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In commenting on the value of open government, Supreme Court Justice Louis Brandeis famously wrote that "sunshine is said to be the best of disinfectants."[1] However, Justice Brandeis failed to note that excessive sunshine inevitably leads to sunburn. New York's Freedom of Information Law ("FOIL") imposes a sweeping duty on government agencies to make their records available to the public upon request.[2] In drafting FOIL, the New York State Legislature stated that the "government is the public's business" and "access to information shouldn't be thwarted by shrouding it with the cloak of secrecy."[3] However, the fear of forced disclosure under FOIL may have a chilling effect on the willingness of agencies to seek assistance in their decision-making processes.[4] To counter this potential chilling effect, FOIL exempts from disclosure certain documents exchanged within or between agencies in order to encourage the free flow of information between them.[5] Until recently, this exemption included communications between agencies and their outside consultants.[6] One New York court recently held, however, that this exemption is inapplicable if there are allegations that the consultant holds a pro-agency bias.[7]

In *Tuck-It-Away Associates, L.P. v. Empire State Development Corp.,* the First Department addressed whether the Supreme Court, New York County erred in compelling a state government agency,[8] pursuant to FOIL, to release documents

1. Louis D. Brandeis, Other People's Money and How the Bankers Use it 92 (1914), *quoted in* Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp., 861 N.Y.S.2d 51, 53 (1st Dep't 2008).

2. *See* N.Y. Pub. Off. Law § 87 (Consol. 2009).

3. *Id.* § 84 (Consol. 2009) ("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."); *Tuck-It-Away,* 861 N.Y.S.2d at 53.

4. *See Tuck-It-Away,* 861 N.Y.S.2d at 61 (Buckley, J., dissenting in part).

5. *See* N.Y. Pub. Off. Law § 87(2)(g) (Consol. 2009). Documents exempted from disclosure include inter-agency and intra-agency deliberative materials. Inter-agency means between, among, or shared among two or more agencies; intra-agency means within a single agency. *See* Kenneth G. Wilson, The Columbia Guide to Standard American English 252 (Columbia University Press) (1993).

6. *See* Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132–33 (1985).

7. *See Tuck-It-Away,* 861 N.Y.S.2d at 58 (citing Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001)).

8. The agency is the Empire State Development Corporation (ESDC). The mission of the ESDC "is to provide the highest level of assistance and service to businesses in order to encourage economic investment and prosperity in New York State." New York State Economic Development Agency, New York Loves Business, http://www.nylovesbiz.com/Contacts_and_About_Us/default.asp (last visited Sept. 27, 2009).

exchanged between the agency and its consultant.[9] The First Department affirmed the lower court's ruling, holding that communications between the agency and its consultant were not protected from disclosure under FOIL's "deliberative materials" exemption.[10] The court concluded that the exemption was inapplicable because the consultant was actually an advocate of the agency.[11] This case comment contends that the First Department departed from controlling Court of Appeals precedent[12] by requiring that a government agency disclose any communications with consultants who are merely alleged to harbor a pro-agency bias.[13] This additional requirement effectively narrows the deliberative materials exemption found in Public Officers Law Section 87(2)(g).[14] This decision likely will deter agencies from eliciting recommendations from consultants, and thus has the potential to harm the quality of agency decision making by restricting the deliberative process.[15]

Tuck-It-Away Associates, L.P. ("Tuck-It-Away") is a self-storage business located in the Manhattanville area of Harlem where Columbia University is planning to expand its campus.[16] Columbia's plans call for the development of 17 high-rise towers on a new 17-acre campus above a seven-story underground "bathtub."[17] Before the plans could proceed, Columbia needed rezoning approval from the New York City Department of City Planning ("Department of Planning"). Pursuant to the State Environmental Quality Review Act ("SEQRA")[18] and the City Environmental Quality Review Act ("CEQR"),[19] the Department of Planning was also required to

9. *See Tuck-It-Away,* 861 N.Y.S.2d at 56.

10. *See id.* at 57–58. Deliberative materials are pre-decisional communications exchanged for purposes of discussion; therefore, they are materials not constituting final policy decisions. *See id.* at 61 (Buckley, J., dissenting in part) (citing N.Y. Pub. Off. Law § 87(2)(g); Russo v. Nassau County Cmty. Coll., 81 N.Y.2d 690, 699 (1993)).

11. *See Tuck-It-Away,* 861 N.Y.S.2d at 59.

12. *See Xerox Corp.*, 65 N.Y.2d 131.

13. *Tuck-It-Away*, 861 N.Y.S.2d at 63 (Buckley, J., dissenting in part).

14. N.Y. Pub. Off. Law § 87(2)(g).

15. *Tuck-It-Away*, 861 N.Y.S.2d at 63 (Buckley, J., dissenting in part).

16. *Id.* at 53.

17. *Id.*; *see generally* Betsy Morais, *CU, City Sued Over M'ville "Bathtub" Plan*, Columbia Spectator, March 27, 2008 ("The 'bathtub,' as it is commonly called, is designed to be a contiguous space, running from 125th Street to 133rd Street and from Broadway to 12th Avenue, that extends seven stories below ground level. If built, it will house a swimming and diving center, business school programs, scientific research laboratories, storage facilities, and a below-grade MTA bus depot."). This proposal requires the approval of New York City's Department of City Planning to rezone a 35-acre area in accordance with the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR"). *See Tuck-It-Away*, 861 N.Y.S.2d at 54.

18. N.Y. Envtl. Conserv. Law § 8-0109 (Consol. 2008); N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11(d) (2009).

19. N.Y. Comp. Codes R. & Regs. tit. 62, § 5–03 (2008).

conduct an environmental review of the proposed rezoning.[20] Further, Columbia needed approval from the Empire State Development Corporation ("ESDC" or "the agency"), an agency of New York State government, because the plan involved taking private property through the power of eminent domain.[21] Columbia hired a leading environmental consulting firm, Alee, King, Rosen, and Fleming ("AKRF" or "the consultant"),[22] to seek rezoning approvals from the Department of Planning.[23] To assist in the Department of Planning's environmental review, AKRF prepared an environmental impact statement which, although paid for by Columbia, the Department of Planning was required to adopt as its own before approving the rezoning.[24]

Columbia also entered into an agreement with ESDC under which Columbia assumed the responsibility of paying the same consultant, AKRF, to execute a blight study.[25] The blight study was important because in order for ESDC to exercise its eminent domain powers, the area had to be "substandard and insanitary."[26] The agency approached AKRF for this project because AKRF was skilled in preparing blight studies and had previously completed a similar report for the agency.[27] In fact, AKRF worked extensively with ESDC on a variety of projects over a 25-year period, such as the redevelopment of 42nd Street, Atlantic Yards, and Roosevelt Island.[28] The agency made clear that as a condition of retention, it was necessary that AKRF's work on the blight study be segregated from any work it was performing for Columbia.[29] There were two separate consulting teams; one team worked on ESDC's blight study, while another team worked on Columbia's environmental impact statement.[30] These two teams functioned independently and did not discuss their work with each other.[31]

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20. Brief for Respondent-Appellant at 3, Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp., 861 N.Y.S.2d 51 (1st Dep't 2008) (No. 107368/07) [hereinafter Appellant's Brief].

21. *See Tuck-It-Away*, 861 N.Y.S.2d at 54. Eminent domain is "[T]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking." Black's Law Dictionary 562 (8th. ed. 2004).

22. *See* AKRF Home Page, http://www.akrf.com (last visited Sept. 27, 2009).

23. Appellant's Brief, *supra* note 20, at 4.

24. *Id.* at 21 (citing N.Y. Envtl. Conserv. Law § 8-0109(3) (2008); 6 N.Y. Comp. Codes R. & Regs. § 617.9 (2009); R.C.N.Y. tit. 43 §§ 6-08 through 6-11 (2009); Executive Order No. 91, as amended (1977)); *Tuck-It-Away,* 861 N.Y.S.2d at 53–54.

25. *Tuck-It-Away,* 861 N.Y.S.2d at 54.

26. *Id.*

27. Appellant's Brief, *supra* note 20, at 4.

28. *Id.* at 3–4.

29. *Tuck-It-Away*, 861 N.Y.S.2d at 54.

30. Appellant's Brief, *supra* note 20, at 5.

31. *Id.*

Threatened by the Columbia expansion project and hoping to find evidence to delay it,[32] Tuck-It-Away initially tried to obtain the project records by filing a FOIL request with the Department of Planning.[33] The Department of Planning denied Tuck-It-Away access to the requested documents on the grounds that the records met FOIL's deliberative materials exemption.[34] Rather than appealing the Department of Planning's decision, Tuck-It-Away decided to file a FOIL request seeking all of ESDC's Columbia project records, reasoning that ESDC was an "involved agency" under SEQRA, and therefore would have copies of the Department of Planning's environmental review records along with its own blight study records.[35] The agency provided several documents, but maintained that others were exempt from disclosure under FOIL's deliberative materials exemption.[36] Specifically, ESDC refused to turn over communications with AKRF, which it had independently retained to perform the blight study, and which it had specifically told that all blight study work needed to be kept separate from the environmental review work it was performing for Columbia.[37]

Under New York's FOIL statute, any person whose request for a government agency record has been denied may appeal that decision in writing within thirty days. The head of the agency or his designee then has ten days to fully explain in writing the reasons for further denial of access to the record. If no explanation is provided, access must be granted.[38] Upon receipt of Tuck-It-Away's written appeal, ESDC affirmed its position that its communications with AKRF were exempt from disclosure.[39] However, FOIL provides a second layer of appeal whereby the requesting party may bring a proceeding for review of the denial pursuant to Article 78 of the New York Civil Practice Laws and Rules.[40] In Article 78 proceedings, the agency has the burden of proving that the records in question clearly fall within one of FOIL's exemptions.[41] Tuck-It-Away initiated an Article 78 proceeding, again challenging the agency's decision to withhold some of the documents from disclosure pursuant to the deliberative materials exemption.[42] Tuck-It-Away argued that extending the

32. *See* Kate Pastor, *Columbia Critics Claim Conflict of Interest*, City Limits, Nov. 19, 2007, http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3446.

33. Appellant's Brief, *supra* note 20, at 27.

34. *Id.* However, because of ESDC's potential role in the project, it was considered an "involved agency" under SEQRA. Therefore, the Department of Planning was obligated to share its Columbia project records with ESDC. *Id.*

35. *See Tuck-It-Away*, 861 N.Y.S.2d at 54–55.

36. *See id.* at 55.

37. *Id.* at 54.

38. N.Y. Pub. Off. Law § 89(4)(a) (Consol. 2009).

39. *Tuck-It-Away,* 861 N.Y.S.2d at 55.

40. N.Y. Pub. Off. Law § 89(4)(b).

41. *Id.*

42. *Tuck-It-Away*, 861 N.Y.S.2d at 55.

deliberative materials exemption to include communications with consultants is "inappropriate when the consultant also represents an entity seeking the benefit of the agency's decision in the same matter."[43] Tuck-It-Away sought an order from the court compelling ESDC to disclose every requested document,[44] or in the alternative, to deliver all the requested documents to the court for an *in camera* inspection.[45] ESDC moved to dismiss, claiming that it had fulfilled its FOIL obligations by providing all the requested documents that did not fall under an exemption.[46] The Supreme Court, New York County ordered the disclosure of all communications between ESDC and AKRF, holding that these deliberative materials were not protected from disclosure under FOIL's deliberative materials exemption because AKRF also represented Columbia in connection with the overall project.[47] The agency appealed.[48]

The First Department affirmed the lower court's holding.[49] Although the appellate court noted that deliberative materials do not lose their exempt status simply because they are prepared by a consultant,[50] the court followed a non-controlling decision of the United States Supreme Court that ordered disclosure of documents exchanged between Indian tribes acting as consultants and the Bureau of Indian Affairs.[51] In *Dept. of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Assn.*, the Supreme Court analyzed the Freedom of Information Act ("FOIA"), a federal law after which New York's FOIL statute is patterned.[52] In dictum, the Supreme Court noted that in cases where the exemption had been extended to consultants, those consultants did not "represent . . . the interest of any other client, when it advises the agency that hired it."[53] The First Department used

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43. *Id.* Tuck-It-Away applied this reasoning to argue that because AKRF also represented Columbia in the expansion project, albeit for a study separate from the blight study, documents between ESDC and AKRF should not receive a disclosure exemption. *Id.*

44. The Tuck-It-Away FOIL request sought all records in possession and control of ESDC pertaining to the Columbia project, related planning activities, and related actions by Columbia University including the agreement between ESDC and Columbia whereby Columbia agreed to pay AKRF for the costs of the blight study. *See id.* at 53–54.

45. *Id.* at 54. An in camera inspection is "a trial judge's private consideration of evidence." Black's Law Dictionary 775 (8th ed. 2004).

46. *Tuck-It-Away*, 861 N.Y.S.2d at 55–56.

47. *Id.* at 56–57.

48. *See id.* at 53.

49. *See id.* at 60–61.

50. *Id. (*citing *Xerox Corp.*, 65 N.Y.2d at 131–32).

51. *Id.* at 58–59.

52. *Id.* at 57 (citing Sea Crest Const. Corp. v. Stubing, 442 N.Y.S.2d 130 (2d Dep't 1981)). FOIA also contains a deliberative materials exemption. See 5 U.S.C. § 552 (2006).

53. *Tuck-It-Away*, 861 N.Y.S.2d at 58 (citing Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10–11 (2001)).

this dictum to reason that the consultant's relationship with Columbia created an inseparable conflict and made the deliberative materials exemption inapplicable.[54]

The dissent argued that the court's opinion allows a FOIL petitioner to "evade the deliberative materials rule merely by alleging the appearance of a bias, in this instance, a conflict of interest, on the part of consultants retained by an agency."[55] The dissent suggested three rationales for the deliberative materials exemption.[56] First, it serves to make subordinates feel comfortable providing frank advice without fear of future public criticism.[57] Second, it serves to protect ideas from disclosure before they are actually adopted as policy.[58] Third, it prevents confusion among the public by exempting from disclosure documents suggesting possible reasons for a policy that were not actually relied upon in the final decision-making process.[59] The dissent argued that the court failed to consider these rationales, and that the holding will "deter agencies from eliciting recommendations from consultants and to inhibit good-faith consultants from rendering frank advice."[60] As a result, courts will now be burdened with the task of investigating the potential biases of every consultant when presented with a FOIL request.[61] This task is neither authorized by the statute, nor supported by precedent.

FOIL imposes a presumption that all records are available to the public for inspection and copying.[62] Exemptions to disclosure under FOIL include matters that "are inter-agency or intra-agency materials" which are not: (1) statistical or factual tabulations or data; (2) instructions to staff that affect the public; (3) final agency policy or determinations; or (4) external audits, including but not limited to audits performed by the comptroller and the federal government.[63] This deliberative materials exemption is important to protect the decision-making process of government agencies; however, exemptions to disclosure are narrowly construed.[64] Where an exemption is claimed, the burden lies on the agency to clearly articulate how the requested material falls squarely within the exemption.[65]

In *Matter of Xerox Corp.*, the Court of Appeals extended FOIL's deliberative materials exemption to include material created by outside consultants. The court

54. *See id.* at 58–59.

55. *Id.* at 62 (Buckley, J., dissenting in part).

56. *Id.* at 61 (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 62.

61. *See id.* at 63.

62. N.Y. Pub. Off. Law § 87.

63. *Id.* at § 87(g).

64. Fappiano v. N.Y. City Police Dep't, 95 N.Y.2d 738, 746 (2001).

65. M. Farbman & Sons, Inc. v. N.Y. City Health and Hosps. Corp., 62 N.Y.2d 75, 80 (1984).

reasoned that if materials prepared by inside "agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker in arriving at his decision,'"[66] then it makes "little sense . . . [to] deny this protection when reports are prepared for the same purpose by outside consultants retained by [the] agencies."[67] The court recognized that the purpose of the deliberative materials exemption is to protect "the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers."[68] Rather than resting its decision on dictum from *Klamath*, a federal case analyzing the Freedom of Information Act,[69] the First Department should have decided *Tuck-It-Away* in a manner consistent with New York precedent. The Court of Appeals has noted that federal case law interpreting the scope of the deliberative materials exemption is only "instructive."[70] The First Department was not bound by *Klamath*. It is a common matter of statutory interpretation that when a state adopts a federal law as its own, the state does not necessarily adopt the federal interpretation of that law.[71]

In its opinion, the First Department agreed with ESDC that *Klamath* is distinguishable on factual grounds, but then proceeded to base its holding on dictum from *Klamath*.[72] The court concluded that AKRF was Columbia's advocate rather than its consultant on the environmental impact statement project, and was therefore unable to act objectively.[73] In *Klamath*, the plaintiff sought documents exchanged between the Bureau of Indian Affairs and an Indian tribe regarding water rights adjudications that allocated scarce water from the Klamath River Basin.[74] The Bureau was charged with administering land and water held in trust for Indian tribes, and filed claims on behalf of the Klamath tribe in response to a new irrigation plan for

66. Xerox Corp. v. Town of Webster, 65 N.Y.2d 132 (1985) (citing Matter of McAulay v. Bd. of Educ., 403 N.Y.S.2d 116 (2d Dep't 1978), *aff'd,* 48 N.Y.2d 659 (1979)).

67. *Id.* at 133.

68. Sea Crest Constr. Corp. v. Stubing, 442 N.Y.S.2d 130, 132 (2d Dep't 1981).

69. Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001).

70. *See Sea Crest Contr. Corp.*, 442 N.Y.S.2d at 132; *see also* Pittari v. Pirro, 683 N.Y.S.2d 700, 705–06 (Sup. Ct. Westchester County 1998).

71. *Cf.* People v. Mitchell, 80 N.Y.2d 519, 526 (1992) ("If no Federal constitutional principles are involved, however, the question of retroactivity is one of State law. The Supreme Court has no concern with the uniformity of our law and if only a local question is presented, the 'state courts generally have the authority to determine the retroactivity of their own decisions.'") (quoting Am. Trucking Ass'n., Inc. v. Smith, 496 U.S. 167, 177 (1990)); *see generally* Towle v. Forney, 14 N.Y. 428 (1856) ("[A]s between the judgments of our own courts and those of the general government, where there is a conflict between them, we ought to follow our own decisions, except in cases arising under the constitution and laws of the Union, where the judgments of the supreme court of the United States are of controlling authority.").

72. *See* Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp., 861 N.Y.S.2d 51, 58–59 (1st Dep't 2008).

73. Appellant's Brief, *supra* note 20, at 16.

74. *See Klamath*, 532 U.S. at 5–6; *see also* Appellant's Brief, *supra* note 20, at 18.

parts of Oregon and California.[75] The Bureau consulted with the tribe on the appropriate scope of the claims.[76] In response to the plaintiff's FOIA request, the Bureau contended that the Indian tribe was acting as an agency consultant, and withheld several documents under the deliberative materials exemption.[77] The Ninth Circuit ordered disclosure, and the Supreme Court affirmed, holding that Indian tribes acting on behalf of their own water rights were advocates rather than consultants for purposes of FOIA's deliberative materials exemption.[78]

The First Department in *Tuck-It-Away* incorrectly analogized the Indian tribe's relationship with the Bureau of Indian Affairs to AKRF's relationship with Columbia. As appellants argued, under New York State and New York City environmental laws, environmental consultants are not advocates.[79] Under SEQRA, AKRF's only obligation as a consultant to Columbia was to produce a satisfactory environmental impact statement for the Department of Planning's review and adoption.[80] Therefore, while the documents at issue in *Klamath* might have shown the Indian tribe's advice to be self-interested, rather than objective, the environmental impact reports at issue in *Tuck-It-Away* were arguably objective because they at least met the same SEQRA guidelines that all such environmental impact reports must meet.[81] Furthermore, the consultant, at ESDC's request, employed two separate teams for the Columbia project: one team prepared the environmental impact statement and the other team prepared the blight study.[82] Thus, AKRF instituted measures to reduce any conflicts of interest presented by the arrangement in which AKRF was to prepare both the environmental impact statement for the Department of Planning and the blight study for ESDC.

