

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Application for Permits Pursuant to Articles 17 and 24 of the Environmental Conservation Law ("ECL"), Section 401 of the Federal Clean Water Act ("CWA"), and Parts 663 and 750-758 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

**RULING ON APPLICATION
FOR PROTECTION OF
CERTAIN INFORMATION
AS BEING PRIVATE
AND CONFIDENTIAL**

October 5, 2007

- by -

TOWN/VILLAGE OF HARRISON, NEW YORK,

Applicant.

DEC Application No.: 3-5528-00104/00001

Appearances:

- Mayor Stephen Malfitano, Robert Wasp, P.E., and Frank Allegretti, Esq., for applicant.
- Alison H. Crocker, Deputy Commissioner and General Counsel (Steve Goverman, Esq., of counsel, and Scott Sheeley) for staff of the New York State Department of Environmental Conservation.
- Kevin J. Plunkett, Esq., Thacher Proffitt & Wood, LLP, for the City of Rye (petitioner).
- Douglas B. Schaper, petitioner, on his own behalf.
- Michael G. LaDore, petitioner, on his own behalf.

PROCEEDINGS

On September 14, 2007, Administrative Law Judges ("ALJs") Mark D. Sanza and Daniel P. O'Connell, who have been assigned to this matter, received copies of a September 11, 2007 letter sent by Douglas B. Schaper, a petitioner in this permit

proceeding, to the Department of Environmental Conservation's ("Department") Region 3 Regional Director, William Janeway (the "Janeway letter").¹ Attached to the Janeway letter were three pages of information purportedly relating to Stephen Malfitano, the current Mayor/Supervisor for applicant, the Town/Village of Harrison (Westchester County). The attachments to the Janeway letter consisted of two pages of Westchester County real property tax assessment information, and one page allegedly containing Mr. Malfitano's personal income tax information for tax years 2002 through 2006.

In addition to the ALJs, Mr. Schaper also sent a copy of the Janeway letter with the aforementioned attachments to Kristen Kelly Wilson, Esq., an attorney with Thacher Proffitt & Wood, LLP, representing the City of Rye, another petitioner in this proceeding. Mr. Schaper did not send copies of the Janeway letter and its attachments to any other party on the service list for this proceeding.²

As a result of Mr. Schaper's *ex parte* communication (see 6 NYCRR 624.10[d]), by letter dated September 14, 2007, ALJ Sanza sent copies of the Janeway letter and its attachments to the other parties to this proceeding, *i.e.*, the Town/Village of Harrison (applicant); Steve Goverman, Esq. (Department staff); Kevin J. Plunkett, Esq. and Kristen Kelly Wilson, Esq. (City of Rye); and Michael G. LaDore (appearing on his own behalf). A copy of ALJ Sanza's September 14, 2007 letter, without the Janeway letter and its attachments, was also sent to Mr. Schaper. Additionally, ALJ Sanza's September 14, 2007 letter reminded the parties of their obligation to adhere to the Department's *ex parte* rule found in 6 NYCRR 624.10(d) ("Parties or their representatives must not communicate with the ALJ or the

¹ For a description of the project subject to this proceeding, see Notice of Legislative Public Hearing and Issues Conference published in the June 20, 2007 edition of the Department's electronic Environmental Notice Bulletin at www.dec.ny.gov/enb/35816.html.

² The initial service list for this proceeding was established on July 23, 2007, copies of which were distributed by the ALJs to all of the parties at the issues conference held on July 24, 2007. Following the issues conference, the service list was revised and sent to all of the parties on it, via electronic mail, on July 25, 2007. Since then, copies of the service list have been re-distributed to the parties in at least two memoranda issued in this matter by ALJ Sanza prior to the date of the Janeway letter (see Matter of Town/Village of Harrison, ALJ Memorandum, July 25, 2007; and Matter of Town/Village of Harrison, ALJ Memorandum, Sept. 6, 2007).

commissioner in connection with any issue without providing proper notice to all the other parties").

Relief Sought

On September 17, 2007, Mayor Malfitano sent a letter of the same date to all parties on the service list, via electronic mail, objecting to Mr. Schaper's dissemination of purportedly personal income tax information with the Janeway letter, and requested that such information be treated as "private" by the Department and not be disseminated further by anyone in this proceeding.

On the morning of September 18, 2007, ALJs Sanza and O'Connell, joined by the Department's Chief ALJ, James T. McClymonds, held a telephone conference with Mayor Malfitano, individually, for the purpose of inquiring further into the nature of the three pages of allegedly personal information included with the Janeway letter and the potential sources of such information. As discussed later in this ruling, the sum and substance of the September 18, 2007 conversation between the ALJs and Mr. Malfitano was shared with all of the parties to this proceeding by the ALJs on September 28, 2007.

Mr. Malfitano advised the ALJs that with respect to the two pages of Westchester County real property tax assessment data, such information was readily available to any member of the public upon request to the Westchester County Clerk's office. As such, Mr. Malfitano conceded that real property tax information was neither "personal" nor eligible for protection from disclosure by the Department (see N.Y. State Comm. Open Govt. Advisory Op. 11074 [real property tax assessment rolls are maintained as public records under section 516 of the real property tax law, therefore disclosure of those records does not constitute an unwarranted invasion of privacy]). Accordingly, Mr. Malfitano agreed that the two pages of real property tax assessment information attached to the Janeway letter were not properly subject to his protection request.

However, with respect to the one-page document allegedly containing his personal income tax information for tax years 2002 through 2006, Mr. Malfitano advised the ALJs that despite his status as an elected official, or whether the information was accurate or not, he was neither required to disclose, nor had he voluntarily divulged, the information contained in the document to any source other than in limited instances, such as to his accountant, certain lending

institutions, and State/federal tax authorities.³ Additionally, according to Mr. Malfitano, some of the 2006 income tax information contained in the one-page document included with the Janeway letter had not, as yet, been made available to any source other than his accountant. In that regard, Mr. Malfitano confirmed that he had contacted his accountant's office and was assured that it was not responsible for the disclosure of his personal income tax information to Mr. Schaper or anyone else.

Oral Argument Considered

The foregoing presentation by Mr. Malfitano to the ALJs constituted a prima facie offer of proof in support of his written request for protection of his personal income tax information by the Department. Accordingly, in the afternoon of September 18, 2007, ALJ Sanza advised all of the parties on the service list, via electronic mail, that Mayor Malfitano's September 17, 2007 letter request was being treated as an application to have his personal income tax information treated as "private" and protected from disclosure under New York's Public Officers Law ("POL") (see POL § 87[2][b]; see also POL § 89[2][b][iv]). Therefore, based upon the parties' schedules, a conference call to hear the respective parties' oral argument on Mr. Malfitano's request to the Department was scheduled to take place on Friday, September 28, 2007. In the interim, and pending the outcome of the September 28th conference call, ALJ Sanza directed the parties not to further disseminate any of Mr. Malfitano's tax information included with the Janeway letter to anyone.

On September 28, 2007, ALJs Sanza and O'Connell convened the conference call with the parties to discuss Mr. Malfitano's pending request for protection of his personal income tax information under POL § 87(2)(b) (see also POL § 92, *et seq.* [Art. 6-A Personal Privacy Protection]; and 6 NYCRR 616.20 *et seq.*). After ALJ Sanza disclosed to the parties the nature and extent of the September 18, 2007 conversation between Mr. Malfitano and the ALJs, and Mr. Malfitano's acknowledgment that only the one-page document containing his personal income tax information was subject to his protection request to the Department, the parties were asked to state their respective positions on Mr. Malfitano's request.

³ Mr. Malfitano indicated that his personal income information had not been made available as part of any election campaign material, political party information, or State Ethics Commission filing.

At the outset, representatives for Department staff, the City of Rye, and Mr. LaDore each responded that they did not object to Mr. Malfitano's personal income tax information being kept private and confidential by the Department.

Mr. Schaper initially maintained that this information was relevant to the freshwater wetlands permit determination, namely, whether applicant's project, as proposed, is the "only practical alternative" in light of Mr. Malfitano's alleged pecuniary interest stemming from ownership of certain parcels of real property located near the proposed project site (see 6 NYCRR 663.5[f][2]). When asked about the source of this information, Mr. Schaper stated that he had received the three pages of information included with the Janeway letter from an unknown, anonymous source by mail several weeks prior to preparing the Janeway letter.

Mr. Schaper further asserted that the information came to him in an envelope having no return address and a postmark bearing the number "100" which he believed was indicative of a Manhattan origin for the mailing. He indicated that he no longer possessed the envelope in which this information was mailed to him. Mr. Schaper stated that he had originally intended for the information included with the Janeway letter to be kept confidential by the Department even though he had not specifically indicated such in the letter. Mr. Schaper then acknowledged that Mr. Malfitano's request that the Department treat the one-page document containing his personal income tax information as "private" and confidential should be granted.

Whereupon, ALJ Sanza advised the parties that, given the respective parties' consent, Mr. Malfitano's request would be granted and a written ruling evidencing same would follow. ALJ Sanza further advised that the ruling would direct all parties to this proceeding to return the one-page document containing Mr. Malfitano's personal income tax information included with the Janeway letter, and any copies thereof, to ALJ Sanza and that such copies would be deemed private and marked "Confidential" in the file maintained by the Department's Office of Hearings and Mediation Services in this matter. As such, the parties were advised that the one-page document containing Mr. Malfitano's personal income tax information included with the Janeway letter would be exempt from further disclosure by the Department in accordance with POL § 87(2)(b).

RULING

Mr. Malfitano's application to have the one-page document containing his personal income tax information included with the Janeway letter be deemed private, confidential and exempt from disclosure by the Department is hereby granted with the consent of all parties to this proceeding.

Accordingly, all parties to this proceeding are hereby directed not to make any copies of the one-page document containing Mr. Malfitano's personal income tax information included with the Janeway letter. All parties to this proceeding are hereby directed to return any and all copies of said document in their possession or within their control to the Department's Office of Hearings and Mediation Services within ten (10) days of the date of this ruling. If any party to this proceeding possesses a copy of Mr. Malfitano's personal income tax information included with the Janeway letter in any format other than in hard copy, such as in an electronic mail message, on a compact disc or in a computer file, that party is hereby directed to remove and delete said version of the document from their possession within seven (7) days of the date of this ruling.

All copies of the one-page document containing Mr. Malfitano's personal income tax information included with the Janeway letter that are returned to and maintained by the Department's Office of Hearings and Mediation Services in this proceeding shall be marked "Confidential" and shall be kept exempt from disclosure by the Department in accordance with Public Officers Law ("POL") § 87(2)(b).

The original version of the one-page document containing Mr. Malfitano's personal income tax information that was sent by Mr. Schaper to Mr. Janeway as Regional Director of the Department's Region 3 office shall be marked "Confidential" and shall be exempt from disclosure by the Department in accordance with POL § 87(2)(b). Any copies of said document maintained by the Department's Region 3 office shall also be marked "Confidential" and shall be exempt from disclosure by the Department in accordance with POL § 87(2)(b).

In the alternative, the Department's Region 3 Regional Director and the Region 3 office may also return any and all copies of the one-page document containing Mr. Malfitano's personal income tax information included with the Janeway letter to the Department's Office of Hearings and Mediation Services for keeping in accordance with the provisions of this ruling.

The failure of any party to comply with this ruling in a timely manner, or to adhere to the Department's *ex parte* rule at 6 NYCRR 624.10, may be deemed grounds for revocation of party status in this proceeding in the future pursuant to 6 NYCRR 624.5(f).

_____/s/_____
Mark D. Sanza
Administrative Law Judge

Dated: October 5, 2007
Albany, New York

To: All Parties on Service List (attached)

cc: William C. Janeway, Regional Director - Region 3
Ruth Earl, Records Access Officer - Central Office
Mike Knipfing, Records Access Officer - Region 3

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