

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ PART 13**  
*Justice*

In the Matter of:

FREE MARKET ENVIRONMENTAL LAW CLINIC,  
ADVOCATES FOR PRATTSBURGH, CITIZEN  
POWER ALLIANCE, COHOCTON WIND WATCH,  
COALITION FOR THE PRESERVATION OF THE  
GOLDEN CRESENT AND 1000 ISLANDS REGION,  
GREAT LAKES WIND TRUTH, CLEAR SKIES  
OVER ORANGEVILLE, and ROGER CAIAZZA,

INDEX NO. 101759/16  
MOTION DATE 03-07-2017  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

Petitioners,

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

For a judgment pursuant to Article 78 of the  
Civil Practice Law and Rules.

The following papers, numbered 1 to 13 were read on this petition to/for Art. 78 relief :

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 10</u>
Replying Affidavits _____	<u>11 - 13</u>

**Cross-Motion: Yes X No**

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that the petition for Article 78 relief to enforce the New York Freedom of Information Law (FOIL), and void Respondent's asserted exemptions under Public Officer's Law §87[2],[e] and §87[2],[g], seeking declaratory and other relief, is denied and this proceeding dismissed.

In 2015, Respondent began an investigation into whether public statements made by ExxonMobil Corporation (hereinafter referred to as "Exxon") to investors and consumers concerning climate change, violated New York business, securities and consumer fraud laws. Respondent alleges that some of the public statements made by Exxon to New York investors and consumers were on the impact of climate change on the company financially and the effect on business. Respondent also alleges that apparent contradictions arose between the public statements and internal Exxon documents that first became available publicly in early 2015, and lent themselves to the suggestion that Exxon inaccurately portrayed the company's conclusions and beliefs, creating a basis for investigation. Respondent claims that as part of the investigation, private organizations and individuals were contacted, and meetings conducted, to obtain information, and depending on veracity or the merit of what was provided, assist in a determination of whether enforcement litigation is warranted.

Petitioners allege that on May 5, 2016 a FOIL request was e-mailed to the Respondent's office seeking records related to meetings conducted in October and November of 2015 between the Office of the Attorney General and representatives of Fahr, LLC, including but not limited to Tom Steyer and Ted White. The May 5, 2016 FOIL request also sought records pertaining to a February 5, 2015 meeting between Respondent and representatives of an organization called Eco-Accountability, including but not limited to John Passacantando and Kert Davies (Pet. Exh. A). The records sought in the May 5, 2016 FOIL request were identified as those reflecting efforts to "arrange, schedule, discuss, or

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

in any way mentioning" the meetings (Pet. Exh. A). Respondent assigned the May 5, 2016 FOIL request tracking # 160286.

In a letter dated September 2, 2016, signed by Assistant Attorney General Michael Jerry, two documents numbered 160286-1 and 160286-23 were provided to Petitioners and an additional thirty-four documents were deemed exempt from disclosure (See Aff. of Asst. Atty. Gen. Michael Jerry). The September 2, 2016 letter identified the exemptions as: (1) Public Officers Law ("POL") §87[2][a], exempt from disclosure as confidential communications between attorney and client, and subject to attorney work product privilege; (2) POL §87[2][e], the documents were compiled for law enforcement purposes and; (3) POL §87[2][g] inter-agency or intra-agency exemptions (Pet. Exh. B).

Petitioners appealed the September 2, 2016 determination seeking further explanation and estimated amount or identification of the alleged exempt materials (Pet. Exh. C). By letter dated September 26, 2016 Kathryn Sheingold, Records Appeals Officer, affirmed the earlier exemptions stating the responsive records were properly withheld as they would reveal: (1) areas of investigative concern, (2) the nature of the Respondent's strategy, (3) identify potential witnesses, (4) give the opportunity to destroy or conceal information not previously produced, or (5) involved communications solely between Respondent's employees (Pet. Exh. D). The September 26, 2016 letter cited, *In re Whitley v. N.Y. Co. District Attorney's Office*, 101 A.D. 3d 455, 955 N.Y.S. 2d 42 [1<sup>st</sup> Dept., 2012], and stated that neither an estimate of the number of responsive records, or particularity on how an exemption is applied, was required (Pet. Exh. D).

The petition pursuant to Article 78 seeks a declaratory judgment annulling and vacating Respondent's final determination, and stating that: (a) the records are public and subject to public release under FOIL, (b) ordering the release of the requested records subject to legitimate exemptions, and (c) estopping Respondent from seeking costs and fees due to the balance of the equities under §89[4][c]. The petition also seeks injunctive relief: (1) having Respondent produce all responsive records to Petitioners within five (5) business days, (2) have this Court order the parties to consult regarding withheld documents, filing a status report within ten (10) days after the last of the produced documents, addressing the Respondent's preparation of a withholdings log, and (3) providing a briefing schedule for resolution of any remaining issues.

Respondent's "Objection in Point of Law" asserted in the Answer, states that only Petitioner, Free Market Environmental Law Clinic (hereinafter individually referred to as "FMELC"), administratively appealed the September 2, 2016 denial, warranting dismissal of the remaining Petitioners' claims for failure to exhaust administrative remedies, this objection is not proper. The May 5, 2016 FOIL request assigned tracking # 160286, was made by FMELC, and stated it was submitted "on behalf of" various individuals and entities that included the remaining Petitioners in this proceeding (Pet. Exh. A). The September 9, 2016 appeal of Assistant Attorney General Michael Jerry's determination on the May 5, 2016 FOIL request referred to the Respondent's tracking # "160286," and although it was written on FMELC letterhead without the "on behalf of," it was meant to address the prior request made for all the named Petitioners (Pet. Exh. C). The omission of "on behalf of" is minor and not sufficient to warrant dismissal of the remaining Petitioners' claims.

Respondent argues that the Petitioners offer no evidence in support of the claims made in the petition and the arguments raised are wholly without merit. Respondent waives the denial under POL §87[2][a], and argues that the exemptions were properly raised under POL §87[2][e], because the documents were for law enforcement purposes, or under POL §87[2][g] as inter-agency or intra-agency materials. Respondent submits an Exemption/Privilege Log, identifying the documents withheld and reasons for doing so, and state that records are available to the Court for In Camera inspection if needed (Aff. of Asst. Atty. Gen. Michael Jerry in Opp. Exh. C).

Under FOIL, all governmental records are presumed available for public inspection without consideration of the purpose of the applicant requesting access (*Tuck-It-Away Associates, L.P. v. Empire State Development Corporation*, 54 A.D. 3d 154, 861 N.Y.S. 2d 51

[1<sup>st</sup> Dept., 2008]). FOIL imposes a broad duty on agencies to promote public accountability and open government by making records available (*Gould v. New York City Police Dept.*, 89 N.Y. 2d 267, 675 N.E.2d 808, 653 N.Y.S. 2d 54 [1996]). FOIL requests are subject to statutory exemptions under Public Officers Law §87(2). Disclosure may only be withheld where the material requested falls squarely within a statutory exemption. The burden is on the agency to demonstrate that the requested material falls within one of the statutory exemptions (*Town of Waterford v. New York State Department of Environmental Conservation*, 18 N.Y. 2d 652, 967 N.E. 2d 652, 944 N.Y.S. 2d 429 [2012] and *Hanig v. State Dept. of Motor Vehicles*, 79 N.Y. 2d 106, 588 N.E. 2d 750, 580 N.Y.S. 2d 715 [1992]).

Respondent alleges that Petitioners are not challenging the sufficiency or scope of the search for documents, and only make speculative assertions that the underlying investigation of Exxon was not "legitimate." Respondent argues that the office acted in the role as New York's chief law enforcement agency and the documents identified as exempt under POL § 87(2)(e) are part of an ongoing investigation of Exxon that started in 2015. It is argued that Respondent has the authority to investigate potential violations of New York's business, securities, and consumer fraud statutes and that providing specific details or identifying documents to Petitioners would significantly impede the ongoing investigation and potential fraud charges against Exxon.

POL § 87(2)(e)(i) is applied to records which if provided would interfere with law enforcement investigations or judicial proceedings. Generically identified materials and a statement of the risks of disclosing them is sufficient to satisfy the POL § 87(2)(e)(i) exemption requirement when there is a pending case and disclosure would interfere with the proceedings (*Matter of Leshner v. Hynes*, 19 N.Y. 3d 57, 968 N.E. 2d 451, 945 N.Y.S. 2d 214 [2012] and *Loevy & Loevy v. New York City Police Dept.*, 139 A.D. 3d 598, 33 N.Y.S. 3d 185 [1<sup>st</sup> Dept., 2016]). POL § 87(2)(e)(iii), (iv) are applied to disclosure that would identify confidential sources and information relating to, "criminal investigations and non-routine investigative techniques or procedures" (*Asian American Legal Defense and Educ. Fund v. New York City Police Dept.*, 125 A.D. 3d 531, 5 N.Y.S. 3d 13 [1<sup>st</sup> Dept., 2015]). A factor used in determining whether investigative procedures are non-routine is whether disclosure would create "a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by personnel" (*Matter of Fink v. Lefkowitz*, 47 N.Y. 2d 567, 393 N.E. 2d 463, 419 N.Y.S. 2d 467 [1979]).

Respondent has met its burden and shown that the materials identified in the privilege log pertain to a fraud investigation and potential criminal charges of Exxon and are subject to the POL § 87(2)(e) exemption for law enforcement investigations (*Aff. of Asst. Atty. Gen. Michael Jerry in Opp. Exh. C*). Petitioners' arguments that the identified materials were shared with private individuals for other purposes are speculative. This argument ignores that the information is needed as part of the investigation to establish fraud and can be, and is, being obtained from non-public sources. The documentation provided by Petitioners as part of the reply papers, including the "Climate Change Coalition Common Interest Agreement," (Reply Exh. 1) do not show that the investigation and related materials are being used solely to address a political agenda or that the investigation has been previously publicized in the media warranting their dissemination under FOIL. Petitioners' reference to using the documents in another action brought against the Respondent that is pending in Supreme Court, New York County, also does not state a reason to find disclosure of the materials is warranted.

Respondent argues that the remaining documents identified in the privilege log are exempt pursuant to POL §87(2)(g), as inter-agency or intra-agency materials and not subject to any exceptions. Asst. Atty. Gen. Michael Jerry and Asst. Atty. Gen. Lemuel M. Srolovic, each state in affidavits in support of the answer that 19 of the 34 documents identified were Office of the Attorney General only internal electronic communications.

POL§87(2)(g), permits an agency to deny a FOIL request for records that are inter-agency or intra-agency materials. Exceptions are made for, "(i) statistical or factual

tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations or (iv) external audits" (McKinney's Cons. Laws of NY, Public Officers Law §87[g]). The purpose of the Public Officers Law §87[2][g] exemption is to allow individuals within an agency to freely express and exchange their opinions as part of the deliberations, without having to worry about public disclosure (Town of Waterford v. New York State Department of Environmental Conservation, 18 N.Y. 3d 652, 967 N.E. 2d 652, 944 N.Y.S. 2d 429 [2012] citing to Matter of New York Times Co. v. City of N.Y. Fire Dept., 4 N.Y. 3d 477, 829 N.E. 2d 266, 796 N.Y.S. 2d 302 [2005]). Materials consisting of internal discussions on decisions that are separate from final agency determinations, including what information can be publicly disclosed and the best way to do so is subject to the POL§87[2][g] exemption (Smith v. New York State Office of Atty. General, 116 A.D. 3d 1209 [3<sup>rd</sup> Dept., 2014]).

The privilege log shows that a majority of the documents identified as exempt under POL§87[2][g], pertain to follow-up discussions after meetings (Aff. of Asst. Atty. Gen. Michael Jerry in Opp. Exh. C). Respondents have stated a basis to find the remaining materials identified in the privilege log exempt pursuant to POL§87[2][g]. Petitioners' argument that the inter-agency and intra-agency exception to FOIL was likely waived as a result of materials and information being shared with outside parties is speculative, conclusory and fails to show that the exemption does not apply.

Petitioners additional arguments and alleged new legal authority filed as the result of a ruling in the United States District Court for the Northern District of Texas are not being considered as part of the petition and this proceeding. This Court does not accept additional papers after oral arguments, or sur-reply papers raising new arguments. New arguments raised for the first time in reply papers, deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ball v. Brodsky, 126 A.D. 3d 448, 5 N.Y.S. 3d 448 [1<sup>st</sup> Dept., 2015]).

Respondent has shown that the materials sought are properly subject to exemptions pursuant to POL§87[2][e] and POL§87[2][g], warranting denial of the declaratory relief and injunctive relief sought in this petition. There is no need to address the relief sought pursuant to POL §89 [4][c] for attorney fees and litigation costs incurred.

Accordingly, it is ORDERED AND ADJUDGED that the petition seeking a declaratory judgment annulling and vacating Respondent's final determination, and stating that: (a) the records are public and subject to public release under FOIL, (b) ordering the release of the requested records subject to legitimate exemptions, and (c) estopping Respondent from seeking costs and fees due to the balance of the equities under §89[4][c]; (d) for injunctive relief: (1) having Respondent produce all responsive records to Petitioners within five (5) business days, (2) have this Court order the parties to consult regarding withheld documents, filing a status report within ten (10) days after the last of the produced documents, addressing the Respondent's preparation of a withholdings log, and (3) providing a briefing schedule for resolution of any remaining issues; and (e) pursuant to POL §89 [4][c] seeking attorney fees and litigation costs incurred, is denied and it is further,

ORDERED and ADJUDGED that this proceeding is dismissed, and it is further,

ORDERED and ADJUDGED that the County Clerk is directed to enter judgment accordingly.

ENTER:

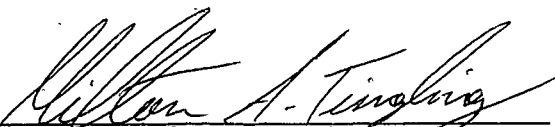
  
MANUEL J. MENDEZ,  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: May 16, 2017

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
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MAY 22 2017,  
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NEW YORK

  
Clerk

As a Judgment

101759/16

Order + Judgment

**FILED** as a Judgment  
MAY 22 2017  
AT 11:30 AM  
NY, CO. CLKS OFFICE