

**Matter of Gilbert v Office of the Governor of the  
State of N.Y.**

2018 NY Slip Op 33697(U)

February 16, 2018

Supreme Court, Albany County

Docket Number: 907743-16

Judge: Richard M. Platkin

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STATE OF NEW YORK  
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

ADAM B. GILBERT,

Petitioner,

**DECISION, ORDER &  
JUDGMENT**

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

-against-

THE OFFICE OF THE GOVERNOR OF THE  
STATE OF NEW YORK and THE NEW  
YORK STATE DEPARTMENT OF  
TRANSPORTATION,

Respondents.

Index No. 907743-16

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Petitioner Adam B. Gilbert brings this special proceeding pursuant to CPLR article 78, challenging the denial of Freedom of Information Law (*see* Public Officers Law art 6 [“FOIL”]) requests made to respondents the Office of the Governor of the State of New York (“Governor’s Office”) and the New York State Department of Transportation (“DOT”). Respondents oppose the application through an answer.

### **BACKGROUND**

Petitioner is a partner with the law firm of Nixon Peabody LLP, which serves as counsel to CPD NY Energy Corp. (“CPD”) (R. 90).<sup>1</sup> CPD is a domestic corporation that operates a Mobil gas station located on the Hutchinson River Parkway in White Plains, Westchester County (R. 95). The land on which the gas station is located is owned by DOT (“Hutchinson Site”) and leased to GTY NY Leasing, Inc. (“GTY”), and CPD is GTY’s subtenant (R. 91, 95-96).

On March 31, 2016, CPD filed a lawsuit against DOT and GTY in Supreme Court, New York County (Index No. 651704/2016 [“New York Action”]), alleging, among other things, that DOT wrongfully had induced the termination of the sublease between CPD and GTY (R. 90-92). The stated reason for the termination was CPD’s alleged failure to disclose its prior history of price gouging after Hurricane Sandy and failing to comply with certain wage and hour regulations (R. 100-104; Hintz Aff., ¶ 13). CPD contends that its sublease was, in fact, terminated for the sole purpose of permitting DOT to erect and operate a Taste NY store on the Hutchinson Site (R. 98-100, 104).<sup>2</sup>

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<sup>1</sup> References preceded by R. \_\_\_ are to the Record submitted by respondents.

<sup>2</sup> Taste NY is a store that promotes food and beverages grown and/or made in New York.

On April 26, 2016, petitioner submitted a FOIL request to DOT that sought access to all communications with the Governor's Office regarding CPD, its affiliates or subsidiaries, including communications between the Governor's Counsel's Office and DOT's counsel (R. 4). DOT denied petitioner's request in its entirety on July 13, 2016, determining that the requested records were protected by FOIL's inter-agency/intra-agency exemption (*see* Public Officers Law ["POL"] § 87 [2] [g]), as well as the attorney-client privilege (*see id.* § 87 [2] [a]; CPLR 4503 [a]) (R. 5-6). Petitioner's administrative appeal was denied on August 23, 2016 (R. 17-20).

On June 1, 2016, petitioner made a similar FOIL request to the Governor's Office (R. 22-23), which was denied on August 4, 2016 on the basis of the same exemptions (R. 30-75).<sup>3</sup> Petitioner's administrative appeal was denied on September 16, 2016 (R. 77-79, 87-89).

Petitioner then commenced this special proceeding challenging the denial of its FOIL requests, arguing that: (1) respondents failed to provide a specific and particularized justification for withholding the requested records and (2) the material sought was not protected by the exemptions invoked by respondents.

### ANALYSIS

Under FOIL, government records are presumptively available to the public for inspection unless subject to an exemption from disclosure (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). This "broad standard of open disclosure" serves to "achieve maximum public access to government documents" (*Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of*

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<sup>3</sup> Petitioner's FOIL request to the Governor's Office requested access to four groups of documents. The records at issue in this proceeding pertain solely to the second group of documents.

*State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 416 [1995]; see POL § 84). FOIL exemptions “are narrowly construed,” and “the agency that seeks to prevent disclosure bear[s] the burden of demonstrating that the requested material falls squarely within an exemption by articulating a particularized and specific justification for denying access” (*Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1292 [3d Dept 2009]; see *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]).

**A. Sufficiency of Respondents’ FOIL Responses**

As an initial matter, the Court rejects petitioner’s contention that respondents should be required to produce the withheld documents because they failed to sufficiently particularize their responses to the FOIL requests. An agency withholding records in response to a FOIL request “is required to articulate particularized and specific justification [for non-disclosure] and, if necessary, submit the requested materials to the court for *in camera* inspection” (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]; see *Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 984 [3d Dept 2009], *lv denied* 12 NY3d 712 [2009]). Here, the responses from DOT and the Governor’s Office “adequately described the documents withheld and set forth the reasons for withholding them” (*Matter of Miller*, 58 AD3d at 984; see e.g. R. 18-20), and, in any event, respondents have submitted the withheld documents to the Court for *in camera* inspection (see *Matter of Fink*, 47 NY2d at 573; *Matter of Miller*, 58 AD3d at 983-984; cf. *Matter of Mazza v Village of Croton-on-Hudson*, 140 AD3d 878, 880 [2d Dept 2016]).

**B. Withheld Materials**

In denying petitioner access to the requested documents, respondents invoke the FOIL exemption for deliberative materials and the attorney-client/attorney work product privilege.

Pursuant to POL § 87 (2) (g), an agency is authorized to withhold “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; or iv. external audits.” This exemption “applies to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*Matter of Smith v New York State Off. of the Attorney Gen.*, 116 AD3d 1209, 1210 [3d Dept 2014] [internal quotation marks and citation omitted], *lv denied* 24 NY3d 912 [2014]; *see e.g. Matter of Shooters Comm. on Political Educ., Inc. v Cuomo*, 147 AD3d 1244, 1245-1246 [3d Dept 2017]). The purpose of the exemption “is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure” (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 488 [2005]; *see Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 658 [2012]).

The exemption for deliberative materials does not, however, encompass factual data or “final agency policy or determinations” (POL § 87 [2] [g] [i], [iii]). In this context, “[f]actual data . . . simply means *objective* information, rather than opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*Matter of Gould*, 89 NY2d at 277 [emphasis added]; *see e.g. Matter of Humane Socy. of U.S. v Empire State Dev. Corp.*, 53 AD3d 1013, 1018 [3d Dept 2008], *lv denied* 12 NY3d 701 [2009]). Nor does the exemption apply to “instructions to staff that affect the public” (POL § 87 [2] [g] [ii]; *see e.g. Matter of Miller*, 58 AD3d at 985).

FOIL also shields from disclosure materials “specifically exempted from disclosure by state or federal statute” (POL § 87 [2] [a]; *see Matter of Moody’s Corp. & Subsidiaries v New*

*York State Dept. of Taxation & Fin.*, 141 AD3d 997, 1000 [3d Dept 2016]). As is pertinent here, the exemption applies to “privileged communications between attorneys and their clients as well as attorney work product” (*Matter of Shooters Comm.*, 147 AD3d at 1245-1246 [holding privileged communications between attorney in Governor’s Office and attorney of executive branch agency]; see CPLR 4503 [a]; 3101 [c]).<sup>4</sup> This privilege “is not lost merely by reason of the fact that [the communication] also refers to certain nonlegal matters,” provided that “the communication is primarily or predominantly of a legal character” (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 594 [1989]).<sup>5</sup>

1. DOT

DOT has identified and submitted for *in camera* inspection 223 pages of withheld records responsive to petitioner’s FOIL inquiry (see DOT001 through DOT223). Upon careful review, the Court finds and determines as follows.

DOT001 properly was withheld from disclosure as a pre-decisional, intra-agency memorandum concerning options for the development of a Taste NY facility at the Hutchinson Site. The memorandum includes some legal content and does not consist of factual data, final agency policy or determinations, or instructions to staff that affect the public.<sup>6</sup>

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<sup>4</sup> The Court therefore rejects petitioner’s untenable position that the invocation of the attorney-client and attorney work product privileges was improper because attorneys in the Governor’s Office cannot have an attorney-client relationship with DOT employees (see Petitioner’s Brief, p. 8). “DOT is an executive agency that ultimately falls under the auspices of the Governor” and “it is common, and indeed expected, for executive agencies to review matters such as those involving CPD with the [Executive] Chamber” (Fontaine Aff., ¶ 13).

<sup>5</sup> Concomitantly, “where . . . a document is exempt from disclosure pursuant to state statute, it may not be subjected to redaction” (*Matter of Moody’s Corp.*, 141 AD3d at 1001).

<sup>6</sup> Petitioner contends that because the Governor has publicly discussed the creation of Taste NY stores, the communications sought necessarily include instructions to staff that affect the public (see

DOT004, DOT028 and DOT030 are not exempt and must be disclosed because they contain purely factual, non-deliberative and non-legal matter, such as executed lease documents concerning the Hutchinson Site, factual information concerning DOT's approval of the assignment of the lease, and factual information concerning whether DOT had any leases or contracts with certain entities or individuals.

DOT032 and DOT035 are exempt from disclosure as predecisional memoranda of a legal character addressing possible arguments for the removal of CPD as sublessee of the Hutchinson Site. In addition, DOT044 is exempt as consisting of predecisional discussions of an exempt memoranda.

DOT039, DOT040, DOT042, DOT043, DOT045 and DOT115 are not exempt and must be disclosed because they contain purely factual, non-deliberative and non-legal matter, such as factual information concerning DOT's approval of the assignment of the lease, factual information as to whether or not DOT had any leases or contracts with certain entities or individuals, and publicly-available information about CPD and the Hutchinson Site.

DOT047, DOT048, DOT153 and DOT154 properly were withheld from disclosure as predecisional, inter-agency communications of a legal character regarding proposed correspondence. With respect to document DOT078, the first three pages (DOT078-DOT080) are exempt from disclosure as draft correspondence, but the remaining pages of the document (DOT081-DOT114) consist of non-exempt matter concerning leases and assignments of leases that must be disclosed.

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Petitioner's Brief, pp. 6-7, n 3). However, the memorandum does not include any mandatory directives and instead merely sets forth *options* for the development of a Taste NY facility (*see Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 132 [1985]; *Matter of Mothers on the Move v Messer*, 236 AD2d 408, 410 [2d Dept 1997]).

DOT051 and DOT069 are not exempt and must be disclosed because they contain purely factual, non-deliberative and non-legal matter, such as a PowerPoint presentation prepared by CPD and photographs of the Hutchinson Site.

DOT156, DOT157, DOT158, DOT201 and DOT214 are communications concerning the New York Action, including copies of CPD's application for temporary injunctive relief. As these records do not include any information of a deliberative or privileged character, the documents are not exempt from disclosure.

The remaining documents (DOT198, DOT200, DOT202, DOT204, DOT209, DOT210, DOT211, DOT215, DOT220, DOT222 and DOT223) all are attorney-client privileged communications concerning the New York Action.

## 2. The Governor's Office

The Governor's Office has identified and submitted for *in camera* inspection 626 pages of records responsive to petitioner's FOIL inquiry (*see* GOV001 through GOV626). Upon careful review, the Court finds and determines as follows.

GOV001, GOV044, GOV046, GOV193, GOV255, GOV260, GOV262, GOV539, GOV593, GOV595, GOV597, GOV598, GOV600, GOV604, GOV606, GOV607, GOV608, GOV610 and GOV612 all are exempt from disclosure as attorney-client privileged communications concerning the New York Action.

GOV002,<sup>7</sup> GOV235, GOV237, GOV238, GOV241, GOV247, GOV251, GOV528, GOV531, GOV541 and GOV583 are exempt from disclosure as predecisional memoranda of a

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<sup>7</sup> GOV002 includes non-exempt attachments, but those attachments (GOV008-GOV040) are duplicates of other documents that already are being provided to petitioner.

legal character addressing possible arguments for the removal of CPD as sublessee of the Hutchinson Site.

GOV244, GOV522, GOV524, GOV535, GOV544,<sup>8</sup> GOV620, GOV621, GOV622, GOV624, GOV625 and GOV626 properly were withheld from disclosure as pre-decisional, inter-agency communications of a legal character regarding proposed correspondence.

GOV256, GOV258, GOV421, GOV519, GOV587, GOV589, GOV591, GOV614, GOV616, GOV617 and GOV619 consist of factual information and documents concerning existing or prior DOT leases with certain entities and publicly available information concerning certain entities. As such, the documents have not been shown to be exempt from disclosure.

GOV263, GOV302, GOV341 and GOV380 are not exempt from disclosure because the records are neither deliberative nor legal in nature. Rather, the records consist of final agency action and default notices sent by a third party to CPD.

GOV045, GOV047, GOV194, GOV234, GOV599, GOV602 and GOV603 are intra- and inter-agency communications regarding the New York Action, but the communications consist solely of factual and/or publicly available information and do not contain any discussion of legal or pre-decisional matters. As such, these documents must be disclosed.

### **C. Attorneys' Fees and Costs**

Finally, petitioner seeks an award of counsel fees and costs pursuant to POL § 89 (4) (c). However, given that “respondents had a rational basis for their belief that the majority of the documents withheld were exempt from disclosure,” the Court declines, in the exercise of

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<sup>8</sup> GOV544 includes non-exempt attachments, but those attachments (GOV547-GOV582) are duplicates of other documents that already are being provided to petitioner.

discretion, to award fees and costs (*Matter of Miller*, 58 AD3d at 985; see *Matter of Henry Schein, Inc., v Eristoff*, 35 AD3d 1124, 1126 [3d Dept 2006]).

### CONCLUSION

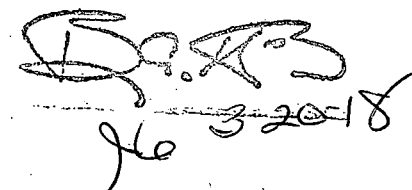
Based on the foregoing, it is

**ORDERED, ADJUDGED and DECREED** that the petition is granted to the extent of ordering that DOT shall produce the following documents to petitioner: DOT004, DOT028, DOT030, DOT039, DOT040, DOT042, DOT043, DOT045, DOT051, DOT069, DOT078 (except pages DOT078-DOT080), DOT115, DOT156, DOT157, DOT158, DOT201 and DOT214; and the Governor's Office shall produce the following documents to petitioner: GOV045, GOV047, GOV194, GOV234, GOV256, GOV258, GOV263, GOV302, GOV341, GOV380, GOV421, GOV519, GOV587, GOV589, GOV591, GOV599, GOV602, GOV603, GOV614, GOV616, GOV617 and GOV619; the petition otherwise is denied.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being transmitted to respondents' counsel; the materials submitted for *in camera* review are being returned to respondents' counsel; and all other papers are being transmitted to the Albany County Clerk. The signing of this Decision, Order & Judgment shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: Albany, New York  
February 16, 2018

  
RICHARD M. PLATKIN  
A.J.S.C.

  
3-20-18

Papers Considered:

1. Notice of Petition, dated December 20, 2016; Verified Petition, dated December 20, 2016, with attached exhibits 1-9; Petitioner's Memorandum of Law in Support of CPLR Article 78 Petition, dated December 20, 2016;
2. Answer, dated October 23, 2017; Affirmation of R. Nadine Fontaine, Esq., dated October 12, 2017; Affirmation of Donna Hintz, Esq., dated October 5, 2017; Record; Material for Court's in Camera Review Only (two volumes); Memorandum of Law in Opposition to the Petition, dated October 12, 2017, with attached exhibits A-B;
3. Affirmation of Thomas M. Mealiffe in Support of CPLR Article 78 Petition, dated November 30, 2017, with attached exhibit A; and Petitioner's Reply Memorandum of Law in Support of CPLR Article 78 Petition, dated November 30, 2017.