

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of

Index No.3859/2017

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

-against-

REPLY AFFIRMATION

MALVERNE UNION FREE SCHOOL
DISTRICT,

Respondent,

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

Cameron J. Macdonald, an attorney admitted to practice before the courts of New York affirms as follows:

1. I am Executive Director and General Counsel of the Government Justice Center, Inc., counsel for Petitioner Empire Center for Public Policy in this matter. In my capacity as such, I have personal knowledge of the matters set forth in this affirmation or am aware of the facts and circumstances based on conversations, records, and written communications.

2. I make this affirmation in reply to Respondent Malverne Union Free School District's opposition to the Petition.

3. Petitioner's lawsuit and related public statements about the lawsuit simply put forward that same belief shared by the legislature "that government is the public's business and that the public . . . should have access to the records of government." Freedom of Information Law (FOIL) § 84.

4. Persons whose FOIL requests are ignored and who are lied to by an agency should not be forced to pay attorney and filing fees to bring lawsuits to obtain public records.

5. Prior to filing a lawsuit, Petitioner made multiple good faith efforts to obtain records it requested from Respondent under the FOIL, including letters, telephone calls, and email messages.

6. The telephone calls and email messages came after Respondent failed to acknowledge four separate FOIL requests or to respond to four related appeals of those FOIL requests between January 2016 and July 2017. Petition, Ex. A, B, F-K.

7. Respondent admits that it received and possesses six of eight of those written requests and appeals, stating that it has no record of Petitioner's July 3, 2017 request or the appeal Petitioner filed on January 26, 2017 relating to an earlier ignored request. Affidavit in Opposition, ¶7.

8. Petitioner only brought this proceeding after Respondent failed to respond to its fourth request, and then only after Respondent ignored follow up email messages. Petition, Ex. D and E.

9. Petitioner further advised Respondent in its last email message that its next step would be filing an Article 78 proceeding. Petition, Ex. E.

10. In a subsequent telephone conversation, Respondent told Petitioner that the records had been mailed that day. Hofer Affidavit, ¶12.

11. Respondent had not mailed the records. Hoefer Affidavit, ¶14.

12. Petitioner commenced this proceeding two months later, on Friday, December 15, 2017.

13. The legislature enacted FOIL § 89 to permit this Court to assess reasonable attorney's fees and litigation costs when a petitioner substantially prevails, and the agency failed to respond to a request or appeal within the statutory time.

14. Petitioner substantially prevailed when Respondent produced the records requested.

15. On Tuesday, December 19, 2017, Respondent contacted Petitioner regarding a Petitioner FOIL request Respondent had "come across or found." Affirmation in Opposition, Ex. A.

16. Respondent located Petitioner's FOIL request before being served with the petition, just days after Petitioner publicly announced the lawsuit. Affirmation in Opposition, Ex. B.

17. Regardless of whether, in fact, Respondent did not receive the initial FOIL request, there is not dispute that Respondent did not respond to Petitioner's appeal timely.

18. Respondent, however, has an obligation under state law to comply with FOIL requests, which includes basic steps like acknowledging requests and responding to appeals consistent with deadlines imposed by FOIL.

19. FOIL further obligates an agency like the Respondent to put personnel and systems in place to ensure FOIL compliance.

20. Respondent's failure to comply with its FOIL obligations forced Petitioner to resort to this lawsuit to obtain the requested records from a delinquent agency, and not to embarrass an individual. Indeed, none of the Petition, Affidavit, or memorandum of law in support identify the Respondent's Records Access Officer by name.

21. Assessing attorney's fees and litigation costs compensates Petitioner for its efforts to make Respondent comply with FOIL and to encourage Respondent and similarly agencies to take steps to improve their FOIL compliance efforts.

22. Moreover, awarding fees and costs is appropriate because the legislature intended FOIL § 89(4)(c) to embarrass and punish government agencies, enacting the provision "to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL." Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5.

23. As Petitioner alleged, Respondent is the only school district of 382 school districts sent FOIL requests last July that failed to respond. Petition, ¶33.

24. That statistic demonstrates the improbability that Respondent did not receive Petitioner's four FOIL requests in 2016 and 2017.

25. It further demonstrates that every other school district, from small to large, has put in place personnel and systems to make a good faith effort to comply with the requirements of FOIL.

26. Awarding attorney's fees and litigation costs in this matter fulfills the purpose of FOIL § 89(4)(c) and should act to encourage Respondent to make a good faith effort to comply with the requirements of FOIL.

WHEREFORE, Petitioner respectfully requests that this Court assess reasonable attorney's fees and other litigation costs reasonably incurred under FOIL § 89(4)(c).

Dated: February 20, 2018



Cameron J. Macdonald