State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 25, 2020 531100

In the Matter of EMPIRE
CENTER FOR PUBLIC POLICY,
Respondent,
v
MEMORANDUM AND ORDER
NEW YORK STATE ENERGY AND
RESEARCH DEVELOPMENT
AUTHORITY et al.,
Appellants.

Calendar Date: October 22, 2020

Before: Garry, P.J., Clark, Devine, Aarons and Reynolds Fitzgerald, JJ.

Letitia James, Attorney General, Albany (Robert M. Goldfarb of counsel), for appellants.

Government Justice Center, Inc., Albany (Cameron J. MacDonald of counsel), for respondent.

Clark, J.

Appeal from a judgment of the Supreme Court (Lynch, J.), entered February 21, 2020 in Albany County, which, among other things, granted petitioner's application, in a proceeding pursuant to CPLR article 78, to review determinations of respondents denying petitioner's Freedom of Information Law request.

In April 2019, petitioner made a Freedom of Information Law (see Public Officers Law art 6 [hereinafter FOIL]) request to respondent New York State Energy and Research Development Authority (hereinafter NYSERDA) and a separate FOIL request to respondent Department of Environmental Conservation (hereinafter DEC). In those requests, petitioner sought "an electronic copy of the 'comprehensive study' ordered by Gov. Andrew Cuomo 'to determine the most rapid, cost-effective, and responsible pathway to reach 100[%] renewable energy statewide' as detailed in [the] January 10, 2017 press release and as completed prior to revisions mentioned publicly by NYSERDA in February 2019."[1] DEC denied the request, stating that it had no responsive records, as the requested study had not yet been completed. NYSERDA also denied the request, stating that, although it had records responsive to the request, said records were exempt from disclosure under Public Officers Law § 87 (2) (g). Petitioner administratively appealed the respective denials. DEC denied the administrative appeal on the ground that it did not possess the completed study. NYSERDA also denied the administrative appeal, stating that, upon further review, the records it had previously identified as responsive were not actually responsive to the request. Petitioner then commenced this CPLR article 78 proceeding to challenge respondents' determinations. Supreme Court granted the petition and directed respondents to produce the requested records and to pay petitioner's counsel fees and costs. Respondents appeal.

Initially, despite any assertions to the contrary, it was entirely reasonable for respondents to interpret petitioner's FOIL request as seeking a completed study. Although there may be some ambiguity in petitioner's request, leaving room for different interpretations, a fair reading of the request can certainly lead to the plausible interpretation that petitioner was solely asking for a completed study.[2]

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[1] Petitioner's electronic FOIL requests included an embedded weblink to the January 2017 press release.

[2] To the extent that petitioner tried to clarify any ambiguity in its FOIL request in its administrative appeals, document descriptions provided for the first time on

Where, as here, an agency maintains that it does not possess a requested record, the agency is required to certify as much (see Public Officers Law § 89 [3]). Here, respondents submitted affidavits from Alicia Barton, the president and chief executive officer of NYSERDA, and Carl Mas, the Director of the Energy and Environmental Analysis Department of NYSERDA, as well as an affirmation from Daniella Keller, an attorney who served as DEC's records access officer at the relevant time. In their sworn affidavits, Barton and Mas attested that the study referenced in Governor Cuomo's January 2017 press release had yet to be completed at the time of petitioner's FOIL request. Keller stated, in her affirmation, that DEC records custodians had conducted a search of relevant files and advised her that the requested record did not exist because the study "had not been drafted." Such sworn attestations amply satisfy respondents' obligations under Public Officers Law § 89 (3) (see Matter of Wright v Woodard, 158 AD3d 958, 958-959 [2018]; see generally Matter of Rattley v New York City Police Dept., 96 NY2d 873, 875 [2001]).

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" (Matter of Gould v New York City Police Dept., 89 NY2d 267, 279 [1996]; see Matter of Jackson v Albany County Dist. Attorney's Off., 176 AD3d 1420, 1421-1422 [2019]). To that end, petitioner relied on public statements made by Barton and others at certain legislative hearings. These statements, however, did not indicate – or come close to indicating – that a completed report existed. Rather, petitioner asks this Court to rely on inferences that may or may not be reasonably gleaned from the public statements to conclude that a completed report did in fact exist at the time of the FOIL request. Indeed, petitioner alleged in the verified petition that the work by NYSERDA that

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administrative appeal cannot cure deficiencies in the original request (see Matter of Reclaim the Records v New York State Dept. of Health, 185 AD3d 1268, 1272 [2020]).

Barton referred to in her public hearing testimony was "[p]resumably" the report sought in the FOIL request. Such speculation and conjecture does not warrant a hearing or a rejection of the sworn statements of Barton and Mas – individuals with personal knowledge of the study and its status – and Keller (see Matter of Gould v New York City Police Dept., 89 NY2d at 279; Matter of DeFreitas v New York State Police Crime Lab, 141 AD3d 1043, 1045 [2016]; Matter of Di Rose v City of Binghamton Police Dept., 225 AD2d 959, 960 [1996]). Thus, inasmuch as petitioner did not establish its entitlement to the relief requested in its petition, it should have been dismissed (see Matter of Jackson v Albany County Dist. Attorney's Off., 176 AD3d at 1421-1422).

Aarons and Devine, JJ., concur.

Reynolds Fitzgerald, J. (dissenting).

We respectfully dissent.

Contrary to the majority's view, we do not believe it was reasonable for respondents to interpret petitioner's Freedom of Information Law (see Public Officers Law art 6 [hereinafter FOIL]) request as seeking a completed study. Petitioner's FOIL request sought the "comprehensive study . . . as completed prior to revisions mentioned publicly by [respondent New York State Energy and Research Development Agency (hereinafter NYSERDA)] in February 2019." By focusing on the word completed, respondents wholly ignored the remainder of the sentence, acknowledging that NYSERDA intended to make revisions to the study. By flatly denying having any responsive records, respondents have subverted the purpose of FOIL, which is to allow public access to governmental agency records. "[T]he public is vested with an inherent right to know and . . . official secrecy is anathematic to our form of government" (Matter of Madeiros v New York State Educ. Dept., 30 NY3d 67, 73 [2017] [internal quotation marks and citation omitted]). A blanket refusal to release documents is inimical to FOIL's purpose in promoting open government (see Matter of Gould v New York City Police Dept., 89 NY2d 267, 275

[1996]). "An agency to whom a FOIL request is made does not have carte blanche to withhold any information it pleases" (Matter of New York Times Co. v District Attorney of Kings County, 179 AD3d 115, 125 [2019] [internal quotation marks and citation omitted]).

Finally, and perhaps most importantly, when NYSERDA initially denied petitioner's request, it in fact identified documents responsive to said request. Further, as part of this CPLR article 78 proceeding, Alicia Barton, president and chief executive officer of NYSERDA, confirmed in her affidavit that she reviewed the responsive documents, including spreadsheets and power points, contradicting the claim that records are not responsive. When an agency has statistical or factual tabulations or data identified as objective information, it should be disclosed (see Matter of Gartner v New York State Attorney General's Off., 160 AD3d 1087, 1090 [2018]; Matter of Humane Socy. of U.S. v Brennan, 53 AD3d 909, 911 [2008], lv denied 11 NY3d 711 [2008]). An agency must conduct a search for the requested records, using methods that can reasonably be expected to produce the information requested, not to withhold the information.

However, we do find that Supreme Court erred in ordering disclosure without allowing them the opportunity to assert FOIL exemptions. As Supreme Court solely addressed the issue of the existence of documents responsive to the request, respondents "must be given the opportunity to establish specific exemptions" (Matter of Dunlea v Goldmark, 54 AD2d 446, 449 [1976], affd 43 NY2d 754 [1977]). For these reasons, we would modify Supreme Court's order and remit the matter to that court to allow respondents an opportunity to assert exemptions under FOIL and for the court to conduct an in camera inspection of the requested records.

Garry, P.J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition dismissed.

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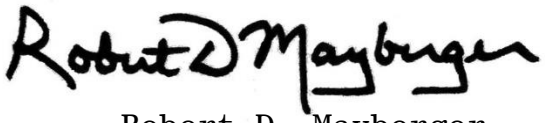

Robert D. Mayberger
Clerk of the Court