

**Matter of Tuck-It-Away Assoc., L.P. v Empire  
State Dev. Corp.**

2008 NY Slip Op 32946(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 07/114035

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER Justice PART 5

Index Number : 114035/2007  
**TUCK-IT-AWAY ASSOCIATES**  
VS.  
**EMPIRE STATE DEVELOPMENT CORP.**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3  
4, 5, 6, 7  
8, 9  
10, 11

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion


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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**  
OCT 28 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/23/08

  
**EILEEN A. RAKOWER** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of  
TUCK-IT-AWAY ASSOCIATES, L.P.,

Plaintiff,

Index No.  
07/114035

- against -

DECISION/ORDER

EMPIRE STATE DEVELOPMENT CORPORATION

**FILED**  
OCT 28 2008

NOT. SEQ. 001

COUNTY CLERK'S OFFICE  
NEW YORK

Defendant.  
-----X

HON. EILEEN A. RAKOWER, J.

On October 17, 2007, Petitioner Tuck-It-Away Associates, L.P. ("Tuck-It-Away") submitted a verified petition, bringing a special proceeding against the Respondent, the Empire State Development Corporation ("ESDC"), pursuant to Article 78 of the CPLR, Public Officers Law § 84, et seq. ("The Freedom of Information Law" or "FOIL"), and CPLR § 3001.

This petition is the fourth in four related cases involving FOIL requests made to ESDC and other agencies by associated West Harlem/Manhattanville businesses seeking records relating to Columbia University's expansion plan (the "Columbia Project"), and ESDC asserts that the petition at issue concerns the same files, documents, and search methods at issue in two previous litigations decided by Justice Kornreich. (*West Harlem Business Group v. Empire State Dev. Corp.*, Sup. Ct. N.Y. Cty., May 4, 2007, Kornreich, S., No. 06/116839 and *Tuck-It-Away Associates, L.P. v. Empire State Development Corporation*, Sup. Ct. N.Y. Cty., Index No. 07/107368.)

The second FOIL request is dated June 15, 2006 and the subject of the *West Harlem* case on which Justice Kornreich issued the May 4<sup>th</sup> decision referenced above and a June 27, 2007 decision discussed below. It sought documents from the time period of November, 1, 2005 through June 15, 2006. The third FOIL request

[\* 3 ]  
(dated October 13, 2006 and decided by Justice Kornreich in the *Tuck-It-Away* case) broadened the time period and encompassed documents from July 30, 2004 through October 15, 2006.

In the present case, Petitioner moves for a declaration stating that Respondent's denial of Petitioner's request for documents and written communications related to the Columbia Project violates FOIL and ordering any other relief the Court deems appropriate. ESDC cross-moves to dismiss the petition. The FOIL request at issue in this case seeks documents from two new time periods - January 1, 2002 through July 29, 2004 and October 10, 2006 through March 15, 2007, as distinct from the previous requests which were the subject of prior motions.

In its motion papers ESDC asserts that the FOIL request at issue in this case is essentially identical to the prior FOIL requests, with the exception of the period of documents sought. (Respondent's Memorandum of Law, p. 16). In the previous decisions, ESDC provided detailed document logs of those documents for which it claimed exemptions, and Justice Kornreich ultimately reviewed *in camera* the material ESDC claimed was exempted from production under FOIL.

Petitioner has argued that this Court should require ESDC to produce additional document logs, such as those prepared in the prior litigations, asserting that ESDC must report specifically on whether the files of each of 40 current and former officers and employees named in the new request did or did not contain responsive records. In support of this position, Petitioner has relied on FOIL case law generally favoring disclosure, rejecting "blanket exemptions" and requiring *in camera* inspections of contested documents. (Petitioner's Memorandum of Law p.7). Petitioner also raises the concern that, because ESDC at one point in the previous litigation needed to supplement its logs to include documents not originally discovered and because Justice Kornreich's *in camera* review found some documents deemed exempt by ESDC to be subject to production, that logs of documents deemed exempt from ESDC's new production must also be created and reviewed.

In the Court's May 4, 2007 *West Harlem* decision, at which point EDSC had provided the court document logs of the disputed documents, Justice Kornreich stated that it could not be determined as a matter of law whether respondent properly applied the agency or the privilege exemptions. (*Id.* citing *M. Farbman & Sons (M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75 [1984].)

[\* 4]

“Where the agency exemption is claimed, unless the agency proves that the material falls squarely in the ambit of the exemption as a matter of law and that it does not contain information falling under one of the four exceptions, the proper procedure is for the court to conduct an *in camera* examination.” (*Id.* at 83.)

Justice Kornreich noted that the respondent’s having identified authors and recipients of documents as agency personnel did not allow the agency exemption to apply automatically because there were exceptions that could be applicable and ordered that respondent produce for an *in camera* review documents withheld in response to the Petitioner’s request. (*West Harlem*, 06/ 116839, May 4, 2007). Similarly, she stated that, with regards to the attorney-client privilege exemption “the record does not permit a determination as a matter of law that the withheld material consists of confidential communications between an attorney and a client in the course of professional employment, C.P.L.R. §4503, which also can be determined after an *in camera* review. (*West Harlem*, 06/116839, May 4, 2007).

Pursuant to the May 4, 2007 order, ESDC produced the documents for an *in camera* examination, and, in a June 27, 2007 decision Justice Kornreich made determinations as to which categories of documents were exempted from Petitioner’s FOIL request. This decision divided the disputed documents into five categories and made determinations on those categories as follows:

I. Documents which were not themselves covered by agency or privilege exemptions:

Justice Kornreich ordered ESDC to produce these documents with protected portions redacted.

II. Documents the Court deemed not to constitute intra or inter agency documents and/or that were disclosed to non-agency persons:

The Court ordered these documents to be produced.

III. Documents the Court found to constitute “instructions to the staff that affect the public:

Justice Kornreich held that these documents were encompassed under an exception to the agency exemption; accordingly, ESDC was ordered to produce

these documents.

IV. An attachment that was not provided to the court for the *in camera* review:

Here, Justice Kornreich found that, because ESDC had failed to meet its burden in demonstrating that this attachment was subject to the exemption, ESDC was required to produce the document.

V. Documents that the Court determined to be inter or intra agency documents but that it held were not “deliberative”:

Justice Kornreich ordered these documents to be produced.

In the Court’s decision on the related *Tuck-It-Away* case concerning Petitioner’s third FOIL request, Justice Kornreich ordered ESDC to use the criteria set forth in the *West Harlem* decision in responding to the request and further ordered that ESDC provide privilege logs if necessary (*Tuck-It-Away*, Index No. 07/107368).

In a recent decision, the Appellate Division, reviewed the *West Harlem* and *Tuck-It-Away* cases upholding in part and modifying in part Justice Kornreich’s decisions as to the five categories of documents described above. (*Tuck-It-Away Associates v. Empire State Development Corporation*, 861 N.Y.S.2d 51 [July 15, 2008]).

On October 17, 2008, EDSC informed this Court by letter that it had voluntarily released to the petitioner’s counsel on October 10, 2008, all documents at issue on except for documents that “are all purely attorney-client privileged documents and inter- and intra-agency documents which are clearly exempt under FOIL §87 (2) (g).” EDSC concluded that this court need only reach a determination as to those documents remaining in dispute. On October 22, *Tuck-It-Away* responded, by letter sent to this Court, disputing ESDC’s assertion that it sent Petitioner the principal documents at issue.

In order that a proper record be preserved, ESDC can not categorically claim privilege under exemptions to FOIL and must instead submit the disputed documents for *in camera* examination. (*West Harlem*, 06/116839, May 4, 2007, citing *M. Farbman* at 75). It is this Court’s intention to examine the expanded document

submission along with accompanying privilege logs submitted for *in camera* inspection in a manner consistent with the approach articulated by Justice Kornreich in the *West Harlem* and *Tuck-It-Away* decisions, as modified by the Appellate Division.

Wherefore it is hereby

ORDERED that ESDC shall produce all documents from the new time periods (January 1, 2002 through July 29, 2004 and October 16, 2006 and March 15, 2007) as to which it claims FOIL exemptions for *in camera* inspection along with accompanying privilege logs within 45 days of receipt of this Order with notice of entry.

DATED: October 23, 2008

  
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EILEEN A. RAKOWER, J.S.C.

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OCT 28 2008  
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