shall, in accordance with Public Officers Law §87(2), provide reasons for the denial of access or, in accordance with Public Officers Law §89(3), certify that it does not have possession of such record or that such record cannot be found after diligent search, with such certification to include an explanation of the efforts constituting the search.

As to the petitioner’s objections with respect to records withheld or redacted, the Court is unable to determine, based on the meager description of those records contained in the respondent’s “Index of Documents Withheld or Redacted,” whether any such record falls within the scope of the asserted statutory exemptions. Accordingly, the Court directs that the respondent produce those records for *in-camera* review (*see Matter of Gould v New York City Police Dept.*, *supra*; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 419 NYS2d 467 [1979]; *Matter of DJL Rest. Corp. v Department of Bldgs. of City of N.Y.*, 273 AD2d 167, 710 NYS2d 564 [2000]).

The petitioner’s request for an award of attorneys’ fees and costs shall be held in abeyance

pending completion of the *in-camera* review. Pursuant to Public Officers Law §89(4)(c), a court may award such fees and costs to a litigant who has “substantially prevailed,” and then only if the agency had no reasonable basis for denying access or the agency failed to respond to a request or appeal within the statutory time. “Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys’ fees” (*Matter of Beechwood Restorative Care Ctr. v Signor, supra* at 441, 808 NYS2d at 571). Notwithstanding the petitioner’s claims, the Court finds that any determination as to whether the statutory prerequisites have been met must await further review.

Accordingly, it is

ORDERED that the respondent shall, within 20 days after the date of this decision and order, produce for *in-camera* review unredacted copies of each record which it seeks to withhold or to produce in redacted form, identifying each portion thereof which it claims is exempt from disclosure and the relevant exemption; and it is further

ORDERED that the entry of judgment shall be held in abeyance pending a further determination by the Court consistent with this decision and order.

Dated: February 28, 2012

PAUL J. BAISLEY, JR.

J.S.C.