SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of:	
ENERGY & ENVIRONMENT LEGAL INSTITUTE, *et al.*	**Index No.: 101181/2016**
Petitioners,	**COMBINED MOTION TO RENEW AND MOTION TO REARGUE**
v.	
THE ATTORNEY GENERAL OF NEW YORK	
Respondent,	
For a judgment pursuant to Article 78 of the Civil Practice Law and Rules.	

NOW COME the petitioners and move, pursuant to Rule 2221(f) of the Civil Law and Practice Rules ("CPLR") to renew and to re-argue.

I. Motion to Renew

Pursuant to CPLR 2221(e), a Motion to Renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion."

Here, subsequent developments in this litigation have shown that this Court's December 21, 2016 Interim Order was based on a false premise, which was unknown to the petitioners (and to the court) at the time this case was briefed and argued. The record reveals that the respondents

took great pains to hide the true facts of the Attorney General's use of private email addresses in an effort to stave off a court-ordered supplemental search. This Court gave credence to the respondents' misleading papers, but the respondents have consistently been less than candid.

Specifically, petitioners had requested in their Petition and in their memorandum that this Court require the Attorney General to search private email accounts for records responsive to the petitioners' Freedom of Information Law requests. The Attorney General opposed the Petition's claims for a supplemental search of private email accounts on the basis that the petitioners had not demonstrated such a search was necessary. The respondents submitted an affidavit from Michael Jerry stating that the use of private email accounts was "prohibited" and argued in their brief that the petitioners had failed to demonstrate that the Attorney General used a private account. Further, the respondents submitted a privilege log which identified Document 160287-210-211 as being sent to the Attorney General, but did not identify what email addresses were used on that correspondence.

The Court accepted the representations made by the Attorney General, stating on December 21, 2016 in its Interim Order that "if the petitioners had made some showing that the AG used his Gmail account or text messages in connection with his work at the OAG, then this court would be more inclined to order respondent to conduct a search of those platforms." Interim Order, p. 5. The Court went on to explain that the petitioners had failed to establish that the AG used private email accounts in connection with his official duties, and declined to order a search of those accounts.

Events subsequent to this Court's Interim Order have definitively established that the Attorney General did, in fact, use his Gmail (or some other private email platform) for the

performance of his duties at OAG. This Court has recognized, after *in camera* review, that Document 160287-210-211 reflects the Attorney General using a private email address.

At the time the December 21, 2016 Interim Order was signed, neither the Court nor the petitioners had any affirmative evidence that the Attorney General used a private email account. However, events subsequent to December 21, 2016 unequivocally establish that such a private email account was used for official business, and that the initial briefing in this case obfuscated that fact, causing a miscarriage of justice. As such, the Court should review its December 21, 2016 Interim Order in light of subsequent developments, and vacate that order. The Court should now order that Mr. Schneiderman's private email account, as identified in Document 160287-210-211, must be searched for records potentially responsive to the request at issue.

II. Motion to Re-Argue

Pursuant to CPLR 2221(d)(2), a Motion to Renew "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

Here, the Court's May 25, 2017 Decision, Order & Judgment overlooked various aspects of the petition, denying them without discussion. Moreover, the Court did not make clear the level of redactions which are permissible in Document 160287-210-211. Petitioners discuss each issue in turn.

First, petitioners note that their petition requested an award of attorneys' fees pursuant to Public Officers Law, Article 6, §89 (4)(c), but the Court did not discuss this aspect of the petition in its Decision, Judgment & Order. In this matter, petitioners have won the release of four documents. In a recent case in Albany, a court awarded attorney's fees when a petitioner won the

release of only a single document, and noted that the Attorney General's office has a habit of stonewalling FOIL requests, which fees awards might serve to remedy. See Exhibit A. Here, the Court should award petitioners' attorney's fees, or at least order supplemental briefing on that issue and grant or deny relief after considering both the facts of this case and the relevant statutory provisions.

Second, petitioners note that the court stated "respondent may redact the attorney general's private email address," while ordering the remainder of Document 160287-210-211 to be produced. Petitioners respectfully submit that this aspect of the Decision, Order & Judgment should be clarified as it leaves considerable room for interpretation regarding the degree of the redactions the court will permit. Public Officers Law, Article 6, §87 (2) requires an agency to provide all records, or "portions thereof" which are not exempt from production by law. As relevant here, §87 (2)(b) allows redaction of portions of a record that "if disclosed would constitute an unwarranted invasion of personal privacy."

Here, assuming *arguendo* that the Attorney General's private email address is a matter of personal privacy, redaction of the entire email address has not been shown to be necessary. For example, the Attorney General could redact only the prefix of the Attorney General's email address, but produce the domain name. Given OAG's vociferous denials that a search of the Attorney General's private email address was necessary, and subsequent revelations that the Attorney General does indeed possess and use a private email address for the business of his office, the public is at a minimum entitled to know the domain name of the email address.

