

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
TOBIN & DEMPFF, LLP,
Petitioner,

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

JUDGMENT

Index No.: 2220-07

RJI No.: 01-07-ST7513

-against-

PRESTON L. FELTON, Interim Superintendent, New
York State Police,

Respondent.

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Tobin and Dempf, LLP
(By: Kevin A. Luibrand, Esq.)
Attorney for Petitioner
33 Elk Street
Albany, New York 12207

Andrew M. Cuomo, Attorney General
Office of the Attorney General
(By: Stephen M. Kerwin, Esq., Assistant Attorney General)
Attorneys for Respondent
The Capitol
Albany, New York 12224

McNamara, J.

This proceeding arises in connection with an incident on December 10, 2006 in which petitioner's client, Derek Demeo, is alleged to have sustained serious injuries. On December 14, 2006 petitioner served a Freedom of Information Law (FOIL, Public Officers Law art. 6) request on the New York State Police. The request sought four items all related to the December 10, 2006 incident which occurred in the vicinity of the Bayou Café on North Pearl Street in the City of Albany

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between 12:01 a.m. and 3:00 a.m. The request listed audio communications, video tapes, incident reports and use of force reports as the items sought. In its response dated January 24, 2007, respondent informed petitioner that the only records located that were responsive to item #1 (audio tapes) were records which, if disclosed would constitute an unwarranted invasion of personal privacy of those concerned. The request was denied on that basis. As to the other items, respondent informed petitioner that a search of their files failed to locate any additional records responsive to the request. Petitioner filed an appeal of the determination on January 30, 2007. In a letter to petitioner dated March 9, 2007, respondent denied the appeal.¹

Petitioner commenced this CPLR article 78 proceeding in March 2007. After the petition was filed and served, the attorney for respondent suggested to petitioner that it should advise respondent in writing of their representation, request particular documents and items and pay a fee of \$18.25. Such a request was made in a letter dated April 5, 2007. On April 23, 2007 respondent sent petitioner a radio log sheet, an Incident Report and a CD containing dispatch communications involving the incident. In the letter accompanying the information, respondent informed petitioner that some redactions had been made to prevent an unwarranted invasion of the personal privacy of others concerned. The redacted information included the names, addresses, dates of birth and phone numbers of seven witnesses or persons interviewed. Petitioner was also advised that the record

¹Respondent has now disclosed that in conducting its review as part of the appeal process it discovered other material responsive to the FOIL request including the radio log, dispatch radio transmissions and the incident report later provided to petitioner. The discovery of these items was not revealed to petitioner in the letter denying the appeal. Rather, the determination of the appeal simply stated that "the only records that were located responsive to your request are records which would constitute an unwarranted invasion of the personal privacy of those concerned if disclosed."

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originally located in response to the December 14, 2007 FOIL request did not pertain to Demeo and therefore, was not enclosed. The letter closed by stating that any appeals should be directed to the Records Appeal Officer.

Initially, respondent argues that the petition should be dismissed because the matter was made moot when it sent responsive material to petitioner on April 23, 2007. Respondent next contends that the April 5th letter from petitioner constituted a new FOIL request and that petitioner failed to exhaust an available administrative remedy because it did not pursue an administrative appeal following the response, also the April 23rd letter. The illogic of the argument is apparent and suggests that respondent is more interested in a game of cat and mouse than in providing appropriate responses to legitimate requests for information.

Respondent provides no explanation as to how the material it sent to petitioner could on the one hand be a response to the FOIL request of December 14, 2006 (and thereby moot the issues raised in the petition) and at the same time be a response to what it terms a second FOIL request: the letter dated April 5, 2007 (which then, according to respondent, obliged petitioner to pursue a second administrative appeal). Respondent proposes an outcome by which petitioner would be punished with dismissal of its petition for cooperating, post-commencement, in an attempt to resolve the issues raised in the petition by sending, at the suggestion of respondent's attorney, the April 5, 2007 letter. Moreover, respondent would be rewarded not only by dismissal of the petition but also by virtue of the fact that any court review of its denial of records would be unlikely given that the 30 day limitation of time for requesting administrative review of the April 2007 response has expired (9 NYCRR §483.7[a]). The petition legitimately raises issues relevant to the December 14, 2006 FOIL

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request and respondent's contrived procedural maneuvering designed to avoid review of its decision will not be sanctioned.

Under FOIL, agency records are presumptively available for public inspection and copying unless the requested documents fall within one of the exemptions set forth in Public Officers Law §87(2) (*Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738). "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 Beyah v Goord*, 309 AD2d 1049, 1050 quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566). Failure to establish the exemption by making the requisite factual showing that disclosure would cause substantial and identifiable harm to the subject which would outweigh the right to access renders this claim for exemption unavailing (*Matter of New York Assn of Homes & Servs. for Aging, Inc. v Novello*, 13 AD3d 958 [2004]).

Although respondent claims that redaction of the information from the report regarding the identities of the seven individuals is consistent with the Appellate Division, Third Department ruling in *Matter of Dobranski v Houper*, 154 AD2d 736 (1989), he does so in conclusory fashion. No factual basis is offered to show that the individuals who spoke to the police had some reasonable expectation that their identities would be shielded from public release, or that some identifiable harm would result from release of that information.

Respondent has the burden of establishing the exemption. And, inasmuch as no legitimate effort has been made to meet that burden, the presumption of access remains. Accordingly,

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respondent is obligated by the statute to provide petitioner with the information redacted from the incident report.

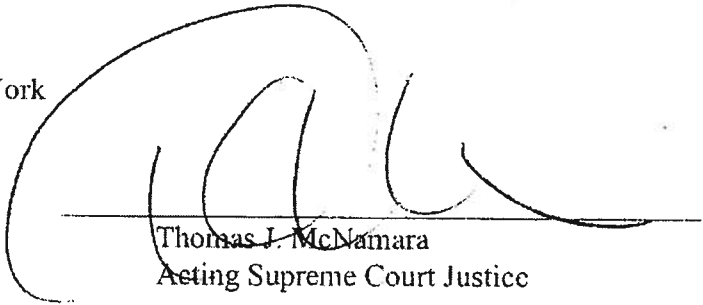
The request for attorney's fees is denied without prejudice as petitioner has not shown that Demco has, or will incur any expense for attorney's fees under whatever retainer agreement he may have with petitioner.

All papers including this Judgment are returned to plaintiff's attorneys. The signing of this Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
August 10, 2007



Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

- 1) Notice of Petition dated March 16, 2007;
- 2) Petition of Tobin & Dempf, LLP dated March 16, 2007 with exhibits annexed;
- 3) Petitioner's Memorandum of Law dated March 16, 2007;
- 4) Answer of Respondent by Stephen M. Kerwin, Esq., verified May 14, 2007 with exhibits annexed;
- 5) Affirmation of Stephen M. Kerwin, Esq., dated May 14, 2007 with exhibits annexed;
- 6) Respondent's Memorandum of Law dated May 14, 2007;
- 7) Affidavit of Laurie M. Wagner sworn to May 9, 2007;
- 8) Affidavit of Kevin A. Luibrand, Esq., sworn to May 17, 2007.