

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

JENNY STEIN,

Petitioner,

vs.

Index No. 2013-0151

**VILLAGE BOARD OF TRUSTEES OF THE
VILLAGE OF CAYUGA HEIGHTS,**

Respondent.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

APPEARANCES: TREVOR J. DESANE, ESQ.
Attorney for Petitioner
10 River Road, Unit 15G
New York, New York 10044

WILLIAMSON, CLUNE & STEVENS
By: John Alden Stevens, Esq.
Attorneys for Respondent
317 North Tioga Street
Ithaca, New York 14850

DECISION & ORDER

Mulvey, Robert C., J.

The petitioner seeks a judgment pursuant to Section 7806 of the Civil Practice Law and Rules directing the respondent municipality to produce documents in accordance with Article 6 of the New York Public Officers Law (“Freedom of Information Law”), together with an award of attorney’s fees and litigation costs.

The documents sought pertain to deer management activities. The respondent contends that release of the records would constitute an unwarranted invasion of personal privacy and could endanger the life or safety of persons. The Mayor of the Village has furnished an affidavit reporting that proponents of a deer-culling program have received threats of death or other personal harm, possibly occurring at culling sites.

The petitioner notes that the respondent has failed to furnish a certified transcript of the record pursuant to CPLR Section 7804(e), and contends that the affirmative defenses set forth in the respondent’s answer are not valid. The petitioner further contends that the respondent has failed to sustain its burden of proof to establish that any FOIL exemptions apply, pointing out that the Mayor’s affidavit contains unsubstantiated representations regarding possible harm to persons or property. Finally, the petitioner objects to the Mayor’s stated intent to make any authorized redactions personally.

FACTS

On August 24, 2012, the petitioner filed a FOIL request with the respondent seeking documents pertaining to potential or actual deer management sites and permission to release forms related to deer management activities. The request sought the following:

“From January 1, 2011 to the present, all communications/correspondence/memos/emails (including all notes regarding conversations in person or by phone or by video chat) between Village officials /Village appointees/Village employees and any Village residents and/or property owners related to the topics of:

a) Actual or potential sites within and/or around Cayuga Heights for activities related to deer management; and

b) Permission forms/release forms related to deer management activities, including documents that have been completed and/or signed and submitted by individual residents and property owners.”

The respondent denied the request by letter dated September 21, 2012, because the records were “compiled for law enforcement purposes and could if disclosed endanger the life or safety of persons.”

On October 19, 2012, the petitioner submitted an appeal of the denial. On October 31, 2012, the respondent, through the Mayor, denied the request, citing danger to life and safety. On November 16, 2012, the petitioner proposed disclosure with identifying information redacted. By letter dated November 26, 2012, the Mayor referred again to the October 31, 2012 denial.

This proceeding was commenced by filing of the Notice of Petition and supporting papers on February 11, 2013.

DISCUSSION

1. Procedural Issues

Although the respondent’s Answer was not properly verified at the time of filing, it did file a proper verification on March 14, 2013.

The respondent has failed to file a certified transcript of the record of the proceedings, as required by CPLR Section 7804(e). This provision has been construed to require a record that is sufficiently developed to provide an adequate basis upon which to review an agency’s determination. **Matter of Global Tel*link v. State of New York Dept. of Correctional Services**, 70 AD3d 1157 (Third Dept., 2010). Although the respondent has failed to comply with this obligation, the record presented through the submissions of counsel provides an adequate basis for the Court’s determination herein.

2. Record Access

The Court finds that the respondent has established that release of identifying information could endanger the life or safety of property owners and could also lead to the unwarranted invasion of personal privacy (see, **Matter of Goyer v. New York State Dept. of Environmental Conservation**, 12 Misc3d 261 (2005)). The petitioner need only demonstrate the possibility of endangerment (*id.*, at 272). The affidavit of the Mayor amply demonstrates the history of threats attendant to this controversial program.

Consequently, the Court directs that all documents requested shall be released to

the petitioner after redaction of names, addresses, and any other information that could allow the identification of a property owner or the location of deer management activities.

The respondent has reported that the documents can be ready for release by April 15, 2013. Absent any legal support for the petitioner's objection to the redaction of the records by the Mayor personally, the Court declines to specify which municipal officer shall carry out the redaction.

3. Award of Counsel Fees

A court may award fees where the party seeking disclosure has "substantially prevailed" in the proceeding and the respondent did not have a "reasonable basis for denying access" to the records in question. **Public Officers Law Section 89(4)(c)**.

The Court finds that the respondent did not have a reasonable basis for rejecting the petitioner's November 16, 2012 proposal to redact the records prior to disclosure. It was not until this proceeding was commenced that the respondent offered redacted copies (Verified Answer, par. 5 referencing attorney Stevens' letter of February 25, 2013). Even if records are produced prior to the court's determination, a court may award counsel fees on the ground that the party requesting the documents substantially prevailed. **New York State Defenders Association v. New York State Police**, 87 AD3d 193 (Third Dept., 2011). In that case, the Appellate Division noted "to allow a respondent to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purposes of FOIL's fee-shifting provision." **Id.**, 196.

In this case, as in the case cited, the respondents have failed to articulate any reason why the records could not have been redacted and the portions that were not exempt from disclosure turned over in response to the initial request.

The Court finds that the petitioner has substantially prevailed in this matter and awards counsel fees and costs to the petitioner. Petitioner's counsel shall submit, on notice to the respondent, proof of services provided and costs and expenses incurred in this proceeding, within twenty days of entry of this Decision and Order. A written request by the respondent for a hearing on the award shall be submitted to the Court, on notice, within five days of receipt of the submission by petitioner's counsel. A hearing on the award shall be conducted by the Court in due course thereafter. If no hearing is requested, the Court will determine the award after consideration of the written submission.

CONCLUSION

The Court therefore grants the petition and awards judgment directing the respondent to furnish all redacted records demanded by the petitioner, subject to the payment of appropriate charges, no later than April 15, 2013. Counsel fees are awarded as directed above.

This Decision constitutes the Order of the Court. Transmittal of this Decision and Order by the Court shall not constitute notice of entry.

Signed this 29th day of March, 2013 at Ithaca, New York.

**Hon. Robert
C. Mulvey**

Digitally signed by Hon. Robert C. Mulvey
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York State Supreme Court, ou=Justice,
email=tpkmulvey_chambers@nycourts.g
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