

**Matter of Moody's Corp. & Subsidiaries v New York
State Dept. of Taxation & Fin.**

2015 NY Slip Op 32897(U)

August 31, 2015

Supreme Court, Albany County

Docket Number: 6197-14

Judge: III, Raymond J. Elliott

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At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 31st day of August, 2015.

PRESENT: HON. RAYMOND J. ELLIOTT, III
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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In the Matter of

MOODY'S CORPORATION AND SUBSIDIARIES,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

DECISION AND ORDER
INDEX NO. 6197-14

-against-

**NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, and
THOMAS A. MATTOX, as Commissioner of the
New York State Department of Taxation and
Finance,**

Respondents.

APPEARANCES: MARC A. SIMONETTI, ESQ.
 SUTHERLAND, ASBILL & BRENNAN, LLP
 114 Avenue of the Americas
 40th Floor
 New York, New York 10036
 Attorney for Petitioner

HON. ERIC T. SCHNEIDERMAN
Attorney General for the State of New York
(TIFFINAY M. RUTNIK, ESQ. of Counsel)

Assistant Attorney General
Attorney for the Respondents

RAYMOND J. ELLIOTT, III J.S.C.

Petitioner commenced the instant CPLR Article 78 proceeding challenging Respondents' violations of the New York State Freedom of Information Law (hereinafter "FOIL") based on a April 4, 2014, FOIL request made by Petitioner. Petitioner requests that the Court grant the petition, order Respondents to comply with its duty under FOIL and provide the records requested in the April 4, 2014, FOIL request and subsequent appeals, to Petitioner and award Petitioner's attorney's fees and litigation costs in this action. Respondents have opposed the relief sought in the Petition.

Petitioner has further filed a motion to strike Respondents' responses to Petitioner's Requests for Admission and deeming the Petitioner's Requests for Admission admitted for purposes of this proceeding pursuant to CPLR §3123(a) and awarding Petitioner attorney's fees and litigation costs pursuant to CPLR §3123(c). Respondents have opposed the relief sought in the motion.

By correspondence dated April 4, 2014, Petitioner's Attorney submitted a FOIL request to the Department of Taxation and Finance (hereinafter "DTF") Records Access Officer. The request was for all documents related to credit rating receipt sourcing.

By correspondence dated June 26, 2014, Frank Nuara, DTF Records Access Officer, sent a response to the FOIL request. The correspondence indicated that: the audit files(s) had been ordered and would be forwarded upon receipt; that access to 416 pages of the file was denied pursuant to Public Officers Law (hereinafter "POL") §87(2)(a) as it concerns individuals or

entities for which there is no Power of Attorney on file and release would constitute an invasion of personal privacy; that access to 391 pages of the file was denied pursuant to POL §87(2)(g)(iii) as the documents are intra-agency or inter-agency documents that are not final agency policy or determinations. The correspondence went on to explain the right to appeal.

By correspondence dated July 22, 2014, Petitioner's counsel filed a FOIL appeal of the partial denial to access of the requested records.

By correspondence dated August 5, 2014, Mark Volk, Acting Records Appeal Officer (hereinafter "RAO") and Deputy Counsel to the DTF, responded to the FOIL appeal. He stated that the initial FOIL response stated that 807 documents were withheld, when in actuality it was 804, as three of the pages were blank. Mr. Volk explained that twelve of the pages were clearly not in any way responsive to the request. He stated that he was releasing 68 pages in their entirety. Mr. Volk then stated that he was releasing thirteen pages with redactions of deliberate comments withheld under POL §87(2)(g). He then indicated that he upheld denial of access to the remaining 711 pages. Mr. Volk explained that of the 711 pages, 369 were withheld under POL §87(2)(b) as disclosure would be an invasion of privacy. He went on to state that 169 pages consist of internal e-mails; 77 pages comprise draft memos, draft letters and draft agreements; 120 pages consist of letters, agreements, internal memos and meeting notes, and that these pages were properly withheld under POL §87(2)(g), as they are internal, deliberative documents that do not contain final agency policy or determination. Mr. Volk further states that the documents were withheld under POL §87(2)(a) and the secrecy provision of the Tax Law. He asserted that thirteen pages consisted of return information, information on pending litigation and executive meeting minutes discussing entities for which Petitioner did not have a Power of Attorney on file

