

Malliotakis v Port Auth. of N.Y. & N.J.

2012 NY Slip Op 32393(U)

September 13, 2012

Supreme Court, Richmond County

Docket Number: 80213/12

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No.: 80213/12

NICOLE MALLIOTAKIS,

Petitioner

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**PORT AUTHORITY OF NEW YORK and
NEW JERSEY**

Respondent

The Petitioner, Nicole Malliotakis, an elected Member of the Assembly of the State of New York from Staten Island, New York, commenced this Special Proceeding in her individual capacity seeking an order to compel the Respondent, Port Authority of New York and New Jersey (Port Authority), to comply with a Freedom of Information Law (FOIL) request seeking a copy of a study concerning the New York Container Terminal (NYCT), which is located in Staten Island, New York. The study was reported upon in Staten Island Advance newspaper articles by Judy L. Randall in April of 2012.

On June 15, 2012 it was reported that a draft of the Study was prepared, but it had not been determined when it would be released to the public. On June 18, 2012 the Petitioner submitted a FOIL request for the Study. On July 9, 2012 Respondent Port Authority advised the Petitioner that her request was denied. On August 6, 2012 Justice Anthony I. Giacobbe, as the Special Term Part II duty Judge signed an Order to Show Cause pursuant to Article 78 of the Civil Practice Law and Rules to have the Respondent, Port Authority show cause before Justice Joseph J. Maltese why an Order should not be granted compelling it to comply with the FOIL request for the study requested by Assembly Member Malliotakis.

In response to the Order to Show Cause, the Respondent's counsel submitted an Affidavit from John Ma, the Chief of Staff to the Executive Director of the Port Authority, and an Answer and Objection in Point of Law and a Memorandum of Law. Attached to the Affidavit of Thomas Hannan, the Manager of Market Research and Analysis in the Port Commerce Department of the Port Authority, was a flash drive that contained the tabulation of all data fields included on approximately 6,700 completed survey forms. The survey was conducted at the NYCT in Staten Island, New York, which is *leased* from the Port Authority, and at Global Container Terminal (GCT), in Jersey City, Bayonne, New Jersey, which is *operated* by the Port Authority (emphasis added). However, the Port Authority did not submit the actual questions and key to interpret the data.

On September 7, 2012 the Port Authority agreed to turn over those questions and keys to interpret the data, which was placed in this court's order. Also, on September 7, 2012, the Port Authority attorney agreed to a court order that it would turn over the Study on "The Economic Analysis of the Effects of the Recent PANYNJ Toll Increase on the New York Container Terminal" (Study) to this court to review by close of business on September 11, 2012. On September 11, 2012 this court received the Study by Federal Express. The Study cover lists that it was prepared by SY & CG, LLC of Paramus, New Jersey, which bears the date May, 2012.

Background

Vehicles traveling to and from the New York Container Terminal located in Staten Island, New York and the U.S. mainland in New Jersey must cross the Kill Van Kull or the Arthur Kill which are Hudson River tidal straits separating Staten Island, New York from New Jersey. In 2011 and continuing each year until 2015, the Port Authority has increased the tolls on all of its trans-Hudson facilities to include the Goethals Bridge, the Bayonne Bridge and the Outerbridge Crossing connecting Staten Island to New Jersey.

Consequently, any increase in the tolls will effect the cost of transportation of those vehicles crossing from New Jersey into New York. The extent of the economic impact on the New York Container Terminal was the purpose of the study. No recommendations or policy decisions were outlined in the Study.

Port Authority's Argument

The essence of the Port Authority's argument why the Petitioner is not entitled to the Study is because the request does not comply with the Port Authority's Freedom of Information Code (PA FOI Code), which was posted online on March 29, 2012.

Counsel for the Port Authority alleges that the PA FOI Code was modeled on the New York Freedom of Information Law (FOIL) found in Article 6 of the Public Offices Law. However, a comparison of the New York FOIL enacted into law by the New York State Legislature to govern all state and municipal agencies, commissions and authorities, and the PA FOI Code, enacted by the Port Authority discloses that the PA FOI Code is more restrictive in its language as to what it will hold exempt from disclosure. Nonetheless, the PA FOI Code states:

that any records (as defined in the PA FOI Code) shall be made available for public inspection and/or copying, *except* where such records:

5. are inter-agency or intra-agency advisory, consultative or deliberative Records, such as recommendations and communications to or from, and discussions among the members of the Board of Commissioners, the Governors of the States of New York and New Jersey and the Port Authority (or the staffs of the foregoing); and inter-agency or intra-agency memoranda, draft reports and presentations, or e-mail messages, which are not statistical or factual tabulations of data, with instructions to staff that affect the public or final agency policy or determinations not exempted...(emphasis added)

In this court's review of the 52 page Study and with its 51 pages of Appendices, it finds that the entire Study is data tabulated as a result of a 5-day survey conducted at the entrance gates of the NYCT in Staten Island, New York and at the Global Container Terminal in Jersey City/Bayonne, New Jersey. The Study compared the volume of traffic to and from the NYCT on Staten Island, which generally requires that trucks from New Jersey pay a toll on one of the three Port Authority operated bridges when coming into Staten Island, as opposed to those going to or coming from the GCT in New Jersey, which did not necessitate a Port Authority bridge toll.

Nowhere in the 103 page Study with colored charts is it labeled as a draft. Only the counsel for the Port Authority has labeled the Study a draft. While the word "confidential" is printed in red at the bottom of each page, there does not appear to be anything in the Study that is confidential in nature. The Study appears to be a complete tabulation of data collected from a survey, which is neatly listed by various groupings covering the two different locations where the Study data was collected, with the categories of questions and answers listed in an orderly fashion, with statistical comparison charts based upon the factual tabulation of the data.

The Appellate Division of the New York Supreme Court has held that statistical or factual data contained in government documents are not exempt from disclosure and accordingly, shall be disclosed upon the filing of a FOIL request.¹ The Port Authority apparently agrees with this because that is why it turned over the data, albeit without the questions or organizational division of it in response to the Order to Show Cause.

Since there are no "instructions to the staff that affect the public or final agency policy or determinations," this Study is not exempt in accordance with both the PA FOI Code and the New York State FOIL. The fact that the Port Authority may later add further analysis does not make this Study a "draft" for purposes of exempting it from immediate disclosure.

¹ *Matter of Miller v. NYS Dept of Transportation*, 58 AD3d 981 (3rd Dept, 2009).

A review of the cases presented by the Port Authority are not applicable to the facts before this court.² While this court agrees with the proposition that inter-agency and intra-agency materials may, under some circumstances, be exempt from FOIL requests or be redacted, that principle is not on point with the facts of this case.

Accordingly, it is hereby:

ORDERED, that the Respondent, Port Authority of New York and New Jersey, shall deliver to the Petitioner, Nicole Malliotakis, the complete study entitled “Economic Analysis of the Effect of the Recent PANYNJ Toll Increase on NYCT,” by the Port Authority of New York and New Jersey and New York Container Terminal dated May 2012, by Tuesday, September 18, 2012.

ENTER,

DATED: September 13, 2012

Joseph J. Maltese
Justice of the Supreme Court

² *Matter of New York Times Co. v. City of New York Fire Dept.*, 4 NY3d 477 (2005); *Matter of Gould v. NYC Police Dept.*, 89 NY2d 267 (1996); *Matter of Xerox Corporation v. Town of Webster, et al.*, 65 NY2d 131 (1985).