SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

DECISION

ENVIRONMENTAL WORKING GROUP,

AND ORDER

Petitioner,

For a judgment pursuant to Article 78
of the Civil Practice Law and Rules

Index No. 5159-12
RJI No. 01-12-ST3965

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK AND AS HEAD OF THE EXECUTIVE DEPARTMENT AND EXECUTIVE CHAMBER,

Respondents.

Supreme Court, Albany County: CPLR Article 78 Special Term: November 30, 2012

Hon. Thomas A. Breslin, J.S.C., presiding

APPEARANCES:

For Petitioner:

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John W. Caffry
Claudia K. Braymer

For Respondents:

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THOMAS A. BRESLIN, J.

Petitioner commenced this CPLR Article 78 proceeding to challenge the determination of respondents concerning responses to

several Freedom of Information Law (hereinafter FOIL) requests. Respondents answered and seek dismissal of the petition.

Petitioner made similar requests to each respondent which related to the subject matter of hydrofracking. The requests sought correspondence and communications since January 1, 2011 between and among Department of Environmental Conservation (hereinafter DEC) officials, the Governor and his aides and oil and gas companies.

DEC Records Access Officer Ruth L. Earl responded on April 12, 2012 and provided a CD that contained "copies of all documents identified as responsive". Petitioner followed up with an email letter requesting that DEC certify that it conducted a good faith search of its records. Petitioner noted that the records provided included emails and letters but no summaries of, inter alia, telephone conversations. DEC responded in an email that as relating to the two FOIL requests petitioner had received all documents identified as being responsive to the requests and that no responsive documents were withheld from disclosure.

Petitioners filed an administrative appeal stating that they believed there were more documents which were not disclosed and thus DEC had constructively denied the requests. The office of

General Counsel for DEC responded that there did not appear to be any basis for an appeal inasmuch as there did not appear to be any further records that would be responsive to the request. In that there was no denial of records there was stated to be no basis for an appeal determination.

Similarly, the Executive Chamber responded to the two requests and indicated that they had performed a diligent search and found one page of electronic records and 86 pages of other records plus a DVD which respond to the request. The records were provided to petitioner. Petitioner filed an appeal alleging a partial constructive denial and claimed that the volume of records provided should have been much larger. The Executive Chamber denied the appeal stating that the chamber had certified to having performed a diligent search and that no particular form of certification was required. It was noted that following certification of a diligent search, speculation by the requester did not require the agency to conduct a further search. It was stated that no records were withheld.

Petitioner filed 10 more requests on June 28, 2012 relating to documents petitioner claimed to be missing and having identified by the records which DEC did produce in response to the initial request. The Executive Chamber responded on August 1, 2012

and DEC responded on October 26, 2012. DEC did produce one document in response to this "new" request. No appeal was filed concerning these new requests.

Petitioner argues that DEC's response that it had provided all documents identified as responsive and that no responsive documents were withheld is not a conclusive demonstration that DEC's search was a diligent one. Citing Matter of Oddone v Suffolk County Police Dept., (96 AD3d 758 [2012]), petitioner contends that it is entitled to a hearing to determine if any additional records exist and are within the control of DEC.

Respondents argue that they provided all responsive documents in their possession and certified such and that inasmuch as no records were withheld, the matter is moot. Furthermore, if the initial certifications as to no records is not sufficient, respondents argue that the sworn statements in support of their answer render the matter moot. It is also contended that the petitioner's desire to obtain a hearing to determine if further documents exist is unwarranted and that even though respondents produced one additional document after the instant proceeding was commenced, that such did not serve to negate respondents' certifications that after a diligent search no further documents were found. As to the new FOIL requests, respondents assert that

there was no appeal and thus petitioner did not exhaust the administrative remedies and that inasmuch as respondents provided what was in their possession, the petition relating to those claims is moot.

This court rejects the argument that the matter is moot or has been rendered moot by the evidence submitted with the answer. Petitioner has asserted that there are additional materials that were not provided by each respondent and therefore the responses do not moot the matter in these particular circumstances. This proceeding can, and should, provide the forum to permit petitioner to present evidence in support of these contentions.

FOIL was enacted to promote open government and accountability to the public and it imposes a broad duty on the government to make its records available to the public (Matter of Data Tree LLC v Romaine, 9 NY3d 454 [2007]; Matter of Gould v New York City Police Dept. , 89 NY2d 267, 274 [1996]; Matter of Miller v New York State Dept. of Transp., 58 AD3d 981, 982 [2009]; Public Officers Law § 84). Government records are thus "presumptively open to inspection and copying by the public unless they come within one of the narrowly construed exemptions of Public Officers Law § 87 (2)" (Matter of Miller v New York State Dept. of Transp.,

supra, at 982). The agency asserting an exemption must articulate a particularized and specific justification for denying access (Matter of Markowitz v Serio, 11 NY3d 43 [2008]; Matter of Data Tree LLC v Romaine, supra). Generally, the need of the requester and the purpose for the request are not relevant to the request (Matter of Buffalo News v Buffalo Enter. Dev. Corp., 84 NY2d 488, 492 [1994]) or the determination of whether an exemption applies (Matter of Porco v Fleisher, 100 AD3d 639 [2012]). Thus "an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" (Matter of Beechwood Restorative Care Ctr. v Signor, 5 NY3d 435 [2005][citations omitted]).

If an agency is unable to locate documents requested it is required to certify that it does not have possession of the record or that the record cannot be found after a diligent search (Public Officers Law § 89[3][a]; Matter of Rattley v New York City Police Dept., 96 NY2d 873, 875 [2001]). "The statute does not specify the manner in which an agency must certify that documents cannot be located, and '[n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required' (Matter of Rattley v New York City Police Dept., 96 NY2d at 875; see Matter of Curry v Nassau

County Sheriff's Dept., 69 AD3d 622 [2010])" (Matter of Oddone v Suffolk County Police Dept., 96 AD3d 758, 761 [2012]). Even when an agency properly certifies that it was unable to locate the requested documents after performing a diligent search, the requester "may nevertheless be entitled to a hearing on the issue where he or she can 'articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [entity's] control' (Matter of Gould v New York City Police Dept., 89 NY2d 267, 279 [1996]; see Matter of Curry v Nassau County Sheriff's Dept., 69 AD3d 622-623; Matter of Ahlers v Dillon, 143 AD2d 225,226 [1988])" (Matter of Oddone v Suffolk County Police Dept., supra at 761). However, unsupported speculation that records have been withheld is insufficient to warrant relief (Matter of DeFabritis v McMahon, 301 AD2d 892 [2003]).

In this case records were provided by each respondent in response to the requests but petitioner asserts that there must be more. As evidence of such petitioner states that in contrast to the records produced by DEC relating to contacts with Tom West of the West firm (who represented Chesapeake Energy Corporation), the Executive Chamber produced no records of contacts with West even despite the fact that a meeting was scheduled which included Executive Chambers staff and West. It is thus argued that some communications or documents must exist. Additionally, it is stated that the Executive Chambers provided materials related to

New York State Dept. of Taxation & Fin., 83 AD3d 1191 [2011], lv denied 17 NY3d 712 [2011]). The petition is dismissed on the merits.

As to the 10 new requests filed subsequent to the appeals of the initial requests, petitioner did not exhaust the administrative remedies available by appealing those determinations and thus the portion of the petition relating to those FOIL requests must be dismissed (see Public Officers Law § 89 [4][a]; Matter of Serrano v David, 45 AD3d 270 [2007]).

Petitioner has requested payment for attorney fees pursuant to Public Officers Law section 89(4)(c). However, petitioner has not met the requirements of the statute in that petitioner did not substantially prevail and the respondents did not deny access nor fail to respond to the requests and therefore the request is denied (see generally Matter of Hearst Corp. V City of Albany, 88 AD3d 1130 [2011]; Matter of New York State Defenders Ass'n. v New York State Police, 87 AD3d 193 [2011]).

Petitioner also seeks payment for attorney fees pursuant to the Equal Access to Justice Act (CPLR article 86, hereinafter EAJA). Petitioner cannot recover under this provision in that the EAJA applies only to actions against the State where another statute does not specifically provide for counsel fees (CPLR 8601[a]). Public Officers Law section 89(4)(c) provides for

counsel fees in certain situations and thus petitioner cannot seek counsel fees pursuant to EAJA (see Matter of Beechwood Restorative Care Ctr. v Signor, 5 NY3d 435, supra [2005]).

The petition is dismissed. This shall constitute the decision and order of this court.

This Decision and Order is being returned to the attorneys for the Respondents. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry. All original papers submitted are being held by this court pending further consideration of this proceeding.

So Ordered.

Dated: Albany, New York
January 7, 2013

Thomas A. Breslin, J.S.C.

PAPERS CONSIDERED:

1) Notice of Petition and Verified Petition sworn to September 17, 2012, with exhibits.
2) Petitioner's Memorandum of Law.
3) Answer of Respondents dated November 16, 2012 with exhibits.
4) Affidavit of Ruth L. Earl sworn to November 16, 2012 with attachments.
5) Affirmation of Justin C. Levin dated November 15, 2012 with exhibits.
6) Respondent's Memorandum of Law.

7) Petitioner's Reply Affidavit by Claudia K. Braymer sworn to November 26, 2012 with exhibits.