

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

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In the Matter of the Application of:

WEST HARLEM BUSINESS GROUP,

Petitioner,

Index No. 116839/06

For a judgment pursuant to Article 78 of the CPLR

-against-

EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

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**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION  
FOR JUDGMENT PURSUANT TO ARTICLE 78**

EMPIRE STATE DEVELOPMENT CORPORATION's (hereinafter "ESDC" or "Respondent") denial of WEST HARLEM BUSINESS GROUP's (hereinafter "WEST HARLEM" or "Petitioner") Freedom of Information Law request is legally insufficient in that it fails to offer an adequate particularized and specific basis for its determination and applies the exemption of Public Officers Law §87(2)(c) for information that would impair impending contract awards in blanket fashion to a broad category of records to which it can not apply. Where other records are alleged by the agency to not exist, Petitioner may prove their existence by a showing of substantial evidence, and the Court may grant a remedy to compel the Agency to disclose such records.

## **POINT I**

### **TO INVOKE AN EXEMPTION TO DISCLOSURE REQUIREMENTS UNDER FREEDOM OF INFORMATION LAW §87(2) A PUBLIC AGENCY MUST OFFER A PARTICULARIZED AND SPECIFIC FACTUAL BASIS FOR THE DENIAL**

“The Freedom of Information Law unequivocally makes all agency records open to the public unless they fall within one of its enumerated exemptions ... . All records are presumptively available and exemptions must be narrowly construed to ensure maximum access to public records ... . The burden of proof rests on the agency that claims an exemption from disclosure ... . Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency’s burden of proof.” *In the Matter of Professional Standards Review Council of America, Inc. v. New York State Department of Health*, 193 A.D.2d 937, 597 N.Y.S.2d 829, 831 (3d Dept. 1993), quoting from *Polansky v. Regan*, 81 A.D.2d 102, 103, 440 N.Y.S.2d 356 (3d Dept. 1981). The Freedom of Information Law requires a particularized and specific justification for denying access to demanded documents that is more than a “blanket” exemption. *DLJ Restaurant Corp. v. Department of Buildings of City of New York*, 273 A.D.2d 167, 168, 710 N.Y.S.2d 564, 566 (1st Dept. 2000). *See also, Matter of Capital Newspapers Div. Of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576 (1986).

ESDC has not provided particularized and specific justification for denying access. It has not indicated either the nature of the records it is withholding, nor what contract award is at risk of impairment, or why it is at risk of impairment. ESDC’s claim to the exemption for the broad category of external communications regarding its agreement with Columbia to undertake

preparatory work for the Project is merely conclusory because ESDC has not provided any factual support for its assertion that the disclosure of such correspondence, memoranda or written communications would impair present or imminent contract awards.

Review of the Present Request on Administrative Appeal, furthermore, was inadequate by the standard established by the Committee on Open Government. The denial of a request for records rendered following an appeal must include a more detailed indication of the basis for the denial than did the initial denial. Com. On Open Gov. FOIL AO-4528. ESDC General Council Laremont's Appeal Denial merely reiterated the ground for denial given in the Pidedjian Letter.

## **POINT II**

### **THE EXCEPTION OF PUBLIC OFFICERS LAW §87(2)(c) IS ONLY APPLICABLE IN THE CONTEXT OF COMPETITIVE BIDDING INVOLVING MULTIPLE BIDDERS**

The FOIL exemption of Public Officers Law §87(2)(c) can generally be invoked only in the context of a competitive bidding situation either between entities competing to provide a public agency with goods or services, or between a public agency and the general public in the acquisition of real property. *Verizon New York, Inc. v. Bradbury*, 10 Misc.3d 785, 803 N.Y.S.2d 409, 416, (Sup. Ct. Westchester Co. 2005). More than one entity must be involved in negotiation with the public agency, for where only one entity is involved, no inequality of information can be said to exist, and therefore no edge can be unfairly given. *Id.*, *See also*, *Laborers' International Union of America Local Union No. 17 v. New York State Department of Transportation*, 280 A.D.2d 66, 70, 719 N.Y.S.2d 354, 357 (3d Dept. 2001) (denying exemption under §87(2)(c) when "there was no competitive bidding procedure and [there was only one] entity having any dealings with [the agency]").

The Agreement between Columbia and ESDC for preparatory work on the Manhattanville Project did not involve any competing developer. ESDC's statutory authorization explicitly exempts ESDC from any requirement to open its selection of a developer for any project to competitive bidding. Urban Development Corporation Law §6 (c), McKinneys Unincorporated Laws, §6256(c). External communications pertaining to the implementation of the Agreement between Columbia and ESDC, therefore, cannot be categorically subject to the Public Officers Law §87(2)(c) exemption.

In the case of any subsequent contracts, sub-contracts, or related contracts, ESDC has not specified either the existence or nature of such contracts, nor has it alleged that those contracts are the subject of competitive bidding.

ESDC, moreover, has not alleged that the responsive records for which it claims exemption relate to real estate valuations that could affect the offering price or settling price for other property the Agency seeks to acquire.

### **POINT III**

#### **THE EXEMPTION OF PUBLIC OFFICERS LAW §87(2)(c) IS INAPPLICABLE WHERE CONTRACTS HAVE ALREADY BEEN AWARDED, OR WHERE REQUESTED MATERIALS RELATE TO MERELY PRELIMINARY NEGOTIATIONS**

In the exemption provided in Public Officers Law §87(2)(c) for records that "if disclosed would impair present or imminent contract awards," New York courts have interpreted the terms "present" and "imminent" narrowly. The exemption does not apply to contracts after they have already been awarded. *Empire Golf Mgt. v. Olivieri*. 18 A.D. 3d 334, 794 N.Y.S.2d 649 (1st Dept. 2005). See, *Matter of Cross-Sound Ferry Servs. v. Department of Transp.*, 219 A.D.2d

346, 349, 634 N.Y.S.2d 575, 577 (3d Dept. 1995). Once the submission process has ended, the winning proposal can no longer be considered competitively sensitive. *Id.* Similarly Public Officers Law §87(2)(c) also does not apply to information relating to the early stages of formation, development, specification, or soliciting bidding for a contract. *Waste-Stream, Inc. v. St. Lawrence County Solid Waste Disposal Authority*, 166 Misc.2d 6, 630 N.Y.S.2d 1020, 1022 (Sup. Ct. Lawrence Co. 1995) (holding customer lists and proposed contracts between county solid waste authority and potential customers “constitut[e] merely preliminary negotiations).

While ESDC’s claim of exemption under Public Officers Law §87(2)(c) may conceivably apply to materials pertaining to certain subcontracts or other contracts into which it may enter in the course of performance of the Columbia Agreement, such as contracts for preparation of an Environmental Impact Statement, or blight, neighborhood condition, or engineering studies, these contracts were well under way by September of 2006 and would have been awarded prior to the date of denial of appeal on August 30, 2006, if not by the date of the denial of the Present Request on July 24. Even if such contracts could be shown to have been subject to competitive bidding, e-mail, written correspondence, meetings agenda, reports and memoranda referring to the need for or specifying the terms of such contracts would not be exempt under Public Officers Law §87(2)(c) as these proceedings would be only preliminary to any final negotiations or award.

#### POINT IV

**WHERE A FOIL REQUEST IS DENIED ON ALLEGATION OF THE NON-EXISTENCE OF RESPONSIVE RECORDS, UPON A SHOWING BEYOND MERE SPECULATION BY THE REQUESTOR THAT SUCH RECORDS MUST EXIST, THE COURT MAY PROVIDE A REMEDY**

Where a public agency denies a FOIL request alleging the non-existence of responsive records, the Court may grant a remedy when the petitioner proves the existence of such records by a factual showing. In *Matter of Johnson v. New York City Police Dept.*, the petitioner was able to establish the existence of requested records on the basis of admissions by the Police Department pertaining to procedures. *Matter of Johnson v. New York City Police Dept.*, 220 A.D.2d 320, 320-321, 632 N.Y.S.2d 568 (1st Dept. 1995), *lv. dismissed* 87 N.Y.2d 943, 641 N.Y.S.2d 825(1996). While the exact standard for such a showing does not appear to have been articulated in New York case law, in cases where the petitioner's claim has been rejected, courts have required a factual basis beyond mere "speculation." *See, Wood v. Ellison*, 196 A.D.2d 933, 602 N.Y.S.2d 237 (3d Dept. 1993); *Corbin v. Ward*, 160 A.D.2d 596, 596, 554 N.Y.S.2d 240, 241 (1st Dept. 1990) (rejecting claim of existence of records as "unsupported speculation").

Petitioner in the present petition can demonstrate by a clear showing of substantial evidence that records responsive to its request other than those for which the exemption of Public Officers Law §87(2)(c) can legitimately be applied must exist. Such evidence includes the type and content of material disclosed in response to the categorically identical Prior Request, expectations of continued planning activity and communications revealed in the Prior Request, contractual obligations under the Columbia Agreement requiring ESDC to provide notice of certain transactions, and ongoing public activity by ESDC, Columbia, the New York City

Planning Department that would necessarily have generated records in the categories requested.

In *Matter of Johnson v. New York City Police Dept.*, 220 A.D.2d 320, 320-321, 632 N.Y.S.2d 568 (1995), the court remanded the petitioner's request to the agency. *Matter of Johnson v. New York City Police Dept.* In the present case, where the Respondent denied the existence of records responsive to the same categories where it had found responsive documents for only a few months time frame earlier, and yet where, on the basis of internal evidence from the Prior Disclosure and external evidence of public actions and events, it is clear that the Agency's activity has not diminished, but if anything increased, the good faith of the ESDC is question. The remedy of mere remand would prove futile. While FOIL does not provide for agency files to be searched by the public, and Petitioner respects the agency's need to protect records subject to legitimate statutory exemption, Petitioner nonetheless sees the need for some party without the agency's political interest in non-disclosure to examine ESDC's Manhattanville Industrial Zone files and determine whether responsive records do in fact exist. Petitioner, therefore, requests the Court to use the mechanism of in-camera inspection, and requests the Court to order ESDC to deliver to it files falling under the categories specified in the prayer for relief of the petition.

### **CONCLUSION**

ESDC's rejection of Petitioner's appeal was legally inadequate for lack of particularized and specific basis. In merely reiterating the blanket claim of exemption of Public Officers Law §87(2)(c) Respondent misapplied a narrow exemption to a broad category of records requested. Insofar as additional records falling outside the exemption claimed exist but were not disclosed, or records responsive to other requested categories were claimed not to exist, Petitioner may

prove the existence of such records by a showing of substantial evidence that goes beyond “unsupported speculation.” And finally, the Court may provide a remedy sufficient to compel the agency to meet its legal obligations under FOIL, which under the circumstances would require in-camera inspection of files.

Dated: New York, New York  
November 8, 2006

Respectfully submitted,

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