

Matter of Newsday, LLC v Town of Oyster Bay
2016 NY Slip Op 32749(U)
July 8, 2016
Supreme Court, Nassau County
Docket Number: 001484/16
Judge: Leonard D. Steinman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Application of

NEWSDAY, LLC,**

**IAS Part 23
Index No.: 001484/16
Motion Seq. No.: 001**

Petitioner,

**For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules**

DECISION AND ORDER

-against-

**TOWN OF OYSTER BAY, TOWN BOARD OF
THE TOWN OF OYSTER BAY, ZONING BOARD
OF APPEALS OF THE TOWN OF OYSTER BAY,
and JAMES ALTADONNA, JR. in his capacity as
Town Clerk for the Town of Oyster Bay,**

Respondents.

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LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Petitioner's Notice of Petition, Verified Petition, Affidavits & Exhibits-----	1
Respondents' Verified Answer with Objections in Points of Law -----	2
Affirmation of Matthew M. Rozea, Esq. in Opposition & Exhibits -----	3
Affidavit of James Altadonna, Jr. in Opposition-----	4
Reply Affirmation of Dina Sforza, Esq. -----	5
Reply Affidavit of Thomas Phillips & Exhibits -----	6
Reply Affidavit of Amy Wolf, Esq. & Exhibits -----	7

Petitioner, Newsday, LLC, has brought this Article 78 proceeding for a determination that the respondents (collectively referred to as "the Town") violated various portions of the Public Officers Law in failing to properly respond to certain requests submitted by Newsday

pursuant to the Freedom of Information Law (“FOIL”) and for an order directing the Town to immediately produce the documents requested. Newsday further seeks an order directing that the Town participate in a training session as a result of repeated violations of the Open Meetings Law (“OML”) and directing the Town to pay Newsday’s counsel fees and costs. The Town asserts that Newsday delayed too long in bringing this proceeding and that it is barred by the statute of limitations. The Town further denies any wrongdoing and contends that it is in full compliance with FOIL and OML.

I. FOIL AND OML

FOIL and OML are two statutory pillars upon which the public may rely to ensure that their government is not only “of the people and by the people,” but “*for the people.*” Both statutes recognize and advance the principle that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). FOIL and OML are intended “to open the workings of government to the public, including through a free press, which is cast as the public representative’s for that purpose.” *Newsday LLC v. Nassau County Police Department*, 42 Misc.3d 1215(A)(Sup.Ct. Nassau Co. 2013); Public Officers Law §84 .

FOIL requires government agencies to make available for public inspection and copying all records, subject to a number of exemptions. *Harbatkin v. New York City Dept. of Records and Information Services*, 19 N.Y.3d 373, 379 (2012); Public Officers Law §87(2). The Legislature intended FOIL to guarantee “[t]he people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations.” Public Officers Law §84; *Perez v. City University of New York*, 5 N.Y.3d 522, 528 (2005). It permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of SUNY at Farmingdale*, 87 N.Y.2d 410, 416 (1995). Public policy favors disclosure and the vast majority of government documents are presumptively discoverable. *Id* at 417; *see also Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007)(“FOIL is based on a presumption of access” to records).

Not every government record, however, is subject to disclosure under FOIL. Although “the balance is presumptively struck in favor of disclosure...in eight specific,

narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered.” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *see also Data Tree LLC v. Romaine*, 9 N.Y.3d at 463 (burden rests solely with responding government agency to establish exemption); Public Officers Law, §87(2). The responding agency is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection, to exempt its records from disclosure. *Fink v. Lefkowitz*, 47 N.Y.2d at 571; *see also Church of Scientology of N. Y. v. State of New York*, 46 N.Y.2d 906, 908 (1979). Only where the material requested falls squarely within the ambit of a statutory exemption, however, may disclosure be withheld. *Fink v. Lefkowitz*, 47 N.Y.2d at 571.

The Open Meetings Law “was intended—as its very name suggests—to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities.” *Gordon v. Village of Monticello, Inc.*, 87 N.Y.2d 124, 126 (1995). As set forth in Public Officers Law §100, OML sought to ensure that “public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.” Like FOIL, its provisions are to be liberally construed in accordance with the statute’s purposes. *Perez v. City University of New York*, 5 N.Y.3d at 528.

As relevant in this proceeding, OML requires that agency records that are subject to FOIL and scheduled to be the subject of discussion at an open meeting be made available upon request prior to or at the meeting to the extent practicable. Public Officers Law §103(e). It further requires that minutes be taken at all open meetings, which “shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.” Public Officers Law §106(1). Minutes are also to be taken of executive sessions as well, and the minutes of all sessions are to be available to the public for inspection upon request within one (for executive sessions) or two (for open meetings) weeks. Public Officers Law §106(2) and (3).

The importance of FOIL and OML as citizenry tools to discourage and expose governmental abuse is reflected in part in the remedial scheme designed to enforce them. If

a violation of these laws is found to occur a party may obtain not only the document or information improperly kept secret, but in a proper case may also recover attorneys' fees incurred in successfully obtaining the information. A court may exercise its discretion and award reasonable counsel fees to a party that "substantially prevailed" in a FOIL proceeding if the record involved was of clearly significant interest to the general public and the agency lacked a reasonable basis in law for withholding the document. *Matter of Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 (2005); Public Officers Law §89(4)(c). Such fees may also be properly awarded when a violation of OML is found, and there is no requirement as found in FOIL that the information withheld be of clear significant interest; nor must there be a lack of a reasonable basis for the government action. Public Officers Law §107(2); *Gordon v. Village of Monticello, Inc.*, 87 N.Y.2d at 127. It has been recognized that the possibility of recovering counsel fees in these proceedings may give citizens the impetus needed to bring meritorious lawsuits and advance the public interest. *Id.* at 128. Violations of OML may also lead to a court order requiring the government agency to participate in a training session concerning its obligations under OML. Public Officers Law §107(1).

This court now turns to Newsday's requests and the claimed violations.¹

II. NEWSDAY'S FOIL REQUESTS

A. The Requests

Request Nos. 1 and 2 (24703 and 24704)

On December 2, 2014, Newsday, by its reporter Ted Phillips, requested of the Town copies of "all agreements and amendments to those agreements made between the town and concessionaire SRB Concession, Inc. as referred to in board resolution 254 for the purpose of operating a food and beverage concession at TOBAY Beach, which the town board passed on April 8, 2014....copies of the review by an independent firm for capital improvements that, according to resolution 254, were completed....[and] copies of the proposal and/or proposals by SRB Concession, Inc. to make an additional \$4.1 million in capital improvements."

¹ Newsday has withdrawn its claims as to certain requests, specifically Request Nos. Eight and Nine, since the Town provided sufficient certification of its efforts to respond to these requests.

On that same date Newsday by Phillips also requested “copies of all agreements and amendments to those agreements between the town and concessionaire HR Singletons and its successor SRB Convention and Catering Corp. as referred to in board resolution 253 for purpose of operating a food and beverage concession at the Town Golf Course Facility which the town board passed on April 8, 2014....copies of the review by an independent firm for capital improvements that, according to resolution 253, were completed....[and] copies of the proposal and/or proposals by SRB Convention and Catering Corp. to make an additional \$3.9 million in capital improvements.”

It is undisputed that on January 20, 2015, the Town provided some documents to Phillips. In May 2015, Phillips identified certain documents and document pages he believed were missing from the Town’s production and requested such documents and pages or a certification from the Town that they did not exist. Among the documents identified as missing were further independent reviews of capital improvements at the golf course concession since, according to Newsday, the review(s) provided by the Town only referred to \$4.29 million of improvements completed whereas an April 8, 2014 Board resolution stated that \$8.2 million of capital improvements had been completed. This led Newsday to believe that certain reviews had not been produced.

On May 29, 2015, counsel to Newsday repeated its request for missing documents to the Town Clerk. The Town Clerk responded that day, stating “upon receipt of the documents from the Town Attorney we will promptly make them available for Ted Phillips’ review.” On July 20, 2015, Phillips again emailed the Town Clerk seeking the requested documents. On August 31, 2015, Newsday administratively appealed the “constructive denial” of the two requests.

On September 2, 2015, the Town provided additional responsive documents to Newsday. Thereafter, Newsday sought a certification from the Town that a diligent search had been conducted for all requested documents and that no other documents could be located. When the certification was not forthcoming, Newsday administratively appealed the refusal to certify (Petition, Exhibit E), which the Town asserts it received on October 16, 2015.

The Town contends that all responsive documents have been provided. The Town further relies on a September 2, 2015 letter to Newsday from its outside counsel, Jonathan Pickhardt, Esq., that the Town argues provides an explanation of such documents and goes beyond its statutory obligations.

Newsday contends that after additional conversations between Phillips and the Town Clerk, the Town Clerk produced on January 6, 2016 three documents in further response to the First and Second Requests, but that these documents were merely duplicates of documents previously produced. Newsday asserts it never received the required certification from the Town.

Request No. 3 (25038)

On February 24, 2015, Newsday submitted a FOIL request to the Town seeking a copy of a report prepared by Thomas Sabellico, Esq., Deputy Town Attorney, regarding allegations concerning certain Town employees made by Robert Ripp, a resident of the Town. On March 4, 2015, the Town acknowledged receipt of the request and informed Newsday that “a determination will be made concerning the availability of these records under the Freedom of Information Law and this Office will notify you within twenty (20) business days.”

On July 31, 2015, after no response was received, Newsday contacted Sabellico, regarding the status of the request. On August 13, 2015, Sabellico corresponded by email to Newsday’s counsel stating that the “document has been forwarded to the Nassau County District Attorney and remains the subject of an ongoing investigation. As such it is our position is that it is currently exempt from being disclosed.” The very next day, on August 14, 2015, the Town Clerk sent a letter to Mr. Phillips informing him of the denial on the same basis.

On September 10, 2015, Newsday administratively appealed the denial of this request. No determination with respect to this appeal was ever received by Newsday.

Request No. 4 (25188)

Newsday submitted a FOIL request to the Town on March 18, 2015 seeking “[a]n electronic database containing all entries in the Town of Oyster Bay’s check register or claims system.” The Town Clerk acknowledged the request on March 25, 2015, and

informed Newsday that “a determination will be made concerning the availability of these records under the Freedom of Information Law and this Office will notify you within twenty (20) business days.” On June 10, 2015, the Town Clerk notified Newsday that it “required more than twenty (20) business days to furnish the information sought, due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved.”

When no response was forthcoming, on July 31, 2015 Newsday emailed the Town seeking a status of the responses. On August 13, 2015, the Town responded that the request was overbroad because it failed to “contain a time period.” The very next day this denial was reasserted in a letter from the Town Clerk to Newsday in which the request was denied. Newsday filed an administrative appeal on September 10, 2015. Newsday never received a response to the appeal.

Request No. 5 (25180)

On March 21, 2015, Newsday submitted a FOIL request to the Town seeking to “inspect all contracts currently in effect between the Town of Oyster Bay and Carlo Lizza & Sons Paving.” On May 21, 2015, and again on June 10, 2015, the Town sought an additional twenty business days to furnish the information “due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved.” After two email requests from Newsday to the Town went unanswered, on August 31, 2015 Newsday submitted an appeal.

On September 18, 2015, the Town responded to the appeal stating that “additional time was required to provide the requested documents.” On October 16, 2015, Newsday appealed the failure by the Town to produce the documents or a certification that no documents could be located after a diligent search.

Request No. 6 (25181)

On March 21, 2015, Newsday submitted a FOIL request to the Town seeking to inspect “all contracts between the Town of Oyster Bay and Carlo Lizza & Sons Paving for projects and work completed since Jan. 1, 2008” as well as “all change work orders and extensions for said contracts.” The Town acknowledged receipt of the request and informed Newsday that a response would be provided within twenty days. On May 21, 2015, and

again on June 10, 2015, the Town sought an additional twenty business days to furnish the information “due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved.” After two email requests from Newsday to the Town went unanswered, on August 31, 2015 Newsday submitted an appeal.

On September 18, 2015, the Town responded to the appeal stating that “additional time was required to provide the requested documents.” After the Town thereafter failed to produce the documents or a certification that no documents could be located after a diligent search, Newsday filed an appeal on October 16, 2015.

Request No. 7 (25196)

On March 23, 2015, Newsday submitted a FOIL request to the Town seeking copies of “all annual financial disclosure forms filed by Frederick Ippolito with the town since the year 2000.” The Town Clerk acknowledged receipt and stated that twenty days was required to respond. On June 10, 2015, the Town sought an additional twenty business days to furnish the information “due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved.” After two emails requesting the status of the response went unanswered by the Town, Newsday filed an appeal of the constructive denial of the request on August 31, 2015.

On September 18, 2015, the Town responded that additional time was needed to provide the requested documents. After the Town thereafter failed to produce the documents or a certification that no documents could be located after a diligent search, Newsday filed an appeal on October 16, 2015.

Request No. 10 (25462)

On May 13, 2015, Newsday sought to “personally inspect all building permits issued by the town [sic] of Oyster Bay in the months of February 2015 and March 2015.” The Town acknowledged receipt of the request and indicated that twenty days would be required to process the request. After Newsday sent two emails requesting the status of the request that went unanswered, it filed an appeal of the constructive denial on August 31, 2015.

On September 18, 2015, the Town responded to Newsday indicating that “additional time was required in order to provide the requested documents.” After the Town failed to

produce the documents or a certification that no documents could be located after a diligent search, Newsday filed another appeal on October 16, 2015.

Request No. 11 (25866)

On August 14, 2015, Newsday submitted a FOIL request to the Town seeking “copies of all income and balance sheets provided to the town by concessionaires SRB Concessions, S.R.B. Convention and Catering, SRB Woodlands, HVS Seafood Shack, HVS Salsa Shack, HVS Dock and Dine, HVS Burger Shack, HVS Centre Island, HVS Stehli Beach, HVS Tappen Beach and any other company owned in part or whole by Harendra Singh or Ruby Singh that has had a concessions agreement with Oyster Bay to operate food and beverage service at the Joseph Colby golf course in Oyster Bay, Tobay Beach, Tappen Beach, Centre Island Beach and Stehli Beach.”

Newsday contends that the Town sent a letter acknowledging the request. On October 16, 2015, after no additional response was received, Newsday appealed the constructive denial of the request. No response to the appeal was provided by the Town.

Request No. 12 (25864)

On August 14, 2015, Newsday sought from the Town copies of all records “indicating payment to the town by concessionaires SRB Concessions, S.R.B. Convention and Catering, SRB Woodlands, HVS Seafood Shack, HVS Salsa Shack, HVS Dock and Dine, HVS Burger Shack, HVS Centre Island, HVS Stehli Beach, HVS Tappen Beach and any other company owned in part or whole by Harendra Singh or Ruby Singh that has had a concessions agreement with Oyster Bay to operate food and beverage service at Joseph Colby golf course in Oyster Bay, Tobay Beach, Tappen Beach, Centre Island Beach and Stehli Beach.”

Newsday contends that the Town acknowledged the request. On October 16, 2015 after no additional response was received, Newsday appealed the constructive denial of the request. No response to the appeal was provided by the Town.

Request No. 13 (25865)

On August 14, 2015, Newsday requested from the Town copies of all “agreements, amendments for concessions agreements approved by the town board in December 2012 to operate food and beverage service [at] Tappen Beach, Centre Island Beach and Stehli

Beach....[and] copies of any reviews or reports of capital improvements made at these facilities since the town entered into the concessions agreement.”

Although Newsday contends that the Town sent a letter on August 21, 2015 acknowledging the request and indicating that twenty days was required to respond, no such letter has been annexed to the Petition reflecting same. On October 16, 2015, after no additional response was received, Newsday appealed the constructive denial of the request. Newsday contends that no response to the appeal was provided by the Town.

B. Statute of Limitations

This proceeding was commenced on February 26, 2016, by the filing of the Petition. CPLR 304(a). The Town argues that Newsday’s Petition as it relates to Newsday’s FOIL claims is untimely because each of the FOIL requests were denied or deemed denied more than four months prior to the commencement of the proceeding. Newsday asserts that its Petition is not time-barred because as late as January 11, 2016, the Town communicated to Newsday that it was still considering the FOIL requests.

An Article 78 proceeding challenging the denial of a FOIL request must be commenced within four months after a petitioner receives notice of a final and binding denial of its appeal. CPLR 217(1); *Church of Scientology of N. Y. v. State of New York*, 46 N.Y.2d at 908; *Berkshire Nursing Center, Inc. v. Novello*, 13 A.D.3d 327 (2d Dept. 2004). Public Officers Law §89(4)(b) provides that an agency’s failure to respond to an appeal within ten days shall constitute a denial of the appeal. But this section is not absolute, as courts have recognized that an agency’s ambiguous actions and communications following an appeal may extend the accrual date of a claim. *See e.g., Carnevale v. City of Albany*, 68 A.D.3d 1290 (3d Dept. 2009); *Berkshire Nursing Center, Inc. v. Novello*, 13 A.D.3d at 328; *Orange County Publications v. Kiryas Joel Union Free School District*, 282 A.D.2d 604 (2d Dept. 2001); *Archdeacon v. Town of Oyster Bay*, 12 Misc.3d 438 (Sup.Ct. Nassau Co. 2006). This is because such ambiguous actions evidence that the agency had not reached a *final* determination. The burden rests on the party seeking to assert the statute of limitations as a defense to establish that its decision was unambiguously communicated as final more than four months before the proceeding was commenced. *Berkshire Nursing Center, Inc. v. Novello*, 13 A.D.3d at 328.

