

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of

THE TOWN OF RAMAPO,

Petitioner,

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

DECISION AND ORDER
INDEX NO. 906354/2019

-against-

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, VERIZON NEW YORK, INC., MCI
COMMUNICATIONS SERVICES, INC., AT&T
COMMUNICATIONS, INC., FIRST LIGHT FIBER,
FIBER TECHNOLOGIES NETWORK, LLC,
CABLEVISION LIGHTPATH, INC., ZAYO GROUP
LLC, AND HUDSON VALLEY DATANET,

Respondents.

APPEARANCES:

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KOWEEK, J.:

Petitioner commenced this CPLR Article 78 proceeding seeking to vacate and annul a
determination by respondent, New York State Department of Taxation and Finance (“Tax”),

which denied, in part, the Town of Ramapo's ("Town") FOIL request. The petitioner also seeks attorney fees and costs. The petitioner claims the actions of the respondents are arbitrary and capricious and lack a rational basis. The respondents assert a general denial and seek dismissal of the petition for failing to state a cause of action pursuant to CPLR 3211(a)(7) and the records the Town seeks are exempt pursuant to Public Officers Law §87(2)(d). The parties seek an *in camera* review of the disputed documents.

Tax requires an "assessment ceiling" of public utility real property located within the state pursuant to RPTL § 4999-kkk(1). Based upon information provided by the respondent telecommunication companies ("companies"), Tax makes a tentative determination of an assessment ceiling for all local public utility mass real property utilizing an accepted methodology. Thereafter, Tax schedules a hearing where the owners of the real property and the assessing jurisdictions can object to the tentative assessment determination. (see, RPTL § 449-0000). After the hearing, Tax determines an assessment ceiling for the real property for each public utility located in the Town. (see, RPTL § 499-pppp). The decision of Tax may be challenged by the owners of the properties pursuant to Article 7 of the RPTL.

On April 5, 2019, the Town of Ramapo filed a FOIL request with Tax and sought disclosure of all records for the years 2013-2019 of telecommunication ceilings (assessments) for telecommunication real property owned by the respondent companies. The FOIL request sought "any calculations or valuation information used to determine the fair market value of each telecommunication installation for the following utility companies in the listed municipalities." The listed municipalities included the Town and twelve villages located within the Town.

On April 25, 2019, Tax provided the Town with 112 pages of records, which contained notices, certificates, calculations and reports. The remaining documents requested either did not exist, were not finalized or were withheld by Tax as exempt records pursuant to POL § 87(2)(d). The decision of Tax was appealed on May 6, 2019. On appeal, the Town claimed it “would accept a redacted copy of any of the requested inventory documents that fall under Section 87(2)(d) of the Public Officers Law.”

In a decision dated May 23, 2019, the Tax Appeals Officer determined the records were properly withheld pursuant to POL § 87(2)(d) as “the utilities that own those properties each have asserted that the records contain trade secrets and disclosure would cause substantial injury to the competitive position of those utilities.” The record indicates the respondent property owners filed an exception from disclosure request as required by Tax pursuant to POL § 89(5)(h) prior to the Town’s FOIL request. The Appeal Officer did release the requested inventory documents but the majority of the records were significantly redacted.

Petitioner commenced this CPLR Article 78 proceeding on September 17, 2019, challenging the May 23, 2019, determination of Tax. By a Stipulation and Order dated January 14, 2020, respondents Verizon New York, Inc. and MCI Communications Services, Inc. intervened in this proceeding. On January 17, 2020, the petitioner filed an Amended Verified petition to add six additional telecommunication respondents who own utility property in the Town and are subject to the ceiling assessment.

The Town claims the documents Tax provided in response to its FOIL request were the exact same documents the Town received for 2015-2019. The Town contends the assessment information provided was the basis of its request for more documentation. The Town alleges the

materials Tax provided were so heavily redacted that it acted in bad faith in the denial of the FOIL information. The Town maintains the denial of the requested cost, depreciation and obsolescence documents makes it impossible for the Town and the Assessor to value all the real property in the Town that is not exempt. The Town claims the redacted documents prohibits it from ascertaining whether the respondents are entitled to an exemption pursuant to POL § 87(2). The Town claims the telecommunication ceiling information requested will only be used by the Town's Assessor for internal valuation purposes. The Town alleges it is required to protect all information/records it receives and maintains the documentation received must remain confidential. The Town claims it has developed a confidential policy that deems records obtained by FOIL confidential. (see, Town of Ramapo Town Law § 60-5-f-5). The Town alleges it may not release records to the public in violation of state and federal FOIL guidelines. The Town claims it has a statutory duty to protect all records that it obtains. The Town contends any FOIL requests by a third party requires it to follow the same standards established by New York State and its agencies. The Town alleges any injuries claimed by the respondents are speculative. The Town also seeks attorney fees and costs pursuant to POL § 89(4)c.

The respondents maintain the requested records are exempt pursuant to POL § 87(2)(d). The respondents claim the records are exempt as they are trade secrets and protect the businesses from substantial competition. The respondents maintain the Town is not entitled to an exception to POL § 87(2) as a municipality. The respondents allege it is essential that its equipment and network facilities remain confidential for security purposes. The respondents claim if the FOIL information was made available to the public, communications in New York could be disrupted by acts of terrorism, vandalism or for other criminal purposes. The respondents contend public

safety could be jeopardized in emergency and first responder situations and financial and banking institutions could be vulnerable. The respondents allege these concerns are not speculative as telecommunications have experienced attacks upon information technology in the past.

The respondent telecommunication companies contend the requested information is also exempt pursuant to POL § 87(2)(f), which provides an exception if disclosure could “endanger the life or safety of any person.” POL § 87(2)(i) also provides exempt protection for records “to guarantee the security of its information technology assets” which includes electronic information systems and infrastructures. The respondents maintain the Town is not entitled to attorney fees and costs.

The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken “without sound basis in reason and . . . without regard to the facts.” (*see*, CPLR § 7803; In the Matter of Murphy v. New York State Division of Housing and Community Renewal, 21 NY3d 649 [2013]; Matter of Pell v. Board of Education, 34 NY 2d 222 [1974]). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis. (Matter of Peckham v. Calogero, 12 NY3d 424 [2009]). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law. (Paramount Communities, Inc v. Gibraltar Cas Co., 90 NY2d 507 [1997]).

“When the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and

judicial deference.” (Matter of Flacke v. Onondaga Landfill System, 69 NY2d 355 [1987]).

Moreover, in order to maintain the limited nature of review, it is incumbent upon the court to defer to the agency’s construction of statutes and regulations that it administers as long as that construction is not irrational or unreasonable. (Matter of 427 W. 51 St. Owners Corp. v. Division of Hous. and Community Renewal, 3 NY3d 337 [2004]; Lorillard Tobacco Co. v. Roth, 99 NY2d 316 [2003]).

The Freedom of Information Law promotes open government and public accountability and, therefore, “imposes a broad duty on government to make its records available to the public.” (Gould v. New York City Police Department, 89 NY2d 267 [1996]). Under FOIL, agency records are presumptively available for public inspection and copying unless the requested documents fall within one of the exemptions set forth in Public Officers Law § 87(2). (Matter of Fappiano v. New York City Police Dept, 95 NY2d 738 [2001]). “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.” (Matter of Newsday Inc. v. Empire State Dev. Corp, 98 NY2d 359 [2002]; Matter of Daily Gazette v. City of Schenectady, 93 NY2d 145 [1999]). “So long as there is a clear legislative intent to establish and preserve confidentiality of records, a State statute need not expressly state that it is intended to establish a FOIL exemption.” (Capital Newspapers Div. of Hearst Corp. v. Burns, 67 NY2d 562 [1986]).

“The legislature enacted FOIL to provide the public with a means of access to government records” and to achieve this purpose, the Court of Appeals has 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.” (Public Officers Law § 84; Newsday, Inc. v. Sise, 71 NY2d 146 [1987]; Capital Newspapers Div. of the Hearst Corp. v. Whalen, 69 NY2d 246 [1987]).

The May 23, 2019, FOIL appeal determination found the owners of the subject telecommunication properties “have asserted that the records contain trade secrets and disclosure would cause substantial injury to the competitive position of those utilities” and as a result, the records were properly withheld pursuant to POL § 87(2)(d).

Public Officers Law § 87 provides in part:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that . . .

(d) 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.

“An agency is required to provide a full written explanation of the reasons for denying access to a record, and may satisfy its burden by submitting the records in question for *in camera* inspection by the court.” (Matter of Mazzone v. New York State Dept. of Transp., 95 AD3d 1423 [3rd Dept. 2012]). Although the Tax Department provided a description of the exempt records and the justification for denying access to the requested records, the Court has had an opportunity to conduct an *in camera* review of the subject information.

It appears the majority of the records provided were redacted. Tax determined the records were exempt as trade secrets and to prevent competitive injury. After a review of the record, the Court concludes Tax properly withheld or redacted information that was considered exempt trade

secrets or would cause significant commercial injury. (see, Public Officers Law § 87(2)(d); Matter of Verizon N.Y. Inc. v. N.Y. State Pub. Serv. Comm'n, 137 AD3d 66 [3rd Dept. 2016]). The case of Matter of Schenectady v. O'Keefe, 50 AD3d 1384 [3rd Dept. 2008], lv denied 11 NY3d 702 [2008] is on point as the Court found the “trade secret exemption was properly applied” to information on age, cost and extent of certain utility projects used to prepare assessments for the calculation of taxes. The Court also found the data submitted by the utility had a significant commercial value and “would cause substantial injury to their competitive position.” Disclosure of respondents’ records would reveal the technological capabilities of respondents’ network including assets, costs and pricing.

The respondent companies filed exemption requests pursuant to POL § 89(5)(h) alleging disclosure of records would cause them substantial injury by revealing their assets and investments at no cost to their competitors. If respondents’ confidential data was released pursuant to FOIL, they would sustain a substantial competitive injury as the information would be available to all competitors. (Matter of Encore College Bookstore, Inc. v. Auxiliary Service Corp., 87 NY2d 410 [1995]). The fact that the Town is a municipality does not entitle it to exempt records pursuant to POL § 87(2)(d). (Matter of Daily Gazette Co. v. City of Schenectady, 93 NY2d at 156).

In addition, Tax was entitled to deny access to records relating to information technology and the redactions were appropriate to guarantee the security of respondents’ technology assets. (see, Public Officers Law § 87(2)(i)). Also, the Court is mindful that it may defer to the respondents’ rulings, interpretations and opinions of statutes and regulations it is charged with enforcing. (International Union of Painters and Allied Trades v. New York State Department of

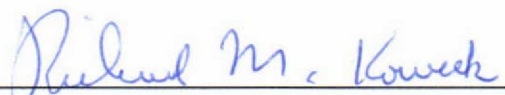
Labor, 32 NY3d 198 [2018]). The Court finds Tax complied with the provisions of FOIL and its determinations were not arbitrary and capricious or an abuse of discretion.

Finally, petitioners application for costs and attorney fees is denied. Since the statutory prerequisites have not been met in as much as petitioners have not prevailed, it would be an error, as a matter of law, for this Court to utilize its discretion and award attorney's fees or costs to the petitioner. (see, Public Officers Law § 89(4)(c); Matter of Beechwood Restorative Care Ctr. v. Signor, 5 NY3d 435 [2005]; Matter of Capital Newspapers Div. of the Hearst Corp. v. City of Albany, 63 AD3d 1336 [3rd Dept. 2009]), affirmed 15 NY3d 759 [2010]).

Accordingly, the petition is hereby denied.

This constitutes the Decision, Order and Judgment, the original of which is being uploaded to NYSCEF for electronic entry and filing. Upon such entry, counsel for the petitioner shall promptly serve notice of entry on all other parties entitled to such notice and is not relieved from the application provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they related to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means.

DATED: August 4, 2020
Albany, New York


RICHARD M. KOWEEK
Acting Supreme Court Justice



Papers Considered:

1. E-filed documents 1-84 from September 17, 2019 through June 11, 2020
2. Unredacted documents provided by respondent the Department of Taxation and Finance on June 25, 2020 in Volumes 1-4 for *in camera* review