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Tax Department Software Subject to FOIL Application, Panel Says

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ALBANY

IN THE LATEST in a string of rulings liberally construing the Freedom of Information Law, an appellate panel in Albany yesterday directed the Tax Department to turn over a copy of the software it uses to store data. The Appellate Division, Third Department, also sent the matter back to the trial court for consideration of attorney fees.

Matter of TJS of New York v. New York State Department of Taxation

Online

✦ The Third Department decision is posted at nylj.com.

and Finance, 512259, began with a tax audit.

TJS operates an adult entertainment bar in Suffolk County and was embroiled in a dispute with the tax department over whether lap dancing is subject to sales tax. The tax department concluded that it is taxable because of the cabaret environment in which it takes place. On the basis of that conclusion,

Barry Leibowicz of Great Neck, the attorney for TJS, submitted a FOIL demand for tax records related to the audit, a common tactic in tax cases because discovery is limited.

He obtained a court order directing the tax agency to provide the requested information. But the digi-

tal record the tax department yielded in response to the FOIL was useless without the agency software required to view the data, and the state refused to share the software.

Although the tax case settled two years ago, Mr. Leibowicz pursued the FOIL matter pro bono. A trial court held that the software was not subject to FOIL. But yesterday, a unanimous Third Department panel reversed.

In an opinion by Justice Robert S. Rose, the judges in Albany



Justice Rose

rejected the tax department's argument that the software does not constitute a record because it does not contain information.

The court cited an affidavit from the agency's auditor, who helped design and develop the software program, and a training manual. Those materials show that the software "does reconciliations, creates letters, produces forms, determines taxes due or refunds owed and creates a comprehensive audit report," the court said.

Interestingly, each side referenced non-binding advisory opinions from the Committee on Open Government in support of its position.

The tax department cited an opinion that software

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that constitutes no more than a data warehouse or delivery system is not subject to FOIL; Mr. Leibowicz cited an opinion stating that software enabling the manipulation of data is a record subject to FOIL, in the same way and for the same reasons that a printed manual describing procedures would be subject to FOIL.

"The description of the software submitted by the Department and the reasoning and analysis contained in the advisory opinions relied on by petitioner lead us to conclude that the software at issue contains information and, thus, constitutes a record for FOIL purposes," Justice Rose wrote in an opinion joined by Justices Thomas E. Mercure, Bernard J. Malone Jr. E. Michael Kavanagh and Elizabeth A. Garry.

The panel also rejected the state agency's claim that disclosure of the software would jeopardize security and potentially make it possible to generate false letters which, if delivered to taxpayers, could lead to the disclosure of confidential information.

Justice Rose said that a FOIL exemption in the Public Officers Law designed to ensure the security of information technology resources was clearly intended to "protect against the risks of electronic attack...and the unauthorized access to an agency's electronic data"—concerns which the tax department never raised.

"The Department's only argument, that the uses to which the software are put might be illegal or fraudulent, is, in our view, an overly broad interpretation of the exemption," Justice Rose wrote. "This is especially so because an applicant's motive for seeking a record is generally irrelevant in determining whether documents are available under FOIL."

It noted the agency's "failure to articulate a legitimate concern" and remitted the matter to Supreme Court for consideration of counsel fees.

Matter of TJS marks at least the fourth time in the past three months in which the Third Department has overruled lower courts on a FOIL issue and opened a door to counsel fees (See *New York State Civil Liberties Union v. City of Saratoga Springs*, 87 AD3d 336; *New York State Defenders Association v. New York State Police*, 87 AD3d 193; and *Matter of Hearst Corp. v. City of Albany*, 511942).

Additionally, last week the Court of Appeals unanimously affirmed the Third Department in *Matter of Schenectady County Society for the Prevention of Cruelty to Animals v. Mills*. In the SPCA case, the Court expressed dismay at the Education Department's failure to disclose public information, and strongly suggested that "agencies of government...comply with their FOIL obligations in a more efficient way" (NYLJ, Oct. 26).

Robert J. Freeman, executive director of the Committee for Open Government, said yesterday's decision "demonstrates the

expansive nature of FOIL, that it has been adaptable to the evolution of information technology, and that its utility is far beyond what had been so not so many years ago."

"It also confirms that the courts have recognized that government agencies must have clear justification for denying access in their efforts in defending nondisclosure," Mr. Freeman said.

Mr. Leibowicz, a descendant of Holocaust victims who was born in the Austrian refugee camp where his parents met, said that he pursued the FOIL case at his own expense after the tax case had settled, in part because he said he has a special appreciation through his parents' experience that "if you don't scrupulously watch what government is doing you will face a bigger problem in the future."

"If they had upheld the denial, FOIL might as well have been repealed because all a government agency would have to do is store its records in a proprietary format and refuse to give people the software to read it," Mr. Leibowicz said. "I think the way New York State deals with records is cavalier to say the least. This was not a profit making venture for me, it was an integrity issue."

Assistant Attorney General Paul Groenwegen argued for the tax department.

Neither the attorney general's office nor the tax department would comment.

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