

SUPREME COURT OF THE STATE OF NEW YORK

HON. JENNIFER G. SCHECTER  
J.S.C.

NEW YORK COUNTY

Index Number : 100388/2014

DONOVAN, MARGARET L.

vs

PORT AUTHORITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

PART 57

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2

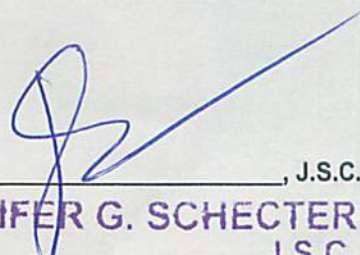
Replying Affidavits \_\_\_\_\_ No(s) 3

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the  
accompanying Decision and Judgment.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 8/30/14

  
\_\_\_\_\_, J.S.C.  
HON. JENNIFER G. SCHECTER  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

-----x  
In the Matter of the Application of  
MARGARET L. DONOVAN, THE TWIN TOWERS ALLIANCE,

DECISION AND JUDGMENT

Petitioner,

Index No. 100388/14

-against-

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY,  
KAREN E. EASTMAN, BOARD SECRETARY, DANIEL DUFFY,  
FREEDOM OF INFORMATION ADMINISTRATOR,

Respondents,

For a Judgment and Order Pursuant to Article 78  
of the New York Civil Practice Law and Rules.

-----x  
JENNIFER G. SCHECTER, J.:

Petitioner Margaret L. Donovan, The Twin Towers Alliance (Donovan) commenced this CPLR article 78 proceeding to annul the determination of The Port Authority of New York and New Jersey (Port Authority) and compel production of records (Amended Verified Petition [Pet] at 5). The petition is granted.

#### Background

On August 5, 2011, pursuant to the Port Authority's Freedom of Information Policy and Procedure, Donovan requested that the Port Authority provide:

"any and all records related to how Silverstein officials have used their more than \$3.5 billion share of the \$4.55 billion insurance payout, including records that identify what they have received or will receive in publicly-backed Liberty Bonds, development fees, fines, penalties, and abatements; what has actually been spent on WTC construction and what remains for that purpose; as well as documents making publicly-funded pledges of assistance" (Pet at ¶ 8, Ex A at 1).

The Port Authority sent Donovan numerous letters explaining why it was unable to timely respond. One reason was its adoption of the Freedom of Information Code (Code), which became effective in April 2012. Finally, on December 5, 2013--more than two years after the request--the Port Authority informed Donovan that material responsive to her request was "exempt from disclosure pursuant to exemption (2.a.) of the Code" (Pet, Ex C).

Donovan commenced this proceeding, urging that the Port Authority improperly failed to provide her with records in contravention of the Code. Respondents maintain that the Port Authority does not possess certain documents that were requested<sup>1</sup> and that all other responsive materials are exempt pursuant to the Code.

Specifically, the Port Authority's Freedom of Information Administrator swears:

"The only potentially responsive records that [the Port Authority] possesses relate to the distribution

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<sup>1</sup> Neither in response to Donovan's demand nor in its response to the original petition did respondents report that the Port Authority did not possess any records responsive to the portion of the request that demanded "'records that identify what Silverstein received or will receive in publicly-backed Liberty Bonds, development fees, fines, penalties, and abatements; what has actually been spent on WTC Construction and what remains for that purpose; as well as documents making publicly-funded pledges of assistance'" (compare January 6, 2015 Affidavit of Daniel Duffy [Duffy Aff] at ¶ 24 with May 7, 2014 Affidavit of Daniel Duffy). It was not until January 2015, that the Port Authority first asserted that it had no such records.

of insurance proceeds regarding Silverstein and World Trade Center Construction.

"The potentially responsive documents relating to distribution of insurance proceeds . . . are subject to express confidentiality provisions that prohibit public disclosure of the terms, subject to the Port Authority Freedom of Information process. Furthermore, potentially responsive documents . . . are subject to express confidentiality provisions in the Master Development Agreement and the Net Lease for Towers, 1, 2, 3 and 4, which are also subject to the Port Authority Freedom of Information process.

. . .

"The Assistant General Counsel for Finance advised that the documents responsive to [the request] . . . that relate to distribution of insurance proceeds regarding Silverstein and World Trade Center Construction are confidential and not subject to disclosure.

"Given this determination by the Assistant General Counsel for Finance and the agreements at issue, in conjunction with the Secretary of the Port Authority, I determined the responsive materials . . . were exempt from disclosure under section 2a of the Code because the responsive materials, would impair present or imminent awards or negotiation of leases, permits, contracts, or other agreements related to World Trade Center construction. Specifically, in conjunction with the Secretary of the Port Authority, I 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 at the World Trade Center" (Duffy Aff at ¶¶ 25-30).

Because there is no basis for concluding that the records sought are exempt from access pursuant to the Code, Donovan's petition is granted.

### Analysis

Although New York's Freedom of Information Law (FOIL) now applies to the Port Authority (see Unconsolidated Laws § 6416-B; see also 4/28/16 Access to Records Resolution <http://corpinfo.panynj.gov/documents/Access-to-Port-Authority-Public-Records>), it is not controlling in this proceeding. The Port Authority's now-obsolete Code governs (see *Weisshaus v Port Authority of New York and New Jersey*, 49 Misc 3d 550, 553 [Sup Ct, Kings County 2015]).

The Code, which was adopted to provide "greater transparency in governance," much like FOIL required that the "the public . . . have access to records of the Port Authority . . . consistent with the freedom of information laws of [New York and New Jersey]" (Meinen Aff, Exs II and Ex GG at 5). It mandated that all records of the Port Authority "be made available for public inspection and/or copying" except that, as relevant here, access or copying could be denied for records or portions thereof, which "if disclosed, would impair, or give a competitive advantage in connection with, present or imminent awards or negotiation of . . . leases, permits, contracts or other agreements, open procurement matters, contracts not yet awarded [and] unexecuted leases or permits . . . ." (Meinen Aff, Ex II at 39-40 [exemption 2.a]).



Respondents failed to provide any rational basis for denying access of the records requested to Donovan; thus, the determination must be deemed arbitrary and capricious.<sup>2</sup>

The Port Authority's contention that disclosure of the material requested could impair the competitive offers for leasing (Respondents' Memorandum of Law [Opp Mem] at 12) "is speculative and unsupported by any evidentiary documentation" (*cf. Matter of Bahnken*, 17 AD3d at 230; see also *Matter of Acme Bus Corp. v County of Suffolk*, 136 AD3d 896, 898 [2d Dept 2016]; *Matter of Dillworth v Westchester County Dept. of Correction*, 93 AD3d 722, 724 [2d Dept 2012] [conclusory assertions that certain records fall within an exemption are not sufficient; "evidentiary support is needed"], *lv denied* 19 NY3d 810 [2012]). 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

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<sup>2</sup> Both parties argued that the arbitrary-and-capricious standard applies in this proceeding, which involves the Port Authority's determination pursuant to its Code as opposed to a statutory duty under FOIL. If the "error of law" standard applied, the outcome would be no different (see *Matter of Thomas v Condon*, 128 AD3d 528, 529 [1st Dept 2015]; *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]; *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229-230 [1st Dept 2005], *lv denied* 6 NY3d 701 [2005]; see also *Matter of Leyton v City Univ. of New York*, 25 Misc 3d 1214[A] [Sup Ct, NY County 2009] [Feinman, J] [error to apply arbitrary-and-capricious standard to FOIL proceedings]).

subject to disclosure" (Duffy Aff at ¶ 29). 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" (Duffy Aff at ¶ 30).

Respondents provided no evidence and made no showing to support the applicability of the cited exemption (*cf. Matter of Acme Bus Corp.*, 136 AD3d at 898). 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 (see Duffy Aff at ¶¶ 26-27); thus, the contractual provisions, by their terms, still require compliance with and adherence to the Code. They mandate that a Code exemption apply.

In the end, respondents failed to show any support for the determination that the records sought are exempt from access pursuant to the Code. They have not set forth the

nature of all of the documents being withheld or how and why the particular records would impair negotiations or unfairly impact leasing offers (Opp Mem at 12). The Court cannot conclude that the Port Authority's Secretary, counsel and Freedom of Information Administrator properly exercised their discretion simply because respondents say they did so (*id.* at 11).

Accordingly, it is ADJUDGED that the petition is granted and respondents must produce all responsive documents within 30 days.

This constitutes the Decision and Judgment of the Court.

Dated: August 30, 2016



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HON. JENNIFER G. SCHECTER