

<b>AIG Specialty Ins. Co. v New York State Dept. of Fin. Servs.</b>
2020 NY Slip Op 34185(U)
December 18, 2020
Supreme Court, New York County
Docket Number: 154497/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: <u>HON. CAROL R. EDMOND</u>	PART	IAS MOTION 35EFM
<i>Justice</i>		
-----X	INDEX NO.	<u>154497/2020</u>
AIG SPECIALTY INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY	MOTION DATE	<u>06/24/2020</u>
Plaintiff,	MOTION SEQ. NO.	<u>001</u>

- v -

NEW YORK STATE DEPARTMENT OF FINANCIAL  
SERVICES, LINDA LACEWELL,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners AIG Specialty Insurance Company and Lexington Insurance Company (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that petitioners' application for costs and attorney's fees is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for respondents shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioners.

## MEMORANDUM DECISION

In this Article 78 proceeding, petitioners AIG Specialty Insurance Company (AIG) and Lexington Insurance Company (Lexington; together, petitioners) seek to compel the respondent New York State Department Of Financial Services (DFS) to comply with a Freedom of Information Law (FOIL) request (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

## FACTS

This is the second consecutive Article 78 proceeding that petitioners have commenced against DFS regarding their initial June 12, 2019 FOIL request. *See* verified answer, Geisel affirmation, exhibit 1. Petitioners concede that DFS has made “rolling” monthly partial document productions since August 2019 in an ongoing attempt to satisfy petitioners’ very large FOIL request. *See* verified petition, ¶¶ 27-72. The court dismissed the prior proceeding (Index Number 101879/19) in a decision dated July 2, 2020 that stated that:

“The Court also finds that the cases cited by Petitioner in support of their proposition that this Court should review subsequent administrative determinations are inapposite here. In *Matter of Madeiros v NY State Educ. Dept* (30 NY3d 67 [Ct App 2017]), the court reviewed the exemptions claimed by respondent in its document disclosures during the pendency of the proceeding only because the agency’s initial determination, which was administratively appealed and later judicially challenged, invoked the same exemptions. In another case cited by Petitioners, *Robbins Geller Rudman & Dowd LLP v New York City Dept of Investigations* (2014 NY Slip Op 31057 (U) [Sup Ct 2014]), the court reviewed the agency’s partial production of documents after the commencement of the proceeding as it was following the precedent of *Coleman v New York City Police Dept.* (282 AD2d 390, 392 [1st Dept 2001] [‘respondents’ laxity in addressing petitioner’s request until legal action had been commenced warrants that he be permitted to appeal the partial production of the documents’]). These cases are not analogous to the circumstances here. From the time that DFS belatedly acknowledged receipt of the FOIL Request on July 23, 2019, the department provided Petitioners with thousands of pages of records on a rolling basis from August 2019, even before the commencement of this proceeding. Thus, as this petition seeks judicial review of the DFS’s August 2019 Determination, this proceeding is now moot. For clarity, the foregoing pronouncement does not prejudice Petitioners’ ability to commence an Article 78 proceeding to challenge the subsequent determination in February 2020.”

See verified answer, exhibit B. As will be discussed, this Article 78 proceeding concerns DFS's February 2020 FOIL appeal determination, mentioned *supra*, and a separate DFS appeal determination issued in April 2020. *Id.*, Geisel affirmation, exhibits 17, 20.

Petitioners commenced this second Article 78 proceeding on June 24, 2020, and DFS filed an answer on August 28, 2020. See verified petition; verified answer. The matter is now fully submitted (motion sequence number 001).

## DISCUSSION

### I. Preliminary Considerations

As an initial matter, the court rejects DFS's argument that the current petition is barred by the doctrine of collateral estoppel. See respondent's mem of law at 20-24. Under New York law, "[t]he doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues of ultimate fact where the issues have been conclusively determined against one party in a proceeding where that party had a full and fair opportunity to litigate the issue." *Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 (1<sup>st</sup> Dept 2016), citing *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 (1985). The court's July 2, 2020 order dismissing petitioners' first Article 78 proceeding found that "[w]hile [DFS] did not strictly conform with the mandates of POL [Public Officers Law, or the FOIL] § 89 (3), [DFS has] produced the requested documents from August to December 2019, resulting in this proceeding being moot." See verified answer, exhibit B, at 6. The July 2, 2020 order also denied petitioner's request that it "review the sufficiency of disclosures made by the DFS after the commencement of this proceeding," on the ground that "the verified petition . . . [is] solely based on [DFS's] failure to comply with POL § 89 (3) (a)," but the petition contained no "allegations challenging the exemptions later invoked by the DFS which . . . were not yet determined." *Id.* By contrast, the current petition alleges that:

“Respondents have withheld certain documents and records responsive to the FOIL Request without asserting, or *erroneously asserting, an applicable exemption from disclosure*, including the records referenced in ¶¶ 51, 52, 55, 63, and 68.” See verified petition, ¶ 97 (emphasis added). Petitioner’s inclusion of this challenge to DFS’s practice of using “applicable exemptions from disclosure” to limit its document responses significantly differentiates it from the petition in the first proceeding. The current petition does not merely allege that DFS failed to comply with the deadlines set forth in POL § 89 (3). It separately claims that DFS improperly invoked certain privileges against disclosure to deny petitioner’s FOIL request with respect to some of the documents that it should have released during its “rolling” productions. The court’s July 2, 2020 order specifically left undecided the issue of whether DFS had properly invoked said privileges in its February 2020 document denial.<sup>1</sup> See verified answer, exhibit B. Because it did so, the instant petition cannot be construed to request “relitigation” of a previously determined issue. Consequently, the court rejects DFS’s collateral estoppel argument as inapposite.

As previously mentioned, DFS has continued making monthly “rolling” document productions in an ongoing effort to satisfy petitioners’ FOIL request. The current petition acknowledges that DFS included partial document productions and/or other responses in letters it sent to petitioners on February 7, 2020, February 24, 2020, March 11, 2020, April 24, 2020, May 7, 2020, June 12, 2020, and June 18, 2020. See verified petition, ¶¶ 53, 55, 57, 62-68, 70-71. DFS’s answer also includes copies of the agency’s most recent letters to petitioners, which are dated August 4, 2020, August 17, 2020 and August 26, 2020. See verified answer, exhibits 27, 29, 30 (exhibits misnumbered). The foregoing correspondence indicates that, on three occasions,

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<sup>1</sup> Indeed, the July 2, 2020 order specifically acknowledged that the court’s dismissal of the prior petition “does not prejudice Petitioners’ ability to commence an Article 78 proceeding to challenge the subsequent determination in February 2020.” See verified answer, exhibit B.

DFS determined that some of the documents it had identified for release were actually privileged against disclosure by provisions of Public Officers Law (POL) § 87 (2) (a/k/a FOIL). The three letters that set forth DFS's denial decisions were dated February 24, 2020, April 24, 2020 and July 17, 2020. *Id.*, exhibits 17, 20, 24 (exhibits misnumbered). This petition concerns only the February 24, 2020 and April 24, 2020 denial letters.<sup>2</sup> *Id.*, exhibits 17, 20 (exhibits misnumbered). The documents at issue in the February 24, 2020 letter consist of "seven non-public records that may be responsive to" items 3, 6 and/or 7 of petitioners' original document request.<sup>3</sup> *See* verified answer, Geisel affirmation; exhibit 17. The documents at issue in the April 24, 2020 letter consist of "137 pages of the [DFS] 1997-98 legislative diary." *Id.*, exhibit 20. Petitioners assert that DFS's decisions to withhold production of this material was arbitrary and capricious. *Id.*, ¶¶ 89-101.

## II. Applicable Standard of Review

The court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether the agency's determination had a rational basis in the record or

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<sup>2</sup> Although the petition discusses the parties' third document production dispute which eventually resulted in DFS's July 17, 2020 denial letter, the petition itself was filed on June 24, 2020, and avers that DFS "did not provide a date certain by which [it] expected to issue their determination with respect to the June 3, 2020 Appeal." *See* verified petition, ¶ 71. Although the July 17, 2020 denial letter constitutes a final agency determination, it was not issued until nearly a month after this proceeding was commenced. As a result, this Article 78 proceeding cannot consider that July 17, 2020 denial letter. Petitioners could have commenced yet another Article 78 proceeding to challenge it; however, it appears that their time do so may have expired. CPLR 217.

<sup>3</sup> Petitioners original June 12, 2019 FOIL letter requested that DFS produce 10 categories of documents. *See* verified answer, exhibit 1 (exhibits misnumbered). Petitioners subsequently sent DFS two more letters, dated August 9, 2019 and August 11, 2019 respectively, which amended their FOIL request by increasing its time-frame and broadening several of the categories of documents. *Id.*, exhibits 8, 9 (exhibits misnumbered). For the purposes of this decision, it is not necessary to list all of the categories of documents that petitioners currently seek in their FOIL request.

was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1<sup>st</sup> Dept 1996). A determination will only be found arbitrary and capricious if it is “without sound basis in reason, and in disregard of the . . . facts . . .” *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell*, 34 NY2d at 231. However, if there is a rational basis for the determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. Further, “[w]hen reviewing the denial of a FOIL request, a court . . . is to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure.” *Matter of Rauh v de Blasio*, 161 AD3d 120, 125 (1<sup>st</sup> Dept 2018), quoting *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 (1<sup>st</sup> Dept 2010).

As previously mentioned, this decision concerns DFS’s February 24, 2020 and April 24, 2020 FOIL denial letters. *See* verified answer, Geisel affirmation; exhibits 16, 20. The privileges against disclosure that DFS cited in those letters are listed in POL § 87 (2), the relevant portions of which provide as follows:

“2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

“(a). are specifically exempted from disclosure by state or federal statute; [or]

\* \* \*

“(g). 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; . . .”

POL § 87 (2) (a) & (g). The exemption from disclosure set forth in POL § 87 (2) (a) has been held to apply to privileged communications between attorneys and their clients and to attorney work product. *See Matter of Gilbert v Office of the Governor of the State of N.Y.*, 170 AD3d 1404, 1405 (3d Dept 2019), citing *Matter of Shooters Comm. on Political Educ., Inc. v Cuomo*, 147 AD3d 1244, 1245 (3d Dept 2017).

### III. The February 24, 2020 Denial Letter

DFS issued the February 24, 2020 denial letter in response to: 1) petitioners' August 9, 2019 and August 11, 2019 letters amending their FOIL request to seek new categories of documents; 2) a letter dated January 27, 2020 in which DFS's "records access officer" (RAO) asserted that she had discovered "seven non-public records that may be responsive" to the amended FOIL request, but which she deemed to be exempt from disclosure; and 3) petitioners' February 7, 2020 request for an administrative appeal of the RAO's letter. *See* verified answer, Geisel affirmation; exhibits 8, 9, 15, 16. DFS's February 24, 2020 denial letter upheld the portion of the RAO's January 27, 2020 determination that found that the subject "seven non-public documents" were privileged against disclosure by the "intra- or inter- agency" exemption set forth in POL § 87 (2) (g). *Id.*, exhibit 16.

The Court of Appeals recognizes 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." *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 488 (2005), citing *Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 132 (1985). The proponent of the exemption must demonstrate that: 1) the material in question is "intra-agency material;" i.e., documents which only agency employees participated in creating; and 2) none of the four exclusions described in POL § 87 (2) (g) (i)-(iv) applies.

*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d at 487. DFS asserts that the February 24, 2020 letter met these requirements. *See* respondent’s mem of law at 26-27. Upon review, the court agrees. In the February 24, 2020 letter, the RAO found that each of the “seven non-public documents” at issue “contain opinions, recommendations, evaluations, and other subjective commentary by a [DFS] employee, and do not contain information that falls within any of the four exceptions to non-disclosure under [POL] § 87 (2) (g).” The court finds that the RAO’s letter provided a rational basis for DFS’s ensuing February 24, 2020 decision to uphold the agency’s reliance of the “intra-agency exemption,” because it set forth all of the prerequisites contained in POL § 87 (2) (g).

Petitioners nevertheless contend that DFS’s argument is deficient because the agency has failed to establish that the so-called “deliberative process exemption” applies to the subject “seven non-public documents.” *See* petitioners’ mem of law at 13-17. However, it is petitioners’ argument that is legally deficient, since POL § 87 (2) (g) does not contain a “deliberative process exemption.” The Court of Appeals explained in *Matter of New York Times Co. v City of N.Y. Fire Dept.* that it had first used the term “deliberative process” in its earlier decision in *Matter of Gould v New York City Police Dept.* (89 NY2d 267 [1996]), but that “we used those words in *Gould* simply to define the scope of the ‘factual data’ exclusion from the intra-agency exception,” and not to specify a new class of exemption. 4 NY3d at 488. Instead, the Court clarified that “we spoke of ‘objective information, in contrast to’ exchanges that were part of ‘the consultative or deliberative process,’” and ruled that “*Gould* does not hold . . . that the intra-agency exception shields from disclosure only formal, lengthy or profound policy discussions.” 4 NY3d at 488. Here, petitioners appear to have made the same mistake as the petitioners did in *Matter of New York Times Co.* by misinterpreting the plain language of POL §

87 (2) (g) (i) to contain additional requirements that the statute does not impose. In its February 24, 2020 denial, DFS noted that the January 27, 2020 RAO's letter recited that the "seven non-public documents" did not contain "statistical or factual tabulations or data" that would place them outside the protection of the intra-agency exemption. *See* verified answer, Geisel affirmation; exhibits 15, 16. This recitation afforded DFS a rational basis to uphold the exemption, and petitioners' out-of-context "deliberative process" argument does not explain how it was unreasonable for DFS to rely on said recitation. Therefore, the court rejects petitioners' argument. Petitioners raise no other legal objection to the February 24, 2020 denial letter. Accordingly, the court concludes that petitioners have failed to demonstrate that the FOIL denial contained in that letter was arbitrary and capricious. Consequently, the court finds that so much of the instant petition as seeks to overturn DFS's February 24, 2020 FOIL denial should be dismissed.

#### IV. The April 24, 2020 Denial Letter

DFS issued the April 24, 2020 denial letter in the wake of: 1) petitioners' August 9, 2019 and August 11, 2019 letters amending their FOIL request to seek new categories of documents; 2) a March 11, 2020 letter from an RAO who had reviewed 137 pages of DFS's 1997-98 legislative diary in response to petitioners' amended FOIL request, but had determined that the material in it was exempt from disclosure; and 3) petitioners' April 10, 2020 request for an administrative appeal of the RAO's March 11, 2020 determination. *See* verified answer, Geisel affirmation; exhibits 8, 9, 19, 20. DFS's April 24, 2020 denial letter upheld the RAO's March 11, 2020 finding that the 137 specified pages of its 1997-98 legislative diary were privileged against disclosure pursuant to both the "attorney/client confidentiality" exemption recognized by

POL § 87 (2) (a), and by the “intra-agency exemption” contained in POL § 87 (2) (g). *Id.*, exhibit 20.

As previously noted, POL § 87 (2) (a) has been interpreted to recognize a disclosure exemption that applies to privileged communications between attorneys and clients and to attorney work product. *See Matter of Gilbert v Office of the Governor of the State of N.Y.*, 170 AD3d at 1405. Here, the RAO’s March 11, 2020 letter recited that the 137 specified pages of DFS’s 1997-98 legislative diary “consist of communications between [DFS’s] counsel and [DFS] for the purpose of providing legal advice and opinion to [DFS].” *See* verified answer, Geisel affirmation; exhibit 19. The court finds that this recitation provided a rational basis for DFS’s subsequent April 24, 2020 decision to uphold the agency’s reliance on the “attorney/client communications” exemption to justify denying petitioners’ FOIL request for those 137 pages.

It is clear that POL § 87 (2) (a) protects the sorts of attorney/client communications described in the RAO’s March 11, 2020 letter. Petitioners nevertheless argue that DFS “merely assert[s] that such documents are privileged simply because they are legal in nature or were prepared by an attorney, but fail to adequately describe how such documents fall within the scope of the attorney-client privilege.” *See* petitioners’ mem of law at 17-18. However, petitioners do not explain why it is incumbent on DFS to provide such a detailed explanation in order to assert the privilege. It is not, and petitioners cite no case law to support their position. The court rejects petitioners’ argument as legally unsupported semantics. Accordingly, the court concludes that petitioners have failed to demonstrate that the FOIL denial contained in DFS’s

April 24, 2020 letter was arbitrary and capricious.<sup>4</sup> Consequently, the court finds that so much of the petition as seeks to overturn DFS's April 24, 2020 FOIL denial should be dismissed.

#### V. Closing Considerations

As a final matter, the court rejects so much of the petition as alleges that DFS violated the provisions of POL §§ 87 (5) and/or 89 (4) by not making timely productions and/or producing documents in the form or medium chosen by petitioners. *See* verified petition, ¶¶ 78-79. DFS notes that petitioners never raised these matters before the agency. *See* respondent's mem of law at 22-24. Petitioners' response that they did raise them with DFS is belied by the evidence. *See* petitioners' reply mem at 5-7. Neither the February 24 letter, the April 24 letter, nor any of the correspondence that preceded those letters contains any mention of POL §§ 87 (5) or 89 (4). *See* verified answer, Geisel affirmation; exhibits 24-32. As a result, petitioners failed to exhaust their administrative remedies regarding those alleged statutory violations, and they cannot assert them in this Article 78 proceeding. *See e.g., Matter of Bradhurst Site Constr. Corp. v Zoning Bd. of Appeals, Town of Mount Pleasant*, 128 AD3d 817, 818 (2d Dept 2015), citing *Matter of Kurland v McLaughlin*, 122 AD2d 947, 949 (2d Dept 1986).

The court likewise rejects so much of the petition as seeks an award of attorney's fees. POL § 89 (4) (c) (i) provides that "[t]he court . . . may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has *substantially prevailed*, and when the agency failed to respond to a request or appeal within the statutory time . . ." (emphasis

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<sup>4</sup> Having ruled that DFS was justified to rely on the "attorney/client communication" disclosure exemption set forth in POL § 87 (2) (a), there is no need to also consider the portion of the April 24, 2020 denial letter that also relied on the "intra-agency disclosure exemption" set forth in POL § 87 (2) (g).

added). Here, petitioners have not “substantially prevailed” in this Article 78 proceeding since the court has rejected their privilege arguments and dismissed their petition. Consequently, there are no grounds for a discretionary award of legal fees pursuant to POL § 89 (4) (c) (i). *See e.g., Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d 435 (1<sup>st</sup> Dept 2020).

CONCLUSION

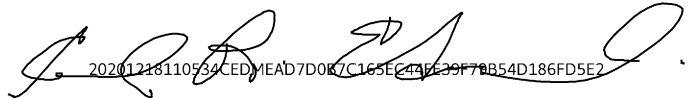
ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners AIG Specialty Insurance Company and Lexington Insurance Company (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that petitioners’ application for costs and attorney’s fees is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for respondents shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioners.



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12/18/2020  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT

APPLICATION:

CHECK IF APPROPRIATE: