

**Matter of BSF Inwood Holding, LLC v New York City
Dept. of Hous. Preserv. & Dev.**

2020 NY Slip Op 30473(U)

February 19, 2020

Supreme Court, New York County

Docket Number: 157569/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of BSF INWOOD
HOLDING, LLC

Index No.
157569/2019

Petitioner,

**DECISION
and ORDER**

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

- against -

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Mot. Seq. 1

Respondent.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner BSF Inwood Holding, LLC (“Petitioner”) brings this action pursuant to Article 78 of the New York Civil Practice Law and Rules (“Article 78”) for an Order compelling Respondent New York City Department of Housing Preservation and Development (“Respondent” or “HPD”) to disclose all responsive documents related to the involvement of the building owned by Petitioner located at 66 Vermilyea Avenue, New York, New York (the “Building”) on Respondent’s Pilot Program List. In the alternative, if no documents exist, Petitioner seeks the Court to declare Petitioner was unlawfully added to Respondent’s Pilot Program List pursuant to CPLR § 3001. Respondent cross moves to dismiss the Verified Petition.

Relevant Background

The Pilot Program List

“Pursuant to Local Law 1 of 2018, [Respondent] was required to, *inter alia*, identify buildings that shared characteristics of ‘building distress’, which the New York City Council believed led to a likelihood of suspected harassment of existing lawful occupants within certain specified Community Districts.” (Verified Petition at 4). Respondent implemented a Pilot Program List to identify if a building was

under distress. Respondent used certain criteria to rank a building, such as whether a building had the necessary “score” on Respondent’s Building Qualification Index (“BQI”). “A building may also be added to the Pilot Program List, regardless of whether it is located in a specified Community District, if the building was subject to a full vacate order issued by the New York Department of Buildings (‘DOB’) within the five-year period ending July 24, 2018, if the building was an active participant in [Respondent]’s alternative enforcement program (‘AEP’) for more than four months since February 1, 2016, or if the building’s owner was found to be guilty of harassing tenants by a city agency.” (Verified Petition at 4).

Petitioner’s FOIL Request

On November 1, 2018 and November 8, 2018, Petitioner sent a FOIL Request to Respondent seeking:

“Specifically, [Petitioner] requests the following information and any documentation supporting the below information, pursuant to the City and State Freedom of Information Laws:

1. The Building’s ‘score’ on [Respondent]’s Building Qualification Index; and
2. [Respondent]’s method of calculation, including the formula employed by [Respondent] to calculate the ‘score,’ and
3. A list of the information, data, documentation or any other record utilized to calculate the ‘score.’

...

In addition, pursuant to the New York City and State Freedom of Information Laws, this Firm requests on behalf of the [Petitioner]: copies of any other records in [Respondent]’s custody which pertain to the Building’s inclusion of the Pilot Program List, including, but not limited to records of open and closed violations of the Hosing Maintenance Code, records of paid or unpaid emergency repair charges, as well as any other statements, notes, correspondence, printouts, determinations, memoranda, opinions, folders, files, forms, photographs,

or letters pertaining to the Building's 'score' on the Building Qualification Index and/or the Building's inclusion on [Respondent]'s Pilot Program List."

On December 12, 2018, Respondent sent a response to Petitioner's FOIL Request. Petitioner contends that Respondent's response "did not furnish the information sought nor provide a written explanation for [Respondent]'s refusal to furnish the information sought." (Verified Petition at 3). On January 7, 2019, Petitioner appealed Respondent's December 12, 2018 response. On April 8, 2019, Respondent sent an identical response that was sent on December 12, 2018 to Petitioner's appeal.

Parties' Contentions

Petitioner argues that Respondent's "failure to produce the requested documents, or to state why the requested documents were purportedly exempt from FOIL disclosure is arbitrary and capricious, and plainly contrary to law." (Verified Petition at 9). Petitioner asserts that Respondent can include buildings on the Pilot Program List only after carrying out an analysis of the individual building pursuant to the Building Qualification Index (the "BQI") analysis. Petitioner contends that its FOIL Request sought the statistical analysis and underlying data that would be required for Respondent to include the Building on the Pilot Program. Petitioner asserts that if an analysis pursuant to the BQI was not done by Respondent, then Respondent has failed to demonstrate that the Building should be included on the Pilot Program List.

In opposition, Respondent argues that the proceeding should be dismissed as moot because it has disclosed all responsive records. Respondent asserts that it certified that it disclosed all responsive records to Petitioner's FOIL Request prior to Petitioner's Article 78 proceeding. Respondent contends that on November 28, 2019, Petitioner sent another FOIL Request ("November 28, 2019 FOIL Request") seeking similar records to the November 1, 2018 and November 8, 2018 FOIL Request, the FOIL Request at issue in this proceeding. Respondent avers that in response to the November 28, 2019 FOIL Request, it disclosed four documents that included a spreadsheet containing the BQI score for every building included on the Pilot Program list in Community Districts identified in in 28 RCNY § 53-02(2)(a), which also included the BQI score for Petitioner's Building and all data used to calculate the score. Respondent contends that it also provided a pdf that "sets forth the methodology for calculation of BQI, as it includes the full text of 28 RCNY § 53-03." (Respondent's Memo of Law at 7-8). Respondent argues that even though the spreadsheet has a column labeled "BDI" the numbers in the column are actually the BQI score for each building.

Respondent further argues that Petitioner has not “substantially prevailed” in this matter. Moreover, Respondent avers that “[e]ven if the Court finds that Petitioner substantially prevailed, however, an award of fees is not automatic, as Respondents had a reasonable basis for its belief that it granted Petitioner’s FOIL request when by its disclosure of March 27,2019.” (Respondent’s Memo of Law at 13).

Legal Standard

“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public (see, Public Officers Law § 84 [legislative declaration]).” *Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]. “All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2).” *Id.* at 274-275. “To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.” *Id.* at 275 (citation omitted).

“At the same time, however, FOIL does not require any entity to prepare any record not possessed or maintained by such entity.” *Covington v Russo*, No. 402817/08, 2010 WL 2158247 [Sup Ct, NY County 2010]; *See, Brown v New York City Police Department*, 264 AD2d 558, 561-562 (1st Dept 1999) (“an agency has no duty to create documents that are not in existence...”) (citations omitted); *see, also*, Public Officer’s Law § 89(3) (providing that “[n]othing in this Article shall be construed to require any entity to prepare any record not possessed or maintained by such entity”). “Thus, an agency’s obligations under FOIL are met when it certifies that it is not in possession of requested records after a diligent search. *See* Public Officers Law § 89(3).” *Covington v Russo*, No. 402817/08, 2010 WL 2158247 [Sup Ct, NY County 2010]

Pursuant to POL § 89(4)(c), a court may award reasonable attorney’s fees and litigation costs incurred where a party has “substantially prevailed” and when the agency “failed to respond to a request or appeal within the statutory time”; and the agency had no “reasonable basis” for denial. *See* POL § 89(4)(c). The Court of Appeals has stated, “[p]ursuant to FOIL’s fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that ‘substantially prevailed’ in the proceeding if the court finds that (1) ‘the record involved was, in fact, of clearly significant interest to the general public,’ and (2) ‘the agency lacked a reasonable basis in law for withholding the record’ (Public Officers Law § 89 [4] [c]). Only after a court finds that the statutory prerequisites have been satisfied may

it exercise its discretion to award or decline attorneys' fees." *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 [2005].

Discussion

Respondent satisfies the certification requirement pursuant to POL § 89(3). Respondent submits the Affidavit of Dina Saffan ("Saffan"), the Records Access Officer in the FOIL unit at Respondent. Saffan states that Respondent "hereby certifies that it has disclosed to Petitioner all records responsive to its FOIL request that are maintained by the agency and were located after a diligent search." Therefore, Respondent's "obligations under FOIL are met." *Covington v Russo*, No. 402817/08, 2010 WL 2158247 [Sup Ct, NY County 2010].

To the extent that Petitioner seeks to have the Court declare that the Building was unlawfully added to the Pilot Program List pursuant to CPLR § 3001, the Court finds that Respondent provided responsive documents to Petitioner, considered relevant factors, and Petitioner has not shown that Respondent acted in an arbitrary or capricious manner. The Petition is denied.

Accordingly, Respondents Cross-Motion to Dismiss is granted. Petitioner's request for attorneys' fees is denied.

Wherefore it is hereby

ORDERED that the Petition is denied and Respondent's Cross-Motion is granted.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 19, 2020



Eileen A. Rakower, J.S.C.