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At an IAS term of the Columbia County Supreme Court, held in and for the County of Columbia, in the City of Hudson, New York, on the 1st day of November 2012

PRESENT: HON. PATRICK J. McGRATH
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

In the Matter of the Application of
WILLIAM PFLAUM,

Petitioner,

DECISION AND ORDER
INDEX NO. 5140-12

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

-against-

PATRICK GRATTAN, FOIL Appeals Officer,
GAIL A. DICOSMO, FOIL Records Officer,
THE COUNTY OF COLUMBIA, New York

Respondents.

Last Submission Received November 7, 2012

APPEARANCES: WILLIAM PFLAUM
Petitioner

ROBERT J. FITZSIMMONS, ESQ.
Columbia County Attorney
For the Respondents

McGRATH, PATRICK J., J.S.C.

In this Article 78 proceeding, petitioner challenges respondent's determinations concerning his Freedom of Information (FOIL) requests. Respondents oppose the petition, and petitioner has submitted a Reply.

On April 2, 2012, the petitioner wrote a letter to the Lawrence J. Andrews, Jr., Chair of the Finance Committee for the Columbia County Board of Supervisors, requesting information of what type of work Tal Rappleyea did as an Assistant County Attorney (hereinafter "ACA") prior to his resignation, and a "vague notion" of what a replacement ACA would do in his stead. The next day, Deputy County Attorney Andrew Howard wrote a letter to Mr. Andrews, which responded to petitioner's inquiry. He states that a new ACA (Christopher Watz, Esq.) had been hired, and that he would work in the areas of real property tax foreclosure, real property acquisitions and transactions, the acquisition of temporary and permanent easements in connection with public works projects, eminent domain proceedings, and would be a "point of interface" with the legal needs of the Columbia County Department of Public Works. The new ACA would also assist in Juvenile Delinquency proceedings, Persons in Need of Supervision (PINS) proceedings, and would assist in collection matters pending in County Court.

On April 10, 2012, petitioner submitted a FOIL request to the Records Access Officer. The first request sought "all evidence of work product" by seven county attorneys for the calendar year 2011. He stated that he was "not interested in confidential information." His second request sought a copy of the March 14, 2012 resolution which "lead to the hiring of Christopher Watz some time prior to April 3, 2012." He requested all notices posted advertising or announcing the position. He also requested "every document pertaining to the exit of the old attorney, Rappleyea, and the arrival" of Mr. Watz. On April 17, 2012, petitioner received an email from Brent Stack, ACA, which noted that his request had been forwarded to the County's Attorney's Office for "review and processing." On May 8, 2012, Mr. Stack sent an email to petitioner, which stated that petitioner would have to be more specific concerning his request for all county attorney work product in 2011. He notes that the documents requested were in various forms, including hard copies, and on the County Attorney server. He notes that the IT personnel indicated that printing a response to his request would amount to an estimated 1,081,320 pages. At .25 per page, the cost would be over $250,000. Also, every page would have to be reviewed and potentially redacted. Mr. Stack requested more specific information.

On May 8, 2012, petitioner send an email to Mr. Stack, wherein he reiterated his request for documents concerning the hiring of Mr. Watz, "which would be limited to January 12, 2012 to April 3, 2012." He also referred to Mr. Howard's April 3, 2012 letter which described what Mr. Watz's duties would be as a new ACA. Petitioner stated that the purpose of his FOIL request was to determine whether "Mr. Watz's job is similar to the work performed by other attorneys." In order to "simplify" his request, he limited his request to "work described in Mr. Howard's letter...but just for Rappleyea and just for the last three months of 2011. So, all work matching the description of the job for Watz that was done by Rappleyea in October, November and December of 2011." He also requested "all logs of work by all attorneys for all of 2011 other than timesheets."

On May 21, 2012, petitioner sent an email to Patrick Grattan, the Foils Appeals Officer, to check on the status of his FOIL appeal and "FOIL clarification." He restates the requests as made in the May 8, 2012 correspondence, and notes that "Numbers one and three have not changed since April 2012" and that his appeal is "essentially that I simply did not get these materials (one and three). One and three are on appeal for this reason: no documents, although many more that 25 days

has passed." Mr. Grattan responded on May 21, 2012 that he would be asking the County Attorney's Office to discuss the matter with him.

On June 1, 2012, Mr. Grattan informed petitioner via email that "With regard to item #3 of your request, prior to 2012, the County Attorney's Office has not maintained 'work logs' or 'logs of work.' Therefore, the County does not have records responsive to this portion of your request."

On June 7, 2012, Mr. Stack wrote to petitioner to inform him that his office has compiled records relative to item #1 of his FOIL request, which were scanned, and attached to his email. He states that the County Attorney's Office "continues to process item #3 of your request." Petitioner responded the same day that the only outstanding items concerned the "3 months of documents involving the services of Tal Rappleyea which correspond to the job description of Christopher Watz in the letter written by Andrew Howard on April 3, 2012 to Lawrence Andrews, and cc-ed to me."

On June 25, 2012, petitioner sent an email to Mr. Stack, Ms. DiCosmo, and Mr. Grattan, which noted that there was still an outstanding item in his FOIL request, and asked how much longer compiling three months of work for Mr. Rappleyea might take. He sent another email to the same people on June 27, 2012, to clarify that he was appealing the lack of response to his request.

On July 23, 2012, Brent Stack wrote a letter to petitioner which states that the County Attorney's Office attempted to process his FOIL request for "evidence of work product of Tal Rappleyea as described in Andrew Howard's letter of April 3, 2012." He states that after review, the office was unable to process the request because petitioner "failed to reasonably describe the documents you are seeking." Mr. Stack noted that the County Attorney's Office consulted with the Committee on Open Government concerning petitioner's request. Mr. Stack stated that the difficulty in locating the records responsive to the request was that the County Attorney's Office did not index information by the particular attorney that performed the work. He described the various ways in which different cases are organized in the office, but noted that there was no official work log for Mr. Rappleyea which could be used to identify cases and/or projects that he was involved in. He notes that in order to process the request, the Office would have to search nearly every file for records responsive to the request. He noted that the Committee on Open Government had previously held that a request very similar to that of petitioner's was too broad because the "the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency." Opinion F10280, *citing* Konigsberg v. Coughlin, 68 N.Y.2d 245 (1986). Further, that "if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records." Opinion F10543. He also notes that attorney work product is protected from disclosure under attorney client privilege, and that the County Attorney's Office cannot waive such privilege on behalf of the client. Finally, Mr. Stack states that this letter "does not constitute a denial of your FOIL request from which an appeal may be taken. This correspondence is to inform you that you have failed to meet the threshold requirement of Public Officers Law 89(3) by failing to reasonably describe the records

you seek to enable this Office to locate and identify same."

On July 28, 2012, petitioner wrote to Ms. Dicosmo, and carbon copied Mr. Stack and Mr. Grattan. He stated that he was writing to issue "new FOIL requests." He stated that he was "willing to consider this request a new request as long as the county makes a sincere effort to understand what documents I am looking for and gets back to me in a timely manner." However, "if the county delays the process further...I would not consider this a new request but simply a follow up to my April 10, 2012 FOIL request." He states that he is now "re-wording" his FOIL request based on Mr. Stack's July 23, 2012 letter, but also states "I am now submitting new FOIL requests."

In his first request, he stated that he was "looking for any document that shows that Mr. Rappleyea did some kind of work for Columbia County...I want a piece of paper relating to any of this work that was produced by Tal Rappleyea in the three month period noted in this letter." He asks that some one from the County Attorney's Office "look through each potential file for a total of one hour." He gives suggestions as to how this unspecified piece of paper could be located, for instance, that email chains could be searched, which may refer to work Mr. Rappleyea did or cases he worked on, and then look up that file. He also suggests that the members of the office "rack your collective memories." He states "you can start looking through files. If you have looked through any possible file for 2 hours, just randomly pull files, and open of them has anything to do with Tal Rappleyea, then you can stop and report that you tried but could not find what I was looking for. You would simply say that 'after one hour of pulling files, we did not find one that Rappleyea worked on and we stopped.' Good enough for me."

His second request seeks any contract files or FOIL requests Mr. Rappleyea was involved with in 2011 after searching the first 50 files of each category. He suggests that "you can rifle through January and see if there are any Rappleyea-related contract files" and that "I would be happy to have you stop at 50 files in each category. If after looking through 50 you don't find one that Rappleyea worked on, you can give up and tell me you tried...at that point, my FOIL request would be complete."

