

Matter of Russell v Town of Mt. Pleasant, N.Y.
2022 NY Slip Op 35062(U)
September 20, 2022
Supreme Court, Westchester County
Docket Number: Index No. 60405/2022
Judge: Robert A. Neary
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

FILED
AND
ENTERED
ON 9-20 - 2022
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X Index No. 60405/2022
In the Matter of JAMES C. RUSSELL,

Petitioner,

- against -

DECISION AND ORDER
Motion Seq. No. 1

THE TOWN OF MOUNT PLEASANT, NEWYORK

Respondent,

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

-----X
NEARY, J.

The Petitioner commenced this proceeding pursuant to CPLR Article 78 seeking an order: (a) declaring that, under FOIL, the Petitioner is entitled to receive from the Respondent the records that he sought in his FOIL request; (b) directing the Respondent to immediately provide the Petitioner with “all names and email addresses of those residents of the Town of Mount Pleasant who have subscribed to the Town’s E-news alerts, news, or announcements” in Excel spreadsheet or comma-separated value (CSV) format; and (c) awarding the Petitioner litigation costs pursuant to Public Officer’s Law §89(4)(c).

The Respondent opposes the Petition in all respects.

*In the Matter of James C. Russell v.
The Town of Mount Pleasant, New York
Index No. 60405/2022*

The Court has reviewed the following papers submitted by the parties:

Petitioner's Notice of Petition, Verified Petition with Exhibits lettered

A through I, and Affidavit of Service

Respondent's Verified Answer, Affirmation in Support with Exhibit A,

Revised Affidavit of Jams Canepa, Revised Affidavit of Carl Fulgenzi,

Memorandum of Law with Exhibit A

Petitioner's Affidavit in Reply.

The Freedom of Information Law was enacted "to promote open government and public accountability," and "imposes a broad duty on government to make its records available to the public." [See *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 274, 675 NE2d 808, 653 NYS2d 54 (1996); see Public Officers Law §84; *Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 656-657, 967 NE2d 652, 944 NYS2d 429 (2012); *Matter of Livson v. Town of Greenburgh*, 141 AD3d 658]. "The statutorily stated policy behind FOIL is to provide '[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations'." [See *Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 NY2d 557, 564, 463 NE2d 604, 475 NYS2d 263 (1984)]. Records held by third parties on behalf of a government agency are "records" which are presumptively subject to disclosure pursuant to FOIL. (See *Mater of Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 417, 663 NE2d 302, 639 NYS2d 990 [1995])

*In the Matter of James C. Russell v.
The Town of Mount Pleasant, New York
Index No. 60405/2022*

; a government agency's lack of physical possession of such records is immaterial. [See *id.* at 418].

In a proceeding pursuant to CPLR Article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that an exemption applies to the FOIL request. [See *Matter of Porco v. Fleischer*, 100 AD3d 639, 640, 953 NYS2d 282 (2012)]. The exemptions from disclosure are to be "narrowly construed" so as to ensure maximum public access to government documents (see *Matter of Gould v. New York City Police Dept.*, 89 NY2d at 275; see *Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation*, 18 NY3d at 657), and in order to satisfy its burden, the agency must demonstrate that the requested material "fall[s] squarely within a FOIL exemption." [See *Matter of Markowitz v. Serio*, 11 NY3d 43, 50, 893 NE2d 110, 862 NYS2d 833 (2008), quoting *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 462-463, 880 NE2d 10, 849 NYS2d 489 (2007); see Public Officers Law §89(4)(b); *Matter of Gould v. New York City Police Dept.*, 89 NY2d at 275].

"[T]he agency does not have carte blanche to withhold any information it pleases," and it must "articulate particularized and specific justification" for the nondisclosure at issue. [See *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571, 393 NE2d 463, 419 NYS2d 467 (1979); see *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 NY3d 882, 885, 921 NE2d 592, 893 NYS2d 825 (2009); *Matter of New York Civ. Liberties Union v. City of Schenectady*, 2 NY3d 657, 661, 814 NE2d 437, 781 NYS2d 267 (2004)].

Pursuant to Public Officers Law §87(2)(b), an agency "may deny access to records" where disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of [Public Officers Law §89(2)(b)]." "[W]here none of the [enumerated

*In the Matter of James C. Russell v.
The Town of Mount Pleasant, New York
Index No. 60405/2022*

exemptions under Public Officers Law §89(2)(b) are] applicable, a court ‘must decide whether any invasion of privacy . . . is “unwarranted” by balancing the privacy interests at stake against the public interest in disclosure of the information.’” [See *Matter of Harbatkin v. New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380, 971 NE2d 350, 948 NYS2d 220 (2012), quoting *Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 NY3d 477, 485, 829 NE2d 266, 796 NYS2d 302 (2005)].

In the present case, the Town did not sufficiently demonstrate the applicability of any enumerated exemptions under Public Officers Law §89(2)(b), nor did it show that the privacy interests at stake outweigh the public interest in disclosure of the information. [See Public Officers Law §87(2)(b); *Matter of Harbatkin v. New York City Dept. of Records & Infor. Servs.*, 19 NY3d at 380; *Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 NY3d at 485; *Matter of Sell v. New York City Dept. of Educ.*, 135 AD3d 594, 595, 24 NYS3d 41 (2016)]. “Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed. [See *Matter of Dilworth v. Westchester County Dept. of Corrections*, 93 AD3d 722, 724, 940 NYS2d 146 (2012); see *Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 NY2d at 567].

The Petitioner seeks email addresses of individuals who have willingly divulged that information to the Town so that they may receive news and information, in electronic form, on matters of public concern in the Town. The Respondent did not demonstrate how any privacy interests would be at stake in the disclosure of the records. The Respondent’s conclusion that disclosure of the requested email addresses could render the subscribers more vulnerable to spamming, and other email scams is speculative. Email addresses by their very nature cannot be

*In the Matter of James C. Russell v.
The Town of Mount Pleasant, New York
Index No. 60405/2022*

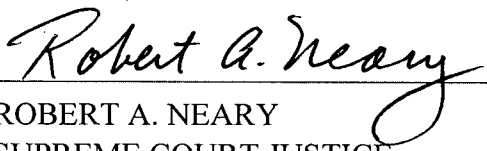
viewed as confidential. The Respondent failed to show that disclosure of the information would make the subscribers more susceptible to such acts than they ordinarily would be.

Therefore, as the Petitioner has demonstrated his entitlement to the relief requested and as the Respondent has failed to sufficiently articulate a particularized and specific justification for not disclosing the requested documents, the Petition is granted. The Respondent is directed to disclosure, in electronic form the names and email addresses sought by the Petitioner upon condition that the Petitioner shall not reproduce, redistribute or circulate the information for solicitation, fund raising or any commercial purpose. [See Public Officers Law §89(2)(b)].

The Court declines to award litigation costs pursuant to Public Officers Law §89(4)(c) as the Court finds that the Respondent acted in good faith and upon a reasonable belief that the information fell within the ambit of an exemption to the statute. [See Public Officers Law §89(4)(c)(i)(ii).

The foregoing constitutes the opinion, decision and order of the Court.

Dated: White Plains, New York
September 20, 2022


ROBERT A. NEARY
SUPREME COURT JUSTICE

James C. Russell
Pro Se Petitioner
288 Sherman Avenue
Hawthorne, New York 10532
Jrussell3@fordham.edu

*In the Matter of James C. Russell v.
The Town of Mount Pleasant, New York*
Index No. 60405/2022

John J. Kolesar, III, Esq.
Darius Pl Chafizadeh, Esq.
Harris Beach PLL
Attorneys for Respondent
445 Hamilton Avenue, Suite 1206
White Plains, New York 10601
jkolesar@harrisbeach.com
dchafizadeh@harrisbeach.com