Quite simply, there is no personal privacy interest implicated by whether the Attorney General's non-official, non-OAG maintained email account used at least on occasion for official

purposes ends in "@gmail.com" or "@yahoo.com." There is however a public interest in knowing, e.g., what system has custody of records belonging to the public, and whether the Attorney General was using an account for official correspondence which may be opportunistically encrypted for higher security, which not all of the major email hosting services do; or whether the system he was using -- which in the description of his own Assistant Counsel and Records Officer Michael Jerry was "prohibit[ed]", as "[a]ll new employees are advised on their first day at the OAG…as well as periodic reminders not to use personal email for OAG business" (Affirmation of Michael Jerry, September 29, 2016, citing to OAG Electronic Information Protection Policy policy Aff. Ex. B)) -- was also was highly insecure.

III. Conclusion

For the foregoing reasons, petitioners respectfully move that this Court vacate its December 21, 2016 and May 25, 2017 orders to the extent set forth above and as described in the contemporaneously-filed Notice of Motion.

Dated this the 14th day of June, 2017.

Law Office of Francis Menton

By: Francis Menton/MDL
Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com
Attorney for Petitioners
Energy & Environment Legal Institute
and
Free Market Environmental Law Clinic

Matthew D. Hardin
Of Counsel (Admitted *Pro Hac Vice*)
314 W Grace St, Suite 308
Richmond, VA 23220
(804) 608-6456
MatthewDHardin@gmail.com

COURT OF CLAIMS
SUPREME COURT CHAMBERS
RENSSELAER COUNTY COURTHOUSE
80 SECOND STREET - THIRD FLOOR
TROY, NEW YORK 12180
TELEPHONE: (518) 285-6170

EXHIBIT
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HENRY F. ZWACK
Acting Supreme Court Justice

Loretta E. Branigan, Es
Principal Court Attorne

Joann M. Vent
Secretary to Judg

April 19, 2017

Baker & Hostetler, LLP
Mark Bailen, Esq., of counsel
1050Connecticut Avenue, NW
Washington, DC 20036-6304

Anna St. John, Esq.
1310 L, St. NW, 7th Floor
Washington, DC 20005

Baker & Hostetler, LLP
Peter B. Shapiro, Esq., of counsel
45 Rockefeller Plaza
New York, New York 10111-0100

Eric T. Schneiderman
Attorney General of the State of New York
Shannan C. Krasnokutski, Esq., of counsel
The Capital
Albany, New York 12224-0341

Re: Competitive Enterprise v. Attorney General
Albany County Index No. 5050-16

Dear Counselors:

The Original Decision and Order is provided to Mr. Bailen, for filing. A copy of the Decision and Order is provided to Mr.Shapiro, Ms. St. John and Ms. Krasnokutski. All papers are returned to the Court Clerk.

Sincerely,

Henry F. Zwack
Acting Supreme Court Justice

HFZ:jmv
enc.

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

ORIGINAL

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 01-16-ST8116 Index No. 5050-16

Appearances: Baker & Hostetler, LLP
Attorneys for Petitioner
Mark Bailen, Esq., of counsel
1050 Connecticut Avenue, NW
Washington, DC 20036-6304

Baker & Hostetler, LLP
Attorneys for Petitioner
Peter B. Shapiro, Esq., of counsel
45 Rockefeller Plaza
New York, New York 10111-0100

Anna St. John, Esq.
Competitive Enterprise Institute
1310 L.St. NW, 7th Floor
Washington, DC 20005

Hon. Eric T. Schneiderman, Esq.
Attorney General
Attorneys For Respondent
Shannan C. Krasnokutski, Esq., of counsel
The Capitol
Albany, New York 12224-0341

DECISION/ORDER

Zwack, J.:

In this CPLR Article 78 proceeding involving a request pursuant to the Freedom of Information Law (Public Officers Law Article 6 - "FOIL") by petitioner Competitive Enterprise Institute ("CEI") for the production of documents by respondent Attorney General, by a decision and order dated November 21, 2016 the Court determined that the petitioner had substantially prevailed and that respondent had failed to fully explain the reason for denial of access and also failed to detail its search for the requested information (Common Interest Agreement - "CIA"). The Court rejected the respondent's conclusory assertions that the subject records fell within a statutory exemption, directed the respondent to provide within 30 days a response "that fully complies with the intent and purpose" of FOIL, and permitted the petitioner to make an application for fees and costs within 60 days — with a response by respondent within 30 days following — with the Court to schedule a hearing on the issue upon the request of either party.[1]

On December 21, 2016, respondent provided a supplemental response to petitioner's FOIL request,[2] stating that after conducting a diligent search it found only one record responsive to the request. Respondent again asserted that the subject document (CIA) was exempt from disclosure "for one or more" of four different exemptions, without specifying

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[1]Neither party requested a hearing on the issue of fees.

[2]Affirmation by Michael Jerry, Esq., dated December 21, 2016.

which of the asserted exemptions applied or why, and, after determining that the document was in the public domain since August 2016, it provided the document (without waiving the applicability of the asserted exemptions) to the petitioner.

Now, petitioner moves for an order awarding attorney fees of $26,901.25 and costs of $466.72, and in support offers an affirmation by CEI attorney Anna St. John, together with supporting documentation including her time entries; and billing statements from Baker & Hostetler, together with copies of biographies of its primary attorneys working on the matter (Mark Bailen and Elizabeth Schutte). In support of the requested award, petitioner argues that if it had not litigated this FOIL request, there would still be questions as to whether other records in response to its request. It also asserts that respondent never identified the actual exemption it was claiming privilege under, and only turned over the CIA document following the Court's decision and then only because it was by then in the public domain.

Respondent opposes the petitioner's application for an award of fees, in sum arguing that petitioner did not substantially prevail in this Article 78 proceeding, that it articulated a reasonable basis for denying access to the requested information, and that petitioner's fee request is excessive and unreasonable. Respondent argues that petitioner failed to support the qualifications of its non-attorneys working on matter, that the hourly rates for the attorneys are overstated/excessive and not consistent with fees customarily charged in the locality, and includes billings for "excessive, duplicative or unnecessary to the conduct of

this litigation."[3]

Here, absent a request to reargue or renew (CPLR 2221) — which is not before the Court — there is no purpose served by respondent's instant attempt to argue that petitioner failed to substantially prevail or that petitioner has not met the statutory requirements to be entitled to an award of fees and costs under FOIL. The Court determined both issues in the November 21, 2016 decision and order — including rejecting respondent's "conclusory assertions that certain records fall within a statutory exemption" and also it's argument that it had substantially complied with petitioner's FOIL request — and thus law of the case now precludes any further examination of either argument (*Martin v City of Cohoes*, 37 NY2d 162, 165 1975]).

In determining an award of fees and costs in a FOIL proceeding, the Court is mindful "that the decision whether to award such fees is discretionary even when the statutory prerequisites have been established" (*Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1293 [3d Dept 2009]), that an "award of attorney's fees is intended to 'create a clear deterrent to unreasonable delays and denials of access[and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL' " (*Matter of South Shore Press, Inc. v Havemeyer*, 136 AD3d 929, 931 [2d Dept 2016], quoting *New York Civil Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338 [3d Dept 2011], and that the award should be should be reasonable and take into consideration

[3]For example, it argues that petitioners's use of both in house and outside counsel resulted in duplicative and unnecessary work in responding to respondent's essentially straightforward motion to dismiss, pointing to St. John expending 25 hours, plus Baker & Hostetler expending additional hours in opposition to a six page motion.

appropriate factors including "the time, effort and skill required; the difficulty of the questions presented; the responsibility involved; counsel's experience, ability and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation"(*Shrauger v Shrauger*, 146 AD2d 955, 956 [3d Dept 1989]).

From attorney St. John's affidavit, it appears that petitioner CEI's attorneys expended 58.75 hours, supported by 17.25 hours of paralegal and paraprofessional, and now seeks legal fees of $16,425 for only the 36.5 hours expended by St. John, with an requested hourly rate of $450. St. John tells the Court that she is paid on a salary basis by CEI (without stating her salary), and that when she was employed in 2014 at another firm her billing rate exceeded $450 per hour. Although St. John's education, training and professional experience[4] could amply support a billing rate of $450, the Court notes that she was supervised by CEI's general counsel, that Baker & Hostetler also represented CEI, and accordingly reduces her hourly rate to $300 and more in line with an hourly rate for an associate. On the issue of the number of hours expended by St. John, in the Court's view the hours are reasonable and to the extent that some of her work paralleled the work performed by Baker & Hostetler, it was not neither excessive or inappropriate.

Turning to the billings submitted by Baker & Hostetler, the Court declines to award fees for the hours expended by its paralegals and paraprofessionals. Petitioner offered no supporting documentation for the Court, beyond speculation, to make any determination on

[4]The same hourly rate was also approved by another court (*In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. C 07-05634 CRB, 2015 U.S. Dist. LEXIS 106943 (N.D. Cal. Aug 13, 2015)).

their training and experience and thus determine an appropriate hourly rate. Turning to the rates charged for the principal attorneys, Bailen and Schutte, each is well supported by their respective education, training and extensive professional experience. A review of the time charged by the attorneys (22.5 hours for Bailen, 6.25 hours for Schutte) shows it to be reasonable and reflective of the nature and quality of the work performed.[5] Albeit respondent proposes that the Court cap the attorney's hourly rate at no more than $250 — arguing that "local courts have recognized, prevailing rates even for experienced attorneys in the Capital District are far lower than rates charged Petitioner by its New York City - and D.C. - based counsel" — the Court is not so inclined. Here, respondent was well aware that petitioner was represented by "New York City - and D.C.- based counsel" and also that the CIA document was in the public domain as early as August 2016. Thus, throughout, it was entirely within respondent's ability to control or limit everyone's costs — including the use of the Court's limited resources — by simply providing the CIA document before petitioner was compelled to commence the Article 78 proceeding, and certainly provide confirmation that there were no other responsive documents before being directed by the Court to provide a response that fully complied with FOIL.[6] On this record, and particularly towards

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[5]This Court, depending on the matter, has approved hourly rates for partners and associates in the range of $275 to $450, including the higher rates in more complex matters including matrimonials, and lower rates in more straightforward real property and foreclosure actions. In any event, an hourly rate alone is not determinative of what is a reasonable fee...how well a party articulates the issues and makes use of judicial resources, more likely than not, can be the more compelling factors...

[6]Factors integral to an award of fees can include tactics taken by a party "which unnecessarily delayed resolution of the issues" (*Siegal Law Offs., LLC v Tulin*, 32 AD3d596, 597 [3d Dept 2006]).

encouraging respondent to make a good faith effort in complying with FOIL, the Court declines respondent's request to reduce an already discounted hourly rate. Any less would be counterproductive and unreasonable under the circumstances.[7]

However viewed, petitioner was entitled to a straightforward response by respondent — whether "to disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" (*Matter of Legal Aid Socy. v New York State Dept. Of Corr. & Community Supervision,* 105 AD3d 1120, 1124 [3d Dept 2013], internal quotations and citations omitted). Instead, in the Court's view, respondent stonewalled, and as noted in the November 2016 Decision and Order baldly "asserted that the records fell within 'one or more' of five possible exemptions...(and completely failed) its obligation to 'fully explain in writing...the reason for the denial of access'" (citing *Matter of West Harlem Bus. Group v Empire state Dev. Corp.*, 13 NY3d 882, 884 [2009]). Thus, on account of respondent's failure to either turn over the requested documents, or identify the applicable exemption and that the material requested fell squarely within that exemption (*Matter of Carnevale* 68 AD3d at 1292), petitioner was required to commence this Article 78 petition. It substantially prevailed, and it was only through the use of judicial process that it was able to obtain the required disclosure. Further, given respondent's continued failure "to proffer

[7]Petitioner is seeking an award of fees for a total of 59 hours expended by both St. John ad Baker & Hostetler, hardly an excessive request in the matter and not disproportionate to the 40.82 hours approved a matter respondent cites in opposition (*Matter of Chiaroscuro Foundation v New York State Department of Health,* Albany County Index No. 3252-13 [Decision and Order dated June 30, 2016, Hartman, J.]).

more than conclusory assertions" as a basis for withholding the subject record (*Matter of Jaronczyk v Mangano*, 121 AD3d 995, 996 [2d Dept 2014]) — and then only producing it after it was in the public domain — the Court's award of substantial attorney fees is particularly appropriate "in order to promote the purpose and policy behind FOIL" (*Matter of South Shore Press, Inc.* 136 AD3d at 931).

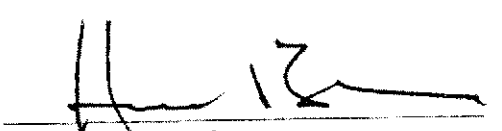
For all of the above, the Court approves an hourly rate for St. John of $300, and for the 36.5 hours expended awards the sum of $10,990. For Baker & Hostetler, the Court approves an hourly rate of $450 for Bailen and hourly rate of $350 for Schutte, and awards fees of $9,387.50 ($12,476.25 less $3,088.75 for paralegals and paraprofessionals).

Accordingly, it is

ORDERED and ADJUDGED, that respondent shall pay to the petitioner the sum of $20,377.50 as counsel fees, with $466.72 in litigation costs, all within 30 days from the notice and entry of this decision and order.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the petitioners for filing and entry. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: April 19, 2017
Troy, New York



Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Amended Notice of Motion dated January 25, 2017; Affirmation of Anna St. John, Esq., dated January 17, 2017, together with Exhibits "1" through "4". Memorandum of Law by Mark I. Bailen, Esq.; dated January 19, 2017;
2. Affirmation of Shannan C. Krasnokutski, Esq., dated March 3, 2017, together with Exhibits "A" through "E"; Memorandum of Law by Shannan C. Krasnokutski, Esq. dated March 3, 2017;
3. Reply Memorandum of Law by Mark I. Bailen, Esq., dated March 9, 2017.