

**Matter of 201 EB Dev. III, LLC v New York City
Dept. of Bldgs.**

2023 NY Slip Op 34153(U)

December 2, 2023

Supreme Court, New York County

Docket Number: Index No. 150652/2023

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

IN THE MATTER OF 201 EB DEVELOPMENT III, LLC,

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS,
KAZIMIR VILENCHIK, P.E., AS ACTING COMMISSIONER
OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS

Respondents.

-----X

INDEX NO. 150652/2023

MOTION DATE 07/06/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Respondents moves pursuant to CPLR § 7804(f) to dismiss petitioner’s Article 78 petition to compel respondents to produce records pursuant to the New York Freedom of Information Law (“FOIL”). Respondents argue that following the filing of the petition they have fully complied with petitioner’s FOIL request thus making the petition moot. Petitioner argues that respondents have not fully responded to the FOIL request, that there are outstanding records that have not been provided, and that the records they have been provided were improperly redacted. Petitioner further argues that they are entitled to attorney’s fees pursuant to NY PUB OFF § 89(4) because respondent failed to respond timely to their FOIL request and had no basis for the delay.

BACKGROUND

Petitioner is the owner of a parcel of property located at 201 East Broadway, New York, NY. Petitioner had previously demolished an existing building on this property and then sought

to construct a new modular building on the parcel. The construction of the new building was delayed both due to litigation with a neighboring property (See *201 EB Development III LLC v 205 East Broadway Housing Development Fund Corp.*, Index No 158179/2020) and due to stop work orders issued by the NYC Department of Buildings (“DOB”) (NYSCEF Doc No 4).

On May 25, 2022 petitioner made a FOIL request to respondent DOB, requesting records related to property located at 201 East Broadway, New York, NY and 205 East Broadway, New York, NY (NYSCEF Doc No 27). Among other things, petitioner sought records of communications and documents regarding a construction project planned for 201, and communications between respondents and representatives of 205 East Broadway regarding alleged code violations issued against the 201 construction project (*Id.*). Petitioner has alleged that the DOB has prevented the 201 project from moving forward by issuing violations and stop work orders based upon evidence received from a third party seeking to stop the project (NYSCEF Doc No 10; *see also* NYSCEF Doc No 31 at ¶ 20). Petitioner made the FOIL request in part to receive information about the nature of the evidence provided by the third party (NYSCEF Doc No 10).

Respondent acknowledged the receipt of the FOIL request on May 26, 2022 and represented that it would furnish the requested record on or about August 29, 2022 (NYSCEF Doc No 7). Respondent failed to respond to the request and on September 8, 2022, petitioner submitted an appeal of the constructive denial of the request (NYSCEF Doc Nos 7-8). Respondent again failed to respond to either the initial request or the appeal which then resulted in petitioner filing the instant petition on January 20, 2023 to compel respondent to produce the requested records (NYSCEF Doc No 1). Following the filing of the petition, respondent provided an initial set of documents to petitioner on February 7, 2023 (NYSCEF Doc No. 26 ¶ 8). After

both parties sought adjournments of the petition to locate additional documents and to review the ones already submitted, respondent produced additional documents on April 21, 2023 (*Id.* at ¶ 9-10). Petitioner then sent a deficiency letter to respondents alleging that the records produced by respondent were incomplete and at times improperly redacted (NYSCEF Doc No 28). On July 11, 2023 respondents produced a third set of documents and now allege they have produced all responsive documents to petitioner’s FOIL request (NYSCEF Doc No 31).

Respondents then filed the present motion to dismiss the petition because they allege, they have provided all responsive documents making the petition moot (NYSCEF Doc Nos 25-26). The court then adjourned the petition to compel to coincide with the instant motion (NYSCEF Doc No 49).

DISCUSSION

A. DOB’s Response to the FOIL request

NY PUB OFF § 87(2) (“FOIL”) provides that agencies “make available for public inspection and copying all records, except those records or portions thereof that may be withheld pursuant to the exceptions of rights of access appearing in this subdivision.” “[T]he purpose of FOIL is ‘to promote open government and public accountability’ with the law imposing ‘a broad duty on government to make its records available to the public’” (*Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 162 [1st Dept 2008]). “All government records are presumptively open for public inspection unless specifically exempted” (*Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]).

When an agency does not provide requested documents under FOIL, “Public Officers Law § 89(3) requires the agency to ‘certify that it does not have possession of [a requested] record or that such record cannot be found after [a] diligent search’” (*Rattley v New York City*

Police Dept., 96 NY2d 873 [2001]). If an agency claims that a requested record is subject to an exemption from disclosure they must provide a particularized and specific justification for denying access (*City of Newark v Law Dept. of City of New York*, 305 AD2d 28 [1st Dept 2003]).

NY PUB OFF § 87(2)(g) provides an exemption to disclosure for records which “are inter-agency or intra-agency materials which are not: statistical or factual tabulations or data; [or] instructions to staff that affect the public; [or] final agency policy or determinations.” “The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure” (*Matter of The New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 488 [2005]).

Here, among the records which respondent provided were emails which were partially redacted with the agency indicating that the redacted portions were intra-agency communication. Petitioner argues that respondent improperly redacted some of the information within the emails as it contains communication which does not fall into the NY PUB OFF § 87(2)(g) exemption. Petitioner points to an email chain between DOB employee Chune Huang and Douglas Lane, an engineer employed by petitioner (NYSCEF Doc No 35). Petitioner contends that since a party outside the agency is included in the email, the email cannot be subject to the intra agency communication exemption. However, the redacted portion of that email is a portion that occurred after Douglas Lane had been excluded from the email chain and the only people on the chain are DOB employees (*Id.*). Therefore, this portion was properly redacted.

Petitioner also takes issue with emails in which it claims the context of the email indicates that it includes “factual or statistical tabulations of data” making it an improper redaction. However, this is speculative and in respondent’s reply affirmation they go into further detail about the nature of those emails (NYSCEF Doc No 47 ¶ 15). Since the purpose of the intra

agency exception is to allow a free exchange of opinions regarding agency matters without fear of public disclosure, and the affirmations by respondent confirm that these records were deliberative in nature these records were properly redacted.

B. Full scope of search

Petitioner also oppose respondent's dismissal arguing that respondent has not complied with a thorough search of their records in accordance with their request. In particular petitioner points to a number of DOB employees who sent, received or were copied on emails regarding the construction project at 201 East Broadway, and the issuing of the violations and stop work orders (NYSCEF Doc No 31 ¶ 69). Respondent argues that this request goes beyond the scope of the FOIL request and that searching these emails would be an unreasonable burden (NYSCEF Doc No. 47).

When making a FOIL request the burden is first on the requester "to provide a reasonable description of the records" that is sufficient "for purposes of locating and identifying the documents sought" (*Reclaim the Records v NY State Dept. of Health*, 185 A.D.3d 1268, 1269 [3rd Dep't 2020]). Respondent relies on *Reclaim the Records* arguing that like in that case petitioner's request is overbroad and conforming with the request would be overly burdensome on the agency. However, in *Reclaim the Records* the burden on the agency was far greater than the one presented here. There, complying with the FOIL request would "require searching the email records of approximately 5,400 of respondent's employees 'for six permutations of Ancestry[']s name] as well as the catch-all of 'similar terms'" (*Id.* at 1270). Here in contrast, the request has been narrowed to only include records directly involving 201 East Broadway and direct neighbor 205 East Broadway and is further narrowed to only require disclosure of the current construction project and its related disputes and violations.

Respondent is correct that it would be overly burdensome to require them to search every one of their employee's emails for these terms, however they are still required by FOIL to perform a reasonable search of their records. This includes searching the emails of employees that respondent knows to have had communications regarding the terms in the FOIL request. Based on the titles of the employees as well as their involvement with the property at the center of the FOIL request as indicated in some of the redacted emails provided, respondent should search the email and records using the same terms and date range indicated in NYSCEF Doc No 26 ¶ 13 of the following employees Matthew Millner, Austin Allcot, Yegal Shamash, Timothy Hogan, and Vishnu Persuad.

Accordingly, respondent has not performed a diligent and reasonable search in response to the FOIL request the petition is not moot and the motion to dismiss must be denied.

C. Attorney's Fees

Petitioner also argues that since they were forced to commence an Article 78 proceeding in order to get respondent to comply with the FOIL request they are entitled to reasonable attorney's fees incurred during this proceeding. NY PUB OFF § 89(4)(c) provides that a court may:

- (i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and
- (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

“[A]n award of attorney's fees is intended to ‘encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding’”(Reiburn v New York City Dept. of Parks and Recreation, 171 AD3d 670, 671 [1st Dept 2019]). To avoid the recovery of attorney’s fees the respondent must establish that they had a reasonable basis for denying access to the records (Jaskaran v City of New York, 200 AD3d 418 [1st Dept 2021]). A party substantially prevails when no disclosure of records was made prior to the commencement of the proceeding but in response to the proceeding the agency then complies with the FOIL request (Barry v O’Neill, 185 AD3d 503 [1st Dept 2020]). “[T]he voluntariness of ... disclosure is irrelevant to the issue of whether petitioner substantially prevailed” (Dioso Faustino Freedom of Info. Law Request v New York City, 191 AD3d 504 [1st Dept 2021]).

Here, respondent denied access to petitioner as they failed to respond to either the initial FOIL request or the appeal, other than an acknowledgement that the request was received. Furthermore, they did not establish a reasonable basis at the time of the denial as they provided no basis at all. While it is true that respondents voluntarily began to comply with the request once the petition was filed, petitioner still “substantially prevailed” since compliance was only reached after litigation began. As the purpose of NY PUB OFF § 89(4)(c) is to encourage agencies to comply with FOIL requests prior to intervention by the court system, petitioner is entitled to reasonable attorney’s fees associated with this proceeding.

Accordingly it is:

ORDERED that the motion to dismiss the petition is denied; and it is further

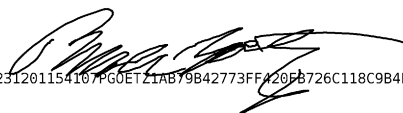
ORDERED that the petition is granted to the extent that respondent shall perform a reasonable search of the records and emails of employees Matthew Millner, Austin Allcot, Yegal

Shamash, Timothy Hogan, and Vishnu Persuad and shall provide the records to petitioner after making any proper redactions pursuant to exemptions in NY PUB OFF § 87; and it is further

ORDERED that respondents shall pay the petitioner’s reasonable attorney’s fees associated with the petition; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall submit via NYSCEF and email to SFC-Part47-Clerk@nycourts.gov an affirmation in support of its request for attorneys’ fees; and it is further

ORDERED that opposition thereto is due 10 days thereafter.


20231201154107PG0ET21AB79B42773FFA20F8726C118C9B4F5FF

12/2/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
--------------------------	--------------

<input type="checkbox"/>	SUBMIT ORDER
--------------------------	--------------

CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
--------------------------	----------------------------

<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
--------------------------	-----------------------	--------------------------	-----------