75 Fort Wash. LLC v New York City Dept. of Hous. Preserv. & Dev.
2024 NY Slip Op 30684(U)
March 5, 2024
Supreme Court, New York County
Docket Number: Index No. 158763/2019
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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75 FORT WASHINGTON LLC

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondent.

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INDEX NO. 158763/2019

MOTION DATE 03/04/2024[1]

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001)1- 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33

were read on this motion to/for ARTICLE 78.

Respondent's cross-motion to dismiss this Freedom of Information Law ("FOIL") proceeding is granted.

Background

In this FOIL proceeding, petitioner sought records concerning why it was placed on a pilot program list for buildings. As explained by Mr. Capperis (a former HPD employee), respondent created an index as a means of ascertaining physically distressed buildings that might need assistance from HPD programs (NYSCEF Doc. No. 21, ¶ 3). In 2018, respondent created a Certification of No Harassment ("CONH") pilot program (*id*.). Mr. Capperis explains that this program used a similar index (called BQI) to help protect tenants at risk of displacement due to landlord harassment (*id*. ¶ 4). A property placed on this list will result in the denial of all permits

[1] The Court recognizes that this proceeding was scheduled for oral argument in early 2020 with the judge initially assigned to this petition, although it is unclear whether oral argument actually occurred. In any event, even though this proceeding was only assigned to this part on March 4, 2024, the Court apologizes, on behalf of the court system, for the lengthy years-long delay in this Article 78 proceeding.

until the building obtains a certificate of no harassment from HPD (*id*.). BQI is based on certain factors, including the number of units, the number of violations of the housing maintenance code and the number of ownership changes.

Petitioner explains that it requested information via FOIL about its placement on the list so that it could, if necessary, bring a proper challenge to its inclusion on the list. It complains that respondent did not provide the information sought in the subject FOIL request when it responded on May 15, 2019. Petitioner claims it timely appealed this response on May 17, 2019 and argues that respondent ignored the appeal, compelling petitioner to bring this proceeding.

The FOIL request sought "the following information and any documentation supporting the below information, pursuant to the City and State Freedom of Information Laws: 1. The Building's 'score' on HPD's Building Qualification Index; and 2. HPD's method of calculation, including the formula employed by HPD to calculate the 'score,' and 3. A list of the information, data, documentation or any other record utilized to calculate the 'score'" (NYSCEF Doc. No. 2 at 3).

Respondent cross-moves to dismiss on the ground that it responded to the FOIL request in an email dated May 15, 2019 and disclosed relevant documents after a diligent search. It acknowledges that petitioner complained that this response did not contain the building's score on the BQI. Respondent argues that it sent all records responsive to petitioner's request to petitioner's counsel in response to a *separate* FOIL request dated March 27, 2019. It also insists that petitioner's request for declaratory relief is a challenge to HPD's determination to include petitioner's building on the pilot program list is therefore barred as untimely.

In opposition, petitioner claims that respondent failed to annex the documents it claims it sent to petitioner's counsel. Petitioner also disputes respondent's argument that it complied with its FOIL obligation by constructively serving the response in a separate FOIL dispute.

In reply to the cross-motion, respondent emphasizes that it has certified that it disclosed all records responsive to the FOIL request. It points to NYSCEF Doc. No. 29 as proof that it annexed the responses on this record. Respondent argues that petitioner's counsel has filed six separate Article 78 proceedings that seek the same records and it has properly provided petitioner's counsel with the responsive records.

FOIL Response

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public. The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Consistent with the legislative declaration in Public Officers Law § 84, FOIL is liberally construed and its statutory exemptions narrowly interpreted. All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that the material requested falls squarely within the ambit of one of the statutory exemptions. While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224-25, 76 NYS3d 460 [2018] [internal quotations and citation omitted]).

The primary issue on the FOIL response is whether or not respondent satisfied its obligation by turning over the records in response to a separate FOIL request. It is axiomatic that

a FOIL proceeding is moot where respondent has disclosed the records (*Carty v New York City Police Dept.*, 160 AD3d 504, 505, 71 NYS3d 354 [1st Dept 2018]). The Court finds, however, that where a petitioner's attorney already has the documents, denial of a FOIL petition is appropriate. "[I]f the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel" (*Matter of Moore v Santucci*, 151 AD2d 677, 678, 543 NYS2d 103 [2d Dept 1989] *abrogated on other grounds in Friedman v Rice*, 30 NY3d 461, 68 NYS3d 1 [2017]).

Here, petitioner's attorney does not deny that he brought multiple FOIL requests seeking the exact same records or that he received the requested information. Petitioner's reply does not cite any caselaw for the proposition that a FOIL proceeding is not moot where petitioner's attorney actually possesses the requested information. The purpose of FOIL is to promote open government and the disclosure of records. Here, there is no dispute that petitioner's counsel has the responsive records and the Court sees no reason to grant the petition simply because respondent should have disclosed all of the records in response to the specific FOIL request at issue here. To be sure, respondent probably should respond to each individual FOIL request as a matter of courtesy and convenience. But under these circumstances, the Court finds that respondent met its burden to show that the FOIL portion of the instant dispute is moot.

Declaratory Relief

The Court finds that petitioner's request for declaratory relief regarding its building's inclusion on the pilot program list is time-barred. As respondent points out, petitioner's FOIL request dated December 19, 2018 specifically mentions that petitioner "recently became aware" that the building was included on this pilot program list (NYSCEF Doc. No. 2). That means that, at the very least, the statute of limitations began to run that day; therefore, the instant petition filed on September 9, 2019 is untimely to the extent it seeks to challenge that determination.

As petitioner did not prevail, it is not entitled to recover attorneys' fees.

Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss the petition is granted; and it is further

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

3/5/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE