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| Matter of LTTR Home Care, LLC v City of Mt. Vernon |
| 2018 NY Slip Op 33800(U) |
| April 19, 2018 |
| Supreme Court, Westchester County |
| Docket Number: 50969/2018 |
| Judge: Anne E. Minihan |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

LTTR HOME CARE, LLC, ALAN LANDAUER,
and ZARIN & STEINMETZ,
Petitioners,

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

DECISION, ORDER &
JUDGMENT

Index No. 50969/2018

- against -

THE CITY OF MOUNT VERNON and
THE MOUNT VERNON INDUSTRIAL
DEVELOPMENT AGENCY,

Respondents.

-----X
MINIHAN, A. J.

The following papers numbered 1-8 were read on this notice of petition and petition pursuant to CPLR Article 78:

PAPERS NUMBERED

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| Notice of Petition, Verified Petition, Supporting Affirmation and Exhibits | 1-4 |
| Petitioners' Memorandum of Law | 5 |
| Respondents' Verified Answer | 6 |
| Respondents' Affidavit in Opposition | 7 |
| Petitioners' Reply Memorandum of Law | 8 |

Factual and Procedural History

Petitioner Alan Landauer is the managing member of petitioner LTTR Home Care, LLC (hereinafter LTTR), which owns property located at One Bradford Road (hereinafter the property) in the City of Mount Vernon (hereinafter City). Respondent Mount Vernon Industrial Development Agency (hereinafter MVIDA) is a public benefit corporation formed to create and promote job opportunities and economic vitality in respondent City.

On October 5, 2017, petitioners submitted identical FOIL requests to the City and MVIDA, seeking documents relating to, among other things, the property, potential development in the City, and applications to MVIDA for financial assistance (*see* Public Officers Law art 6). The City did not acknowledge the FOIL request. By letter dated November 30, 2017, petitioners appealed the City's "constructive denial" of the FOIL request. The City did not respond to the appeal.

By email on October 10, 2017, the Deputy Director of MVIDA asked petitioners for a copy of the FOIL request form. By email on October 11, 2017, petitioners re-sent the FOIL request and request form. By letter dated October 18, 2017, MVIDA's Records Access Officer ("RAO") advised petitioners that MVIDA was conducting a records search and would provide the records or a status update on or before November 8, 2017. By status update letters dated November 8, 2017, and December 7, 2017, the RAO stated, in pertinent part, "MVIDA intends to grant the records request in part but is still in the process of conducting a records search to determine if we are the agency that maintains documents responsive to your request, and if any exemptions contained within New York Public Officers Law § 87(2) are applicable." Each status update letter gave a date, about a month later, by which MVIDA would provide "the requested records or a status update."

By letter dated December 12, 2017, petitioners appealed MVIDA's "constructive denial" of the FOIL request. MVIDA did not respond to the appeal. MVIDA's RAO sent another status update letter, dated January 5, 2018, echoing the prior letters and promising to provide the "requested records or a status update" on or before February 5, 2018.

On January 19, 2018, petitioners commenced this Article 78 proceeding for an order directing respondents to comply with FOIL and awarding attorney's fees and litigation costs pursuant to Public Officers Law § 89(4)(c). Petitioners argue that respondents violated Public Officers Law § 89(3)(a), by failing to respond to the FOIL request within five business days, and § 89(4)(a), by failing to respond to the appeal within ten days. With respect to MVIDA's status update letters, petitioners argue that they did not provide a "date certain... when the request will be granted in whole or in part", as required by statute (Public Officers Law § 89[3][a]).

By verified answer, respondents argue that petitioners failed to exhaust administrative remedies. Respondents cite to MVIDA's status update letters as proof that "further agency proceedings" would "assuredly render this dispute moot or academic" because respondents "expressly stated" that they were granting the FOIL request in part, searching agency records, and analyzing whether any exemptions were applicable (Verified Answer, ¶ 15). Respondents also argue that (1) the FOIL request was onerous, overly broad, and failed to distinguish which documents were requested of which agency, (2) petitioners made the FOIL request to coerce MVIDA into providing financial assistance for the redevelopment of the property, (3) respondents met their obligations under FOIL, and (4) some of the requested material may be exempt from disclosure.

Respondents' answer is supported by an affidavit of Lawrence Porcari, Esq., Corporation Counsel for the City and co-chair of MVIDA. Porcari states, in pertinent part, that his office

received the FOIL request on behalf of the City and that he forwarded it to MVIDA “for disposition” because it “appeared to pertain to records held by [MVIDA]” (Aff. of Porcari, ¶ 15). Porcari notes that on December 18, 2017, petitioners commenced a federal action against MVIDA, among others, relating to MVIDA’s denial of financial assistance to a prospective purchaser of the property. Porcari suggests that by commencing the instant Article 78 proceeding on January 19, 2018, petitioners were trying to circumvent the discovery process in that federal action.

In reply, petitioners argue that over half of the requested records relate to the City and that the City, thus, did not satisfy its obligations under FOIL by passing along the request to MVIDA. Furthermore, petitioners argue that a FOIL request cannot be rejected as burdensome, that any alleged motive in making the FOIL request is irrelevant, and that respondents’ vague reference to statutory exemptions is insufficient and too late.

Analysis

While MVIDA met its obligations under FOIL, the City did not satisfy the statute (*see* Public Officers Law art 6). Pursuant to FOIL, all agency records are presumptively available for public inspection and copying unless they fall within an enumerated exemption in Public Officers Law § 87(2) (*see Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]). The burden rests on the agency to establish that requested records qualify for any of the exemptions, which must be narrowly construed (*see Gould v New York City Police Dept.*, 89 NY2d at 275). An agency must fully comply with a proper FOIL request without regard to the status, need, good faith or purpose of the applicant requesting access (*see Scott, Sardano & Pomeranz v Records Access Officer*, 65 NY2d 294, 296 [1985]; *Moore v Santucci*, 151 AD2d 677 [2d Dept, 1989]).

Here, the City failed to acknowledge the FOIL request. Public Officers Law § 89(3)(a) requires, in pertinent part, that an agency respond to a FOIL request within five business days by either making the record available, denying the request in writing, or providing a written acknowledgment of the request and an approximate date when the request will be granted or denied. According to Porcari’s affidavit, the City passed along the FOIL request to MVIDA because many of the sought-after records relate to that agency. However, the request also seeks documents relating to the City, i.e., the comprehensive plan. Therefore, the City erred in not responding to the request in compliance with Public Officers Law § 89(3)(a).

The City also failed to respond to petitioners’ appeal (Public Officers Law § 89[4][a]). Contrary to respondents’ claim, petitioners’ administrative remedies with respect to the City were exhausted by the appeal from the constructive denial (*see* Public Officers Law § 89[4][a]; *Matter of New York Times Co. v City of NY Police Dept.*, 103 AD3d 405, 408 [1st Dept, 2013]). Within 10 business days of receipt of an appeal, an agency must either fully explain in writing the reasons for the denial or provide access to the records sought (Public Officers Law § 89[4][a]). Failure to timely respond to an appeal is deemed a denial and a petitioner’s remedy, as herein, is to commence an article 78 proceeding to review that denial (*see* Public Officers Law § 89[4][a], [b]; *Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 406 [1st Dept, 2013]).

In contrast, MVIDA acknowledged the FOIL request by letter dated October 18, 2017, and thereafter met its statutory obligation to keep petitioners updated on when, within a reasonable period, the request would be granted in whole or in part. Public Officers Law § 89(3)(a) provides, in pertinent part, that if an agency decides to grant the FOIL request in whole or in part, and if circumstances prevent such disclosure within 20 days from the date of acknowledgment of receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within 20 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 (Public Officers Law § 89[3][a]). By status update letters dated November 8, 2017, and December 7, 2017, MVIDA stated its intention to grant the request in part, explained that it was in the process of conducting a records search, and provided a date, about a month later, by which it would provide either the requested records or a status update. Under the circumstances, MVIDA has, thus far, complied with the statute.

Moreover, petitioners failed to exhaust their administrative remedies with respect to MVIDA. In the context of a FOIL request, administrative remedies are considered exhausted only after the agency has completed the FOIL request and has rendered a final adverse determination of any administrative appeal of that request (*see Braxton v Commissioner, N.Y.C. Police Dept.*, 283 AD2d 253 [1st Dept, 2001]). Here, MVIDA did not deny the request and petitioners have no basis to assert a constructive denial by MVIDA. Public Officers Law does not set a deadline within which an agency must grant or deny a FOIL request after acknowledging it (*see Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 406-407 [1st Dept, 2013]; *Legal Aid Society v New York City Police Dept.*, 274 AD2d 207, 215 [1st Dept, 2000]). Here, the record does not clearly show an unreasonable delay, or a lack of good faith effort, by MVIDA in responding to the request before petitioners commenced this proceeding.

Under the circumstances, the petition is granted with respect to the City, but denied as premature with respect to MVIDA. Petitioners have substantially prevailed in this proceeding as against the City, which has offered no reasonable basis for failing to comply with the FOIL request. The City is directed to comply with the request in accordance with Public Officers Law. Moreover, petitioners are entitled to an award of reasonable attorney's fees and other litigation costs from the City (*see Public Officers Law § 89[4][c]*; *Matter of South Shore Press, Inc. v Havemeyer*, 136 AD3d 929, 931-931 [2d Dept, 2016]). An award of attorney's fees is intended to deter unreasonable delays in disclosure and encourage every agency subject to FOIL to make a good faith effort to comply within the requirements of the statute (*Matter of Acme Bus Corp. v County of Suffolk*, 136 AD3d 896, 898 [2d Dept, 2016]).

It is hereby ORDERED and ADJUDGED that the petition is granted with respect to the City of Mount Vernon and the City of Mount Vernon is directed to comply with petitioners' document requests within 45 days from the date of this decision, order, and judgment; and it is further,

ORDERED and ADJUDGED that petitioners' request for an award of reasonable

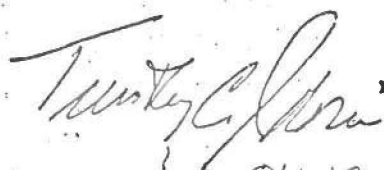
attorneys' fees and litigation costs from the City of Mount Vernon is granted, and petitioners may submit on notice a proposed judgment assessing against the City of Mount Vernon reasonable attorney's fees and litigation costs, with an affidavit of the financial responsibility they have incurred in this proceeding with respect to the City of Mount Vernon, and a bill of costs, and it is further,

ORDERED and ADJUDGED that the petition is denied with respect to the Mount Vernon Industrial Development Agency, and the proceeding against the Mount Vernon Industrial Development Agency is dismissed.

Dated: White Plains, New York
April 19, 2018


Hon. Anne E. Minihan, A.J.S.C.

TO: NYSCEF


04-19-2018