

AIG Specialty Ins. Co. v New York State Dept. of Fin. Servs.
2020 NY Slip Op 32760(U)
July 2, 2020
Supreme Court, New York County
Docket Number: 101879/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

AIG SPECIALTY INSURANCE COMPANY, LEXINGTON
INSURANCE COMPANY

Plaintiff,

INDEX NO. 101879/2019

MOTION DATE 5/12/2020

MOTION SEQ. NO. 001

- v -

NEW YORK STATE DEPARTMENT OF FINANCIAL
SERVICES, LINDA A. LACEWELL, AS SUPERINTENDENT
OF THE NEW YORK STATE DEPARTMENT OF
FINANCIAL SERVICES,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

Upon the foregoing documents, it is

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioners AIG Specialty Insurance Company and Lexington Insurance Company (Motion Seq. 001) is denied in its entirety and the cross-motion to dismiss by Respondents New York State Department of Financial Services and its superintendent Linda A. Lacewell is granted; and it is further

ORDERED that Petitioners' application for costs and attorney's fees is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Petitioners.

FINAL DISPOSITION

MEMORANDUM DECISION

In this Article 78 proceeding, petitioners AIG Specialty Insurance Company (formerly known as Chartis Specialty Insurance Company and American International Specialty Lines Insurance Company (AISLIC) and Lexington Insurance Company (Lexington) (collectively, Petitioners) seek an order directing respondents New York State Department of Financial Services (DFS) and its superintendent Linda A. Lacewell (collectively, Respondents) to disclose certain records pursuant to the Freedom of Information Law § 84 (FOIL). Respondents cross-move for an order, pursuant to CPLR § 3211(a)(2), (a)(7) and 7804(f), dismissing the petition.

BACKGROUND FACTS

Petitioners' FOIL Request

On June 12, 2019, Petitioners requested copies of ten categories of documents relating to themselves and the regulation or taxation of unauthorized, excess and surplus lines insurance companies in New York (NYSCEF doc No. 5). Petitioners allege that the FOIL Request was received by the Department's Office of General Counsel on June 17, 2019 but it was not until July 23, 2019 that Respondents acknowledged receipt thereof and advised Petitioners of next steps (NYSCEF doc No. 4, ¶¶ 12-17). Petitioners appealed what they considered to be a "deemed" denial of the FOIL request earlier that same day.

On July 31, 2019, the DFS Supervising & Records Access Officer (RAO) advised Petitioners that the FOIL Request was being processed; that insurance-related opinions of the Office of the General Counsel (OGC) from 2000 to 2011 were accessible through the DFS website; and that Petitioners could make an appointment to visit the DFS office to view OGC opinion files and legislative diaries that were available to either print or scan (NYSCEF doc No. 10).

In a letter dated August 6, 2019 (the August 2019 Determination), the DFS determined that Petitioners' appeal was premature as the DFS was still "actively reviewing" the FOIL Request and had not issued any denial (NYSCEF doc No. 11).

On August 12, 2019 and August 21, 2019, Petitioners visited the DFS office and inspected certain records related to their FOIL Request. Respondents provided Petitioners with copies of documents identified during the visits on a rolling basis, starting from August through December 2019. Claiming that the documents provided were still incomplete, Petitioners commenced this proceeding on December 6, 2019.

The Petition

Petitioners assert that Respondents' August 2019 determination was erroneous, arbitrary and capricious (NYSCEF doc No. 4, ¶ 60). Petitioners contend that the DFS erred in finding their appeal premature given that Respondents "constructively" denied the FOIL Request when the DFS failed, within five (5) business days from receipt of the request, to: (i) make the records requested available; (ii) deny the request in writing; or (iii) furnish a written acknowledgement of receipt of the request, pursuant to New York Public Officers Law § 89(3) (NYSCEF doc No. 25, p. 5). Petitioners also claim that while Respondents made certain documents available after the August 2019 Determination, Respondents failed to provide many of the records requested and refused to provide an approximate timeframe for their production (*Id.*, p. 7).

The DFS's response to the FOIL Request post-petition

Based on the record before the Court, the parties continued to communicate regarding the FOIL Request even after the commencement of this proceeding. In particular, Respondents provided Petitioners with additional documents in December 2019 (NYSCEF doc No. 45) and communicated its RAO's official responses on the FOIL Request in January 2020 (collectively,

the January 2020 Response). The first RAO response sent on January 10, 2020 advised Petitioners that the DFS already “completed a diligent search for all of the other records that [Petitioners] requested...and it has no other records responsive to [Petitioners’] request beyond the opinion file records that have been, and the legislative diary records that will continue to be, provided to [Petitioners]” (NYSCEF doc No. 46). The second RAO response dated January 27, 2020 clarified that the DFS did not construe filings by Petitioners themselves to be part of the FOIL Request as those records were already in Petitioners’ possession. The letter also requested that Petitioners further clarify the ambit of records sought under items 1 and 2 of the FOIL Request so the DFS could review and provide the records subject to exemptions. Finally, the letter disclosed that certain records that may have been responsive to items 3, 6 and 7 of the request would not be provided pursuant to the exemptions under POL § 87(2)(a) and (g) as they are non-public records (NYSCEF doc No. 47). On February 7, 2020, Petitioners appealed the RAO’s January responses, but the appeal was denied by the DFS on February 24, 2020 (February 2020 Determination). The February 2020 Determination is not the subject of this Article 78 proceeding.

Cross-Motion to Dismiss

Respondents are cross-moving for the dismissal of the petition on the grounds that the petition fails to state a cause of action as there is no denial of the FOIL Request to challenge (NYSCEF doc No. 49, pp. 9-10), that Petitioners failed to exhaust administrative remedies (*Id.*, pp. 10-14), and that this proceeding is moot as Petitioners received the relief to which they are entitled (*Id.*, pp. 14-18).

In opposition, Petitioners maintain that they were entitled to administratively appeal the constructive denial of their FOIL Request and the DFS’s August 2019 Determination constitutes a final agency action under Article 78 (NYSCEF doc No. 57, p. 5). Petitioners contend that the

document production after the commencement of the petition was a result of Petitioners' own review of Respondents' file and had nothing to do with their FOIL request (*Id.*, p. 18-19). Finally, Petitioners dispute that the case is moot considering that the sufficiency of Respondents' response to the FOIL Request remains at issue (*Id.*, pp. 15-18).

DISCUSSION

The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986]). “[R]esponsiveness and accountability are the very point of FOIL” (*Floyd v McGuire*, 87 AD2d 388 [1st Dept 1982]). Thus, the statute provides that within five business days of the receipt of a written request for a record reasonably described, the agency is to make the record available, deny the request in writing, or acknowledge in writing the receipt of the request and provide an approximate date by which the request will be granted or denied (POL § 89 (3)(a)). Failure by an agency to conform to this requirement “shall constitute a denial” which can be appealed to the head of the agency involved (POL § 89(4)(a); *see also* Comm Pub Acc Rec FOIL—Ad Op 1825 and Comm Pub Acc Rec FOIL—Ad Op 1846). The denial of an administrative appeal, in turn, entitles the requester to commence a proceeding pursuant to Article 78 (POL § 89 (4)(b)); *see also* *Matter of Pons v New York City Police Dept.*, 212 NY Misc Lexis 105 [Sup Ct 2012]).

Section 7801(1) of the CPLR states that no determination shall be challenged in an Article 78 proceeding “which is not final or can be adequately reviewed by appeal to a court or to some other body or officer....” A determination is deemed final and binding and thereby ripe for review “when it ‘has its impact’ upon the petitioner who is thereby aggrieved” (*Parent Teacher Ass'n of*

P.S. 124M v Board of Educ. of City School Dist. of City of N. Y., 138 AD2d 108 [1st Dept 1988] citing *Matter of Edmead v McGuire*, 67 NY2d 714 [Ct App 1986]).

Here, Petitioners' FOIL Request was received by Respondents on June 17, 2019 (NYSCEF doc No. 6, Exhibit A). Respondents do not deny that they failed to acknowledge receipt of the FOIL Request within five business days from June 17. Such failure, under the FOIL statute, constitutes a denial which Petitioners were entitled to administratively appeal. The Court notes that Petitioners' administrative appeal was filed ahead of Respondents' first acknowledgement email (see NYSCEF doc No. 7). Thus, at the time of the appeal, there could be no "ongoing efforts" to respond to the FOIL Request to speak of. When the appeal was denied on August 6, 2019, Petitioners were deemed to have exhausted their administrative remedies; consequently, they were entitled to commence this Article 78 proceeding (*see Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 [1st Dept 2015] ["Contrary to the court's finding, petitioner's administrative remedies were exhausted when NYPD denied her administrative appeal from the constructive denial of her FOIL request."]; *see also Newton v Police Dep't of New York*, 183 Ad2d 621 [1st Dept 1992] ["As for Indictment No. 2441/84, there is no doubt that respondents have not fulfilled the dictates of Public Officers Law § 89 (3), and, consequently, petitioner is deemed to have exhausted his administrative remedies and may maintain this article 78 proceeding."]).

Notwithstanding the fact that Petitioners had grounds to commence this proceeding, the Court finds that the petition should nevertheless be dismissed as Respondents provided Petitioners with records responsive to their FOIL Request during the pendency of this litigation. While Respondents did not strictly conform with the mandates of POL § 89 (3), Respondents have produced the requested documents from August to December 2019, resulting in this proceeding being moot (*see Newton v Police Dep't of New York*, 183 Ad2d 621 [1st Dept 1992] ["It is clear

that respondents did not conform with the mandates of Public Officers Law § 89 (3) when they did not make petitioner's records available within the five business days specified therein or deny the requests in writing...Yet, where the relief being sought is supplied during the pendency of litigation, the matter becomes moot.”)]. The Court rejects Petitioners’ argument that the document production from August to December 2019 was unrelated to their FOIL Request. Petitioners’ communications with the DFS contradict this argument (*see e.g.*: (i) Petitioners’ August 11, 2019 letter to DFS stating “For the legislative materials, we are interested in any records pertaining to the subject matter outlined in our FOIL request...” [NYSCEF doc No. 36]); and (ii) the Verified Petition, ¶¶ 23 and 25 which both state that “counsel for Petitioners inspected certain records identified by Respondents as responsive to the FOIL Request at Respondents’ offices...” and ¶ 38 which states “[t]he documents provided to Petitioners to-date in response to the FOIL Request include documents and records that are arguably responsive to the FOIL Request, but are an incomplete response to the FOIL Request” [NYSCEF doc No. 4]).

Petitioners nevertheless argue that the case is not moot since this Court may review the sufficiency of disclosures made by the DFS after the commencement of this proceeding (NYSCEF doc No. 57, pp. 15-16). The Court finds this argument unpersuasive as this, in essence, asks this Court to review the January 2020 Response and February 2020 Determination from the DFS which do not form the basis of this Article 78 proceeding (*see Matter of Gannet Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072 [3d Dept 2020]). In *Gannet Satellite*, Respondent disclosed thousands of documents and withheld those which were supposedly exempt after the proceeding was commenced. The Court declined to review the sufficiency of this subsequent disclosure, stating that “Petitioner's sole contention in its petition was that respondent's failure to provide the requested documents by the anticipated response dates set by respondent

constituted a constructive denial of the request. Given that respondent ultimately disclosed 1,320 pages of documents during the pendency of this special proceeding, the claim of constructive denial was rendered moot” (*Id.* at 1074, citing *Matter of Associated Gen. Contrs. of N.Y. State, LLC v New York State Thruway Auth.*, 173 AD3d 1526, 1527, [2019]). Here, the verified petition and the memorandum of law accompanying it are solely based on Respondents’ failure to comply with POL § 89(3)(a) which Petitioners construed as “constructive” denial of their FOIL Request. The papers do not set forth allegations challenging the exemptions later invoked by the DFS which, of course, at that time of the commencement of this proceeding were not yet determined.

The Court also finds that the cases cited by Petitioner in support of their proposition that this Court should review subsequent administrative determinations are inapposite here. In *Matter of Madeiros v NY State Educ. Dept* (30 NY3d 67 [Ct App 2017]), the court reviewed the exemptions claimed by respondent in its document disclosures during the pendency of the proceeding only because the agency’s initial determination, which was administratively appealed and later judicially challenged, invoked the same exemptions. In another case cited by Petitioners, *Robbins Geller Rudman & Dowd LLP v New York City Dept of Investigations* (2014 NY Slip Op 31057 (U) [Sup Ct 2014]), the court reviewed the agency’s partial production of documents after the commencement of the proceeding as it was following the precedent of *Coleman v New York City Police Dept.*, 282 AD2d 390, 392 [1st Dept 2001] (“[R]espondents’ laxity in addressing petitioner’s request until legal action had been commenced warrants that he be permitted to appeal the partial production of the documents”). These cases are not analogous to the circumstances here. From the time that DFS belatedly acknowledged receipt of the FOIL Request on July 23, 2019, the department provided Petitioners with thousands of pages of records on a rolling basis from August 2019, even before the commencement of this proceeding. Thus, as this petition seeks

judicial review of the DFS's August 2019 Determination, this proceeding is now moot. For clarity, the foregoing pronouncement does not prejudice Petitioners' ability to commence an Article 78 proceeding to challenge the subsequent determination in February 2020.

Regarding Petitioners' request for attorney's fees, pursuant to FOIL's fee-shifting provision, POL § 89(4)(c)(i) provides that a court "may assess...reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case...in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time". Here, the Court finds that attorney's fees are not warranted. While the DFS initially failed to respond to the FOIL Request within the statutory time period, Respondents immediately remedied this procedural lapse by acknowledging receipt of the request within five business days of taking notice of Petitioners' email dated July 16, 2019 (NYSCEF doc No. 29). Thereafter, Respondents produced thousands of pages of documents even before Petitioners commenced this proceeding. To date, Respondents claim to have produced 14,401 pages of documents in response to the FOIL Request (NYSCEF doc No. 62). As Respondents exerted efforts to address the FOIL Request even before this litigation, the Court declines to shift attorney's fees in this proceeding.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioners AIG Specialty Insurance Company and Lexington Insurance Company (Motion Seq. 001) is denied in its entirety and the cross-motion to dismiss by Respondents New York State Department of Financial Services and its superintendent Linda A. Lacewell is granted; and it is further

ORDERED that Petitioners' application for costs and attorney's fees is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Petitioners.

Carol R. Edmead
HON. CAROL R. EDMEAD
J.S.C.

7/2/2020
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	