

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

Case No. 526167

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

GARY TRAVIS WHITEHEAD,

Petitioner-Appellant,

– against –

WARREN COUNTY BOARD OF SUPERVISORS,

Respondent-Respondent.

APPELLANT’S REPLY BRIEF

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Preliminary Statement

Appellant Whitehead discovered issues with a geo-thermal energy project and contract between Siemens Building Technologies, Inc. and Warren County. His efforts led to the County questioning Siemens' performance under the contract. It hired an engineering firm, Bergmann, to evaluate the project. During that time, Whitehead submitted a Freedom of Information Law (Public Officers Law §§ 84-90 "FOIL") request for Bergmann's draft reports. The County did not disclose any portion of the reports, including "factual or statistical tabulations or data" (FOIL § 87[2][g][i]). Whitehead then filed an Article 78 proceeding to compel disclosure. Weeks later, the County disclosed the reports. The Supreme Court then dismissed Whitehead's case as moot and erred by not addressing his request for his litigation costs.

Argument

Whitehead substantially prevailed because the County disclosed in its entirety a report he requested that should have been disclosed in a redacted form prior to litigation. Whitehead is a County taxpayer who had a vested right to know the facts contained in the engineering reports informing the County's decision-making process. FOIL required the County to disclose the facts and statistics in those reports to Whitehead.

Instead, the County argued that it was keeping the report secret—first, ironically, to protect Siemens, and then as material not

subject to a final agency determination (R. 219). The County’s refusal forced Whitehead to bring a lawsuit to compel disclosure (R. 4). Only then did he learn the County purportedly also withheld the reports as attorney work product in the form of draft expert reports prepared in anticipation of litigation (R. 45). But none of the excuses given by the County excuse its failure to disclose redacted records.

“[G]overnment is the people’s business.” FOIL § 84. Courts must interpret and apply FOIL, including by awarding fees and costs, to promote “[t]he people’s right to know the process of governmental decision-making.” That right includes access to “documents and statistics leading to determinations.” (*Id.*)

Point I

A. Whitehead Did Not Abandon His Appeal.

Whitehead filed his Notice of Appeal on April 28, 2017. The date nine months later, January 28, 2018, fell on a Sunday. Whitehead timely filed his opening brief on the next succeeding business day, Monday, January 29, 2018 (General Construction Law § 25a). The Clerk properly accepted Whitehead’s brief under this Court’s rules as timely filed (*id.*).

Point II

A. The Supreme Court Failed to Address Whitehead’s Request for Litigation Costs.

The County mischaracterizes the evidence in the record to assert that the Supreme Court considered Whitehead’s request to be

awarded his litigation costs. Nothing in the Supreme Court's Order suggests the Supreme Court exercised its discretion one way or the other (R. 3). And no one can know because the Supreme Court gave no stated reasons for not awarding Whitehead his litigation costs, "a practice this court has discouraged in the past" (*Matter of Schulz v. Warren County Bd. of Supervisors*, 179 AD2d 118, 123 [3d Dept 1992]). Any doubt should be resolved in favor of Whitehead and this matter remanded for the Supreme Court to award his costs.

Further, the County misstates the elements the Supreme Court must consider for a fees determination. Under FOIL, a court:

(ii) shall 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 and the court finds that the agency had no reasonable basis for denying access.

(FOIL § 89[4][c][ii]). The requested records do not need to be "of clearly significant interest to the general public" (County Brief, p. 16). The Legislature removed that element when it amended FOIL in 2006 (L 2006, ch 492). Here, the Supreme Court should have awarded Whitehead his litigation costs because he substantially prevailed, and the County had no reasonable basis for denying access.

Point III

A. This Matter Should Be Remanded for the Supreme Court to Award Whitehead's Litigation Costs.

Whitehead substantially prevailed when the County disclosed the draft reports and asked the Supreme Court to dismiss the case as moot (*see e.g. Matter of Hearst Corp. v. City of Albany*, 88 AD3d 1130, 1133 [3d Dept 2011]). That left the Supreme Court with the task of determining whether to award Whitehead's litigation costs if the County had no reasonable basis for denying access. None of the arguments the County puts forward excuses its failure to grant Whitehead access to redacted records.

1. The Status of the Siemens Settlement Is Irrelevant and Improperly Raised in this Appeal.

The County improperly bases part of its argument on facts not in the record before the Supreme Court (County Brief, pp. 4-5). Neither party put before that court information regarding a potential settlement with Siemens or a Board of Supervisors meeting to approve such a settlement. Even if the meeting and settlement were relevant, the County may not introduce those facts on appeal, and that argument (County Brief, p. 7) should be disregarded (*Matter of D.B.S. Realty v. New York State Dept. of Env'tl. Conservation*, 201 AD2d 168, 173 [3rd Dept 1994][“We cannot consider factual allegations in petitioner's brief that are not included in the record on appeal.”]). Regardless, the status of the Siemens dispute is irrelevant to the County's obligation to disclose redacted versions of the engineering reports.

2. The County Unreasonably Withheld Factual or Statistical Tabulations or Data.

Whitehead does not contest that FOIL § 87(2)(g) permits agencies to exempt inter- or intra-agency deliberative materials from disclosure. But there are three exceptions, with two that could apply here. The County does not address the exception for “statistical or factual tabulations or data” (FOIL § 87[2][g][i]). Instead, the County continues to argue that the draft reports were non-final agency policy or determinations (FOIL § 87[2][g][iii]). That characterization, however, is irrelevant to the County’s obligation to disclose the statistics and facts in the records.

The cases the County cites actually support Whitehead’s position by recognizing that exempt portions of records can be redacted to facilitate disclosing non-exempt facts and statistics. Indeed, the Court of Appeals previously has stated Whitehead’s position explicitly:

While the reports in principle may be exempt from disclosure, on this record -- which contains only the barest description of them -- we cannot determine whether the documents in fact fall wholly within the scope of FOIL’s exemption for “intra-agency materials,” as claimed by respondents. To the extent the reports 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 appellant

(Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 133 [1985]).

The other cases cited by the County also implicitly support Whitehead’s position. In *Matter of Moody’s Corp. & Subsidiaries v.*

New York State Dept. of Taxation and Fin. (141 AD3d 997 [3d Dept 2016]), this Court affirmed Supreme Court *redactions* of portions of documents as exempt under FOIL § 87(2)(g) (*id.* at 1002). In *Matter of Smith v. New York State Off. of the Attorney Gen.* (116 AD3d 1209 [3d Dept 2014]), the Supreme Court correctly determined the agency properly withheld opinions and advice exchanged as part of the agency's deliberative process after reviewing exemption and *redaction* logs (*id.* at 1210).

Regardless of the engineering report's purpose, the County should have disclosed the statistical or factual tabulations or data it contained with inter- or intra-agency deliberative materials redacted.

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

Whitehead is a County taxpayer with the same interest as the County in the Siemens dispute. He was not a litigation opponent when he made his FOIL request. CPLR disclosure rules apply in the context of disclosure in ongoing litigation. Even if the CPLR rules are applicable, they need to be applied together with FOIL in a manner that meshes the goals of each statute and recognizes the public's presumption to access to government records (see e.g. FOIL § 84; *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 462 [2007]).

a. The County Improperly Invoked Grounds for Exemption Not Raised in the Administrative Determination.

The County never informed Whitehead that it withheld the draft Bergman report as attorney work product prepared in anticipation of litigation before he filed his petition. While the County told Whitehead that it delayed disclosure for the County Attorney to review the draft report and appendices, it then omitted the report, without explanation, when it finally disclosed some of the records (R. 212). Ten days later, the County explained the denial to access, without revealing that it withheld the report as a draft expert report prepared in anticipation of litigation (R. 219). Nor did it provide that reason when it responded to Whitehead's FOIL appeal (R. 224).

“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” (*Matter of Montauk Improvement v. Proccacino*, 41 NY2d 913, 913 [1977] [quoting *Securities Comm. v. Chenery Corp.*, 332 US 194, 196, 67 S Ct 1575, 1577, 91 L Ed 2d 1995]). The County ignored its obligation to explain its denial in the administrative determination. It was not permitted to raise new grounds for denial before the Supreme Court (and this Court).

The cases the County cites do not support its position. In *Matter of Rose v. Albany County Dist. Attorney's Off.* (111 AD3d 1123 [3rd Dept 2013]), the agency responded to an appeal after missing

its statutory deadline and an Article 78 proceeding had been commenced. The agency belatedly claimed that disclosure of certain records could endanger the life and safety of persons to whom they pertained. This Court first recognized that “review of an administrative determination is generally limited to the grounds invoked by the agency at the time of its determination.” It then drew a narrow exception to the rule to protect the confidentiality rights of third parties implicated by the disclosure determination. (*Id.* at 1125). In other words, narrow exceptions to the administrative law rule can be drawn when an agency’s failure to comply with FOIL’s requirements may adversely affect third parties.

In *Moody’s*, this Court concluded that the agency had not raised new grounds for denial in the Article 78 proceeding (*Matter of Moody’s Corp.*, 141 AD3d at 999-1000). Nevertheless, citing *Matter of Rose*, it repeated that the privacy interests of third parties are a limited exception to the rule that a review of an administrative determination is limited to the grounds invoked by the agency at the time of its determination (*id.* at 1000).

The cases cited by the County only establish that an agency’s failure to raise issues in the administrative determination can be excused for a narrow purpose—on behalf of strangers to the FOIL proceeding with potential privacy or safety concerns. Here, no such third party or privacy excuse exists. And the County’s conduct should not otherwise be excused.

As the County represented to Whitehead at the time, the County Attorney reviewed the draft report as part of the FOIL process (R. 212, 216). The County Attorney was copied on the response explaining the disclosure determination (R. 219). The FOIL officer copied the County Attorney on the appeal response (R. 224). No one from the County asserted applicable state law as grounds for non-disclosure at any time before Whitehead filed his lawsuit. The County's misconduct should not be excused. FOIL cannot work as the Legislature intended if requestors like Whitehead must be required to file lawsuits to learn the grounds for FOIL denials.

And it is not enough that "for all intents and purposes" (County Brief, p. 13) the reports were submitted to the Supreme Court for in camera review *after* Whitehead commenced his Article 78 proceeding. It is fundamentally unfair to a FOIL requestor for an agency to withhold grounds that could affect a decision to undertake the effort and expense to bring a lawsuit to compel disclosure, only to have the agency negate its own misconduct by submitting the records for the court's review.

Moreover, the County's argument is inapplicable. There is no evidence that the County actually submitted the records for in camera review, or that the Supreme Court dismissed the proceeding based on reviewing the records.

b. A Redacted Version of the Report Could Have Been Disclosed Consistent with Applicable State Law and FOIL.

FOIL and CPLR should be construed together to promote and maximize taxpayer access to public records. Redacted versions of the draft reports disclosing only factual and statistical information could have met FOIL's requirements without violating the intent and purpose of CPLR § 3101(d)(1)(i). As discussed above, courts have interpreted FOIL § 87(2)(g) to require agencies to redact deliberative materials from records in order to disclose statistical or factual tabulations or data. Those same redactions protect the attorney work product and expert opinion in the reports protected from disclosure by CPLR § 3101(d)(1)(i).

Besides, CPLR § 3101(d)(1)(i) does not provide a blanket protection for the contents of expert reports. In *Matter of Love Canal Actions* (161 AD2d 1169 [4th Dept 1990]), the Fourth Department Appellate Division modified a Supreme Court order providing for disclosure of expert reports. Specifically, the Fourth Department modified the order to compel disclosure of, among other things “the *substance of the facts* and opinions on which each expert is expected to testify * * * and a summary of the grounds for each expert's opinion” (*Id.* at 1169-70)[emphasis added].

Whitehead was not a litigation opponent. As a taxpayer and stakeholder in the potential litigation, he was entitled to at least as much information as the law allows to be disclosed to an adver-

sary. A report redacted consistent with FOIL conveys the substance of the facts and the grounds for the expert's opinion consistent with required disclosures under CPLR § 3101(d)(1)(i). Thus, even if the County had raised FOIL § 87(2)(a) in the administrative determination, it did not have a reasonable basis not to disclose the reports with attorney work product and expert opinions redacted.

Conclusion

The Supreme Court erred by not addressing Whitehead's request to be awarded his litigation costs after he substantially prevailed. The County had no reasonable basis to withhold the records it disclosed after Whitehead commenced an Article 78 proceeding. This matter should be remanded to the Supreme Court with directions to award Whitehead's litigation costs.

Dated: Albany, New York
April 26, 2018

Respectfully submitted,



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GARY TRAVIS WHITEHEAD,

Appellant,

v.

WARREN COUNTY BOARD
OF SUPERVISORS,

Respondent.

Cameron J. Macdonald, an attorney admitted to practice before the courts of New York affirms the following under the penalties of perjury:

I am not a party to this action, am over 18 years of age, and maintain a law office in Albany, New York.

On April 26, 2018, I served two copies of G. Travis Whitehead's **Reply Brief** by depositing true copies of the document in a postpaid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

The name and address of the person served is:

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Dated: Albany, New York
April 26, 2018


Cameron J. Macdonald

