SHORT FORM ORDER

INDEX
NO.: 25774-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 8-31-11
SUBMITTED: 12-1-11
MOTION NO.: 001-MD; CASE DISP

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COUNTY OF SUFFOLK, Individually and on behalf of THE RATE PAYERS OF THE COUNTY OF SUFFOLK,

Petitioner,

-against-

LONG ISLAND POWER AUTHORITY, RICHARD M. KESSEL, as Chairman of the Long Island Power Authority,

Respondents.

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REILLY, LIKE & TENETY
Attorneys for Petitioner
179 Little East Neck Road North
P.O. Box 818
Babylon, New York 11702

RIVKIN RADLER LLP
Attorneys for Respondents
926 RXR Plaza
Uniondale, New York 11556

ORDERED that the amended petition for a judgment pursuant to CPLR article 78 directing the respondent Long Island Power Authority to provide access to, or copies of, certain e-mails is denied, and the proceeding is dismissed.

The petitioner, the County of Suffolk (the "County") is the plaintiff in a pending action in this court against the respondents, the Long Island Power Authority ("LIPA") and its former Chairman Richard Kessel (Index No. 24125-02). By an order dated June 3, 2010, this court, inter alia, quashed subpoenas issued by the County in that action to depose certain non-party witnesses. By a subsequent order dated December 22, 2010, this court denied the County's motion for reargument and resettlement of the prior order. By a letter dated April 15, 2011, the County made a request of LIPA, pursuant to the Freedom of Information Law ("FOIL"), to provide it with e-mails between and among Kessel and others, including several LIPA officers and employees, LIPA's accountants and auditors, the State Comptroller, and LIPA's financial advisor, during the period from 1999 to 2003. The County's request sought e-mails on specific topics and documents that were related to the pending litigation between the County and LIPA.

By a letter May 11, 2011, LIPA denied the County's FOIL request on the ground that it had no responsive records. LIPA explained that, although it maintained certain e-mails from 2003, which were backed up for disaster recovery purposes, they were not accessible for the purpose of running a search because LIPA no longer maintained the technology necessary to access and search them. Thus, there was no practical or reasonable way to search the back-up tapes. Moreover, it was LIPA's position that it was not required to expend the effort needed to restore e-mails through the use of back-up tapes in order to search for particular e-mails in response to a FOIL request.

By a letter dated June 23, 2011, the County appealed LIPA's denial of its FOIL request. The County argued that LIPA had a responsibility to restore information from back-up tapes in order to conduct a search for the requested records, which were relevant to the determination of unresolved legal and factual issues in the pending civil action and within the scope of permissible discovery in that action. By a letter dated July 11, 2011, LIPA denied the County's appeal for the following reasons:

> LIPA has no responsive records and there is no practical or reasonable way to restore and search "back-up" tapes from 2003. LIPA has no back-up tapes prior to 2003. LIPA has maintained data from 2003, which was backed-up for disaster recovery purposes. However, the emails potentially backed-up in 2003 are not accessible for the purposes of running a search. Moreover the 2003 tapes are not restorable using LIPA's present IT systems, since the tapes were created by currently outdated technology. The first tapes that LIPA may be able to restore using technology within LIPA's possession are from 2005.
>
> LIPA no longer maintains the technology to restore any of the 2003 tapes. Even if the technology relevant to the 2003 tapes was available, it is not clear that the tapes could be restored. After purchasing (if it could be located) the compatible software and hardware, LIPA would then need to recreate, at its ratepayers' expense, an environment for that specific purpose. LIPA would then have to reassign an employee from its limited staff, for potentially a week or longer, to attempt to individually restore the "mailboxes" and search each individual mailbox for the emails for each respective tape and user.
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> [I]t is not practical or reasonable for LIPA to undergo such activities in response to your request under FOIL.

The County commenced this CPLR article 78 proceeding on August 15, 2011. On August 31, 2011, the County filed an amended notice of petition and amended petition.

Accordingly, the original notice of petition and petition are deemed withdrawn and superceded by the amended notice of petition and amended petition. The County seeks to compel LIPA to comply with its FOIL request and to turn over the requested e-mails, as well as additional documents and e-mails related to "plans and schedules for retiring debt associated with the Shoreham Nuclear Power Station and related surcharges on Suffolk County rate payers for the period starting with LIPA acquiring the assets of the former Long Island Lighting Company until the present" and "a complete current accounting of the status of all debt related to the Shoreham Nuclear Power Station asset."

A party requesting documents under FOIL must adhere to the procedure articulated in § 89 of the Public Officers Law (**People v Seeley**, 179 Misc 2d 42, 48). Under § 89 (3), a party seeking the production of documents must first make a written request that reasonably describes the items sought to the agency holding such documents (**Id.** at n 5). There is no evidence in the record that the County made a written request to LIPA for the additional documents and e-mails that it now seeks. Having failed to follow the mandated procedure, the County has not exhausted its administrative remedies with regard to such additional documents and e-mails (**Id.**; *see also*, **Matter of Bentley v Demskie**, 250 AD2d 886, 886-887). Accordingly, the County's request for additional documents and e-mails is denied.

