

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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with
home
address"
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In the Matter of the Application of
NEWSDAY, LLC,

Petitioner,

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

DECISION
AND
ORDER

THE STATE OF NEW YORK, OFFICE
OF THE STATE COMPTROLLER,

Respondent.

(Supreme Court, Albany County, Special Term, December 7, 2012)
Index No. 12-5872
(RJI No. 01-12-ST4059)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES:

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Attorney General of New York State
Attorney for Respondent
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Counsel)
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MELKONIAN, J.:

This CPLR Article 78 proceeding is brought by the petitioner, Newsday, LLC, challenging a determination by the respondent, the State of New York, Office of the State Comptroller which denied in part petitioner's Freedom of Information Law ("FOIL") request for records pertaining to all public employees on Long Island enrolled in the state pension system from 2008 to the present. The respondent served an Answer and maintains that the petition fails to state a cause of action pursuant to CPLR § 3211(a)(7).

Petitioner is the publisher of the daily newspaper "Newsday," which has a general circulation throughout Long Island and the New York metropolitan area. On April 30, 2012, petitioner filed a Freedom of Information Law (see, Public Officers Law article 6 [hereinafter "FOIL"]) request seeking "records relating to all public employees on Long Island enrolled in the state pension system from 2008 to the present." It asked that the response include the fiscal year, the pension system's member's name, his or her employer, his or her title, days worked and salary as well as the zip codes of such public employees. Respondent furnished most of the requested information, but refused to disclose the zip code where the public employees participating in the pension system resides, stating that such information is exempt from disclosure under Public Officers Law §§§ 87(2)(b), 89(2) and 89(7). After an unsuccessful administrative appeal, petitioner commenced this instant CPLR article 78 proceeding seeking, *inter alia*, an order directing respondent to provide the zip codes of the public employees participating in the pension system. Petitioner also seeks an award of attorneys' fees.

An Article 78 proceeding which seeks to compel a government official to undertake a particular act is in the nature of a Writ of Mandamus. (see, CPLR § 7801; Klostermann v. Cuomo, 61 NY2d 525 [1984]). Mandamus is available to compel the performance of a non-discretionary duty only where there has been a showing of a clear legal right to the relief sought. (Hassig v. NYS Dept. of Health, 5 AD3d 846 [3rd Dept. 2004]). Where a party seeks to compel a public official to undertake a purely discretionary act, a writ of mandamus is not available. (Kaufman v. Tudor Realty Services Corp., 4 AD3d 212 [1st Dept. 2004]).

The Freedom of Information Law promotes open government and public accountability and, therefore, “imposes a broad duty on government to make its records available to the public” (Gould v New York City Police Department, 89 NY2d 267 [1996]). Under FOIL, agency records are presumptively available for public inspection and copying unless the requested documents fall within one of the enumerated exemptions set forth in Public Officers Law § 87(2) (Matter of Fappiano v New York City Police Dept., 95 NY2d 738 [2001]; Matter of Encore Coll. Bookstores v Auxiliary Sers. Corp., 87 NY2d 410 [1995]). “Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” Matter of Newsday Inc. v Empire State Dev. Corp., 98 NY2d 359 (2002); Daily Gazette v Schenectady, 93 NY2d 145 (1999).

Public Officers Law § 89(7) provides that “[n]othing in this article shall require the

disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment." Inasmuch as a "zip code" is concomitant with "home address," they are accordingly prohibited from release.

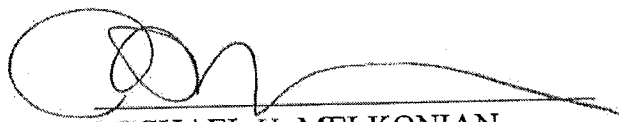
Petitioners application for attorney fees is also denied. Since the statutory prerequisites have not been met inasmuch as petitioner has not prevailed, it would be error, as a matter of law, for this court to utilize its discretion and award attorney's fees or costs to the petitioner. (see, Public Officers Law § 89(4)(c); Matter of Beechwood Restorative Care Ctr. v Signor 5 NY3d 435 [2005]).

Accordingly, the petition is dismissed.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the respondent. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
March 5, 2013



MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated October 19, 2012;
2. Verified Petition dated October 19, 2012, with exhibits annexed;
3. Petitioner's Memorandum of Law;
4. Verified Answer dated November 21, 2012;
5. Affirmation of Adam W. Silverman, Esq., dated May 12, 2011 with exhibits annexed;
6. Respondent's Memorandum of Law;
7. Petitioner's Reply Memorandum of Law.