

Matter of Donovan v Port Auth. of N.Y. and N.J.

2019 NY Slip Op 31397(U)

May 15, 2019

Supreme Court, New York County

Docket Number: 161471/2017

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

INDEX NO. 161471/2017

In the Matter of MARGARET L. DONOVAN and THE TWIN
TOWERS ALLIANCE,

MOTION DATE 05/14/2019

Petitioners,

MOTION SEQ. NO. 001

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

DECISION AND ORDER

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this CPLR article 78 proceeding, the petitioners Margaret L. Donovan and The Twin Towers Alliance seek judicial review of a Port Authority of New York and New Jersey (PA) determination denying, in part, their request for agency records under the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL). The PA answered the petition and filed the administrative record. The petition is granted, the PA is directed to provide the petitioners with copies of relevant agency records as set forth herein, and the matter is referred to a referee to hear and report on the issue of which documents have already been provided, which must still be provided, and which do not exist.

The petitioners requested documents in the PA's possession that authorized, approved, or memorialized any attempt by Larry Silverstein to reclaim his and/or his financial backers' July 2001, down payment on the World Trade Center property, and the documents that authorized and memorialized the transactions arising from that attempt. They also sought documents referable and with respect to any attempt by Silverstein to apply insurance proceeds to pay annual ground rent and, in the event that Silverstein could not fulfill his contractual obligations,

any attempt he made to pay his own expenses from the insurance proceeds, instead of being excused from redeveloping the site by default. They also requested documentation as to whether Silverstein received any development fees for the right to redevelop the World Trade Center site at his sole expense, despite having purportedly paid for that right on July 24, 2001. In addition, the petitioners sought records with respect to whether the PA made agreements, or facilitated others in making agreements, assigning publicly backed Liberty Bonds to Silverstein Properties, Inc. (SPI), paying fines or penalties to SPI, transacting abatements, or making any publicly funded pledges of assistance, as well as records reflecting payments of insurance proceeds to SPI's attorneys in connection with SPI's litigation against the PA. Finally, the petitioners sought records documenting any insurance proceeds that SPI invested or committed to invest in 3 World Trade Center and 4 World Trade Center, private funds that SPI committed to the construction those buildings, and rents being paid by each state agency that transferred its operations to 4 World Trade both before and after the PA moved its operations there.

The PA denied the petitioners partial access to certain agency records based on general assertions that the "privacy" of several private companies, including real estate companies and retailers, would be compromised.

In a prior, related proceeding in which the petitioners sought similar agency records from the PA pursuant to FOIL, Justice Schecter granted the petition and directed the PA to produce the records requested, explaining:

"The Port Authority's contention that disclosure of the material requested could impair the competitive offers for leasing . . . is speculative and unsupported by any evidentiary documentation. In fact, the Port Authority's Freedom of Information Administrator made plain that he denied access because the Port Authority's Assistant General Counsel determined that the materials were 'confidential and not subject to disclosure.' Given that determination, without any specificity or explanation, the administrator in conjunction with the Secretary of the Port Authority 'determined disclosure would impair or unfairly advantage negotiations underway regarding financing and construction of additional World Trade Center buildings, as well as retail and corporate leasing agreements under negotiation.' Respondents provided no evidence and made no showing to support the applicability of the cited exemption. The Court cannot simply assume that the Code exception applies just because the Port Authority recited it. Such

blind deference would be inconsistent with the purpose of article 78 review. Nor is respondents' reliance on quoted confidentiality provisions availing. All of the cited confidentiality provisions supposedly state that they are subject to the Port Authority's freedom-of-information process and policies" (citations and some internal quotation marks omitted).

(*Matter of Donovan v Port Auth. of N.Y. & N.J.*, Index No. 100388/14 [Sup Ct, N.Y. County, Aug. 30, 2016]).

Although the parties all argue that the "arbitrary and capricious" standard of CPLR 7803(3) applies to agency determinations to withhold documents requested under FOIL, that is the incorrect standard, even though judicial review of the PA's pre-2016 records accessibility determinations under its own Freedom of Information Code (FOC) may have warranted the application of that standard. "[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 94 [3d Dept 1985], *affd* 67 NY2d 562 [1986] [emphasis added]; see *Matter of Prall v New York City Dept. of Corrections*, 129 AD3d 734 [2d Dept 2015]; *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153 [1st Dept 2010]). Rather, upon judicial review of an agency's determination to deny FOIL requests, the court must assess whether "the requested material falls squarely within a FOIL exemption" and whether the agency, upon denying such access, "articulat[ed] a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566).

