

Matter of Data Tree LLC v Romaine

2005 NY Slip Op 30134(U)

April 18, 2005

Supreme Court, Suffolk County

Docket Number: 0019331/2004

Judge: Michael F. Mullen

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART XXVI

PRESENT:
HON. MICHAEL F. MULLEN, J.S.C.

INDEX NO. 19331/2004

-----x
In The Matter of the Application of
DATA TREE LLC,

Petitioner,

for a Judgment Pursuant to CPLR Article 78,

-against-

EDWARD P. ROMAINE,
as Suffolk County Clerk,

Respondent.
-----x

DATE: APRIL 18, 2005
SEQ 002 - CDISP5UBJ

PETITIONER'S ATTY:
Piper Rudnick, LLP
By: Andrew L. Deutsch
1251 Avenue of the Americas
New York, NY 10020

RESPONDENT'S ATTY:
Christine Malafi,
Suffolk County Attorney
By: Christopher A. Jeffreys,
Assistant County Attorney
H. Lee Dennison Building
100 Veterans Memorial Highway
PO Box 6100
Hauppauge, NY 11788-0099

This is an Article 78 proceeding in which petitioner, Data Tree LLC, ("Data Tree") seeks to annul and vacate respondent's denial of its request for the production of certain public records maintained by the Suffolk County Clerk's Office, ("Clerk's Office") and to direct respondent to provide petitioner with access to and copies of said records, pursuant to Article 6 of the Public Officers Law.

Respondent, Edward P. Romaine, the County Clerk, has submitted opposition through the County Attorney's Office.

Some Background: On or about January 14, 2004 petitioner Data Tree, a provider of online public land records, made a formal request pursuant to Public Officers Law §89, commonly referred to as a Freedom of Information Law (FOIL), for records from the County Clerk's Office.

The request sought the production of the following documents:

Mechanics Liens starting on 1/1/03 through the date of request;

Mechanics Liens Satisfaction starting on 1/1/03 through the date of request;
Federal Tax Liens starting on 1/1/93 through the date of request;
Federal Tax Liens satisfaction starting on 1/1/93 through the date of request;
Uniform Commercial Code starting on 1/1/98 through the date of request;
Uniform Commercial Code Termination starting on 1/1/98 through the date of request;
Lis Pendens starting 1/1/03 through the date of request;
Lis Pendens Release starting 1/1/03 through the date of request.
Mortgages starting on 1/1/83 through the date of request;
Deeds starting on 1/1/83 through the date of request;
Building Loans starting on 1/1/83 through the date of request;
Certificates of Abandonment starting on 1/1/83 through the date of request;
Filed Maps starting on 1/1/83 through the date of request;
Map Abstract starting on 1/1/83 through the date of request;
Torrens Certificates starting on 1/1/83 through the date of request;
Torrens Deeds and Mortgages starting on 1/1/83 through the date of request;
Torrens Tax Sale Certificates starting on 1/1/83 through the date of request;
Judgments starting on 1/1/93 through the date of request;
Judgment Satisfaction starting on 1/1/93 through the date of request.

The respondent constructively denied the request, i.e., he failed to respond within the five day time period as required by Pub. Off. Law 89(3). Thereafter, on February 5, 2004 petitioner appealed to the Suffolk County Attorney, (the designated recipient of such appeals), and on April 14, 2004, in an eight page letter, the County Attorney's Office denied petitioner's appeal. It enumerated several reasons for the denial. It is that denial which petitioner seeks to annul.

First, the County maintains that the vast majority of the records *are public ones*, and are available for public inspection and copying as paper files or at computer terminals in the Clerk's Office (see, Public Off. Law §87[2]). Additionally, some of the records are available via the internet.

Second, the County asserts that petitioner's request that the documents be produced in a computerized form known as Tagged Image File Format (TIFF) or images in the electronic format regularly maintained by the County ("electronic images") on CD-ROM or other electronic storage medium regularly used by the County, would require the County to create a new record, in a format and with programming that is not pre-existing, and that it is not required to re-write and reformat the data maintained by the Clerk's Office to satisfy a FOIL request. It should be noted that petitioner requested, in the alternative, that the documents be produced on microfilm, however, the County has phased out the microfilming service previously available.

