

**Rankin v City of N.Y. Dept. of
Info. Tech. & Telecom.**

2009 NY Slip Op 30199(U)

January 28, 2009

Supreme Court, New York County

Docket Number: 109626/08

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer
Justice

PART 8

Index Number : 109626/2008
RANKIN, DAVID B.
vs.
INFORMATION TECHNOLOGY
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 109626-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

_____ 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, it is ordered that this motion is denied in accord
with the annexed memorandum.

FILED
FEB 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/28/09

[Signature]
HON. MARILYN SHAFER, JSC
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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X
DAVID B. RANKIN,

Petitioner,

Index No.: 109626/08

-against-

DECISION AND ORDER

CITY OF NEW YORK DEPARTMENT OF
INFORMATION TECHNOLOGY &
TELECOMMUNICATIONS (DoITT),

Respondent.

-----X
SHAFER, J.

FILED
FEB 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Petitioner instituted this proceeding, pursuant to CPLR Article 78, to review, among other things,¹ the determination of respondent that denied petitioner's Freedom of Information Law (FOIL) request for a map of the entrance and exit points to subways, bus stops, the path train, and other transit points in a Shapfile format, specifically ESRI SHP.

In its denial, respondent stated that, pursuant to § 87 (2) (f) of FOIL, governmental information is exempt from disclosure "if disclosed could endanger the life or safety of any person." In its response to the instant petition, respondent states that, since September 11, the New York City subway and transit system

¹ By stipulation, dated December 5, 2008, the parties agreed to limit this motion to the specified request addressed in this decision, reserving other matters following a final determination of this matter.

has been the subject of terrorist threats, and, consequently, the release of the requested map would significantly undermine the government's efforts to keep the transit system safe.

In his reply, petitioner agreed to limit his request to exclude "data related to top secret New York City Police Department locations, communication infrastructure, power conduit clusters, and the like."

DISCUSSION

CPLR 2106 allows attorneys licensed to practice law in the State of New York to submit affirmations in support of court documents, unless the attorney is an active litigant in the matter. *Schutzer v Suss-Kolyer*, 57 AD2d 613 (2d Dept 1977). In the instant matter, petitioner, a licensed New York attorney, submitted an affirmation, rather than the requisite affidavit mandated by CPLR 2106 for attorney-litigants, in support of the petition. Although technically insufficient to maintain the instant proceeding, in the interests of the efficient administration of justice, the court will consider the substantive merits of the petition, and order petitioner to file the necessary affidavit nunc pro tunc.

It is well settled that government records are presumptively available for public inspection, unless they fall within a specified exemption. See *Gould v New York City Police Department*, 89 NY2d 267 (1996). However,

"exemptions from disclosure are to be narrowly construed, with the burden resting on the agency to justify the applicability of the exemption upon which it relies. In order to assure that these standards are met, it is necessary that the agency set forth a particularized and specific justification for denying access [internal quotation marks and citations omitted]."

Johnson v New York City Police Department, 257 AD2d 343, 346 (1st Dept 1999).

Respondent has indicated that, because of terrorist threats, information relating to the New York City transit system poses a potential threat to the public safety. In reply, petitioner has agreed to limit his request to exclude the items indicated above, which would, apparently, only leave a map of transit entrances and exits, items which are physically viewable by the public anyway.

Courts may, if appropriate, make in camera inspections of documents alleged to be exempted from FOIL disclosure (see *Gould v New York City Police Department*, *supra*), or to have exempted material redacted from documents otherwise available for inspection under FOIL (see generally *Flowers v Sullivan*, 149 AD2d 287 [2d Dept 1989]). In the case at bar, since petitioner has indicated a willingness to modify his request to exclude items that might endanger public safety, the court believes that the most practicable approach would be to have respondent provide the requested documents with the specified items redacted. Further, once the redacted items have been supplied to petitioner, the

parties should return to court for a compliance conference to address any issues that might be left unresolved by the records so disclosed. See generally *City of Newark v Law Department of the City of New York*, 305 AD2d 28 (1st Dept 2003).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that petitioner supply the court with an affidavit in support of his petition, to be filed nunc pro tunc; and it is further

ORDERED that respondent is to provide petitioner, within 20 days of notice of entry of this order, with a map of the entrance and exit points to subways, bus stops, the path train, and other transit points in a Shapfile format, specifically ESRI SHP, with data related to top secret New York City Police Department locations, communication infrastructure, power conduit clusters, and the like, redacted; and it is further

ORDERED that the parties are to appear in court for a compliance conference on FEB. 27th, 2009; and it is further @9:30 A.M.

ORDERED that the Clerk of the Court is to enter judgment accordingly.

Dated: 1/28/09

ENTER: MARILYN SHAFER
Marilyn Shafer, J.S.C.

FILED
FEB 02 2009
COUNTY CLERK'S OFFICE
NEW YORK