SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Edmead Justice PART 35

Index Number : 157144/2019
RIVERKEEPER, INC.
vs
PORT AUTHORITY OF NEW
Sequence Number : 001
ARTICLE 78

INDEX NO. 157144/19
MOTION DATE 9/20/19
MOTION SEQ. NO. 1

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the annexed memorandum Decision and Order, it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Riverkeeper Inc. (Motion Seq. 001) is granted and Respondent Port Authority of New York and New Jersey is directed to disclose all outstanding materials sought in Petitioner's December 7, 2018 FOIL request within thirty (30) days; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the issue of the amount of such attorneys' fees is hereby severed and referred to a Special Referee to Hear and Determine; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-22-2019

HON. CAROL R. EDMEAD, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

In the Matter of the Application of

RIVERKEEPER, INC.,

Petitioner,

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

DECISION AND ORDER
Index No.: 157144/2019
Motion Seq. 001

-against-

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Respondent.

----------X

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Article 78 proceeding, Petitioner Riverkeeper, Inc. seeks an order to compel Respondent Port Authority of New York and New Jersey to produce certain documents pursuant to Freedom of Information Law (FOIL) § 89. For the following reasons, this petition is granted.

BACKGROUND FACTS

This case epitomizes the recurring conflict between environmental concerns and regional transportation development.

The dispute that underlies this proceeding concerns competing development projects that the parties are pursuing in the County of Queens (City and State of New York). Respondent wishes to construct a monorail train line between LaGuardia Airport and the Willets Point/Citi Field subway/LIRR station. The project to do so is known as the LaGuardia Airport Access Improvement Project (LGAAIP). (*See* verified petition, ¶ 1; exhibit A). Petitioner is advancing a collection of contiguous, ecologically friendly projects to restore and revitalize the wetlands and

waterfront located at the World's Fair Promenade and Marina. These efforts have been presented to New York City government for review in the Flushing Waterways Vision Plan (FWVP). (*Id.*, ¶ 19).

Petitioner is concerned that the LGAAIP will have negative effects on the FWVP, and has submitted a FOIL request to Respondent for documents that contain specific details of the former plan. Specifically, on December 7, 2018, Petitioner submitted a request for four categories of documents to Respondent. The first three categories sought communications between Respondent and private entities regarding the LGAAIP. The fourth category requested communications between Respondent and the Federal Aviation Administration (FAA) regarding forthcoming environmental review for the LGAAIP. (*See* verified petition, ¶¶ 20-21; exhibit B). In response to the FOIL request, Respondent produced all documents in the first three categories but excluded the fourth category of documents. (*Id.*, ¶¶ 22-26; exhibits C-I).

Petitioner states that, on its own, it obtained a copy of a memorandum of understanding (MOU) between the FAA and Respondent which concerns the environmental impact statement (EIS) that the FAA will perform in connection with the LGAAIP. (*See* MOU, exhibit J). The portion of the MOU that pertains to disclosure provides as follows:

> "Information developed under this MOU is disclosable to the public to the extent required by law. The FAA will maintain the confidentiality of, and will not release or allow access to, any information, documents or materials which in its opinion are validly designated as confidential by the Sponsor [i.e., Respondent] . . . and which contain trade secrets, proprietary data, or commercial or financial information, or falls within any other applicable federal exemption. . . . ."
>
> (*Id.*, ¶ III.C.T, exhibit J).

Petitioner states that, on April 16, 2019, it made a final request to Respondent to comply with the entirety of the FOIL request and produce the fourth category of documents, but that

Respondent answered with a letter dated April 30, 2019 that declined to make any further document production. (*Id.*, ¶¶ 28-29; exhibits K, L).

Petitioner thereafter commenced this Article 78 proceeding on July 22, 2019 to compel Respondent to produce the fourth category of documents. Respondent filed an answer on September 6, 2019. Petitioner asserts that no exemptions preclude its inspection of the FAA communications that it seeks from Respondent. (*See* Petitioner's mem of law at 5-11). Respondent, however, responds that two such exemptions apply; specifically, the "deliberative process" exemption and the "common interest" or "attorney client privilege" exemption. (*See* Respondent's mem of law at 6-15[1]).

DISCUSSION

The legal standards that govern FOIL disputes in New York have been well documented by the Court of Appeals:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. The statute, enacted in furtherance of the public's vested and inherent "right to know", affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to "make intelligent, informed choices with respect to both the direction and scope of governmental activities" and with an effective tool for exposing waste, negligence and abuse on the part of government officers.
>
> To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted. This presumption specifically extends to intra-agency and inter-agency materials...Exemptions 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."

[1] Respondent initially contended that Petitioner failed to exhaust all administrative remedies available to it prior to commencing this Article 78 petition, rendering the petition premature. However, Respondent's moving papers do not address this but rather proceed to the merits of its arguments regarding the FOIL exemptions. As such, this decision will not consider whether the petition is premature but instead address the merits of the arguments presented.

(*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986], citations omitted).

Given that the Court generally presumes all records are open and statutory exemptions to FOIL requests are to be construed narrowly, the standard of review of an Article 78 proceeding challenging an agency's denial of a FOIL request is more stringent than the general standard applicable to most Article 78 petitions (*see Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 [1st Dept 2010]).

The Deliberative Process Exemption

The statutory exemption known as the deliberative process exemption holds that pre-decisional inter-agency or intra-agency materials may be protected from disclosure (*See* Public Officers Law § 87 [2] [g]). For the purposes of FOIL, the statute defines "agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" (Public Officers Law § 86 [3]). The Court of Appeals has made it clear that a plain reading of the statute's definition of "agency" renders the inter-agency exemption inapplicable to communications with a federal agency. In *Waterford v New York State Dept. of Envtl. Conservation*, the petitioner sought materials exchanged between the Department of Environmental Conservation (DEC) and the Environmental Protection Agency (EPA). DEC argued that the materials were protected under the inter-agency deliberative process exemption. The Court of Appeals held that the communications did not fit under the exemption, reasoning that:

> "By its plain terms, the statutory definition does not include federal agencies. Rather, the definition of 'agency' is limited to state and municipal entities. DEC's argument that the definition of 'agency' should not be applied to the distinct phrases 'inter-agency' and 'intra-agency' is meritless, as there is nothing particular to either the context or usage of those phrases that would indicate a legislative intent to treat the term 'agency,' as used in that section, separately from the rest of FOIL. Although the EPA would be an agency within the definition of that term as it is commonly understood, that fact is of no assistance to respondent when the term is clearly defined in the statute. Since the EPA is not an 'agency' for purposes of FOIL, the inter-agency exemption does not apply to materials exchanged between these entities. To the extent that there is resonance to the argument that the exemption should apply in order to protect the pre-decisional joint deliberative process, that issue must be addressed to the Legislature."
>
> (18 NY3d 652, 656–57 [2012]).

Petitioner asserts that as the FAA, like the EPA, is a federal agency, it is excluded from the statute and Respondent may not raise the deliberative process exemption for inter-agency communications. Respondent's opposition papers do not address this argument explicitly. Nor does Respondent include a discrete discussion of the "deliberative process" exemption. Instead, Respondent's argument appears to conflate the two exemptions together by asserting that the FAA communications which Petitioner seeks are entitled to be treated as either "deliberative materials" or "attorney work product" because it and the FAA "share a common legal interest." (*See* Respondent's mem of law at 8-12). Respondent's moving papers actually raise this same argument twice under separate headings although there is no substantive difference between the arguments. (*Id.*, at 12-15). Respondent essentially contends that although the FAA is a federal agency, the *Waterford* decision is not controlling as in that case, DEC and EPA had divergent interests, while here, Respondent and the FAA share a common interest. However, Respondent cites no authority for this argument, nor does it identify any precedent in which a federal agency such as the FAA was permitted to make use of the "deliberative process" exemption as a defense to a New York FOIL request. In fact, the FAA does not support Respondent's position in that the MOU explicitly states that

> "The Port Authority acknowledges that any such documents shared with the FAA will no longer be protected from disclosure based on the deliberative process privilege, however the FAA will consider whether other exemptions and privileges to withhold documents may still exist and be applicable."
>
> (*See* ¶ III.D, exhibit J).

As a result, the Court finds that Respondent is not entitled to assert this exemption as a defense to Petitioner's instant FOIL request.

The Common Interest/Attorney Client Privilege Exemption

The common interest doctrine derives from attorney client privilege, and usually applies when multiple parties are represented by the same counsel (*see Denney v Jenkens & Gilchrist,* 362 F Supp 2d 407 [SDNY 2004]). While the privilege is not limited to those situations, parties represented by different counsel have a higher burden in establishing a joint legal strategy:

> "The party asserting the common interest rule bears the burden of showing that there was an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy. A claim resting on the common interest rule requires a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given. Some form of joint strategy is necessary to establish a [common interest] agreement, rather than merely the impression of one side."
>
> (*Id.* at 415).

In *Ambac Assur. Corp. v Countrywide Home Loans, Inc.* the Court of Appeals noted that "New York courts appl[y] the common interest doctrine in criminal as well as civil matters, to communications of both coplaintiffs and codefendants, but always in the context of pending or reasonably anticipated litigation," and that "New York courts [have] uniformly rejected efforts to expand the common interest doctrine to communications that do not concern pending or reasonably anticipated litigation" (27 NY3d 616 at 627). The Court of Appeals has deemed the privilege to be generally inapplicable when parties are represented by different counsel and there is no threat of pending litigation. The Court reasoned as follows:

> ". . . when clients retain separate attorneys to represent them on a matter of common interest . . . [i]t is less likely that the positions of separately-represented clients will be aligned such that the attorney for one acts as the attorney for all, and the difficulty of determining whether separately-represented clients share a sufficiently common legal interest becomes even more obtuse outside the context of pending or anticipated litigation. Consequently, although a litigation limitation may not be necessary in a co-client setting where the fact of joint representation alone is often enough to establish a congruity of interests, it serves as a valuable safeguard against separately-represented parties who seek to shield exchanged communications from disclosure based on an alleged commonality of legal interests but who have only commercial or business interests to protect."

(*Id.* at 631).

As Respondent and the FAA were represented by separate counsel, Respondent bears the burden of demonstrating whether the common interest exemption should still apply. However, the MOU does not establish any such common interest, nor does it state that the communications should be privileged or protected. In fact, as noted above, it explicitly states that "[i]nformation developed under this MOU is disclosable to the public to the extent required by law." (*See* ¶ III.C.T, exhibit J). Respondent shares no other documentary evidence indicating that a common interest was established. (*See* Petitioner's reply mem of law at 2-7). Moreover, the nature of the relationship between the FAA and Respondent is that of a federal agency reviewing and approving the plans of a state agency. While Respondent is seeking the approval of the FAA so it can proceed with plans for the LGAAIP, Respondent and the FAA are not two parties with a common interest working together toward a shared goal. The MOU does state that the FAA agreed not to disclose "any information, documents or materials which . . . [Respondent] validly designated as confidential;" however, there is no evidence that Respondent ever attached such a designation to its communications with the FAA. (¶ III.C.T, exhibit J). In the absence of such evidence, and in view of the fact that Respondent and the FAA do not share legal representation,

the law does not permit Respondent to invoke the "common interest exception" to shield its communications with the FAA from Petitioner 's FOIL request

Additionally, Respondent has not demonstrated that the communications with the FAA were made in reasonable anticipation of litigation. Respondent argues that the agreed standards and procedures for drafting an EIS were created in anticipation of litigation, but as Petitioner points out, if that were true nearly all documents exchanged between federal and state agencies would be exempt. (*See* Petitioner's reply mem of law at 5-6). The belief of anticipated litigation must be objectively reasonable; therefore, a general concern over litigation that may or may not come to fruition is an insufficient basis to demonstrate reasonable anticipation of litigation (*see g Gulf Islands Leasing, Inc. v Bombardier Capital, Inc.*, 215 FRD 466, 475 [SDNY 2003]). Furthermore, if any litigation did result from the development of the LGAAIP, it is very possible that Respondent and the FAA could have opposing positions and interests. For example, since Respondent was applying for approval from the FAA, it could argue that the FAA's conclusions regarding the EIS were incorrect and had negative effects on its ability to carry out the plans for the LGAAIP. Respondent and the FAA thus cannot be said to be collaboratively working towards the same goal, as they have their own independent interests, which is reiterated by the fact that they retained separate counsel in drafting the MOU. Therefore, Respondent has not met its burden of establishing that the common interest exemption related to anticipation of litigation is applicable.

Respondent further argues that although it does not share legal representation with FAA, it is nevertheless precluded from disclosing the communications because it is an agent of FAA. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the

principal's control, and the agent manifests assent or otherwise consents so to act" (Restatement [Third] of Agency § 1.01 [Am. Law Inst. 1981]). A party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence (*Lippincot v East Riv. Mill & Lbr. Co.*, 79 Misc 559 [1913]), and "[t]he declarations of an alleged agent may not be shown for the purpose of proving the fact of agency." (*se Moore v Leaseway Transp. Corp.*, 65 AD2d 697 [1st Dept 1978].) "[T]he acts of a person assuming to be the representative of another are not competent to prove the agency in the absence of evidence tending to show the principal's knowledge of such acts or assent to them." (*Lexow & Jenkins v Hertz Commercial Leasing Corp.*,122 AD2d 25 at 26, quoting 2 NY Jur 2d, Agency and Independent Contractors § 26.)

Here, Respondent has not submitted any documentary evidence establishing that is an agent of the FAA. The MOU also includes no provision indicating that Respondent is acting as an agent, nor does it state that Respondent is authorized to act on the FAA's behalf in any manner. It is clear that all final decisions regarding the LGAAIP were within the FAA's jurisdiction. Respondent has submitted its own affidavit asserting it was acting as an agent of the FAA, but as discussed, an "agent cannot by his own acts imbue himself with apparent authority" (*Hallock v State*, 474 NE2d 1178, 1181 [NY 1984]). The affidavit points out that per the terms of the MOU, Respondent was required to take certain actions, but that is not sufficient to establish the formation of an agency relationship. Respondent was seeking approval from the FAA but was not acting with any authority as its agent. Thus, Respondent cannot use agency law to argue that the common interest exception applies to its communications with the FAA.

Accordingly, Petitioner's FOIL request is valid, and the fourth category of documents sought must be exchanged.

Regarding Petitioner's request for attorney's fees, pursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that "substantially prevailed" in the proceeding if the court finds that the agency had no reasonable basis for denying access. (*See* FOIL § 89[4][c][ii]). Respondent argues that fee shifting is improper as Respondent complied with the majority of Petitioner's request and had a valid basis for denying access to the FAA documents. Here, the Court finds that Respondent had no reasonable basis for withholding its communications with the FAA. Respondent's MOU with the FAA, the plain meaning and reading of the applicable statutory exemptions and controlling Court of Appeals caselaw make it abundantly clear that Respondent's reliance on the exemptions was improper. First, Respondent gave short shrift to the applicability of the "deliberative process" exemption. Second, the caselaw in support of the "common interest" exemption was, on its face, insufficient to establish Respondent's exemption. Finally, the agency argument was wholly inapplicable. In sum, Respondent's bases for exemptions had "no legs." As such, attorneys' fees in favor of Petitioner are appropriate. (*See Matter of Rauh v de Blasio,* 161 AD3d 120, 126-27 [1st Dep't 2018]). As the Court has now determined that Respondent had no reasonable basis on the merits, the Court is exercising it discretion pursuant to FOIL § 89 and granting Petitioner's request for attorney's fees in an amount to be determined by a Special Referee.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Riverkeeper Inc. (Motion Seq. 001) is granted and Respondent Port Authority of New York and New Jersey is directed to disclose all outstanding materials sought in Petitioner's December 7, 2018 FOIL request within thirty (30) days; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the issue of the amount of such attorneys' fees is hereby severed and referred to a Special Referee to Hear and Determine; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

Dated: New York, New York
October 22, 2019

ENTER:

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.