Oral Argument Requested
Time Requested: 15 Minutes
To be argued by: Brian Reichenbach

NEW YORK SUPREME COURT
APPELLATE DIVISION - THIRD DEPARTMENT

GARY TRAVIS WHITEHEAD,

Petitioner-Appellant,

-against-

WARREN COUNTY BOARD OF SUPERVISORS,

Respondent-Respondent.

Appellate Division Case No.: 526167

RESPONSIVE BRIEF ON APPEAL OF RESPONDENT WARREN COUNTY BOARD OF SUPERVISORS AND RESPONDENT'S APPENDIX

Warren County Index No.: 63545

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QUESTIONS PRESENTED:

1. Q. Did petitioner "substantially prevail" in his article 78 proceeding?

1. A. No.

2. Q. Did respondent have a good faith basis in law for withholding the documents from disclosure under FOIL?

2. A. Yes.

3. Q. Was Supreme Court correct in declining to award petitioner costs and fees upon dismissal of his petition?

3. A. Yes.

TABLE OF AUTHORITIES

COUNTER-STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

1. Respondent is the duly constituted and appointed Board of Supervisors of the County of Warren, State of New York, and exercises the authority granted to it under New York County Law, New York Public Officers Law and its local laws and policies. The Board has authorized its Chairman to hear and determine appeals of denials of access to records pursuant to New York Public Officers Law Article 6, referred to as the Freedom Of Information Law ("FOIL"), after such determinations have been first made by county employees who respond to such requests.

2. In early 2007, Warren County had a new heating and cooling system installed at its main office building, the Warren County Municipal Center. The system was provided and installed by Siemens Building Technologies, Inc., ("Siemens") pursuant to a "Performance Contracting Agreement" that was supposed to have increased energy efficiency to enable the County to save significant costs for heating, cooling and lighting of the facility. The energy savings were to have substantially offset the cost of the project.

3. Several years into the project, several County residents and officials, including petitioner, began communicating with individual members of the Board of Supervisors and other County officials warning them that in their view, the project had not and was not delivering the savings that Siemens had claimed and which had been the basis for the County entering into the agreement.

4. Beginning in early 2016, respondent Board of Supervisors, specifically the County Facilities Committee thereof, began the process to solicit, commission and procure a report from an independent engineering firm as to the effectiveness of the geothermal energy heating and cooling project.

5. On August 30, 2016, respondent entered into a contract with Bergmann Associates, Architects, Engineers, Landscape Architects & Surveyors, D.P.C. ("Bergmann") by which Bergmann would evaluate the efficiency of the project undertaken by Siemens.

6. At the time of the solicitation of contractors and prior to entering into a contract with Bergmann, respondent considered that personnel of the selected consultant would become

the county's expert witnesses in any subsequent litigation between the county and Siemens. The prospective contractors' willingness to do so was discussed in the interviews and considered essential in evaluating proposals and ultimately in awarding the contract.

7. In response to a specific question regarding the possibility, Charles Bertuch, P.E., a Principal at Bergmann, advised the County Facilities Committee that such an engagement would not be a problem, but would require additional compensation.

8. Pursuant to the contract and after conducting some field work and analysis, on or about November 10 and November 29, 2016, Mr. Bertuch transmitted preliminary draft reports for discussion with the County's deputy superintendent of public works, Kevin Hajos, P.E., and the county attorney. The county attorney advised respondent's outside counsel, who was engaged in evaluating a strategy for discussing and resolving any shortcomings in the project with the project contractor, Siemens, of the sum and substance of the draft reports.

9. On or about November 18, 2016, petitioner transmitted a request, via e-mail, to respondent's clerk (of the Board of Supervisors) and the superintendent of public works to "make available all communications, reports, memos, etc [sic] between the County and Bergmann Engineering as they become available."

10. On November 22, 2016, four days after receipt of petitioner's request, the confidential assistant to the DPW superintendent transmitted an electronic response to petitioner acknowledging his request and advising that the deputy superintendent of public works anticipated being able to respond to petitioner's request on or before December 21, 2016.

11. On Saturday, December 31, 2016, petitioner sent an e-mail to deputy superintendent Hajos, the county attorney and the clerk of the Board of Supervisors, characterizing that he had been "promised" a response by December 21 and asking whether there had been a "constructive denial" of his FOIL request.

12. On Tuesday, January 3, 2017 (the next business day) deputy superintendent Hajos sent an e-mail to petitioner indicating that the county attorney's office had completed a review of the request and advising that access had been granted to materials contained on a compact disc, that the materials were too voluminous to e-mail, and asking petitioner how he wanted to receive the materials.

13. On the same date petitioner e-mailed deputy superintendent Hajos confirming receipt of some information but advising he could not locate the November 9, 2016 interim report and certain appendices.

14. On Wednesday, January 4, 2017, deputy superintendent Hajos sent an e-mail to petitioner advising that the county attorney's office was reviewing the material to determine its releasability under FOIL, and that he expected to provide a response within 7 business days.

15. On Friday, January 13, 2017, deputy superintendent Hajos sent an e-mail to petitioner releasing appendices D, E, F and G, and withholding the preliminary draft reports and appendices A, B and C. The response advised petitioner that a portion of his request was being denied because the materials were not statistical or factual tabulations of data or final agency policy that affected the public. The e-mail further recited that portions of the requested material would, if released to the public, injure the competitive position of a private entity.

16. On Friday, January 13, 2017, petitioner sent an e-mail to deputy superintendent Hajos and copy to the county attorney and others indicating his belief that the withheld materials should have been released. On behalf of Chairman of the Board Ronald Conover, the county attorney's office treated the e-mail as an appeal of the denial of petitioner's request as to the withheld materials.

17. On January 30, 2017, the county attorney's office transmitted an electronic version of a letter signed by Chairman Conover affirming the denial of access. As required by the Public Officer's Law, the county attorney's office transmitted a copy of the determination to the NYS Committee on Open Government.

18. On February 6, 2017, petitioner commenced this proceeding by notice of petition and verified petition filed with the Warren County Clerk and served on the Clerk of the Board of Supervisors.

19. Respondent answered the petition by verified answer and memorandum of law on March 3, 2017. Concurrent with the answer, respondent filed a notice of motion to dismiss supported by the verified pleading and its accompanying exhibits, and an affidavit of Charles Bertuch, P.E. The transmitted letter to the Court of March 3, 2017 included an assurance that the county attorney's office would transmit the withheld materials to the Court for an in camera

review upon the Court's request. The cover letter was copied to petitioner but was not included in petitioner's record on appeal. Accordingly, the letter is included in respondent's appendix filed herewith, RA p. 1.[1]

20. On or about March 7, 2017, petitioner filed a response to respondent's answer and motion papers, including his own notice of motion for summary judgment.

21. On March 23, 2017 respondent filed and served a reply affirmation with the Court.

22. On March 24, 2017, Bergmann and Associates issued its final report. On the same date, respondent released the final report and the first three appendices electronically to petitioner, another local citizen who had requested the final report and a local newspaper reporter who had also requested the report. The e-mails transmitting the documents to petitioner are included in respondent's appendix, RA pp. 2-4.

23. On March 28, 2017, petitioner filed and served a sur-reply and cover letter raising his objections to respondent's motion papers that had been served and filed timely for the March 24, 2017 return date.

24. On March 28, 2017, respondent filed and served a letter arguing that petitioner's March 28 arguments were untimely and that the Court should disregard them in its consideration.

25. On March 30, 2017, the Clerk of the Board of Supervisors issued a Notice of Special Meeting of the Board for April 4, 2017 the purpose of review of a potential settlement with Siemens Building Technologies.

26. On April 3, 2017, in preparation of the Board's meeting the next day to approve a civil settlement with Siemens Building Technologies, respondent filed a letter with the Court asking that the Article 78 proceeding be dismissed as moot and advising the Court that by copy of the letter to the Court petitioner was being provided the materials he sought, the draft reports and appendices A, B and C. Respondent's letter specifically did not concede that petitioner had ever been entitled to release of the documents pursuant to FOIL.

27. On April 4, 2017 respondent Board of Supervisors approved a settlement agreement with Siemens Building Technologies that settled all civil claims respondent may have had against

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[1]For clarity of reference, this brief will refer to the Record on Appeal as submitted by petitioner as "ROA" and Respondent's Appendix as "RA".

Siemens with regard to the heating and cooling project at the Warren County Municipal Center. On the same day, after the Board of Supervisors' meeting, the county attorney's office transmitted electronic copies of the draft reports petitioner had requested to him. That day petitioner acknowledged receipt of the electronic version and hard copies of the draft reports and appendices.

28. On April 5, 2017, the Court issued a letter Order dismissing the Article 78 petition as moot. Respondent's counsel entered the order and served notice of entry upon petitioner the same date.

29. On April 28, 2017 petitioner filed a notice of appeal.

30. On January 29, 2018, petitioner filed an appellant's brief and purported record on appeal arguing that he is entitled to fees and costs because he "substantially prevailed" in the proceeding and in his view respondent had no good faith argument for withholding access to the draft reports and appendices.

ARGUMENT

I. PETITIONER ABANDONED HIS APPEAL

A. The Court's rules provide that petitioner's appeal has been abandoned.

The Court's Rules of Practice, at §800.12, mandate that "A civil appeal or proceeding **shall** be deemed to have been abandoned where appellant or petitioner shall fail to **serve and file** a record and brief within nine months after the date of the notice of appeal or order of transfer...and the clerk of this court shall not accept or file any record or brief attempted to be filed beyond the nine-month period unless directed to do so by order of the court." Further, "[S]uch an order shall be granted only pursuant to a motion on notice supported by an affidavit setting forth a reasonable excuse for the delay and facts showing merit to the appeal or proceeding." (Emphasis added.)

