

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
THE HUMANE SOCIETY OF THE UNITED STATES,

Petitioner,

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

-against-

PATRICK H. BRENNAN, as Commissioner of the
New York State Department of Agriculture and Markets,
and, THE NEW YORK STATE DEPARTMENT OF
AGRICULTURE AND MARKETS,

Respondents.

**DECISION, ORDER AND
JUDGMENT**

Index No. 3402-06

RJI No.: 01-06-ST6747

(Supreme Court, Albany County, Special Term)

APPEARANCES:

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Leslie E. Stein, J.:

Petitioner commenced this CPLR Article 78 proceeding to challenge respondent's alleged failure to produced certain records in response to petitioner's Freedom of Information Law ("FOIL") request. Petitioner seeks an Order requiring respondents to disclose and provide all relevant records in response to petitioner's request for records. In addition, petitioner seeks an Order requiring respondents to identify and disclose all relevant records it seeks to withhold on the basis of statutory exemptions, as well as an award of attorneys fees. Respondents answered the petition and request dismissal of the proceeding, together with costs and disbursements. Respondents specifically assert that Public Officers Law §87[2][e] and [2][g] permits denial of access to the records petitioner seeks. The Court held oral argument and conducted an *in camera* review of the documents which were withheld by respondents.

Petitioner requested "records that reflect, relate, or refer to the production of, or the final product, known as 'foie gras'...". In addition, petitioner sought records that reflect, relate, or refer to the following corporations: LaBelle Farm Inc., Hudson Valley Foods, Inc. (also known as AGY, Inc.); their employees and any facilities owned or operated by these corporations. Respondents allege that they have identified approximately 1,300 pages of documents which could be disclosed, 43 documents (consisting of approximately 106 pages) which are exempt from disclosure on the basis that they consist of inter- or intra-agency correspondence, and 85 documents (totaling approximately 209 pages) which related to an ongoing investigation. Respondents assert that they sent a letter with the documents that were being disclosed which explained that the documents that were withheld were exempt pursuant to Public Officers Law §87[2][g] and [2][b] and Public Officers Law §96[1][c]. Petitioner appealed, asserting that the

disclosure was non-responsive and that the documents that were withheld were not adequately described so as to permit review as to whether the reason for denial was proper. Respondents denied petitioner's appeal and this proceeding ensued.

“The Freedom of Information Law unequivocally makes all agency records open to the public unless they fall within one of its enumerated exceptions ... All records are presumptively available and exemptions must be narrowly construed to ensure maximum access to public records ... The burden of proof rests on the agency that claims an exemption from disclosure ... Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency's burden of proof” (*Matter of Polansky v Regan*, 81 AD2d 102, 103 [citations omitted])” (*Professional Standards Review Council of Am. v New York State Dep't of Health*, 193 AD2d 937, 939 [1993]). “[T]he agency seeking to prevent disclosure must demonstrate that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; see *Hassig v New York State Dept. Of Health*, 294 AD2d 781 [2002]). “[A]ffidavits merely repeating the statutory phrasing of an exemption are insufficient to establish the requirement of particularity” (*Matter of City of Newark v Law Dept. of the City of New York*, 305 AD2d 28 [2003][citations omitted]).

In the instant matter, the response to petitioner's FOIL requests was not sufficiently articulate in describing the documents which respondents were withholding or in setting forth the specific exemption claimed for each. Without such information, petitioner is unable to ascertain whether the denial is justifiable. While it may be that, based upon the present statutory scheme, in order to be certain that the agency FOIL denials are valid in each and every case, an Article 78

proceeding with *in camera* review of the documents is unavoidable, respondents are not relieved of their responsibility to fully comply with the Public Officer's Law and articulate a specific and particularized reason for withholding each document.

Turning to the documents withheld herein, the Court notes that counsel for respondents has agreed that a letter dated February 25, 1999 from Jeffrey Huse to Ira Reed should have been disclosed. In the event that it has not been turned over, respondents shall be directed to provide petitioner with a copy of that letter within ten days of the date of service of this Decision, Order and Judgment, with notice of entry upon respondents.

Respondents have also now provided a sworn affidavit alleging that the investigation of Hudson Valley Foods, Inc. was completed on April 27, 2006. The first denial of petitioner's request was made on November 14, 2005 and the appeal determination was rendered on January 25, 2006. Thus, respondents' contention that the 209 pages of laboratory reports were part of an ongoing investigation and exempt from disclosure was reasonable. Furthermore, since respondents have now turned those documents over to petitioner, that issue is moot.

Concerning the remainder of the 43 documents consisting of approximately 106 pages¹, the Court finds, after *in camera* review, as follows:

¹The exemption claimed for these documents is Public Officers Law §87[2][g] which provides that those documents which "are inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; iv. external audits, including but not limited to audits performed by the comptroller and the federal government;" are exempt from disclosure.

(A) Not Exempt from Disclosure

Attorney General Complaint Form² received by the Attorney General's Office on May 13, 2002 - This document is not inter- or intra-agency material. Therefore, respondents shall be directed to turn over this document after redacting the complainant's name and address pursuant to Public Officers Law §87(2)(b) and in accordance with FOIL -AO-6143;

The letter to Farm Products Inspection stamped received on March 23, 2000 is not inter- or intra-agency material (*see* Public Officers Law §87(2)(g)). Therefore, respondents shall be directed to turn over this document after redacting the writer's name and address pursuant to Public Officers Law §87(2)(b);

The fax cover page from Dr. Jagne to Dr. Gray is not inter- or intra-agency material;

The e-mail from Pamkowski to Geiser dated March 4, 2005 is not inter- or intra-agency material, except that the phone numbers for "Izzy" and "Marcus" shall be redacted pursuant to Public Officers Law §87(2)(b). Once redacted, respondents shall provide this document to petitioner;

Monitored Flock Inspection Reports for inspections performed on February 26, 2002 - This report consists of data (*see* Public Officers Law §87(2)(g)(i));

The document entitled "Operation Daffy Duck" dated May 20, 2005 consists of instructions to staff that affect the public (*see* Public Officers Law §87(2)(g)(ii));

The document entitled "Operation Duck Swabs" dated June 27, 2005 consists of instructions to staff that affect the public (*see* Public Officers Law §87(2)(g)(ii));

Memorandum from Huntley to Becker dated May 27, 2005 - This document consists of data (*see* Public Officers Law §87(2)(g)(I));

The portion of the e-mail from Trock to McKay dated March 3, 2005 which consists of an email from Geiser to Trock (the portion from Trock to McKay is exempt as set forth below) is not inter- or intra-agency material (*see* Public Officers Law §87(2)(g)).

²This document refers to attached letters to the editor which were not provided to the Court; only the first page, and not the reverse side, of this document was produced for *in camera* inspection.

(B) Exempt from Disclosure

The e-mail dated February 11, 1999 from Richard Breitmeyer to agency employees is exempt from disclosure pursuant to Public Officers Law §87(2)(b) and on the basis that it is irrelevant to petitioner's FOIL request.

The list of names and phone numbers is exempt from disclosure pursuant to Public Officers Law §87(2)(b).

In addition, the following records fall squarely within the protection of Public Officers Law §87(2)(g), insofar as they consist of opinions, advice, evaluations, deliberations, proposals, policy formulations, conclusions, or recommendations (*see Oyster Bay v Williams*, 134 AD2d 267, 268 [1987]):

E-mail from Bruno to Huntley dated February 20, 1999;

Memorandum from Bruno to Drs. Huntley, Gray & Huse dated March 10, 1999;

Fax Cover sheet and Memorandum from Bruno to Huntley, Huse & Gray dated February 20, 1999;

National Veterinary Services Laboratory Findings (two pages);

E-mail from Bruno to Huntley dated January 29, 1999;

Memorandum from Huntley to Lipinski dated February 5, 1992;

Document entitled Summary Pro/Con arguments;

Memorandum from Huntley to Lipinski dated May 5, 1992;

Memorandum from Holowka to Gray dated April 13, 2000;

Fax from Bruno to Gray dated May 24, 1999;

Memorandum from Bruno to Gray dated May 8, 1998;

Memorandum from Bruno to Gray dated May 20, 1998;

Memorandum from Bruno to Huse, Gray & Trock dated March 28, 2003;

Memorandum from Proctor to Bruno dated October 3, 2001;
Memorandum from Proctor to Bruno dated October 3, 2001 with notations;
Memorandum from Scrafford to Bruno dated February 29, 1996;
Memorandum from Bruno to Scrafford dated February 16, 1996;
Document entitled "To Do Item Details" dated February 8, 1996;
Memorandum from Drazek to Widger dated March 14, 1986;
Memorandum from Mary Beth to Files dated October 11, 2005;
Memorandum from Phillips to McKay dated September 27, 2005;
Facsimile from Bruno to Huse, Huntley & Gray dated January 19, 1999;
E-mail from Trock to McKay dated March 3, 2005 (except the portion of the email which consists of an email from Geiser to Trock which is not exempt);
Memorandum from Bruno to Huntley dated May 26, 1999;
Facsimile from Bruno to Gray dated April 17, 1999;
Low Pathogenic Avian Influenza Flock Plan Draft from Dave Smith;
Meeting notes re Hudson Valley Foie Gras and drawings.

(C) Decision Reserved

The Court is unable to ascertain the nature of the following documents in order to make a determination as to whether they are exempt from FOIL disclosure and the Court shall reserve decision thereon pending receipt of further explanation from respondents:

AGY Corporation Memorandum dated May 23, 2005;
AGY Corporation Memorandum dated May 19, 2005;
AGY Corporation Memorandum dated June 15, 2005;
Notes dated May 18, 2005.

Attorneys Fees

Under FOIL, attorney's fees may be awarded to a petitioner if they have "substantially prevailed" and meet two conditions: (1) the requested records are "of clearly significant interest to the general public", and (2) "the agency lacked a reasonable basis in law" for withholding the requested records" (*Beechwood Care Ctr. v Signor*, 5 NY3d 435, 441 [2005], citing Public Officers Law §89[4][c]). Requested records must be of "clear and significant interest" to the public, not merely of potential interest (*see Beechwood Care Ctr. v Signor, supra*). Even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the Court (*see Matter of Henry Schein, Inc. v Eristoff*, 2006 NY Slip Op 9983, 2 [2006]).

The production of foie gras and the means utilized by producers have been somewhat controversial. In addition, the information sought by petitioner relates to the Avian Flu, which has struck bird populations throughout the world and is clearly of significant public interest. Therefore, the records sought herein are clearly of significant interest to the general public. However, petitioner has not demonstrated that respondents have failed to articulate "a reasonable basis in law" to justify their position. There is no evidence that respondents' reliance on the exemptions in Public Officer's Law was unreasonable or in bad faith. Thus, the Court finds that respondents' determination does not warrant an award of attorneys fees (*see Matter of Todd v Craig*, 266 AD2d 626 [1999]).

Accordingly, it is

ORDERED AND ADJUDGED, that the petition is hereby dismissed in part and granted in part as set forth in detail hereinabove; and it is further

ORDERED, that respondents are directed to provide petitioner with the documents listed above in paragraph "A" within ten (10) days of the date of service of a copy of this Decision, Order and Judgment, with notice of entry; and it is further


ORDERED, that respondents are directed to provide the Court with a further explanation as to the nature of the four documents listed above in paragraph "C" within ten (10) days of the date of service of a copy of this Decision, Order and Judgment, with notice of entry. The Court reserves decision with respect to those documents pending receipt of such information; and it is further

ORDERED and ADJUDGED, that petitioner's request for attorneys fees is denied.

This shall constitute the Decision, Order and Judgment of the Court. All papers, except the documents submitted for *in camera* review, are returned to the counsel for petitioner, who is directed to enter this Decision, Order and Judgment without notice and to serve respondents with a copy of this Decision, Order and Judgment, with notice of entry. The documents submitted for *in camera* review are being held by the Court pending determination of the Court with respect to the remaining four documents.

SO ORDERED AND ADJUDGED!

Dated: Albany, New York
March 6, 2007



Leslie E. Stein
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated May 23, 2006;
2. Verified Petition dated May 23, 2006, together with all supporting documents;
3. Verified Answer dated June 27, 2006, together with exhibit;
4. Affidavit of Jessica Chittendon, sworn to on June 27, 2006;
5. Reply Affirmation of Leonard Egert, Esq., dated on August 22, 2006;
6. Affidavit of Susan C. Strock, DVM, MPH, DACVPM, sworn to on November 30, 2006, together with annexed exhibit;
7. Affirmation of Michael McCormick, Esq., dated November 30, 2006;
8. Affirmation of Leonard Egert, Esq., dated December 14, 2006, together with annexed document;
9. Documents submitted for *in camera* review.