

Matter of Rosasco v St. James Fire Dist.
2018 NY Slip Op 31223(U)
June 15, 2018
Supreme Court, Suffolk County
Docket Number: 18-1354
Judge: Sanford N. Berland
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SHORT FORM ORDER

INDEX NO.: 18-1354

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

In the Matter of Troy Rosasco, Esq.,
Freedom of Information Law Request,

Petitioner(s),

-against-

St. James Fire District; Board of Fire Commissioners,
St. James Fire District, Records Access Officer Kelly
Lally and Records Access Officers Christopher Ring,

Respondent(s).

ORIG. RETURN DATE: March 30, 2018
FINAL RETURN DATE: June 14, 2018
MOT. SEQ. #: 001-MD

ORIG. RETURN DATE: May 22, 2018
FINAL RETURN DATE: June 14, 2018
MOT. SEQ. #: 002-MG; CASE DISP

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Upon the reading and filing of the following papers in this matter: (1) Notice of Petition, dated March 6, 2018, and supporting papers; (2) Notice of Motion, dated April 20, 2018, and supporting papers; (3) Affirmation in Opposition, dated April 30, 2018, and supporting papers; (4) Reply Memorandum, dated May 22 2018; it is

ORDERED that the motion made by respondents to dismiss the verified petition as moot is granted.

This is a special proceeding brought pursuant to CPLR Article 78 seeking, among other things, to compel the respondents - the St. James, New York Fire District, its Board of Commissioners and its designated records access officer - to comply with a series of requests that petitioner, who is himself a lawyer, and his retained counsel made pursuant to the Freedom

of Information Law, Public Officers Law §§ 84-90 (“FOIL”). According to the petitioner, those requests were made in connection with his effort to provide the public with, among other things, information concerning a proposal “to sell off” the fire district’s “historic 100-year old firehouse,” which is the subject of an upcoming referendum. Notwithstanding the seemingly well-defined goal articulated by petitioner, especially as stated in the introductory paragraphs of his third FOIL request, dated January 16, 2018 - a request that in many respects substantially combined and restated the requests contained in petitioner’s two prior requests, dated, respectively, December 21 and December 29, 2017 - his third request alone spanned more than nine pages and consisted of over forty categories of requested records, covering generally, but not without exception, the five-year period 2013 through 2017¹, and seeking, among many other things, certified copies of so-called “Length of Service Award Program” audit records (including reports, notes, memoranda and audits); all records, notes, memoranda, charts and/or worksheets used by the fire district to prepare its annual budget proposals; “[a]ll records, financial statements, procurement documents, notes and/or memoranda relating to, detailing, pertaining to or mentioning the purchase and/or lease of new . . . Fire District vehicles”; “[a]ll bid records, bid proposals, contracts, notes, memoranda and/or invoices sent to or received by vendor, including but not limited to catering halls, architects, attorneys, and/or public relations firms,” as well as similar types of records “relating to, detailing, pertaining to or mentioning the . . . Fire District bid process or proposals”; “[a]ll records, notes, memoranda, financial records, travel plans, reimbursement documents and/or requests, itineraries, and/or records showing hotel reservations relating to, detailing, pertaining to or discussing St. James Fire Commissioner, employees, and/or volunteers for training or conference”; and - but not until the ninth page of the request - “[a]ll records, notes memoranda, planning documents, and/or sale documents pertaining to the sale, value, and /or future plans for the Fire District’s main firehouse . . . including but not limited to plans for the use of the sale proceeds.” The January 16 letter also requested “[c]ertified copies of all electronic mailings sent or received by Fire District Commissioners, employees, agents and/or members through public or private electronic mail accounts,” but that request was subsequently withdrawn, along with several others, by petitioner’s counsel, in a letter dated February 2, 2018, in which he stated that the withdrawn requests would be included in a “subsequent request for records clarifying the records sought to be produced and preserved by the now withdrawn requests.”²

1 In some instances, the time period over which records are requested is a year shorter, 2014 through 2017, while in others, no time period is stated.

2 It does not appear that the subsequent clarifying request was ever tendered to the Fire District, although petitioner took the position, after the current proceeding was commenced - as discussed in the text, below - that the similar request stated in his December 29, 2017 letter, for “[c]ertified copies of all emails sent or received by Fire District email accounts, including any and all those received from members of the St. James Fire Department,” had not been withdrawn.

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In any event, the petitioner claims that the respondents failed to respond to his requests within the time limits set by the Freedom of Information Law, failed to provide records that he had requested, failed to provide the “particularized and specific justification for denying access to the documents” he had requested, and never honored the appeal he had made with respect to what he claims were failures to respond to several of his requests. He asks that the court enter an order finding that the respondents have violated the Public Officers law, requiring that the records he has requested be provided to him, finding that he has prevailed in this proceeding and awarding him attorneys’ fees and other litigation costs. He also requests that mandatory training be ordered for the respondents and the district’s officers, employees and volunteers in responding to FOIL requests.

In lieu of answering the petition, the respondents have served a motion to dismiss requesting that it be dismissed, contending, *inter alia*, that the petition is moot as a matter of law as they have responded within the time required by the Freedom of Information Law to petitioner’s voluminous and, in their view, duplicative and unreasonable requests, have acted appropriately to comply with his requests and have produced to him the responsive documents in their possession, custody and control. In support of their motion, they have provided, among other things, affidavits of both the Fire District employee, Kelly Lally, who serves as the Fire District’s Records Access Officer, and Christopher Ring, Esq., outside counsel for the Fire District – both of whom are among the respondents named in the proceeding – averring both to the sequence of events and to the communications between the Fire District, on the one hand, and the petitioner and his counsel, on the other, beginning with the Fire District’s receipt of petitioner’s first request to the Fire District, on December 26, 2017, as well as, in Ms. Lally’s case, swearing to the diligence with which she searched for records responsive to petitioner’s requests and to those requests for which no responsive documents were found to exist notwithstanding the diligence of her search³ (*see Rattley v. New York City Police Dep’t*, 96 N.Y.2d 873, 875 [2001]). Respondents have also provided copies of the email and paper correspondence between the parties both before and for a period of time after this proceeding was commenced as well as copies, in electronic form on compact disc, of the records they provided to petitioner in response to his FOIL requests. Petitioner, for his part, opposes the motion, taking issue with respondents’ assertions as to the timeliness and completeness of their responses and on the applicable law.

FOIL requires that state and municipal agencies “make available for public inspection and copying all records,” subject to certain exemptions (Public Officers Law’ § 87 [2]; *accord Matter of Data Tree v Romaine*, 9 NY3d 454, 849 NYS2d 489 [2007]; *Matter of Madera v Elmont Pub. Lib.*, 101AD3d 726, 957 NYS2d 129 [2012]; *Matter of Dilworth v Westchester*

³ In addition to Ms. Lally’s affidavit in connection with the current petition, and the representations made in her cover letters when she transmitted the produced records to petitioner’s counsel, on May 14, 2018, Ms. Lally provided counsel with a further certification for the Fire District’s March 23, 2018 production.

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County Dept, of Correction, 93 AD3d 722, 940 NYS2d 146. *lv. denied* 19 NY3d 810, 951 NYS2d 720 [2012]). If a FOIL request is denied, the agency must show that the requested information “falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578 [1986]). A party denied access to a requested record may commence an article 78 proceeding in which the agency seeking the benefit of an exemption bears the burden of demonstrating that it applies (Public Officers Law § 89 [4] [b]).

CPLR 7804[f] provides that the respondent in an article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an “objection in point of law,” which is akin to an affirmative defense (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C7804:7). Where the proceeding has been brought to compel compliance with a request under the Freedom of Information Law, the respondent may seek dismissal of the petition as moot if there has been compliance with the petitioner’s FOIL requests (*Rattley v. New York City Police Dep’t*, 96 N.Y.2d 873 [2001]); *Robert v. Fondulis*, 40 A.D.3d 1002, 1003 [2d Dept 2007][“The Supreme Court properly denied the petition and dismissed the proceeding as against the respondent . . . on the ground that the Freedom of Information Law was fully complied with”]).

Here, the record shows that the Fire District, both through Ms. Lally, acting as its Records Access Officer, and Mr. Ring, as its attorney, complied with the timing requirements of the Freedom of Information Law in connection with petitioner’s requests, and that it did so notwithstanding that the petitioner, both individually and through counsel, had made multiple overlapping and, in significant part, duplicative requests and gave what were in a number of instances conflicting instructions or request modifications or withdrawals. Thus, the record confirms that the Fire District, through Ms. Lally, responded to the petitioner’s initial request, which was received on December 26, 2017, on January 3, 2018, that is, within five days of receipt, *see* Public Officers Law §89(3) and began searching for and photocopying potentially responsive records shortly after that, and that it likewise made timely response to the two succeeding requests, notwithstanding the confusion and inconsistencies of position engendered by petitioner and his counsel continuing to some extent to engage in separate, not entirely consistent communications. Despite that, in letters sent, respectively, to petitioner and to his counsel on February 8, 2018, Mr. Ring, based upon a telephone conversation he had had with petitioner’s counsel on February 2, was able to advise that the Fire District estimated that it would require 90 days to provide its response to the request, that because of the scope of the request, it would require a \$500 deposit for reproduction costs, and that to the extent any requests from the Fire District “to reasonably describe any portion of your FOIL request” remained outstanding, it should be provided at once. Mr. Ring avers that “neither Petitioner nor his counsel objected to this timeline,” and Ms. Lally makes a like averment.

In early March, before the current proceeding was commenced, Ms. Lally, in anticipation of beginning production of the records that had been located, prepared a “FOIL Request

Invoice,” addressed to the petitioner, which, *inter alia*, summarized, by page count and request, the records that were being provided to petitioner in the first tranche of production, as well as identifying categories for which no responsive documents had been located. On March 16, 2018, according to Ms. Lally, 638 pages of documents were provided to petitioner, responding to each of the requests in his December 21, 2017 letter and to requests 1(e) through 1(pp) of his counsel’s January 16, 2018 letter. Also according to Ms. Lally, on March 23, 2018, an additional 487 documents, responding to each request in petitioner’s December 29, 2017 letter and to requests 1(a) through 1(c) of the January 16, 2018 letter were produced to petitioner’s counsel by email. Subsequently, following initial argument, on May 29, 2018, at which the petitioner asserted that although the expansive request for emails set forth in petitioner’s counsel’s January 16, 2018 letter had been withdrawn, it had not been his intention to withdraw the request for emails set forth in petitioner’s December 29, 2017 letter – which called for “Certified copies of all emails sent or received by Fire District email accounts, including any and all those received from members of the St. James Fire Department,” without any subject matter or temporal limit. The parties agreed, and the court directed, that the respondents search for and produce only those Fire District emails relating to the possible firehouse sale. As a result, an additional 434 pages, of emails, were subsequently produced to petitioner, with approximately 40-50 additional emails withheld, pursuant to a schedule also provided to petitioner, as privileged. Respondents have represented to petitioner and to the court that apart from those emails that have been scheduled as privileged, no other otherwise responsive records have been withheld from production to petitioner.⁴

⁴ At the conference held in this matter on June 13, 2018, petitioner argued that a so-called “response-time study” commissioned by the Fire District and recently finalized, was required to be produced to it or, at the very least, the email by which the study was transmitted to the Fire District’s Board of Commissioners should have been included in the respondents’ production. Testimony, taken on June 14, 2018, of a current member of the Board of Commissioners, Joseph A. Kuethen, proffered by petitioner, confirms, however, that the finalized report was, indeed, only recently – in late May of 2018 - provided to the Board of Commissioners by the consultant who had been retained by the Board - at least partly at the insistence of Mr. Kuethen, who had rejoined the Board in 2018 - to conduct the study to inform their decision making (*see* also Paragraph #12 of the “FOIL Request Invoice, bearing the date March 2, 2018 (“We can find no records pertaining to written records regarding response time analysis. This is something the Board is currently looking into”). In any event, Respondents are correct that the report and any antecedent drafts that may have been provided, particularly as characterized by Mr. Kuethen, as well as the transmittal email from the consultant that was made part of the record in the course of Mr. Kuethen’s testimony, fall within the ambit of Public Officers Law §87 (2)(g), which permits an agency to deny access to materials prepared for it by an outside consultant where the consultant’s work is submitted to the agency as part of its “deliberative process” (*Matter of Sea Crest Constr. Corp. v Stubing*, 82 A.D.2d 546 [2d Dept 1981]).

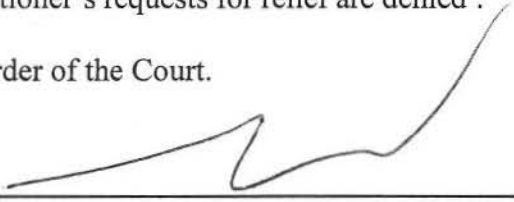
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Based upon the foregoing, and as addressed at length in the proceedings conducted in this matter on the record on May 29, June 13 and June 14, it is evident that the Fire District addressed petitioner's and his counsel's series of broad and complicated requests as soon as each was received and began working on its response to those requests, informed by its interaction with the petitioner and his counsel, promptly and diligently. Although the aggressiveness with which petitioner pursued his requests is admirable, here, as in *Friedland v. Maloney*, 148 A.D.2d 814, 815-16 [3d Dept 1989], "it cannot be said as a matter of law that the [Fire District] released the documents and records because of the commencement of litigation." Also as in *Friedland v. Maloney*, *supra*, petitioner adduced no evidence indicating that respondents at any time acted other than in good faith, and the record is clear that notwithstanding both the complexity and the several inconsistencies engendered by the overlapping and duplicative character of the requests and the fact that both petitioner and his attorney at times differently communicating with respondents, respondents endeavored to respond as promptly as feasible to those requests and that they have done so fully and completely within the requirements of the Freedom of information Law, Public Officers Law §§ 84-90. Therefore, it cannot be said that petitioner has substantially prevailed in this proceeding.

Accordingly, and for all the reasons stated above and on the record, respondents' motion is granted, the petition is dismissed as moot and petitioner's requests for relief are denied⁵.

The foregoing constitutes the decision and order of the Court.

Dated: June 15, 2018
Riverhead, New York



HON. SANFORD NEIL BERLAND, A.J.S.C.

XX FINAL DISPOSITION _____ NON-FINAL DISPOSITION

⁵ This includes petitioner's belated oral request that the upcoming June 19, 2018, Fire District referendum be stayed. No such request was asserted in the petition, parties necessary to any such request for relief have not been joined, and there is no basis for such relief alleged in the petition or shown by the current record (*see Fossella v Dinkins*, 114 AD2d 340, 342-43 [2d Dept 1985]).