

Matter of Stephens v Town of Hornellsville
2015 NY Slip Op 30717(U)
May 4, 2015
Supreme Court, Steuben County
Docket Number: 2015-0006CV
Judge: Marianne Furfure
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State of New York Supreme Court
County of Steuben

In the Matter of the Application of
LARRY STEPHENS,
Petitioner,

For a Judgment under Article 78 of the Civil Practice DECISION
Laws and Rules

Index No.:
2015-0006CV

v.

TOWN OF HORNELLSVILLE,
SHERYL ISAMAN, Individually
Respondents.

Appearances: *Larry Stephens, Canisteo, Petitioner Pro Se*
Patrick F. McAllister, Wayland for the Town of Hornellsville

This matter has come before the Court on petitioner’s Article 78 application for a judgment directing respondent Sheryl Isaman (Isaman) and the Town of Hornellsville (Town) to comply with petitioner’s Freedom of Information Law (FOIL) requests set forth in his petition. The Town claims that, in the first instance, the petition against Isaman in her individual capacity must be dismissed because she was acting as Town Clerk when she responded to petitioner’s several FOIL requests. The Town further claims that petitioner’s July 28, 2014, FOIL request is barred by the Statute of Limitations. The Town also claims that petitioner’s Article 78 proceeding must be dismissed because petitioner did not

exhaust his administrative remedies by filing a written appeal to the denial of his various FOIL requests. Finally, the Town claims that the Article 78 proceeding must be dismissed because petitioner failed to serve the notice of petition and petition within 15 days after the date on which the applicable statute of limitations expired.

To the extent that petitioner has brought this Article 78 proceeding against Isaman individually, and not in her capacity as Town Clerk of the Town of Hornellsville, the petition is dismissed. Article 78 proceedings are used to challenge actions, or inactions, of state and local government agencies and officers, or the conduct of private corporations or other state chartered organizations (N.Y. Civil Practice Law and Rules Section 7802 [McKinney 2011, Commentary p.493]). As this Court has no jurisdiction in this proceeding over Isaman in her individual capacity, the petition must be dismissed (*Matter of Aarismaa v. Bender*, 108 AD3d 1203, 1205 [4th Dept. 2013]). Nevertheless, the petition does set forth sufficient allegations regarding Isaman's actions as Town Clerk to continue this proceeding against her in that capacity.

Turning to the merits of the claims, petitioner alleges that on four separate dates in 2014 he filed FOIL requests with the Town Clerk seeking various information and, to date, he has not received any of the information he has requested.

Public Officers Law (POL) Section 89 governs requests for public records. This section provides that, within five (5) business days of receipt of a written request for a reasonably described record, the record shall be made available to the person requesting it, or the request shall be denied in writing, or a written acknowledgment of receipt of the request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when the request will be granted or denied shall be provided. Failure to follow these statutory mandates is deemed to be a denial of the request (POL Section 89(4)(a)). Any person denied access to a record may, within thirty (30) days of the denial, file an appeal in writing with the governing body (POL Section 89(4)(a)). A person whose appeal is denied may then file an Article 78 proceeding to review such denial (POL Section 89(4)(b)).

Respondents claim that this petition should be dismissed, as petitioner failed to file an appeal with the Town Board before filing this Article 78 proceeding and, therefore, failed to exhaust his administrative remedies. However, whenever a FOIL request is deemed denied by an agency, the agency is required to inform petitioner that he has a right to an administrative appeal. Failure to provide this notice bars the agency from asserting the failure to exhaust administrative remedies as a defense (*Matter of Barrett v. Morganthau*, 74 NY2d 907, 908 [1989]; *Matter of Purcell v. Jefferson County District Attorney*, 77 AD3d 1328, 1328-1329 [4th Dept. 2010]; *Matter Pennington v. Clark*, 307 AD2d 756,757 [4th

Dept. 2003]). In this case there is no proof or claim that the Town Clerk ever advised petitioner of his right to an administrative appeal, and, therefore, the Town is barred from claiming that petitioner failed to exhaust his administrative remedies (accord *Matter of Rivette v. District Attorney of Rensselaer County*, 272 AD2d 648, 649 [3rd Dept. 2000]).

The Town argues that petitioner's first FOIL request must be denied because petitioner did not commence his Article 78 proceeding within the four-month limitation period allowed by statute (CPLR Section 217(1)), nor did he serve a copy of the petition on the Town within fifteen days after the expiration of the limitation period (CPLR Section 306-b). There is no dispute that petitioner's first FOIL request was filed on July 28, 2014, that the Town did not respond to this request within five (5) business days, and that petitioner filed his Article 78 proceeding on January 5, 2015. Respondent argues that petitioner was obligated to commence his Article 78 proceeding within four months from August 2, 2014, the fifth day following petitioner's request. The Town argues that, because petitioner's Article 78 proceeding was filed on January 5, 2015, the proceeding is time barred and must be dismissed.

Although the Town Clerk did not respond to petitioner's request within five (5) business days, she did send a letter dated August 11, 2014, advising petitioner that the requested information could not be provided "for some time" and that the Clerk would inform petitioner within twenty-five (25) days (September

5, 2014) when he could expect the requested information. The Town Clerk's representation that she could not provide the requested information until September 5, 2014, is a permissible response under the statute (POL Section 89 (3)(a)). By extending the time the Town had to respond to petitioner's request, the Town also extended the time petitioner had to file his Article 78 proceeding from August 4, 2014 to September 5, 2014. When the Town failed to provide the information or a date certain when the documents would be produced by September 5, 2014, petitioner's request was deemed denied (POL Section 89 (4)(a)). Petitioner then had four months from that date to file his Article 78 proceeding. As petitioner's proceeding was filed within the four-month time limit, January 5, 2015, the Town's claim that petitioner's proceeding was not timely is without merit. Further, petitioner submitted an affidavit of service verifying that he served respondent with process on January 6, 2015, well within the fifteen days required by CPLR Section 306-b. Therefore, based on the above, the Town's claim that petitioner's first FOIL request must be denied because it was not timely filed or served is denied. The Town is directed to provide petitioner with the information requested in the FOIL request dated July 28, 2014 within twenty (20) business days from the receipt of the Judgment issued as a result of this decision.

Petitioner's second FOIL request was made on September 11, 2014, and requested all abstracts from January 1, 2014, to the date the FOIL request was received. On September 15, 2014, the Town Clerk responded to petitioner's

request by marking the "Other" box on the FOIL request designated "For Agency Use" and writing in: "will try to give you 25 days from this date 9-15-14 due to normal workload and all other FOILS you requested." The twenty-fifth day from September 15, 2014 was October 10, 2014. Petitioner did not receive the information he requested by that date, nor did he receive any other contact from the Town Clerk giving a reason for the failure to provide the information or a date certain when it would be provided.

The Town acknowledges that the information set forth in the second FOIL request was never provided, but claims that the two deputy clerks, who were hired to fill in while the Town Clerk was out on an extended medical leave, resigned as a result of petitioner's excessive FOIL requests. An agency has the ability to set a reasonable time to respond to a FOIL request, taking into consideration such factors as the volume of the request, the ease or difficulty in locating or retrieving the information, the need to review the records, the number of other FOIL requests received by the Town, and other factors (Public Officer Law Section 89(3)(a); 21 NYCRR Section 1401.5(d)). However, the agency may not deny a request on the grounds the request is voluminous, or that locating or reviewing the records is burdensome because the agency lacks sufficient staffing, or for any other reason, if the agency may engage a professional service to help fill the request by providing copying services (POL Section 89(3)(a)). Further, the agency may recover from the petitioner the costs it incurs in complying with a FOIL request (POL Section 87(1)(b),(c)).

Here, the Town did not set forth how much time it estimated was a reasonable period of time to produce the documents. Although the Town referenced the workload of the two interim deputy clerks, the Town did not address any of the statutory factors which allow the Town additional response time. Further, the Town failed to provide an explanation as to why it was unable to hire outside assistance, at petitioner's expense, to furnish the requested information.

The Town also contends that petitioner filed multiple requests for FOIL disclosures, on average once every week or two, for the purpose of forcing the resignation of Kenneth and Sheryl Isaman from their positions with the Town. The Town claims that petitioner's FOIL requests amount to an abuse of process and should be denied. However, access to government records does not depend on petitioner's purpose for requesting the records (*Matter of Gould v. New York City Police Department*, 89 NY2d 267, 274 [1996]). All government records are presumed to be available for public review, unless the records are exempt from disclosure under POL Section 87(2). In this case, the Town does not claim that a statutory exemption precluded the release of the information petitioner seeks. Therefore, the Town's claim that petitioner's second FOIL request should be dismissed, is denied. The Town is directed to provide the information set forth in the FOIL request dated September 11, 2014, within twenty (20) business days from the receipt of the Judgment issued as a result of this decision.

Petitioner's third FOIL application was made on October 14, 2014, and requested any documents which showed that an agreement signed May 10, 2011, between the Town and one Robert Rink, was no longer in effect. The Town responded by advising "No Documents Found." Petitioner contends that the Town "lied" in making this claim, and, to prove his point, petitioner included a copy of the agreement between the Town and Rink, as well as a copy of a newspaper ad titled "Hornellsville's Corrupt Soap Opera," dated April 16, 2014.

Petitioner's claim that the Town failed to adequately respond to this FOIL request must be denied. Petitioner did not request a copy of the agreement between the Town and Rink, but rather documents to verify that the agreement was no longer in effect. The Town claimed that there were no documents to satisfy this request and the documents petitioner submitted do not establish petitioner's claim that the Town failed to truthfully and adequately respond to his request (*Matter of Curry v. Nassau County Sheriff's Dept.*, 69 AD3d 622, 622-623 [2nd Dept. 2010]). Therefore, petitioner's third request is denied.

Petitioner's fourth FOIL application was made on October 27, 2014, and requested all documents regarding "justification studies" done on the need for the BOCES access road. Attached to the Town's answer is a copy of a letter dated October 30, 2014, confirming that none of the documents petitioner requested exist. This satisfied the Town's obligation under FOIL requirements (*Matter of Gould v. New York Police Department*, 89 NY2d 267, 279 [1996]; *Matter of Curry v. Nassau County Sheriff's Dept.*, Id). Petitioner claims that he never received

any letters from the Town Clerk regarding his FOIL requests and that the response should not be believed. However, petitioner failed to offer a factual basis to establish that the documents exist and are in the Town's possession (*Matter of Gould v. New York Police Dept.*, Id). Therefore, petitioner's fourth request is denied.

Petitioner to submit Judgment.

Dated: May 4, 2015.

ENTER:



Hon. Marianne Furfure
Acting Supreme Court Justice