Third, the County claims that Pub. Off. Law 87 (2)(b) exempts from disclosure records that "...if disclosed would constitute an unwarranted invasion of personal privacy..." An unwarranted invasion of personal privacy includes "... sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" (Pub. Off. Law §89[2][b][iii]). Given the nature of the requesting entity's business, and the nature and volume of the information sought, it is reasonable to infer that Data Tree is seeking the records for a commercial purpose.

The County also notes that the requests for lis pendens records and judgments are outside the coverage of FOIL, as they are court records.

Finally, respondent notes that the documents relating to UCC chattels are no longer maintained by the Clerk's Office, and points out that the Clerk's official website has available for viewing and downloading mortgages, deeds, judgments, judgment satisfactions, mechanic's liens and mechanic's lien satisfactions, dating from December 1, 2000 to present.

Article 6 of Public Officer's Law makes it clear that the public, (with certain exceptions) has access to and the right to review government documents. In general, governmental agency records are presumptively open to inspection and the exemptions from disclosure are to be narrowly interpreted (see, *Matter of Buffalo News, Inc. v Buffalo Enterprise Developmental Corp.*, 84 NY2d 488 492). The burden of showing whether a record is exempt from disclosure falls on the agency asserting the exemption, and in order for a record to be exempt it must fall squarely within one of the enumerated exemptions (see, *Matter of M. Farbman & Sons, Inc. v New York City Health and Hospital Corp. et al.*, 62 NY2d 75, 80).

The Clerk's Office has rightly denied petitioner's request. As indicated, the Clerk's Office maintains, and has available for public inspection, many of the requested documents, on computers and in paper form, and also has many documents available on its website.

Additionally, the Director of Optical Imaging for the County Clerk's Office has affirmed that the bulk of the *other* documents, although maintained by the County Clerk, cannot be transferred to the requested form, *viz.*, TIFF or "electronic images," on CD-ROM or other electronic storage medium without requiring the creation of a new record, in a format and with programming which is not presently available.

FOIL does not require that an agency create a record "not possessed or maintained" (see, Pub. Off. Law 89[3]; see also, *O'Shaughnessy v New York State Div. of State Police*, 202 AD2d 508, 510).

Specifically, the Director Of Technology and Optical Imaging states:

- (1) that the request is for millions of documents maintained by the Clerk's Office;
- (2) there is no way to redact all of the private information, (i.e., names, dates of birth, addresses, or social security numbers) prior to reproduction;
- (3) in order to comply with Data Tree's FOIL request, the Suffolk County Clerk would need to extract all of the requested data from the respective computer systems, which would require that a separate computer program be written, a "relational program" which would permit the information to be readable on a computer disc or other electronic means; and
- (4) the Clerk's Office would have to write another separate program called a "front end user program" so that the data could be accessed from the computer disc or other electronic means.

Finally, in a case similar to this one which was decided by Justice Paul Baisley, Jr., (February 14, 2005) *Matter of Coalition of Landlords, Homeowners and Merchants v County of Suffolk*, a hearing was held to determine whether respondent had the capacity to retrieve information sought by petitioner from the Suffolk County Clerk's Office and the Suffolk County RPTSA without the necessity of creating a new record. The Court found that the testimony (from the Director of Technology and Optical Imaging in the Suffolk County Clerk's Office) was credible, and established by a preponderance of the evidence that to produce the information requested would require approximately 171 days of technical "man hours," and would be to the exclusion of other work normally performed by the technical staff. The petition seeking disclosure was denied.

As indicated, the Clerk's Office is required by statute to make available all documents which do not come under an exception to FOIL. It is not mandated to create a record where none exists, particularly when that would be at considerable expense to the taxpayers.

Petitioner's application for access is granted to the extent the documents are maintained and available in the Clerk's Office, or on the internet.

Submit judgment on notice.

DATED: April 18, 2005

Michael F. Mullen
HON. MICHAEL F. MULLEN, J.S.C.