

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

EMPIRE CENTER FOR PUBLIC POLICY

Petitioner,

-against -

DECISION AND ORDER
Index No. 908004-19
RJI No. 01-19-ST0748

(Lynch, J.)

NEW YORK STATE ENERGY RESEARCH AND
DEVELOPMENT AUTHORITY, NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondents.

Hon. Peter A. Lynch, J.

INTRODUCTION

This is an Article 78 Proceeding commenced pursuant §89 (4) (b) of Article 6 of the Public Officer’s Law (hereinafter “FOIL”). In fine, Petitioner seeks disclosure of a comprehensive study directed by Governor Andrew Cuomo on January 10, 2017 relative to determining a cost-effective and responsible pathway to reach 100 percent renewable energy statewide. Respondents denied the request, and the administrative appeal upheld the denial.

FACTS

In the 2017 State of the State Address, Governor Cuomo identified the need to address Climate Change via renewable energy sources. The corresponding Press Release dated January

10, 2017 included the following phrase, “Directs State Agencies to Determine Cost-Effective and Responsible Pathway to Reach 100 Percent Renewable Energy Statewide”¹.

NYSERDA President Alicia Barton testified at the February 27, 2018 and January 23, 2019 Joint Legislative Hearings held by the Senate Finance and Assembly Ways and Means Committee. At the February 27, 2018 hearing, the following colloquy took place:

Assemblyman Cusick²: Earlier this morning the commissioner of DEC had mentioned that DEC was working with NYSERDA on the Governor’s plan that was announced in last year’s budget of reaching 100 percent renewable. The commissioner did not get into the details. Could you get into some details on where we are on that right now?

NYSERDA President Barton: Sure. Yes, we are working with DEC and with a consultant and with outside academic stakeholders for the purposes of peer review to complete an analysis around the feasibility of achieving 100 percent renewables. That work is ongoing. We’re really actively in the middle of that and expect that we would be able to provide initial results to stakeholders later this spring” (Hrg. Tr. P. 437-438) (emphasis added).

At the January 23, 2019 hearing, the following colloquy took place:

Senator Krueger: “One, if the Governor’s goal of 100 percent clean electricity by 2040 is based on the NYSERDA study that he announced in his State of the State two years ago? And will we be able to read that study at some point?”

NYSERDA President Barton: With respect to your specific question about the analysis, it is our anticipation that the work that NYSERDA has done previously to date at the Governor’s direction would be leveraged to support the work and incorporated into the work of the Climate Action Council...” (Hrg. Tr. P. 429-430).

A reasoned inference from that response is that the study had been completed to a point where it could be used to gain an advantage i.e. “leveraged”.

¹ See Affidavit of Carl Mas ¶3.

² The record includes Assembly Member Cusick’s News Release seeking disclosure of the study.

On April 12, 2019, Petitioner sent each Respondent an e-mail stating, “I am writing to request, under the state Freedom of Information Law, an electronic copy of the ‘comprehensive study’ ordered by Gov. Andrew Cuomo ‘to determine the most rapid, cost-effective, and responsible pathway to reach 100 percent renewable energy statewide’ as detailed in this January 10, 2017 press release and as completed prior to revisions mentioned publicly by NYSERDA in February 2019” (emphasis added) .

Same date, DEC acknowledged receipt of the request and advised that a response would issue “no later than 5/10/19”, later extended to “5/30/19”. On May 30, 2019, DEC issued its response: “Please note that the ‘comprehensive study’ described at the link you provided...has not yet been ‘completed’. Therefore, please be advised that the Department does possess the records you have requested” (emphasis added). On June 28, 2019, Petitioner filed its administrative appeal, noting that statistical or factual tabulations or data were not exempt from disclosure and requested a redacted copy of the study. On July 16, 2019, DEC denied the appeal under a claim “that the RAO responded that the Department does not possess records responsive to your request”.

By letter dated June 25, 2019, NYSERDA’s Records Access Officer Sal Graven responded to Petitioner’s FOIL request, to wit: “NYSERDA’s search for records has identified documents responsive to your request. We are withholding these records pursuant to Public Officer’s Law §87 (2) (g), which provides an exception to disclosure for inter- or intra-agency records that are not statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations” (emphasis added). By letter dated July 25, 2019, NYSERDA President denied Petitioner’s administrative appeal, stating, inter alia: “I have reviewed the administrative record related to this matter and have determined that the documents

identified by the Records Access Officer [Graven] were not in fact responsive...I have reviewed the records in our possession. My review has indicated that these records are not, in fact, responsive to your request”.

Based on the FOIL denial, the instant proceeding ensued.

PETITION

Petitioner seeks an order directing the respondents to release the requested records within 5 days of the date of the order, together with an award of attorney’s fees and costs.

ANSWER³

Respondent seeks dismissal of the Petition, with costs and disbursements. In Answer paragraphs 17-22 Respondent has raised various defenses under CPLR 3211 (a) (1) (2) and (7), and argues the FOIL denial was appropriate, not arbitrary and capricious nor an abuse of discretion. Other than making a general claim, it is manifest the record does not support the defenses raised.

Under CPLR 3211 (a) (1) Respondents claim a defense founded on documentary evidence. A motion to dismiss will only be granted “if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (Fontanetta v. John Doe 1, 73 A.D. 3d 78, 83 [2d Dept. 2010]; see also, S & J Serv. Ctr., Inc. v. Commerce Commercial Group, Inc., 2019 NY Slip Op 09049 [2d Dept. 12/18/19]). A review of the record documents does not, however, support this defense. To the contrary, as more fully set forth below, Petitioner has established a basis to grant relief.

Under CPLR 3211 (a) (2) Respondents claim the Court lacks subject matter jurisdiction. Respondent has failed to set forth any basis to make this claim. Moreover, this Court has subject matter jurisdiction in accord with FOIL § 89 (4) (b).

³ With Objections in point of law in accord with CPLR §7804 (f).

Under CPLR 3211 (a) (7) Respondents claim Petitioner failed to exhaust its administrative remedies. The Court notes Respondent does not identify any further administrative remedies available to Petitioner. In Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y. 2d 52, 57 [1978], the Court held,

“It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law. This doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its expertise and judgment.

Here, the record evidences that Petitioner did, in fact, exhaust its administrative remedies in accord with FOIL §89 (4) (a).

Under CPLR 3211 (a) (7) Respondents claim Petitioner failed to state a cause of action. Once again, Respondent has failed to set forth its basis to support the defense. Under FOIL 89 (4) (a) (b) “any person” who is denied access to a public record may maintain a proceeding to enforce its claim. Petitioner has alleged that it did, in fact, submit a FOIL request, which was denied. Petitioner also alleged it filed its administrative appeal and was denied. Petitioner has stated a cause of action.

STATEMENT OF LAW

Here, record access was denied under various conflicting claims, ranging from non-possession of responsive records to claims of exemption as inter-agency or intra agency materials under FOIL §87 (2) (g) (i) (ii) (iii), inclusive of a claim that the study is not final (i.e. pre-decisional deliberative process). Pursuant to FOIL §89 (4) (b), “in the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this

article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two” (emphasis added).

In Matter of Town of Waterford v. New York State Dept. of Env'tl. Conservation, 18 N.Y. 3d 652, 656-657 2012], the Court held,

"It is settled that FOIL is based on the overriding policy consideration that 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. As a result, we have required that FOIL be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government. It is the agency's burden to establish that 'the material requested falls squarely within the ambit of one of these statutory exemptions” (internal quotations and citations omitted) (emphasis added).

The Court noted that DEC failed to meet its burden to establish an intra-agency exemption, finding that the EPA did not meet the statutory definition of agency. The Court did note, however, that third party consultants fall within the agency definition for exemption purposes.

Respondent's claim that they do not have records responsive to the FOIL request is misleading and belied by the record. As aforementioned, on May 30, 2019, DEC issued its response:

“Please note that the ‘comprehensive study’ described at the link you provided...has not yet been ‘completed’. Therefore, please be advised that the Department does possess the records you have requested.”

The foregoing notwithstanding, on July 16, 2019 DEC then claimed, “the Department does not possess records responsive to your request”. Like its counterpart, Respondent NYSERDA has also taken apparent conflicting positions. As aforementioned, on June 25, 2019, NYSERDA acknowledged its “search for records has identified documents responsive to your request” but changed its position on July 25, 2019 to “these records are not, in fact, responsive to your request”. As aforementioned, NYSERDA President Barton acknowledged the existence of the

study as of January 23, 2019, when she stated an intent to use the work for leverage purposes, albeit now claims it is not complete”⁴ (see also Affidavit of Carl Mas). To reconcile these conflicting statements, Respondent bears the burden to prove they have not made “final...policy or determinations” to claim an exemption from disclosure in accord with FOIL §87 (2) (g) (iii)

A claim that there are no responsive records due to the lack of finality in the deliberative process does not, however, end the inquiry. In Matter of Gartner v. New York State Attorney General’s Off., 160 A.D. 3d 1087, 1090 [3d Dept. 2018], the Court addressed this exemption as follows:

“An exemption from FOIL disclosure exists for intra-agency and inter-agency materials, but there are exceptions—meaning that disclosure is permitted—if the document consists of, among other things, statistical or factual tabulations or data. **Factual data . . . simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making**” (internal quotations and citations omitted) (emphasis added).

Here, Respondent’s failed to acknowledge let alone distinguish factual data from material corresponding to the claimed pre-decisional deliberative process.

Considering record admissions that the study exists in some form, the proper procedure would have been to submit the responsive documents with a privilege log for the Court’s in camera review, yet Respondents failed to do so (see Matter of Madeiros v. New York State Educ. Dept., 30 N.Y. 3d 67 [2017] where Court conducted in camera review of redacted documents; see also, Matter of Moody’s Corp. & Subsidiaries v. New York State Dept. of Taxation & Fin., 141 A.D. 3d 997 [3d Dept. 2016], where the Court held, “Upon receipt of a

⁴ In her affidavit, NYSERDA President Barton stated, “in response to a question from Senator Krueger about pending climate legislation, I stated that the work that NYSERDA had done previously to date at the Governor’s direction would be leveraged...” (Barton Aff. ¶10) In fact, the question Senator Krueger asked was “and will we be able to read that study at some point?” The misrepresentation as to the nature of the true question and corresponding reference to using the study as leverage begs the question as to whether the study is final but undisclosed.

FOIL request, an agency is duty-bound to conduct a diligent search of the records in its possession responsive to the request and to state, in writing, the reason for the denial of access. The agency's response must not merely parrot the statutory language of the FOIL exemptions but must adequately describe the documents withheld and set forth the reasons for withholding them. Where, as here, a party is challenging an administrative determination to withhold or redact documents that are responsive to a FOIL request, the proper procedure is to commence a CPLR article 78 proceeding where the agency's burden to articulat[e] a particularized and specific justification for denying access may be satisfied through the submission of the responsive documents with a privilege log" (internal quotations and citations omitted) (emphasis added); Matter of Pflaum v. Gratton, 116 A.D. 3d 1103, 1105 [3d Dept. 2014], where Court held, "the broad allegation here that the files contain exempt material is insufficient to overcome the presumption that the records are open for inspection. In the event that the requested record can be located electronically and respondents are able to establish that the document contains exempt material, the appropriate remedy is an in camera review and disclosure of all nonexempt, appropriately redacted material" (citations omitted)).

Based on the conflicting positions taken by Respondent, it is manifest that Respondents have failed to meet their burden of proof to establish an exemption pursuant to FOIL §87 (2) (g) (i) (ii) (iii).

With respect to attorney fees, FOIL §89 (4) (c) provides: "The Court in such a proceeding ...shall assess, against such agency involved, reasonable attorney fees and other litigation costs reasonably incurred by such person on any case under the provisions of this section in which such person has substantially prevailed and the court finds the agency had no reasonable basis for denying access" (emphasis added). Here, Petitioner has substantially

prevailed. Moreover, Respondent has failed to meet its burden of proof to sustain an exemption (Matter of Madeiros v. New York State Educ. Dept., supra. at 15-16; c.f. Associated General Contractors of New York State, LLC v. Dormitory Authority of State, 173 A.D. 3d 1523 [3d Dept. 2019]). Accordingly, Petitioner is awarded reasonable attorney fees and litigation costs, and is directed to submit an application for such award, with proposed Order, on not less than three (3) days' notice to Respondents.

CONCLUSION

For the reasons more fully stated above, the Petition is Granted, and Respondents are directed to provide a copy of the records corresponding to and referenced in DEC's Memo dated May 30, 2019 and NYSERDA's memo dated June 25, 2019 to Petitioner within five (5) days of service of this decision and order. Petitioner's application for an award of counsel fees and costs is Granted.

This memorandum constitutes both the decision and order of the Court.

Dated: Albany, New York
February 20, 2020



PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED: All e-filed pleadings, with exhibits.

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