

**Matter of Fairfield Presidential Assoc., LLC v
City of New York**

2008 NY Slip Op 33416(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 108283/08

Judge: Joan B. Lobis

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: COBIS
Justice

PART 20

FARFOLD PRESIDENTIAL
ASSOCIATES
- v -
CITY OF NY

INDEX NO. 108283/08
MOTION DATE 10/31/08
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 16 were read on this motion to/for Art. 78 petition

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits x met 7
Replying Affidavits _____

PAPERS NUMBERED
<u>1-6</u>
<u>8-12</u>
<u>13; 14; 15; 16</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

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

Dated: 12/19/08

JBH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of

FAIRFIELD PRESIDENTIAL ASSOCIATES, LLC,
PRESIDENTIAL MANAGEMENT CORP., and
FAIRFIELD TOWERS CONDOMINIUM OWNERS, INC.,

Petitioners,

Index No. 108283/08

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

**Decision, Order,
and Judgment**

- against -

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, and JONATHAN DAVID
NEW YORK CITY POLICE DEPARTMENT
ACCESS APPEALS OFFICER,

Respondents.

-----X

JOAN B. LOBIS, J.S.C.:

Petitioners move, by order to show cause, for an order compelling respondents to comply with petitioners' request for documents pursuant to Public Officers Law § 84, et seq., known as the Freedom of Information Law ("FOIL"). Petitioners requested records, photos, and reports made by the Police Department relative to a homicide that occurred on August 28, 2005, at 400 Corzine Avenue, Brooklyn, New York. The victim was Davon Walton.

Petitioners' initial request was made on December 27, 2007. A denial letter from the Records Access Appeals Officer was issued on January 11, 2008. The basis for the denial was an assertion that production was exempt under Section 87(2)(c)(i), which exempts production of records that are compiled for law enforcement purposes which, if disclosed, would "interfere with law enforcement investigations or judicial proceedings."

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Petitioners appealed from the denial by letter dated February 5, 2008. The appeal was denied by letter dated February 15, 2008. The Appeals Officer adhered to the earlier denial on the same grounds. The letter went on to recite that petitioners might have recourse by way of a motion under the C.P.L.R.

Petitioners bring this Article 78 proceeding to challenge the denial of their FOIL request. They assert that the records are necessary for their defense to the civil action that was brought in Supreme Court, Kings County by Sherry Williams, as Administratrix of the Estate of Davon Walton. The civil action alleges that petitioners failed to provide adequate security at the location of the homicide. The papers do not indicate whether any requests for the same materials were made in the Kings County action. The possibility that there exists an alternative means of obtaining the records that petitioners seek does not negate their right to proceed with their FOIL application.

Petitioners do not allege an intent to frustrate the police investigation or prosecution. They assert that the disclosure would not in any way interfere with open law enforcement investigations or judicial proceedings. While the homicide remains open, it occurred over three years ago, and petitioners believe there are no leads. They offer to be bound by a confidentiality agreement and do not oppose redactions to prevent disclosure of an informant or a confidential source. Finally, petitioners argue that the agency claiming the exemption has the burden of articulating a specific and particularized basis in order to establish the exemption.

Respondents cross-move to dismiss the petition, alleging that production is exempt under Section 87(2)(c)(i) and Section 87(2)(e)(ii), which exempts production of records “compiled for

law enforcement purposes and which, if disclosed, would . . . deprive a person of a right to a fair trial or impartial adjudication.” Respondents assert that the Section 87(2)(e)(i) exemption is satisfied because there is an ongoing investigation. They provide no specificity beyond the fact that the perpetrator has yet to be apprehended, and that the case, therefore, is considered an open investigation. As to the Section 87(2)(e)(ii) exemption, respondents posit that disclosure would deprive someone in the tort action of a right to a fair trial or impartial adjudication, without explaining how that would occur. Respondents also assert that petitioners must first comply with the disclosure rules of the C.P.L.R. and assert that C.P.L.R. § 3120(4) is the exclusive vehicle through which the requested material may be obtained, citing Hawkins v. Kurlander, 98 A.D.2d 14 (4th Dep’t 1983).

While the claim for an exemption under Section 87(2)(e)(i) has some merit, respondents’ argument under the Section 87(2)(e)(ii) exemption is rejected. Not only does the application to this tort action make no sense, but the exclusivity of the C.P.L.R. remedy has been rejected by the Court of Appeals. See M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp., 62 N.Y.2d 75 (1984). As stated by Judge Kaye, “[i]n the absence of indication from the Legislature, we refuse to read into FOIL the restriction that, once litigation commences, a party forfeits the rights available to all other members of the public and is confined to discovery in accordance with article 31.” Id. at 81. Petitioners are not precluded from recourse under FOIL simply because they may have another avenue of discovery under the C.P.L.R.


“[G]overnment records are ‘presumptively open,’ statutory exemptions are ‘narrowly construed,’ and the City must articulate a ‘particularized and specific justification’ for nondisclosure.

N.Y. Civ. Liberties Union v. City of Schenectady, 2 N.Y.3d 657, 661 (2004), citing Gould v. N.Y. City Police Dept., 89 N.Y.2d 267, 274, 275 (1996). At oral argument of this motion on September 23, 2008, this court permitted respondents to submit a supplemental affidavit setting forth the status of the homicide investigation. The purpose was to allow respondents to meet the requirement of "particularized and specific justification," which the agency must establish if it seeks to rely on an exemption. See N.Y. Civ. Liberties Union, supra. The affidavit by Detective John Mullins merely states that "based on personal knowledge as well as, upon information and belief, based on a review of the files and records of the NYPD and upon my knowledge of the procedures . . . the investigation into the homicide of Davon Walton . . . is open and ongoing." This falls well short of providing sufficient detail to justify reliance on Section 87(e)(2)(i). As noted by the Court of Appeals, if "the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material. Gould, supra, 89 N.Y.2d at 275 (citations omitted).

Accordingly, respondents are directed to submit a response to the FOIL request by January 15, 2009, to my chambers, room 690 at 60 Centre Street, New York, New York, or, in the alternative, by January 30, 2009, to supply petitioners with properly redacted records responsive to their request and subject to a confidentiality agreement. Respondents' cross motion is denied.

This constitutes the decision, order and judgment of the court.

Dated: December 19, 2008



 JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
 This judgment has not been entered and notice of entry cannot be obtained until the County Clerk appears in person. To appear in person at the County Clerk's Desk (Room 1415).