When reviewing the denial of a FOIL request, the court is to presume that all records of a public agency are open to public inspection and copying (**Matter of New York Committee for Occupational Safety and Health v Bloomberg**, 72 AD3d 153, 158). An agency must make available for public inspection and copying all records unless it can claim a specific exemption from disclosure (**Matter of Data Tree, LLC v Romaine**, 9 NY3d 454, 462, *citing* Public Officers Law § 87 [2]). The term "record" is defined to include "computer tapes or discs" (Public Officers Law § 86 [4]). In denying the County's FOIL request, LIPA did not rely on any of the exemptions from disclosure found in Public Officers Law § 87 (2). Rather, LIPA claimed that it no longer maintained the requested information in an electronic format that was accessible and that the County's FOIL request required the creation of a new record.

An agency is not required to create records in order to comply with a FOIL request (**Matter of Data Tree**, *supra* at 464). Public Officers Law § 89 (3) (a) provides, "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity." Thus, an agency has no obligation to accommodate a request to compile data in a preferable commercial electronic format when the agency does not maintain the records in such a manner (**Id.** at 464). If the records are maintained electronically by an agency and are retrievable with reasonable effort, the agency is required to disclose the information. In such a situation the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium (**Id.** at 464-465). On the other hand, if the agency does not maintain the records in a transferable electronic format, then the agency should not be required to create a new documents to make its records transferable (**Id.** at 465). A simple manipulation of the computer necessary to transfer existing records should not, if it does not

involve significant time or expense, be treated as the creation of a new document (**Id.**).

The question then is whether the computer manipulation that LIPA claims is necessary to retrieve the requested e-mails constitutes a "simple manipulation of the computer necessary to transfer existing records" or the creation of a new document. The former does not excuse responding to the County's FOIL request, while the latter does (*see*, **Matter of New York Committee for Occupational Safety and Health**, *supra* at 161).

In opposition to the amended petition, LIPA has produced an affidavit from its Director of Information Technology in which she avers:

> In order to ascertain whether any data on any of the back-up tapes is responsive to Suffolk's FOIL request, the entirety of the data on the tape must be restored and retrieved. However, the tapes created prior to 2005 are not restorable using LIPA's present IT systems since the tapes were created by currently outdated technology. Prior to 2005, LIPA used DLT tapes to back-up its data. Beginning in or about April 2005, LIPA used LTO tapes to back-up its exchange and file servers. Each back-up tape must be restored using the technology that created it (DLT versus LTO). LIPA no longer maintains the hardware to restore any of the DLT tapes. The LTO tapes created from April 2005 to May 2008 can only be restored by creating a new environment with a new exchange server....a tedious process that would consume an inordinate amount of time, with no assurance that any responsive record would actually be retrieved. In particular, LIPA would need to create, at its expense, a new environment with a new exchange server for the specific purpose of restoring the back-up tapes....[I]t would take a trained information technology professional approximately 7-10 days to create such an exchange environment. Once an appropriate environment is created, each tape would take approximately 8-10 hours of professional time to restore.

In reply, the County contends that there are commercially available software and services that can restore and recover the requested e-mails from the back-up tapes.

Even if, as the County contends, the back-up tapes can be restored using commercially available software or services, the restoration would require LIPA to purchase the software or hire a third-party vendor. The County has provided the court with no case law or other authority that would require LIPA to make such an expenditure in order to respond to a FOIL request. The cases upon which the County relies involve the discovery of electronic documents in pending civil actions (*see*, **Delta Fin. Corp. v Morrison**, 13 Misc 3d 604; **Zubulake v UBS Warburg LLC**, 220 FRD 212 [SDNY 2003], 229 FRD 422 [SDNY 2004];

Einstein v 357 LLC, 2009 NY Slip Op 32784[U]) and are inapplicable to the facts of this case. That the County is a civil litigant is irrelevant. When requesting documents or records under FOIL, the entitlement to the document or record is based on the petitioner's status as a member of the public. The County's status as a litigant in a pending matter neither enhances nor restricts its rights under FOIL (**People v Seeley**, *supra* at 47-48 [and cases cited therein).

The court finds that, in order to respond to the County's FOIL request, LIPA would need to compile the data in an electronic format in which LIPA does not maintain the records. LIPA's back-up tapes are maintained in an electronic format that LIPA no longer has the hardware to restore. Thus, they are not retrievable with reasonable effort. LIPA would have to create new documents using software or services that it would need to purchase from third parties in order to comply with the County's FOIL request. Any documents so produced could not be produced by a simple manipulation of the computer and would involve significant time and expense. Accordingly, the County's FOIL request was properly denied.

In view of the foregoing, the County is not entitled to attorney's fees (*see*, Public Officers Law § 89 [4][c]).

Dated: April 3, 2012

HON. ELIZABETH HAZLITT EMERSON

J.S.C.