

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

In the Matter of an
Article 78 Proceeding

ANTHONY BOTTOM a/k/a
JALIL MUNTAQIM

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER,
DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION (DOCCS)

Respondents.

Index No. 21314-13

Reply Affidavit

State of New York)
County of Erie)

I, Michael Kuzma, an attorney licensed to practice law in this state, first being duly sworn, depose and say:

1. I represent the Petitioner, Anthony Bottom a/k/a Jalil Muntaqim, and as such am fully familiar with the facts and circumstances of this case.

2. This affidavit is filed in response to the October 22, 2013 Affirmation of Terrence X. Tracy (hereinafter Tracy Affirmation), Counsel to the New York State Board of Parole, on file herein with the Court.

3. There are 403 pages of material attached to the Tracy Affirmation marked Exhibits A through J. Five of the 403 pages are copies of letters in opposition of Petitioner's parole bid. The remaining documents consist of letters in support of Petitioner's parole application as well

material prepared for Petitioner's 2010 and 2012 parole hearings. The Tracy Affirmation does not indicate how many pages falling within the scope of Petitioner's May 30, 2012 Freedom of Information Law (hereinafter FOIL) request are letters opposed to his parole bid.

4. For the period from 2009 to 2012, Petitioner's case record received approximately 627 pieces of correspondence reflecting support for or against his parole application. See ¶2 (k) Tracy Affirmation. Clearly, this material fell within the scope of Petitioner's FOIL request. Nevertheless, Respondents elected not to furnish copies of this material to Petitioner, nor have Respondents indicated why they failed to do so. Petitioner's FOIL request was quite explicit and contained an agreement to pay copying costs. Consequently, Respondents' failure to provide Petitioner with copies of the 627 pages of correspondence is inexplicable.

5. Nowhere in the Tracy Affirmation is there any indication as to how many pages in total fall within the scope of Petitioner's FOIL request. Also, said affirmation fails to indicate who conducted the search, when it was conducted, or what systems of records were searched to locate records responsive to Petitioner's request. Simply put, Petitioner still does not have any idea as to how many pages his FOIL request encompasses, nor does he know the precise nature of the withheld material.

6. When an agency resisting disclosure fails to provide sufficiently detailed information to establish to the satisfaction of the trial court that the documents sought are exempt an *in camera* inspection of the records should be performed. See Zuckerman v. Bd. of Parole, 53 A.D.2d 405, 408, 385 N.Y.S.2d 811, 813.

7. Petitioner calls into question the adequacy of Respondents' search for records. For example, Respondents have failed to provide Petitioner with a copy of the COMPAS Reentry

Risk Information. COMPAS is supposed to be considered by the Parole Board in every case. COMPAS is a document which embodies the risk and needs principles contemplated by N. Y. Exec. Law §259-c (4).

8. In addition to COMPAS, Petitioner is interested in receiving copies of any Parole Commissioner's Worksheets that may still exist. Respondents have failed to furnish Petitioner with copies of these documents and, if they have been destroyed, Respondents have not provided Petitioner with the date of and authority under which such destruction occurred.

9. Finally, the New York City Police Benevolent Association maintains a website called "Keep Cop-Killers in Jail" (<http://www.nycpba.org/miscellaneous/copkillers.html>). When an individual such as Petitioner is up for parole, this website allows users to send letters of objection to the Parole Board. See Exhibit A. According to an article entitled, "Police Widow Knows Recurring Pain of Parole Hearing for Husband's Killers," which appeared in the September 27, 2012 edition of the *Chicago Tribune*, the website has generated more than 200,000 letters to the New York State Division of Parole. See Exhibit B. In addition, the New York City Police Benevolent Association created a petition opposing parole for Petitioner. See Exhibit C. In light of these facts, Respondents search for records was incomplete. If Respondents had conducted an adequate search for records in response to Petitioner's FOIL request, they would have most certainly located more than five letters in opposition to his application for parole.

10. Respondents assert that a letter from the Office of the District Attorney for New York County dated May 16, 2012 is exempt from disclosure in its entirety. Respondents, however, have failed to articulate any persuasive reason why this letter could not have been redacted and the portions that were not exempt from disclosure released to Petitioner.

11. The New York Court of Appeals has made it clear that an agency may not withhold a record solely because some of the information in that record may be exempt from disclosure, nor can the agency refuse to produce the whole record simply because some of it may be exempt from disclosure. See Schenectady County SPCA v. Mills, 18 N.Y.3d 42, 45, 935 N.Y.S.2d 279, 280.

12. As was brought out in Gould v. NYC Police Dept., 89 N.Y.S.2d 267, 275, 653 N.Y.S.2d 54, 57, “. . . blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” Further, “FOIL imposes a broad duty of disclosure on government agencies.” See Hanig v. NYS Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 717. It should be additionally noted that, “Exemptions are to be narrowly construed to provide maximum access.” See Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 578.

13. “The Freedom of Information Law compels disclosure, not concealment.” See Westchester News v. Kimball, 50 N.Y.2d 575, 580. Further, the language of the exemption provision under FOIL contains permissive rather than mandatory language. See Capital Newspapers v. Burns, *supra* at 567.

14. In Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 470, it was made clear that “. . . an agency does not have *carte blanche* to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection to exempt its records from disclosure.”

