

RECEIVED
APR 15 2013

BY:

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

x

In the Matter of an Article 78 Proceeding

DECISION, ORDER
AND JUDGMENT

DR. JOSEPH NORTON and
DUTCHESS UNITED EDUCATORS,
Petitioners,

-against-

Index No: 7555/12

DUTCHESS COMMUNITY COLLEGE and
THOMAS E. LeGRAND, as Chair of the
Board of Trustees,

Respondents. *

x

The following papers were read and considered on this Article 78 petition.

NOTICE OF PETITION
PETITION.
EXHIBITS A-F

VERIFIED ANSWER
ANSWERING AFFIDAVIT
MEMORANDUM OF LAW IN OPPOSITION

MEMORANDUM OF LAW IN FURTHERANCE

Petitioners bring this proceeding pursuant to CPLR Article 78 alleging that respondents have failed to comply with a Freedom of Information Law request.

Pursuant to the Freedom of Information Law (Public Officers Law Article 6, hereinafter "FOIL"), petitioner Dr. Joseph Norton ("petitioner") sent respondent Dutchess Community College ("the college") a letter on September 21, 2012 seeking, inter alia, "copies of the most recent insurance policy statements including the current value of the policy for Dr. Conklin." Petitioner further sought "the itemized college contributions to the insurance policy and the cash surrender value to date." By letter dated October 12, 2012, the college provided petitioner with a copy of a Board of Trustee resolution authorizing the purchase of a \$250,000.00 life insurance policy in the name of Dr. Conklin, a copy of an annual premium statement and paperwork indicating payment of

the annual premium was made on August 15, 2012.

On October 17, 2012 petitioner resubmitted his FOIL and elaborated that he was seeking “the contract plan document(s)” for the policy as well as “policy annual reports showing the value accrued during the prior five (5) years.” The college responded that it had provided the available documentation relating to the insurance policy in response to his first FOIL request and that the additional information requested was “not available within the record of the college.” Petitioner then sent a letter appeal to the college’s Board of Trustees seeking “the insurance policy the college pays on behalf of Dr. Conklin, the annual report the insurance company issues and the cumulative record of all payments made for the insurance policy and the value to date.” Respondent Thomas LeGrand replied to petitioner that the college had provided all information available regarding the subject insurance policy. The letter further restated that the “additional information you requested is not available in the records of the college, and therefore, cannot be provided to you.” This proceeding followed.

FOIL was enacted “to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage officials secrecy.” Matter of Alderson v. New York State Coll. of Agric. & Life Sciences, 4 NY3d 225 (2005). When faced with a FOIL request, an agency must either disclose the records sought, deny the request and claim a specific exemption to disclosure, or “certify that it does not possess the requested document and that it could not be located after a diligent search.” Public Officer’s Law §89(3)(a); Beechwood Restorative Care Center v. Signor, 5 NY3d 435 (2005).

In this proceeding, petitioner maintains that: (1) respondents have failed to provide all documents in their possession responsive to his FOIL request; and (2) respondents failed to certify that they were not in possession of such records or that they conducted a diligent search in an attempt to locate the requested documents. In response, respondents assert that they have provided all documents in their possession responsive to petitioner’s request and that they were not required to certify that responsive records could not be located because petitioner failed to request any such certification.

Contrary to respondents’ assertions, petitioner was not required to explicitly request that respondents certify that responsive records could not be located following a diligent search. The express language of Public Officer’s Law §89(3) states that “the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search.” See De Fabritis v. McMahon, 301 AD2d 892 (3rd Dept. 2003).

Respondents’ statements that the requested information “is not available within the record of the college” fails to satisfy the certification requirement of Public Officer’s Law §89(3). While the statute does not specify the manner in which an agency must certify that documents cannot be located and “neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required,” Oddone v. Suffolk County Police Dept., 96 AD3d

758 (2nd Dept. 2012), respondents response that the information requested was "not available" failed to indicate that a diligent search was conducted.

The court recognizes that the answering affidavit of Dr. William F. Anderson states that the college is not in possession of the requested records. However, such affidavit fails to expressly state that a diligent search was been conducted and thus is insufficient to render this proceeding moot. See generally Rattley v. New York City Police Dept., 96 NY2d 873 (2001). Wherefore, it is hereby

ORDERED that the petition is granted to the extent that within thirty days of the date of this decision, respondents are hereby directed to either disclose the requested documents or provide a certification that they have conducted a diligent search and the requested records are not in their possession or can not be located. It is further

ORDERED that petitioner's request for counsel fees and costs is denied. The court does not find that this proceeding involved a matter of significant interest to the general public or the respondents' conduct warrants invoking FOIL's fee-shifting provision.

The foregoing constitutes the decision, order and judgment of this court.

Dated: April 11, 2013
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C

David A. Sears, Esq.
One Civic Center Plaza, Suite 302
Poughkeepsie NY 12601

Roemer Wallens Gold & Mineaux, L.L.P.
Earl T. Redding, Esq.
13 Columbia Circle
Albany NY 12203

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Rosa's Chambers, please do not submit any copies. Submit only the original papers.