

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
SLIC NETWORK SOLUTIONS, INC.,

Petitioner,

-against-

DECISION AND
JUDGMENT

Index No. 908385-19

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE AND MICHAEL SCHMIDT, IN HIS
OFFICIAL CAPACITY AS COMMISSIONER OF
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, AND TOWN OF
BANGOR, NEW YORK, TOWN OF BELLMONT,
NEW YORK, TOWN OF BRANDON, NEW YORK,
TOWN OF DICKINSON, NEW YORK, TOWN OF
MALONE, NEW YORK, TOWN OF MOIRA, NEW
YORK, AND TOWN OF WAVERLY, NEW YORK.

Respondents,

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

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

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Hartman, J.

Petitioner commenced this CPLR article 78 proceeding challenging as arbitrary and capricious and contrary to law respondent New York State Department of Taxation and Finance's (hereinafter the Tax Department) determination denying petitioner's request that records submitted by petitioner to the Tax Department be exempted from disclosure under the Freedom of Information Law (FOIL). The Tax Department and respondents the Towns of Bangor, Bellmont, Brandon, Dickinson, Malone, Moira, and Waverly (hereinafter the municipal respondents) have answered and oppose the petition. For the reasons that follow, the petition is denied.

Background

In 2015, the State established its Broadband Program, which "provides State grant funding through an innovative 'reverse auction' method to support projects that deliver high-speed Internet access to [u]nserved and [u]nderserved areas of New York State" (New York State Broadband Program Office, <https://nysbroadband.ny.gov/>). In developing Internet access in these underserved communities, Internet providers must erect miles of equipment, much of it on private property using private rights of way. This equipment, known as "public utility mass real property" (RPTL 499-hhhh), is real property subject to taxation (*see Matter of T-Mobile Northeast, LLC v DeBellis*, 32 NY3d 594 [2018], *rearg denied* 32 NY3d 1197 [2019]).

Under the Real Property Tax Law, local assessors are required to “annually assess all local public utility mass real property situated in such city, town, village or county” (RPTL 499-jjjj). These assessments, however, are subject to a ceiling established by the State Tax Commissioner (*see* RPTL 499-kkkk). In establishing the assessment ceiling, the State Tax Commission requires that the owners of such public utility mass real property make an annual report providing certain information, including the location, description, age, account number, and tax district of equipment, and whether the equipment is located in the public or private right-of-way (*see* RPTL 499-rrrr; 20 NYCRR 8197-2.1).

Through the Broadband Program, petitioner is the provider of broadband services to customers in northern New York and the owner of certain properties on the assessment rolls of the municipal respondents. Claiming that it pays significantly higher taxes on its properties located in the municipal respondents’ jurisdictions, petitioner commenced a RPTL article 7 tax proceeding. In connection with this litigation, on or about September 17, 2019, the municipal respondents filed with the Tax Department a FOIL request seeking disclosure of certain information submitted by petitioner to the Tax Department in its annual report for use in establishing assessment ceilings in

2019.¹ At the time petitioner submitted the requested data, it did not request protection from disclosure. But, pursuant to the Tax Department's custom and practice, by letter dated September 26, 2019, the Tax Department notified petitioner of the FOIL request and allowed petitioner to submit a written statement requesting protection from disclosure.

On or about October 8, 2019, petitioner opposed the municipal respondents' FOIL request, arguing that disclosure of the requested information would constitute an unwarranted invasion of personal privacy and the requested information could be proprietary in nature, disclosure of which may compromise petitioner's business. In an email on October 18, 2019, the Tax Department's Records Access Officer partially denied the municipal respondents' FOIL request and released only limited information.

On or about November 5, 2019, the municipal respondents appealed the Records Access Officer's determination. By letter dated November 18, 2019,

¹ The municipal respondents argue that, because they are not privy to the information reported by Internet providers to the State Tax Commission, it is a "practical impossibility for the Town Assessor[s] to determine what the mass property is, where it is located, or how to place a value on it." "[F]aced with this conundrum," the town assessors "have uniformly determined to take the Tax Department's Ceiling Assessment figure and use it as the assessed value [because n]o other approach is feasible." And, since the tax ceiling is based on self-reported information, "the net effect is that the telecommunications companies set their own assessments for this mass property." "Nevertheless," the municipal respondents argue, "the assessing [t]owns are unfairly charged with the responsibility and the cost of defending the assessment in an RPTL [a]rticle 7 proceeding, without any information with which to do so," and believe the requested information to be "minimally necessary to defend themselves in the [a]rticle 7 proceeding."

the Tax Department's Records Appeals Officer reversed the initial determination, granted the municipal respondents' appeal, and denied petitioner's request for protection from disclosure. The Appeals Officer stated that the Tax Department would not release the requested documents pending petitioner's CPLR article 78 proceeding.

By notice of petition dated December 3, 2019, petitioner commenced this CPLR article 78 proceeding challenging as arbitrary and capricious and contrary to law the Tax Department's denial of its request for protection from disclosure. Petitioner now argues that disclosure of the records sought by the municipal respondents would constitute an unwarranted invasion of personal privacy, disclose trade secrets, and harm petitioner's business. The municipal respondents and the Tax Department have each answered and oppose the petition. Respondents argue, among other things, that the personal privacy exemption does not apply, and petitioner did not demonstrate at the administrative level its entitlement to exemption from disclosure based on an alleged trade secret or fear of competitive disadvantage.

Analysis

"An agency must 'make available for public inspection and copying all records' unless it can claim a specific exemption to disclosure (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007], citing Public Officers Law § 87 [2]; 89 [3]). "FOIL imposes a broad duty of disclosure on government agencies

and all agency records are presumptively available for public inspection and copying unless one of the statutory exemptions applies, permitting the agency to withhold the records” (*Matter of Hepps v Department of Health*, __ AD3d __, 2020 NY Slip Op 02517, *2 [3d Dept 2020] [internal quotation marks, brackets, and citations omitted]; see Public Officers Law §§ 84, 87 [2]; *Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 109 [1992]). The exceptions are narrowly construed and the entity resisting disclosure “must show that the requested information ‘falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access’” (*Matter of Data Tree, LLC v Romaine*, 9 NY3d at 462-463, quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; see *Matter of Hepps v Department of Health*, 2020 NY Slip Op 02517, *2; *Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d at 109; *Matter of Verizon N.Y v Bradbury*, 40 AD3d 1113, 1114 [2d Dept 2007]).

The two exemptions from disclosure relevant to this proceeding authorize an agency to deny access to records that: (1) “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [Public Officers Law § 89 (2)]” (Public Officers Law § 87 [2] [b]); and (2) “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if

disclosed would cause substantial injury to the competitive position of the subject enterprise” (Public Officers Law § 87 [2] [d]).

Unwarranted Invasion of Personal Privacy

“[A]n agency may decline disclosure of records which, ‘if disclosed[,] would constitute an unwarranted invasion of personal privacy” (*Matter of Hepps v Department of Health*, 2020 NY Slip Op 02517, *2, quoting Public Officers Law § 89 [2] [b]). “This personal privacy exemption incorporates a nonexhaustive list of categories of information that the Legislature has determined would statutorily constitute unwarranted invasions of personal privacy if disclosed, such as employment histories and medical or credit histories” (*id.* [internal quotation marks, brackets, and citations omitted]). In the absence of proof establishing the applicability of one of these specifically-enumerated categories, the Court must “evaluate whether disclosure would constitute an unwarranted invasion of personal privacy ‘by balancing the privacy interests at stake against the public interest in disclosure of the information” (*Matter of Laveck v Village Bd. of Trustees of Vil. of Lansing*, 145 AD3d 1168, 1170 [3d Dept 2016], quoting *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]; see *Matter of Hepps v Department of Health*, 2020 NY Slip Op 02517, *2).

Petitioner is not entitled to exemption from disclosure under the personal privacy exemption. Initially, RPTL 500 (1) provides that disclosure of

real property tax inventory data “shall not be considered an unwarranted invasion of personal property as defined in [Public Officers Law § 89 (2)].” Furthermore, corporate information is not normally covered by the personal privacy exemption (*see Matter of Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42 [2011]), and petitioner does not allege that disclosure of the requested documents would invade upon customers’ privacy interests. In any event, petitioner has not claimed exemption under any of the enumerated categories of information constituting an unwarranted invasion of personal privacy, nor has petitioner articulated the implicated privacy interests, if any, that are to be weighed against the community’s interest in having access to the requested information (*see Matter of Laveck v Village Bd. of Trustees of Village of Lansing*, 145 AD3d at 1170; *see also Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d at 45-46). Thus, the Tax Department’s determination to deny petitioner’s request for protection from disclosure on the ground of unwarranted invasion of personal privacy was not arbitrary and capricious or contrary to law.

Trade Secret or Substantial Competitive Injury

To meet its burden in seeking exemption under Public Officers Law § 87 (2) (d), petitioner was required to “present specific, persuasive evidence” that the requested information constitutes a trade secret or “that disclosure will

cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm” (*Matter of Markowitz v Serio*, 11 NY3d 43, 50 [2008]; see *Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn.*, 137 AD3d 66, 74 [3d Dept 2016]). In its request for protection from disclosure, the sole document petitioner submitted to the Tax Department was a letter from counsel, in which he provided only the brief, speculative conclusion: “[petitioner] believes there is a potential risk that the materials requested could be proprietary in nature, and, if released, could compromise [petitioner’s] business,” citing Public Officers Law § 87 (2) (d). In denying petitioner’s request for protection from disclosure, the Tax Department’s Records Appeals Officer noted that petitioner made “no mention of trade secrets” and further stated: “Since your letter is devoid of evidence as to how this release of the requested data would result in actual substantial competitive injury to your client, and merely asserts in an entirely conclusory manner that release could compromise [petitioner’s] business, I find your letter insufficient to prove entitlement to the exemption from disclosure in paragraph (d).”

The Tax Department’s determination denying petitioner’s request for protection from disclosure on the ground that the requested records include trade secrets or information that, if disclosed, would cause substantial injury to petitioner’s business was not arbitrary and capricious or contrary to law

(Public Officers Law § 87 [2] [d]). In requesting protection from disclosure, petitioner failed to argue with any particularity, or otherwise demonstrate, that the requested information included trade secrets. And although petitioner provided far more detailed information in the petition, “[i]t is a fundamental principle of administrative law that judicial review of an administrative determination is limited to the facts and record adduced before the agency” (*Matter of Rose v Albany County Dist. Attorney’s Off.*, 111 AD3d 1123, 1124 [3d Dept 2013] [internal quotation marks and citations omitted]; see *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of N.Y. Corr. Officers & Police Benevolent Ass’n v Governor’s Office of Emp. Relations*, 126 AD3d 1267, 1269 [3d Dept 2015], *affd* 27 NY3d 936 [2016]). At the administrative level, petitioner provided mere speculation that disclosure of the requested records may cause harm to its business; it did not provide any “specific, persuasive evidence” that disclosure would cause substantial injury to petitioner’s competitive position (*Matter of Markowitz v Serio*, 11 NY3d at 50; see *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; Public Officers Law § 87 [2] [d]). Thus, based upon the information submitted, the Tax Department’s determination to deny petitioner’s request for protection from disclosure was entirely rational.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied.

This constitutes the Decision and Judgment of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for respondent New York State Department of Taxation and Finance shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
May 4, 2020

Denise A. Hartman

HON. DENISE A. HARTMAN, AJSC

Papers Considered

1. Notice of Petition, dated December 3, 2019;
2. Verified Petition, dated December 3, 2019, with Exhibits A-F;
3. Answer to Petition by Municipal Respondents with Affirmative Defenses and Counter Statement of Facts, undated;
4. Memorandum of Law of Municipal Respondents, dated December 20, 2019;
5. Answer of State Respondent, dated February 5, 2020, with Exhibits 1-7;
6. Affirmation of Deborah R. Liebman, Esq., dated February 4, 2020;
7. Memorandum of Law in Support of the State Respondent's Answer, dated February 5, 2020; and
8. Petitioner's Reply Memorandum of Law in Further Support of the Verified Petition, dated February 14, 2020.