

<b>Haddad v Johnson</b>
2021 NY Slip Op 30451(U)
February 17, 2021
Supreme Court, New York County
Docket Number: 162170/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM**

*Justice*

-----X

JAMES HADDAD,

Petitioner,

- v -

JAMES JOHNSON, THE NEW YORK CITY LAW  
DEPARTMENT

Respondent.

-----X

INDEX NO. 162170/2019

MOTION DATE 08/27/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 43, 45, 46, 47, 48, 49

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

Upon the foregoing documents, it is hereby ordered that the instant petition is granted in part and denied in part as and for the reasons set forth herein.

Background

Petitioner, James M. Haddad, commenced this CPLR Article 78 special proceeding on December 17, 2019, seeking to compel respondents, in effect the New York City Law Department (“the Law Department”), to disclose certain records pursuant to a Freedom of Information Law (“FOIL”) request.

On November 27, 2018, petitioner filed a FOIL request, via email, with the Law Department, requesting:

All publicly available documents and records of the government, including but not limited to: taxpayer returns and filings, audits, investigations, conciliations requests and hearings, correspondence, administrative proceedings, lawsuits, papers filed in lawsuits, determinations, statements and/or invoices, and any other records, relating to the real estate transaction concerning “Terrace Gardens,” two 98-unit, Section 8 apartment buildings located at 195 and 231 Steuben St. in Concord, Staten Island, NY. The transactions involved were in years 2008 and 2009, involving African American Parent Council and Steuben DelShah LLC.

(NYSCEF Doc. No. 2.) As stated above, the FOIL request arose out of to the “Terrace Gardens” transaction, in which there may have been fraud, in that Steuben Delshah LLC allegedly used African American Parent Council, a charity, as a front to avoid paying real property transfers taxes.

At the time the FOIL request was issued, and following an investigation of the transfers by the Department of Finance (“DOF”) and the Office of the New York City Sherriff, the Commissioner of Finance of New York City had already issued notices of determinations to Steuben DelShah, LLC and the African American Parent Council, asserting deficiencies in the real property transfer tax paid in the above-described transaction and imposing a fraud penalty on the transfer of those properties. Steuben DelShah, LLC and the African American Parent Council filed petitions with the New York City Tax Appeals Tribunal, contesting the notices of determinations; those proceedings were consolidated and remain pending before the tribunal.

By email dated December 5, 2018, the Law Department acknowledged petitioner’s FOIL request and stated that a response to the request would be forthcoming on or about March 4, 2019. By email dated February 28, 2019, the Law Department further extended its time to respond to July 10, 2019, citing the fact that the investigation into the FOIL request remained ongoing.

By letter dated July 10, 2019, respondents denied the FOIL request, asserting that the requested records are exempt from disclosure because of the law enforcement exemption (Public Officers Law (“POL”) § 87(2)(e)), privileged attorney work product and/or attorney-client communications (POL § 87(2)(a)), and the inter-agency or intra-agency materials exemption (POL § 87(2)(g)). The letter also asserts that certain of the responsive records are exempt from disclosure, as disclosure would constitute an unwarranted invasion of personal privacy (POL § 87(2)(b)). By email dated July 26, 2019, petitioner appealed the denial. On August 23, 2019, respondents denied petitioner’s appeal, asserting that all of the responsive records relate to an ongoing litigation pending before the New York City Tax Appeals Tribunal and are therefore exempt from disclosure pursuant to POL § 87(e)(2)(i) and (ii). In addition, the appeal denial asserted that certain responsive records were exempt from disclosure pursuant to POL § 87(2)(a) as privileged attorney-client communications and/or attorney work product; POL § 87(b), as disclosure of the records would constitute an unwarranted invasion of personal privacy; POL § 87(2)(g) as protected inter-agency materials; and 26 USC § 6103, the tax secrecy statute of the Internal Revenue Code, which exempts records relating to federal taxation. The appeal denial also identified specific categories of responsive documents that were withheld; that list includes:

- Petitions and answers filed in the subject litigation.
- E-mails between and among parties to the litigation and others ...
- Printouts of certain information taken from the website of the New York City [DOF].
- Documents relating to payment of the New York State real property transfer tax on the properties which are the subject of the litigation.
- Documents relating to certain entities involved in the subject litigation.
- Documents relating to federal taxation ...
- Printouts from certain websites relating to entities involved in the subject litigation.
- Documents relating to indemnification of certain entities involved in the subject litigation.
- Contracts for the sale of certain properties involved in the subject litigation.
- Documents relating to the waiver of certain rights by entities involved in the subject litigation and other entities.
- Assignments of leases and contracts by and to entities involved in the subject litigation.

- Letters between and among certain individuals and entities involved in the subject litigation as well as non-parties.
- Settlements and other agreements among certain individuals and entities involved in the subject litigation.
- Documents generated by DOF relating to certain individuals and entities involved in the subject litigation.
- Closing statements and statement of audit procedure relating to properties involved in the subject litigation.
- Deeds and titles relating to certain properties involved in the subject litigation.
- Certain documents relating to the disposition of criminal charges against certain individuals involved in the subject litigation.

(NYSCEF Doc. No. 18.)

Petitioner then commenced the instant special proceeding, seeking, inter alia, to overturn respondents' final determination. Petitioner argues that respondent's response to the FOIL request is insufficient, as the determinations fail to explain how the cited exemptions are applicable to the responsive documents [as there is no privilege log]. Petitioner further argues that many of the responsive records possessed and withheld by respondents are clearly subject to disclosure; for example, petitions and any answers filed in the pending litigation before the Tax Appeals Tribunal are open to the public pursuant to Judiciary Law § 4; documents relating to real estate transfer taxes are presumptively public, as they are recorded on ACRIS and are not subject to the tax secrecy regulation found in Administrative Code of the City of New York § 11-2115(e); pursuant to 26 USC 6104 and NYS Executive Law Article 7-a, the federal tax returns of African American Parent Council are open to public inspection as it is a charity; and lastly, deeds, public titles, contracts for sale of properties, assignment of leases etc., as these types of documents are public records subject to disclosure pursuant to FOIL § 89(2)(c)(4) and pursuant to the opinion of the Committee on Open Government, FOIL, AO-fl7009, which held that contracts of sale are subject to FOIL disclosure, especially given that one of the parties to the subject transaction, African American Parent Council, is a public charity.

#### Discussion

FOIL presumes compliance, absent enumerated exceptions. "The Freedom of Information Law requires state and municipal agencies 'to make available for public inspection and copying all records,' subject to certain exemptions." Matter of Verizon N.Y., Inc. v Mills, 60 AD3d 958, 959 (2<sup>nd</sup> Dept. 2009) (quoting POL § 87(2)). "However, the exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government." Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 (2007). "The entity claiming an exemption has the burden of showing that the requested material falls squarely within the ambit of one of the statutory exemptions." Matter of Verizon N.Y., Inc. v Bradbury, 40 AD3d 1113, 1114 (2<sup>nd</sup> Dept. 2007).

This Court finds that POL § 87(2)(e)(i) and (ii) exemptions apply to a number of the responsive documents, as these records were compiled with law enforcement investigative purposes in mind, and their disclosure would interfere with the judicial proceeding pending before the New York City Tax Appeals Tribunal (by revealing confidential investigative material and revealing

potential witnesses), and disclosure of said records has the potential of depriving the principal of Steuben DelShah LLC, Michael Shah, of an impartial adjudication before the Tax Appeals Tribunal. Furthermore, it appears that many of the responsive records would be exempt under POL §§ 87(2)(g) and 87(2)(a). Lastly, pursuant to 26 USC § 6103, the federal tax returns for Steuben DelShah, LLC and Michael Shah are exempt from disclosure.

Furthermore, respondents' assertions that disclosure of the investigatory file will interfere with an ongoing law enforcement investigation and pending Tax Appeals Tribunal proceeding is a sufficiently particularized justification for the denial of access to those responsive records. See Matter of Whitley v New York County Dist. Attorney's Off., 101 AD3d 455 (1<sup>st</sup> Dept. 2012) (rejecting petitioner's contention that respondents were required to set forth particularized findings about whether the FOIL exemption at issue applied to each responsive document). Additionally, pursuant to the affidavit of Michael Shah, he was under the impression that it is the long-standing practice of the Tax Appeals Tribunal to preserve the confidentiality of pleadings and evidence submitted by the parties to the proceeding. For those reasons the following specific categories of responsive documents were properly withheld: petitions and answers filed in the subject tax tribunal proceeding; emails and/or letters between and among the parties to the tax tribunal proceeding; documents relating to certain entities involved in the tax tribunal proceeding; documents relating to indemnification of certain entities involved in the tax tribunal proceeding; documents relating to the waiver of certain rights by entities involved in the tax tribunal proceeding; settlements and other agreements among certain individuals and entities involved in the tax tribunal proceeding; documents generated by DOF relating to certain individuals and entities involved in the tax tribunal proceeding (to the extent that the materials are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits, and to the extent that the materials were not generated or compiled for law enforcement purposes); closing statements and statement of audit procedure relating to properties involved in the tax tribunal proceeding; and documents relating to the disposition of criminal charges against certain individuals involved in the tax tribunal proceeding (to the extent those criminal charges are unsealed and thus are publicly available).

However, it appears that a number of the responsive documents being sought, such as print outs from public websites such as the DOF website or ACRIS, could be obtained by simple public inspection. Because these responsive records are easily available to the public at large, respondents are required to produce them to petitioner with whatever redactions are required pursuant to POL § 87(b). Additionally, pursuant to the Administrative Code of the City of New York § 11-2115(e), real estate transfer tax returns and related reports and records, as well as contracts of sale, are not exempt from disclosure. See the opinion of the Committee on Open Government, FOIL, AO-f17009. Pursuant to POL § 89(2)(c)(iv), responsive records that "relate[s] to the right, title or interest in real property, or relate[s] to the inventory, status or characteristics of real property" are also not exempt from disclosure on the basis that disclosure will be an unwarranted invasion of personal property so long as disclosure of electronic contact information collected from a taxpayer under Real Property Tax Law § 104 is not provided. Thus, deeds, titles, and assignments of leases by and to entities involved in the pending Tax Appeals Tribunal proceeding and that involve the properties in the pending Tax Appeals Tribunal proceeding are not exempt from disclosure. Pursuant to 26 USC 6104 and New York

State Executive Law Article 7-a, the federal tax returns for the now-defunct charity African American Parent Council are also not exempt from disclosure.

Furthermore, pursuant to Tax Law § 1146, any decisions from the Department of Taxation and Finance and the Department of Tax Appeals concerning the above-mentioned transaction are public records that must be disclosed. See Tax Law § 1146 (“The tax commission may, nevertheless, publish a copy or a summary of any decision rendered after a hearing required by this article.”) These responsive records that must be disclosed include: printouts of certain information taken from DOF’s website; documents relating to the payment of New York State real property transfer tax (this Court notes that respondents have agreed to disclose to petitioner the two real property transfer tax returns at issue in the pending Tax Appeals Tribunal proceeding); printouts from certain websites relating to entities involved in the Tax Appeals Tribunal proceeding; contracts of sale of certain properties involved in the Tax Appeals Tribunal proceeding; deeds and titles relating to the properties involved in Tax Appeals Tribunal proceeding; documents relating to federal taxation concerning the African American Parent Council; and any decisions from the Department of Taxation and Finance and the Department of Tax Appeals concerning the above-mentioned transaction.

This Court declines to grant petitioner reasonable attorney’s fees, as petitioner has not “substantially prevailed” in this proceeding. See POL § 89(4)(c).

The Court has considered petitioner’s and respondents’ remaining arguments and finds them unavailing and/or non-dispositive.

### Conclusion

Thus, for the reasons set forth herein, Respondents are hereby ordered to turn over the following categories of documents: print outs from public websites such as the DOF website or ACRIS; deeds or any other documents relating to the title of the subject real property; documents relating to the payment of the New York State real property transfer tax; the contracts of sale; documents relating to the right, title or interest in the subject real property or that relates to the inventory, status or characteristics of the subject real property; the federal tax return concerning the African American Parent Council; and any decisions from the Department of Taxation and Finance and the Department of Tax Appeals concerning the subject transaction.

Respondents do not have to turn over the following categories of documents: petitions and answers filed in the subject tax tribunal proceeding; emails and/or letters between and among the parties to the tax tribunal proceeding; documents relating to Steuben DelShah, LLC and the African American Parent Council; documents relating to indemnification of Steuben DelShah, LLC and the African American Parent Council ; documents relating to the waiver of certain rights by Steuben DelShah, LLC and the African American Parent Council; settlements and other agreements among Steuben DelShah, LLC, the African American Parent Council, and entities involved in the tax tribunal proceeding; documents generated by DOF relating to Steuben DelShah, LLC and the African American Parent Council (to the extent that the materials are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits, and to the extent that the materials were not generated or compiled for law enforcement purposes); closing statements and statement of audit procedure relating to properties involved in the tax tribunal proceeding; and documents relating to the

disposition of criminal charges against certain individuals involved in the tax tribunal proceeding (to the extent those criminal charges are unsealed and thus are publicly available).

The clerk is hereby directed to enter judgment as indicated in this Conclusion.

The parties are encouraged to contact the Court if clarification of any of the above is needed or if any disputes arise. To the extent possible, this Court shall retain jurisdiction of this matter for these purposes, although this decision is "final" and the case is "disposed."



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2/17/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE