

**Matter of Stengel v New York City School Constr.  
Auth.**

2009 NY Slip Op 31689(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 106333/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

Part 5

PART

Index Number : 106333/2009

**STENGEL, ANDREW**

VS.

**NYC SCHOOL CONSTRUCTION AUTHORITY**

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 106333-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1

2, 3

4

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

**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 141B).

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 7/29/09



**HON. EILEEN A. RAKOWER**

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  
ANDREW STENGEL,

Petitioner,

Index No.  
106333/09

-against-

DECISION  
and ORDER

THE NEW YORK CITY SCHOOL CONSTRUCTION  
AUTHORITY & THE NEW YORK CITY  
DEPARTMENT OF EDUCATION

**UNFILED JUDGMENT**

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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  
1315)**

Mot. Seq.  
1001

HON. EILEEN A. RAKUSEK, J.

Petitioner Andrew Stengel ("Petitioner") brings this petition pursuant to Article 78 of the Civil Practice Law and Rules seeking an order directing Respondents New York City School Construction Authority ("SCA") and the New York City Department of Education ("DOE") (collectively "Respondents") to provide additional documents in response to Petitioner's requests pursuant to the Freedom of Information Law ("FOIL"). In addition, Petitioner seeks attorney's fees in connection with the instant petition.

Petitioner states that he is an appointee to Brooklyn's Community Board #2 and a member of the board's Land Use Committee, as well as a taxpayer concerned with government spending and transparency. On December 29, 2008, Petitioner sent two separate requests for documentation pertaining to a proposed construction project in the area of Brooklyn, New York commonly referred to as "Dumbo" to SCA and DOE pursuant to Public Officers Law §84 *et. seq.*, also known as the Freedom of Information Law ("FOIL"). Both requests sought "all written material and communications" from 2003 to the present pertaining to:

- (a) a middle school at a proposed Dock Street development site in Dumbo, Brooklyn;
- (b) a proposal to annex P.S. 8 in Brooklyn Heights with a middle school; and
- (c) possible sites for a new middle school within District 13 in Brooklyn.

DOE first responded to Petitioner's FOIL request by e-mail dated January 6, 2009, wherein DOE acknowledged receipt of Petitioner's request, and advised that it would undertake a search for responsive records, which it anticipated would be completed by February 3, 2009.

On February 5, 2009, DOE advised Petitioner by e-mail that it had concluded its search and was forwarding responsive documents to Petitioner. DOE states that these documents consisted of e-mail correspondence between DOE's Chief Operating Officer and school officials concerning Brooklyn schools.

Petitioner appealed the DOE's response to his FOIL request by letter dated March 3, 2009, stating that he found DOE's response insufficient, and requested additional documents.

DOE responded to Petitioner's appeal by letter dated April 23, 2009, wherein DOE's General Counsel advised Petitioner that he had directed DOE's Central Records Access Officer to conduct another search for responsive records, and that DOE would advise Petitioner as to the results of the search by May 25, 2009.

Petitioner commenced the instant Article 78 proceeding on or around May 20, 2009, prior to DOE's supplemental response.

By letter dated May 26, 2009, DOE advised Petitioner that it had located additional documents responsive to his FOIL request, and forwarded same to Petitioner. These documents consisted of letters from private citizens to DOE employees regarding school construction projects in Brooklyn. In addition, the letter stated that a number of documents were located that were responsive to Petitioner's request, but were being withheld because they were exempt from disclosure pursuant to Public Officers Law §87(2)(g) as inter and/or intra-agency materials which consisted of opinions, recommendations, and conclusions. Specifically, DOE states that these documents were "e-mail correspondence among DOE and SCA employees regarding proposed school construction projects, related meetings, and related press articles." Further, DOE asserts that these documents did not contain "statistical or factual data, final agency determinations, instructions to agency staff that affect the public, or external audits of the agency," such that their disclosure would be required.

SCA first responded to Petitioner's request by letter dated December 29, 2008, wherein SCA advised Petitioner that it was in receipt of his FOIL request, and that it would undertake a search for responsive records and contact him as to the results as soon as possible.

SCA states that, by letter dated February 23, 2009, SCA forwarded to Petitioner 97 pages of responsive documents, including e-mail correspondence between SCA employees and private developers involved in proposing school sites in Brooklyn; e-mail correspondence between SCA employees, staff in the Mayor's office, and private citizens involved in proposing school sites in Brooklyn; letters between SCA officials and elected officials in Brooklyn regarding potential school construction sites; and feasibility studies of proposed school sites.

Petitioner appealed SCA's response to his FOIL request by letter dated March 3, 2009, stating that he found SCA's response to be insufficient, and requested that SCA provide additional documents.

As noted above, Petitioner commenced the instant Article 78 proceeding on May 20, 2009. Subsequent thereto, on June 22, 2009, SCA sent Petitioner an additional 110 documents pursuant to a second search for responsive records. SCA states that these documents included e-mail correspondence between SCA staff and private developers and/or architects regarding new school sites in Brooklyn; architectural drawings and feasibility plans related to various proposed new school sites in Brooklyn; and e-mail correspondence among SCA staff and other outside entities regarding school sites in Brooklyn.

In addition, SCA advised Petitioner that it located other documents responsive to his request, but that these documents were inter and/or intra-agency materials which contained opinions, recommendations and conclusions, and thus were exempt from disclosure under FOIL. These documents, according to SCA, did not contain "statistical or factual data, final agency determinations, instructions to agency staff that affect the public, or external audits of the agency," such that their disclosure would be required. Specifically, SCA states that these exempted documents consist of "(a) draft architectural plans, (b) e-mail correspondence among only SCA employees and employees of other City agencies regarding the viability of various potential school sites, and (c) feasibility studies of proposed school sites that were produced by the SCA and circulated solely within City agencies."

Petitioner has submitted a verified petition. Annexed to the Petition as exhibits are copies of the DOE's "Five-Year Capital Plan;" DOE's 2/5/09 response; SCA's 2/23/09 response; Petitioner's 3/3/09 appeal with respect to DOE; DOE's 4/23/09 letter in response to Petitioner's appeal; Petitioner's 3/3/09 appeal with respect to SCA's response; and an Advisory Opinion by Robert Freeman, Executive Director of the New York State Committee on Open Government.

The City has submitted a verified answer and a memorandum of law in support of its answer. Annexed to the answer as exhibits are Petitioner's 12/29/08 FOIL requests to DOA and SCA; DOE and SCA's initial writings to Petitioner acknowledging receipt of his FOIL requests and setting forth a date in which responses should be sent; DOE's 2/5/09 response; SCA's 2/23/09 response; Petitioner's appeals to DOE and SCA; DOE's 4/23/09 response to Petitioner's appeal; DOE's 5/26/09 letter to Petitioner; and SCA's 6/22/09 letter to Petitioner.

Finally, Petitioner has submitted a reply affirmation.

Respondents argue that the petition is moot, as DOE and SCA have both provided all responsive documents in their possession to which Petitioner is entitled. Petitioner disputes Respondents' assertions.

In keeping with its purpose of promoting open government and public accountability, FOIL imposes a broad duty upon government officials to make records available to the public (*see Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 [1996] (citing Public Officers Law §84)). All government records are presumptively open to public inspection and copying, irrespective of the identity or motive of the individual seeking access, and an agency which seeks to deny access to records is required to make an affirmative showing that the sought-after documents fall within one of the enumerated exceptions contained in Public Officers Law §87(2) (*id.* at 274-75). Further, these statutory exemptions are to be narrowly construed, and the agency may withhold records only when it shows that the sought-after records "fall[] squarely within the ambit of one of these statutory exemptions" (*id.* at 275).

To successfully invoke an exemption to disclosure under §87(2), the agency must articulate a "particularized and specific justification" for non-disclosure. "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” (*id.*).

As noted above, Respondents contend that certain material which is responsive to Petitioner’s request is exempted from disclosure under §87(2)(g), which exempts from disclosure records which “are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or 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 Court of Appeals has explained that “[t]he point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” (*New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 488), thus protecting the deliberative processes of government (*Gould* at 276).

Based upon the foregoing principles and the record before it, the court finds that Respondents have provided a sufficiently detailed basis to support their claims of exemption under §87(2)(g), negating the necessity of an in camera inspection by the court (*see Smith v. Capasso*, 200 A.D.2d 502 [1st Dept. 1994]; *see also Robert v. LoCicero* 2006 NY Slip Op 2766, \*1-2 [2nd Dept. 2006]). Respondents identify the withheld documents as communications purely within and among DOE and SCA officials which concern policy deliberations with respect to the subject construction project, as well as draft (*i.e.*, non-final) architectural plans concerning same. These items fall squarely within Public Officers Law §87(2)(g), and are thus exempt from disclosure under FOIL.

Finally, as Respondents provide attorney’s affirmations verifying that DOE and SCA have provided Petitioner with all non-exempt material within their custody, the petition is moot insofar as Petitioner seeks additional records (*see Gould* at 279).

Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 29, 2009

  
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EILEEN A. RAKOWER, J.S.C.

**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).**