

<b>Matter of Kent v Steiner</b>
2011 NY Slip Op 30093(U)
January 18, 2011
Supreme Court, Albany County
Docket Number: 5143-10
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

SUSAN KENT on behalf of , PROFESSIONAL,  
SCIENTIFIC & TECHNICAL EMPLOYEES  
of the NEW YORK STATE EDUCATION  
DEPARTMENT,

Petitioner,

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

-against-

**DECISION and ORDER**  
**INDEX NO. 5143-10**  
**RJI NO. 01-10-ST1720**

DAVID STEINER, in his capacity as  
COMMISSIONER, NEW YORK STATE  
EDUCATION DEPARTMENT & PRESIDENT,  
UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

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Supreme Court Albany County All Purpose Term, December 24, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Susan Kent  
*Petitioner, Pro Se*  
Public Employees Federation  
89 Washington Avenue  
Albany, New York 12234

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
*Attorney for the Respondent*  
(Brian J. O'Donnell, Esq. AAG)  
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Albany, New York 12224

**TERESI, J.:**

Petitioner commenced this CPLR Article 78 proceeding to compel Respondent to fully

comply with her November 9, 2009 “Freedom of Information Law (FOIL) Request,” and issue has now been joined by Respondent.<sup>1</sup> Although Respondent demonstrated that the majority of the documents Petitioner seeks are exempt from disclosure pursuant to Public Officer’s Law §87(2)(g)’s “inter-agency or intra-agency” exemption, because a portion of the documents Respondent refused to disclose are not exempt, the petition is granted to that limited extent.

While “the provisions of FOIL must be construed liberally, and... governmental agencies subject to its provisions must, as a general rule, make their records, upon request, public... [a denial of disclosure will be upheld where] the agency can demonstrate that a statutory provision exempting the requested material from disclosure is applicable.” (Town of Waterford v. New York State Dept. of Environmental, 77 AD3d 224, 228 [3d Dept. 2010]).

At issue here, “[t]he interagency and intraagency exemption[,] applies to records that are deliberative, i.e., communications exchanged for discussion purposes not constituting final policy decisions.” (Miller v. New York State Dept. of Transp., 58 AD3d 981, 984 [3d Dept. 2009], quoting Russo v. Nassau County Community College, 81 NY2d 690 [1993][internal quotation marks omitted]; Public Officer’s Law §87(2)(g)). “[R]ecords may be considered ‘intra-agency material’ even though prepared by an outside consultant at the behest of an agency as part of the agency’s deliberative process.” (Xerox Corp. v. Town of Webster, 65 NY2d 131, 133 [1985]; Miller v. New York State Dept. of Transp., *supra*; Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546 [2d Dept. 1981]; Tuck-It-Away Associates, L.P. v. Empire State Development Corp., 54 AD3d 154 [1<sup>st</sup> Dept. 2008]). “The point of the intra-agency ex[emption] is to permit

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<sup>1</sup> Respondent’s earlier pre-answer motion to dismiss was granted, with leave to re-plead. Thereafter, Petitioner filed her amended petition, which Respondent answered.

people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” (The New York Times Co. v. City of New York Fire Dept., 4 NY3d 477 [2005]).

Although intra-agency documents are exempt from disclosure, Public Officers Law § 87(2)(g)(i-iv) sets forth four exceptions to the exemption. Specifically applicable in this proceeding is the “factual data” exception. (Public Officers Law § 87[2][g][i]). “Factual data is identified as objective information, rather than opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” (Humane Soc. of U.S. v. Brennan, 53 AD3d 909, 911 [3d Dept. 2008], quoting Matter of Gould v New York City Police Dept., 89 NY2d 267 [1996][internal quotation marks omitted]). Moreover, “any impressions, recommendations, or opinions [of third parties] recorded [by the agency or its consultant]... would not constitute factual data and would be exempt from disclosure.” (Matter of Gould v. New York City Police Dept., *supra* at 277).

The origin of the documents Petitioner seeks is largely uncontested. In or about January 2008, Respondent hired McKinsey and Company Inc. United States (hereinafter “McKinsey”) as a consultant, using grant funds provided by the Bill and Melinda Gates Foundation. Generally, McKinsey was hired to collect, compile and analyze data to assist Respondent in creating a comprehensive school improvement organization within the Education Department. In part, McKinsey collected Respondent’s consumers’s opinions and information about Respondent’s then current structure. As it compiled and analyzed the data, McKinsey submitted its findings and recommendations to Respondent in numerous reports.

Although Respondent has disclosed some of the documents McKinsey prepared, it



refused to disclose the balance of the McKinsey documents as “intra-agency” exempt.

Respondent submitted to this Court, in camera, all of the McKinsey documents in its possession. It did not explain the records submitted, but instead grouped them (1-14) into distinguishable, independent documents. Respondent marked each page as not disclosed, disclosed or disclosed with highlighted redactions. In sum, Respondent’s denial and in camera submission, does not constitute an unacceptable “blanket exemption[ but rather]... articulate[d a] particularized and specific justification for not disclosing.” (Matter of Gould v. New York City Police Dept., supra at 275; Miller v. New York State Dept. of Transp., supra).

Notwithstanding Respondent’s procedural compliance, Respondent has not disclosed all of the McKinsey documents excepted from the intra-agency exemption.

On this record, it is uncontested that McKinsey was an outside consultant. As such, Respondent was generally correct in denying disclosure of the McKinsey documents as “intra-agency material.” (Xerox Corp. v. Town of Webster, supra; Miller v. New York State Dept. of Transp., supra).

However, Respondent improperly applied the “factual data” exception. Reviewing each page of Respondent’s in camera submission separately for the information contained therein, McKinsey inserted factual, non-opinion data throughout its reports. This data was not derived from the opinions of the individuals it interviewed, but rather was based upon McKinsey’s investigation of the Respondent’s then existing structures and external examples. As this factual data was not based upon “impressions, recommendations, or opinions” it is not exempt from disclosure. (Matter of Gould v. New York City Police Dept., supra at 277).

Respondent's submission of the McKinsey documents in fourteen groups, without pagination, precludes this Court from simply listing the group and page number that contains undisclosed "factual data." As such, a copy of each undisclosed page that contains factual data is being delivered, with this Decision and Order, to Respondent only.<sup>2</sup> As nearly every "factual data" page includes non-factual opinions or recommendations, Respondent is hereby directed to redact the non-factual portion of each "factual data" page and forward the redacted page to Petitioner, within thirty days of the date of this Decision and Order. Respondent shall not charge Petitioner for these documents, as Respondent is providing no copying services.

To the extent that the Petition seeks documents Respondent does not possess, Respondent sufficiently "certif[ied] that it does not have possession of [the requested] record[s] or that such record[s] cannot be found after diligent search." (De Fabritis v. McMahon, 301 AD2d 892 [3d Dept. 2003], quoting Matter of Rattley v. New York City Police Dept., 96 N.Y.2d 873, 875, 730 N.Y.S.2d 768, 756 N.E.2d 56).

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion (except Respondent's exhibits "5" and "6") are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220.

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<sup>2</sup> These documents were derived from Respondent's Exhibit 5 as follows: Group 1-A, 7 total pages; Group 1-B, 49 total pages; Group 3, 1 total page; Group 5, 8 total pages; Group 6, 1 total page; Group 9, 1 total page; Group 11, 33 total pages; Group 12, 2 total pages; Group 14, 2 total pages. A copy of these pages is being retained by this Court and are sealed pursuant to 22 NYCRR 216.1. Because these documents have not yet been redacted, in accord with this Decision and Order, there is "good cause" for this sealing.

Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
January 18, 2011

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Amended Petition, undated; Verified Petition, undated; with unattached Exhibits "A"- "E(1-4)".
2. Answer to Amended Petition, dated December 10, 2010, with attached Exhibits 1-8; Affidavit of David Walsh, dated October 15, 2010; Affirmation of Alison Bianchi, dated December 10, 2010.