

Lost Lake Holdings, LLC v Hogue
2023 NY Slip Op 35323(U)
April 7, 2023
Supreme Court, Sullivan County
Docket Number: Index No. E2022/556
Judge: David M. Gandin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

LOST LAKE HOLDINGS, LLC,

Petitioner,

**AMENDED
DECISION AND ORDER**

Index No. E2022-556

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

Present:

David M. Gandin, JSC

-against-

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,

Respondents.

The following papers were read and considered in this CPLR Article 78 proceeding:

1. Notice of Petitioner and Verified Petition with Exhibits A-C;
2. Affirmation in Support with Exhibits 1-3;
3. Notice of Motion and Affirmation in Support;
4. Daniel Hogue Affidavit;
5. Memorandum of Law in Support;
6. Joanne Nagoda Affidavit with Exhibits 1-19;
7. Verified Answer;
8. Memorandum of Law in Opposition with Exhibits A-B;
9. Affirmation in Opposition.

Petitioner is a developer seeking to construct an approximately 2,500 acre luxury resort development ("the Lost Lake resort project") in the Town of Forestburgh, New York. It initiated this CPLR Article 78 proceeding to challenge the partial denial of its 15 part Freedom of Information Law (FOIL) request following respondents' decision to not issue building permits for the construction of single family homes on the property. Petitioner submitted its FOIL request on October 28, 2021. Respondents' records access officer issued her determination on the request on December 21, 2021. Petitioner then pursued an administrative appeal in which the December 21, 2021 determination was reversed in part but otherwise affirmed. This proceeding followed.

As a threshold matter, respondents assert that petitioner is barred from initiating this special proceeding because it failed to timely file an administrative appeal to respondents' December 21,

2021 determination within the statutory 30 day deadline. As such, respondents maintain that petitioner failed to exhaust its administrative remedies and that its claims are not preserved for judicial review. Petitioner alleges that the administrative appeal was timely commenced as of February 11, 2022 because respondents continued to produce documents responsive to its FOIL requests through January 13, 2022. It has produced email correspondence between the Town Clerk and petitioner's attorney dated December 22, 2021 in which respondents acknowledge receipt of a December 21, 2021 letter from petitioner indicating that materials responsive to the October 28, 2021 were forthcoming.

"A petitioner must exhaust all ... administrative remedies before seeking judicial review unless he or she is challenging an agency's action as unconstitutional or beyond its grant of power, or if resort to the available administrative remedies would be futile or would cause the petitioner irreparable harm." *Matter of McFadden v. Fonda*, 148 AD3d 1430, 1431 (3d Dept 2017) (internal quotation marks omitted). POL § 89(4)(a) prescribes that an aggrieved individual denied access to a record may within 30 days appeal such denial to the designated officer of such agency. The record before the Court reveals that despite respondents' characterization of its December 21, 2021 decision as a final determination, respondents continued to disclose records responsive to petitioner's FOIL requests after the purported final denial. Respondents conceded that their obligation to disclose was outstanding through the town clerk's December 22, 2021 email to petitioner. In the writing, the clerk acknowledged that due to the holidays and staffing issues respondents needed more time to provide minutes from town and planning board meetings and outside consultant contracts. Accordingly, petitioner's FOIL claim did not accrue until the respondents answered petitioner's December 21, 2021 letter and took the position that no further action would be taken. See *Matter of Carnevale v. City of Albany*, 68 AD3d 1290 (3d Dept 2009). As the 30 day statute of limitations did not begin to run until January 13, 2022, petitioner timely filed its administrative appeal and respondents' failure to exhaust argument is without merit.

Petitioner's first cause of action alleges that respondents failed to adequately respond fully to parts 1, 5, 6, and 12 of their FOIL request. Petitioner asserts that respondents denied its requests based on categorical exemptions without identifying and disclosing specific records responsive to the requests and not sufficiently particularizing the basis for such denial. Petitioner further alleges that respondents' denials were blanket, conclusory and lacked a proper factual basis.

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). FOIL expressly provides that 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). "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.” *Id.* A conclusory contention that an entire category of documents is exempt will not suffice. See *Matter of Buffalo Broadcasting Co., Inc. v. New York State Dept. of Correctional Services*, 155 AD2d 106 (3d Dept 1990).

Part 1 of petitioner’s FOIL request sought “[e]very document and communication...by and between any Town employee or official...and any outside Town consultant and Town counsel...pertaining to the final determinations by [the Town Code Enforcement Officer] issued on August 18, 2021 and September 30, 2021...” The request was granted in part and denied in part. On administrative appeal petitioner asserted that respondents erred by not disclosing documents outside legal counsel prepared which were referenced in time vouchers. Respondents claimed that the materials were not disclosed on the basis of privilege (POL § 87(2)(a)) and inter/intra-office communications (POL § 87(2)(g)). Request number 5, which sought production of “every contract or agreement between Bergmann Associates or Chuck Voss and [the town]...and all correspondence, memoranda, emails, notes and other records or documents pertaining to or referencing and such contract...”, was granted in part and denied in part. Petitioner appealed respondents failure to provide any correspondence between town employees and its outside engineering consultants. Respondents asserted that such communications, to the extent that they existed, were properly withheld pursuant to the inter/intra-office agency materials exception. The justifications respondents provided for withholding the aforementioned documents are insufficient. Respondents failed to describe with particularity the records withheld or set forth the specific reasons why each document was exempt from disclosure. “Blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 275 (1996). Without a privilege log or specific description of which records respondents withheld, the Court is unable to ascertain whether the cited statutory exemptions apply. See *Matter of W. Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882 (2009). Wherefore, it is

ORDERED that the petition is granted to the extent that respondents shall review withheld records responsive to parts 1 and 5 of petitioner’s October 28, 2021 FOIL request and provide an updated response. Each document withheld shall be cataloged and respondents shall identify with particularity for each record withheld which statutory exemption they are relying on in withholding its disclosure and their factual basis for doing so. See *W. Harlem Bus. Group*, supra. Respondents shall have until **May 1, 2023** to provide petitioner with their response.

Petitioner’s sixth request demanded production of “all letters, emails, memoranda, other correspondence, notes and other documents regarding the Lost Lake Planned Development District...” between, *inter alia*, members of the Town of Forestburgh government, its outside consultants and the public.” Respondents granted the request in part and denied it in part on grounds that materials prepared by and exchanged between the town and its outside consultants were exempt as privileged or inter/intra-agency office materials. Respondents further found that petitioner’s request did not describe the materials in a manner which would reasonably lead to their retrieval. Respondents did not err in affirming the denial because the demand was overbroad. “Public Officers Law § 89(3)(a) requires that requested records must be reasonably described. This requirement “serves to enable an agency to locate and identify the records in question.” *Jewish Press, Inc. v. New*

York State Police, 207 AD3d 971, 974 (3d Dept 2022) (internal quotation marks omitted). In requesting essentially any and all written documents “regarding” the Lost Lake development between any town official, their outside counsel and any member of the public without any further subject matter limitations, petitioner failed to reasonably limit the scope of respondents’ search for records responsive to the request. See *Reclaim the Records v. New York State Dept. of Health*, 185 AD3d 1268 (3d Dept 2020).

Petitioner’s twelfth request sought “any documents...to or from any Town board, official, employee, consultant or counsel and any state, county or other governmental official or any officer or employee of any private or public utility company.” Again, respondents granted the request in part and denied it in part based on privilege and the inter/intra-agency exception. Petitioner’s administrative appeal alleged that respondents participated in a proceeding before the Public Service Commission yet failed to produce any records from the proceeding. Respondents affirmed the denial finding that the records officer certified that respondents did not maintain any such records. “Where an agency properly certifies that it does not possess a requested record, a petitioner may be entitled to a hearing on the issue if it can articulate a demonstrable factual basis to support the contention that the requested document existed and was within the agency’s control.” *Empire Ctr. for Pub. Policy v. New York State Energy and Research Dev. Auth.*, 188 AD3d 1556, 1558 (3d Dept 2020) (internal quotation marks omitted). Unsupported speculation that records exist and have been withheld is an insufficient basis upon which to grant a petition. See *Matter of De Fabritis v. McMahon*, 301 AD2d 892, 894 (3d Dept 2003). Without more, petitioner’s assertion that such documents exist and were unlawfully retained is inadequate to sustain their burden.

Petitioner’s second cause of action challenges respondents’ alleged failure to provide via the Town’s official website “the minutes, audio recording and video recording of each meeting of the Town Board, Planning Board and Zoning Board of Appeals” at which the Lost Lake project was discussed since January 1, 2016. Petitioner asserts that, while some of the requested minutes were uploaded to the website, many of the dates on which the project was discussed were missing. Petitioner further alleges that despite production of some of the written minutes, respondents did not produce audio recordings of the meetings. Respondents maintain that while the minutes of select dates were not published on the town website, petitioner was nonetheless granted access to review all of the Town’s meeting books and ledgers on December 8, 2021. They assert that these records comprised the totality of the records petitioner sought, including the minutes from the missing dates from the website. Respondents’ record access officer certified that although the meetings were recorded, the audio files are not preserved once their content is transcribed and written minutes are generated. She further certified that to the extent that these files existed after petitioner commenced this proceeding, the files were saved for inspection and review.

Respondents’ decision to affirm the denial of this aspect of petitioner’s FOIL request was not affected by an error of law. “As a general rule, an agency responding to a FOIL request is not required to create any new record or data that is not already possessed and maintained by it as such.” *Madden v. Vil. of Tuxedo Park*, 192 AD3d 802, 804 (2d Dept 2021). While petitioner contends that several sets of meeting minutes were omitted from the town’s official website, it does not controvert

respondents' assertion that it was granted access to inspect and copy the books and ledgers which contained the records responsive to their request. Accordingly, respondents complied with their obligations under FOIL and were not required to convert the minutes to a digital format. To the extent that petitioner asserts that it is entitled to the audio recordings of the meetings as well, respondents' records officer certified that the audio files which predate this proceeding were not preserved after the minutes were transcribed. "Nothing in [FOIL] shall be construed to require any entity to prepare any record not possessed or maintained by such entity." POL § 89(3)(a). Consequently, respondents were not obligated to disclose audio files which predated this proceeding.

Petitioner's third cause of action challenges the denial of part 8 of their FOIL request. The request sought written records that identified email addresses used by various town officials and respondents' legal and engineering consultants. The decision following administrative appeal reversed the record officer's original determination that disclosure of the email addresses constituted an unwarranted invasion of privacy (POL § 87(2)(b)). Respondents subsequently provided petitioner with a list of associated email addresses for the town officials named in part 8 of its FOIL request. As petitioner obtained the relief it now seeks before it initiated this proceeding, its third cause of action is dismissed as moot. See *Gannett Satellite Info. Network, LLC v. New York State Thruway Auth.*, 181 AD3d 1072 (3d Dept 2020).

The fourth cause of action challenges denial of part 13 of petitioner's FOIL request which sought "any agreement between Double Diamond and the Town Engineer regarding inspections of the Lost Lake property..." as well as any correspondence which referenced it. In response to the demand, respondents produced some records and certified that after a diligent search it found no other records responsive to the request. Petitioner alleges that, upon information and belief, additional records exist which respondents have failed to disclose. The speculative claim that respondents have withheld records, without more, is insufficient to refute the certification of respondents' records officer that the documents do not exist or are not within respondents' control. See *Empire Ctr. for Pub. Policy, supra*.

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

ORDERED that petitioner's challenge to parts 6 and 12 of its FOIL request is denied.

The foregoing constitutes the decision and order 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: April 7, 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.