

Matter of Ateres Bais Yaakov Academy of Rockland v Town of Clarkstown
2020 NY Slip Op 32103(U)
May 13, 2020
Supreme Court, Rockland County
Docket Number: 034514/2019
Judge: Robert M. Berliner
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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In the Matter of the Application of
ATERES BAIS YAAKOV ACADEMY OF
ROCKLAND

Petitioner,

For a Judgment Pursuant to CPLR Article 78 and
for Other Relief

DECISION, ORDER,
AND JUDGMENT

-against-

THE TOWN OF CLARKSTOWN, THE TOWN
OF CLARKSTOWN ZONING BOARD OF
APPEALS, and THE TOWN OF CLARKSTOWN
BUILDING DEPARTMENT,

Index No.: 034514/2019

Respondents.

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The following papers, numbered 1 to 6, were read in connection with Petitioner’s hybrid CPLR Article 78 proceeding/declaratory judgment action:

Petition/Exhibits (A-T)/Notice of Petition/Memorandum of Law in Support.....	1-3
Answer/Exhibits (A-E)/Memorandum of Law in Response/.....	4-5
Affirmation in Further Support/Exhibits(1-7)	6

Upon the foregoing papers, it is ORDERED that this hybrid proceeding is disposed of as follows:

Petitioner Ateres Bais Yaakov (“ABY”) commenced this hybrid CPLR Article 78 proceeding/declaratory judgment action against Respondents Town of Clarkstown, Town of Clarkstown Zoning Board of Appeals, and Town of Clarkstown Building Department (“Respondents”) after it was denied a building permit and hearing before the Clarkstown Zoning Board of Appeals. By Decision and Order dated December 23, 2029, the Court dismissed all but

one of ABY's causes of action based on Respondents' violation of the Freedom of Information Law ("FOIL").

The subject of the building permit was a parcel of real property located in Nanuet, New York ("the Property") that ABY negotiated to purchase from Grace Baptist Church ("GBC"). After this agreement was terminated, the Town expressed interest in purchasing the Property from GBC. Thereafter on June 6, 2019, ABY submitted a FOIL request with the Town Clerk requesting, *inter alia*, records of communications between the Town and any other party pertaining to the purchase and sale of the Property. On July 5, 2019, the Town Clerk responded to the FOIL request and stated that the requested records did not exist. On July 22, 2019, ABY filed a FOIL appeal to Town Supervisor George Hoehmann via email. In its appeal, ABY sought access to:

"records of communications between the Town or any of its representatives or agents and any other party, including the Grace Baptist Church of Nanuet, its officers and directors;

records relating to [Hoehmann's] statement quoted by the Rockland/Westchester Journal News on May 16, 2019 and June 4, 2019 regarding the Town's interest in the property[];

copies of any offers, term sheets, letters of intent or agreements, whether formal or informal, binding or non-binding, submitted or received by the Town regarding the purchase of such property."

Petition, ex. T, July 22, 2019 Letter to Clarkstown Supervisor, at 2. On August 8, 2019 after not receiving a response from Hoehmann, Petitioner filed the instant action.

On August 9, 2019, one day after ABY commenced this hybrid proceeding, Hoehmann responded to Petitioner's FOIL appeal that "no such records exist." On September 6, 2019, Respondents filed its motion to dismiss, in which they sought to dismiss the FOIL cause of action, contending that no such records exist. Then on November 13, 2019, ABY filed another FOIL request to the Town Clerk, which was substantially similar to its June 6, 2016 request and included the records requested in its July 22, 2019 appeal to Hoehmann. On December 4, 2019, the Town Clerk responded to the request with various emails.

Significantly, the response included two emails dated June 5, 2019 sent from Rand Realty to Paul Schofield, an employee of the Town, discussing the purchase price and title report of the Property. Also included was another email from Rand Realty to Schofield on June 6, 2019

discussing an inspection report. The emails were printed from Schofield's email account. The rest of the emails provided are dated between September 17, 2019 and November 26, 2019.

In support of its FOIL cause of action, ABY alleges that Respondents failed to respond to its July 22, 2019 FOIL appeal. Further, ABY alleges that Respondents have not provided all the documents in its possession pertaining to the request. ABY bases its argument on published articles on May 16, 2019 quoting Hoehmann regarding the Town's interest in purchasing the Property, certain Town Meeting minutes, and the June 2019 emails between Rand Realty and employees of the Town. ABY alleges that these documents show that there are additional communications and documents in connection with the Town's contemplated purchase of the Property other than what has already been produced in response to their two FOIL requests.

Government agencies are required to "make available for public inspection and copying all records . . ." Public Officers Law § 87(2). The government agency must "provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search . . ." Public Officers Law § 89(3)(a). "The statute does not specify the manner in which an agency must certify that documents cannot be located." *Rattley v NY City Police Dep't*, 96 NY2d 873, 875 [2001]. When an individual appeals the denial of access to a record, the government agency designated to review the appeal "shall within ten business days of receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." Public Officers Law § 89(4)(a). Additionally, the agency's failure to respond to such an appeal constitutes a denial. Public Officers Law § 89(4)(b). "Public Officers Law § 89(3) places the burden on petitioner to reasonably describe the documents requested so that they can be located. Petitioner must show by more than speculation that all responsive documents were not produced." *Mitchell v. Slade*, 173 AD2d 226, 227 [1st Dept 1991][internal citations omitted].

Here, ABY established that on July 22, 2019, it appealed the Town Clerk's FOIL response by sending Hoehmann a letter via email and that Hoehmann did not respond within 10 days of the appeal. Respondents contend that the statutory 10-day time period did not begin because ABY failed to submit their appeal via first class mail, as required by the Town on the FOIL appeal form. However, the form states "[y]ou have a right to appeal a denial of this

application within thirty days of the date of denial to the head of this agency[,]" which is followed by Hoehmann's name, business address, phone number, and title as Town Supervisor. The Court finds this argument unpersuasive because Respondents do not cite any authority requiring a FOIL appeal to be submitted via first class mail. As such, by operation of law, namely Public Officers Law 89(4)(b), Respondents denied ABY access to the requested records by failing to respond within ten business days pursuant to Public Officers Law 89(4)(a).

Furthermore, ABY alleges that Respondents have yet to provide all the records in their possession that it requested. The May 16, 2019 news article of Hoehmann's statements regarding the then contemplated purchase of the Property and the November 27, 2018 Town Meeting minutes showing interest in the Property are speculative that ABY's requested records exist. However, ABY also points out the June 5 and 6, 2019 emails provided by the Town in response to its November 13, 2019 FOIL request, but they were not provided as a response to its June 6, 2019 FOIL request. Further, ABY points out that those emails were from Paul Schofield's email account only. The three June 2019 emails show that two other employees of the Town were carbon copied in the correspondence, Hoehmann and Susan Resnick, yet records of their email communications with Rand Realty were not included in the responsive documents. These email communications indeed discuss the potential purchase of the Property and were in Respondents' possession on or before ABY's June 6, 2019 FOIL request and well before ABY's July 22, 2019 FOIL appeal. Therefore, the Court finds that in addition to failing to respond to ABY's appeal, Respondents failed to provide all the records requested by ABY. As such, an appropriate remedy would be to remand the FOIL appeal to the Town to respond to ABY's appeal. Next, the Court addresses ABY's request of attorney's fees and costs.

Pursuant to Public Officers Law § 89(4)(c), "[a] court may award an attorney's fee and costs to a petitioner in conjunction with a FOIL request where the petitioner 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.'" *Matter of Jaronczyk v Mangano*, 121 AD3d 995, 997 [2d Dept 2014][internal citations omitted]. Here, the Court declines to award counsel fees in the instant hybrid proceeding, as ABY was represented by pro bono counsel and failed to submit any proof of legal fees actually incurred. Verified Petition, Ex. M, Memorandum of Law to ZBA at 1. Accordingly, ABY's request for an award of counsel fees

is denied, in the Court's discretion. *See Maddux v. New York State Police*, 64 A.D.3d 1069, 1070 [3d Dept 2009].

The foregoing constitutes the Decision, Order, and Judgment of the Court.

Dated: New City, New York
May 13, 2020

ENTER


HON. ROBERT M. BERLINER, J.S.C.

To:
Counsel of record via NYSCEF