His third request sought one single Juvenile Delinquency file or PINS file Mr. Rappleyea worked on after a search of "the first 50 files." His fourth request seeks "any miscellaneous file indexed by subject matter and/or department/agency of origin" that Mr. Rappleyea worked on after a search of 50 files. The fifth request seeks any paper "pertaining to eminent domain proceedings, interface with the legal needs of the Columbia County Public Works Department (DPW), real property tax foreclosure, real property acquisition and transactions, the acquisition of temporary and permanent easements necessary in connection with public works projects that involve the work of Mr. Rappleyea." Specifically, a single example from all the categories. He again states that "you can stop after looking at a total of 50 files."

On August 31, 2012, Brent Stack wrote to petitioner to inform him that his most recent FOIL request failed to meet the threshold requirement of POL 89(3) by failing to reasonably describe the records sought. The letter notes that petitioner is seeking various records and documents which

indicate "some kind of work that Rappleyea did in 2011." Mr. Stack stated that "this is not a valid FOIL request." He also notes that to the extent petitioner made a reasonably descriptive request for attorney work product, Mr. Stack noted that such records are confidential pursuant to CPLR 3101[c]. Mr Stack informed the petitioner that his FOIL request was "denied in its entirety" and notified him of his right to appeal.

On September 10, 2012, petitioner appealed the denial to Mr. Grattan. On September 28, 2012, Mr. Grattan wrote to petitioner upholding the denial based on CPLR 3101 as well as the fact that petitioner failed to reasonably describe the records he was seeking, which is required by POL 89(3).

Petitioner now brings this Article 78 proceeding. He argues that he is not seeking attorney work product or any privileged material. He notes that not all work done by an attorney is attorney work product. Further, that he made clear in his requests that he would accept redacted material. He also claims that CPLR 3101[c] "does not pertain in this case" because "there is no lawsuit between the parties." He also claims that the assertion of confidentiality "may be intended to cover up for felony larceny, fraud, embezzlement, and filing false instruments on the part of Rappleyea" and therefore, the Court "must insist" on respondents articulating a clear reason for the denial.

Petitioner also makes the preemptive argument that respondent cannot claim that the instant proceeding is time barred. As respondents do not make this claim, the point does not require extended discussion.

Finally, petitioner argues that the records "implied by [the] Howard letter on April 3, 2012 are presumed available to the public." Petitioner argues that the areas of law described in Attorney Howard's letter would lead to the production of documents such as a Note of Issue, Notices of Pendency, Mortgages, Deeds, etc, which are presumptively available for public inspection.

Respondents cite several opinions from the Committee on Open Government. In one instance (Opinion AO-14363), the request included "...records that exist in your office [] county clerk which are kept and maintained on computer that relate to any judgments, liens, assumed business name certificates, pistol permits, and any other records (as that term is defined in the New York State Freedom of Information Law) which are contained on compute [sic]." The opinion rendered on the request was as follows:

> "[T]he Freedom of Information Law does not require that an applicant for records must refer to "specific" records when making a request. Section 89(3) of that statute states that an applicant must "reasonably describe" the records sought." From my perspective, it is doubtful that a court would determine that your request meets that standard. A computer, as you are aware, may and often does contain a variety of records, information, data and e-mail concerning an array of subjects. In many instances, various aspects of the contents of those materials may be deniable under the Freedom of Information Law or perhaps other statutes. I would conjecture that a court would determine that a request for the contents of a computer

or of all the computers used in the office of a county clerk is not a request for records and that it does not reasonably describe a record or record series.

The decision that appears to be factually most similar to the hypothetical request to which you referred involved a "massive" request denied by the New York City Department of Health in which the court sustained the agency's denial of the request, finding that it "transcends a normal or routine request by taxpayer" (Fisher & Fisher v. Davison, Supreme Court, New York County, October 6, 1988).

In my view, your hypothetical request would essentially involve all of the records maintained by a county clerk; it would be equivalent to a request for all the books in a library. That being so, in short, I do not believe that a request for all of the information stored within a computer is, in actuality, a request for a record or records or that it would reasonably describe records in a manner envisioned in by the Freedom of Information Law.

Respondents also cite Opinion AO-7584, wherein the following request was made: "[a]ll policy statements of the State Division...that are currently in effect pertaining employment discrimination under the Human Rights Law." The opinion rendered was as follows:

In this regard, in an effort to learn more of the matter and to attempt to gain insight concerning the means by which the records sought are maintained, I contacted Mr. Kunin. He indicated that the issuance of a policy statement, such as the sample that you enclosed, is unusual and that such statements are not issued on a regular or ongoing basis. He also said that the sample statement was part of what he characterized as a "drug file", and that no policy statements have been issued on any other subject. Mr. Kunin referred to a fourteen volume set of materials containing a variety of information, some of which might include what you consider to be policy statements. That set is apparently indexed in broad, general categories, and he said that the process of locating the kinds of records that you requested would take weeks and would involve a review of much of the fourteen volumes.

From my perspective, the issue in terms of the Freedom of Information Law is whether the request "reasonably describes" the records sought as required by §89(3) of the Law. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought." [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)....

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In *Konigsberg*, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the case of your request...the Division's record-keeping system does not enable the staff to retrieve the kinds of records in which you may be interested, except by reviewing various aspects of the fourteen volumes page by page. In my view, an agency would not be required to go to such lengths in order to comply with the Freedom of Information Law.

Finally, respondents cite Opinion AO-15751, wherein the Committee provided the following response:

"In considering the requirement that records be "reasonable described", the Court of Appeals has indicated that whether or the extent to which a request meets the standard may be dependent on the nature of an agency's filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 N.Y.2d 245 (1986)]. When an agency has the ability to locate and identify records sought in conjunction with its filing, indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records, irrespective of the volume of the request. By stating, however, that an agency is not required to follow "a path not already trodden" (id., 250) in its attempts to locate records, I believe that the Court determined, in essence, that agency officials are not required to search through the haystack for a needle, even if they know or surmise that the needle may be there.

For purposes of further illustration, assuming that the Suffolk County telephone directory is a fire district record and that you request portions of the directory identifying those persons whose last name is "Johnson", the request would meet the requirement of reasonably describing the records, for items in the directory are listed alphabetically by last name. Even if there were ten thousand Johnsons, the request would be valid. But what if you request those listings in the directory identifying all of those persons whose first name is "John?" The request is specific and it is certain that, as a common first name, there are such entries. Nevertheless, to locate the entries pertaining to persons whose first name is John would require an entry by entry search of the entire directory. Despite the specificity of the request and the certainty that the entries sought are included within the record, the request, in my opinion, would not "reasonably describe" the records as required by the Freedom of Information Law.

Respondents argue that these opinions support their position that the agency is not required to perform the type of search requested by petitioner based on the manner in which files are maintained and indexed in the Columbia County Attorney's Office. Respondents claim that they would be required to perform a file by file search in order to provide petitioner with the documents he is seeking, or a "a path not already trodden."

Respondents also argue that under POL 87(2)(a), an agency need not disclose documents specifically exempted from disclosure by state or federal law, and that under CPLR 4503(a) and 3101(c), attorney client communications, and attorney work product are privileged. Respondents note that agency documents are exempt from disclosure under FOIL where they contain either of these two categories of privileged information. Morgan v. N.Y. State Dep't of Envtl. Conservation,

9 A.D.3d 586 (3d Dept. 2004) ("Under FOIL, an agency need not disclose documents "specifically exempted from disclosure by state or federal law" (Public Officers Law § 87 [2] [a]). The CPLR creates privileges for communications between attorneys and their clients (see CPLR 4503 [a]), as well as for attorney work product (see CPLR 3101 [c])," and are thus exempt from FOIL disclosure.). Respondents note that information pertaining to Juvenile Delinquency prosecutions, PINS petitions, and AOT petitions or records made by Mr. Rappleyea would contain confidential information.

In reply, petitioner again claims that CPLR 3101[c] is not relevant to the instant case, but if it were, that it does not constitute a clear legislative intent to withhold the requested documents. In any event, he argues that respondents have not made a valid confidentiality claim.

Further, he argues that respondents are "opaque" about the chronology of events, in an attempt to suggest that petitioner is seeking an unreasonable amount of documents. The Court notes that it has referred to the record in order to establish the emails sent and requests made, which it finds to be the best record of the chronology of this case.

Petitioner urges that he is simply looking for any piece of paper from various types of litigation files which demonstrates that Mr. Rappleyea did some work as an Assistant County Attorney. He notes that his requests got smaller and smaller every time he requested documentation, until finally, his request became "a single record or document from any time at all in any area of work."

Finally, petitioner argues that it would not be difficult to find one single record that indicates Rappleyea did some work, noting that he worked in the County Attorneys Office for nine years. He notes that he would accept any document, including a memo of law, a correspondence, a draft of a public notice, etc., even if redacted. He also argues that respondent is being disingenuous when it claims that it cannot locate the files he requested while also claiming that they are confidential.

Discussion

First, it is necessary to address what FOIL petitions are actually before the Court. Petitioner's initial FOIL request was made on April 10, 2012. On May 8, 2012, he revised one of the three requests, but maintained the other two. On May 21, 2012, he sent his first FOIL appeal as to the May 8, 2012 request. Petitioner was provided with some documentation, however, July 23, 2012, the agency sent petitioner a letter which stated that it could not provide the documents he requested because they were not reasonably specified. The letter stated that it did "not constitute a denial of your FOIL request from which an appeal may be taken. This correspondence is to inform you that you have failed to meet the threshold requirement of Public Officers Law 89(3) by failing to reasonably describe the records you seek to enable this Office to locate and identify same." On July 28, 2012, petitioner wrote another letter stating that he was making a new FOIL request, but if that delays continued, he would not consider it new, but rather a continuation of his former requests. He then made the request concerning a document from each of several categories. He was denied these

documents, filed an appeal, which was denied.

With respect to the April 10, 2012 request, the petitioner modified his request, and received notification that the agency would not be providing him with documentation based on POL 89(3). Mr. Stack's assertion that this was not a denial entitling petitioner to appeal is questionable, as the August 31, 2012 denial was based primarily on POL 89(3), and petitioner's inability to specify the documents. Further, the petitioner did bring an appeal. The Court finds that petitioner has exhausted his administrative remedies with respect to both the May 8, 2012 and the July 28, 2012 FOIL request.

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. *See* CPLR §7803(3); Gilman v. N.Y. State Div. of Hons. & Community Renewal, 99 N.Y.2d 144 (2002); Nestor v. New York State Div. of Hous. & Community Renewal, 257 A.D.2d 395 (1st Dept. 1999). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and without regard to the facts." Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 231, (1974).

The purpose of the Freedom of Information Law is "[t]o promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public ... All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)." Matter of Gould v New York City Police Dept., 89 N.Y.2d 267, 274-275 (1996). Where an agency asserts an exception to the disclosure requirements of FOIL, the agency has the burden to demonstrate that the material sought is exempt from disclosure. See Matter of Farbman & Sons v New York City Health & Hosp. Corp., 62 N.Y.2d 75 (1984). "[T]to invoke one of the exemptions of section 87 (2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents." Matter of Gould v New York City Police Dept., supra, at 275, *quoting* Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979).

The Court first holds that petitioner is incorrect that CPLR §§ 3101[c] and 4503 are inapplicable to the instant matter. POL 87(2)(a) states that an agency need not disclose documents specifically exempted from disclosure by state law. Attorney work product and attorney-client communications are privileged according to the above captioned statutes, even if there is no lawsuit (other than FOIL) between the petitioner and respondent, and could not be disclosed regardless of who requested them. Nonetheless, "the broad allegation here that the files contained exempt material is insufficient to overcome the presumption that the records are open for inspection and categorically to deny petitioner all access to the requested material." *Konigsberg*, supra, at 251.

With respect to the main point of respondents' opposition, "Public Officers Law §89(3) places the burden on petitioner to reasonably describe the documents requested so that they can be located." Mitchell v. Slade, 173 A.D.2d 226, 227 (1st Dept. 1991); *see also* Matter of Rogue v.

Kings County District Attorney's Office, 12 A.D.3d 374, 375 (2d Dept. 2004) (Public Officers Law §89(3) requires a "written request for a record reasonably described."). In Konigsberg v. Coughlin, 68 N.Y.2d 245 (1986), the Court addressed what constitutes a reasonable description. In that case, an inmate filed a request for records pursuant to FOIL, specifically, "to inspect and review any and all files of records kept on me and my number of identification of the New York State Department of Correctional Services which is identification number 71-A-0224". Respondents, the correctional services department and its officers, denied the request because the inmate had not reasonably identified the documents sought. The inmate coordinator suggested several means by which petitioner could more closely tailor his request -- by stating "the name of document (if known), or the type of content, the approximate date, etc." The inmate records coordinator also furnished petitioner with the names of several folders that were "accessible" to him. Petitioner took an administrative appeal, which upheld the decision denying him access on the ground that the "request failed to reasonably describe the records sought as required by Public Officers Law § 89 (3)".

The Court noted that the requirement of Public Officers Law § 89 (3) that documents be "reasonably described" was to enable the agency to locate the records in question. The Court noted that the failure of a requester to "reasonably describe" desired records is a ground for nondisclosure that is entirely separate from the exemption provisions under section 87 (2) of the Public Officers Law, but noted that the "agency had to establish that before denying a FOIL request for reasons of overbreadth." Id. at 249 (internal citations omitted). The Court found that the inmate's FOIL request reasonably described the documents he was searching for because the respondent had submitted an affidavit from the inmate records coordinator which demonstrated that respondents were able to identify the documents to which petitioner sought access, by using the inmate's identification number. The Court held that "because the present FOIL request was framed sufficiently, respondents lacked authority to require greater specificity." Id. at 250.

Petitioner's main argument is that is he not looking for a large amount of documents, and goes so far as to say that one document would suffice. The caselaw and the Committee Opinions cited above do not focus on the amount of documents to be produced. In fact, the Public Officers Law 89(3) states that "an agency shall not deny a request on the basis that the request is voluminous." Rather, the focus is whether the descriptions are sufficient for purposes of locating and identifying the documents sought. Here, petitioner states that he is requesting documentation of a non-confidential nature to establish that former ACA Tal Rappleyea worked in various categories of litigation. There is no question that petitioner is asking respondent to forge a path not already trodden, as the County Attorney's Office does not organize or maintain its files by attorney name. This language comes from National Cable Television Asso. v. Federal Communications Com., 479 F.2d 183 (US. Dist. Ct. for the District of Columbia) (1973), where the Court held that "[i]f the agency has previously identified a class or category of documents in the normal course of its affairs, it must produce them in response to a request phrased in terms of the class or category...[i]f the agency has never segregated that class or category, production may be required where the agency may be able to identify that material with reasonable effort." Id. at 192. The Court continued that "it was not apparent that the [respondent] had at any time either indexed its files in a way that would enable it to locate what it did have, or that it had ever brought the materials together for a common

purpose or otherwise acted on them as a group. Thus, the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency."

The search requested by the petitioner may or may not require the agency to search every file in its possession. As the files are not organized by attorney name, there is no way to tell how many files would have to be reviewed in order to obtain the documents petitioner is requesting. His suggestion that respondent simply start searching random files for an hour, two hours, or whatever the agency deems to be a reasonable amount of time, or that the agency members sit together and "rack their collective memories", does not change the fact that the agency would have to comb through numerous cases individually that have never been segregated to the class or category requested by the petitioner in order to locate those falling within the scope of petitioner's request. Furthermore, POL 89(3) requires that an agency must conduct a "diligent search" of its records before it can certify that the document could not be found. The agency could hardly certify that it had made a diligent search if it spent one to two hours reviewing the first 50 files of any given file cabinet or database, when thousands of such files, (over a million documents, according to respondents' IT personnel) are maintained by the office.

The Court agrees with the respondent that the request, in its current form, fails to reasonably describe the documents requested. As such, the petition is denied.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order, and Judgment are being returned to the attorneys for respondent. All supporting documentation is being returned to the County Clerk's Office for filing. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.
ENTER.

Dated: January 10, 2013
Hudson, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Verified Petition, dated October 1, 2012, with annexed Exhibits.
2. Verified Answer, dated October 26, 2012; Affirmation in Opposition, Robert J. Fitzsimmons, Esq., dated October 26, 2012; Memorandum of Law, dated October 26, 2012, with annexed Exhibits A-L.
3. Verified Reply Affidavit, with annexed Exhibits.