

**Matter of GRASSO v Megna**

2009 NY Slip Op 30004(U)

January 2, 2009

Supreme Court, Albany County

Docket Number: 5356-08

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

In The Matter of the Application of  
RICHARD A. GRASSO,  
Petitioner,

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

-against-

ROBERT L. MEGNA, COMMISSIONER OF THE  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE; and DEBORAH R. LIEBMAN,  
RECORDS APPEAL OFFICER,  
Respondents.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-08-ST9087 Index No. 5356-08

Appearances:            Morrison & Foerster, LLP  
                                 Attorney For Petitioner  
                                 1290 Avenue of the Americas  
                                 New York, NY 10104  
                                 (Irwin M. Slomka, Esq.,  
                                 of Counsel)

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**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The Petitioner and his wife were the subject of an audit by the New York State Department of Taxation and Finance concerning their New York City income tax for the years of 2002 and 2003. As a result of this audit the petitioner and his wife were assessed additional tax, interest and penalties. On September 21, 2007, through a letter from his attorney, the petitioner requested documents relating to this audit under the Freedom of Information Law or "FOIL" (see Public Officers Law Article 6) from the Records Access Office of the Department of Taxation and Finance. In a response dated January 28, 2008, the Records Access Officer, Tax Compliance Agent Michael J. Hall of the Department of Taxation and Finance, provided approximately 3,000 pages of documents. Agent Hall redacted information from a portion of these documents and denied access to other portions of the file. He indicated that some of these documents were withheld or redacted because they were specifically exempted from disclosure by State or Federal Statute under Public Officers Law ("POL") § 87 (2) (a). For the remainder of the documents Agent Hall stated that the documents were intra-agency or inter-agency material which was not final agency policy or determination and protected under POL § 87 (2) (g).

Petitioner appealed Agent Hall's FOIL response in a letter dated February 7, 2008. In a determination dated February 27, 2008 Appeals Officer Liebman upheld the FOIL response, citing the same grounds as in the original response.

Petitioner commenced the above-captioned CPLR Article 78 Proceeding to compel the Department of Tax to disclose the 33 redactions in the Tax Field Audit Record, 105 pages that were described as exempted under state and federal statute, and 16 pages described as intra-agency or inter-agency material which was not final agency policy or determination.

Petitioner also requested attorney's fees and litigation costs incurred in the course of the appeal letter.

It is settled law that the Freedom of Information Law is based on the overriding policy consideration that "the public is vested with an inherent right to know, and that official secrecy is anathematic to our form of government" (Matter of Fink v. Lefkowitz, 47 NY2d 567, 571). The Court of Appeals has repeatedly held that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government (see Capital Newspapers v. Whalen, 69 NY2d 246, 252; Matter of Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564; Matter of Fink v. Lefkowitz, *supra*, p. 571; Matter of Citizens For Alternatives To Animal Labs, Inc. v Board of Trustees of the State University of New York, 92 NY2d 357 [1998]; Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 463 [2007]).

All agency records are presumptively available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in Public Officers Law § 87 (2) (see, Matter of Encore Coll v Auxiliary Serv, 87 NY2d 410, 417; Matter of Hanig v State of New York Dept. of Motor Vehicles, 79 NY2d 106, 109; Matter of Humane Society of the United States v Fanslau, 54 AD3d 537 [3<sup>rd</sup> Dept., 2008]; Matter of Data Tree, LLC v Romaine, *supra*). Blanket exemptions for particular types of documents are inimical to FOIL's policy of open government (see Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 569; Gould v NYC Police Dept. 89 NY2d 267 [1996]). The exemptions available are to be narrowly construed, and "the agency seeking to prevent disclosure bears the burden of demonstrating the applicability of

the particular exemption claimed" (Matter of Legal Aid Socy. of Northeastern N.Y. v New York State Dept. of Social Servs., 195 AD2d 150 [3d Dept., 1993], at 153; see, POL § 89 [4] [b]; see, Matter of Hanig v State of New York Dept. of Motor Vehicles, supra, at 109; see also, Daily Gazette v Schenectady, 93 NY2d 145, 158-159 [1999]). The agency at issue must "articulat[e] a particularized and specific justification for denying access" to the requested documents (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, supra, p. 566; Matter of Fink v Lefkowitz, supra, 571; Gould v NYC Police Dept. supra, p. 275).

### **Sixteen Page Tax Field Audit Record**

The respondent takes the position that the redactions in the Tax field Audit Record are exempt from disclosure under POL § 87 (2) (a) and (g). With respect to POL § 87 (2) (g), generally speaking, an agency may withhold inter-agency or intra-agency records unless they are (i) statistical or factual tabulations; (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 (see, "POL § 87 [2] [g] [iii]; Matter of Mingo v New York State Division of Parole, 244 AD2d 781, 782 [3d Dept., 1997]). "The term 'interagency materials' has been interpreted to mean deliberative materials or 'communications exchanged for discussion purposes not constituting final policy decisions' (Matter of Mingo v New York State Division of Parole, supra at 82 quoting Matter of Russo v Nassau County Community Coll., 81 NY2d 690, 699 [1993], and citing Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 132; see also Matter of Marino v Pataki, 55 AD3d 1171 [3<sup>rd</sup> Dept., 2008]). "Predecisional material consisting of opinions and recommendations

prepared by agency employees to assist agency decision makers in reaching a decision may also be exempt from disclosure under the Freedom of Information Act” (*id.*, citing Matter of Xerox Corp. v Town of Weber, *supra*, at 132). Notably however, “[t]o the extent the [documents] contain ‘statistical or factual tabulations or data’ (Public Officers Law § 87 [2] [g] [i]), or other material subject to production, they should be redacted and made available to the applicant” (Xerox Corp. v Town of Webster, *supra*, at p. 133).

A review of the redacted material contained in the Tax Field Audit record reveals that it is a record of communications made, or specific actions taken, with respect to the audit of petitioner and his wife. With regard to intra-agency and inter-agency material, the court is mindful that, as noted above, factual information is not exempt from disclosure (*see* POL 87 [2] [g] [i]). “Factual data [] simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (Gould v NYC Police Dept., 89 NY2d 267, 277 [1996]). With the foregoing in mind, the Court has reviewed the redacted intra-agency and inter-agency material to ascertain if it contains opinions, ideas or advice or recommendations. Where it did the Court has upheld the redaction. Where it did not, the Court has directed that the redacted material be disclosed. With respect to much of the material which the Court has directed to be disclosed, the Court also considered the context in which it is found, from the stand point that similar information was not redacted in other portions of the report. In a few instances, the redactions were upheld as communications with agency counsel, exempt from disclosure under POL § 87 (2) (a) (*see* Matter of Morgan v new York State Department of Environmental Conservation, 9 AD3d 586 [3d Dept., 2004]).

The Court makes the following finds with regard to the Field Audit Record.

<u>Date of Entry</u>	<u>Determination</u>
11/05/03 (Page 1):	The redacted material should be disclosed.
06/14/04 (Page 3):	The redaction was proper under POL § 87 (2) (g).
12/29/04 (Page 5):	The redaction was proper under POL § 87 (2) (g).
08/25/05 (Page 7):	The redaction was proper under POL § 87 (2) (g).
08/29/05 (Page 7):	The redaction was proper under POL § 87 (2) (g).
08/30/05 (Page 7):	The redacted material should be disclosed.
10/20/05 (Page 8):	The redacted material should be disclosed.
11/21/05 (Page 8):	The redacted material should be disclosed.
11/25/05 (Page 8):	The redaction was proper under POL § 87 (2) (g).
11/28/05 (Page 8):	The redaction was proper under POL § 87 (2) (g).
05/01/06 (Page 10):	The redacted material should be disclosed.
05/09/06 (Page 10):	The redaction was proper under POL § 87 (2) (g).
07/25/06 (Page 11):	The redaction was proper under POL § 87 (2) (g).
07/26/06 (Page 11):	The redaction was proper under POL § 87 (2) (g).
09/13/06 (Page 11):	The redacted material should be disclosed.
12/04/06 (Page 12):	The redaction was proper under POL § 87 (2) (g).
12/21/06 (Page 13):	The redaction was proper under POL § 87 (2) (g).
01/02/07 (Page 13):	The redaction was proper under POL § 87 (2) (g).
01/05/07 (Page 13):	The redacted material should be disclosed.
01/09/07 (Page 13):	The redaction was proper under POL § 87 (2) (a), (g).

01/10/07 (Page 13): The redaction was proper under POL § 87 (2) (a), (g).

01/11/07 (Page 13): The redacted material should be disclosed.

01/12/07 (Page 14): The redacted material should be disclosed.

01/12/07 (Page 14): The redacted material should be disclosed.

01/25/07 (Page 14): The redaction was proper under POL § 87 (2) (a), (g).

04/19/07 (Page 14): The redaction was proper under POL § 87 (2) (a), (g).

04/24/07 (Page 15): The redacted material should be disclosed.

05/21/07 (Page 15): The redacted material should be disclosed.

05/25/07 (Page 15): The redacted material should be disclosed.

05/29/07 (Page 15): The redacted material should be disclosed.

06/05/07 (Page 15): The redaction was proper under POL § 87 (2) (a), (g).

06/07/07 (Page 15): The redaction was proper under POL § 87 (2) (a), (g).

06/12/07 (Page 16): The redaction was proper under POL § 87 (2) (a), (g).

06/13/07 (Page 16): The redaction was proper under POL § 87 (2) (a), (g).

06/14/07 (Page 16): The redaction was proper under POL § 87 (2) (a), (g).

06/22/07 9Page 16): The redaction was proper under POL § 87 (2) (a), (g).

07/11/07 9Page 16): The redacted material should be disclosed.

### **105 Pages of Documents Withheld Pursuant to POL § 87 (2) (a)**

Pages 1-17. The respondent maintains that this material is protected by either the attorney-client privilege and/or as attorney work product. The Court finds that said pages fall within

the either the attorney-client privilege or constitute attorney work product (see Matter of Morgan v new York State Department of Environmental Conservation,<sup>9</sup> AD3d 586, supra), except for the following: pages 6, 7, the last 13 lines of page eight (which commences “To: <ISlomka@mof.com>”), pages 9, 10, and 13 through 16. The foregoing represent e-mails to or from Irwin M. Slomka, Esq., of Morrison & Foerster, LLP, attorneys for the petitioner, and a copy of a stipulation of settlement dated March 7, 2007 between Mr. Slomka, Esq. and Lewis A. Polishook, a New York State Assistant Attorney General. As such, the Court is of the view that neither of the foregoing protections would apply.

Pages 18-41. The respondent indicates that these documents are real estate tax records maintained on Department of Taxation servers. Tax returns filed pursuant to the provisions of Tax Law article 31 (entitled “Real Estate Transfer Tax”) are subject to a general confidentiality provision directing that they not be disclosed except under limited circumstances (see Tax Law §1418). As the respondent points out, the power of attorney given to Irwin M. Slomka, Esq. by Richard and Lorraine Grasso identifies the tax matters to which it applies as New York City Personal Income Tax and New York State Personal Income Tax for 2002-2003, “with full power to receive confidential information and to perform any and all acts that the taxpayer(s) can perform with respect to the above specified tax matter(s)”. No mention is made of real estate transfer tax returns. For purposes of FOIL (and mindful that this is a FOIL proceeding, not a proceeding with respect to petitioner’s income taxes), the Court finds that it was not irrational for the respondent to determine that the real property tax records did not fall within the scope of the power of attorney, and

therefore were subject to the confidentiality provisions of Tax Law § 1418. The Court finds that the respondent properly denied disclosure of the documents under POL § 87 (2) (a), as being specifically exempted under state law.

Pages 42-105. Respondent indicates that these records are the product of a search request made to the Internal Revenue Service for 1099 forms relating to income of Mr. and Mrs. Grasso. Specifically, the respondent indicates that the 1099 forms were obtained from the Internal Revenue Master file (“IRMF”) maintained by the United States Internal Revenue Service (“IRS”). The respondent contends that these records are confidential under § 6103 (a) of the Internal Revenue Code (see 26 USC § 6103 [a]). § 6103 (a) of the Internal Revenue Code prohibits officers or employees of any state from disclosing any federal return or return information (see 26 USC 6103 [a]). While provision is made therein for disclosure of tax returns or return information to the taxpayer or his attorney in fact (see 26 USC § 6103 [e] [1] [i], [e] [6], [e] [7]), it appears that a written application must be submitted to the Internal Revenue Service (see 26 USC § 6103 [e]). The Court discerns nothing within § 6103 which authorizes state employees to disclose federally protected documents. Under the circumstances, the Court finds that the documents were exempt from disclosure under the provisions of POL § 87 (2) (a).

**16 Pages of Documents.** The respondent maintains that these records are protected from disclosure under POL § 87 (2) (g) as inter-agency and intra-agency decisional material. Upon in *camera* review, the Court agrees and finds that the material is exempt from disclosure under POL § 87 (2) (g).

Lastly, with respect to petitioner's request for attorneys fees, the Court observes that the petition has only been granted in part, and finds that although the petitioner has prevailed to a limited extent, "the initial denial of the request was not so unreasonable as to warrant an award of counsel fees" (see Matter of Humane Society of the United States v Fanslau, 54 AD3d 537, 539 [3<sup>rd</sup> Dept., 2008]). With regard to respondent's failure to issue a decision within ten days of receipt of the appeal, as required under POL 89 (4) (a), the Court observes that the respondent's appeals decision was only six days late, and that the petitioner has not presented any evidence of prejudice or even inconvenience arising from the brief delay.

The Court concludes that the petition should be granted to the limited extent set forth above.

Accordingly, it is

**ORDERED and ADJUDGED**, that the petition is granted to the limited extent that the following records be disclosed: (1) portions of the Sixteen Page Tax Field Audit Record, as set forth herein; and (2) portions of 105 Pages of Documents Withheld Pursuant to POL § 87 (2) (a), as set forth herein; and it is further

**ORDERED and ADJUDGED**, that the records directed to be disclosed be produced within twenty (20) days of the date of service of a copy of this decision/order/judgment with notice of entry.

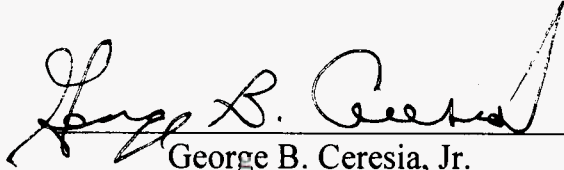
**ORDERED and ADJUDGED**, that the petition is otherwise dismissed.

This shall constitute the decision, order and judgment of the Court. All papers, other than respondent's Appendix to Answer (which was submitted by the respondents for *in camera* review) are returned to the attorney for the petitioner who is directed to enter this

Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

**ENTER**

Dated: January 2, 2009  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated June 19, 2008, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated August 14, 2008, Supporting Papers and Exhibits
3. Appendix to Answer dated August 14, 2008, submitted to the Court for *In Camera* Review