

**Crown Castle NG E. LLC v Town of Hempstead**

2017 NY Slip Op 32581(U)

November 28, 2017

Supreme Court, Nassau County

Docket Number: 2063/2017

Judge: Karen V. Murphy

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

*Honorable Karen V. Murphy*  
Justice of the Supreme Court

CROWN CASTLE NG EAST LLC,

Plaintiff,

-against-

THE TOWN OF HEMPSTEAD, MARIE JEROME, as  
Records Access Officer/FOIL Officer of the TOWN OF  
HEMPSTEAD, FRANK A. AMORINI, As FOIL Appeals  
Officer of the TOWN OF HEMPSTEAD, and NASRIN  
G. AHMAD, as Town Clerk of the TOWN OF  
HEMPSTEAD,

Defendant.

Index No. 2063/2017

Motion Submitted: 09/01/17

Motion Sequence: 001, 002

*MOD, MD*

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... XX
- Answering Papers..... XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's..... X
- Defendant's/Respondent's.....

Petitioner moves this Court for an Order overturning the determination of respondent Amorini, as FOIL Appeals Officer of the Town of Hempstead (TOH), along with related declaratory and injunctive relief, pursuant to CPLR Articles 30 and 78, and New York State Public Officer Law, Article 6, known as the Freedom of Information Law (FOIL).

Respondents oppose the relief sought by petitioner, and they cross-move to dismiss this action in its entirety, or in the alternative, if the cross-motion is denied, respondents seek leave to file an answer.

By way of background, there are presently pending against petitioner approximately thirty-two (32) criminal summonses in Nassau County District Court,

based upon petitioner's failure to obtain building permits for each of the telecommunication antennae it has erected at various sites within the TOH, in violation of Town Code. The next appearance date in District Court is December 7, 2017.

In connection with the criminal proceedings, petitioner served the TOH with demands to produce documents pursuant to Criminal Procedure Law (CPL) § 240.40. In sum, there are fifty-four (54) requests for documents that the TOH has objected to as being improper, which has given rise to a motion now pending in District Court. Counsel for the parties have represented to this Court that the District Court motion has not yet been decided.

Petitioner has made three FOIL requests upon the TOH dated October 11, 12, and 13, 2016, copies of which are annexed to the instant petition. The three requests were acknowledged as having been received by the TOH via letters each dated October 18, 2016. By letter dated November 7, 2016, the TOH Records Access Officer advised petitioner's counsel that his three FOIL requests "cannot be accommodated as the records you requested are included as part of a criminal case currently at trial. As such, your request falls within the exception to the FOIL under § 87(2)(e)(i)."

Petitioner appealed the denial of his FOIL requests to the FOIL Appeals Officer, Frederick A. Amorini, on December 7, 2016. By letter dated December 12, 2016, Mr. Amorini denied petitioner's requests, citing FOIL § 87(2)(e)(i), as well as *Pittari v. Pirro*, 258 AD2d 202 (2d Dept 1999) and *Matter of Fink v. Lefkowitz*, 47 NY2d 567 (1979). Mr. Amorini's reasoning, based upon his cited references, was that petitioner is a defendant in a pending criminal proceeding and the disclosure of the requested information would interfere with the adjudication of those proceedings and the statutory provisions controlling discovery in criminal matters, frustrate pending or threatened investigations, or impede a prosecution by use of the requested information to construct a defense.

The crux of petitioner's requests under FOIL are set forth as follows:

October 11, 2016

- (i) Legislative history related to the TOH enactment of the local ordinances that the TOH uses to regulate wireless facilities.
- (ii) Any and all rules adopted by the TOH building inspector.
- (iii) TOH building department and code enforcement records, including permits fees charged, certificated, and summons for structures within the public rights-of-way.
- (iv) Annual reports submitted by the building inspector to the TOH Board
- (v) Correspondence among TOH officials pertaining to criminal or civil prosecution of entities or persons operating within the public rights-of-way.

- (vi) Copies of all criminal or civil dispositions between the TOH and any third party in connection with a violation Chapter 86 of the Town Code.
- (vii) Any prior determination, finding, or opinion of the TOH with regard to permitting activity in the public rights-of-way.

October 12, 2016

- (i) Any and all correspondence between the TOH and the Center for Municipal Solutions relating to petitioner, and relating to the criminal or civil enforcement of any third party operating within the TOH.
- (ii) Documents relating to the retention and payment of the Center for Municipal Solutions.
- (iii) Proof of the TOH prosecutor's authority to prosecute certain allegations charged against petitioner.

October 13, 2016

- (i) TOH's entire file for thirty-three (33) specifically identified utility poles located within the TOH.
- (ii) Proof of the TOH code enforcement officer's authority to write certain charging documents.

“The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy” (*Matter of Alderson v New York State College of Agriculture and Life Sciences at Cornell University*, 4 NY3d 225, 230 [2005], citing *Matter of Newsday Inc. v. Sise*, 71 NY2d 146, 150 [1987], cert denied 486 US 1056 [1988]; see also, *Matter of Harbatkin v New York City Department of Records and Information Services*, 19 NY3d 373, 379-380 [2012]; *Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]).

An agency's records “are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that ‘FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government’” (*Matter of Buffalo News, Inc. v Buffalo Enterprise Development Corporation*, 84 NY2d 488, 492 [1994][citations omitted]).

Accordingly, “[w]hen faced with a FOIL request, 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 Center v Signor*, 5

NY3d 435, 440 [2005]; *see also Public Officers Law §§ 87[2], 89[3]; Matter of Leshner v Hynes*, 19 NY3d 57, 64 [2012]). “Put another way, in the absence of specific statutory protection for the requested material, the Freedom of Information Law compels disclosure, not concealment” (*Matter of Westchester Rockland Newspapers v Kimball*, 50 NY2d 575, 580 [1980]).

The Court of Appeals has emphasized that “[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *see, Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462–463 [2007]).

Wholly blanket-type statements and/or “[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed” to sustain an agency’s burden with respect to a FOIL exemption (*Matter of Dilworth v Westchester County Dept. of Correction*, 93 AD3d 722, 724 [2d Dept 2012]; *see, Matter of Konigsberg v Coughlin*, 68 NY2d 245, 250–251 [1986]; *Matter of Madera v Elmont Public Library*, 101 AD3d 726, 727 [2d Dept 2012]).

With respect to an investigation exemption, Public Officers Law § 87(2)(e)(i) excludes from the reach of a FOIL disclosure notice, those records “compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings” (*Pittari v Pirro*, 258 AD2d 202, 204 [2d Dept 1999]; *see also Matter of Leshner v Hynes, supra; Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]; *Matter of Legal Aid Society. v New York City Police Dept.*, 274 AD2d 207, 213 [1<sup>st</sup> Dept 2000]).

In *Matter of Leshner v Hynes, supra*, the Court of Appeals construed Public Officers Law § 87(2)(e)(i) and discussed an agency’s burden upon invoking that exemption. Guided by reference to relevant federal case law (*e.g., NLRB v Robbins Tire & Rubber Co.*, 437 US 214, 228–229 [1978]; *5 USC § 552[af]*), the *Leshner* Court ultimately concluded that the involved agency, the Kings County District Attorney’s Office, had sustained its FOIL exemption burden. In so holding, the Court determined that a “document-by-document” showing of interference with an investigation would not be required under Public Officers Law § 87[2][e][1] (*Matter of Leshner v Hynes, supra*). Rather, and provided that a qualifying, law enforcement or court proceeding existed, an agency could permissibly demonstrate its entitlement to the investigation exemption by: (1) identifying general or so-called “generic” document description categories, as opposed to “document-by-document” descriptions, (*Matter of Legal Aid Society. v New York City, supra*); and (2) thereafter describing “the generic risks posed by disclosure of these categories of documents” (*Matter of Leshner v Hynes, supra*, at 67–68; *see also, Matter of Whitley v New York County District Attorney’s Office*, 101 AD3d 455 [1<sup>st</sup>

Dept 2012]; *Matter of Legal Aid Society. v New York City*, *supra* at, 213; *Pittari v Pirro*, *supra* at 205). The Court cautioned, however, that “not . . . every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there” (*Matter of Lesher v Hynes*, *supra*, at 67-68).

Moreover, despite this lessened, “generic” standard of particularity, an “agency must still fulfill its burden under Public Officers Law § 89[4][b] to articulate a factual basis for the exemption” (*Matter of Lesher v Hynes*, *supra* at 67). Relatedly, vague allegations and/or attorney affirmations alone, will not suffice since, “evidentiary support is needed” (*Matter of Dilworth*, *supra*; *Newsday LLC v Nassau County Police Dept.*, 42 Misc3d 1215[A] [Supreme Court, Nassau County 2014] *see also*, *Matter of Washington Post Co. v New York State Ins. Co.*, 61 NY2d 557, 567 [1984]; *Matter of Madera v Elmont Public Library*, *supra*; *Matter of Loevy & Loevy v New York City Police Dept.*, 38 Misc3d 950, 954-955 [Supreme Court, New York County 2013]; *Windham v City of New York Police Department*, 2013 NY Slip Op 32418 [Supreme Court, New York County 2013]). In sum, the applicable “burden requires identifying the types of documents, their general content, and the risk associated with that type of content” (*Windham*, *supra*, at 7; *see also*, *Matter of Lesher v Hynes*, *supra* at 67).

With these principles in mind, and cognizant of the requirements that statutory exemptions must be “narrowly interpreted,” and established with “evidentiary” support (*Matter of Data Tree, LLC v Romaine*, *supra*, at 462; *Matter of Dilworth*, *supra*, at 724), the Court agrees that the respondents have failed to demonstrate their entitlement to a statutory exemption predicated upon Public Officers Law § 87(2)(e)(i).

Here, the respondents submit, *inter alia*, only the affirmation of counsel, petitioner’s second demand to produce, and a copy of the motion papers pending in Nassau County District Court, Criminal Part, in support of their cross-motion to dismiss the instant petition. These submissions are insufficient to sustain their burden.

“Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officer 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” (*Matter of Farbman v. New York City Health and Hospitals Corp.*, 62 NY2d 75, 78 [1984]). Accordingly, counsel’s theory that this petition is “nothing more than an improper attempt by Crown Castle to avoid the limited discovery rights permitted under Criminal Procedure Law § 240.20 for purposes of constructing defenses to the criminal charges” is largely unavailing.

There is no affidavit from either the prosecutor charged with prosecuting petitioner in the District Court, or from the TOH itself, as to how disclosure of any of the requested materials, or types thereof, pose a risk to the pending prosecutions.

Respondents' reliance upon *Fink v. Lefkowitz* (47 NY2d 567 [1979]) is misplaced. The respondents in that matter objected to disclosing certain portions of the prosecutor's manual that would reveal to the public the confidential methods and investigative techniques used to investigate nursing home fraud. Of note in the *Lefkowitz* decision is the Court's recognition that an "agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for an *in camera* inspection, to exempt its records from disclosure" (*Id.* at 571).

Moreover, respondents fail to articulate how disclosure of the requested materials would emasculate Criminal Procedure Law § 240.20 (*see Pittari, supra*), especially with regard to legislative history, TOH building department records, and the other requests contained in the October 11 and 12, 2016 demands noted above, plus item(ii) in the October 13, 2016 demand. The only request that may possibly touch upon this concern voiced by the *Pittari* Court is the October 13, 2016 demand for the TOH's entire file for thirty-three (33) specifically identified utility poles located within the TOH, which apparently form the basis of the prosecution of Crown Castle in District Court; yet, respondents do not particularly address that request for the 33 files, nor do respondents state with any particularity the risk associated with disclosure of those files.

Respondents simply rely upon *Pittari* in a general sense, but the *Pittari* Court's determination was not of the blanket variety; specifically, the *Pittari* Court found that "FOIL disclosure of materials pertaining to the arrest and prosecution of a defendant in a pending criminal proceeding would interfere with the adjudication of the criminal proceeding" (*Id.* at 207).

Here, respondents make no such assertion with regard to any of the specific documents requested by petitioner. Moreover, it is undisputed that Criminal Procedure Law § 240.20 requires the prosecution to disclose numerous items of discovery upon the demand of the defendant in a pending criminal matter. In fact, respondents do not even request that this Court conduct an *in camera* inspection of any of the documents demanded pursuant to FOIL.

In view of the fact that petitioner has substantially prevailed upon its application, this Court further determines that, pursuant to Freedom of Information Law § 89 (4)(c)(i), petitioner is entitled to reasonable attorneys' fees, plus costs and disbursements of this action that were reasonably incurred.

The Court denies respondents' request that they be permitted an opportunity to submit an answer. The TOH claims that it should be permitted to interpose an answer in order to assert "additional defenses for rejecting Crown Castle's FOIL request." Yet, the TOH contradicts its own position that it should be permitted to answer when it states that

its motion to dismiss the instant petition “was directed to a single defense based on FOIL § 87(2)(e)(i), which it believes is dispositive of Crown Castle’s claims.”

Moreover, “it is also a bedrock principle of administrative law that a ‘court, in dealing with a determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency’” (*Matter of National Fuel Gas Distribution Corporation v. Public Service Commission of the State of New York*, 16 NY3d 360, 368 [2011] quoting *Matter of Scherbyn v. Wayne-Finger Lakes Bd. Of Coop Educ. Servs.*, 77 NY2d 753, 758 [1991], quoting *Matter of Montauk Improvement v. Proccacino*, 41 NY2d 913, 913 [1977]; see also *Matter of Law Offices of Adam D. Perlmutter, P.C. v. New York City Police Department*, 123 AD3d 500, 501 [1<sup>st</sup> Dept 2014]).

Here, the TOH and its FOIL officers invoked a single claimed exemption to disclosing the requested documents, that is, FOIL § 87(2)(e)(i). Respondents’ contemplated alternative grounds for denying petitioner’s requests would not properly be before this Court via an answer that attempts to expand upon the agency’s single ground for denial of the FOIL requests (*see Matter of Perlmutter, supra*).

Accordingly, that branch of the petition seeking to compel respondents to produce copies of the records requested by petitioner is granted. Compliance with this Order is to be accomplished on or before December 7, 2017.

As determined herein, reasonable attorneys’ fees, plus costs and disbursements of this action that were reasonably incurred are awarded to petitioner.

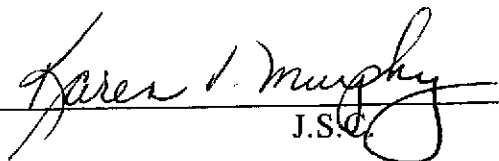
Any other relief not specifically addressed is hereby denied.

Respondents’ cross-motion is denied in its entirety (Motion Sequence 2).

Petitioner is directed to submit a judgment on notice, accompanied by an affirmation as to reasonable attorneys’ fees, and a bill of costs.

The foregoing constitutes the Order of this Court.

Dated: November 28, 2017  
Mineola, NY

  
J.S.C.

**ENTERED**

NOV 28 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE