

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

**In the Matter of the Application of
CAPITOL NEWSPAPERS DIVISION OF
HEARST CORPORATION AND J. ROBERT PORT,**

Petitioners,

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

-against

**Decision, Order &
Judgment**

**THE HON. JOSEPH L. BRUNO, in his capacity as
Senate Majority Leader and Temporary President
of the Senate, THE HON. SHELDON SILVER, in his
capacity as Assembly Speaker, NEW YORK STATE
SENATE, NEW YORK STATE ASSEMBLY, STEVEN
M. BOGGESS, in his official capacity as Secretary of the
Senate and SHARON WALSH, in her official capacity as
Assembly Records Access Officer,**

Respondents.

**Motion Return Date : Albany County Special Term, August 11, 2006
RJI No.: 01-06-ST6360
Index No.: 4001-06**

Present: Robert A. Sackett, JSC

**Appearances: Office of General Counsel
Attorney for petitioner Hearst Corporation
1345 Avenue of the Americas
New York, New York 10105
By: Eve Burton, Esq.
Jonathan R. Donnellan, Esq.
Kristina E. Findikyan, Esq.**

**Eliot Spitzer, Attorney General of the State of New York
Counsel for respondents
The Capitol
Albany, New York 12224
By: Richard Lombardo, Esq.
Nancy G. Groenwegen, Esq.**

Sackett, J.:

Petitioner Capitol Newspapers, a Division of Hearst Corporation (Hearst), publishes the Times

Union, a newspaper of general circulation in Albany County and the Capitol District; petitioner J. Robert Port (Port) is a journalist employed as Senior Editor of Investigations for the Times Union. Petitioners seek a judgment annulling the determination of respondents denying access to certain records related to the Community Projects Fund (CPF) which petitioners have requested pursuant to Public Officer's Law Article 6, commonly known as the Freedom of Information Law (FOIL), and directing that access to and copying of all requested documents, not heretofore provided, be permitted, together with reasonable attorneys fees. Respondents oppose the petition.

The two unopposed motions for leave to file and amicus curiae briefs by Brennan Center for Justice, the Citizens Budget Commission, the Citizens Union of the City of New York, Common Cause New York, the League of Women Voters of New York State and the New York Public Interest Research Group and by Media Amici are granted. These briefs are in support of the petition.

The New York State budget for the fiscal years 2003-04 and 2004-05 each contain a \$200 million appropriation for a pool of public funds designated as the Community Projects Fund (CPF) and set aside for services and expenses, grants, contracts for not-for-profit agencies, universities, colleges, school districts, corporations and municipalities. Discretionary expenditures from the CPF fund are known as legislative "member items." Pursuant to a Memorandum of Understanding among the Director of the Budget, the Secretary of the Senate Finance Committee and the Secretary of the Assembly Ways and Means Committee, CPF suballocation plans for fiscal years 2003-04 and 2004-05 allocated \$85 million each to respondents Bruno and Silver and \$30 million to Governor George Pataki for CPF projects.

In April 2006, petitioners made requests to respondents herein, the Governor's office and the offices of the Senate and Assembly Minority leaders for certain information regarding approved CPF projects including . Those offices complied with the requests, providing the name of the legislator sponsoring the project, the names of the recipients of the funds and a description of the project. Respondents Bruno did not respond; the office of respondent Silver provided only project titles, funding levels and the administering agency.

By letters dated May 10, 2006 Port served FOIL requests on Bruno and the Senate and Silver and the Assembly requesting an electronic copy of all computer data kept by the Senate/Assembly Majority staff for approved majority staff member items for fiscal years 2003-04 and 2004-05, including the initiative forms for approved member items, project or grant title, location, description, funding level, name of the agency administering the program, program contact information, date and the name of the legislator(s) seeking the member item. The Assembly provided the information requested except for the name of the legislator sponsoring the member item. Initially, the Senate declined to respond; but later provided all requested information except the name of the sponsoring legislator.

On June 2, 2006 Port appealed the denials of his FOIL requests. By letter dated June 16, 2006 Counsel to the Senate Majority denied the request in full on the grounds that the information sought was for internal use, did not consist of factual or statistical tabulation within the meaning of POL §88 and is not intended to be a final statement of decision making. By letter dated June 13, 2006, the Assembly Records Appeals Officer denied the request seeking the names of the legislators sponsoring member items on the grounds that such names are not objective information and not central administrative records pursuant to the Assembly's Records Access Policy.

Respondents raise two objections in point of law. First, respondents assert that the proceeding is barred by the Speech and Debate Clause of the New York State Constitution, Article III §11, which provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." Respondents also assert that petitioners have been provided with all the information they have requested except for the names of the legislators sponsoring the member items and that information is not subject to disclosure under POL §88.

The Speech and Debate Clause protects legislators from civil or criminal suits aimed at curbing lawful legislative activities (see Rivera v Espada, 98 NY2d 422 [2002]). "Historically the Speech or Debate Clause serves to preserve the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties" (People v Ohrenstein, 77 NY2d 38, 54 [1990]). The FOIL application is not a civil or criminal suit against one or more legislators. Respondents have not alleged that any of the information is intended as evidence in a pending civil or criminal action; nor have they alleged that disclosure would result in any impairment or threatened impairment in the ability of the legislators to represent their constituencies; nor have they alleged that release of the names of the sponsors of these public expenditures would be an unwarranted invasion of personal privacy. The FOIL application does not in any way interfere with the legislators in the performance of their duties. The Speech and Debate Clause is inapplicable to this proceeding.

POL §88 sets forth the specific categories of records which must be disclosed and made available for public inspection; unless one of these categories applies, there is no obligation to disclose the records. POL §88(2)(e) provides that the Legislature must make available to the public "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law." Petitioner argues that the names of the sponsoring legislators for member items are part of the factual tabulation with regard to each member item. Additionally, POL §88(2)(a) requires disclosure of bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto and

index records.

"The premise of FOIL is 'that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government' [citation omitted]" (Matter of *Newsday, Inc. v State Department of Transportation*, 5 NY 3d 84, 88 [2005], *cert dismissed* 126 S. Ct. 410). The Court of Appeals has consistently interpreted the statute liberally to implement its broad purposes of achieving public accountability of state and local government (*see* Weston v Sloan, 84 NY2d 462, 465 [1994]). The information requested is clearly part of an internal audit and/or a factual tabulation concerning public funds allocated to specific projects, and, further, that the name of the sponsoring legislator is "objective information" (*see* Ibid.) which is part of the internal audit and/or factual tabulation of member item expenditures. Additionally, CPF funds are part of the budgets enacted for the relevant years. As such, records related to the specific approved allocations of those funds must be disclosed pursuant to POL §88(2)(a) (*cf* Weston v Sloan, at 468 [requiring disclosure of expenditures for a Senator's printings and mailings to the extent that they are "with respect to" items in the budget law]).

The Court finds that respondents have failed to articulate a rational basis for redacting the names. The names of the sponsoring legislators of approved projects is not protected as a "part of the deliberative and communicative processes by which members participate in proceedings" (*see* People v Ohrenstein, *supra* at 54), as the "deliberative and communicative process" with respect to deciding which projects and, to what extent, to fund is over and the expenditures already approved. As approved expenditures of public funds, the public has a right to know the names of legislators associated with the funding of member item projects (*see* POL §84).

Finally, petitioner requests an award of costs, including reasonable counsel fees. "FOIL authorizes a court to award reasonable attorney fees and other litigation costs reasonably incurred in any case in which the requestor has substantially prevailed, provided that the court finds that: (1) the record involved was, in fact, of clearly significant interest to the general public; and (2) the agency lacked a reasonable basis in law for withholding the record (*see* POL § 89[4][c]); an award of counsel fees is within the discretion of the Court (*see* Matter of URAC Corp. v Public Service Comm. of the State of New York, 223 AD2d 906, 908, [1996]). The Court finds that petitioners have met the standards for an award of reasonable attorneys. Petitioners are directed to submit an affidavit of services within two weeks of the date of this decision, on notice to respondents.

Therefore, it is

ORDERED that the motion of Brennan Center for Justice, the Citizens Budget Commission, the Citizens Union of the City of New York, Common Cause New York, the League of Women Voters of

New York State and the New York Public Interest Research Group is granted, without costs; and it is further

ORDERED that the motion of Media Amici is granted without costs; and it is further

ORDERED & ADJUDGED that the petition is granted in all respects, without costs, and respondents are directed to disclose the names of sponsoring legislators for each approved member item.

This shall constitute the decision, order and judgment of the Court. The original Decision, Order and Judgment and all papers are being forwarded to petitioner's counsel who is not relieved from the provisions of CPLR 2220 regarding filing, and service with notice of entry.

SO ORDERED.

Dated: Monticello, New York
October 19, 2006

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ENTER



HON. ROBERT A. SACKETT, JSC

Papers considered:

Notice of petition, verified petition and affidavit of J. Robert Port dated June 22, 2006; verified answer and objections in point of law dated July 31, 2006, affidavit of Steven M. Bogess dated July 31, 2006, affidavit of David J. Natoli dated July 21, 2006, affidavit of Sharon Walsh dated July 28, 2006, affidavit of Stephen M. August dated July 24, 2006;

Notice of motion, affirmation of Joaquin Ezcurra, Esq. dated August 3, 2006 and memorandum in support of the petition;

Notice of motion, affirmation of Christopher D. Thomas, Esq. dated August 1, 2006 and memorandum in support of the petition.