

**Matter of Safe Harbor Retreat, LLC v Town of East Hampton**

2020 NY Slip Op 31849(U)

June 10, 2020

Supreme Court, Suffolk County

Docket Number: 6293/2018

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 6293/2018

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

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In the Matter of the Application of

SAFE HARBOR RETREAT, LLC,

Petitioner,

For an Order Pursuant to Article 78 of the  
Civil Practice Law and Rules

-against-

TOWN OF EAST HAMPTON, EAST  
HAMPTON TOWN BOARD, THERESA  
BERGER, TIM BRENNEMAN, DONALD  
CIRILLO, ROY DALENE, BRYAN GOSMAN,  
SAMUEL KRAMER, DAVID LYS, CATHY  
ROGERS, ALEXANDER WALTER, JOHN  
WHELAN and LEE WHITE,

Respondents.  
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ORIG. RETURN DATE: JANUARY 10, 2019  
FINAL SUBMISSION DATE: MARCH 14, 2019  
MTN. SEQ. #: 001  
MOTION: MD

**PLTF'S/PET'S ATTORNEY:**  
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Upon the following papers: (1) Petitioner's Order to Show Cause Granted by this Court December 6, 2018, including Verified Petition dated November 28, 2018 and supporting papers and exhibits; (2) Respondents' Verified Answer To Petition dated February 19, 2019; (3) Respondents' Memorandum Of Law In Opposition To Verified Petition dated February 19, 2019; (4) Respondents' Affirmation in Opposition dated February 15, 2019 including supporting papers and exhibits; (5) Reply Affirmation Of Alex Kriegsman In Support Of Petition And Order To Show Cause dated March 11, 2019; (6) Affirmation In Further Opposition by Respondents dated March 18, 2019; (7) Affirmation of Alex Kriegsman In Support Of Motion For Leave To Respond To Improper Sur-Reply by Petitioner dated April 15, 2019 and exhibits; and upon due consideration of the foregoing; it is

**ORDERED** that the petitioner's Order to Show Cause (mot. seq. #001) and Verified Petition is hereby **DENIED**; and it is further

**ORDERED** that counsel for the petitioner shall promptly serve a copy of this decision and Order upon the respondents via First Class Mail and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk.

In this article 78 special proceeding, the petitioner seeks to annul the Town's refusal to produce all documents responsive to petitioner's August 22, 2018 request pursuant to the New York Freedom of Information Law ("FOIL Request"), and an Order directing the respondents to produce all non-privileged and responsive documents. In its FOIL Request, the petitioner sought all communications, including emails and electronic communications stored on public and private servers, regarding "The Dunes" (a treatment facility for individuals recovering from drug and alcohol addictions, run by the petitioner), the petitioner, or the Premises (facility grounds leased by the petitioner): (1) between the first attorney for a community opposition group and any member of the Town Board, Planning Board, Zoning Board of Appeals for the Town or any Town employee between January 1, 2011 and December 31, 2017; (2) between the second attorney for the community opposition group and any member of the Town Board, Planning Board, Zoning Board of Appeals for the Town or any Town employee between January 1, 2018 and the present; and (3) from any party between January 1, 2011 and the present.

Pursuant to Public Officers Law § 89 (3) (a), the Town shall make, within five business days of the receipt of a written request for a record reasonably described, such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied. Furthermore, if the Town determines to grant the request in whole or in part, and if circumstances prevent disclosure within twenty business days from the date of the acknowledgement of the receipt of the request, the Town must state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part (Pub. Off. Law § 89 [3] [a]).

In this case, on August 28, 2018, the Town acknowledged the receipt of the petitioner's FOIL Request and stated that it would provide the responsive records within twenty days. The Town, however, failed to provide any response within the time limit it imposed which constitutes a denial (Pub. Off. Law § 89 [4] [a]). The petitioner therefore appealed such denial. The Town, in a timely response to said appeal, produced 27 emails and letters (nearly 100 pages of documents) on October 4, 2018, and stated in its cover letter that the documents provided were responsive to the petitioner's first and second request but as to the petitioner's third request, some documents were being produced but some responsive documents were being withheld pursuant to a privilege or exemption. The petitioner brought this proceeding as a result.<sup>1</sup> During the pendency of this special proceeding, the respondent Town performed subsequent searches and provided petitioner with 122 more pages of responsive documents not previously produced, as an attachment (Exhibit "I") to its Affirmation in Opposition to the Order to Show Cause and Verified Petition, and reiterated its position in said Affirmation in Opposition and in an affidavit from the FOIL appeals officer regarding the nondisclosed material and the applicable exemptions that were originally in the FOIL officer's October 4, 2018 response.

In its Reply Affirmation of Alex Kriegsman in Support of the Petition and Order to Show Cause ("Reply"), the petitioner argues, *inter alia*, that the newly disclosed documents provided refer to attachments, enclosures, and other records that were responsive yet not provided. Petitioner further argues in its Reply that the respondents have failed to articulate a particularized and specific justification for not disclosing documents purportedly being withheld due to the statutory exemptions of Public Officers Law § 87 (2). The petitioner also argues that it is entitled to attorney's fees pursuant to Public Officers Law § 89 (4) (c). Lastly, the petitioner seeks discovery regarding the efforts undertaken by the respondents to search for responsive documents.

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<sup>1</sup> On October 23, 2018, the petitioner submitted a "second appeal" to the Town criticizing its October 4, 2018 production of documents as deficient. The Town responded on November 1, 2018 as a "courtesy" and stated that the petitioner had already exhausted its administrative remedies with its (first) appeal and explained that the Town conducted its search with the "Barracuda" system. Finally, the Town suggested that the petitioner file a new request pointing out the names and email addresses of any individuals and any dates of correspondence that the Town missed in its search. No further FOIL Request was made.

In its reply to the petitioner's Reply, denominated Affirmation in Further Opposition ("sur-reply"),<sup>2</sup> the respondents argue that the documents enclosed and attached to emails, and referred to in other produced documents were not produced because they did not fall within the petitioner's FOIL Request as they were not "communications." Moreover the respondents argue that one of the documents that the petitioner claims in its Reply was improperly withheld is exempt pursuant to Pub. Off. Law § 87 (2) (g) because it constitutes inter-agency/intra-agency material. Lastly, the respondents argue that the requested discovery must be denied as it not necessary, material or relevant.

The petitioner, in its response to the respondents' sur-reply, in a submission denominated "Affirmation of Alex Kriegsmann in Support of Motion For Leave to Respond to Improper Sur-Reply," it argues for this Court to disregard the respondents sur-reply, but to accept its Exhibit "A" which contains its "proposed" response to that sur-reply, should the Court accept said sur-reply. In its Exhibit "A," the petitioner argues in favor of its discovery request pertaining to the respondent Town's search efforts.

Under FOIL, public agencies must "make available for public inspection and copying all records" except where they fall within one of the statute's enumerated exemptions (Public Officers Law § 87 [2]). "This presumption of access subject to legislative exemptions recognizes 'the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government' and the parallel 'legitimate need' to keep certain government matters confidential" (*Kosmider v Whitney*, 34 NY3d 48, 54, 132 NE3d 592, 597-98, *rearg denied* 33 NY3d 1134, 132 NE3d 1099 [2019] citing *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571, 419 NYS2d 467, 393 NE2d 463 [1979]). Exemptions are construed narrowly, and an agency has the burden of demonstrating that an exemption applies "by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 496 NE2d 665 [1986]).

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<sup>2</sup> In the interests of judicial economy and because the Court is accepting the petitioner's Reply which by necessity of the new document production raised new issues, the Court shall consider the respondents' Affirmation In Further Opposition to the petitioner's Reply ("sur-reply") and the petitioner's subsequent Affirmation of Alex Kriegsmann in Support of Motion for Leave to Respond to Improper Sur-Reply.

