

Argued by: Cameron J. Macdonald
Time Requested: 15 minutes

Case No.

**New York Supreme Court
Appellate Division—Third Department**

GARY TRAVIS WHITEHEAD,

Petitioner-Appellant,

– against –

WARREN COUNTY BOARD OF SUPERVISORS,

Respondent-Respondent.

APPELLANT'S BRIEF

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Preliminary Statement

New York's Freedom of Information Law (FOIL) empowers the public's right to know, and discourages government secrecy, through broad access to agency records, so that the public can root out abuse and hold its officials accountable (*Friedman v. Rice*, No. 56, 2017 WL 5574476, at *9-10 [N.Y. Ct. App. Nov. 21, 2017]). "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 [1987], cert. denied 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 [1988]).

In early 2017, Appellant Whitehead tried to participate in Respondent Warren County's decision-making regarding a contract dispute with a project vendor. Warren County frustrated his efforts and hid information by failing to provide in a timely manner draft reports from an engineering firm retained by the Respondent to evaluate the disputed project. Thus, Whitehead, *pro se*, commenced a C.P.L.R. Article 78 special proceeding. Warren County then provided access to the draft reports, and the Supreme Court dismissed the proceeding as moot, failing to address Whitehead's request to be reimbursed his filing fees and costs.

Summary of Argument

Petitioner substantially prevailed in the Article 78 special proceeding. Respondent provided the draft reports in his FOIL requests. Respondent did not have a reasonable basis for withholding the reports or not providing redacted copies to Petitioner. Thus, the Supreme Court erred when it dismissed the proceeding as moot without addressing Petitioner's request to be reimbursed his filing fees and costs.

Questions Presented

Did the Supreme Court err when it entered an order dismissing the Article 78 special proceeding as moot without addressing Petitioner's request to be reimbursed his filing fees and costs after Petitioner had substantially prevailed and Respondent had no reasonable basis for denying access?

Statement of the Case

In August 2016, Warren County contracted with an engineering company (Bergman) to evaluate the efficiency of a Warren County geothermal energy heating and cooling project (R. 39, ¶ 25). Siemens Building Technologies, Inc. was the project vendor under a contract from early 2007 (*id.*, ¶ 24). By 2016, questions had been raised by Warren County regarding Siemens' performance under the contract (*id.*).

Whitehead is a Warren County resident and professional engineer (R. 5, ¶ 1). Whitehead initially alerted Warren County to the issues regarding the geothermal energy project leading to the Siemens contract (R. 221).

That November, Bergman submitted preliminary draft reports to Warren County's Deputy Supervisor for Public Works and County Attorney (R. 30, ¶ 27). The County Attorney passed the reports along to outside counsel retained to evaluate a strategy for addressing the project's shortcomings with Siemens (*id.*).

On November 18th, Whitehead emailed a FOIL request for all communications, reports, memos, etc., between Bergman and Warren County (*id.*, ¶ 28; R. 205).

Warren County promptly acknowledged the FOIL request and advised Whitehead that it anticipated providing responsive information by December 21st (R. 39, ¶ 29; R. 207).

On New Year's Eve—a Saturday, Whitehead emailed Warren County, advising that he had not received the records he requested that were supposed to be provided ten days earlier (R. 40, ¶ 30; R. 210). Whitehead asked Warren County whether his FOIL request should be considered constructively denied, and further asked that his email be treated as appealing constructive denial of his FOIL request (*id.*).

At 7:46 a.m. the next business day after the holiday weekend, Warren County informed Whitehead that the County Attorney's

office had completed its review of the request and was granting access to the information Whitehead requested on compact disc, asking how Whitehead wanted to receive the materials (R. 40, ¶ 31; R. 212). Warren County did not inform Whitehead that it was denying access to any records at that time (R. 212).

Later that day, Whitehead requested the Bergman draft report and appendices, which he could not locate in the materials provided by Warren County (R. 40, ¶ 32; R. 214).

The next day, Warren County advised Whitehead that the County Attorney's office was reviewing the draft report and appendices to determine whether they were releasable under FOIL (R. 40, ¶ 33; R. 216). Warren County further advised that it would be providing a response within seven business days (*id.*).

Seven business days later, Warren County emailed Whitehead four of the seven appendices to the draft report, withholding the draft report and three other appendices in their entirety (R. 40, ¶ 34; R. 219).

According to Warren County, it denied the FOIL request as to the draft report and three appendices because the materials were not statistical or factual tabulations of data or final agency policy that affected the public (R. 40, ¶ 34; R. 219). Warren County further denied access because portions of the withheld materials could injure the competitive position of a private party if released to the public (*id.*).

Whitehead emailed Warren County the same day stating the reasons for his belief that Warren County did not have a basis for withholding the requested materials (R. 41, ¶ 35; R. 221).

Warren County treated Whitehead's email as an appeal, and ten business days later, the maximum time to respond under FOIL, affirmed its determination to deny the FOIL request in part, citing exemptions set forth in FOIL § 87(2)(d) and (g) (R. 41, ¶ 36; R. 224).

A few weeks later, Whitehead started a CPLR Article 78 proceeding by filing a Verified Petition, Notice of Petition, and Memorandum of Law that he served on Warren County (R. 41, ¶ 37).

Warren County responded by filing its Verified Answer, with exhibits and a supporting affidavit from Bergman's Charles Bertuch, and its Notice of Motion to Dismiss, relying on the Verified Answer and Bertuch affidavit for support (R. 33-227).

Whitehead subsequently responded by filing a response to the Verified Answer, Opposition to Warren County's Motion to Dismiss, and a Notice of Motion for Summary Judgment (R. 228-41). Whitehead noted that Warren County had engaged in a similar pattern of conduct regarding his FOIL requests for Siemens-related records that caused him to file an Article 78 lawsuit (R. 234).

Warren County then filed its Reply Affirmation (R. 242-45). Among other things, Warren County acknowledged that Whitehead's earlier Article 78 proceeding had been dismissed as moot (R. 245, ¶ 19).

On April 3, 2017, Warren County copied Whitehead on a letter sent to the Supreme Court, advising that Warren County was providing Whitehead with copies of the draft reports (dated November 9 and 29, 2016) he was seeking in the proceeding (R. 254). Warren County did not concede that access was required under FOIL, but instead stated that no further public purpose would be served by withholding access to the documents (*id.*). Warren County further requested that Whitehead's petition be dismissed as moot (*id.*).

On April 5, 2017, the Supreme Court acknowledged Warren County's correspondence, found the controversy to be moot, and dismissed the petition accordingly (R. 3). Warren County served notice of entry of the letter Order later that same day (R. 2).

A few weeks later Whitehead timely filed his notice of appeal with the Supreme Court (R. 1).

Argument

The New York Legislature enacted FOIL recognizing that “a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government” (Pub. Off. L. § 84).

Whitehead has twice needed to bring lawsuits to obtain records relating to the Siemens project at a substantial personal expense

(R. 4; R. 234). Each has been dismissed as moot after Warren County disclosed the records, leaving Whitehead holding personally expensive public records that should have been disclosed without the need for litigation.

FOIL § 89(4)(c) permits a court to assess attorney's fees and litigation costs against an agency when a requestor substantially prevails and the agency has no reasonable basis for denying access (Pub. Off. L. § 89(4)(c)). The legislature enacted FOIL § 89(4)(c) "to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL" (Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5). Courts should not condone an agency's attempt to avoid judicial scrutiny of unsupported assertions by disclosing records after litigation and seeking dismissal of the proceeding as moot (*Matter of Hearst Corp. v. City of Albany*, 931 N.Y.S.2d 713, 717 [3d Dept 2011]).

Point I

A. Whitehead's Request To Be Reimbursed His Litigation Costs Was Not Moot

Whitehead's Article 78 proceeding became moot on the merits when Warren County produced the draft reports described in his FOIL request. "Where the relief being sought is supplied during the pendency of litigation, the matter becomes moot" (*Matter of Newton v. Police Dept. of the City of New York*, 585 N.Y.S.2d 5, 8

[1st Dept 1992]). However, Whitehead's request to be reimbursed his litigation costs was not moot (*Kohler-Hausman v. New York City Police Dept.*, 18 N.Y.S.3d 848, 848 [1st Dept 2015]). It can be an abuse of discretion to deny without explanation a petitioner's request for attorney's fees and costs when the prerequisites for such fee-shifting relief are met (*Bottom v. Fischer*, 10 N.Y.S.3d 786, 787 [4th Dept 2015]).

It makes sense that a petitioner's request for an award of attorney's fees and litigation costs is not made moot when the requested records are produced. And it further makes sense that a court must address the merits of an award request, even when records have been produced. Otherwise, a respondent could wait until litigation, provide the records, avoid paying the petitioner's fees and costs, and defeat the fee-shifting provisions intended to ensure FOIL compliance (*Matter of New York State Defenders Assn. v. New York State Police*, 927 N.Y.S.2d 423, 425 [3d Dept 2011]).

FOIL § 89(4)(c) was added to the Public Officers Law for the precise purpose of stopping agencies from delaying and taking "a 'sue us' attitude in relation to providing access to public records" (*New York Civ. Liberties Union v. City of Saratoga Springs*, 926 N.Y.S.2d 732, 734 [3d Dept 2011] (quoting Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73)). Awarding fees and costs is appropriate where disclosure only occurs through a petitioner

needing to use judicial process and a respondent showing a clear disregard of the public's right to open government (*Id.* at 736).

Here, Warren County (i) ignored its self-imposed first deadline to provide records; (ii) disclosed some records only when asked again; (iii) failed to inform Whitehead that it was partially denying his request and not providing all the requested records, especially the draft reports; (iv) waited until the last minute each time it was obligated to respond to Whitehead; (v) made unsupported assertions of exceptions from disclosure to delay disclosure; (vi) did not provide records access until a time after Whitehead commenced litigation; and (v) did not provide reasons for finally disclosing the reports consistent with its earlier positions.

Point II

B. Whitehead Substantially Prevailed When Warren County Disclosed the Draft Reports

While litigation should not have been required to compel disclosure of the draft reports, Whitehead substantially prevailed when Warren County disclosed the draft reports. A petitioner can substantially prevail when a respondent voluntarily discloses records after litigation commences (*Hearst Corp.*, 931 N.Y.S.2d at 717). A petitioner can also substantially prevail despite losing on appeal challenges to redactions made to records produced only after the litigation commenced (*Madeiras v. New York State Educ. Dept.*, 30 N.Y.3d 67 [2017]). Further, a petitioner can substantially prevail when no public records exist, but a petitioner's litigation efforts

cause an agency to certify that records cannot be found after a diligent search (*Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 962 N.Y.S.2d 773, 775 [2013]).

In *Hearst*, the agency turned over records during litigation, but maintained that its initial denial complied with FOIL. There, the agency had withheld administratively dismissed parking tickets as exempt from disclosure under New York criminal law or as unwarranted invasions of personal privacy. This Court found that in addition to the petitioner having substantially prevailed, the agency failed to meet its burden to show that that records were reasonably withheld. It agreed with petitioner that a fees and costs award was warranted (*Hearst Corp.*, 931 N.Y.S.2d at 717).

Here, the same analysis applies. Whitehead has the documents and has substantially prevailed. Warren County never met its burden of showing that the records ever fell within an exception to disclosure under FOIL. Accordingly, the underlying Article 78 special proceeding should not have been dismissed as moot without addressing Whitehead's request to be awarded his fees and costs.

Point III

C. Warren County Did Not Have a Reasonable Basis to Withhold the Records

The Supreme Court had no information before it that any circumstances had changed between the special proceeding being filed and the reports disclosed to Whitehead. Warren County merely stated that "it has decided that no further public purpose

would be served by withholding access to the documents” (R. 254). But Warren County unreasonably withheld the records in the first place. The reports were not exempted from disclosure under FOIL § 87(2). It had no good reason to withhold the records as exempt from disclosure as intra-agency reports, by operation of state law, or as containing trade secret or commercial information that could cause substantial injury to Siemens if disclosed.

1. Warren County Unreasonably Withheld Factual or Statistical Data

FOIL exempts from disclosure certain intra- or inter-agency materials that are not statistical or factual tabulations or data (Pub. Off. L. § 87(2)(g)(i)). Factual data is objective information, as opposed to opinions, ideas, or advice that is exchanged as part of a deliberative government body’s decision-making process (*Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277 [1996]). Intra-agency pre-decisional material can be exempt from disclosure, but “[b]ackup factual and statistical data to a final determination of an agency is not exempt from disclosure” (*Matter of Professional Standards Review Council of America, Inc. v. New York State Dept. of Health*, 597 N.Y.S.2d 829, 831 [3d Dept 1993]).

Courts and agencies have interpreted this provision to mean that portions of records may be withheld as exempt, but they may not be withheld in their entirety when there is “statistical or factual tabulations or data” within them that can be disclosed (*Gould*, 89 N.Y.2d at 277). Such records should be redacted accordingly (e.g., *Humane Soc. of U.S. v. Empire State Development*

Corp., 863 N.Y.S.2d 107, 122 [3d Dept 2008] (holding that while opinions and projections regarding economic issues addressed in records were exempt intra-agency materials, the factual portions of the documents should be disclosed with the exempt materials redacted)).

Purely factual information does not fall within the intra-agency exemption which is designed to foster open and candid discussions in government deliberations (*Pasek v. New York State Dept. of Health*, 56 N.Y.S. 627, 631 [3d Dept 2017]). Thus, the opinions and analysis in an independent consultant's report can be withheld, but not the factual material on which it is based (*id.* (Independent consultant's report analyzing medical treatment should be disclosed by redacting all but the factual description of the medical treatment))).

Whitehead sought disclosure of draft engineering reports that his experience as a professional engineer and common sense suggest contained statistical or factual tabulations or data. Indeed, the Bergman scope of work was predominantly fact-finding (R. 59-60; R. 170-71). A central purpose of the Bergman report affecting Warren County and its residents was the comparison of energy savings projected by Siemens against the actual amounts paid. In other words, statistical or factual tabulations or data. Thus, Warren County had no reasonable basis to withhold the draft reports *in their entirety* as exempt intra-agency materials.

2. Warren County Unreasonably Withheld Records as Exempt from Disclosure under State Law

When Warren County denied Whitehead’s appeal, it limited the basis of its determination to FOIL § 87(2)(d) and (g). Warren County did not invoke FOIL § 87(2)(a), which permits an agency to deny access to records, or portions thereof, that are specifically exempted from disclosure by state or federal statute (Pub. Off. L. § 87(2)(a)). In its Verified Answer, Warren County belatedly added that it denied access to the draft reports as exempt from disclosure under CPLR § 3101(d)(1)(i), which addresses disclosures relating to expert witnesses in civil litigation.

It is a bedrock principle of administrative law, however, that “[a] reviewing court, in dealing with a determination * * * which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency” (*Montauk Imp., Inc. v. Proccacino*, 41 N.Y.2d 913, 913 [1977] (quoting *Securities Comm. v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed.2d 1995)). Here, Warren County at the administrative hearing level—determining the FOIL appeal—did not invoke FOIL § 87(2)(a) as grounds for its determination. Thus, it could not have met its burden for showing the draft reports were exempt from disclosure under a state statute in the Article 78 proceeding.

Even if the FOIL § 87(2)(a) state statute exemption had been invoked in denying Whitehead’s FOIL appeal, it would not have been reasonable.

First, the Bergman contract documents bely Warren County's assertion that Warren County and Bergman's Bertuch discussed the Warren County Attorney using him as an expert witness. None of the Bergman contract (R. 50), nor the request for proposal (RFP) (R. 58) or the Bergman bid (R. 165) the contract incorporates, mentions potential litigation against Siemens. In addition to not mentioning potential litigation in the scope of services, the RFP contained an anticipated project completion date of November 30, 2016, with no mention of future work or services for trial testimony or other litigation services. Nothing in the contract documents before the Supreme Court suggested that the Bergman report was being prepared for anticipated or pending litigation.

Second, FOIL and CPLR do not necessarily conflict regarding the information Whitehead sought. Assuming, for the sake of argument, that Warren County retained Bergman to provide expert testimony in potential litigation, C.P.L.R. § 3101 would require Warren County to provide the same information to an adversary that FOIL requires it to provide to the public. Specifically, upon request, Warren County would be required to disclose to an opposing party in reasonable detail "the substance of the facts and opinions on which each expert is expected to testify" (C.P.L.R. § 3101(d)(1)(i)). Similarly, as discussed above, FOIL does not permit Warren County to exempt from disclosure the substance of the facts in the draft reports (Pub. Off. L. § 87(2)(g)(i); *see, e.g. Brossoit v. O'Brien*, 565 N.Y.S.2d 299, 301 [3d Dept 1991]).

Warren County failed to raise the state statute exception at the proper time and could not raise it before the Supreme Court. Even so, Warren County could not meet its burden of showing that the Bergman report was an expert report within the meaning of C.P.L.R. § 3101. Moreover, C.P.L.R. § 3101 requires the same level of disclosure relating to facts in the report as required under FOIL. Thus, Warren County unreasonably withheld the draft reports.

3. Warren County Unreasonably Withheld the Records as Trade Secrets

Warren County's conclusory statements fail to meet its burden to establish the disclosure exception in FOIL § 87(2)(d) that the draft reports contained trade secrets or information that would cause substantial injury to a commercial enterprise if disclosed (Pub. Off. L. § 87(2)(d)). In denying Whitehead's appeal, Warren County did not even identify the commercial enterprise that would be injured, let alone describe with any particularity the nature of the harm.

In its Verified Answer, Warren County identified Siemens as the commercial enterprise, but again failed describe with any particularity the nature of the harm. Moreover, the engineer's representative, Bertuch, could only state in his affidavit that he was of the opinion that information in his report originated with Siemens. The Verified Answer otherwise only contains conclusory statements parroting the FOIL statute not supported by facts or law.

At the time that Siemens and Warren County entered into the project contract in 2007, Siemens had the ability to exercise its rights under FOIL § 89(5) to request that Warren County except certain information from disclosure under FOIL § 89(2)(d). Warren County did not present any evidence that Siemens made such a request when denying the FOIL appeal or answering the petition in this matter.

To the contrary, the evidence suggests that Siemens knew that its information was subject to disclosure under FOIL, and simply asked for notice. First, the Siemens contract contemplates disclosures being made by Warren County under FOIL. Under the terms of the contract, Warren County agreed “not to disclose [the technical or pricing information] or otherwise make it available to others except as may be required by freedom of information law of the State of New York” (R. 150). Second, the Siemens contract further provided that Warren County only would provide Siemens with a seven-day notice before disclosing information (*id.*).

There is no evidence that Siemens designated any information to be excepted from disclosure using FOIL § 89(5). If Warren County complied with its contractual obligations and provided that notice before disclosing the draft reports, there is no evidence that Siemens acted to stop disclosure.

Warren County’s generosity toward Siemens in not disclosing the draft reports as potentially injuring that enterprise is inconsistent, at best. While the draft reports were purportedly being

withheld as expert reports in potential litigation against Siemens, Warren County was choosing not to provide them as potentially harming Siemens.

Excepting records from disclosure under FOIL § 87(2) is permissive. “[W]hile an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses” (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 567 [1986]). Warren County’s had no binding obligations under FOIL § 87(2)(d). Its use of that provision as an excuse for not disclosing the reports its ongoing dispute with Siemens, to a professional engineer and taxpayer with a vested interest in the outcome, rings hollow.

There is no support in the record for Warren County’s baseless assertion that disclosing the draft reports would result in releasing information that would harm Siemens. Warren County unreasonably withheld the draft reports under FOIL § 87(2)(d).

Conclusion

Whitehead has the documents and has substantially prevailed. Warren County has not met its burden of showing that the records ever fell within an exception to disclosure under FOIL. Accordingly, the underlying Article 78 special proceeding should not have been dismissed as moot without addressing Whitehead’s request

to be awarded his fees and costs. This Court should award Whitehead his attorney fees and litigation costs and remit this matter to the Supreme Court to determine the appropriate fees and costs.

Dated: Albany, New York
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Respectfully submitted,



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