In this matter, petitioner filed his notice of appeal on April 28, 2017 (ROA p.1). To calculate months, the procedure specified by General Construction Law §30 provides that the day in the last month that is the same day of the month from when the counting began is the last day in the computed period. Accordingly, the last date upon which petitioner could have timely filed his

brief and record on appeal would have been January 28, 2018. Respondent's Appendix (RA p.5) includes a photocopy of the cover page of petitioner's brief filed in the Appellate Division, Third Department's Clerk's Office, clearly stamped "Received" on January 29, 2018, the day after the last day for timely filing. Since petitioner may have **served** the papers timely, but did not **file** the papers timely, his appeal has been abandoned as a matter of law because section 800.12 mandates that petitioner's papers be served **and** filed within nine months of the date of the notice of appeal. Although papers served on an adversary may be timely served upon mailing, the rule is different for papers required to be filed (CPLR 2102). This Court, in *Matter of Esteves*, 31 A.D.3d 1028 (3d Dept., 2006) upheld the distinction, holding that "[A]s papers are not deemed filed until received by the Clerk of the Court (*see Matter of Cochran v New York City Employees' Retirement Sys.*, 131 AD2d 351, 353 [1987]), mailing the objections did not constitute filing..."), *Esteves*, at 1029.

Finally, since the time for filing and serving is now well past, petitioner does not have the option to make a **timely** motion for late filing of his brief, a result also endorsed in the *Matter of Esteves* opinion, *Id.*, at 1030.

Upon the plain language of the Court's Rules of Practice, §800.12, petitioner's appeal has been abandoned and Supreme Court's decision below must stand.

II. PETITIONER IS NOT ENTITLED TO FEES AND COSTS AS HE DID NOT "SUBSTANTIALLY PREVAIL" IN THE PROCEEDING

A. Respondent released the withheld records to petitioner because respondent had settled any possible civil claims against Siemens.

Petitioner argues that he has "substantially prevailed" in the proceeding merely because he has possession of the document that he requested. Petitioner's argument is factually inaccurate. The draft reports and appendices would have been the basis of respondent's position had it litigated the issues surrounding the performance of the heating system against Siemens Building Technologies. Those facts were verified in Charles Bertuch's affidavit submitted to the Court and the county's verified answer also filed in support of the county's position (ROA p.39 ¶26; p. 226 ¶3).

Respondent released the interim, non-final, draft reports and the appendices to petitioner by hard copy mailed on April 3, 2017, followed by electronic copy sent on April 4, 2017 shortly after the Board of Supervisors meeting at which the settlement of all claims against Siemens was approved (respondent had authorized release of the final report and the first three appendices on March 24, 2017, and immediately transmitted them to petitioner, RA p. 2-4). It is a matter of public record, and well-known to petitioner, that as of April 4, 2017, the respondent Board of Supervisors approved a settlement of any claims the county may have had at that point against Siemens regarding the heating system installed in 2007, that had been the subject of Bergmann's analysis and report. The settlement was approved at a properly-noticed public meeting of the Board of Supervisors that petitioner attended and that was reported in the local newspaper the next day. Because no expert testimony would then be required from Bergmann, and no damaging inferences or evidence could be gained by a potential adversary in litigation, respondent released the draft report and appendices to petitioner even though the basis for their exemption from disclosure under FOIL still remained.

Petitioner is now seeking to use the discretionary release of the documents to him against respondent. The draft reports remained non-final parts of the deliberative process that could have remained withheld from petitioner indefinitely despite the release of the final report. Respondent released the drafts to petitioner despite that they could have remained undisclosed because continued withholding would not further any other public interest. If the Court uses the fact that respondent released the draft reports to petitioner on which to base a finding that petitioner "substantially prevailed", then further release of similar documents by other agencies may be chilled and the overall purposes of FOIL frustrated. Petitioner has the draft documents despite that they could have remained undisclosed. Petitioner did not receive the documents in any way based on the litigation, rather because of the surrounding factual situation.

III. THE WITHHELD MATERIAL WAS AND IS STILL EXEMPT FROM DISCLOSURE UNDER FOIL

A. The New York Public Officers Law allows an agency to withhold access to inter- or intra-agency documents that are not final agency determinations.

The statutes that authorize and provide for access to public records also allow municipalities to withhold access to documents that meet certain criteria. New York Public Officers Law, Article 6, the Freedom Of Information Law ("FOIL"), § 87, provides that an agency may withhold certain types of records from public access. Relative to this matter, Public Officers Law §87(2)(g)(iii) provides in part that "each agency...may deny access to records or portions thereof that: (g) are inter-agency or intra-agency materials which are not: iii. final agency policy or determinations". [2]

As recently as July 2016, this Court addressed the question directly in *Moody's Corp. v. New York State Dept. of Taxation and Finance*, 141 A.D.3d 997 (3d Dept., 2016). In that case, the court considered whether an agency had properly withheld communications that were intra- or inter-agency materials in furtherance of the decision-making process. The Court ruled that the FOIL exemption for intra- or inter-agency materials that do not constitute final policy decisions applies to records that are deliberative, that is, communications exchanged for discussions not constituting final policy decisions, including information shared between different agencies in furtherance of the decision-making process. The Court held that "[t]he purpose of this exemption is 'to protect the deliberative process of the government by ensuring that person[nel] in an advisory role will be able to express their opinions freely to agency decision makers' (*Matter of Smith v. New York State Off. of the Attorney Gen.*., 116 A.D.3d 1209, 1210, 984 N.Y.S.2d 190 [2014][internal quotation marks, brackets and citation omitted], *lv. denied* 24 N.Y.3d 912, 2014 WL 7180243 [2014]; *see Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985])." *Id.*, at 1001-1002.

Both this Court and the Court of Appeals have reinforced this exemption, an exemption clearly motivated by the strong public policy which encourages a free governmental deliberative

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[2]This brief will refer to the withheld materials at times as "draft", not for the proposition that simply marking a document as such exempts it from disclosure under FOIL, rather in recognition that the documents at issue were not the final work product of the consultant engaged by respondent County to prepare a final report, and that additional information and data would be gathered and additional review and analysis would be performed prior to preparation of a final report. The interim reports were part of the deliberative process that County decision makers were undertaking to decide their negotiation position and strategy, and if necessary, their litigation position and strategy, *See*, ROA, 226-227.

process that allows individuals to express their opinions and consider options and draft documents without having to reveal their intermediate, incomplete and tentative thought processes and conclusions.

In the *Moody's* case this Court cited the Court of Appeals in holding that opinions and recommendations exchanged by agency personnel that constitute pre-decisional material, prepared to assist an agency decision maker....in arriving at his [or her] decision, may be withheld from public access, *Id.*, at 1002.

One of the cases cited in the *Moody's* opinion, above, *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131 (1985) is the Court of Appeals' take on the issue. In that case, the Court considered two questions that are important here.

First, the Court of Appeals addressed the scope of the exemption where the materials at issue had been prepared by an outside agency, as in this case. The Court held simply and clearly that "[o]pinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the Freedom of Information Law (FOIL) as 'intra-agency materials' (Public Officers Law § 87[2][g]), do not lose their exempt status simply because they are prepared for the agency, at its request, by an outside consultant.", *Id.*, at 131-132.

The Court of Appeals also addressed the substantive question of access, and announced the rule that the Appellate Division later confirmed in the *Moody's* case, above. The Court of Appeals was deciding whether final versions of real estate appraisal reports, to be used by town officials in reaching a decision with respect to property revaluation, could be withheld from disclosure as part of the government's deliberative process. The Court answered affirmatively, holding that the material was exempt from disclosure in part "to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers", *Id.*, at 132.

The Court elaborated on the exemption, holding that "The final determination being that of respondents to take no action with respect to property revaluation, the consultant's opinion or recommendation cannot be considered a final agency determination subject to disclosure under section 87(2)(g)(iii) of the Public Officers Law. Similarly, the fact that respondents ultimately took no action does not divest the reports of their quality as 'intra-agency materials,' since FOIL

protects against disclosure of predecisional memoranda or other nonfinal recommendations, whether or not action is taken", *Id.*, at 133.

The facts in this case square with the Court of Appeals' decision in *Xerox* and this Court's previous decision in *Moody's*. The respondent engaged an outside consultant to prepare a report to inform its discussions with the prior vendor as to any shortcomings in the energy system, and in preparation to be its expert witness if the discussions didn't result in a settlement. As set forth more fully in the affidavit of Charles Bertuch, P.E., the preliminary reports were subject to review and analysis of additional information that he and his colleagues may collect, and in any case were not final agency action, rather they were designed to be used by the county's outside and inside counsel, and the members of the County Board of Supervisors, to decide what, if any action to undertake with regard to the energy contractor. (Petitioner has argued that Mr. Bertuch's sworn, factual recitations to that effect are somehow not availing. To the contrary, Mr. Bertuch's affidavit and the verified answer reciting the same facts were the only factual evidence before Supreme Court on the issue. Insofar as they were unchallenged by any contrary facts, Supreme Court was free, if not required, to rely upon them, ROA, pp. 44-45; pp. 226-227.)

There can be no reasonable dispute that the preliminary reports were not in and of themselves final agency action, rather they were part of the deliberative process to assist the government agency decision-maker, the Board of Supervisors, in reaching a decision as to any action it may have chosen to undertake.

Under the clear rules announced by the Court of Appeals and this Court, the preliminary draft report and its appendices that the Board of Supervisors used to assist it in reaching a decision were part of the deliberative process and were properly withheld from disclosure under FOIL originally and could properly remain withheld by respondent as "draft," non-final materials.

B. Respondent properly withheld the materials from disclosure because they are exempted by state statute as prospective expert witness reports.

Public Officers Law § 87 (2)(a) provides that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute".

Since the earliest stages of the procurement process leading to a contract between Bergmann and the County, the county attorney's office envisioned that even if the matter didn't

ultimately ripen into litigation against the original contractor, Siemens, the County had to prepare for the possibility. In recognition of that reality, the county attorney inquired of each prospective contractor whether the entity would be willing to be the County's expert witness in the case of such litigation. Charles Bertuch, the Principal who presented Bergmann's proposal to the County Facilities committee, replied that Bergmann would not have any problem acting in such a capacity. His company's position on that issue is set forth in his affidavit before Supreme Court at ROA p. 226 ¶3. The county attorney advised the committee and ultimately the respondent Board of Supervisors that Bergmann would be the County's expert witness in any lawsuit between it and Siemens.

Petitioner argues that since the original contract between respondent and the expert engineering firm, Bergmann, did not refer to expert testimony then such a relationship was not contemplated. That is simply untrue. Respondent's goal from the outset with regard to Siemens was a civil settlement without resort to litigation. Respondent commissioned the Bergmann study to determine whether the County had any claim against Siemens, and if so on what basis. Had the County sought to enter into a contract with an engineering firm for a study and expert testimony at the same time the cost of such a relationship would necessarily been much higher. Additionally, since County leadership desired to settle with Siemens absent the need for litigation, to contract and pay for additional expert witness services would hopefully become unnecessary. As a practical matter, had litigation become necessary, it would have been inefficient at best to engage another engineering contractor to study the same issues for which Bergmann and Associates was being paid and to then prepare as an expert witness.

The Civil Practice Law and Rules, § 3101(d)(1)(i), provides that certain information about an expert witness must be provided as part of pre-trial disclosure, but does not include the expert's report, and certainly does not include interim, draft reports used by the party in litigation to establish its position with respect to a possible claim. Contrary to petitioner's arguments, the matters regarding an expert that are disclosable, the "substance of the facts and opinions on which each expert is expected to testify" is not the same as the expert's interim, draft reports. Requiring disclosure of a potential expert's interim, draft report would be a significant expansion of current CPLR disclosure requirements. Petitioner would apparently have the Court read CPLR 3101 to

require disclosure of an expert witnesses' work papers, inconclusive theories and incomplete calculations. Case law pursuant to that section has consistently held that an expert witnesses' report is not subject to disclosure. As a report prepared by a prospective expert witness, the materials requested by petitioner were and are protected from disclosure by state statute and are therefore not subject to release under FOIL.

That construction of the applicable CPLR provision that protects an expert witness' report from disclosure has been consistently affirmed by courts throughout the state. In one of the seminal cases on the question, *In re Love Canal Actions*, 161 A.D.2d 1169 (4th Dept., 1990), the Appellate Division, Fourth Department held simply that "CPLR 3101(d)(1)(i) does not provide for disclosure of expert reports...", *Id.*, at 1170. Since expert witness reports are protected from disclosure by state statute, they are exempt from release under Public Officers Law § 87(2)(a).

Petitioner has argued that since the exemption from disclosure as expert witness material was not recited in the Chairman of the Board of Supervisors' decision on petitioner's appeal of denial of access, then respondent could not argue it before Supreme Court. Petitioner has misread the law on this point.

First and most importantly, the interim "draft" reports were properly withheld as part of the deliberative process pursuant to Public Officers Law §87(2)(g)(iii) and any additional justification for their non-disclosure was and remains unnecessary. However, in the interest of completely briefing the matter, respondent's argument regarding the withheld materials' status as protected by disclosure under CPLR 3101 was properly before Supreme Court and a proper element of why respondent had a sufficient, arguable, good faith basis for not releasing the documents.

This Court, in *Rose v. Albany County Dist. Attorney's Office*, 111 A.D.3d 1123 (3d Dept., 2013), addressing a similar argument, that reasons for withholding documents under FOIL could not be raised initially before Supreme Court in an article 78 special proceeding, rejected such a rule stating "Yet, in the context of FOIL, 'the next step in the procedure for challenging an alleged inappropriate denial of access to records by an agency [following an administrative appeal] is a CPLR article 78 proceeding"..."and it is in such proceeding that the agency bears the burden of 'articulating a particularized and specific justification for denying access'". The Court further

opined that "As such, '[w]hether or not respondent provided petitioner with a full written explanation at the administrative level is academic'", *Rose*, at 1125.

Less than three years later, this Court cited the *Rose* opinion in *Moody's Corp. v. New York State Dept. of Taxation and Finance*, 141 A.D.3d 997 (3d Dept., 2016), holding that in a similar case there was no reason for the Court of Appeals to consider petitioner's claims with regard to the adequacy of the respondent's administrative response. In *Moody's*, respondent had submitted the withheld documents to Supreme Court for in camera review. The Court found that so doing limited the general rule that judicial review of an administrative determination will be limited to the grounds invoked by the agency at the time of the determination.

On March 3, 2017, respondent offered Supreme Court the materials for in camera review when it filed and served its verified answer. The transmittal letter was not included in petitioner's record on appeal, so is filed herewith as Respondent's Appendix, RA, p. 1. The materials were not included with the letter pending Supreme Court's direction as to the format (electronic or paper) desired given the substantial volume of the draft reports and the appendices and in consideration of the fact that the Court's chambers are merely yards down the hallway from the county attorney's office. At direction from the Court hard copies or an electronic version would have been delivered to chambers immediately. Presumably the special proceeding was moot before Supreme Court cared to wade through the interim reports and appendices.

This Court announced a similar rule in *Miller v. New York State Dept. of Transportation*, 58 A.D.3d 981 (3d Dept., 2009), holding that "While it is true that respondents have the burden of establishing that the records fall squarely within an exemption by providing a particularized and specific justification...a proper procedure for meeting this burden is to submit the records in question for in camera inspection by the court...", *Miller*, at 983-984.

In such a regard, the materials were for all intents and purposes submitted for in camera review by Supreme Court, rendering whether respondent's particular arguments for exemption from disclosure were proper at the administrative level academic. Clearly Supreme Court found that respondent's reasons were at least arguable and in good faith, resulting in dismissal of petitioner's claim for costs and fees.

Moreover, like in the *Moody's* case, petitioner knew that the grounds raised in the article

78 proceeding were being invoked prior to commencement of the proceeding. See ROA, p. 232, from petitioner's March 7, 2017 "Response" to verified answer, where he recites to the county attorney that "You have verbally stated on more than one occasion that you do not want to disclose this report because of the possibility of litigation against Siemens and that this information could aid them in some way." The quotation is from an e-mail sent by petitioner to the county attorney on January 13, 2017 and also appearing as Exhibit "I" to respondent's verified answer, ROA p. 221.

C. Respondent's responses to petitioner's FOIL requests were timely.

Petitioner has argued that because the county Department of Public Works ("DPW") responded with a partial disclosure of records he sought, and that some of the records were supplied a few days after the original date by which an answer was "anticipated" that respondent has exhibited a "disregard of the public's right to an open government", petitioner's brief on appeal, at 9. Petitioner claims that such "disregard" entitles him to costs and fees.

Petitioner's characterization is incorrect.

In 2009, this Court held in *Miller v. New York State Dept. of Transportation*, 58 A.D.3d 981 (3d Dept., 2009) that, in reviewing whether a response to a FOIL request was timely, the court looked at the circumstances including the number of documents requested and the time taken to respond, and found that since the delay "was not excessive", no violation of the statute had occurred (11,000 responsive documents; three months delay). *Id.*, at 983. A little over five years later, this Court addressed the question again, finding that a three month delay for a police incident report was "not inordinate", *Mineo v. New York State Police*, 119 A.D.3d 1140 (3d Dept., 2014), at 1142.

Petitioner herein made a request for records on November 18, 2016. The deputy superintendent of public works transmitted an electronic response on the second business day thereafter, estimating that he "anticipate[d] being able to respond...on or before 12/21/2016."

On December 31, 2016, a Saturday, and seven business days after the date upon which deputy superintendent Hajos had anticipated being able to respond, petitioner e-mailed three County employees and inquired whether he should construe the fact that he had not received that which he demanded a denial of his request and made an anticipatory appeal of the "denial". On

the next business day thereafter, January 3, 2017, deputy superintendent Hajos offered petitioner several options for receiving the documents that respondent was releasing on that date. After several instances of confusion among the Department of Public Works and the county attorney's office as to which documents were contained on which disks and which .pdf attachments, petitioner was notified via e-mail on January 13, 2017, eight business days later, that access to some of the materials to which he sought access was being denied.

In all, petitioner's initial request was acknowledged within two business days of its receipt. A date four weeks later was estimated to be the date by which responsive materials could be provided. Seven business days after that date, at petitioner's request, deputy superintendent Hajos provided much of the material requested, and eight business days after that he provided specific information regarding what requested materials were being withheld and why. See ROA, pp. 212-219.

Respondent has complied with the statutory time frames for responding to FOIL requests. Petitioner's initial demand was acknowledged on the second business day, well within the five business days allowed by statute. At that point, Mr. Hajos made a good faith estimate that it would take until December 21, 2016 to assemble, review and transmit the responsive documents. His estimate was overly optimistic. Ideally, he would have known in late November how long the task would take the Department of Public Works and county attorney's office to review, assemble and transmit those documents responsive to the request and determine which of them were or were not disclosable pursuant to FOIL. He did not, but that is why the statute allows an agency to provide a "good faith estimate". By definition, an estimate is something short of, as petitioner characterizes it, a "date certain".

Petitioner's arguments that the minimal delays are evidence of some bad faith or indifference to the principles of open government are unavailing. If, as petitioner argues, there was bad faith or indifference to the principles of the Freedom Of Information Law, respondent would not have authorized release of the interim, draft report on the same day an agreement was reached which obviated the possibility of litigation against Siemens. As intra-agency or inter-agency materials that were not final agency action, the interim report could have remained undisclosed. Respondent Board of Supervisors chose to release the documents in light and

respect of the principles embodied by FOIL, not despite them.

Petitioner argues that the fact that respondent's counsel filed papers with Supreme Court close to the end of the statutory time frames is also evidence of some nefarious purpose or somehow indicative of bad faith. Likewise, respondent respectfully submits that the statutory time frames exist for a reason, and if petitioner thought them so inadequate he could have moved Supreme Court via order to show cause. Respondent's need for the time within which to prepare and file its papers and exhibits should in no way be construed against respondent.[3]

IV. SUPREME COURT EXERCISED SOUND DISCRETION IN DENYING PETITIONER'S APPLICATION FOR FEES

Petitioner, in his initial petition, asked Supreme Court to award his "legal expenses to bring this action (filing fees only)", ROA, p. 6.

Petitioner is not entitled to any relief and Supreme Court was correct in so holding.

This Court has held that the standard for a petitioner to show that Supreme Court may entertain an award of counsel fees in a FOIL case is that "the litigant has 'substantially prevailed,' where the court finds that the record involved was 'of clearly significant interest to the general public' and where 'the agency lacked a reasonable basis in law for withholding the record' (Public Officers Law § 89[4][c]; *see Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441, 808 N.Y.S.2d 568, 842 N.E.2d 466 [2005]). Significantly, even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court...", *Henry Schein, Inc. v. Eristoff*, 35 A.D.3d 1124 (3d Dept., 2006), at 1125-1126.

In this case, petitioner has not "substantially prevailed", as set forth in Argument section II.A., above.

As to the second prong of the test, the record at issue was not "of clearly significant interest to the general public". The record at issue was not the final engineering report prepared by Bergmann Associates and upon which the respondent relied in evaluating its position relative to Siemens. The documents petitioner demanded are the two interim, draft reports that the

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[3]Notably, appellant filed his notice of appeal on April 28, 2017, and perfected his appeal on January 29, 2018, one day **beyond** the full allowable nine months window.

contractor prepared while still engaged in investigating and evaluating the effectiveness of the project and which the Board of Supervisors and the County's inside and outside counsel used to formulate and negotiate their position with Siemens. It is doubtful that the general public would even have been significantly interested in the final report, but the interim drafts that still needed additional review and analysis were not of interest to the general public. In fact, petitioner admitted as much in his March 7, 2017 "Response to verified answer", at ROA p. 234, wherein he wrote that "This is no time for false modesty. There is no person in the County [sic] that has a better understanding of both the performance and the Contracts [sic] that led to the losses that the County [sic] never identified on its own, than myself". Petitioner has therefore conceded that the interim, draft reports were not of clearly significant interest to the general public, only to he, who in his judgment had the best understanding of the issues of anyone in the county. His position was essentially that the Board of Supervisors should not be allowed to proceed to investigate and analyze the situation without the benefit of his expertise in addition to that of the County's consultant. Not satisfied to simply offer his expertise to the Board of Supervisors, once his offer was not accepted, petitioner then sought via the article 78 special proceeding to have it forced upon them, despite the decision by the same Board to engage Bergmann Associates, not petitioner, in the project.

As shown above, at Argument section III., respondent had at least two sufficient reasons for denying access to the interim, draft reports and the appendices that accompanied them. Both reasons independently constitute a reasonable basis in law to withhold the documents. The reports were inter-agency or intra-agency materials which were not: final agency policy or determinations, in essence, draft documents that were going to be modified for a final report (which may or may not have been accessible under FOIL in its own right) and that were used by the County government to formulate and evaluate it position with regard to possible litigation. The documents were also notes, drafts or other materials prepared by a prospective expert witness for litigation, and in that regard protected by disclosure under CPLR 3101 and the case law stemming from it. Even had Supreme Court (or indeed this Court) disagreed in the final analysis that the records could be withheld by the respondent, if it found that respondent's withholding was reasonably based in law it should not entertain an award of fees and costs, see *Schein*, at 1125-

1126.

Even if the above criteria had been met, Supreme Court was still free to exercise its discretion and deny an award of fees. Only if the statutory criteria have been satisfied can Supreme Court award counsel fees and costs, and even then the decision to grant or deny them is a matter committed to the court's sound discretion, *Mineo v. New York State Police*, 119 A.D.3d 1140 (3d Dept., 2014) , at 1141.

Finally, if the decision to release or deny access or to redact portions of the records was made in good faith, as it was here, an award of counsel fees and costs is precluded, see *Laveck v. Village Bd. of Trustees of Village of Lansing*, 145 A.D.3d 1168 (3d Dept., 2016).

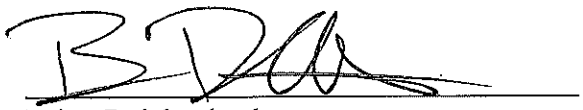
CONCLUSION

According to the plain language of this Court's Rules of Practice, petitioner has abandoned his appeal and so Supreme Court's decision should be affirmed. Alternatively, petitioner has not met the statutory criteria for an award of fees, and even if he had, the materials that were withheld were withheld based upon statutorily acceptable grounds, and in good faith. Supreme Court's decision to deny an award of counsel fees was an appropriate exercise of sound discretion and in all respects proper.

Respondent respectfully requests an Order and decision of this Court affirming Supreme Court's Order, denying petitioner's appeal and granting such other and further relief as the Court deems just and proper.

Dated: March 28, 2018

Respectfully submitted,



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NEW YORK SUPREME COURT
APPELLATE DIVISION - THIRD DEPARTMENT

GARY TRAVIS WHITEHEAD,

Petitioner-Appellant,

-against-

WARREN COUNTY BOARD OF SUPERVISORS,

Respondent-Respondent.

Appellate Division Case No.: 526167

RESPONDENT'S APPENDIX

Warren County Index No.: 63545

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TABLE OF CONTENTS

TRANSMITTAL LETTER

WARREN COUNTY ATTORNEY'S OFFICE

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March 3, 2017

Hon. Robert J. Muller, J.S.C.
Supreme Court Chambers
Warren County Municipal Center
1340 State Route 9
Lake George, NY 12845

RE: Whitehead v. Warren County Bd. of Supervisors
Index No.: 63545

Dear Justice Muller:

Enclosed please find respondent Warren County Board of Supervisors' Verified Answer in the above captioned CPLR Article 78 special proceeding, with exhibits, and the supporting affidavit of Charles Bertuch, P.E. Also enclosed is respondent's Notice of Motion to Dismiss, which relies upon the verified pleading and Bertuch affidavit for support.

Petitioner's Notice of Petition made the matter returnable on March 8, 2017, but as a courtesy to petitioner, we have made our motion to dismiss returnable on March 24, 2017 at 9:30 a.m., to afford petitioner the full notice provisions for motions under the CPLR in the event he wishes to file and serve responsive papers.

We respectfully request oral argument on the motion at Your Honor's convenience on or after the return date.

Finally, upon the Court's request we will provide the withheld materials for *in camera* review.

Please contact me if Your Honor has further requirements or instructions.

Very truly yours,

Brian S. Reichenbach

BSR/abm
Encl.
Cc: G. Travis Whitehead, *pro se*

RA-1

E-MAILS TO APPELLANT

Reichenbach, Brian

From: Reichenbach, Brian
Sent: Friday, March 24, 2017 3:23 PM
To: Travis Whitehead (travis4@roadrunner.com)
Subject: FW: Bergmann Report including appendices
Attachments: Appendix A.pdf; Appendix B.pdf; Appendix C.pdf; Appendix D.pdf; Appendix E.pdf; Appendix F.pdf; Appendix G.pdf; Warren County Report - Final.pdf

Travis:

This is the final report, issued today.

Brian

From: Allen, Amanda
Sent: Friday, March 24, 2017 3:16 PM
To: WarrenCountySupervisors; jbeerock3@gmail.com; Hyde,Cynthia
Cc: Reichenbach, Brian
Subject: FW: Bergmann Report including appendices

Good Afternoon,

Attached, please find the Bergmann Report and all appendices. This information is being forwarded to all members of the Board of Supervisors at the direction of the Chairman.

Thank you.

Amanda Allen
Clerk of the Board
Warren County Board of Supervisors
Phone 518-761-7656
Fax 518-761-7652
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RA-2

Reichenbach, Brian

From: Reichenbach, Brian
Sent: Friday, March 24, 2017 3:45 PM
To: Travis Whitehead (travis4@roadrunner.com)
Subject: Bergmann Report
Attachments: Appendix A.pdf; Appendix B.pdf; Appendix C.pdf; Warren County Report - Final.pdf

Travis:

Here is the Bergmann report issued today and the first three appendices.

Brian Reichenbach
Warren County Attorney's Office
Warren County Municipal Center
1340 State Route 9
Lake George, New York 12845
(518) 761-6463
reichenbachb@warrencountyny.gov

RA-3

Reichenbach, Brian

From: Reichenbach, Brian
Sent: Friday, March 24, 2017 3:46 PM
To: Travis Whitehead (travis4@roadrunner.com)
Subject: Appendices
Attachments: Appendix D.pdf; Appendix E.pdf; Appendix F.pdf; Appendix G.pdf

The rest of them.

Brian Reichenbach
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reichenbachb@warrencountyny.gov

RA-4

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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Warren County Clerk's Index No. 63545