In the petitioner's Reply, wherein it took issue with the newest document disclosure contained in the respondents' Affirmation In Opposition (Exhibit "I"), the petitioner points to six specific and disclosed documents that either are missing their enclosures/attachments or point to the existence of other responsive documents not produced. The respondents argue that such enclosures/attachments and other documents referred to in the disclosed records were not "communications" within the ambit of the FOIL Request and therefore were not produced, and that while the October 27, 2015 letter from the Town Attorney to OASAS referred to in a disclosed document is a communication, it is exempt from disclosure under Pub. Off. Law § 87 (2) (g) as it constitutes inter-agency/intra-agency materials. As FOIL requires an expansive interpretation and response, this Court will liberally construe the petitioner's FOIL Request. This Court will not, however, engage in speculation as to whether such missing enclosures/attachments and other documents referred to in the produced records are responsive to the FOIL Request. In order to make any determination regarding the petitioner's arguments relating to these disclosed documents and whether they point to more responsive unproduced documents, these six disclosed documents in issue must be clearly provided to the Court. The petitioner, however, has failed to do so. It has not clearly identified any of the documents in issue. The petitioner did not attach the six disclosed items that either are missing their enclosures or make reference to other unproduced items, to its Reply but merely refers to the respondents' Exhibit "I" at various page numbers. The respondents' Exhibit "I" contains over 100 pages that are not Bates stamped, leaving this Court without a clear understanding as to which specific documents the petitioner is referring. Accordingly, such unsubstantiated request must be denied.

In addition, as stated above, in its Reply the petitioner seeks discovery pursuant to CPLR 408, regarding the efforts undertaken by the Town to search for documents responsive to the FOIL Request. For discovery to be granted, the petitioner must assert facts to establish a cause of action; demonstrate a need to determine information directly related to the cause of action; show the requested disclosure is carefully tailored so as to clarify the disputed facts; demonstrate whether any prejudice will result; and if so, the court must determine whether it can fashion or condition its order to diminish or alleviate any resulting prejudice (*see Lonray, Inc. v Newhouse*, 229 AD2d 440, 440-41 [2d Dept 1996]).

In a proceeding such as this, where disclosure is available only by leave of court pursuant to CPLR 408, the Supreme Court "has broad discretion in granting or denying disclosure" (*City of Glen Cove Indus. Dev. Agency v Doxey*, 79 AD3d 1038, 1038–39 [2d Dept 2010]). Here, the petitioner has failed to make the requisite showing pursuant to CPLR 408 as it has failed to show the information was material or necessary to its claims. The petitioner has not established its cause of action, has not demonstrated any need, and has not shown how having this information regarding the Town's search methods will clarify the dispute as to whether the Town has withheld documents or turned over all responsive documents. Moreover, Public Officers Law does not specify the manner in which an agency must certify that documents cannot be located. Public Officers Law § 89 (3) merely requires the agency to "certify that it does not have possession of such record or that such record cannot be found after diligent search." Notably, no detailed description of the search is required. Here, the Town satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate (*see Rattley v New York City Police Dep't*, 96 NY2d 873, 875, 756 NE2d 56 [2001]). Accordingly, the petitioner's request for discovery pursuant to CPLR 408 is denied.

The petitioner further argues that the Town's response regarding the nondisclosed exempt material is inadequate and requires an in camera review. The Town may not 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 in camera inspection, to exempt its records from disclosure (*New York Times Co. v Dist. Attorney of Kings Cty.*, 179 AD3d 115, 125 [2d Dept 2019]). Here the Town specified its reasons for withholding records when its FOIL officer stated on October 4, 2018 that some of those documents constitute an attorney-client communication that are privileged pursuant to Public Officers Law § 87 (2) (a), and others are exempt pursuant to Public Officers Law § 87 (2) (g) as they constitute both inter-agency and intra-agency communications which are not statistical or factual tabulations, not instructions to staff affecting the public, not final agency policy or determinations, and not external audits including but not limited to audits performed by the comptroller and the federal government. The Town reiterated its response regarding the applicable exemptions in its Affirmation in Opposition which included the FOIL officer's affidavit, and in its sur-reply when it discussed the October 27, 2015 letter it withheld. Accordingly, as the Town articulated

particularized and specific justifications for withholding these documents from disclosure, the petitioner's request for an in camera review is denied.

Finally, pursuant to Public Officers Law § 89 (4) (c), this Court may assess reasonable attorney's fees and other litigation costs reasonably incurred by the petitioner against the Town if the petitioner has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and shall assess, against the Town, reasonable attorney's fees and other litigation costs reasonably incurred by the petitioner in any case under the provisions of this section in which such petitioner has substantially prevailed and this Court finds that the Town had no reasonable basis for denying access. In this case, the petitioner has not "substantially prevailed" and thus its request for fees and costs is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: June 10, 2020

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION