

Investigative Post, Inc. v Empire State Dev. Corp.

2022 NY Slip Op 32964(U)

September 6, 2022

Supreme Court, New York County

Docket Number: Index No. 160769/21

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Investigative Post, Inc.

INDEX NO. 160769/21

Decision and Order

- v -

MOT. SEQ. NO. 001

Empire State Development Corp.

The following papers were read on this motion to/for Article 78

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

This is an Article 78 proceeding. Petitioner Investigative Post, Inc. (Petitioner or IPost) challenges respondent's Empire State Development Corp. (ESD) denial to produce records responsive to its two FOIL requests and an award of costs and attorney's fees pursuant to Public Officers Law (POL) 89 (4)©, more commonly referred to as New York's Freedom of Information Law ("FOIL"). Respondent opposes the petition and cross-move to dismiss and for denial of petitioner's request for attorney's fees.

As a way of background, petitioner served two FOIL requests on respondent on or about August 12, 2021 and September 27, 2021, respectively. The first FOIL request requested "[a]ny and all studies commissioned by Pegula Sports and Entertainment, LLC and conducted by CAA Icon and/or Populous as they relate to the development of the new football stadium for the Buffalo Bills." and the second FOIL request requested "[a] copy of the economic impact [study] commissioned by Pegula Sports Entertainment, the management company that oversees the holdings of the owners of the Buffalo Bills, that analyzed all of its holdings in Buffalo and Rochester as referenced in the following report that appeared in the Buffalo News on Sept. 24, 2021. Respondent responded to IPost and denied both FOIL requests under POL § 87(2)(c) and claimed that disclosing the information would "impair present or imminent contract award". Petitioner appealed both denials and respondent denied the appeals. On December 1, 2021 petitioner filed this Article 78.

Respondent cross-moves to dismiss and contends that it produced a link to the commissioned study and that it has no additional documents responsive to the FOIL requests and subsequent Article 78 petition. ESD argues that IPost received a response to its FOIL requests, that it has no further documents to produce and therefore the application is moot. ESD further contends that it properly withheld the study for the sole purpose of negotiations, a clearly delineated exception to FOIL that was invoked. Finally, respondent argues that at the time IPost "made the FOIL requests, the documents being sought were crucial to negotiations relating to the future of the Buffalo Bills stadium, and the request was properly denied under § 87(2)(c) of the Public Officers Law.

Dated: 9-6-22



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

Currently, the document responsive to the request at issue is no longer essential to ongoing negotiations because of the passage of time and since much of the information contained in the CAA ICON study was published in another study that was made publicly available on ESD's website after the FOIL requests and the subsequent appeals were made by Investigative Post." Respondent further argues that petitioner's request for attorney's fees should be denied as the documents sought by petitioner were publicly available.

In further support of its petition and in opposition to respondent's cross-motion, petitioner argues that petitioner substantially prevailed because ESD released all the documents it sought after it initiated litigation and that petitioner is entitled to fees under 89 [4][c][ii] because there was no reasonable basis for denying access.

FOIL was enacted "[t]o promote open government and public accountability." *Matter of Gould v. New York City Police Dep't.*, 89 NY2d 267, (1996). To realize this policy objective, FOIL mandates that all public agency records are "presumptively open to public inspection and copying unless otherwise specifically exempted." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562 (1986); Public Officers Law § 87(2). FOIL exemptions are to be narrowly interpreted, and the burden is on the agency to show that the requested material "falls squarely within a FOIL exemption" to prevent disclosure. *Friedman v. Rice*, 30 NY3d 461 (2017) (citing *Matter of Fink*, 476 N.Y.2d 567, 571 (1979)); *Capital Newspapers*, 67 NY2d at 566-567; see Public Officers Law § 89(4)(b). Ultimately, if an agency fails to meet its burden to prove an exemption applies, then FOIL mandates disclosure. *Matter of Data Tree, LLC*, 9 NY3d 454, 463 (2007). The agency is "required to articulate particularized and specific justification" for withholding any record or a portion of a record. *Fink v. Lefkowitz*, 47 NY2d 567 (1979). An agency fails to carry this burden where it merely cites to an exemption and offers conclusory characterizations of the records. *Church of Scientology of N.Y. v. State of New York*, 46 NY2d 906 (1979)

Respondent has not met its burden to show that the requested materials in the FOIL requests fall within an exemption. Here, ESD has not only failed to provide a particularized and specific justification for denying both FOIL requests, but also claimed a blanket exemption to the requested records without providing any reason or analysis. ESD denial of the FOIL requests stating only that disclosure would "impair present or imminent contract awards." § 87(2)(c) is a conclusory statement that lacks any particularity or explanation on how releasing the study would impair negotiations. If respondents are able to rely on an exemption to FOIL requests without specific reasoning or justification and only mimic the statutory language, then petitioners could never obtain information without resorting to litigation.

Respondent's argument that it responded to and provided all documents and it has nothing more, therefore petitioner's application is moot mandating dismissal is rejected.

A petitioner must "substantially prevail" in an Article 78 proceeding in order to receive attorney's fees and costs (Public Officers Law § 89 [4] [c]). A petitioner "substantially prevails" when documents are provided or awarded after the commencement of litigation. see *Madeiras v New York State Educ. Dept.*, 30 NY3d 67, 79 [2017]; It is therefore "evident" that a petitioner substantially prevails in those cases when it "ultimately obtains all of the documents it sought." *Matter of N.Y. Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336 [3d Dept 2011]. A claim for attorney's fees and costs is not moot when an agency voluntarily provides the requested documents when the petitioner initiates litigation. (*Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 [1st Dept 2015]). "[T]o allow a respondent to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purposes of FOIL's fee-shifting provision." *Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195 [3d Dept 2011]

Here, Petitioner substantially prevailed because it filed its petition with this court on December 1, 2022. Before answering or asserting any defense, Respondent publicly released all of the documents iPost sought on December 23, 2021. Petitioner received its requested documents only after initiating the instant proceeding. Further, respondent's claim that the contract impairment exemption under POL §

87(2)(c) applies is rejected not only for the reasons stated above, but it also requires a showing of harm from disclosure, which respondent has also failed to do.

Since petitioner has substantially prevailed, it is entitled to reasonable attorney's fees and costs. The court hereby orders the parties to appear for a pre-hearing conference on **September 21, 2022 at 3pm via Microsoft Teams.**

Accordingly, it is hereby

ORDERED that the petition is granted and respondent's cross-motion is denied; and it is further

ORDERED that the parties are directed to appear for a pre-hearing conference on **September 21, 2022 at 3pm via Microsoft Teams.**

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

9-6-22
New York, New York



Hon. Lynn R. Kotler, J.S.C.