

At a term of Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on May 2, 2013.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

In the Matter of the Application of
ANTHONY BOTTOM,
a/k/a JALIL MUNTAQIM, #77-A-4283, *Petitioner*

v.

Index No. 21,314-13

BRIAN FISCHER, Commissioner, NYS Department
of Corrections and Community Supervision, *Respondent*

For the Petitioner
Michael Kuzma, Esq.
1893 Clinton Street
Buffalo, New York 14206

For the Respondent
ERIC T. SCHNEIDERMAN, Attorney General
by Timothy J. Flynn
Assistant Attorney General
Main Place Tower, Suite 300A
350 Main Street
Buffalo, New York 14202

STATE OF NEW YORK
Wyoming County Clerk's Office ss.

I, Rhonda Pierce, Clerk of the County, of the County Court of said County, and the Supreme Court, both Courts of Record having a common seal, do hereby certify that I have compared the annexed copy of Order with the original entered.

MAY - 6 2013 in this office and that the same is a correct transcript thereof and of the whole of said original in Testimony whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, at Warsaw, N.Y. MAY - 6 2013

Rhonda Pierce, Clerk

ORDER

By petition pursuant to Article 78 of the CPLR verified on January 17, 2013, Anthony Bottom seeks review of the respondent's response to his request for access to records under the Freedom of Information Law [hereinafter "FOIL"] (Public Officers Law, Article 6).

Respondent requests that the petition be denied or dismissed upon the answer of Timothy J. Flynn, Assistant Attorney General, dated March 7, 2013. In response to the answer, petitioner's attorney has submitted a reply affidavit sworn to on March 14, 2013.

The FOIL request that is the subject of this proceeding was made by the petitioner's attorney in a letter dated May 30, 2012, addressed to the respondent's FOIL officer. In the letter, the petitioner's attorney wrote that he wished to have access to "any and all records maintained by your agency" pertaining to the petitioner "for the time frame 2009 until the present." The petitioner's attorney then added, "[m]ore specifically, this request includes any and all communications sent to your agency supporting or opposing parole for [the petitioner]."

Terrence X. Tracy, Esq., counsel for the respondent, notified petitioner's counsel in a letter dated October 25, 2012, that the FOIL request had been denied. In his letter, Mr. Tracy asserted that "[d]ocuments [sent] to the Board of Parole supporting or opposing an inmate's possible release to parole supervision are exempt from disclosure pursuant to Public Officers Law §§87(2)(a), 87(2)(f) and 87(2)(g)." Mr. Tracy also asserted an exemption under 9 NYCRR §8000.5(c)(2), stating that "the information in these letters often expresses an individual's opinion, and is therefore evaluative in nature." In denying the FOIL request in its entirety, Mr. Tracy did not specifically address the petitioner's attorney's reference to "any and all records" pertaining to the petitioner "for the time frame 2009 until the present." The denial was affirmed upon the petitioner's administrative appeal.

In his reply affidavit, the petitioner's attorney argues that the respondent has "merely supplied the Court with conclusory statements unsupported by any factual basis as to why the sought-after records must be withheld in their entirety." He asks the Court to conduct an in camera review of the requested documents to determine whether they are, in fact, exempt from disclosure.

In camera inspection may be used to resolve a FOIL dispute, but it should be ordered only in the "rare case" where "the agency fails to give sufficiently detailed information with respect to the material allegedly exempt to permit the trial court to decide the issue"

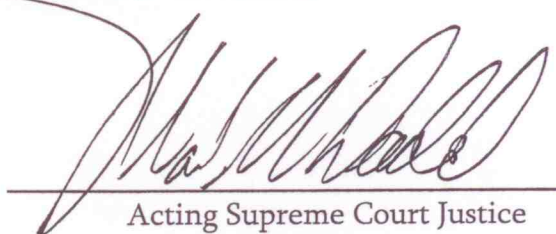
(Miracle Mile Associates v. Yudelson, 68 A.D.2d 176, 180 [4th Dept., 1979], appeal denied by 48 N.Y.2d 706 and 48 N.Y.2d 606 [1979]). Accordingly, the Court believes that it would be appropriate in this case to give the respondent 60 days to submit a more detailed explanation as to what requested material falls within the claimed exemptions. Thereafter, the matter will be restored to the calendar so that the Court may consider whether the respondent's submissions support the cited exemptions or whether a hearing or in camera inspection is required.

NOW, THEREFORE, it is hereby

ORDERED that the respondent shall have sixty days after service of this order to provide petitioner's counsel with affidavits or other proof supporting the application of the specific exemptions for the information which was withheld; and it is further

ORDERED that, after the 60-day period has elapsed, petitioner's counsel shall notify the Court when the matter is ripe to be returned to the calendar.

DATED: May 2, 2013



Acting Supreme Court Justice