Supreme Court, New York County

October 6, 1988

IA PART 10

Justice Shainswit

FISHER & FISHER v. DAVISON — The primary issue here is one of first impression, and therefore requires a full exposition of the factual frameworkdefining the issue. The Freedom of Information Law is at the core of the proceedings.

The cardinal question is whether voluminous records and data, sought by a landlords' organization under the claimed authority of the Freedom of Information Law, can be withheld because the very nature of the landlords' organization per se establishes that the information sought is desired for a commercial purpose. A related question is whether the massive information sought threatens an unjustified intrusion into the privacy of numerous individuals.

The record on this motion can be concisely summarized.

Petitioner Fisher & Fisher, a law firm originally appearing pro se, but ultimately conceding that it was acting on behalf of a landlords' organization called the Rent Stabilization Association, applied, on January 7, 1988, to the New York City Department of Health, under the Freedom of Information Law ("Foil"), for the following information, within five days:

"1. Instructions given to and procedures followed by Department of Health inspectors carrying out window guards inspections, including all training manuals and materials.

2. Instructions given to and procedures followed by hearing officers of the Department of Health Administrative Tribunal with regard to hearings concerning violations of §131.15 of the Health Code, incluu ing all training manuals and materials.

3. All violations issued to either landlords or tenants for violations of §131.15 of the Health Code since July 1, 1986.

4. All hearing decisions issued by the Department of Health Adminstrative Tribunal in Proceedings concerning violations of §131.15 of the Health Code since July 1, 1986.

5. All decisions rendered after appeals from decisions of the Department of Health Administrative Tribunal concerning violations of §131.15 of the Health Code since July 1, 1986.

6. All letters sent to tenants since July 1, 986, informing them of their obligations nder §131.15 of the Health Code, and of he consequences of failing to comply with 131.15.

7. A list of all tenants to whom the letters eferred to in request 6, above, were sent, the same exists.

8. All press releases, speeches, and pub- documents or reports issued by the Dertment of Health with regard to window ards since January 1, 1984.

9. All opinions of counsel issued by or ven to the Department of Health with rerd to window guards.

10. All pleadings, motions, briefs and emoranda, judicial decisions, orders and lgments from any litigation ot which the partment of Health or any official or emyee thereof acting in the course of emyment, is a party, involving window ards."

The Department provided all of the information asked, except as follows:

3. We have no capability of retrieving information.

4. We have no capability of retrieving this information except as is available as a statistical summary, which is provided. * *

6 & 7. These requests are denied. Disclosure of this information would constitute an unwarranted invasion of personal privacy (Sections 87(2)(b) and 89(2)(b) of the Public Officers Law."

Petitioner appealed to the agency's Appeals Officer, contending that difficulty in retrieval is irrelevant, and that it was itself "prepared to visit the Health Department offices and sift through whatever files are required in order to isolate the documents we seek"; it added the statement "that this material is not sought for the purpose of any commercial or fundraising solicitation.

The appeal was denied, with the explanation that:

"The landlord is a party properly concerned with enforcement of Health Code Section 131.15 in his or her building and accordingly, is entitled to the information with regard to his or her tenants. You are not such a party. Therefore, you were properly denied access to the names and addresses of the tenants under Section 87(a)(b) and 89(2)(b) of the Public Officer's Law, as disclosure thereof would constitute an unwarranted invasion of personal privacy.

Items 3 and 4 of your original request were also correctly denied. Section 89(3) of the Freedom of Information Law does not require an agency to prepare any record not possessed nor maintained by it or to create any new filing system in order to locate and provide material sought under the law. In order to provide you with the material sought in these items of your request, where no docket/violation numbers and names and addresses are provided by you, would require the agency to prepare and maintain an entirely new record system."

Petitioner thereupon brought on this Article 78 proceeding, seeking essentially three types of documents:

(a) all letters sent to tenants by the Department seeking to have the tenant provide the landlord with information or access to the apartment, and a list of the names and addresses of the tenants receiving such letters.

(b) all hearing decisions issued by the Department's Administrative Tribunal.

(c) all notices of violation issued for violation of §131.15 of the Health Code.

Respondents, in addition to denying petitioner's allegations, raised as affirmative defenses:

"(1) petitioner seeks names and addresses of the tenants to whom the Department's Window Falls Prevention Office has written letters. Names and addresses are exempt from production under §87(2)(b) and §89(2)(b)(iii) of the Public Officers Law unless the requestor can prove that it will not use the information for commercial purposes. Petitioner, who is apparently acting for an organization of landlords, has failed to establish that neither it nor the organization are going to use the information for financial advantage against tenants. Accordingly, the information is exempt from disclosure; (2) decisions of the Administrative Tribunal are records of a municipal court, and therefore exempt from Foil under §85 of the Public Officers Law, and (3) Notices of Violations and decisions of the Administrative Tribunal contain names and addresses of tenants and other individuals and are therefore exempt from production, as in (1) above.

In reply, petitioner contended that it ". . . seeks to obtain information . . . as an effective tool for exposing waste, negligence and abuse on the part of government officers."

Petitioner does not deny respondents' statement that there are over 9000 Notices of Violation for the period sought by petitioner, stored by the address of the building, that 2000 letters have been sent to tenants, and that the Administrative Tribunal has had a total docket of over 30,000 cases in that same period.

Sec. 87(2)(b) of the New York Public Officers Law states, in pertinent 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: * * *

b. if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eightynine of this article * * *

e. are complied for law enforcement purposes and which, if disclosed, would

i. interfere with law enforcement investigations or judicial proceedings.

Sec. 89(2)(b) reads:

"An unwarranted invasion of personal provacy includes, but shall not be limited to: * * *

iii. sale or release of lists of names and address if such lists would be used for commercial or fund-raising purposes"

(1) Petitioner's allegation that it does not intend to use the names and addresses it seeks "for commercial purposes" cannot withstand scrutiny. The landlords' group involved is openly seeking this information for its own benefit — and that benefit is, by definition, commercial — however principled and highminded its clients are in petitioner's eyes. Indeed, even if this were not so, and landlords had indeed no commercial purpose, their request could still be denied because tenants are entitled to personal privacy — apart from the specific language of FOIL — as against an organization seeking to advance the interests of landlords.

Accordingly, letters sent to tenants, notices of violation, and hearing decisions — all including names and addresses of tenants and individuals appearing at hearings — were properly held exempt from disclosure.

(2) Respondents are correct that the Administrative Tribunal should not have to interrupt its work — speedily processing health code violations cases — to respond to massive Foil requests like this one.

Sec. 558(e) of the New York Charter, authorizing the Tribunal, provides that:

"* * * an administrative tribunal established by the board of health to enforce the provisions of the health code shall have the power to enforce its final decision and orders imposing pecuniary penalties as if they were money judgments, without court proceedings, in the manner described herein. After four months from the issuance of such a final decision and order by such board of tribunal a copy of such decision and order shall be filed in the office of the clerk of any county within the city * * *. Upon such filing, such county

clerk shall enter and docket such decision and order in the same manner and with the same effect as a money judgment. Upon such entry and docketing, such decision and order may be enforced as provided in article fifty-two of the civil practice law and rules."

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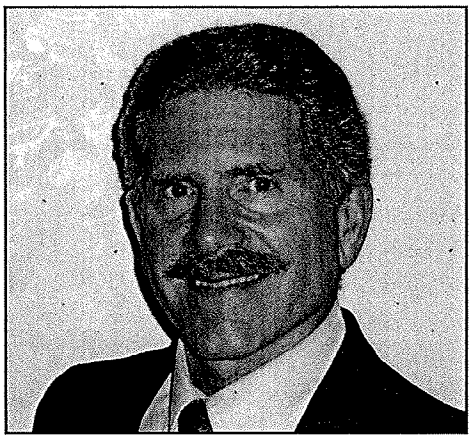
(3) Finally, petitioner's claim that it is entitled to see the records in question merely as a taxpayer (New York Charter, Sec. 1114) begs the question. No one is denying petitioner's right to see public records generally, or any of these dockets for which it has an index number.

Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons, subserves a commercial purpose outside the concerns of the Freedom of Information Law, and would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy. All in all, respondents were abundantly justified in decining to issue the directives sought by petitioner. The court will not disturb respondents' determination on the record now presented.

Settle judgment.

FOIL and...Harassment!

By: Robert Freeman
Exec. Director for Committee
on Open Government
NYS Department of State



To Contact Bob:
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Albany, NY 12231
Phone: (518)474-2518
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With increasing frequency, I hear from you concerning what some would consider to be harassment on the part of those who use FOIL. Before offering recommendations, I'd like to suggest that every town these days seems to have what I have characterized as the "local lunatic." In some cases, it may be the local gadfly. In others, it may be political motivation, and on occasion, we've heard of plain old nastiness. Some people, it seems, make dozens of requests just to create work, and not really caring about whether records are made available or not.

For better or worse, there is little in the way of judicial guidance regarding the issue. Courts historically have been reluctant to draw a clear dividing line between what is viewed as harassment as opposed to "mere inconvenience." A person can be a pain in the neck to some but a hero to others. Facts and circumstances, and the terms of a request, are the keys to figuring out what course of action should be taken.

Let's assume for the purpose of discussion that one of those people lives in your town and makes request after request...after request. Several points can be offered.

First, FOIL pertains to records. It doesn't require that you answer questions. You can choose to do so, and we all do, but there's no requirement in FOIL indicating that you must supply information in response to questions.

Second, FOIL deals with existing records, and the law does not require that you create new records to accommodate an applicant. If, for example, the request is for the record indicating the total cost of heating the town hall last year. Chances are that there is no record containing a total. You have what most of us have: twelve monthly bills. You would not be obliged to add the figures in the monthly bills to come up with a total. If it's the lunatic, you might state that there is no total, and "please go away." But if you're nice (and I'm sure that you are), you could prepare a total even though there's no obligation to do so; or you could tell the applicant that you have twelve monthly bills that can enable that person to create his/her own total.

Third, if the applicant asks for copies of records, you can estimate the number of pages and ask for payment before going through the effort of making copies. Perhaps better yet, if you've made copies at the request of the applicant, and that person hasn't paid but has submitted another request, you may inform him/her that a new request will not be honored until the town is paid the amount due. Also, if it's a repeat requester and that person is seeking the same records repeatedly, case law indicates that if copies of particular records were made available previously, ordinarily there is no obligation to make copies of the same records again in response to a second (or third or fourth) request.

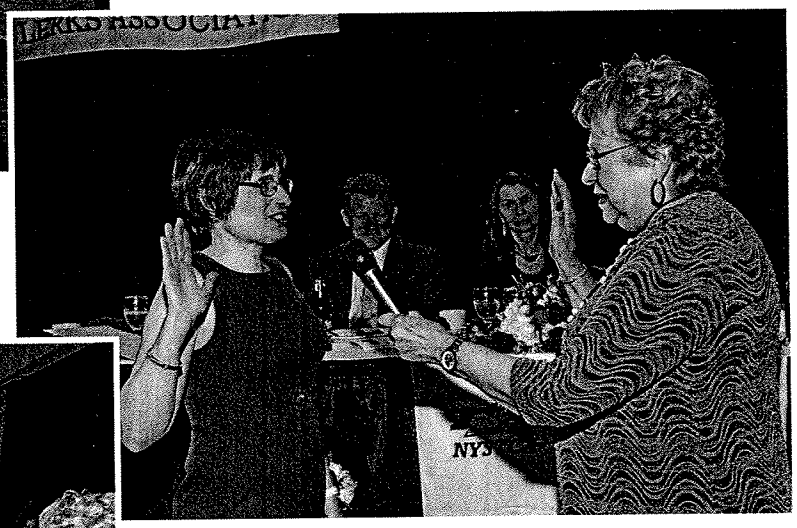
Fourth, if the applicant wants to save money and asks to inspect records, if the records are public in their entirety, inspection is free. However, if there is something within a record that may be redacted, such as a social security number, a home phone number, an indication of the nature of a medical condition, etc., you can tell the applicant that he/she cannot inspect the record. If that person wants a copy of the record following the proper redactions, you have the right to charge up to twenty-five cents per photocopy, and again, you may charge in advance.

Next, we haven't yet considered the needle in the haystack. FOIL requires that an applicant must "reasonably describe" the records sought. Insofar as you have the ability to locate and identify the requested records with reasonable effort, the request is valid. But if you have to go through the haystack in order to find the needles that you know are there, somewhere, and you have to go through thousands of pages or entries one by one to find them, the request does not reasonably describe the records.

I offer the example that was suggested at the last NYSTCA conference: I see the phone book in your office and say, "Aha, it's a record, and I hereby request all the listings in the phone book involving people whose last name is "Smith." That's easy because that's how the phone book is presented: last names in alphabetical order. Even if there are a thousand Smiths, the request would reasonably describe the records. But what if the same person comes in the next day and asks for all the listings pertaining to those persons whose first name is "John." It's not an uncommon

continued on page 11

NYSTCA Officials Take Oaths of Office



Jo-Ann Raia, Huntington Town Clerk issued the Oaths of Office to the officers and incoming district directors at the 2018 NYSTCA Banquet.

Committee On Open Government

continued from pg 2

name, and you know that there are Johns there, but you can't find them unless you review thousands of listings one by one. That's when you tell the applicant that you maintain the records by last name in alphabetical order, not by first name, and that the request, therefore, does not reasonably describe the records at issue.

Finally, you've heard this, too: if you want to jump in response to a request, you can jump. However, FOIL doesn't require that you jump. FOIL is flexible. If you need more than five business days to determine rights of access, the law requires that the receipt of the request be acknowledged in writing within that time, and that an approximate date of response be given, usually not to exceed twenty additional business days. If you need more than twenty business days, the law requires that an explanation for the inability to respond within that time must be given in writing, and that you provide a "date certain", which is a self-imposed deadline. So long as the delay beyond five business days is reasonable based on the facts and circumstances, you'd be complying with law.

Suggestion: when you're involved with the local lunatic or repeat requester, keep a record of the requests and your responses. If the town is sued, you want to be able to show the judge that you've acted reasonably....and that the applicant has been unreasonable (if not irrational!).

SUPREME COURT : NEW YORK COUNTY

IAS : PART 10

BERNARD HANFT,

Petitioner,

-against-

MATTHEW T. CROSSON, CHIEF ADMINISTRATOR OF THE COURTS, AND AS FOIL APPEALS OFFICER,

Respondent.

INDEX #24803/90-001

Cal. #10 -- 1/14/91

SHAINSWIT, J.:

Petitioner brings this Article 78 proceeding to compel compliance by respondent, the Chief Administrator of the Courts of New York State, with a number of requests for records under the Freedom of Information Law (Public Officers Law, §84 et seq. "Foil").

On careful review of the record, the court finds that, prior to the initiation of this lawsuit, petitioner had already been informed of the method for obtaining each and every one of the records he seeks, and has chosen not to avail himself of those methods.

The court further finds that petitioner's requests are part of his continuing campaign to harass and intimidate members of the Judicial Branch. The Foil requests -- the documents appointing various judges, their payroll records, etc. -- are almost all concerning judges who have ruled against him or nonjudicial employees who failed to carry out his requests. The Appellate

Division, First Department, recently, in Jones v. Camar Realty Corp., ___ AD2d ___ (NYLJ November 23, 1990, p. 26, col. 2) sanctioned petitioner in the sum of $2,000 for frivolous litigation conduct and his ad hominem attack on the judiciary. The Foil requests, and the abusive letters to respondent and the Chief Judge, submitted in connection therewith, were patently intended to continue that conduct and those attacks. The proceeding is dismissed.

Dated: January 25, 1991.

J. S. C.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

WAYNE JACKSON,

Petitioner,

-against-

Decision and Order
Index #1563-96
RJI #01-96ST6530

BRIAN J. WING, Acting Commissioner of New York Dept. of Social Services, ROSS A. PRINZO, JR., Commissioner of Albany County Dept. of Social Services, MR. RAY TOBIN, MR. RICHARD RUDDOCK, both of Albany County Dept. of Social Services, DENNIS VACCO, Attorney General of New York State, MICHAEL G. ROSSETTI, of New York Dept. of Law, Albany, N.Y. and other to be named,

JUN 17 2 53 PM '96
OFFICE OF ALBANY COUNTY CLERK ALBANY, N.Y.

Respondents,

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

(Supreme Court, Albany County, Special Term of April 26, 1996)

(Justice Thomas W. Keegan, Presiding)

APPEARANCES:

WAYNE JACKSON
Petitioner Pro Se
421 Clinton Avenue
Albany, New York 12206

HON. DENNIS C. VACCO
Attorney General of the State of New York
(Keith E. Kammerer, of Counsel)
Attorney for Respondents Wing, Vacco and Rossetti
The Capitol
Albany, New York 12224

MICHAEL C. LYNCH, ESQ.
Albany County Attorney
(Craig A. Denning, of Counsel)
Attorney for Respondents
Prinzo, Tobin and Ruddock
112 State Street
Albany, New York 12207

KEEGAN, J.:

Petitioner commenced this CPLR article 78 proceeding to review determinations of the respondents in regard to petitioner's repeated Freedom of Information Law ("FOIL") requests for production of documents relating to his applications for public assistance.

Respondents move to dismiss and interject several objections in point of law. All of the objections raised by the respondents have merit, and most are dispositive of the instant proceeding; however, in the interest of judicial economy, the Court will only address only the following four.

First and foremost, petitioner has filed a Notice of Appeal of the Decision and Order of the Hon. George Ceresia dated February 26, 1996, which involved essentially the same litigants, and petitioner's FOIL requests for the same material. Thus, there is a prior proceeding pending, and "[u]nder CPLR 3211(a)(4), the court enjoys broad discretion to dismiss an action pending between the same parties, dealing with a like action in another forum ." Matter of Janet L., 200 AD2d 801, 803, *lv to appeal dismissed in part, denied in part* 83 NY2d 941.

Second, it is obvious that in regard to his FOIL requests after the return date of his earlier article 78 proceeding on August 11, 1995, petitioner has failed to exhaust his administrative remedies by simultaneously serving on the State an appeal of a denial with the application for access without being notified that any portion of his request was being denied.

Watergate v. Buffalo Sewer, 46 NY2d 52, 57. Furthermore, petitioner has not shown that he followed established FOIL procedures, or pursued and obtained a final administrative determination from Albany County Department of Social Services.

Third, the petition fails to state a cause of action against the Albany County respondents as no facts are stated to support petitioner's claim that Albany County or any of its designated employees failed to follow § 87 of the Public Officers Law, or Resolutions Nos. 58 of 1978 and 35 of 1993.

Four, as evidenced by his signed receipt of February 22, 1996, petitioner has received 524 pages of the documents he seeks despite continually thwarting State respondents' attempts to comply with his requests, rendering his claims moot in regard to those documents.

Accordingly, respondents' motions are granted and the petition dated March 20, 1996 is dismissed.

Finally, a review of the papers before this Court indicates that the conduct of the petitioner throughout the earlier proceeding and since has been utterly vexatious, and at times, abusive. Although the Court hesitates to impose the financial sanctions sought by the respondents, it does not hesitate, given petitioner's course of conduct, to enjoin and restrain the petitioner from entering the non-public portions of the Attorney-General's and Department of Law premises. Furthermore, the Court will also hereby enjoin and restrain the petitioner from commencing any further actions, or proceedings in any form, with respect to

his FOIL requests, in any jurisdiction or in any forum, against the State and/or County respondents, and/or their respective agencies or employees, without the permission of this Court.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to State respondents' attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Albany, New York
June 13, 1996.

Thomas W. Keegan, J.S.C.

6-17-96

PAPERS CONSIDERED:

(1) Notice of Petition, sworn to March 20, 1996.
(2) Verified Petition, sworn to March 20, 1996, with attached exhibits.
(3) Notice of Motion to Dismiss, dated April 19, 1996.
(4) Affirmation of Keith E. Kammerer, Esq., dated April 19, 1996, with attached exhibits.
(5) Affidavit of David S. Kellogg, Esq., sworn to April 18, 1996.
(6) Notice of Objections and Motion to Dismiss, dated April 19, 1996.
(7) Affidavit of Craig A. Denning, Esq., sworn to April 19, 1996, with attached exhibits.
(8) Affidavit of Raymond J. Tobin, sworn to April 18, 1996.
(9) Affidavit of Richard J. Ruddock, sworn to April 18, 1996.
(10) Affidavit of Eric Nisch, sworn to April 16, 1996.

IA PART 10

Justice Shainswit

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Settle judgment.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Application of

SCOTT L. FENSTERMAKER,

Petitioner,

For an Judgment Pursuant to CPLR Article 78

DECISION AND ORDER
Index No.: 06-11632

- against -

THE EDGEMONT UNION FREE SCHOOL DISTRICT, NANCY L. TADDIKEN, District Superintendent, and SUSAN SHIRKEN, as District Records Access Officer,

Respondents.

----------X

LOEHR, J.

In this proceeding pursuant to Article 78 of the Civil Practice Law and Rules petitioner seeks a judgment:

Directing respondent Edgemont Union Free School District (the "School District") to provide copies of all records requested in his FOIL request of January 31, 2006 (the "First FOIL Request") at the lowest fee collected by the School Dsitrict on FOIL requests during the period between the enactment of FOIL until the present;

Directing the School District to eliminate extraneous, irrelevant and superfluous documents from its response to petitioner's First FOIL request; and

Directing the School District to comply with petitioner's FOIL request of June 8, 2006 (the "Second FOIL Request") wherein he requested a copy of each FOIL application filed with the School District since the enactment of its FOIL rules and regulations, such copies to be

provided at the lowest fee collected by the School District on FOIL requests during the period between the enactment of FOIL and the present.

As a resident of the Edgemont School District and apparently concerned with the District's "fraud-prevention" efforts, by letter dated January 31, 2006, petitioner made a request of the School District pursuant to the Freedom of Information Law ("FOIL"). The request specified 60 categories of financial records which spanned the period from January 1, 2001 to December 31, 2003.[1] In the letter, petitioner stated: "Naturally, I and my fellow residents involved in this effort will be responsible for any and all costs reasonably associated with this effort."

By letter dated February 8, 2006, respondent Shirken, in her capacity as the School District's Records Access Officer, provided a written response. Requests numbered 41 and 42 were denied on the basis that they called for a narrative response and not for records. The 58 other requests were granted. Her reply also advised that some of the records which had been requested would have to be redacted to delete personal information such has home addresses and Social Security numbers (*see Beyah v Goord,* 309 AD2d 1049, 1050 [3d Dept 2003]). The letter closed with the following:

> "When the records have been assembled and boxed up, we will, as you ave suggested, have them delivered to an outside contractor for duplication at your expense. I encourage you to confer with Mr. Kehl [Respondents' counsel] for the for the purpose of recommending a duplicating contractor for this purpose. We will require that it be an entity with experience and established reputation in handling bulk duplicating projects

[1] Typical of this request is the following: "(1) Any and all records, in whatever form, reflecting accounts payable by the Edgemeont Union Free School District for the period from January 1, 2001 through December 31, 2003."

efficiently and without damage or disarrangement to the original materials being copied . . . . We will also require that you make appropriate advance arrangements to ensure payment, as you will, I trust, understand that we cannot permit a situation to develop in which public records might become subject to a contractor's retaining lien for unpaid services.

"To the extent that access to any record has been denied, you may appeal such denial in writing within thirty days after your receipt of this letter. Your appeal should be addressed to Ms. Nancy L. Taddiken, Superintendent of Schools, at the above address."

Petitioner did not appeal this determination.

By letter dated February 15, 2006, petitioner responded in part:

"In the penultimate paragraph of your letter [of February 8, 2006], you make a number of requests, or some may reasonably conclude, demands, about how, and by whom the records will be copied. One of the reasons that I asked that communications be routed through Mr. Kehl is to avoid any unnecessary confrontational episodes during this process, which I anticipate will take a number of years. As far as what you 'will require,' we will comply with what the law requires, not what you and your colleagues require. We have every intention of using professional copying services equipped to adequately, professionally, and efficiently handle this responsibility. I suggested, in the Request, that Mr. Kehl and I agree on such a service. I again reiterate that suggestion, notwithstanding your 'requirements.'

* * *

"As far as ensuring that proper payment arrangements are made we will comply with your requirement that adequate payment arrangements are made. We are confident that, at

the conclusion of this matter, we will ultimately be reimbursed by School District funds."

By April 3, 2006, respondents had identified and assembled 48 boxes of original records for copying as well as having already copied several thousand pages of additional material which needed to be copied so that the material could be returned to working files or redacted. The parties agreed that they would use an outside copying service and anticipated having to look to Manhattan in order to find a facility large enough to properly handle the job. It was also agreed, at petitioner's request, that he could inspect the records before they were sent out for copying in order to insure that he would not have to pay for the duplication of non-responsive material. Rather than make this inspection, however, by letter dated April 7, 2006, petitioner accused respondents of having created a situation "rife with bribes and kickbacks;" that he was certain that respondents had already altered or destroyed certain of the requested records; that counsel was operating under a conflict of interest in that he was responsible as counsel for respondents' malfeasance; and that he was therefore demanding that the records be sent to a copy service designated by him.

By letter dated April 10, 2006, respondents through counsel informed petitioner that he would be billed $0.25 per page for the records that had already been copied; that the balance of the requested records would be copied by a duplicating service of the School District's choice; that petitioner could inspect the records before they were sent out for copying but they would not be sent out at all unless and until petitioner paid for the copies that had already been made and provided suitable security for payment for the copies to be made. By letter dated April 12, 2006, petitioner was informed that the charges for the copies already made was $4,666.25.

On April 26, May 10, May 17, May 24 and June 1, 2006, petitioner made five two-hour visits to the School District's office where, with an employee of the School District present, he

reviewed the records. No objection was then made that the records were non-responsive, nor did petitioner pay for the copies already made.

Rather, by letter dated June 8, 2006, petitioner made a second FOIL request, this time seeking a copy of each FOIL application filled with the School District since the enactment of its FOIL rules and regulations.[2] By letter dated June 12, 2006, Shirken granted the request on the condition that the $4,666.25 still outstanding for the copies made pursuant to petitioner's first FOIL request be paid. The letter concluded with the following: "To the extent that access to any record has been denied, you may appeal such denial in writing within thirty days after your receipt of this letter. Your appeal should be addressed to Ms. Nancy L. Taddiken, Superintendent of Schools, at the above address." By letter dated June 17, 2006, petitioner appealed this determination. By letter dated June 29, 2006, the Superintendent affirmed Shirken's June 12, 2006 determination. This article 78 proceeding followed.

Petitioner's first request for relief seeks an order directing the School District to provide copies of the records requested in his FOIL request of January 31, 2006 at the lowest fee collected by the School District on FOIL requests during the period between the enactment of FOIL and the present. As a preliminary matter, respondents move to dismiss this claim on the basis that petitioner has not exhausted his administrative remedies.

Public Officers Law § 89(4)(b) provides:

> ""[A] person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules."

Respondents contend that petitioner having failed to appeal Shirken's determination of February

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[2] The School District enacted FOIL regulations in the 1970's.

8, 2006, petitioner has failed to exhaust his administrative remedies thereby precluding article 78 relief.

While it is true that petitioner did not appeal the February 8 determination and that determination provided that petitioner would have to make appropriate advance arrangements to ensure payment for the copies, that is not the determination which petitioner is challenging. What he is challenging is the determination that he must pay $0.25 per page. That determination was not made until April 2006. Petitioner's failure to appeal the February 8 determination therefore does not preclude article 78 relief with respect to this issue (*Pennington v Clark*, 307 AD2d 756 [4th Dept 2003]). Moreover, the April 10, 2006 letter which advised petitioner of the price per page he was to be charged failed to also advise of the availability of an administrative appeal. Having failed to do so, respondents cannot now argue that petitioner failed to exhaust his administrative remedies with respect to this issue by not appealing (*Matter of Barratt v Morganthou*, 74 NY2d 907, 909 [1989]). Moreover, the foregoing is true, notwithstanding that the petitioner may have been aware of the availability of such an administrative review by virtue of respondent's letter of February 8 (*Orange County Pub. v Kiryas Joel Union Free School Dist.*, 282 AD2d 604, 606 [2d Dept 2001]). Respondents' motion to dismiss this claim on exhaustion grounds is therefore denied.[3]

With respect to the merits, petitioner reiterates that he has offered to pay for the entire cost of the copying. The gravamen of his claim is that inasmuch as the photocopying service he regularly employs would have charged only $0.15 per page, respondents' unilateral decision to

[3] Respondents also moved to dismiss the petition based on petitioner not having filed a verified claim with the School District pursuant to Education Law § 3813. Inasmuch as petitioner is seeking primarily equitable relief, that section does not apply (*Trehy v Commack Union Free School Dist.*, 93 AD2d 891 [2d Dept], *rev'd on other grounds* 61 NY2d 658 [1983]).

use a service of their own choosing at a cost of $0.25 per page is arbitrary and capricious.

Public Officers Law § 87(1)(b)(iii) authorizes an entity subject to FOIL to charge up to $0.25 per page for copies of records (*see also* 21 NYCRR 1401.8[c][1]). Moreover, once an agency has determined the number of copies requested, it may require that the fee therefor be paid prior to the reproduction of the records (Committee on Open Government FOIL-AO-4076; 92 NY Jur 2d § 57) and there is no authority for the proposition that the individual who submitted the FOIL request has any right or say in how or by whom the copies shall be made. Furthermore, even if there were, respondents' decision to send the records to an independent copying service at a statutorily authorized price is more than reasonable given the alternative: releasing these original School District records to a copying service where petitioner would have had unsupervised access to them. Based thereon, petitioner's first request for relief is denied.

In his second request for relief, petitioner seeks an order directing the School District to eliminate extraneous, irrelevant and superfluous documents from the District's response to his First FOIL Request. This smacks of bad faith. First, petitioner cites no authority for this proposition. Moreover, it is undisputed that petitioner was given more than an ample opportunity to review the literally hundreds of thousands of pages of records which he requested – and which required over 177 hours to collect, copy and redact at an estimated cost in lost staff time to the School District of over $14,500 – in order to cull out those records which he did not want copied. He declined to do so, and in so doing manufactured and perpetuated an issue that could have and should have been resolved then. The second request for relief is denied.

In his third request, petitioner seeks an order directing the School District to comply with his Second FOIL Request and to provide such copies at the lowest fee collected by the School District on FOIL requests from the enactment of FOIL to the present. As indicated above, this

request was granted on the condition that petitioner first pay the $4,666.25 outstanding for the copies made with respect to petitioner's First FOIL Request.

The Committee on Open Government, the administrative agency charged with the interpretation of the FOIL statute, has issued the following advisory Opinion:

> "If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made."

(Committee on Open Government FOIL Opinion dated August 27, 1996 [Beverly L. Ouderkirk]). Again, petitioner has submitted no authority to the contrary. Thus, respondents' decision with respect to petitioner's Second FOIL Request was neither arbitrary nor capricious but reasonable and in accordance with the law. Based thereon, the third request for relief is denied and the petition is dismissed.[4]

In its cross-motion, respondents' assert that this proceeding is frivolous and was filed in bad faith and seeks that sanctions be imposed.

Pursuant to 22 NYCRR 130-1.1, the Court in its discretion may award to any party in any civil action or proceeding costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Frivolous conduct includes the filing of a proceeding that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.

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[4] Inasmuch as the Court has denied all of petitioner's substantive requests for relief, his request for attorney's fees is likewise denied.

For the reasons stated above, the Court finds this proceeding to be frivolous. Each of respondents' decisions challenged in this proceeding was supported by statute and administrative rulings and petitioner cited no authority to the contrary. Accordingly, in addition to statutory costs to be taxed by the Clerk of the Court (CPLR 8201; *City of Buffalo v George Irish Paper Co.*, [4th Dept 1969]; *affd without opn* 26 NY2d 869 [1970]), the School District is awarded costs to be paid by petitioner for the actual expenses reasonably incurred and reasonable attorney's fees incurred in defending this proceeding. Respondents' counsel shall submit an affidavit of such expenses and attorney's fees on notice to petitioner to the Court by November 1, 2006. This constitutes the decision and order of this Court.

The Court considered the following papers in connection with this application: (1) Notice of Amended Petition and Amended Petition dated July 8, 2006 with exhibits attached; (2) Verified Reply dated July 23, 2006 with exhibits attached; (3) Respondents' Notice of Motion dated July 24, 2006 together with Affidavits and exhibits attached; (4) Respondents' Memorandum of Law; (5) Petitioner's Memorandum of Law; and (6) Reply Affidavit of Sheila Y. Samuels.

Dated: White Plains, New York
September 26, 2006

HON. GERALD E. LOEHR
Acting J.S.C.

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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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E/sl

A. GAIL PRUDENTI, P.J.
FRED T. SANTUCCI
WILLIAM F. MASTRO
MARK C. DILLON, JJ.

2006-09749 DECISION & ORDER ON MOTION

In the Matter of Scott L. Fenstermaker, appellant,
v Edgemont Union Free School District, et al.,
respondents.

(Index No. 06-11632)

Motion by Scott L. Fenstermaker for leave to appeal from an order of the Supreme Court, Westchester County, entered September 27, 2006.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied as unnecessary as the order is appealable as of right (*see Matter of Palaez v Waterfront Comm. of N.Y. Harbor*, 48 NY2d 1021).

PRUDENTI, P.J., SANTUCCI, MASTRO and DILLON, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

December 28, 2006
MATTER OF FENSTERMAKER v EDGEMONT UNION FREE SCHOOL DISTRICT