

Lost Lake Holdings, LLC v Hogue
2023 NY Slip Op 35309(U)
March 27, 2023
Supreme Court, Sullivan County
Docket Number: Index No. E2022-1815
Judge: David M. Gandin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
COUNTY OF SULLIVAN

LOST LAKE HOLDINGS, LLC,

Petitioner,

-against-

**DECISION, ORDER
AND JUDGMENT**

Index No. E2022-1815

DANIEL S. HOGUE, JR., in his official capacity as TOWN
SUPERVISOR and TOWN FOIL APPEALS OFFICER;
JOANNE NAGODA, in her official capacity as TOWN CLERK
and TOWN RECORD ACCESS OFFICER; TOWN BOARD
OF THE TOWN OF FORESTBURGH; AND TOWN OF
FORESTBURGH,

Present:

Hon. David M. Gandin, JSC

Respondents.

The following papers were read and considered in this special proceeding:

1. Petition with exhibits A-M;
2. Affidavit in Support with exhibit 1;
3. Notice of Motion;
4. Affidavit in Support with exhibits 1-11;
5. Affidavit in Further Support;
6. Record Certification;
7. Memorandum of Law in Support;
8. Affirmation in Support of Article 78 and in Opposition to Motion for Summary Judgment;

Petitioner property owner and land developer commenced this Article 78 proceeding challenging respondents' denial of two Freedom of Information Law (FOIL) requests. Both requests sought records pertaining to the denial of building permits and petitioner's subsequent appeal of the denial to the Town of Forestburgh Zoning Board of Appeals (ZBA). A request dated March 25, 2022 demanded production of "all records pertaining to the [a]ppeal" in the possession of any town employee as well as billing statements issued to respondents from their outside legal counsel. A second request dated April 13, 2022, comprised of twenty-subparts, restated the demand for records included in the March 2022 request and additionally sought production of records pertaining to petitioner's efforts to develop the Lost Lake Resort Project, an approximately 2,500 acre subdivision of land in the Town of Forestburgh. Petitioner previously made a FOIL demand in October 2021 for records pertaining to the denial of the same building permits that resulted in a separate Article 78 proceeding bearing the Index Number E2022-556.

FOIL provides that all records of a public agency are presumptively open to public inspection

and copying unless otherwise specifically exempted. See Public Officers Law §87[2]. An agency that has denied disclosure on the basis of an exemption “shall in all proceedings have the burden of proving entitlement” (POL §89[5][e]) to the exemption by articulating “a particularized and specific justification for denying access.” *Matter of Capital Newspapers Div. Of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 [1986]. An agency that seeks to withhold documents pursuant a statutory exemption must make a particularized showing that each such document falls within that exemption. See POL § 87(2). “These exemptions are construed narrowly and the burden rests on the public agency to demonstrate that the material requested falls squarely within the ambit of one of the statutory exemptions.” *Matter of Laveck v. Vil. Bd. of Trustees of Vil. of Lansing*, 145 AD3d 1168, 1169 (3d Dept 2016) (internal quotation marks and citation omitted). “A denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial.” *Matter of Capital Newspapers*, at 566.

Petitioner’s March 2022 request called for production of “all records pertaining to the [ZBA challenge].” Respondents’ FOIL appeals officer affirmed denial of the request, in part, on grounds that the request did not adequately describe the records sought. The determination stated that petitioner’s request directing respondents to search for “all letter, emails, memoranda and correspondence...” relating to the ZBA proceeding “may make it difficult, if not impossible, for agency staff to identify and locate the responsive records with reasonable effort based on the nature of the agency’s filing system.” Respondents also denied the request on grounds that some of the documents sought constituted privileged communications (see POL § 87(2)(a)) and/or inter/intra-office communications (see POL § 87(2)(g)). The request was further denied on grounds that it was duplicative of petitioner’s October 2021 request. Respondents granted the portion of the request which called for production of invoices from respondents’ attorneys.

With respect to petitioner’s April 2022 request, respondents’ FOIL appeals officer denied parts 2, 3, 4, 8, 10, and 12-20 on grounds that petitioner failed to reasonably describe the records sought. These requests demanded production of “all letters, emails, memoranda, notes documents and other records...” regarding, *inter alia*, the Lost Lake development project and permitting process, “all emails, correspondence, and communications among and between any member of the Town Board, the [ZBA], the Planning Board, the Zoning Committee, and any secretary,” including “all communications, emails and other correspondence issued by or received by any member of the [ZBA]... since January 1, 2021.” Respondents denied requests 1, 6, 7, 9 seeking disclosure of respondents’ subject matter list (see POL § 87(3)(c)), notes of town officials and records pertaining to the Town of Forestburgh Comprehensive Plan Committee on grounds that respondents did not maintain such records. Respondents also maintained that several categories of documents sought were exempt from production under POL § 87(2)(a) and/or POL § 87(2)(g).

Petitioner claims that respondents erred in denying its FOIL requests for failure to adequately describe the records sought. In support, it cites the relatively finite period of time its appeal of the denial of the building permits had been pending at the time of the FOIL request. Petitioner also contends that, in denying the requests, respondents’ failed to explain the structure of respondents’ record-keeping system and how petitioner’s FOIL requests precluded respondents from locating the

records. Petitioner further alleges that respondents' determinations that classes of records were statutorily exempt from disclosure was affected by an error of law because the refusals were categorical and not particularized with a factual justification for the nondisclosure. Petitioner also contends that respondents failed to conduct a diligent search for records related to the Comprehensive Plan Committee, a citizen group the town planning board delegated to review the Lost Lake Development Project. Lastly, petitioner's move for an order directing respondents to produce a subject matter list of all records in its possession and for the Court to set a deadline for respondents to disclose attorney billing statements.

The portion of petitioner's March 2022 FOIL request seeking all records pertaining to the ZBA challenge was properly denied. The Court notes that in the FOIL Article 78 which preceded the instant case, part six of petitioner's October 2021 fifteen part FOIL request called for production of "all letters, emails, memoranda, other correspondence, notes and other documents" related to the Lost Lake development project since January 1, 2019. The record before the Court establishes that respondents already provided a response to petitioner's records request. The affidavit of respondents' FOIL appeals officer demonstrates that any records pertaining to the Lost Lake project are kept in physical form within a file in the Town Hall. Respondents further submit that to the extent records responsive to petitioner's October 2021 request were identifiable, petitioner was provided access to the file to inspect such records. The affidavit also states that records pertaining to the ZBA proceeding were previously made publically available on the Town of Forestburgh's website. Petitioner previously challenged the sufficiency of respondents' disclosure pursuant to the prior request and the Court affirmed respondents' denial of this aspect of the request based on petitioner's failure to adequately identify the records sought. Thus, petitioner's March 2022 request for records is duplicative of its prior request and its contentions have already been reviewed by the Court. See *Mendez v. New York City Police Dept.*, 260 AD2d 262 (1st Dept 1999).

"The requirement of Public Officers Law § 89(3)(a) that requested documents be 'reasonably described' serves to enable an agency to locate and identify the records in question." *Reclaim the Records v. New York State Dept. of Health*, 185 AD3d 1268, 1269 (3d Dept 2020), quoting *Matter of Pflaum v. Grattan*, 116 AD3d 1103, 1104 (3d Dept 2014). "[A] valid basis for denying the FOIL request has been established—at least with respect to the actual files—when they are not 'indexed in a manner that would enable the identification and location of documents.'" *Matter of Pflaum*, at 1104 (3d Dept 2014), quoting *Matter of Konigsberg v. Coughlin*, 68 NY2d 245, 250 (1986). "[A]n agency denying a FOIL request for lack of a reasonable description 'bears the burden to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought.'" *Puig v. New York State Police*, 212 AD3d 1025, 1026 (3d Dept 2023), quoting *Jewish Press, Inc. v New York State Police*, 207 AD3d 971, 974 (3d Dept 2022). "With particular respect to records that are maintained electronically, the agency must show 'that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document[s] from the virtual files through an electronic word search ... [by] name or other reasonable technological effort.'" *Puig*, at 762, quoting *Matter of Pflaum*, at 1104.

To the extent that petitioner insists that respondents erred by not requiring every town official

to conduct a records search through their email accounts for records pertaining to the ZBA appeal, the Town properly denied the request for failure to reasonably describe the records sought. See *Reclaim the Records v. New York State Dept. of Health*, 185 AD3d 1268, 1273 (3d Dept 2020) (“A failure to provide a reasonable description of the records sought may present the same obstacles to an electronic search as it does to a search of paper records, preventing an agency from retrieving a record with reasonable effort”) (internal quotation marks omitted). Respondents’ FOIL appeal officer explains in his affidavit that because town personnel do not have official email accounts maintained by the town on a central server, to comply with petitioner’s request each town official would have to conduct an individual search for records from their personal email accounts. Each employee would thus be tasked with identifying any records potentially responsive to the request and reporting the results of their search to respondents’ records access officer. The absence of any limiting criteria in petitioner’s request for any and all records “pertaining” to their appeal renders it impermissibly vague. Logically, records “pertaining” to the ZBA proceeding are not limited to records directly pertaining to the appeal such as petitioner’s filings, meeting minutes, the agenda and the like, but may also be understood to encompass records indirectly related to the appeal, e.g. records upon which respondents’ building inspector based the denial of building permits or materials cited in petitioner’s appellant brief. Additionally, what may “pertain” to a particular topic is a matter of interpretation that defies finite parameters. While petitioner is correct that an agency may not refuse production on grounds that the nature of the request is voluminous, FOIL only mandates that an agency make a “reasonable effort” to retrieve or extract records or data in electronic or computer form. See POL§ 89(3)(a). Compliance with petitioner’s request would not be a matter of merely retrieving specific documents within town officials’ email accounts through the use of a rudimentary word search. Instead, it would require respondents to parse through an unidentifiable amount of documents to determine whether each individual record could arguably be construed as “pertaining” to petitioner’s ZBA appeal. Due to its open ended nature, petitioner’s request was properly denied.

The Court further rejects petitioner’s contention that respondents erred in failing to provide particularized factual objections to support the claim that some of the requested records were exempt from production as privileged and/or intra-agency communications. Because petitioner failed to meet his initial burden of providing a reasonable description of the records sought, respondents were not obligated to articulate facts in support of their claims of statutory exemptions. See *Id.*, at 1269. Based on the foregoing, the Court also affirms respondents’ denial of parts 2, 3, 4, 8, 10, and 12-20 of the April 2022 FOIL request. Petitioner failed to reasonably describe the records sought.

Respondents categorical denial of parts 7 and 9 of petitioner’s April 2022 FOIL request seeking records relating to the operation and meetings of the Town Comprehensive Zoning Plan Committee was improper. Respondents claimed that the requested documents did not constitute agency records because the Committee was advisory in nature and thus did not amount to a government entity. However, the minutes from meetings of the town board and resolutions therefrom demonstrate that the board designated the Committee as a “special board” (see Town Law § 272-a(2)(c)), delegated it authority under Town Law § 272-a to revise and adopt the Comprehensive Plan and to call and schedule public meetings in conformity with the authority endowed by the statute. Hence, the Committee played more than an advisory role and constituted a subsidiary entity of

respondents which exercised governmental functions. See *Matter of Smith v. City Univ. of New York*, 92 NY2d 707 (1999). Accordingly, to the extent that the Committee's work product is not already a matter of public record, respondents are obligated to search for and produce the records. Petitioner's remaining challenges were properly denied on grounds that the records sought were not in respondents' possession or did not constitute agency records. Wherefore, it is

ORDERED that petitioner's first, second and third causes of action are granted to the extent that respondent shall conduct a search for records responsive to parts 7 and 9 of petitioner's April 13, 2022 FOIL request. Respondents shall serve their response to the request on petitioner on or by May 1, 2023. The causes of action are otherwise denied. It is further

ORDERED that petitioner's fourth cause of action calling for production of respondents' subject matter list in accordance with POL § 87(3)(c) is granted. Respondents have conceded that they will promulgate the list and make it available to petitioner. Respondents shall serve petitioner with the list by May 1, 2023. It is further

ORDERED that petitioner's fifth cause of action which seeks production of any and all invoices from Harris Beach issued to respondents is granted to the extent that respondents shall disclose and make available for inspection any additional invoices not already provided to petitioner by May 1, 2023. It is further

ORDERED that petitioner's sixth cause of action is denied. Petitioner has not substantially prevailed within the meaning of POL § 89(4)(c) and thus is not entitled an award of attorney's fees. See *Edmond v. Suffolk County*, 197 AD3d 1297 (2d Dept 2021).

The foregoing constitutes the decision, order and judgment of the Court. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: March 27, 2023
Kingston, New York

ENTER:



DAVID M. GANDIN, J.S.C.

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty (30) days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty (30) days thereof.