with the Department. He further noted that of the 379 pages, 121 are duplicative, as there are e-mail threads with corresponding attachments. Mr. Volk stated that the remaining 332 pages are withheld from the original request under POL §87(2)(g). He explained that of the 332 pages, 264 are internal emails and 68 pages are draft memos, draft letters and draft Advisory Opinions, and are deliberative intra-agency documents not containing final agency policy or determination. He further stated that 32 pages contain information about entities for which Petitioner did not have a Power of Attorney on file with the Department and are properly withheld under POL §87(2)(a) and the secrecy provision. He further noted that of the 332 pages, 154 are duplicative, as there are e-mail threads with corresponding attachments. Mr. Volk recognized that the Audit file was being sent separately to Petitioner's Attorney, and he certified that there were no other records that are responsive to his request.

By correspondence dated August 19, 2014, Frank Nuara, DTF Records Access Officer, provided Petitioner's Attorney with the Audit file. Mr. Nuara advised that three pages were redacted as they contained information regarding individuals for which there is no Power of Attorney on file and is proper under POL §87(2)(b). Two pages were redacted under POL §87(2)(e) as the information involves a method of investigative technique or procedure. Mr. Nuara stated that access was denied to 178 pages pursuant to POL §87(2)(g)(iii) as they are intra-agency or inter-agency documents that are not final agency policy or determination. The correspondence went on to explain the right to appeal.

By correspondence dated September 3, 2014, Petitioner's counsel filed a FOIL appeal of the partial denial to access of the requested records.

By correspondence dated September 17, 2014, Mark Volk, Acting Records Appeal

Officer and Deputy Counsel to the DTF, responded to the FOIL appeal. He stated that the RAO has released five pages with redactions, which he upheld. He stated three pages contained Social Security Numbers for individuals with no Power of Attorney on file and the other two pages contained deliberative materials regarding possible future audit action contemplated and were properly redacted pursuant to POL §87(2)(e) and (g). Mr. Volk stated that of the 178 pages withheld, he was releasing 26 of the pages in their entirety and six pages with redactions. The redactions are of deliberative comments that do not contain final agency policy or determination and are properly withheld under POL §87(2)(g). Mr. Volk upheld the denial of the remaining 146 pages. He stated that 69 pages comprise internal emails that are deliberative intra-agency documents that do not contain final agency policy or determination and are properly withheld under POL §87(2)(g). Mr. Volk further indicated that two pages also referenced other taxpayers for whom there was no Power of Attorney on file, are properly withheld under POL §87(2)(a), and the secrecy provision. He stated that 77 pages consist of auditors' notes, draft information requests and draft audit summaries that are intra-agency documents that do not contain final agency policy or determination and are properly withheld under POL §87(2)(g). He further noted that 19 of the withheld pages are duplicative, as there are e-mail threads with corresponding attachments. Mr. Volk certified that there were no other records that are responsive to the request.

Petitioner asserts that Respondents failed to disclose under FOIL what was required to be disclosed. Petitioner states that the concealing of the information is problematic because the unresolved substantive tax issue involves whether the Department of Taxation and Finance (hereinafter "Department") concealed both the existence of an agreement with a similarly

situated taxpayer and the Department's true position regarding taxation of the credit rating industry. Petitioner states that it seeks additional documentation to expose the Department's misrepresentation and discriminatory tax treatment. Petitioner asserts that it has an interest as a taxpayer, and the public has a substantial interest in knowing whether the Department is unfairly and improperly administering the Tax Law and discriminating against taxpayers.

Petitioner explains the basis for its allegations concerning the Department's concealment of an agreement with its primary competitor McGraw-Hill Financial's Standard & Poor Ratings Services and the Department's true position regarding taxation of the credit rating industry. Petitioner asserts that because of its reliance of the representations made by the Department, it entered into a closing agreement that was not in its best interest and paid additional tax pursuant to an origination source method.

Petitioner asserts that FOIL requires maximum disclosure of government records and that Respondent has failed to properly assert and satisfy its burden to withhold documents. Petitioner argues that the personal privacy exemption does not apply as the documents sought are not personal. Petitioner asserts that the personal privacy exemption does not apply to information that has already been publicly released, citing the opinion released on February 24, 2014, by the New York City Tax Appeals Tribunal, which discussed the McGraw-Hill agreements. Petitioner argues that both its and the public's substantial interest overcome any privacy interest at stake. Petitioner states that even if the personal privacy exception applies and the public's interest in disclosure does not overcome the privacy interests, FOIL requires that documents containing personal information be redacted and disclosed when possible.

Petitioner argues that the inter or intra agency communications exception does not apply

to the documents sought as the documents have been given to interested outside parties.

Petitioner asserts that final agency policy and instructions to staff affecting the public are not protected from disclosure. Petitioner cites POL §87(2)(g)(i)-(iv) as to what materials the inter or intra agency materials exception does not apply to.

Petitioner asserts that New York Tax Law's secrecy provisions protect numerical and other proprietary information submitted on tax returns, and the law does not protect draft agreements, draft letters or internal memoranda.

Petitioner argues that the McGraw-Hill agreements and other related materials must be disclosed as they do not fall within any of the FOIL exceptions. Petitioner states that Respondent must release or disclose: any documents and materials surrounding the negotiation and execution of the McGraw-Hill agreements; all internal documents that reflect final Department decisions concerning credit rating receipt sourcing and the Department's position in Petitioner's audit; and all withheld and redacted portions of Petitioner's audit file.

Respondents have filed an Answer and object in point of law stating that the Petition fails to state a cause of action.

In support of their Answer and opposition to the Petition, Respondents provide numerous exhibits including five binders of withheld documents and the related privilege log, for the Court to conduct an *in camera* inspection, along with an Affidavit from Mark F. Volk.

Respondents assert the withheld and redacted documents fall squarely into the exemptions asserted and the Petition must be denied. Respondents state that they have provided the Court with all withheld and redacted documents in order for the Court to conduct an *in camera* inspection. Respondents assert that this is recognized as the most appropriate method for

determining whether the material falls within an exemption.

Respondents argue that the claimed FOIL exemptions are applicable to the withheld and redacted materials. Respondents claim that they have properly withheld and redacted documents based on state or federal statute, including the attorney-client privilege in CPLR §4503 and secrecy in Tax Law §211. Respondents assert that they properly withheld and redacted documents where disclosure would constitute an unwarranted invasion of personal privacy and where disclosure would interfere with law enforcement investigations or judicial proceedings. Respondents further state that they properly withheld and redacted documents as non-final agency policy or determinations.

Respondents argue that Petitioner is not entitled to attorneys fees and costs because Respondents did properly and reasonably respond to the FOIL request. Respondents argue that Petitioner has not met the statutory requirements to obtain an award of attorney's fees found in POL §89(4)(c). Respondents state that in order for the Court to consider an award of attorney's fees, three statutory requirements must be met: that a party must substantially prevail in the litigation; that the agency had no reasonable basis for denying the access to the records; and the agency failed to respond to a request or appeal within the statutory time. Respondents further state that an award of attorney's fees is within the trial court's discretion.

Respondents assert that the request for attorney's fees is premature and not yet ripe for adjudication, as the Court has not found that there was no reasonable basis for the partial denial of the FOIL request.

In support of the opposition, Mark F. Volk, filed an Affirmation asserting that Respondents complied with the statutory mandates of FOIL and properly withheld or redacted

records pursuant to POL §87(2)(a),(b),(e) and (g). Mr. Volk further informs the Court that based on his further review of the documents, he recognizes that some mistakes were made in the collection and review of the documents prepared for the FOIL response. Mr. Volk states that to the extent that the privilege logs differ with his previous responses, he relies on the privilege logs to have the most accurate accounting of the documents in response to Petitioner's FOIL request and the reasons for withholding or redacting them.

In reply, Petitioner asserts that Respondents have failed to meet their burden to justify non-disclosure of the documents under FOIL, as they did not prove the exemptions apply or adequately document and disclose the reasons for their denial. Petitioner argues that the Court should disregard the newly raised arguments for non-disclosure, including the attorney-client privilege which does not apply to FOIL disclosure, and the taxpayer secrecy provision which Respondents are extending beyond its scope. Petitioner asserts that the Court should compel disclosure without conducting an *in camera* inspection as "it is not the function of the Supreme Court to apply the exemptions for the agency" (*West Harlem Bus Gp. v. Empire State Dev. Corp.*, 3 N.Y.3d 882, 886 [2009]). Petitioner states that if the Court does conduct an *in camera* inspection and finds any information is protected, it must compel the Respondents to redact that information and disclose the document. Petitioner states that the Respondents must provide a privilege log to it pursuant to POL §89(3)(a) to explain their justification for withholding documents in writing after a diligent search.

Petitioner asserts that both parties have raised a triable issue of fact concerning whether certain documents were previously disclosed to outside parties and requests that the Court order a trial forthwith. Petitioner further requests that the Court permit discovery when a trial is ordered.

Petitioner reiterates and reserves its request for attorney's fees and costs based on the Respondents' failure to act reasonably and to provide a rational basis for its position to withhold documents.

Petitioner served a Notice to Admit by mail and e-mail on Respondents' counsel on February 24, 2015. Respondents' Counsel served a Response to Request for Admissions dated February 26, 2015, which included an Affirmation from Mark F. Volk, dated February 26, 2015.

Petitioner's Counsel filed a motion seeking an order striking the Respondent's responses to the Notice to Admit and deeming the Petitioner's Request for Admission admitted for purposes of this proceeding pursuant to CPLR §3123(a) and a request for attorney's fees and costs as allowed by CPLR §3123(c).

Petitioner argues that the Respondent's response to the Notice to Admit is improper as it contains stand-alone objections without any accompanying admission, denial, qualification or explanation. Based on the improper objections, Petitioner states that Respondents failed to provide a bona fide response to the requests. Petitioner argues that even if the Respondents had properly raised the objections, the Court would be required to overrule them. Petitioner states that taxpayer secrecy does not prevent the Respondents from admitting indisputable facts that are already available to the public. Petitioner argues that its requests are relevant and fall within the scope and purpose of CPLR §3123. Petitioner asserts that Respondents' other objections are not applicable, such as stating that certain requests were "vague and confusing" and demanded "interpretations of law". Petitioner states that the three denials entered by Respondents are unreasonable and should be admitted.

In opposition to the motion, Respondents' counsel asserts that the motion is untimely as

Petitioner's Counsel served the motion two weeks after the return date for the underlying Petition, and it is not entitled to short-service under CPLR §406.

Respondents assert that they properly responded to the Notice to Admit and the motion should be dismissed. Respondents state that the Affidavit of Mark F. Volk, which accompanied the Response to the Notice to Admit, provided the reasons why matters could not be fairly admitted or denied without some material qualification or explanation. Respondents assert that this is allowed under CPLR §408. Respondents state that the remedy for an unreasonable refusal to admit is not to deem the matter admitted, but is set forth in CPLR §3123(c) and further state that a protective order is not necessary.

Respondents argue that the Notice to Admit should not be used to circumvent FOIL and the well-established tax secrecy laws.

The Court heard oral argument on the Article 78 Petition and underlying motion on March 16, 2015. At that time, Petitioner's Counsel acknowledged that it had received a redacted privilege log from Respondents.

The Freedom of Information Law promotes open government and public accountability and, therefore, "imposes a broad duty on government to make its records available to the public." (*Gould v. New York City Police Department*, 89 NY2d 267 [1996]). Under FOIL, agency records are presumptively available for public inspection and copying unless the requested documents fall within one of the exemptions set forth in Public Officers Law § 87(2). (*Matter of Fappiano v. New York City Police Dept.*, 95 NY2d 738 [2001]). "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.” (*Matter of Newsday Inc. v. Empire State Dev. Corp.*, 98 NY2d 359 [2002]; *Matter of Daily Gazette v. Schenectady*, 93 NY2d 145 [1999]). “So long as there is a clear legislative intent to establish and preserve confidentiality of records, a State statute need not expressly state that it is intended to establish a FOIL exemption.” (*Wm. J. Kline & Sons, Inc. v. County of Hamilton*, 235 AD2d 44 [3rd Dept. 1997]).

POL § 87(2) provides the exemptions for denial of a FOIL request. POL §87(2)(a),(b),(e) and (g) are the exemptions which have been raised by Respondents in this proceeding.

POL §87(2)(a),(b),(e) and (g) states: “2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
- (e) are compiled for law enforcement purposes and which, if disclosed, would:
 - i. interfere with law enforcement investigations or judicial proceedings;
 - ii. deprive a person of a right to a fair trial or impartial adjudication;
 - iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (g) are inter-agency or intra-agency materials which are not:
 - i. statistical or factual tabulations or data;

- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations;
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government;”.

“The intra-agency exemption applies to ‘opinions, ideas, or advice exchanged as part of the consultation or deliberative process of government decision making’” (*Matter of Smith v. New York State Off. of the Attorney Gen.*, 116 A.D.3d 1209, 1210 [3d Dept. 2014] quoting *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277 [1996]). “Public Officers’ Law §87(2)(g), which allows for ‘people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure’” (*Matter of Entergy Nuclear Indian Point 2, LLC v. NYS Dept. of State*, 2015 Slip Op 05988 [3d Dept. 2015] quoting *Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 N.Y.3d 477, 488 [2005]).

“The term ‘interagency materials’ has been interpreted to mean deliberative materials or ‘communications exchanged for discussion purposes not constituting final policy decisions’” (*Matter of Mingo v. New York State Division of Parole*, 244 A.D.2d 781, 782 [3d Dept. 1997] quoting *Matter of Russo v. Nassau County Community Coll.*, 81 N.Y.2d 690, 699 [1993]).

“Predecisional material consisting of opinions and recommendations prepared by agency employees to assist agency decision makers in reaching a decision may also be exempt from disclosure under the Freedom of Information Act” (*Id.*, citing *Matter of Xerox Corp. V. Town of Weber*, 65 N.Y.2d 131, 132 [1985]). “Notably however, ‘[t]o the extent the [documents] contain ‘statistical or factual tabulations or data’ (Public Officers Law §87[2][g][i]), or other material subject to production, they should be redacted and made available to the applicant” (*Xerox Corp.*

v. Town of Weber, supra, at 133).

POL §89(2) states: "(a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
- vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;
- vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law."

“[W]here only a portion of a given document is properly exempt, the agency is nonetheless obligated to produce a redacted version that discloses all the non-exempt information” (*Matter of Grabell v New York City Police Dept.*, 47 Misc. 3d 203, 208 [Sup. Ct. New York Co. 2014] citing *In the Matter of Schenectady County Society for the Prevention of Cruelty to Animals, Inc.*, 18 N.Y.3d 42, 45-46 [2011]).

CPLR §4503(a)(1) sets forth the attorney-client privilege and states “Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.”

“Public Officers Law §87(2) exempts attorney-client communications that are confidential under CPLR 4503(a) and attorney work product under CPLR 3101(c) in paragraph (a), and exempts intra-agency predecisional material in paragraph (g)” (*Turner v. Department of Fin.*, 242 A.D.2d 146, 148 [1st Dept. 1998]).

Tax Law §211(8) states "Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for any tax commissioner, any officer or employee of the department of taxation and finance, or any person who, pursuant to this section, is permitted to inspect any report, or to whom any information contained in any report is furnished, or any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a report filed pursuant to this article, to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report under this article. The officers charged with the custody of such reports shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state or the commissioner in an action or proceeding under the provisions of this chapter or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the commissioner is a party or a claimant, or on behalf of any party to any action or proceeding under the provisions of this article when the reports or facts shown thereby are directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby as are pertinent to the action or proceeding, and no more. The commissioner may, nevertheless, publish a copy or a summary of any determination or decision rendered after the formal hearing provided for in section one thousand eighty-nine of this chapter. Nothing herein shall be construed to prohibit the delivery to a corporation or its duly authorized representative of a copy of any report filed by it, nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports and the items thereof; or the publication of delinquent lists showing the names of

taxpayers who have failed to pay their taxes at the time and in the manner provided by section two hundred thirteen of this chapter together with any relevant information which in the opinion of the commissioner may assist in the collection of such delinquent taxes; or the inspection by the attorney general or other legal representatives of the state of the report of any corporation which shall bring action to set aside or review the tax based thereon, or against which an action or proceeding under this chapter has been recommended by the commissioner of taxation and finance or the attorney general or has been instituted; or the inspection of the reports of any corporation by the comptroller or duly designated officer or employee of the state department of audit and control, for purposes of the audit of a refund of any tax paid by such corporation under this article; and nothing in this chapter shall be construed to prohibit the publication of the issuer's allocation percentage of any corporation, as such term 'issuer's allocation percentage' is defined in subparagraph one of paragraph (b) of subdivision three of section two hundred ten of this article."

"Tax Law §1146(a) prohibits the Department from disclosing any sales or use tax 'return or report' filed with it except to certain designated entities" (*Tartan Oil Corp. v. State Dept. of Taxation & Fin.*, 239 A.D.2d 36, 38 [3d Dept. 1998]). "[A] major purpose of tax secrecy statutes is to facilitate tax enforcement by encouraging tax payers to make full and truthful declarations without fear that these statements will be revealed or used against them for other purposes" (*Id.*).

With the foregoing in mind, the Court has now completed a lengthy *in camera* inspection of the documents contained in five binders and the related privilege logs. During its *in camera* inspection, the Court weighed counsels' arguments regarding whether the privileges or exemptions asserted applied to each document. The Court further considered whether the

documents could be appropriately redacted for release.

Attached hereto and made a part of this Decision and Order, are revised privilege logs. The Court has indicated which exemptions or privileges it found did or did not apply to each document by striking out those reasons that the Court found did not apply. The Court has further indicated on the privilege logs which documents are to be turned over to Petitioner, as all of the privileges or exemptions asserted have been struck. In the event that the Court has ordered a document redacted prior to release, it is duly noted on the privilege logs. The Court further reviewed all redacted pages to determine if the exemptions applied and marked the privilege logs accordingly. The Court reviewed the 13 pages marked as not responsive at the end of Privilege Log F-02170 and agrees that the pages are not responsive.

The following items/tab numbers are ordered to be released:

From Privilege Log F-02261: 3, 4, 5, 88, 89 with redaction

From Privilege Log F-02170: 8, 9, 16, 55, 56 with redaction, 59, 60, 116, 180, 183, 332 with redaction, 366 with redaction

The Court hereby directs Respondent to provide to Petitioner within thirty days of this Decision and Order copies of all documents which it has ordered to be released.

CPLR §406 states: "Motions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time." CPLR §408 provides: "Leave of court shall be required for disclosure except for a notice under section 3123. A notice under section 3123 may be served at any time not later than three days before the petition is noticed to be heard and the statement denying or setting forth the reasons for failing to admit or deny shall be served not later than one day before the petition is noticed to be heard, unless the

court orders otherwise on motion made without notice.”

In this proceeding, the return date of the underlying Article 78 Petition was February 27, 2015. The Notice to Admit was dated February 24, 2015, and served by mail and e-mail on that same date. The Court finds that the Notice to Admit was served not later than three days before the Petition was noticed to be heard and was therefore timely served.

The purpose of a Notice to Admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. A Notice to Admit which goes to the heart of the matters at issue is improper. (*DeSilva by DeSilva v. Rosenberg*, 236 A.D.2d 508 (2d Dept. 1997).

The Court finds that Petitioner is using the Notice to Admit to obtain information that was denied through its FOIL request via a different discovery device. This goes to the heart of the matter at issue before the Court. The purpose of this proceeding is to determine whether Respondents violated their FOIL obligations. It should not be used as a forum to seek additional discovery for a potential lawsuit that may be filed in the future between the parties. The Court further deems adequate the Answer filed by Respondent in response to the Notice to Admit, in light of its finding that this procedure should not have been employed in this proceeding.

Public Officers Law §89(4)(c) states: “The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when: i. the agency had no reasonable basis for denying access; or ii. the agency failed to respond to a request or appeal within the statutory time.”

“Counsel fees may be imposed against an agency opposing a FOIL request if (1) the petitioning party substantially prevailed, (2) the record involved was of a clearly significant

interest to the general public, and (3) the agency in question lacked a reasonable basis for withholding the requested documentation” (*Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police*, 218 A.D.2d 494, 499-500 [3d Dept. 1996]; Public Officers Law §89). All three requirements must be met and, even then, the award of counsel fees lies within the trial court's sound discretion (see, *Matter of Legal Aid Society v. New York State Dept. of Social Services*, 195 A.D.2d 150, 152 [3d Dept. 1993]).

The Court finds that based on the circumstances regarding the FOIL request in this case, there is no basis for it to exercise its discretion and award counsel fees. There was no stonewalling or evidence that the Respondents were purposely withholding the documents requested. Based on the Affirmation of Mark F. Volk, Esq., the Court finds that Respondents complied with the statutory mandates of FOIL and properly withheld or redacted records pursuant to POL §87(2)(a),(b),(e) and (g). The Court acknowledges that Respondents even continued to review and release additional documents to Petitioner.

In addition, the Court finds that Respondents’ asserted and demonstrated that the release of the records sought fall within statutory exemptions and the agency in question did not lack a reasonable basis for withholding the requested documentation.

Following the *in camera* review, the Court released 17 documents. This is not a basis for finding that Petitioner substantially prevailed.

The ultimate decision on whether attorney’s fees will be awarded lies with the Court, and the Court has found that there is not a basis for an award of attorney’s fees or costs in this case.

Accordingly, it is hereby

ORDERED, that the Petition is granted in part and denied in part; and it is further

ORDERED, that within thirty days of the date of this Decision and Order, Respondents are to deliver to Petitioner those documents which the Court has ordered to be turned over as indicated by the privilege logs attached hereto and made a part hereof; and it is further


ORDERED, that Petitioner's motion to strike is denied; and it is further

ORDERED, that Petitioner's request for attorneys fees is denied.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the Attorneys for Petitioner. All original supporting documentation is being filed with the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

**SO ORDERED AND ADJUDGED.
ENTER.**

Dated: August 31, 2015
Albany, New York



RAYMOND J. ELLIOTT, III
Supreme Court Justice