In this proceeding, Newsday's appeals (one of which related to multiple FOIL requests) must be examined individually. In sum, there are two relevant appeal dates: September 10, 2015, on which date two relevant appeals were taken (one each for Request Nos. 3 and 4); and October 16, 2015, in which one joint appeal was taken for Request Nos. 1, 2, 5-7 and 10-13. The limitations defense as to the October 16, 2015 appeal is easily disposed of: according to the Town this proceeding had to be commenced by February 29, 2016 (a response was due by October 26, 2015, the claim accrued on October 27, 2015 and the first business day four months later was February 29th). Since this proceeding was commenced on February 26, 2016, by the Town's own calculation this proceeding as it relates to the October 16, 2015 joint appeal is timely.

Furthermore, the Town itself, in an email to Newsday from Jonathan Sinnreich, Esq., on January 11, 2016, stated that the Town's response to the October 16, 2015 appeal was contained in a December 18, 2015 letter from Thomas Sabellico, Esq. Although the December 18 letter only makes explicit reference to one of the FOIL requests that were the subject of the October 16 appeal (a request not in issue in this proceeding), the January 11 Sinnreich email further states that "the Town anticipates providing responses to the remainder of Newsday's outstanding FOIL requests by the end of this week." Sinnreich's January 11 email was in response to three emails sent to him by Newsday, dated January 5, 7 and 8, 2016. These emails asked about the status of Request Nos. 25180 (Request No. 5), 25181 (Request No. 6), 25196 (Request No. 7) and 25462 (Request No. 10). Sinnreich similarly stated in an email to Newsday on December 18, 2015, that the Town was still working on Newsday's outstanding FOIL requests and acknowledged that "the Town is aware that there are some outstanding FOIL requests that have not been responded to." As a result of these communications from the Town, the limitations period for Newsday to file this proceeding with respect to the October 16 appeal did not accrue until January 11, 2016, at the earliest.

The timeliness of this proceeding concerning the September 10, 2015 appeals is not as straightforward. Absent evidence that the Town still had not finally determined the appeals by October 26, 2015, this proceeding is untimely. The Town argues that Newsday's claim accrued on September 21, 2015—the first day after the Town's response to the appeals was

statutorily due. Newsday claims that the Town's communications reflect that it still had not finally determined these appeals as late as January 2016. Newsday submits the affidavit of Dina Sforza, Esq., Newsday's counsel, who attests that on October 27, 2015 she had a telephone conversation with Sinnreich during which he advised her that he had been retained by the Town to, among other things, respond to Newsday's outstanding appeals. She attests that Sinnreich "indicated that he would be working with the Town to ensure that Newsday received responses to all of them." Newsday further makes reference to the parties' communications from November 2015 through January 2016 as evidence that the Town was still indicating that it was working on the outstanding FOIL requests and appeals.

It cannot be said, however, that the communications clearly reflect that the Town was still considering the two requests at issue in these appeals: the Sabellico internal investigation report (Request No. 3) and an electronic copy of the Town's check register or claims system (Request No. 4). Undoubtedly, Newsday's communications to the Town during this period inquire as to the status of these requests, but it cannot be ascertained from the documents alone that the Town gave Newsday the reasonable understanding that it had not made a final decision concerning providing these two items. As a result, a question of fact is presented that must be determined at a hearing.

C. The Merits of the FOIL Request Denials

With respect to Request Nos. 1 and 2, Newsday seeks a certification that the Town has done a diligent search and it does not possess requested documents beyond those produced or that such documents could not be located after a diligent search. *See Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440-41 (2005) (responding entity must certify that it does not possess a requested document and that it could not be located after a diligent search if not produced or subject to a request denial). The Town argues that it had made clear to Newsday that all of the contracts and contract amendments sought were produced. But Newsday's request was broader. As noted above, Newsday also sought copies of independent reviews of capital improvements at the locations at issue as well as proposals to make capital improvements, and it has a good-faith basis to believe that not all responsive documents in this regard were provided. As a result, Newsday is entitled to the sought-after certification.

Request No. 3 seeks the Sabellico internal investigation report. This report, according to the Town, was prepared by its “Special Counsel” Thomas M. Sabellico, Esq., in connection with an investigation of allegations by a Town resident concerning certain unspecified wrongdoing. The Town argues that the report was prepared for investigation and law enforcement purposes, forwarded to the Nassau County District Attorney and, if released, would interfere with an ongoing investigation.

It is unclear from the record, however, precisely why the investigation was conducted, what was being investigated and the intended purpose of the report. It does not appear that the Town conducted a criminal investigation and the law enforcement purpose is unclear. The Town provides no legal authority to support the proposition that the investigation that was conducted fits within the “law enforcement” exemption under these circumstances, although there is New York caselaw supporting the proposition that the exemption applies to civil as well as criminal enforcement. *See, e.g., Pride International Realty LLC v. Daniels*, 4 Misc.3d 1005(A)(Sup. Ct. New York Co. 2004). But what laws were the Town seeking to enforce and in what manner was the Town capable of enforcing them?

Furthermore, although the report may have been forwarded to the Nassau County District Attorney, there is nothing in the record that establishes that there presently is an ongoing law enforcement investigation with respect to the subject of the report. By a copy of this decision, which is being forwarded to the District Attorney, the court requests that the District Attorney advise the court by way of judicial submission her position concerning release of the report; whether there has ever been an active investigation concerning the subject of the report and, if so, whether that investigation is ongoing; and whether release of the report would interfere with such investigation (and, if so, the reasons for this belief). The court further directs that a copy of the report be provided to it for an *in camera* inspection. *See Fink v. Lefkowitz*, 47 N.Y.2d at 571. Because factual issues are raised concerning the preparation and purpose of the report and the validity of the Town’s objection, such issues are to be addressed at the already-required timeliness hearing.²

² At the hearing, the parties will also be given an opportunity to address whether the report may be withheld as an intra-agency or inter-agency document pursuant to Public Officers Law §87(2)(g).

Request No. 4 seeks an electronic copy of the Town's check register or claims system database. The Town asserts that the request, not limited in time, is too broad and burdensome. But although such an objection may be a proper response to an adversary's demand for documents, it has no place in the context of a FOIL request. *See M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 82-83 (1984). All that is required is that the records requested be "reasonably described" so that they may be located. *Id.* No information has been supplied concerning the form in which the requested material is kept by the Town to allow this court to issue an appropriate order with respect to the timing or manner of its production. As a result, at the hearing to determine the timeliness of this claim, evidence is to be presented concerning this issue.

In response to Request Nos. 5-7 and 10-13, the Town argues that the requested documents may be withheld based upon the investigation/law enforcement exemption. In addition, with respect to Request Nos. 11, 12 and 13, the Town asserts that it is withholding such documents "due to the possibility of significant litigation and the need to preserve the Town's position in any such litigation." These objections find no support from the facts or the applicable law.

Request No. 5 seeks to inspect all contracts currently in effect between the Town and Carlo Lizza & Sons Paving ("Lizza"). Request No. 6 seeks to inspect Town contracts with Lizza completed since January 1, 2008, including change work orders and extensions. In defense of its failure to respond to the request, produce the documents or object to their production, the Town in its answering papers filed herein relies upon its legal position concerning Request No. 7—which sought financial disclosure forms filed since 2000 by Frederick Ippolito, a former Town commissioner. Otherwise, states the Town, it "will not comment any further on this topic." An interesting, and ultimately unwise, position for a litigant that bears the burden of proof.

In response to Request No. 7, the Town states that the request for Ippolito's financial disclosure forms is "unique" because the documents "were the subject of activities by law enforcement agencies." Presumably, the Town was making reference to the fact that Ippolito was the subject of a federal indictment (the indictment was unsealed in March 2015) and charged with six counts of tax evasion based on his receipt, from 2008 through 2013, of over

\$2 million from Lizza and a principal of Lizza that he failed to report. Ippolito eventually pleaded guilty to one felony count of tax evasion in January 2016. The Town argues that “[a]s materials that are the subject of law enforcement investigations and/or proceedings are generally kept secret...it would have been improper for the Town to disclose those documents to Newsday, which would have undoubtedly published a story....” In support of this argument the Town cites to Fed. R. Crim. Proc. 6 and CPL §190.25(4)(a). Both of these provisions relate, among other things, to the secrecy of grand jury proceedings.

The argument of the Town is wholly without merit. The Newsday requests have nothing to do with grand jury proceedings nor any criminal investigation. Instead, they ask for government contracts and financial disclosure forms required to be in the Town’s possession—documents that undoubtedly are proper subjects of a FOIL request. They were not compiled for law enforcement purposes and therefore cannot possibly be subject to the law enforcement exemption. Whether the contents of these made-in-the-ordinary-course Town documents reveal or establish nefarious or criminal conduct and as such may be used as evidence in a criminal proceeding is material only to the extent that Newsday, as the public’s representative, is able to bring such conduct to public light—precisely part of Newsday’s mission, as well as that of the FOIL statutes. The Town’s argument to the contrary reveals a misunderstanding (or perhaps contempt) of the purpose of the FOIL statutes, and the materials must be produced.

Request No. 10 seeks Town building permits issued in February and March 2015. As with respect to its responses to Request Nos. 5 and 6, the Town relies upon its argument seeking to justify its refusal to provide documents in response to Request No. 7; *i.e.*, that the materials are the subject of some unspecified law enforcement investigation. These materials too must be produced.

Request Nos. 11-13 seek documents that the Town describes as “relative to the Singh matter,” which the Town defines as “issues involving certain corporations and one of their mutual principals, Harendra Singh, which had license agreements to provide concession services at Town facilities.” Respondents’ Memorandum of Law at 1, 2. Newsday seeks income and balance sheets provided to the Town by various Singh-owned entities (including entities owned by Ruby Singh) that operated concessions at various Town facilities (Request

No. 11); documents reflecting payments made by various Singh-owned entities (including entities owned by Ruby Singh) that operated concessions at various Town facilities (Request No. 12); and contracts and amendments for the operation of food and beverage concessions at Tappen Beach, Centre Island Beach and Stehli beach, as well as reviews or reports concerning capital improvements made at these facilities (Request No. 13). The Town again relies on its now-losing argument that these types of documents can somehow be exempt from disclosure under the law enforcement exemption. It is irrelevant that the contents of the requested documents might prove to be "bad news" for Singh or the Town. The public has a right to see the contracts entered into by the Town and documents concerning the performance under those contracts.

The Town makes one additional argument in support of withholding the documents called for by Request Nos. 11-13: the "possibility of significant litigation and the need to preserve the Town's position in any such litigation." Respondents' Memorandum of Law at 13, 14. Again, no case law is advanced to support this argument. That is likely because such a defense would not fly even if the Town were smack in the middle of a significant litigation and the documents were the subject of a FOIL request by its adversary. As held by the Court of Appeals over twenty years ago: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, art 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency." *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d at 78. Furthermore, the court cannot help but wonder how non-disclosure of a document assists in preserving one's position in a litigation. Would the Town's arguments change depending upon whether its adversary knew the contents of the documents?

For the reasons set forth above, the Town is directed to promptly make available to Newsday the documents and materials responsive to Request Nos. 5-7 and 10-13, and the certification in connection with Request Nos. 1 and 2. A court conference shall be held on July 14, 2015 at 9:00 a.m. to schedule a hearing with respect to the remaining requests and establish a firm deadline for the production of the documents (the court expects that the Town will begin making arrangements for such production forthwith).

III. OPEN MEETINGS LAW

At 8:44 a.m. on January 5, 2016, Newsday, by its reporter Phillips, sought copies from the Town Clerk of “all back up material, including but not limited to memos, studies, contracts, correspondence, and statistical information, to all resolutions scheduled to be considered at the board meeting” being held that day. According to Newsday, the request was neither acknowledged nor responded to by the Town.

On February 2, 2016 at 9:51 a.m., Phillips sent a similar email to the Town requesting materials concerning the Town Board meeting to be held on that day. On February 8, 2016, the Town sent a letter to Newsday indicating that it would respond within twenty days to the request for information pursuant to FOIL as to the availability of the requested records.

The Town contends that Newsday failed to provide the Town with sufficient time to respond to either request either prior to or at the meetings at issue. Town Board meetings started at 10:00 a.m. Newsday alleges that the Town violated Public Officers Law §103(e) by failing to make the material available prior to or at the meetings in question.

Public Officers Law §103(e), enacted in 2011, provides that agency records otherwise available under FOIL as well as “any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or department, prior to or at the meeting during which the records will be discussed.” The text of this statute introduces a rule of reason: documents are to be provided to the extent practicable. Practicable means feasible. See <http://www.merriam-webster.com/dictionary/practicable>. Although the Town has discretion to determine what is “practicable,” as with any exercise of discretion it must be reasonable. As stated by the Department of State Committee on Open Government: “To the extent practicable’ pertains to the ability to take reasonable steps through reasonable efforts to achieve the goals of the legislation.” See <http://www.dos.ny.gov/coog/openmeetinglawfaq.html>. For example, it likely would not be reasonable to fail to provide for inspection long-prepared resolutions that were to be voted on by the Board, at least at the meeting itself.

Here, the court cannot determine from the evidence before it whether the failure of the Town to provide any requested materials was reasonable. The court does not have the

agendas for the Town Board meetings at issue and does not know what, if any, records or resolutions were to be discussed; the amount of notice given to the public of the scheduled agendas; and what was actually discussed or voted upon at such meetings. As a result, a factual hearing is required to determine if the Town was in violation of OML as alleged in the Petition and, if so, the appropriate remedy.

IV. ZONING BOARD OF APPEALS MINUTES

Newsday alleges that the Town has violated Public Officers Law §§ 106(1) and 106(3) by failing to provide it with minutes of the Town's Zoning Board of Appeals meetings for the years 2010, 2011, 2012 and 2015 as it requested (once again, through Phillips) on October 26, 2015. The Town responds that it has now produced such minutes and presumably would have done so before this action commenced if only Newsday had been clear with respect to its request (the Town asserts that it was unclear if Newsday only desired minutes or wanted transcriptions of the ZBA proceedings).

A review of the correspondence submitted reflects that Newsday was not ambiguous as the Town contends with respect to its request: it sought the ZBA minutes. The Town, on the other hand, conflated the request for minutes with the possibility of providing transcripts, as evidenced by Jonathon Sinnreich's January 11, 2016 email to Dina Sforza: "[I]t remains the Town's position that, in accordance with the provisions of the freedom of information law, the Town will require payment for the transcription of any zoning board of appeals minutes that Newsday may request...."

In all events, Newsday now contends that the minutes supplied by the Town after the commencement of this proceeding are insufficient as they fail to properly record the votes of each member in accordance with the Public Officers Law. *See Zehner v. Bd. of Educ. of the Jordan-Elbridge Cent. School Dist.* 31 Misc.3d 1218(A)(Sup. Ct. Onondaga Co. 2011). Newsday is correct in that at least the minutes as provided to the court do not contain this information. It is possible that the transcriptions, which the Town sought to require Newsday to purchase, contain this information. It is also possible that the Town had a particular custom or practice that may shed more light on the substance of the minutes. In any event, the appropriate remedy with respect to any minute deficiencies must await a hearing to be

scheduled by the court so that evidence can be adduced concerning the Town practices of recording minutes of its meetings.

V. NEWSDAY'S REQUEST FOR COUNSEL FEES

Newsday has “substantially prevailed” with respect to at least a portion of this FOIL proceeding—that part which pertains to its October 16, 2015 appeal. It may, following a hearing, also prevail with respect to its September 10, 2015 appeals. Furthermore, the records that the Town must now produce are clearly matters of significant public interest. A single Google search utilizing the terms “Singh” and “Oyster Bay” produces approximately 151,000 results. A search of “Ippolito” and “Oyster Bay” produces approximately 20,100 hits. Whether Newsday itself conjured up a “cloud of controversy surrounding the Town of Oyster Bay” as the Town alleges, or whether it was the facts as reported by Newsday that created the cloud, is not for the court to decide. Either way, controversy exists and it is in the general public’s significant interest that Newsday be permitted to conduct the news investigation it is attempting to pursue by examining public documents (or, at least, documents that should have been and now will be public).

Finally, the Town lacked a reasonable basis in law for withholding the documents at issue ruled upon herein. *Matter of Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 (2005). The paucity of case law cited by the Town to support its actions is indicative of the weakness of its arguments. As a result, Newsday is entitled to at least a portion of its counsel fees with respect to its FOIL claims, the extent and amount of which shall be determined at the hearing. Whether Newsday is entitled to recover counsel fees concerning the alleged OML violations must await the outcome of the hearing.

This constitutes the Decision and Order of this court.

Dated: July 8, 2016
Mineola, NY

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED

JUL 22 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE