

**Matter of Chatham Towers, Inc. v New York City  
Dept. of Transp.**

2007 NY Slip Op 32513(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0106236/2007

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

*Justice*

In the matter of CHATHAM TOWERS, INC.,  
CHATHAM GREEN, INC., CONCERNED  
CHATHAM GREEN SHAREHOLDERS,  
JEANIE CHIN AND DANNY CHEN,

INDEX NO. 106236/2007

Petitioners

- v -

MOTION DATE 08/03/2007

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,  
PENNY JACKSON in her official capacity,  
FRANCO ESPOSITO, in his official capacity,  
NEW YORK CITY DEPARTMENT OF CITY PLANNING,  
WENDY NILES, in her official capacity,  
DAVID KARNOVSKY, in his official capacity,  
OFFICE OF THE MAYOR OF THE CITY OF NEW YORK,  
ANTHONY W. CROWELL, in his official capacity, and  
CAROL ROBLES-ROMÁN, Deputy Mayor of the  
City of New York, in her official capacity,

MOTION SEQ. NO. 001

Respondents.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, this application is decided in accordance with the accompanying memorandum decision.

**FILED**

AUG 15 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/15/07

WALTER B. TOLUB, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
In the Matter of the Application of  
CHATHAM TOWERS, INC., CHATHAM GREEN INC.,  
CONCERNED CHATHAM GREEN SHAREHOLDERS,  
JEANIE CHIN and DANNY CHEN,

Petitioners,

Index No. 106236/07  
Mtn Seq. 001

-against-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,  
PENNY JACKSON in her official capacity,  
FRANCO ESPOSITO in his official capacity,  
NEW YORK CITY DEPARTMENT OF CITY PLANNING,  
WENDY NILES in her official capacity,  
DAVID KARNOVSKY in his official capacity,  
OFFICE OF THE MAYOR OF THE CITY OF NEW YORK,  
ANTHONY W. CROWELL in his official capacity,  
and CAROL ROBLES-ROMÁN, Deputy Mayor of the  
City of New York, in her official capacity.

Respondents.

-----x

**WALTER B. TOLUB, J.:**

Nearly seven years ago, the City of New York, in the aftermath of the September 11, 2001 terrorist attack, implemented what has become known as the Security Plan for One Police Plaza (the "Security Plan"), the headquarters of the New York City Police Department ("NYPD").<sup>1</sup> The Security Plan, created by the NYPD, established seven checkpoints and barriers restricting vehicular access around One Police Plaza, thereby creating a "secure zone".<sup>2</sup>

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<sup>1</sup>As noted previously, One Police Plaza is surrounded by densely populated residential, commercial, State and Federal buildings and facilities.

<sup>2</sup> Security checkpoints continue to be located at Park Row, west of Worth Street; Park Row, near the Brooklyn Bridge; Pearl Street at Foley Square; Pearl Street at either side of Park Row;

Of significance to this application, and indeed, to its predecessors,<sup>3</sup> was the closure of Park Row, a major north-south thoroughfare, to all unauthorized traffic. Pedestrian access, with the exception of the immediate perimeter of One Police Plaza, has remained unaffected, and City bus routes which had been previously diverted from the area have since been restored.<sup>4</sup>

By this application, petitioners<sup>5</sup> move pursuant to Article 78 for an order directing the production of all documents responsive to petitioners' Freedom of Information Law ("FOIL") requests

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Pearl Street and St. James Place; Madison Street at St. James Place; Rose Street at Pearl Street; Rose Street at Avenue of the Finest; and Avenue of the Finest at Pearl Street.

<sup>3</sup>To date, three actions have been commenced challenging the implementation of the Security Plan.

<sup>4</sup> When the Security Plan was initially implemented in 2001, all City busses with routes stopping at or near the restricted vehicle zone were diverted to alternate stops. Service was restored prior to the issuance of this court's 2006 decision in the matter of Chatham Towers, Inc. v. Bloomberg, (Index No. 107761/2004, Decision dated 9/11/2006, *affirmed*, 39 AD3d 308 [1<sup>st</sup> Dept. 2007]).

<sup>5</sup> Petitioners Chatham Towers, Inc. ("Chatham Towers") and Chatham Green, Inc. ("Chatham Green") are cooperative apartment complexes located on Park Row. Chatham Towers shares its boundaries with the southwest corner of Worth Street, and Chatham Green shares its boundaries with St. James Place and Pearl Street, directly opposite One Police Plaza. Petitioner Concerned Chatham Green Shareholders ("Chatham Green Shareholders") is an unincorporated association of the shareholders of Chatham Green. Petitioner Jeanie Chin is a resident of Chatham Towers. Petitioner Danny Chen is a resident of Chatham Green and an officer of the Chatham Green Shareholders. Each of these organizations and individuals claim to have been impacted by the implementation of the One Police Plaza Security Plan.

(Public Officers Law §84 et seq.) submitted to the New York City Department of Transportation ("DOT"), the New York City Department of City Planning ("DCP"), and the Office of the Mayor of the City of New York (the Mayor's Office") in August, 2006. These requests seek documents and records prepared in connection with, concerning, relied upon or otherwise related to the environmental review of the One Police Plaza Security Plan, CEQR Number 04 NYPD002M.<sup>6</sup> Respondents<sup>7</sup> DOT, DCP, and the Mayor's Office, have produced some of the requested information, but maintain that other requested documents are exempt from disclosure pursuant to Public Officers Law §§ 87(2)(a) and (g). The balance of petitioners' application seeks an order directing respondents to pay reasonable attorneys fees and costs incurred by petitioners in connection with this proceeding.

#### *Litigation History*

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<sup>6</sup> The term CEQR refers to the City Environmental Quality Review act (62 RCNY §§ 5,6). The requirements of CEQR are similar, if not identical, to those set forth under Article 8 of SEQRA (ECL §8. See also, 6 NYCRR § 617).

<sup>7</sup> Respondents, DOT, DCP, and the Mayor's Office are the City departments and/or agencies involved with the creation and/or implementation of the One Police Plaza Security Plan. Respondent Penny Jackson is the Records Access Officer for the DOT. Respondent Franco Esposito, Esq. is the Records Access Appeals Officer for the DOT. Respondent Wendy Niles is the Records Access Officer for the DCP. Respondent David Karnovsky, Esq. is the Records Access Appeals officer for the DCP. Respondent Anthony W. Crowell is the Records Access Officer for the Mayor's Office. Respondent Carol Robles-Román is the Records Access Appeals Officer for the Mayor's Office.

To understand the nature of this application and the request for the information sought by petitioners requires this court to briefly revisit the lengthy history of the legal challenges made in connection with the implementation of the Security Plan and the evolution of the resulting Environmental Assessment Statement ("EAS") and Environmental Impact Statement ("EIS") of the Security Plan which followed.

The initial challenge to the Security Plan, and subsequent direction by this court to the NYPD, as lead agency, to complete an EAS in accordance with the New York State Environmental Quality Review Act ("SEQRA"), was the subject of the Article 78 application captioned, Chatham Green, Inc. v. Bloomberg, 1 Misc 3d 434 [NY Sup. Ct. NY County, 2003]] (the "Chatham Green" application). The EAS was completed in November, 2003, and supplemented in January 2004.

After the issuance of a Negative Declaration on the EAS by the NYPD in early 2004, a second challenge to the Security Plan was brought in the form of an Article 78 application seeking to nullify the Negative Declaration (see, Chatham Towers, Inc. v. Bloomberg, 6 Misc.3d 814 [NY Sup. Ct. 2004], *aff'd as modified*, 18 AD3d 395 [1<sup>st</sup> Dept 2005], *leave to appeal denied*, 6 NY3d 704 [2006]). As a result of this application, the NYPD was directed to complete a full EIS on the Security Plan (Id.).<sup>8</sup> Petitioners in Chatham

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<sup>8</sup> In addition to directing the completion of the EIS, the October 2004 decision allowed Concerned Chatham Green Shareholders to intervene in the petition and permitted the

Towers brought a fourth challenge to the Security Plan in 2006, which was ultimately denied and affirmed on appeal (In re Chatham Towers v. Bloomberg, 39 AD3d 308 [1<sup>st</sup> Dept 2007]).

As a final note to the present litigation history in this matter,<sup>9</sup> the court acknowledges that this application is accompanied by a copy of the final EIS ("FEIS") for the One Police Plaza Security Plan (CEQR # 04NYPD002M). The FEIS was issued by the NYPD on August 1, 2007.<sup>10</sup>

*The Instant Application*

In early August of 2006, petitioners, through their counsel, submitted FOIL requests to the DOT, DCP and Mayor's Office. The FOIL requests sought, in pertinent part:

any and all documents and other records prepared in connection with, concerning, relied upon in, or otherwise related to the environmental review for CEQR Number 04NYPD002M, including but not limited to such documents in connection with the Draft Scope of Work, Final Scope of Work, Draft Environmental Impact Statement ("DEIS"), and the final Environmental Impact Statement ("FEIS") to be prepared or to be prepared by the New York Police Department and/or its consultant(s). This request includes, but is not limited to, copies of any and all drafts

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maintenance of the existing delta barriers located on Park Row during the pendency of the completion of the EIS (Chatham Towers Inc., 6 Misc.3d 814)

<sup>9</sup> The court is well aware of the likelihood of additional litigation on this issue.

<sup>10</sup> A copy of the FEIS is available online through a link from the homepage of the New York City Police Department under the "Recent Press releases/News section" of the website (<http://www.nyc.gov/html/nypd>).

[\* 7]

of the Draft Scope of Work, Final Scope of Work, DEIS and FEIS; markups; interagency comments; internal review comments; involved agency sign-offs; studies; research; notes and memoranda. This request is to be construed as continuing in nature throughout the duration of environmental review CEQR Number 04NYPD002M [...]

(Notice of Petition, Exhibits E, F, and G).

*Responses of the DOT, DCP and Mayor's Office*

By letter dated August 14, 2006, the DOT responded to petitioners' counsel in a request for more specific information (Notice of Petition, Exhibit H). In response, counsel for petitioners sent supplemental FOIL requests to the DOT on August 11, and August 18 2006. In responses from the DOT dated November 2, 2006 and January 12, 2007, the DOT produced a portion of the requested materials, but denied the production of others, asserting that the information sought were either inter- or intra-agency materials, and therefore exempt from production under Public Officers Law § 87(2)(g) (Notice of Petition, Exhibits K, N). Specifically, the DOT withheld:

inter- and intra-agency electronic communications concerning the draft EIS; preliminary drawings; a preliminary outline concerning the CEQR submission; meeting notes; draft EIS chapters; and various intra- and inter-agency comments to the EIS [...]

(Notice of Petition, Exhibit N).

By letter dated August 18, 2006, the DCP responded to petitioners' counsel indicating that it was conducting a review of the materials sought in order to determine whether those documents

fell within the exceptions of the FOIL laws (Notice of Petition Exhibit O). On December 12, 2006 and January 8, 2007, the DCP produced a portion of the requested documents, but denied others invoking the exemption under Public Officers Law § 87(2)(g) (Notice of Petition Exhibits Q, T). The documents withheld by the DCP included:

intra- and inter-agency materials of the following nature: staff memos and draft comment letters reflecting opinions or deliberations; and inter-agency communications of a similar nature which are not final agency determinations.

(Notice of Petition, Exhibit Q). Counsel for the DCP reiterated their denial of the requested information by letter on January 8, 2007, emphasizing that the materials sought consisted of "draft DEIS chapters and related materials which reflect interagency comments and deliberations with regard to the DEIS; (2) interagency memoranda regarding opinions and other deliberative issues; and (3) interagency notes regarding meetings or discussions regarding options and other deliberative issues", and therefore were exempt from disclosure. (Notice of Petition Exhibit T).

The response of the Mayor's office was similar, resulting in the production of certain records and withholding others as being exempt from disclosure (Notice of Petition, Exhibits U, W). The withheld documents were identified, in relevant part as follows:

- (1) One (1) fax which constitutes a privileged attorney-client communication [...]
- (3) One (1) memorandum that constitutes inter or intra-agency

communication [...];

(4) Thirteen (13) records that are meeting notes and agendas constituting inter or intra-agency communication [...];

(5) Fifteen (15) records that are draft documents constituting inter or intra-agency communication [...]; and

(6) Thirty-Eight (38) emails that constitute inter or intra-agency communication [...]

(Notice of Petition, Exhibit W).

Maintaining that the aforementioned documents were wrongfully withheld by the respective agencies, petitioners commenced this Article 78.

*Freedom of Information Laws*

"The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (Matter of Alderson v. New York State College of Agriculture and Live Sciences at Cornell University, 4 NY3d 225, 230 [2005], quoting, Matter of Newsday v. Sise, 71 NY2d 146, 150 [1987], cert denied 486 US 1056 [1988]). Regardless of the needs of the applicant, all governmental records are therefore available for public inspection unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2) (Matter of Gould v. New York City Police Department, 89 NY2d 267, 274 [1996]; Matter of Beechwood Restorative Care Center v. Signor, 5 NY3d 435, 440 [2005]). Public Officers Law § 87(2), in pertinent part, reads as follows:

2. Each agency shall, in accordance with its published rules,

make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article; [...]

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations of 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; [...]

The exemptions, while available, are construed narrowly (Matter of Hanig v. State of New York Department of Motor Vehicles, 79 NY2d 106, 190 [1992]; Kheel v. Ravitch, 93 AD2d 422 [1<sup>st</sup> Dept. 1983] *aff'd*, 62 NY2d 464 [1984]). Therefore, the agency restricting disclosure must not only establish that an exemption applies, but must present a particularized and specific justification for not disclosing the requested documents (Matter of Gould, 89 NY2d 267, 275).

Virtually all of the documents involved in the instant application are claimed exempt by the respective City offices involved because they are inter or intra-agency in nature. While it is well established that these kinds of documents are exempt from disclosure under FOIL so as to protect the deliberative

process of the government and ensure that persons serving in an advisory role are able to freely express their opinions to agency decision makers, (see, Matter of Rome Sentinel Company v. City of Rome, 174 AD2d 1005 [4<sup>th</sup> Dept. 1991]; Matter of Sea Crest Construction Company v. Stubing, 82 AD2d 546, 549 [2<sup>nd</sup> Dept. 1981]; Matter of Xerox Corporation v. Town of Webster, 65 NY2d 131, 132 [1985]; Public Officers Law §87(2)(g)), it does not obviate the requirement that the objecting agency present a specific reason supporting the decision to not disclose the requested documents.

With the exception of the actual drafts of the EIS, which, as non-final agency determinations fall squarely within the ambit of Public Officers Law §87(2) (Mitzner v. Sobol, 173 Ad2d 1064 [3<sup>rd</sup> Dept. 1991]; Rome Sentinel Company, 174 AD2d 1005 [4<sup>th</sup> Dept. 1991]), this court cannot determine, in the absence of an *in camera* inspection, whether the refusal to disclose the other documents requested was appropriate. As such, this court is required to conduct an *in camera* inspection of those remaining documents responsive to petitioners' FOIL request which have been withheld from disclosure (see, Matter of Gould, 89 NY2d 267, 275). The balance of petitioners' application which seeks attorneys' fees is therefore held in abeyance pending the completion of the *in camera* review. Accordingly, it is

ORDERED that counsel for respondents produce copies of the documents responsive to petitioners' August 2006 FOIL request, but

withheld from disclosure by the Department of Transportation, the Department of City Planning, and the Office of the Mayor of the City of New York within 10 days of service of a copy of this order with notice of entry; and it is further

ORDERED that upon receipt of the documents, this court will conduct an expedited *in camera* review so as to ascertain whether the documents fall within the claimed exemptions.

Counsel for respondents are directed to deliver the aforementioned documents to 60 Centre Street, Room 660, New York, New York.

Counsel for the parties are further reminded that this *in camera* review, expedited as it may be, does not act as a stay upon any other statutory time limitations faced by the parties with respect to other actions which may be necessary.

This memorandum opinion constitutes the decision and order of the court.

Dated: 8/15/07

*WBT*

HON. WALTER B. TOLUB, J.S.C.

**FILED**  
AUG 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK