

Legal Alert

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Decision: *Town of Waterford v. DEC*, 2012 NY Slip Op. 02125

On March 22, 2012, The Court of Appeals ruled, on appeal from the Appellate Division, Third Department, that the Inter-Agency Exception under FOIL does not apply to materials exchanged between state and Federal agencies engaged in cooperative undertakings.

Since 1984, the Hudson River (the “River”) has been listed on the National Priorities, or “Superfund,” List due to the presence of PCBs in the sediment. Both the U.S. Environmental Protection Agency (“EPA”) and New York State Department of Environmental Conservation (“DEC”) have a statutory responsibility for the River’s water quality and have enacted various enforcement efforts through cooperative agreements.

In 2002, the EPA approved a remediation plan directing that PCB-laden sediment be dredged from the River. Thereafter, the EPA entered into a consent decree with General Electric (“GE”) wherein GE agreed to perform the dredging activities. GE was further directed to prepare a “Water Supply Option Analysis” to address contingency plans for the Towns of Waterford and Halfmoon, which draw drinking water from the River, in case PCB levels in the river water reach unsafe levels during dredging.

Shortly after GE released its Analysis, the Town of Waterford (the “Town”) submitted a FOIL request to the DEC seeking access to documents and communications exchanged between the EPA and DEC concerning PCB levels in the river water, the regulations fixing permissible levels of PCBs in the river water and any materials exchanged concerning GE’s Analysis. The DEC denied access to 377 records citing as authority Section 87(2)(g) of the Public Officers Law (“POL”), which exempts

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deliberative inter-agency documents from disclosure. The Town appealed the DEC's decision which appeal eventually reached the New York Court of Appeals.

In ruling in favor of the Town, and requiring the disclosure of the requested documents, the Court of Appeals ruled that documents exchanged between the EPA and DEC were not “inter-agency” documents within the meaning of POL §87(2)(g) because federal agencies are not “agencies” as defined under the POL.

Specifically, the POL defines an “agency” as “any *state* or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state...” [POL §86(3)]. Thus, federal agencies are not “agencies” subject to FOIL and, therefore, cannot benefit from the inter-agency exception.

The Court noted, however, that documents exchanged between state and federal agencies might still be entitled to protection from disclosure as “*intra-agency*” documents pursuant to POL 87(2)(g) where a state agency engages a federal agency for consultant purposes. The Court found that this was not the case in *Waterford* as it was not only clear that the EPA and DEC were engaged in a *cooperative* undertaking to remediate the River, but also that the EPA was the lead agency for that program. If there are any questions regarding the accessibility of documents under FOIL, please contact a Keane & Beane, P.C. municipal attorney.

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