

NEW YORK APPELLATE COURT AWARDS ATTORNEYS' FEES IN FOIL CASE INVOLVING HIGH PROFILE LIMO CRASH

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On a quiet Saturday afternoon in late 2018, twenty people died in upstate New York when a stretch limousine careened through a rural intersection, hit a parked car, and came to rest in a gully. It was the deadliest road transportation accident in the United States since 2005, resulting in national news coverage for several days. A few months later, the administrator for the estate of one of the decedents filed multiple Freedom of Information Law (“FOIL”) requests with the New York State Department of Transportation and the New York State Department of Motor Vehicles. These requests sought a litany of pre-accident records regarding the limousine, including state inspection information, notices of violation, suspension records, and administrative hearing documents. The agencies denied the requests, claiming that the documents were statutorily exempt from disclosure. Specifically, the agencies claimed that the documents were exempt because: (1) federal law prohibited disclosure, (2) they were compiled for law enforcement purposes, and (3) they were intra- or inter-agency materials.

The estate administrator appealed the agencies’ ruling to the state Supreme Court of Albany County, seeking production of the records and an award of attorneys’ fees. That court overturned the agency’s FOIL denial and ordered the documents released, and granted the request for attorneys’ fees. The agencies then appealed to the Appellate Division for the Third Judicial Department in the case now known as *Vertucci v. New York State Department of Transportation et al.* While the litigation was pending, the agencies turned over the documents, rendering moot the challenge to their denials. However, the attorneys’ fees award remained in dispute.

The appeals court in *Vertucci* ultimately upheld the lower court’s decision and ordered the agencies to pay the estate’s attorneys’ fees because the state agencies failed to meet their burden in claiming that the records were exempt from disclosure under FOIL. The court also held that the agencies lacked a “reasonable basis” to withhold the records, which entitled the estate to the payment of its attorneys’ fees. As the court explained, if a court overturns a state agency’s decision to deny a FOIL request (or if the agency turns over the records on its own) meaning the requesting party has “substantially prevailed,” then that agency generally will be required to pay the requestor’s attorneys’ fees if it lacked a “reasonable basis” for denying the FOIL

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request. One such “reasonable basis” for denying a FOIL request is the existence of statutory language that would exempt the agency from disclosing the documents.

The problem for the agencies, however, was that they failed to sufficiently show that any of those exemptions actually applied. In order to claim a statutory exemption from disclosure, the agency must provide a “factual basis” for invoking the statutory exemption. The court ruled that the “factual basis” provided by the agencies in *Vertucci* was woefully inadequate. In fact, the agencies merely quoted the statutory language and failed to provide any factual assertions from anyone with personal knowledge of whether an exemption applied. Instead of filing detailed affidavits from agency officials with firsthand knowledge of the documents who could explain the applicability of the exemptions, the agencies filed simple affirmations from agency attorneys who were not actually involved in the decision to review and deny access to the requested documents. The court found that these affirmations were “conclusory and speculative” and did not do much beyond “parroting” the statutory language. The court also held that federal transportation law did not bar the agencies from releasing the records, contrary to their prior position.

This led the court to conclude that, because the agencies did not provide sufficient facts supporting their claimed statutory exemptions, they failed to meet their burden of showing that they had a reasonable basis for denying the FOIL request. Therefore, the court ordered the agencies to pay the respondent’s counsel fees and costs associated with the appeal.

Takeaway. *Vertucci* should serve as a reminder to public agencies and government entities that they bear the burden of demonstrating the applicability of any exemption they cite under FOIL. Simply quoting the general language from the statute is not enough in court. Specific facts are typically required. And if the court finds that the agency denied a FOIL request without a reasonable basis for doing so, the requesting party is entitled to an award of attorneys’ fees.

For any questions you have regarding whether this recent decision impacts you or your organization, please contact Charles Malcomb (716.848.1261), Ryan Cummings (716.848.1665), or Aaron Saykin (716.848.1345).