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75. *See Klamath*, 532 U.S. at 5.

76. *Id.*

77. *See id.* at 4–6; *see also* Appellant's Brief, *supra* note 20, at 18.

78. *See Klamath*, 532 U.S. at 7, 12.

79. Appellant's Brief, *supra* note 20, at 20.

80. In making SEQRA findings:

> [P]ublic agencies must: (1) consider the relevant environmental impacts, facts and conclusions disclosed in the final environmental impact statement; (2) weigh and balance relevant environmental impacts with social, economic and other considerations; (3) provide a rationale for the agency's decision; (4) certify that the requirements of [6 N.Y.C.R.R. Part 617] have been met; [and] (5) certify that consistent with social, economic and other essential consideration from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

N.Y. Comp. Codes R. & Regs. tit. 16 § 617.11(d) (2009); *see also* Appellant's Brief, *supra* note 20, at 23.

81. *See* Appellant's Brief, *supra* note 20, at 19, 21–22.

82. *Id.* at 4–5.

However, even if these measures failed to eliminate all potential conflicts of interest, the documents sought in Tuck-It-Away's FOIL request should still have been exempt from disclosure pursuant to the deliberative materials exemption found in Public Officers Law section 87(2)(g). As the dissent pointed out, "the majority's decision ultimately rests upon the thesis that only objective advice should be entitled to the FOIL deliberative materials exemption."[83] Indeed, it is difficult to imagine that any advice an agency receives from an outside consultant will always be truly objective. And regardless, the statute does not require a determination of whether bias exists. Therefore, absent a decision by the courts stating that they will not involve themselves in determining whether a consultant is truly objective, the *Tuck-It-Away* decision will harm the deliberative process. An agency, fearing that an outside consultant could be construed to have some sort of bias in the favor of the agency, will be afraid to seek advice from the outside consultant for fear that the deliberative materials produced would suddenly lose their exemption to disclosure under FOIL. This result contravenes the rationale behind the Court of Appeals' decision in *Matter of Xerox Corp.,* which specifically extended FOIL's deliberative materials exemption to outside consultants so that reliance on outside advice would not be chilled.[84]

Not only was AKRF a consultant to, rather than an advocate for, Columbia, the firm also served as ESDC's consultant. AKRF had acted in this capacity for 25 years, and had performed other blight studies for the agency.[85] ESDC retained AKRF for the Columbia project to provide it with "accurate and objective information concerning the condition of buildings and other features of West Harlem."[86] As a consulting firm, AKRF's business reputation hinged on it being able to exercise good judgment to provide decision makers with objective information on which they could reliably assess their options.[87] The New York State Legislature acknowledged the importance of the deliberative process by creating the deliberative materials exemption in FOIL. As Justice Buckley noted in his dissenting opinion in *Tuck-It-Away*, the exemption is justified as a means for agencies to elicit frank advice without fear of future public criticism,[88] protect pre-decisional ideas from disclosure,[89] and withhold documents suggesting possible reasons for policy which were not actually relied upon in the final decision-making process.[90]

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83. Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp., 861 N.Y.S.2d 51, 62–63 (1st Dep't 2008) (Buckley, J., dissenting in part).

84. Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132–133 (1985) (citing Sea Crest Const. Corp. v. Stubing, 442 N.Y.S.2d 132 (2d Dep't 1981)).

85. *See* Appellant's Brief, *supra* note 20, at 4–5.

86. *Id.* at 24.

87. *Id.*

88. *Tuck-It-Away,* 861 N.Y.S.2d at 61 (Buckley, J., dissenting in part).

89. *Id.*

90. *Id.*

While the *Tuck-It-Away* court likely viewed its decision as furthering FOIL's goal of open government,[91] it disregarded the fact that the exemption is meant to offer some protection for the deliberative process. The First Department's decision creates an additional burden on the courts to examine the alleged biases of any consultants whose advice is the subject of a FOIL request, and will frustrate the deliberative process on which agencies base their decisions. The result will make agencies reluctant to elicit a wide range of opinions during their decision-making processes.

91. *Id.* at 57 (citing Matter of Gould v. N.Y. City Police Dept., 89 N.Y.2d 267, 274 (1996)).