

STATE OF NEW YORK
SUPREME COURT

COUNTY OF WARREN

In the Matter of the Application of

PETITION

PROTECT THE ADIRONDACKS! INC.,

Petitioner,

INDEX NO. 58113

For a Judgment Pursuant
to CPLR Article 78

-against-

DATE OF FILING:

ADIRONDACK PARK AGENCY,

November 21, 2012

Respondent.

Petitioner Protect the Adirondacks! Inc. ("Petitioner"), for its verified petition herein, by its attorneys, Caffry & Flower, alleges as follows:

1. By a request made pursuant to the Freedom of Information Law, Public Officers Law Article 6 ("FOIL"), dated March 23, 2012, Petitioner requested access to certain records held by the respondent Adirondack Park Agency ("Respondent" or "APA") regarding the Adirondack Club & Resort project ("ACR") which the Respondent had approved in January 2012.

2. Respondent has granted Petitioner access to some, but not all, of the requested records and denied access to the remainder of the records, by claiming that they were exempt from disclosure under FOIL. In addition, certain documents that were produced by Respondent were heavily redacted for similar reasons.

3. The withholding and redaction of said documents was not authorized by FOIL, and APA's claims of exemption are erroneous, as a matter of law.

4. Respondent also failed to conduct a diligent search for the requested records, and failed to certify that it had conducted a diligent search for them, as required by FOIL.

5. In this CPLR Article 78 proceeding, Petitioner seeks to have the Court:

A. Declare null and void:

(1) the July 6, 2012 decision of Respondent that partially denied Petitioner's March 23, 2012 request for access to records pursuant to the Freedom of Information Law ("FOIL"); and

(2) the July 24, 2012 decision of Respondent that partially denied Petitioner's administrative appeal of that decision pursuant to FOIL;

B. Declare that the records, or redacted portions thereof, which were withheld by Respondent are not lawfully exempt from disclosure under FOIL;

C. Declare that the withholding of records, and the redaction of portions thereof, by the Respondent pursuant to said July 6, 2012 and July 24, 2012 decisions was arbitrary and capricious and affected by error of law;

D. Order Respondent to produce unredacted versions of all of the records identified in Petition ¶¶ 30 and 37;

E. In the alternative, conduct an *in camera* review of all of the records identified in Petition ¶¶ 30 and 37, and then order Respondent to produce all such records, or portions thereof, which are not privileged or otherwise exempt from release under FOIL;

F. Order Respondent to conduct a diligent search for additional records that are responsive to Petitioner's March 23, 2012 FOIL request, as identified in Petition ¶¶ 47 and 49-50;

G. In the alternative, declare that Petitioner is entitled to a hearing on whether additional responsive records exist and are within the Respondent's control, schedule such a hearing before the Court, and order production of all such additional responsive records identified in the hearing;

H. Award Petitioner its attorneys fees and other litigation expenses pursuant to Public Officers Law § 89(4)(c);

I. Award Petitioner the costs and disbursements of this proceeding; and

J. Grant such other and further relief as may seem just and proper to the Court.

THE PARTIES

6. Petitioner Protect the Adirondacks! Inc. ("PROTECT") is a New York not-for-profit corporation. It is exempt from taxation pursuant to Internal Revenue Code § 501(c)(3). PROTECT was formed by the consolidation in 2009 of two predecessor organizations: Residents' Committee to Protect the Adirondacks, Inc. (formed in 1990) and The Association for the Protection of the Adirondacks, Inc. (formed in 1902).

7. Among the purposes for which PROTECT was organized are the following statements from its Certificate of Consolidation:

Protect the Adirondacks! Inc. shall be a non-profit, grassroots membership organization dedicated to the protection and stewardship of the public and private lands of the Adirondack Park, and to building the health and diversity of its human communities and economies for the benefit of current and future generations.

Permanently protect the Park's wildlands, with special emphasis on the Forest Preserve.

Ensure that the Park's private farms and forests are sustainably managed to conserve their productivity, economic viability, and open-space character.

Promote the development of local communities and economies that remain strong, diverse, and vibrant.

Ensure that the "Forever Wild" clause, Article XIV of the New York State Constitution, is preserved and that the Forest Preserve and other lands are strictly managed according to such Article.

Promote the Adirondack Park as a global model of landscape-scale conservation in which strong protection of large, interconnected public wildlands are

integrated with sustainably managed, economically viable, private farms and forests that are linked to healthy, diverse rural communities.

Protect, preserve, and enhance the wilderness character, ecological integrity, scenic resources, and appropriate recreational uses of the New York State Forest Preserve.

Conserve the wild, natural, open-space character and the economic viability of the private farms and forests of the Adirondack Park.

8. Respondent is an agency of the State of New York created pursuant to § 803 of the Adirondack Park Agency Act ("APA Act"), Executive Law Article 27. Its office is located at Ray Brook in the Town of North Elba, County of Essex, New York.

9. Respondent is an "agency" subject to FOIL as that term is defined in Public Officers Law § 86(3).

VENUE

10. Venue is appropriate in Warren County, pursuant to CPLR § 506(b), because said county is in the Fourth Judicial District, as is the principal office of the Respondent, and because the actions complained of occurred in Warren County and Essex County.

THE FREEDOM OF INFORMATION LAW

11. FOIL was adopted in 1977 and took effect in 1978. As set forth in Public Officers Law § 84, its purposes include, *inter alia*, to protect the "people's right to know the process of governmental decision-making and to review the documents and

statistics leading to determinations . . .” and to do so by providing the public with “access to the records of government.”

12. As set forth in Public Officers Law § 87(2), all records held by any agency are available for public inspection and copying, unless they are exempted from disclosure pursuant to an exemption enumerated in §§ 87(2)(a) to (j).

13. There is a presumption that all agency records shall be made available to the public unless they fall squarely within one of the enumerated exceptions to FOIL.

14. FOIL provides for a process whereby members of the public may request access to agency records, and the agency must grant access thereto, except as set forth in Public Officers Law § 87(2). A process for an administrative appeal of a denial of a request for access to agency records is set forth in Public Officers Law § 89(4)(a) and in APA’s regulations at 9 NYCRR § 587.1.

15. In the event that access to any record is denied, and an administrative appeal thereof is unsuccessful, Public Officers Law § 89(4)(b) provides for judicial review of the agency’s action pursuant to CPLR Article 78.

16. In any such proceeding, the agency has the burden of proving that the records to which access has been denied fall within the exemptions set forth in Public Officers Law § 87(2).

17. In the event that judicial review of such an agency decision occurs, the court may undertake an *in camera* review of any records in question, in order to determine whether the agency has met its burden of proving that the records fall within one of the claimed exemptions.

18. In addition, the court may order a hearing to determine whether additional requested documents exist and are within the respondent's control, and should be released.

19. The public's right "to review the documents" at issue herein "should not be thwarted by shrouding it with the cloak of secrecy". Public Officers Law § 84.

BACKGROUND - THE ACR PROJECT

20. The ACR project is a proposed 700 +/- unit real estate development in the Town of Tupper Lake, within the Adirondack Park. It is the largest project for which an application has been filed with the APA since the adoption of the APA Act in 1971.

21. After a multi-year review process, a 19 day adjudicatory hearing, and several days of deliberations, Respondent voted to approve the ACR project on January 20, 2012. Petitioner was involved in all of the public phases of APA's review of the ACR project, and was a party to the adjudicatory hearing.

22. Petitioner and other parties have filed an Article 78 proceeding challenging that decision in Supreme Court, Albany County.¹ Pursuant to CPLR § 7804(g), the proceeding was transferred to the Appellate Division, Third Department, and is now pending in that court.

23. The ACR project requires the approval of several other agencies in addition to the APA, including the NYS Department of Environmental Conservation, the NYS Department of Health, the County of Franklin Industrial Development Agency, the Village of Tupper Lake, and the Town of Tupper Lake. Upon information and belief, none of the other required approvals have been issued.

24. The March 23, 2012 FOIL request which is at issue in this proceeding seeks certain records related to the APA's review and approval of the ACR project. In particular, the records sought were related to APA's "Guidelines for Biological Surveys" which were relied upon by APA in its final decision on the ACR Project, and to communications between APA and outside parties regarding APA's review and approval of the ACR project, from January 1, 2010 to March 23, 2012.

25. Petitioner no longer seeks the records related to the "Guidelines for Biological Surveys". This proceeding seeks only documents related to communications, as further described below.

¹ Protect the Adirondacks! Inc., et al. v. APA, et al., index no. 1682-12.

AS AND FOR A FIRST SEPARATE
AND DISTINCT CAUSE OF ACTION

26. Each and every allegation set forth above is incorporated in this cause of action as if set forth more fully herein.

27. By a letter dated March 23, 2012, and e-mailed to Brian M. Ford, the Respondent's designated Records Access Officer, on that date, Petitioner's attorney filed with APA, on behalf of Petitioner and others, a FOIL request seeking numerous documents and records related to the APA's review and approval of the ACR Project. A copy of said FOIL request is annexed hereto as Exhibit A.

28. By a letter signed by its Records Access Officer and dated March 30, 2012 APA acknowledged receipt thereof on that date. A copy of said letter is annexed hereto as Exhibit B.

29. Thereafter, by a letter dated July 6, 2012 from its Records Access Officer, APA provided 149 pages of documents in response to Petitioner's FOIL request. A copy of said letter is annexed hereto as Exhibit C.

30. Said response (Exhibit C) stated that certain records were excluded from the APA's response, for the following reasons:

The Agency has no mechanism to search for the records you have requested in Item #1 and #2 of your letter. However, the cover memo to the "Guidelines for Biological Survey" has been included.

Also not released in response to your request are inter-agency or intra agency materials that are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv) external audits, including but not limited to audits performed by the comptroller and the federal government. Such materials are exempt from release pursuant to §87(2)(g) of the Public Officer's Law.

Additional records not provided in response to your request are exempt from release pursuant to §87(2)(b) of the Public Officer's Law, as disclosure of these records would result in an unwarranted invasion of personal privacy as defined in §89(2)(b) of the Public Officer's Law.

31. Thereafter, by e-mail, Petitioner's attorney confirmed with the Records Access Officer the identity of the proper person at APA that an administrative FOIL appeal should be filed with. Copies of those e-mails are annexed hereto as Exhibit D.

32. On behalf of Petitioner and others, Petitioner's attorney then filed a timely administrative appeal of the partial denial of the FOIL request with the Respondent's Associate Counsel, Sarah Reynolds. A copy of said appeal, dated July 12, 2012, is annexed hereto as Exhibit E.

33. By letter from Ms. Reynolds dated July 24, 2012, the appeal was granted in part and denied in part. A copy of said letter is annexed hereto as Exhibit F.

34. By a letter dated August 8, 2012, Petitioner's attorney responded to a question raised by Ms. Reynolds in her July 24, 2012 letter regarding the identity of the parties that the initial FOIL request and the appeal had been filed on behalf of. A copy of said letter is annexed hereto as Exhibit G.

35. In response to Petitioner's FOIL appeal, APA released an additional 946 pages of records. See Exhibit F, page 3.

36. However, many of these records were heavily redacted. See Exhibit F, pages 3-4.

37. In addition, APA continued to withhold 23 records, or classes of records, as follows:

The documents considered responsive under this FOIL appeal were created between the dates at issue in the initial FOIL request - January 1, 2010 and March 23, 2012. A description of all of the documents being withheld or redacted is as follows:

1) Nine email threads between Agency attorneys (or other Agency employees acting pursuant to attorneys) and attorneys within the Executive Chamber, which are being withheld pursuant to POL §87(2)(a). These documents are subject to the attorney-client privilege and are attorney work product.

2) Three legal updates exchanged between Agency attorneys and attorneys within the Executive Chamber, which are being withheld pursuant to POL §87(2)(a). These documents are subject to the attorney-client privilege and are attorney work product.

3) Six email threads between Agency employees and employees within the Executive Chamber, which are being withheld as inter-agency documents pursuant to POL §87(2)(g). These documents are also subject to the deliberative process privilege.

4) Five draft Agency meeting agendas, which are being withheld as inter-agency documents pursuant to POL §87(2)(g). These documents are also subject to the deliberative process privilege.

5) All redacted materials are either (i) not responsive to your request or (ii) withheld pursuant to POL §87(2)(a) or (g) and subject to one or more of the attorney-client, deliberative process, and official information privileges.

See Exhibit F, pages 3-4.

38. Respondent has offered no proof that the documents that were withheld are lawfully subject to the claimed privileges or are otherwise exempt from disclosure under FOIL.

39. As a matter of law, the documents that were withheld are not lawfully subject to the claimed privileges and are not otherwise exempt from disclosure under FOIL.

40. Respondent has offered no proof that the material redacted from the redacted documents that were produced is lawfully subject to the claimed privileges or otherwise exempt from disclosure under FOIL.

41. As a matter of law, the material redacted from the redacted documents that were produced is not lawfully subject to the claimed privileges and is not otherwise exempt from disclosure under FOIL.

42. The action of Respondent in denying Petitioner access to the records, or redacted portions thereof, described above was arbitrary and capricious, affected by error of law, and a failure to perform a duty enjoined upon it by law.

43. Respondent lacked a reasonable basis for denying Petitioner access to the requested records, or the redacted portions thereof. Accordingly, pursuant to Public Officers Law § 89(4)(c), Petitioner should be awarded its reasonable attorney's fees and other litigation costs.

AS AND FOR A SECOND SEPARATE
AND DISTINCT CAUSE OF ACTION

44. Each and every allegation set forth above is incorporated in this cause of action as if set forth more fully herein.

45. Respondent has not met its burden of proving that it conducted a diligent search for the records that were requested on behalf of Petitioner pursuant to Exhibit A hereto.

46. Respondent never certified, in accordance with Public Officers Law § 89(3)(a), that it did not have possession of the requested records, or that it could not find the requested records after a diligent search.

47. Petitioner's FOIL request (Exhibit A, pp. 1-2) included the following:

3. All day calendars or other calendars or docket systems, maintained by or for the persons listed in paragraph A below, including, but not limited to, paper calendars, "Groupwise" records, calendars or records kept on any "Blackberry" or similar electronic device, and the like, below regarding any contacts or communications of any kind with the persons listed in paragraph B below.

4. All phone messages, memos, meetings summaries or minutes, correspondence, notes and other records produced by or for the persons listed in paragraph A below regarding any contacts of any kind with the persons listed in paragraph B below regarding the ACR application.

48. The records that were produced included none of these things.

49. The absence of "'Groupwise' records, calendars or records kept on any 'Blackberry' or similar electronic device,

and the like, [] regarding any contacts or communications” (Exhibit A, p. 1) is particularly inexplicable. Upon information and belief, all APA staff members are required to maintain such records.

50. Likewise, the absence of “phone messages, memos, meetings summaries or minutes, correspondence, notes and other records produced by or for the persons listed in paragraph A below regarding any contacts of any kind with the persons listed in paragraph B below regarding the ACR application” (Exhibit A, p. 2) is inexplicable. As shown by a January 13, 2012 memorandum written by the attorney for the ACR project,² there were extensive contacts between APA personnel (as listed in Paragraph A of Exhibit A) and representatives of the ACR project (as listed in Paragraph B of Exhibit A). A copy of said memorandum is annexed hereto as Exhibit H.

51. The action of Respondent in denying Petitioner access to such records, in failing to conduct a diligent search for them, and in failing to certify that it had conducted a diligent search, was arbitrary and capricious, affected by error of law, and a failure to perform a duty enjoined upon it by law.

52. Respondent lacked a reasonable basis for denying Petitioner access to the requested records. Accordingly,

² Said memorandum (Exhibit H) was directed from said attorney to members of the ACR project group, and copied, via e-mail, to the then-General Counsel of the APA, John Banta. A copy of this memorandum was produced by APA in response to Petitioner’s FOIL request (Exhibit A).

pursuant to Public Officers Law § 89(4)(c), Petitioner should be awarded its reasonable attorney's fees and other litigation costs.

WHEREFORE, Petitioner requests that judgment be made and entered in its favor as follows:

A. Declaring null and void:

(1) the July 6, 2012 decision of Respondent that partially denied Petitioner's March 23, 2012 request for access to records pursuant to the Freedom of Information Law ("FOIL"); and

(2) the July 24, 2012 decision of Respondent that partially denied Petitioner's administrative appeal of that decision pursuant to FOIL;

B. Declaring that the records, or redacted portions thereof, which were withheld by Respondent are not lawfully exempt from disclosure under FOIL;

C. Declaring that the withholding of records and the redaction of portions thereof, by the Respondent pursuant to said July 6, 2012 and July 24, 2012 decisions was arbitrary and capricious and affected by error of law;

D. Ordering Respondent to produce unredacted versions of all of the records identified in Petition ¶¶ 30 and 37;

E. In the alternative, conducting an *in camera* review of all of the records identified in Petition ¶¶ 30 and 37, and then

ordering Respondent to produce all such records, or portions thereof, which are not privileged or otherwise exempt from release under FOIL;

F. Ordering Respondent to conduct a diligent search for additional records that are responsive to Petitioner's March 23, 2012 FOIL request, as identified in Petition ¶¶ 47 and 49-50;

G. In the alternative, declaring that Petitioner is entitled to a hearing on whether additional responsive records exist and are within the Respondent's control, scheduling such a hearing before the Court, and ordering production of all such additional responsive records identified in the hearing;

H. Awarding Petitioner its attorneys fees and other litigation expenses pursuant to Public Officers Law § 89(4)(c);

I. Awarding Petitioner the costs and disbursements of this proceeding; and

J. Granting such other and further relief as may seem just and proper to the Court.

Dated: November 21, 2012

/S/ John W. Caffry

CAFFRY & FLOWER
Attorneys for Petitioner
John W. Caffry, of Counsel
100 Bay Street
Glens Falls, New York 12801
518-792-1582

VERIFICATION

STATE OF NEW YORK)
)SS.:
COUNTY OF WARREN)

John W. Caffry, being duly sworn, deposes and says that deponent is the attorney for the Petitioner herein; that deponent has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true; and that this verification is made by the deponent because the material allegations thereof are within my personal knowledge, and because I am a Director of Petitioner Protect the Adirondacks! Inc.

/S/ John W. Caffry

John W. Caffry

Sworn to before me this
 21st day of November, 2012.

/S/

NOTARY PUBLIC

R:\Client.Files\Protect-ACR.APA.2186\FOIL.Art78.2927\Petition.wpd