**Matter of Pegram v Port Auth. of N.Y. & N.J.**

2025 NY Slip Op 32688(U)

July 31, 2025

Supreme Court, New York County

Docket Number: Index No. 156106/2024

Judge: John J. Kelley

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

**PRESENT:** **HON. JOHN J. KELLEY** **PART** **56M**

***Justice***

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In the Matter of

JOHN B. PEGRAM,

Petitioner,

- v -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

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**INDEX NO.** 156106/2024

**MOTION DATE** 07/31/2024

**MOTION SEQ. NO.** 001

**DECISION, ORDER, AND FINAL JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

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

In this CPLR article 78 proceeding, the petitioner, John B. Pegram, seeks judicial review of a May 1, 2024 Port Authority of New York and New Jersey (Port Authority) records access appeal officer's (RAAO's) determination denying his administrative appeal from a March 26, 2024 Port Authority records access officer's (RAO's) determination, made upon reconsideration, that denied, in part, his November 7, 2023 requests for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq*.; hereinafter FOIL). The Port Authority answers the petition, opposes the petitioner's request for relief, and files the administrative record. The petition is granted in its entirety, and, on or before September 2, 2025, the Port Authority shall produce, without redaction, all of the records requested by the petitioner with respect to which it claimed a statutory exemption from disclosure.

In his November 7, 2023 request, the petitioner sought production of a copy of each request for proposal (RFP) issued by the Port Authority from 2017 until November 7, 2023 that had been addressed to consultants to who wished to bid on a contract to conduct a "Tier II" Environmental Impact Study pursuant to the State Environmental Quality Review Act (*see*

Environmental Conservation Law §§ 8-0101-8-0117, *et seq.*) in connection with the proposed Cross Harbor Freight Movement Project (the project) that the Port Authority had and has under consideration. In addition, the petitioner sought copies of RFPs addressed to engineering and consulting firms that wished to participate in complementary advanced planning and engineering work for the project (PRA #202312913). He further requested production of a copy of each contract or agreement entered into by the Port Authority with third-party consultants, from 2017 until November 7, 2023, pursuant to which the consultants agreed to undertake or contribute to the environmental impact study and/or to participate in complementary advanced planning and engineering work for the project (PRA #202312914). In addition, the petitioner requested production of a copy of each written report received by the Port Authority since January 1, 2022 from consultants in connection with the Tier II Environmental Impact Study and/or complementary advanced planning and engineering work for the project (PRA #202312915). Finally, the petitioner also sought production of a copy of each written report, since January 1, 2022, that had been generated either by the Port Authority or its consultants and delivered to the United States Department of Transportation, including, but not limited to, its Federal Highway Administration, in connection with that environmental impact study and complementary advanced planning and engineering work for the project (PRA #202312916).

In a notice dated November 30, 2023, the Port Authority informed the petitioner that it had received his requests, and that he should expect a full response on or before January 9, 2024. Inasmuch as the Port Authority did not provide any responses to the petitioner's request by that date, the petitioner deemed the Port Authority's failure in this regard to constitute a constructive denial of his request. Hence, on January 10, 2024, the petitioner administratively appealed the constructive denial to the Port Authority's RAAO. In a determination dated January 25, 2024, the RAAO granted the petitioner's administrative appeal, directed all divisions of the Port Authority to conduct a thorough search for records responsive to the petitioner's

request, and asserted that the responsive records would be produced within 30 days of that determination. The Port Authority did not meet that deadline.

Rather, in a March 26, 2024 response to the request, the Port Authority's RAO provided the petitioner with a 40-page document constituting the RFPs in connection with the aforementioned work, and an 86-page document consisting of a January 26, 2018 contract for that work, entered into between the Port Authority and Cross Harbor Partners, which is a joint venture between engineering and consulting firms STV Incorporated (STV) and AKRF, along with heavily redacted technical schedules describing elements of the precise nature of the work that was anticipated to be performed on the project, and the anticipated costs thereof. With respect to the redactions, the Port Authority's RAO invoked "[e]xemptions . . . for personal privacy, confidential commercial information, and information which could cause substantial competitive injury to a business enterprise, if disclosed." He further stated that "a diligent search was conducted for other records responsive to these requests, but no such responsive records were located."

On April 11, 2024, the petitioner administratively appealed so much of the RAO's March 26, 2024 determination as had redacted significant portions of the subject contract and supporting technical schedules, arguing that the RAO's response was late, and was incomplete in any event, inasmuch as the RAO produced only one responsive, redacted document. He further contended that the response failed to provide the "particularized and specific justification" for the asserted exemptions, as required by Public Officers Law § 87(2), and failed to identify any withheld documents. More specifically, the petitioner contended that the response failed to show that a "personal privacy" exemption was applicable, and challenged the applicability of the exemption from disclosure for "confidential commercial information, and information which could cause substantial competitive injury to a business enterprise, if disclosed" (*see* Public Officers Law § 87[2][d]). Importantly, the petitioner argued that the documents that the RAO ultimately did produce were heavily and inappropriately redacted.

In a May 1, 2024 determination, the RAAO denied the petitioner's second administrative appeal, except to the extent that he produced a copy of the RFP issued by the Port Authority in 2017 that solicited consultant services for preparing the environmental impact statement required by the project. In that determination, the RAAO expressly asserted that there were no additional documents responsive to the petitioner's request that were being withheld. With respect to the Port Authority's invocation of the "personal privacy" exemption, the RAAO noted that the only information redacted on that ground was the petitioner's own contact information. The RAAO further concluded that most of the material that was, in fact, redacted from the responsive consulting agreement was deemed exempt from disclosure on the basis that such material was "submitted to an agency by a commercial enterprise . . . and which if disclosed would cause substantial injury to the competitive position of the subject enterprise" within the meaning of Public Officers Law §87(2)(d), and was "information which, if disclosed, would give an advantage to competitors or bidders" within the meaning of N.J.S.A. 47:1A-1.1. The RAAO rejected the petitioner's argument that the records could only be withheld on those grounds if the vendor submitting the proposal or signed a contract initially requested them to remain confidential. Rather, he asserted that,

> "counsel for STV submitted correspondence objecting to the disclosure of portions of the responsive material providing information as key financial and commercial terms in the agreement, including matters like the consulting fee that STV and its subcontractors would be paid, overhead percentages for STV and subcontractors, certain detailed information about the types and volume of services that STV was proposing to provide, and the hourly fees and proposed number of hours to be worked by each individual STV employee who was proposed to work on the contract."

This proceeding ensued.

In an interim order dated December 24, 2024, this court granted the petition to the extent of directing the Port Authority to provide the court with unredacted copies of all records responsive to the petitioner's request for in camera review, a copy of the redacted versions of

the records, and a privilege log. The Port Authority complied with that directive, the court has now reviewed the records and proposed redactions, and grants the petition.

"All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records" (*Matter of Hanig v State of New York Dept. of Motor Vehs.*, 79 NY2d 106, 108 [1992] [citations omitted]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (Public Officers Law § 89[4][b])" (*id.*; *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]; *Matter of Newsday v Empire State Dev. Corp.*, 98 NY2d 359, 362 [2002]; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). "[T]o invoke one of the exemptions of section § 87 (2), the agency must articulate particularized and specific justification for not disclosing requested documents" (*Matter of Gould v New York City Police Dept.*, 89 NY2d at 275). Moreover, "an agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information" (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v Mills*, 18 NY3d 42, 45 [2011]).

"While the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential" (*Matter of Fink v Lefkowitz*, 47 NY2d at 571). When denying a FOIL request, a state or municipal agency must "state, in writing, the reason for the denial of access" (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 884 [2009]). If the requesting party administratively appeals the denial, the agency's appeals officer must also provide written reasoning for upholding the denial (*see id.*).

> "[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 [3rd Dept. 1985], *affd* 67 NY2d 562 [1986]; *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 a FOIL request, 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). In other words, the court may only review an agency's FOIL determination to ascertain whether the determination to invoke a particular statutory exemption was affected by an error of law (*see Matter of Abdur-Rashid v New York City Police Dept*., 31 NY3d 217, 246 & n 2 [2018], *affg* 140 AD3d 419, 420-421 [1st Dept 2016]; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 531 [1st Dept 2015]; CPLR 7803[3]).

In support of his petition, Pegram argued that Paragraph 19 of the consulting agreement (Paragraph 19) and Part N of the RFP (Part N) together established that STV waived its right to assert a statutory exemption from disclosure. In opposition, the Port Authority asserted that this issue did not matter, as any statutory exemptions applied regardless of ownership of the subject records or the waiver by the private entity that had supplied those records to the public agency. The court finds contention unavailing. First, the Port Authority gave STV notice that the information that STV had submitted would not be confidential. Indeed, Paragraph 19 expressly states that any information connected with the services performed is "not given in confidence," and that the Port Authority "will have the right to use or permit the use of them . . . for any purpose and at any time without compensation other than that specifically provided herein." Further, under Paragraph 19, the Port Authority is under no obligation to protect the

confidentiality of this information, and STV has no property interest in the information. Second, Part N put STV on notice that if it had any

> "specific exceptions, such exceptions should be set forth in a separate letter included with its response to the RFP. The [Port] Authority is under no obligation to entertain or accept any such specific exceptions. *Exceptions raised at a time subsequent to proposal submission will not be accepted*."

(emphasis added). Together, Paragraph 19 and Part N established that STV knew that it would be waiving an interest in exemption from disclosure, that it had an opportunity to request an exception, and that it did not timely request an exception. Thus, the court finds no factual or legal basis to support the Port Authority's contention, and the court concludes that STV waived its right to any statutory exemption from disclosure.

In light of the court's determination with respect to waiver, it need not address the petitioner's contention that the Public Officers Law § 87(2)(d) exemption does not apply in any event. Were the court to address that issue, it would be constrained to agree with petitioner and conclude that the redactions are not entitled to exemption from disclosure even if STV timely requested that the subject records be exempted from disclosure pursuant to FOIL.

The court rejects the Port Authority's argument that Public Officers Law § 87(2)(d) exempted the requested information from disclosure. Agency records are exempt from disclosure if they contain trade secrets (*see* Public Officers Law § 87[2][d]). Although the term "trade secrets" is not defined by FOIL or elsewhere in New York statutory law, § 757 of the Restatement (First) of Torts (hereinafter § 757) provides guidance in determining whether information is classified as a trade secret (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]; *Matter of Rayner v New York State Dept. of Corr. & Community Supervision,* 81 Misc 3d 281, 286-287 [Sup Ct, Albany County 2023]). Under § 757, a trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives the business an opportunity to obtain an advantage over competitors who do not know or use it.

Section 757 provides a non-exhaustive list of factors to consider in classifying information as a trade secret, including,

> "(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others"

(Restatement [First] of Torts § 757 [1939]). If an individual company discloses its trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished (*see Ruckelshaus v Monsanto Co.*, 467 US 986, 1002 [1984]). Nonetheless, even records that do not qualify for trade secret protection are exempt if submitted to the agency by a commercial enterprise, and disclosure would cause substantial injury to the competitive position of the subject enterprise (Public Officers Law § 87[2][d]). There is no explicit definition of "substantial competitive injury" in FOIL. However, FOIL's federal counterpart, the Freedom of Information Act (FOIA), provides that "substantial competitive harm exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means" (*Encore Coll. Bookstores v Auxiliary Serv. Corp.*, 87 NY2d 410, 420 [1995]). Where the material or information is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the commercial enterprise that submitted it to a public agency (*see id.*).

The petitioner argued, among other things, that the information that he requested was not confidential, as Paragraph 19 removed STV's interest in the information. The Port Authority argued that it provided all records responsive to his requests, with redactions limited only to trade secrets, asserting that information relating to, inter alia, STV's rate information, compensation figures, amounts to be paid to STV, overhead rates, the fixed fee, other direct costs, individual rates and estimated hours of employees, cost assumptions, labor cost

worksheets, and staffing analysis were trade secrets. The court finds this argument unpersuasive. That information is public information, as it relates to the amounts that the Port Authority, as a public entity, was obligated to pay from public monies under the relevant publicly bid contract. The court notes that, although FOIL includes an exemption from disclosure for records which, "if disclosed would impair present or imminent contract awards or collective bargaining negotiations" (Public Officers Law § 87[2][c]), the Port Authority did not and, in fact, cannot, invoke this exemption because STV's contract is not in the bidding phase, but had been executed and performed. In any event, although State Finance Law § 163 former (9)(c) had also prohibited the disclosure of pending bids to prevent competitive disadvantage to the bidder, that provision was repealed by L. 2008, ch. 137, § 3, effective August 30, 2008, so that even *open bids* for contracts with public agencies may be disclosed, subject to the requirement of Public Officers Law § 87(2)(c) that disclosure not "impair" the bidding process. A fortiori, after a bid is accepted by a public agency, the resulting contract, which necessarily memorializes the granular terms of the bid, is presumptively subject to disclosure pursuant to FOIL. Even before 2008, in the context of FOIL, "'[o]nce the contract was awarded, the terms of [the successful bidder's response to the request for proposals] could no longer be competitively sensitive'" (*Matter of Laborers' Intl. Union of N. Am., Local Union No. 17 v New York State Dept. of Transp.*, 280 AD2d 66, 70 [3d Dept 2001] [parenthetical in original], quoting *Matter of Cross-Sound Ferry Servs. V Department of Transp.*, 219 AD2d 346, 349 [3d Dept 1995]). Moreover, as explained above, under Paragraph 19, the Port Authority is under no obligation to protect the confidentiality of this information, and STV has no property interest in the information. Hence, the Port Authority failed to meet its burden in establishing the requested disclosures fall within the ambit of FOIL's trade secret or competitive disadvantage exemptions from disclosure.

Alternatively, the petitioner argued that the RAAO's decision to redact that information was invalid and should be reversed for the failure to articulate particularized and specific justifications for the redactions. He further contended that the Port Authority failed to meet its

burden in establishing that STV would suffer substantial injury, inasmuch as the requested records, and the information contained therein, were neither the property of STV nor confidential. In opposition, the Port Authority argued that the issue of ownership was not relevant to the determination of whether STV would suffer substantial injury if the requested information were disclosed. Further, the Port Authority asserted that STV could suffer substantial injury if disclosures of the amount of time dedicated to the project by STV personnel are permitted, because it would reveal STV's approach to staffing the project, including the areas which STV considers priority and allocates more resources. In addition, the Port Authority argued that disclosing the requested information would provide an unfair insight into STV's strategic thinking into staffing projects and allocating resources. The court concludes that these contentions are unavailing (*see Matter of Bahnken v New York City Fire Dept.,*17 AD3d 228, 230 [1st Dept 2005] [FDNY's contention that disclosure of contracts that it had entered into with ambulance service companies operating in the 911 system and several designated private hospitals and their affiliates would affect those parties' "ability to contract for identical services" was "speculative and unsupported by any evidentiary documentation"]; *Matter of Laborers' Intl. Union of N. Am., Local Union No. 17 v New York State Dept. of Transp.*, 280 AD2d at 70). While the RAAO did give particularized and specific justifications for the redactions, STV is not at threat of substantial competitive injury if the requested disclosure is granted, and that any contention to the contrary is speculative and unsupported. First, STV has already been awarded the project and, therefore, is not at risk of harm in connection with the project. Secondly, even the likelihood of substantial future harm is nonexistent. The tasks that STV was contractually obligated to perform, and the costs and payments in connection with those tasks have, in fact, already been undertaken by STV, its employees, and its subcontractors. The work has been completed, and STV and all relevant parties have been paid from public funds. Withholding of the requested records would be tantamount to telling the public that it is not

entitled know how the Port Authority already has spent public money, and for what tasks and expenses that money was disbursed.

Moreover, in entering into the subject contract, STV apparently felt no risk that it would suffer substantial injury, as it allowed the Port Authority full control over the information. Indeed, had Port Authority willingly provided the unredacted copies to the petitioner, STV would have no recourse for objection. Hence, the court concludes that STV would not suffer substantial competitive injury from the release of the requested information, and that the Public Officers Law § 87(2)(d) exemptions are not applicable in the instant case.

Finally, the petitioner argues that STV lacks standing to object to his FOIL request as STV lacked property rights, invoking *Contr. Plumbers Co-Op. Restoration Corp. v Ameruso* (105 Misc 2d 951, 953-954 [Sup Ct, N.Y. County 1980] [holding that a successful bidder on a public contract lacked standing to *intervene* as a party when the bidder was "not a party to the petitioner's applications for disclosure or appeal and could not have been a party thereto as of right."]). This argument presents an academic issue, since STV was not a party to this proceeding in the first instance, and it has not attempted to intervene herein. The petitioner has cited, and research has revealed, no authority for the petitioner's contention that the Port Authority is legally barred from eliciting STV's opinion in formulating its own responses.

Pursuant to FOIL's fee-shifting provision, a court

> "shall 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 the court finds that the agency had no reasonable basis for denying access"

(Public Officers Law § 89[4][c][ii]). Prior to 2006, the law required that, for attorneys' fees to be awarded, the documents involved must be of clearly significant interest to the general public. Pursuant to L. 2006, ch. 492, the Legislature amended FOIL to remove that statutory requirement. An award of an attorney's fee and costs pursuant to FOIL is particularly appropriate to promote the purpose of and policy behind FOIL. Specifically, in enacting FOIL,

"the legislature declared that 'government is the public's business' and expressly found that 'a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions" (*Matter of South Shore Press, Inc. v Havemeyer*, 136 AD3d 929, 931 [2d Dept 2016]; *see New York Times Co. v City of N.Y. Off. of Mayor*, 194 AD3d 157, 166 [1st Dept 2021] ["The legislature's [2017] amendment to the fees provision, which made a fees award mandatory rather than 'precatory,' was intended to give more teeth to the public's right of access under FOIL."]). As explained by the Court of Appeals, "[o]nly after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees" (*Beechwood Restorative Care Ctr. v. Signor*, 5 NY3d 435, 441 [2005]). Where, as here, "it was the initiation of this proceeding which brought about the release of the documents" (*Matter of Powhida v City of Albany*, 147 AD2d 236, 239 [3d Dept 1989]), the petitioner is deemed to have "substantially prevailed" (s*ee Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 79 [2018]).

The court notes that FOIL's 2006 fee-shifting provision was itself enacted in order to "create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL" *(Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338 [3d Dept 2011], quoting Senate Introducer's Mem in Support, Bill Jacket, L. 2006, ch. 492, at 5). Where a contract or statute provides for the award of attorneys' fees to a prevailing party, an attorney, such as John B. Pegram, who represents himself, may recover fees for "'the professional time, knowledge and experience . . . which he would otherwise have to pay an attorney for rendering'" (*Board of Mgrs. of Foundry at Wash. Park Condominium v Foundry Dev. Co., Inc.,* 142 AD3d 1124, 1126 [2d Dept 2016], quoting *Parker 72nd Assoc. v Isaacs*, 109 Misc 2d 57, 59 [Civ Ct, N.Y. County 1980], quoting, in turn, *Kopper v Willis*, 9 Daly 460, 469 [NYC Ct Common Pleas, Gen Tm 1881]; *cf. Gray v Richardson*, 251 AD2d 268, 268 [1st Dept 1998] [pro se attorney may recover attorney's fees since applicable Delaware statute permitted such an award]).

Hence, the petition is granted, on or before September 2, 2025, the Port Authority shall, in accordance herewith, provide the petitioner with all documents responsive to requests PRA #202312913, 202312914, 202312915, and 202312916, to the extent not already produced, without redactions, and the petitioner is awarded his reasonable attorneys' fees for the professional time, knowledge, and experience that he utilized and expended.

This court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is,

ADJUDGED that the petition is granted in its entirety; and it is,

ORDERED that, on or before September 2, 2025, the respondent, Port Authority of New York and New Jersey, shall provide the petitioner, John B. Pegram, with all records responsive to the petitioner's requests identified as PRA Nos. 202312913, 202312914, 202312915, and 202312916, without redactions, to the extent not already produced; and it is further,

ORDERED that the petitioner is awarded his reasonable attorneys' fees; and it is further,

ORDERED that, on or before September 2, 2025, the petitioner shall submit to the court an affirmation of attorney's services and any supporting documentation in support of his request for an award of attorney's fees.

This constitutes the Decision, Order, and Final Judgment of the court.

**7/31/2025**
**DATE**

**JOHN J. KELLEY, J.S.C.**

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|---|---|---|---|---|---|---|---|
| **CHECK ONE:** | [X] | **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** |