

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

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In the Matter of the Application of

RONALD PODOLSKY,
Petitioner,

VERIFIED PETITION

Index: 06/100889

For An Order and Judgment Pursuant to Article 78, CPLR,

-against-

MICHAEL BLOOMBERG, Mayor of the City of
New York; JOYCE FRANK MENSCHER, as President
of the Art Commission of the City of New York,
Office of the Mayor; and ADRIAN BENEPE, as
Commissioner of the New York City Parks & Recreation
Department,

Respondents.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

RONALD PODOLSKY, the Petitioner as and for a Petition respectfully alleges:

1. At all times hereinafter, the Petitioner was and still is a resident of the State of New York, County of New York and is an attorney who heretofore brought a proceeding in this Court on behalf of himself and multiple organizations and individuals in opposition to certain plans by the Respondent Benepe as Commissioner of the New York City Parks and Recreation Department who had indicated an intention to undertake certain renovation projects in Washington Square Park during the summer of 2005. That proceeding, Emergency Coalition Organization to Save Washington Square Park et al v The City of New York, Supreme Court, New York County, Index 05/110200 was discontinued without prejudice.

2. At all times hereinafter mentioned the Respondent MICHAEL BLOOMBERG was and still is the Mayor of the City of New York; the respondent JOYCE FRANK MENSCHER was and still is President of the Art Commission of the City of New York, Office of the Mayor; at all times hereinafter mentioned the Respondent ADRIAN BENEPE was and still is the Commissioner of the Parks & Recreation Department of the City of New York. All Respondents are in their capacities members of the Executive Branch with headquarters in New York County, the venue for this proceeding.

3. This Petition is brought pursuant to Article 78, CPLR and requests judicial review and annulment of a certain determination by the Art Commission of the City of New York, [Hereinafter: Arts Commission] to grant approval to a certain proposal submitted to it by the New York City Parks & Recreation Department [Hereinafter: Parks] to make certain redesign and renovations to Washington Square Park involving moving the existing fountain, and certain statutes. This proceeding is brought brought by reason of the assertion that the determination complained of was founded in whole or in part on the intentional and deliberate violation of the Freedom of Information Law and Public Officers Law Section 84 et seq. requests made by your Petitioner and others, as hereinafter alleged.

4. This Petition is founded on the procedural violations which prevented your Petitioner, and the Press and others from having information sufficient to make their views known either personally or through expert opinion respecting the detailed submission of the Parks Department at a certain consideration hearing held January 9, 2006. At that meeting the New York City Art Commission is reported to have unanimously approved the plan submitted by the Parks Department. See: Press Report Exhibit A.

5. The Art Commission's approval of the plan of phase one of the Washington Square renovation project was, upon information and belief, unanimously approved by its members on January 9, 2006 shortly after a hearing at which the Parks Department gave an approximately 50 minute slide show presentation and members of the public including your petitioner were permitted to speak on either side of the issue for three minutes each.

6. Your Petitioner requested that the hearing be adjourned because his Freedom of Information Law [FOIL] requests for the written submission of the Parks Department, made to the Art Commission about a week before December 20, 2005 had been ignored or not complied with. A copy of your Petitioner's FOIL requests dated December 20, 2005 to the Parks Department and the one dated December 20, 2005 to Art Commission are annexed as Exhibit B. The Response of the Art Commission dated December 29, 2005 and the response of the Parks Commission dated January 11, 2006 (two days after the hearing and vote) are annexed as Exhibit C. On January 18, 2006 the Parks department indicated that the material requested was available and consisted of 73 pages and the copy charge was \$18.25. This was nine days after the hearing and approval by the Art Commission. Because nothing was heard from either agency respecting the January 9, 2006 hearing, your Petitioner appealed by letter dated January 4, 2006 from the lack of response. Copies are annexed as Exhibit E.

5. The hearing by the Respondent New York City Art Commission and its approval of the NYC Parks & Recreation Department's filed proposal which took place on January 9, 2006 was the result of arbitrary, capricious, unreasonable and illegal withholding of information regarding the filing by Parks and was calculated to deprive your Petitioner, the press and others of information necessary to present appropriate views at the hearing.a. The FOIL request was deliberately thwarted.

6. Upon information and belief, the Freedom of Information Law and the Public Officers law provide direction concerning the time and manner in which agencies must respond to requests. Upon information and belief each governmental agency is supposed to, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.

7. Your Petitioner made the request by letter dated December 20, 2005, within a few days of the filing by Parks of the proposal with the Art Commission. It was made to both agencies. It was strictly limited in scope as requesting the "recently filed plans" Parks had filed with the Art Commission concerning Washington Square Park. It specified that the request was made in order to prepare for a hearing on the matter scheduled for January 9, 2006. Your Petitioner appealed to the agencies on January 4, 2006 from their inaction respecting need for the material for the hearing January 9, 2006. Exhibit E.

9. The fact that the request was narrowly limited to that which had been filed by the Parks Department and hence was readily discernable with a minimum of effort not requiring a search for records; the fact that the Petitioner identified himself as one who would need information for himself and attorney for others in order to adequately familiarize themselves with the proposal in order to give well reasoned and appropriate comment thereon at the January 9, 2005 hearing was a knowing and deliberate withholding of information relevant to hearing scheduled for that date. This observation is based in part on some of the following facts:

a. Your Petitioner, by the FOIL request, and others including the newspaper The Villager had requested a copy of the filing. According to a report in the Villager, a copy of which is annexed as Exhibit E(2), a spokesman for the Parks Department stated that the filed plan would not be given to anyone, not even the New York Times before the hearing on January 9, 2006.

b. This is in comportment with the fact that your Petitioner and others, including experts, were purposely not given an opportunity to timely review the filing in order to give intelligent comment thereon. Apparently realizing the absolute arbitrary and capricious and unreasonable nature of the Park's position, a representative left a message on your Petitioner's voice mail on Friday afternoon, January 6, 2005, indicating that the Petitioner could go to Parks to look at the plan. Your petitioner got the message Friday night. He called the number left by the Parks Department caller on Saturday January 7, 2005 no one was there. The hearing went on

unabated at 8:30 a.m. Monday, January 9, 2006.

c. The response of Parks dated January 18, 2006 indicates that the filing that your Petitioner requested was now available and that it consisted of 73 pages and the charge was \$18.25. Your Petitioner has sent a check for that amount to Parks. The fact that Parks has indicated that the filed plan is available in response to your Petitioner's FOIL request indicates that the scope of the FOIL request was within proper discoverable bounds and not excludable under any real or imagined strictures of law. The actions of the Respondents in refusing to reveal the contents of the plan timely before the hearing is in comportment with the position of Parks that no one, not even the New York Times was going to get the filing before the hearing of January 9, 2009.

e. As of the date hereof, the Art Commission, despite its representation that it would comply with the law and at least respond in 20 days as set forth in its letter of December 29, 2005, has failed to do so.

f. It was arbitrary, capricious and unreasonable for the Art Commission to deny your Petitioner's request made at the hearing of January 9, 2006 to adjourn the hearing in order for the compliance with the FOIL request to afford an opportunity for meaningful discourse. The Respondent Menschel acknowledged that your Petitioner's FOIL request had been received but that the lawyer for the Commission was at the podium and that the adjournment would be denied.

d. The fact that Parks acknowledged receipt of your Petitioner's FOIL

request dated December 20, 2005 and true to its stated position that no one would get the filing before January 9, 2006, your Petitioner and others were denied meaningful information upon which to comment at the hearing. Such secrecy in government is intolerable and in direct violation of the disclosure laws discussed herein.

10. A number of shocking matters were revealed publicly for the first time by Parks at the hearing. For example,

a. in addition to moving the depressed fountain comprising a "theater in the round" used by generations of musicians and political activists for peaceful assembly, the fountain not only will be centered on the Washington Square Arch but will emit a copious discharge of water shooting some 40 feet into the air. This condition will obviously deprive the fountain of its theater in the round aspect recognized throughout the world as unique and important, but would deprive the children who theretofore waded in the fountain during summer days this refreshing asset. See Report Exhibit A and F annexed hereto. Exhibit F shows the fountain water spout and children wading in it.

b. It was revealed at the hearing that two tacky 2'x2' plaques will be placed on opposite sides of the fountain attesting to the fact that a moneyed interest, the Tish family, apparently upset that the fountain is not currently centered on Washington Square Arch at the foot of Fifth Avenue, will contribute to the move. It is true that the Tish Foundation demanded that unless the plaques are placed thereat, they would not pay the \$2,500,000.00 for digging up the present theater in the round fountain and center it on the arch as set forth in Exhibit G hereto, but this compliance with the view of Confucius that "Where money talks, few men are deaf" is not an appropriate reason to fix what is'n't broken. It should be noted that New York University which has property on all sides of the Park is contributing one million dollars to the project at a time it was in Albany requesting money for educational purposes and that a building of NYU is known as the Tish Building, reveals a transparent attempt of Parks to limit the use of the park more in accordance with a college campus rather than the use of the public.

c. the statue of Garibaldi, now visible from the back, side and front because it faces west on an east-west partway is to be moved to the edge of the pathway and face south so that in order to see the back one must scale a fence and go onto the grass and in order to see the front without straining the neck with an upward tilt of the face, must scale the opposite fence to see the same view of Garibaldi's stance and visage that one can see now. It was also revealed during the slideshow that tacky and huge vases will be added to the fountain.

d. These and many other revelations could have been learned by your Petitioner, the Press and others sufficiently before the hearing in order to afford an opportunity to consult experts respecting those details as well as comment from those using the park. These and other aspects of the park were revealed without adequate notice upon which to appropriately comment.

11. Your Petitioner is of the view that there was and is no legitimate reason why he, the press and others were denied timely access to the narrowly described material which had been filed just a few days earlier by Parks with the Art Commission. Not only does it appear to be a deliberate fostering of the position of Parks that no one, not even the New York Times would have access before the hearing but it appears to be a direct violation of the FOIL and Public Officers Law disclosure provisions pursuant to which Petitioner and others acted.

12. That the public had a right to know what had been filed with the Art Commission by Parks is verified by the Parks Commissioner himself according to a quote in an Article in the Villager dated December 29, 2005 set forth as Exhibit H hereto, wherein he appreciates "vigorous debate" on the renovation.

13. The same article, Exhibit H, sets forth the fact that the Fine Arts Federation of New York, opposed moving the fountain. The article confirms that seven of the eleven members of the NYC Art Commission appointed by the Mayor were members of the federation. Yet the Art Commission is reported to have unanimously voted to approve the plan. There is serious concern that the withholding from the public by the Respondents of information needed by the public and experts had something to do with this sordid state of affairs.

14. That the Petitioner's request and those of others were and do relate to public issues and the public's right to know and were and are not frivolous can be discerned from a series of newspaper articles attached as Exhibit I. Concerns by such experts as Luther Harris, author of a definitive work on Washington Square Park; concerns by Robert B. Nichols who was the lead architect for the 1960s renovation of Washington Square Park; concerns by the Community Board and others, all of which concerns by right should have been the subject of knowing discourse at the hearing, which discourse was essentially a one-sided affair where opposing views were constricted by time, lack of information, and violation by the respondents of existing law.

15. That even without the imperatives of the FOIL procedures and the Executive Law requirements, the action of the Respondents were arbitrary, capricious and unreasonable as set forth in Article 78, CPLR.

b. The Relief Requested is Justified

16. The purpose of this Petition is to request an Order and judgment annulling the determination of the Respondent Art Commission which approved the submission of the Parks department and remanding the matter to the Art Commission for further hearings at which the views of various organizations and individuals including your Petitioner can be appropriately addressed with knowledge of the facts and consultation with persons with familiarity with park design and history, all with a view towards the concerns of the artistic aspects of the plan.

17. No prior application for an Order annulling the determination of the Respondent New York City Art Commission has been made to this or any other court of competent jurisdiction; Petitioner has no adequate remedy at law; a preliminary injunction against the Respondents from proceeding with the renovation pending this Court's determination of this request for vacating the determination complained of and remand to the Art Commission is requested in that the petition has merit by disclosing a violation of law as well as arbitrary, capricious and unreasonable action upon which the determination complained of was based; that the likelihood of success in obtaining the remand is clear and that in the absence of a preliminary injunction Parks may undertake part or all of the proposed renovation rendering the decision of the Court should the remand issue to be moot, time being of the essence.

BY REASON WHEREOF, it is respectfully requested that an Order and Judgment be issued pursuant to Article 78, CPLR and the Public Officers Law annulling the determination of the Respondent Art Commission which determination approved a certain filed plan by the New York City Parks & Recreation Department in December, 2005 relating to the movement of the fountain and certain statues in Washington Square Park, and remanding the matter to the Respondent New York City Art Commission for further proceedings with ample opportunity for the Petitioner to obtain a copy of the filing and opportunity to obtain information which would assist in presenting views respecting the Park Department proposal, together with a temporary injunction against the Respondents from starting work calculated to accomplish the renovations to Washington Square Park approved January 9, 2006.

Dated: January 23, 2006.

Respectfully submitted:

Ronald Podolsky, Petitioner

State of New York
County of New York: ss

RONALD PODOLSKY, the Petitioner being duly sworn deposes and says: that he has read the foregoing Petition and knows the contents thereof to be true except as to matters stated upon information and belief and as to those matters he believes it to be true.

Sworn to before me
January 23, 2006.

Ronald Podolsky

NOTARY PUBLIC

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MEMO OF LAW.

POINT: THE RESPONDENTS' REFUSAL TO TIMELY PROVIDE THE REQUESTED FILING BY THE PARKS DEPARTMENT TO THE ART COMMISSION WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND ILLEGAL; THE REFUSAL TO ADJOURN THE ART COMMISSION HEARING AND THE VOTE OF APPROVAL FOR THE RENOVATIONS BEING CONSIDERED SHOULD BE VACATED AND THE MATTER REMANDED TO THE RESPONDENTS FOR FURTHER ACTION.

The stance of the Parks Department that no one, not even the New York Times was to be able to see the proposal it submitted to the Art Commission as reported in Exhibit E(1) and adopted by the Art Commission deprived the Petitioner, the public and the Art Commission itself of meaningful discourse during the hearing and did violate the right of the Petitioner and others to information necessary to form appropriate commentary on the multiple aspects of the Parks Department proposal. The refusal of the Respondents to timely and meaningfully comply with the Petitioner's FOIL request presents a classic example of the conduct by public officials which the law was designed to prevent.

Public Officers Law, Sec. 84. Sets forth the Legislative declaration.

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible. The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that: "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgment of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days

indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." Every law must be implemented in a manner that gives reasonable effect to its intent, and in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."

When records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there is no basis for a delay in disclosure. In [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)] it was held that:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit"

In Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001) the Court observed that:

"The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure.

In the case at bar, (1) the amount and volume of documents requested was limited to what had been filed by Parks with the Art Commission a few days earlier and did not involve a horizontal search for a wide range of documents; (2) the time involved was that the hearing was to be held on January 9, 2006 whereat the public was given the opportunity to comment on that very file; (3) the issues were complex from the point of view of those seeking information upon which commentary could be made--the Parks Department at the hearing gave an approximate 50 minute detailed presentation with slideshow capability--(4) the fact that Parks did by written advisory indicate after the hearing that the file was available for copy indicates there was no excludable basis upon which to deny the Petitioner's request.

It is contended that even were there no FOIL and Public Officers Law disclosure requirement, the refusal of the Respondents to timely provide the information prior to the January 9, 2006 hearing or the refusal to adjourn the hearing in order for the Petitioner on behalf of himself and others to adequately prepare or consult on the issues would be and are arbitrary, capricious and unreasonable under the terms of Article 78, CPLR. The refusal to provide the information under the statutory requirements of FOIL and the Public Officers Law makes such refusal illegal as well as arbitrary, capricious and unreasonable.

Further it should be noted that access was not accorded the Petitioner within 20 days of the request. The appeal to the Art Commission has not been ruled upon and the offer by Parks to permit access after the fact of the hearing and approval of the subject matter under dispute was clearly part of the stance of the Parks Department that no one, not even the New York Times would have access to the proposal prior to the January 9, 2005 hearing.

CONCLUSION: The actions of the Respondents were arbitrary, capricious, unreasonable and illegal; the determination complained of should be annulled and the matter remanded to the Respondents for further action; to prevent irreparable harm a preliminary injunction should issue staying any action to physically undertake the renovations described in the proposal approved by the Art Commission.

Dated: New York, N.Y.
January 23, 2006

Respectfully Submitted:

Ronald Podolsky, Attorney and Petitioner