The PA is subject to FOIL (see *McKethan v New York Branch of N.Y./N.J. Port Auth. Police Dept.*, 277 AD2d 15 [1st Dept 2000]; *Matter of Weisshaus v Port Auth. of N.Y. & N.J.*, 49 Misc 3d 550 [Sup Ct, N.Y. County 2015]); in 2015 New Jersey amended its Open Public Records Act to make the PA subject to that New Jersey law, and the PA has updated its own

FOC to reflect that change. As relevant here, the FOIL exempts from disclosure those agency records, or portions thereof, that, if disclosed, would constitute an unwarranted invasion of personal privacy or would impair present or imminent contract awards or collective bargaining negotiations, or are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise (see Public Officers Law § 87(2)(b), (c), (d)). Whether or not Justice Schecter's determination has preclusive effect here, the court agrees with her analysis. It thus rejects the PA's unsupported contention that production of the documents sought by the petitioners would harm some unexplained privacy interest asserted by a private developer or retailer or that the documents sought are subject to exemption from disclosure under FOIL. The PA has simply not articulated a particularized and specific justification for denying access.

The court thus directs the PA to produce all of the records requested by the petitioners, subject to redaction only with respect to confidential personal information such as bank account numbers and with respect to matters that are related to security and safety at the World Trade Center site. At the most recent appearance before the court, the PA represented that it had provided the petitioners with certain documents since the oral argument on March 25, 2019. The petitioners insist that the PA is still withholding relevant documents that are required to be disclosed. Since the court cannot ascertain from the parties' contentions whether the PA has indeed provided all agency records responsive to the petitioners' request, the matter is referred to a referee to hear and report on the issue of whether the PA has complied with its obligations under FOIL. At the hearing, the referee shall conduct a line-by-line review of the petitioners' FOIL request in order to ascertain whether the PA responded to the particular request, whether there remain documents, including spread sheets and computer files, that are responsive to the request but have yet to be produced, or whether the PA can credibly claim that documents responsive to any particular request do not exist. The court notes with skepticism the PA's

contention that it does not maintain a balance sheet, accounting file, or document that tracked or tracks the allocation and expenditure of insurance proceeds that have been paid and disbursed in connection with the September 11, 2001, terrorist attacks, or that tracked or tracks its own expenditures for the redevelopment of the World Trade Center site.

Accordingly, it is

ORDERED that the petition is granted, and the respondents are directed to produce all documents requested by the petitioners in their Freedom of Information Law request, subject to redaction only with respect to personal confidential information such as social security numbers and bank account numbers and content specifically referring to the safety and security of the World Trade Center site; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: whether the respondents are in possession of agency records responsive to the petitioners' Freedom of Information Request, whether the respondents have already produced records responsive to each request, whether the respondents are in possession of responsive records they have yet to produce, whether the documents sought do not exist, whether the respondents are in possession of account balance sheets, spread sheets, or other financial statements, either in paper form or in the form of a computer file, referable to the acceptance, budgeting, and allocation of insurance proceeds paid out in connection with the September 11, 2001, terror attacks, and the manner in which the respondents searched for records responsive to the petitioners' request; and it is further,

ORDERED that the JHO or Special Referee shall review the petitioners' request for agency records in a line-by-line manner to ascertain what records are responsive and whether they have been produced; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which

the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that the petitioners shall immediately consult with counsel for the respondents, and the petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

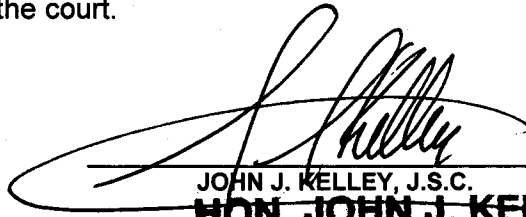
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the court shall enter a judgment finally disposing of this proceeding; and it is further,

ORDERED that the petitioners shall serve a copy of this order upon the respondents within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

5/15/2019

DATE



JOHN J. KELLEY, J.S.C.

**HON. JOHN J. KELLEY
J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

X

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE