

**Matter of Arbor E&T, L.L.C. v New York City Human
Resources Admin.**

2012 NY Slip Op 32465(U)

September 24, 2012

Sup Ct, New York County

Docket Number: 102981/2012

Judge: Alexander W. Hunter Jr

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SCANNED ON 9/25/2012

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

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Index Number : 102981/2012
ARBOR E&T, LLC
vs.
NYC HUMAN RESOURCES
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 26, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1-12, 14-25

Answering Affidavits — Exhibits _____ **No(s).** 26

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, It is ordered that this motion is

See memorandum decision and judgment annexed hereto.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/25/12

AWH J.S.C.
ALEXANDER W. HUNTER JR

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X

In the Matter of the Application of

Index No.: 102981/12

Arbor E&T, L.L.C. d/b/a/ Rescare
Workforce Services,

Petitioner,

Decision and Judgment

-against-

New York City Human Resources
Administration and the Office of the Mayor
of New York City,

Respondents.

-----X

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to C.P.L.R. Article 78, compelling respondent to perform the duties required by Public Officers Law § 84 *et seq.* by producing documents requested in petitioner’s Freedom of Information Law (“FOIL”) requests, is denied. Respondents’ cross-motion to dismiss the petition is granted.

The Wellness, Comprehensive Assessment, Rehabilitation & Employment (“WeCARE”) program strives to assist cash assistance clients with medical and/or mental health barriers to employment achieve their highest level of self-sufficiency. On September 8, 2010, respondent New York City Human Resources Administration (“HRA”) issued a Request for Proposals (“RFP”) seeking vendors to provide WeCARE program services to approximately 25,000 participants. The RFP required that proposals be received by December 2, 2011. The RFP stated that awards would be made “to the reasonable proposer(s) whose proposal(s) are determined to be most advantageous to the City, taking into consideration the price and such other factors or criteria that are set forth in the RFP.” The RFP listed three criteria: 1) “demonstrated quality and quality of successful relevant experience”; 2) “demonstrated level of organizational capacity”; and 3) “quality of proposed approach”.

On December 15, 2010, petitioner submitted its proposal to HRA. By letter dated April 13, 2011, HRA notified all WeCARE proposers that the names of the evaluation committee members were inadvertently disclosed to one of the proposers and that a new committee had been selected. The letter also indicated that a statement regarding the scoring sheets concerning the experience section had also been mistakenly disclosed to one of the proposers. By letter dated February 2, 2012, HRA informed petitioner that is was not selected for an award from the RFP. The next day, HRA published a notice in the *City Record* stating that the WeCARE contract had been awarded to FedCap Rehabilitation Services, Inc. The notice further indicated

that draft copies of the proposed contract would be available for public inspection from February 3, 2012 to February 16, 2012.

On February 7, 2012, petitioner went to inspect the draft proposed contract. However, the only document available for viewing was a printed boilerplate document. Petitioner learned that no actual draft contract had been prepared as of that date.

On February 6, 2012, petitioner submitted a FOIL request to respondents seeking documents, records, and files related to the RFP issued by HRA for the WeCARE program, the resulting decisions, and contract awards. By letter dated February 10, 2012, HRA acknowledged receipt of the request and indicated that a response would be provided by March 20, 2012. On March 6, 2012, petitioner wrote to respondents inquiring about the status of its FOIL requests. Respondent Office of the Mayor of New York City ("Mayor's Office") failed to respond to either of petitioner's letters.

By letter dated April 16, 2012, HRA responded by producing almost 1,800 pages of responsive documents to petitioner. The partial denial letter also provided that other responsive documents were being withheld because disclosure would "reveal non-final intra-agency documents"; that the requested documents are "reflective of opinion, advice, and recommendation"; that the production of documents would "impair present or imminent contract awards"; and that the requested documents are "subject to attorney-client privilege." Petitioner asserts that respondent HRA's production of documents was highly deficient. Thereafter, petitioner appealed HRA's denial of its FOIL request by email on May 11, 2012. On June 1, 2012, HRA rejected petitioner's appeal. Thereafter, HRA produced additional documents to petitioner including redacted versions of the evaluation tools for the three bidders and the contract between HRA and the winning bidder of the WeCARE program for Region I. These subsequent productions totaled another 1500-2,000 pages of documents.

Respondents assert that the FOIL request sent to the Mayor's Office was misdirected as general correspondence and was never forwarded to the FOIL Officer. The Records Access Officer did not learn of petitioner's request until after the commencement of the instant proceeding. Thereafter, the Mayor's Office began searching for responsive documents. Respondents contend that to date, one record has been found that is responsive, not exempt pursuant to Public Officers Law § 87(2), and not duplicative. This record was produced via email on July 25, 2012.

Petitioner asserts that it is entitled to the disclosure of the requested documents pursuant to New York City Charter § 334, which provides in pertinent part that: "[a]gency contract files shall be open to public inspection with adequate protection for information which is confidential." Petitioner argues that in light of the legislative history and the statutory text, New York City Charter § 334 must be read as providing greater access and fewer exceptions to access than that provided under Public Officers Law § 84 *et seq.* Arbor also argues that it is entitled to the requested documents under FOIL. In the alternative, petitioner requests this court to order

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respondents to produce an index of the withheld documents and submit the documents to the court for an *in camera* inspection. Petitioner also seeks the payment of attorney's fees from respondent Mayor's Office since it failed to respond to the FOIL request.

Respondents oppose the petition in its entirety and cross-move to dismiss the proceeding pursuant to C.P.L.R. 3211(a)(1) and (7) on the grounds that: 1) petitioner failed to exhaust its administrative remedies; 2) the joinder of two separate causes of action against two respondents challenging two separate determinations in a single proceeding is improper; and 3) all responsive and non-exempt documents have already been produced.

First, respondents argue that as to respondent Mayor's Office, petitioner failed to exhaust its administrative remedies before commencing the instant proceeding and as such, this court lacks subject matter jurisdiction and the petition must be dismissed. Respondents aver that although the Mayor's Office failed to timely respond to petitioner's request, petitioner failed to file an appeal of the Mayor's Office's constructive denial pursuant to Public Officers Law §§ 89(3) and (4).

Second, respondents assert that petitioner has improperly joined two separate claims against two separate respondents. Respondents contend that this misjoinder is improper and the petition should be dismissed or severed into two separate proceedings.

Third, respondents argue that petitioner is attempting to circumvent the FOIL exemptions by invoking New York City Charter § 334. Respondents note that this court has previously held in **Fields v. Giuliani**, 2001 WL 1649393 (Sup. Ct., NY County, Oct. 15, 2001), that confidential documents pursuant to FOIL should also be deemed confidential under the New York City Charter. Since the responsive documents were withheld under FOIL, petitioner is not entitled to those same documents under the New York City Charter.

Lastly, respondents oppose petitioner's request for attorney's fees since the awarding of attorney's fees may only be granted if the party seeking fees is the substantially prevailing party. Respondents assert that it is premature at this juncture to award attorney's fees since petitioner is not a substantially prevailing party.

In opposition to respondents' cross-motion to dismiss, petitioner first argues that when an agency ignores a FOIL request, an Article 78 proceeding commenced to compel production cannot be dismissed on the basis of petitioner's failure to exhaust administrative remedies. Second, petitioner asserts that respondents were properly joined in this proceeding because petitioner's claim arises from two identical FOIL requests concerning the same government contract award. As such, this proceeding concerns "the same transaction, occurrence, or series of transactions of occurrences" with a "common question of law of fact...." **C.P.L.R. 1002(b)**.

Third, petitioner argues that when considering a motion to dismiss for failure to state a cause of action, only the petition is to be considered. When given every favorable inference,

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petitioner asserts that it has pled sufficient facts to support a cognizable legal claim. As such, respondents' cross-motion to dismiss must be denied.

It is well established that prior to commencing an action pursuant to C.P.L.R. Article 78 action, the petitioner must exhaust his or her administrative remedies. Young Men's Christian Ass'n v. Rochester Pure Waters Dist., 37 N.Y.2d 371 (1975); Slater v. Gallman, 38 N.Y.2d 1 (1977).

Ordinarily, petitioner's failure to avail itself to all administrative remedies requires dismissal of the instant petition as to respondent Mayor's Office. However, it is clear that respondent Mayor's Office has failed to act in accordance with Public Officers Law § 84 *et seq.* by ignoring petitioner's FOIL request and therefore, petitioner is deemed to have exhausted its administrative remedies to maintain this action. See, Matter of Newton v. Police Dept., City of N.Y., 183 A.D.2d 621 (1st Dept. 1992). Nevertheless, during the pendency of the litigation of the case at bar, respondent Mayor's Office has released a non-duplicative and non-exempt document to petitioner. The release of the responsive document has rendered that portion of petitioner's application moot. See, Pordum v. Nyquist, 42 N.Y.2d 958 (1977).

In an Article 78 proceeding, the only questions that may be raised are: 1) "whether the body or officer failed to perform a duty enjoined upon it by law"; 2) "whether the body or officer proceeded is proceeding or is about to proceed without or in excess of jurisdiction"; 3) "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..."; 4) "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence; and 5) "a proceeding to review the final determination or order of the state review officer..." C.P.L.R. 7803.

The Court of Appeals has stated that FOIL was enacted "to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage secrecy." Matter of Newsday, Inc. v. Sise, 71 N.Y.2d 146, 150 (1987); see also, Public Officers Law § 84. Government records not falling within an enumerated exemption under Public Officers Law § 87(2) are presumptively open to the public. Matter of Gould v. New York City Police Dept., 89 N.Y.2d 267 (1996). These statutory exemptions are to be narrowly construed and the agency has the burden of establishing that they apply to the requested documents. Matter of Fink v. Lefkowitz, 47 N.Y.2d 567 (1979).

This court finds that respondent HRA properly withheld responsive documents that squarely fell within one or more statutory exemptions pursuant to Public Officers Law § 87(2) and New York City Charter § 334. A careful review of the June 1, 2012 denial letter concerning petitioner's appeal indicates that the Appeals FOIL Officer specifically and methodically reviewed each category of documents requested by petitioner and provided the applicable statutory exemption. Although HRA did not itemize and label each and every document that was

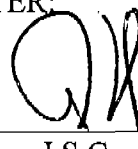
[* 6]
withheld, it provided petitioner with a description of the type of document that was withheld and the reasons for the non-release of those documents. See, Marino v. Morgenthau, 1 A.D.3d 275 (1st Dept. 2003).

Accordingly, it is hereby

ADJUDGED that the application by petitioner for an order pursuant to C.P.L.R. Article 78, compelling respondents to produce documents requested in petitioner's FOIL requests, is denied. Respondents' cross-motion to dismiss the petition is granted.

Dated: September 24, 2012

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR.