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| <b>Ferncliff Cemetery Assoc. v Beville</b>                                                                                                                                                                                                                       |
| 2017 NY Slip Op 30551(U)                                                                                                                                                                                                                                         |
| March 27, 2017                                                                                                                                                                                                                                                   |
| Supreme Court, Westchester County                                                                                                                                                                                                                                |
| Docket Number: 1564/2016                                                                                                                                                                                                                                         |
| Judge: Larry J. Schwartz                                                                                                                                                                                                                                         |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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FERNCLIFF CEMETERY ASSOCIATION,

Petitioner,

-against,

JUDITH A BEVILLE, Records Access Officer of the Town  
of Greenburgh, the TOWN BOARD OF THE TOWN OF  
GREENBURGH, and the TOWN OF GREENBURGH,

Respondents,

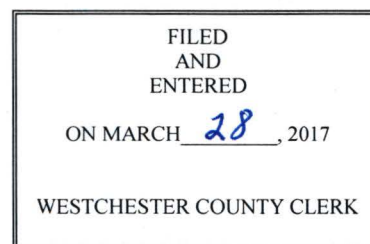
For a Judgment, pursuant to Article 78 of the  
Civil Practice Law and Rules.

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SCHWARTZ, J.

In this Article 78 proceeding, the petitioner FERNCLIFF CEMETERY ASSOCIATION ("Ferncliff") sought an order to compel the respondents (collectively the "Town") to release all records requested by Petitioner in a request made pursuant to Public Officers Law Article 6, commonly known as the Freedom of Information Law ("FOIL"). After a conference with this Court, the parties executed a stipulation pursuant to which the Town (1) delivered records responsive to the FOIL request to Petitioner and (2) submitted documents it deemed privileged or exempt to the Court for *in camera* inspection.

I find the documents submitted for *in camera* review were properly deemed privileged or exempt by the Town. Further, because Petitioner substantially prevailed in this proceeding by obtaining the requested records, and because the Town, without a reasonable basis, failed to respond to the subject FOIL request or decide the Petitioner's appeal within the statutory time, I find the Petitioner is entitled to reasonable attorney's fees and costs pursuant to POL § 89(4)(c).



**DECISION & ORDER**

Index No. 1564/2016

The Court has considered the following papers, together with the affidavits and exhibits attached to them:

| <u>PAPERS</u>                                                                            | <u>NUMBERED</u> |
|------------------------------------------------------------------------------------------|-----------------|
| Amended Notice of Petition                                                               | 1               |
| Affirmation of Frederick W. Turner in Support of the Petition                            | 2               |
| Amended Affirmation of Edward Lieberman in Opposition                                    | 3               |
| Affirmation of Timothy Lewis in Opposition                                               | 4               |
| Amended Verified Answer                                                                  | 5               |
| Reply Affirmation of Mr. Turner                                                          | 6               |
| Affirmation of Mr. Lieberman in Support of List of Exempt Documents                      | 7               |
| Reply Affirmation of Mr. Turner in Response to Respondents Assertion of Privilege        | 8               |
| Affirmation of Mr. Lieberman in Opposition to Request for Attorney's Fees                | 9               |
| Reply Affirmation of Mr. Turner in Response to Respondents Opposition to Attorney's Fees | 10              |

## FACTS

### Prior Ferncliff Proceeding

Petitioner operates a cemetery on approximately 75 acres of land in the Town of Greenburgh in Westchester County. In December 2013, Petitioner filed an application with the Town's building inspector to construct a caretaker cottage on a parcel of land. The application was denied by the building inspector and referred to the Town's Zoning Board of Appeals ("ZBA"). On August 7, 2015, the ZBA upheld the building inspector's denial. On or about August 21, 2015, Petitioner commenced a separate Article 78 proceeding against the Town of Greenburgh to challenge that denial (*Ferncliff Cemetery v. Town of Greenburgh*, Westchester Index No. 2868/15).

### Ferncliff's FOIL Request and the Instant Proceeding

On July 23, 2015, about a month prior to commencing the above-mentioned Article 78 proceeding, Petitioner filed a FOIL request with the Town Clerk's office which requested:

Any record regardless of form, including e-mail correspondence, sent &/or received by any town official, Board member, employee or agent since December 1, 2012 regarding Ferncliff's right to use the 12.5 acre parcel for cemetery purposes, including construction of a caretaker cottage

(Turner Affirm. in Supp. Ex. A).<sup>1</sup> On August 18, 2015, an employee in the Town Clerk's office sent Petitioner's counsel, Mr. Turner, an e-mail response with documents attached and requested acknowledgment of its receipt. Mr. Turner replied that same day by e-mail which stated:

Confirmed.

There should be more . . . Planning Dept; to/ from the ZBA members, to/fr T. Board members, etc...

(Ex. C).

On August 25, 2015, the Town Clerk's office replied by e-mail and stated that "an additional 15 days is been [sic] requested to comply with this Foil Request" (Ex. D). Sometime in mid-September 2015, Petitioner's counsel called the Town Clerk's office to follow up on the Town's response to the FOIL request. By e-mail dated September 14, 2015, the same Town Clerk's office employee stated:

Good Afternoon!

I was just advised that the Town Attorney's office that [sic] an additional time will be required to fulfil your request. Should you have any questions, you should contact Town Attorney

(Ex. E).

By letter dated September 17, 2015, Petitioner's counsel wrote to the Town Attorney and requested a "date certain within a reasonable period" for when Petitioner's request would be granted "in whole or in part" as required of the Town pursuant to Public Officers Law §89(3)(a) and the Greenburgh Town Code §306-8(B)(1)(c) (Ex. F). The Town never responded.

On December 23, 2015, Petitioner's counsel wrote to the Town Board and stated that it was appealing what Petitioner deemed to be a constructive denial of its FOIL request due

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<sup>1</sup> All exhibit references refer to the Affirmation of Mr. Turner in Support of the Petition unless otherwise stated.

to the Town's failure to provide a date for compliance pursuant to POL §89(3)(a) or "any of the information requested" (Ex. G).

The Town Board did not respond to the Petitioner's letter of appeal. The Petitioner commenced this proceeding by a petition filed with the Court on March 18, 2016 for an order directing disclosure of all records pursuant to FOIL or, in the alternative, a certification pursuant to 21 NYCRR § 1401.2(b)(7)<sup>2</sup> that such records are not in the Town's possession. An amended petition was filed on March 23, 2016.

On June 22, 2016, a conference was held before this Court. The parties thereafter resolved the dispute surrounding Petitioner's FOIL request by stipulation executed by counsel for the parties dated November 23, 2016. The stipulation ("Stipulation") memorialized an agreement that provided, in pertinent part, that by November 18, 2016: (1) the Town would deliver records responsive to Petitioner's FOIL request together with the certifications pursuant to 21 NYCRR § 1401.2(b)(7) and (2) the Town would provide to Petitioner a list of records the Town deemed privileged or exempt from disclosure under FOIL and would submit these records to the Court for *in camera* inspection. It is undisputed that the Town has provided to Petitioner the responsive records together with the certifications sought by Petitioner pursuant to the Stipulation. Therefore, the only remaining issues are (1) whether the documents the Town has withheld for *in camera* inspection are privileged or exempt from disclosure and (2) the Petitioner's claim for attorney's fees.

## DISCUSSION

### Documents Reviewed in Camera

POL §87(2)(a) provides that "each agency shall in accordance with its published rules, make available for inspection and copying all records, except that such agency may deny

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<sup>2</sup> "The records access officer is responsible for assuring that agency personnel upon failure to locate records, certify that: (i) the agency is not the custodian for such records; or (ii) the records of which the agency is a custodian cannot be found after diligent search." 21 NYCRR §1401.2(b)(7).

access to records or portions thereof that are specifically exempted from disclosure by state or federal statute.” “Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Brown v DiFiore*, 139 AD3d 1048, 1049, 33 NYS3d 327, 329 [2d Dep’t 2016] [internal citations omitted]; see *Madera v Elmont Public Library*, 101 AD3d 726, 727 [2d Dep’t 2012]).

Pursuant to the Stipulation, the Court has reviewed the two categories of documents that were withheld by the Town and submitted for *in camera* review pursuant to POL §87(2)(a): (1) documents that the Town submitted and categorized as privileged attorney-client communications and/or attorney work product (Exhibit 1) and (2) documents that the Town submitted and categorized as exempt “intra-agency non-final pre-decisional documents” (Exhibit 2) (see documents attached to Lieberman Affirm. in Supp. of List of Exempt Documents).

“In order for attorney-client communication to be privileged, the document must be primarily or predominantly a communication of a legal character.” (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dep’t 2005], citing *Spectrum Systems Intern Corp. v Chemical Bank*, 78 NY2d 371 [1991]). “That nonprivileged information is included in an otherwise privileged lawyer’s communication to its client—while influencing whether the document would be protected in whole or only in part—does not destroy the immunity. In transmitting legal advice and furnishing legal services it will often be necessary for a lawyer to refer to nonprivileged matter.” *Id.* I find that all the documents the Town deemed privileged were properly withheld as privileged attorney-client communications<sup>3</sup> of

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<sup>3</sup> “Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose,

a predominantly legal character, except for one. The March 15, 2016 e-mail from Deputy Town Attorney David Fried to the Town's Planning Board is not primarily or predominantly of a legal character. However, it is an e-mail discussion between Planning Board members that does not include statistical or factual tabulations or data, instructions to staff, or final agency policy or determinations. Therefore, it is predecisional material exempt from disclosure under POL §87(2)(g). As to the documents in Exhibit 2, each document is either a draft decision, revision of a draft, or an e-mail discussing or attaching a draft decision of the ZBA. Such documents are also intra-agency predecisional materials that were properly withheld from disclosure (see *Matter of Smith v. New York State Off of the Attorney Gen*, 116 AD3d 1209 [3d Dep't 2014]). Accordingly, all the documents submitted for *in camera* review were properly withheld as privileged or exempt from disclosure.

The only remaining claim for the Court to address in this proceeding is Petitioner's claim for attorney's fees.

*Petitioner's Claim for Attorney's Fees*

Under Public Officer Law § 89(4)(c):

The court may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:

- (i). the agency had no reasonable basis for denying access; or
- (ii.) the agency failed to respond to a request or appeal within the statutory time.

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or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services. NY CPLR §4503(a)(1).

“The 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” (*Acme Bus Corp. v Cty. of Suffolk*, 136 AD3d 896, 898, 26 NYS3d 159 [2d Dep’t 2016], citing *Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338 [2011]; see also *South Shore Press, Inc. v Havemeyer*, 136 AD3d 929, 25 NYS3d 303 [2d Dep’t 2016]). When a FOIL requester brings a proceeding to compel production of documents and “eventually receive[s] the documents it sought, it substantially prevail[s]” (see *Acme Bus Corp.* at 897).

As a threshold finding in the attorney’s fees analysis, the Petitioner has substantially prevailed as it eventually received the documents it sought pursuant to the Stipulation (see *id.*).

Petitioner argues that as the prevailing party, it should be awarded attorney’s fees as the Respondents: (1) failed to timely provide responsive documents or set a date certain for compliance with Petitioner’s FOIL request pursuant to POL §89(3)(a) and the Town Code, (2) failed to respond to Petitioner’s appeal of the constructive denial of the request within the statutory time, and (3) had no justifiable basis for denying Petitioner access to the records sought.

Public Officers Law §89(3)(a) states, in pertinent part:

(a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section...If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a

reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

To implement this FOIL provision, the Greenburgh Town Code at section 360-8(B)(1) provides:

A response shall be given within five business days of receipt of a request by:

(a) Informing a person requesting records that the request or portion of the request does not reasonably describe the records sought, including direction, to the extent possible, that would enable that person to request records reasonably described;

(b) Granting or denying access to records in whole or in part;

(c) Acknowledging the receipt of a request in writing, including an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than 20 business days after the date of the acknowledgment, or, if it is known that circumstances prevent disclosure, within 20 business days from the date of such acknowledgment, providing a statement in writing indicating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part; or

(d) If the receipt of request was acknowledged in writing or e-mail and included an approximate date when the request would be granted in whole or in part within 20 business days of such acknowledgment, but circumstances prevent disclosure within that time, providing a statement in writing within 20 business days of such acknowledgment specifying the reason for the inability to do so and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part.

I find the Town Clerk failed to timely provide responsive documents or set a date certain for compliance with Petitioner's FOIL request pursuant to POL §89(3)(a) and the Greenburgh Town Code at §360-8(B)(1). Since the September 14, 2015 e-mail from the Town Clerk's office to Petitioner's counsel requested additional time to fulfill the FOIL request, the Town Clerk was required to set a date certain for when the request would be granted in whole or in part within five business days of the request as required by these provisions of the Public

Officers Law and the Town Code (*see id.*). It is undisputed the Town Clerk failed to do so.<sup>4</sup> The e-mail from the Town Clerk's office also failed to specify the reason for the Town's inability to provide access to the records within twenty business days as required by FOIL and the Town Code.

The Town Board also failed to respond to Petitioner's appeal of the constructive denial of the request within the statutory time. The Town Code provides that "[t]he Town Board shall inform the requester of its decision in writing within seven business days of receipt of an appeal" (Greenburgh Town Code §360-9[E]). It is undisputed that the Petitioner appealed what it deemed a constructive denial of its FOIL request by the Town Clerk by letter on December 23, 2015. Since the Respondents concede that the Board tabled the appeal rather than consider it (Lewis Affirm. in Opp. at ¶15), there is no dispute that the Town Board did not respond to the appeal in writing within seven business as required by the Town Code. By failing to do so the Town Board constructively denied the Petitioner's appeal and Petitioner exhausted its administrative remedies. (*see New York Times Co. v City of New York Police Dept.*, 103 AD3d 405, 408 [1st Dep't 2013]).

I find that the Town Clerk and the Town Board had no reasonable or justifiable basis for constructively denying the FOIL request and the subsequent appeal. The Town's counsel argues that because there was a motion to dismiss pending in the related Article 78 proceeding concerning the ZBA denial (Westchester County Ct. 2868/15), the Town believed the FOIL request was an attempt by Petitioner to circumvent a stay of discovery in that related proceeding pursuant to CPLR 3214(b) (Lewis Affirm. in Opp. at ¶14). Therefore, the Town argues, the failure to provide the records and address Petitioner's FOIL appeal pursuant to the statutory timeframes was in good faith. This argument is wholly without merit and contrary to law.

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<sup>4</sup> The Town Attorney's office also failed to respond to Petitioner's September 17, 2015 letter requesting a date certain.

Regardless of the procedural posture of the related proceeding, the mandates of FOIL should have been adhered to and Petitioner was entitled to a timely response to the FOIL request and its appeal to the Town Board. "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, art. 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" (*M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp.*, 62 NY2d 75, 79 [1984]). "Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request....FOIL's mandate of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other person" (*id.*).

#### Respondents' Affirmative Defenses

The Respondents' first affirmative defense is that the initial production of documents, attached to the August 18, 2015 e-mail, was a timely response. This defense is without merit. After Petitioner's counsel replied to the August 18th e-mail from the Town Clerk and stated that there should be more documents, the Town Clerk in a subsequent e-mail specifically requested more time to respond to the request (*see* Ex. E). The Town thereafter failed to respond or produce any additional documents until after this proceeding was commenced. The Town ultimately produced more than 3,000 documents pursuant to the Stipulation after a conference with the court (Lieberman Affirm. in Opp. to Request for Attorney's Fees, ¶11).

The Respondents' second affirmative defense that the original FOIL request was too vague as to permit a timely response is without merit. If the Town Clerk was indeed unable to respond due to any vagueness in the request, the Town Clerk should have denied or otherwise responded to the request within five business days in writing as required by Public Officers Law §89(3)(a) and the Greenburgh Town Code at §360-8(B)(1). It is undisputed it failed to

do so. Moreover, the Town has conceded the reason the Town Clerk did not respond is because it believed the FOIL request was stayed, a belief that was erroneous as stated above.

The Respondents' third affirmative defense that the FOIL request was stayed is also without merit. As stated above, the subject FOIL request was not affected by pending litigation between the parties and the Town was required to respond within the statutory time (see *M. Farbman & Sons, Inc.* at 79). The Town failed to do so.

The Respondents' fourth affirmative defense that Petitioner did not timely file its appeal of the Town Clerk's constructive denial of its FOIL request to the Town Board is also without merit. The Town Clerk never set a date certain for a response, nor did it send a written denial of access advising Petitioner of its right to appeal to the Town Board which would have begun the running of Petitioner's time (see *Barrett v Margenthau*, 74 NY2d 907 [1989] and 21 NYCRR 1401.7[b]).

Accordingly, all the Respondents' affirmative defenses are dismissed.

### CONCLUSION

The Petitioner has substantially prevailed. I find Petitioner is entitled to attorney's fees and costs pursuant to Public Officers Law § 89(4)(c) because the Town Clerk failed to timely respond to the FOIL request and the Town Board failed to timely decide Petitioner's appeal. Petitioner is also entitled to attorney's fees and costs because the Town denied its FOIL request without a reasonable basis (see *id.*). The parties are to appear before the Court on May 3, 2017 at 2:30pm for a hearing to fix the amount of reasonable attorney's fees and costs to be awarded to Petitioner. Submission of judgment shall await the hearing's determination.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 27, 2017



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HON. LARRY J. SCHWARTZ, A.J.S.C.

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