

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

~~against~~

MALVERNE UNION FREE SCHOOL
DISTRICT,

Respondent,

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

Index No. 3859/2017

**MEMORANDUM OF
LAW IN SUPPORT OF
VERIFIED PETITION**

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Background

Respondent Malverne School District has ignored requests and denied access to its contract with its teachers, failing to respond to four separate access requests over the past two years.

Petitioner Empire Center for Public Policy (“Empire Center”) informs taxpayers and policymakers about public issues such as the economy, taxes, spending, public employment issues including pension reform, energy policy, health care and education.

To accomplish its mission, Empire Center, among other things, operates a web portal—“SeeThroughNY.net”—through which taxpayers can share, analyze and compare data from counties, cities, towns, villages, school districts and public authorities throughout New York.

Empire Center also seeks to give New Yorkers a clearer view of how their state and local taxes are spent, including by providing access to copies of collective bargaining agreements between local governments and their unionized employees.

Empire Center obtains state and local public employee collective bargaining agreements to post for the public to view on SeeThroughNY.net through regular requests under the Freedom of Information Law—Public Officers Law §§ 84-90 (“FOIL”).

Argument

The New York Legislature enacted FOIL recognizing that “a free society is maintained when government is responsive and responsible to the public,

and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.” Pub. Off. L. § 84.

FOIL § 89 sets out the steps the public may take to access government information, the conditions needed for a government to deny public access, and steps the public can seek a denial’s review and reversal.

The steps are straightforward. Under FOIL § 89(3)(a) an entity subject to FOIL that receives a written request for a record reasonably described must respond in writing within five days. The response can include making the requested record available, denying the record request, or acknowledging the request and stating an approximate date when the record will be made available. Pub. Off. L. § 89(3)(a).

Under FOIL § 89(4)(a), an entity’s failure to respond to a record request within five days is a denial. That section further provides that a person denied record access can appeal such a denial to the head, chief, or governing body of the denying entity (or such person designated to receive appeals). That appeal must be made in writing within thirty days of denial. The entity then must fully explain in writing within ten days either the reasons for further denial or provide the requested record. Pub. Off. L. § 89(4)(a).

If an agency in an appeal denies record access, or constructively denies access by failing to conform with FOIL § 89(4)(a), a person may commence a special proceeding under C.P.L.R. Article 78 for a judicial review of the denial. Pub. Off. L. § 89(4)(b).

A. Malverne School District Improperly Denied the July 2017 FOIL Request

On July 3, 2017, Empire Center submitted to the Malverne School District a request under FOIL, for (1) the contract (or any agreement) between the Malverne School District and its teachers' bargaining unit; and (2) the contract (or any agreement) between the Malverne School District and its superintendent ("FOIL Request"). Verified Petition, Exhibit A (hereinafter "Ver. Pet., Ex. ___").

Malverne School District did not respond to the FOIL Request within five days of receipt under FOIL § 89(3)(a) and constructively denied the FOIL Request. Affidavit of Tim Hoefler ("Hoefler Aff.") ¶ 5. Empire Center timely appealed the denial of its FOIL Request to the Record Access Officer by letter dated July 31, 2017. Ver. Pet., Ex. B.

On August 3, 2017, Malverne School District, through its Record Access Officer, responded to the appeal, stating that it had no record of receiving the original FOIL Request and stating that it would "expedite the review and retrieve any such documents via email as soon as possible." Ver. Pet., Ex. C.

On August 18, 2017, Empire Center emailed Malverne School District's Record Access Officer to ask when the documents responsive to the FOIL Request would be provided, but did not receive a response. Ver. Pet., Ex. D; Hoefler Aff. ¶ 8. A few days later, Empire Center called and spoke with the Record Access Officer, who stated that that a complete response would be sent in the next week. Hoefler Aff., ¶ 9.

A month passed with no response. Hoefler Aff., ¶ 10. On September 28, 2017, Empire Center emailed to ask when the documents responsive to the FOIL Request would be provided, but did not receive a response. Ver. Pet.,

Ex. E; Hoefer Aff., ¶ 11. Two weeks later, on October 13, 2017, Empire Center called and spoke with the Record Access Officer who stated that the contracts sought by the FOIL Request had been mailed that day. Hoefer Aff., ¶ 12.

Empire Center asked in the same conversation that the contract be sent in its electronic form via email, as requested in the original FOIL Request, and the Record Access Officer agreed to email the contract. Hoefer Aff. ¶ 13.

Empire Center, however, never received a copy of the contract, either by mail or by email. Hoefer Aff. ¶ 14.

FOIL § 89(4)(b) deems a failure to respond to the appeal consistent with § 89(4)(a) within ten days a denial. At that point, the requesting party may begin a proceeding under C.P.L.R. Article 78. Malverne School District denied Empire Center's FOIL request by failing to provide a written response to Empire Center's appeal and Empire Center commenced this proceeding.

Malverne School District has no excuse for not providing a copy of its contracts with its teachers and superintendent. Malverne School District is a state agency subject to FOIL. Pub. Off. L. § 86(3). Its records are presumed to be available to public inspection. *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440 (2005). And it is obligated under FOIL to "make available for public inspection and copying all records" that are not subject to certain exemptions from disclosure. Pub. Off. L § 87(2). Those exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of government." *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). The contracts here, however, are not subject to any exemptions from disclosure. Pub. Off. L. 87(2).

B. Malverne School District Should Pay the Litigation Costs and Fees Incurred by Empire Center

Malverne School District's failure to respond repeats a behavior pattern established in three prior requests made by Empire Center since the beginning of 2016.

On February 24, 2016, Empire Center sent a FOIL request for the collective bargaining contract or agreement between Malverne School District and its teachers' bargaining unit. Ver. Pet., Ex. F. Malverne School District did not respond. Hoefler Aff. ¶ 17. Empire Center appealed the constructive denial of its information request under FOIL. Ver. Pet., Ex. G. Malverne School District did not respond to the FOIL appeal. Hoefler Aff. ¶ 19.

On July 1, 2016, Empire Center sent a FOIL request for the collective bargaining contract or agreement between Malverne School District and its teachers' bargaining unit. Ver. Pet., Ex. H. Malverne School District did not respond. Hoefler Aff. ¶ 21. Empire Center appealed the constructive denial of its information request under FOIL. Ver. Pet., Ex. I. Malverne School District did not respond to the FOIL appeal. Hoefler Aff. ¶ 23.

On January 4, 2017, Empire Center sent a FOIL request for the collective bargaining contract or agreement between Malverne School District and its teachers' bargaining unit. Ver. Pet., Ex. J. Malverne School District did not respond. Hoefler Aff. ¶ 25. Empire Center appealed the constructive denial of its information request under FOIL. Ver. Pet., Ex. K. Malverne School District did not respond to the FOIL appeal. Hoefler Aff. ¶ 27.

In July 2017, Empire Center sent FOIL requests to 382 school districts for which it did not have updated contracts. Malverne School District was the

only school district that failed to comply with its FOIL obligations. Hoefer Aff. ¶ 28.

As established above, Malverne School District has no excuse for failing to meet its FOIL obligations. Its contracts with its teachers and its superintendents are records not subject to any exemptions from disclosure that should have been provided to Empire Center immediately.

FOIL § 89(4)(c) permits this Court to assess attorney's fees and litigation costs against an agency when a requestor substantially prevails and the agency has no reasonable basis for denying access, or the agency fails to respond to a request or appeal within the statutory time. Pub. Off. L. § 89(4)(c). Here, both circumstances apply.

The legislature enacted FOIL § 89(4)(c) "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. Awarding fees and costs is appropriate where disclosure only occurs through a petitioner needing to use judicial process and a respondent showing a clear disregard of the public's right to open government. *Matter of New York Civ. Liberties Union v. City of Saratoga Springs*, 926 N.Y.S.2d 732, 736 (3d Dept 2011).

Frustrated with Malverne School District's refusal to respond to its FOIL requests, Empire Center took extra steps to email and call multiple times to avoid the need for litigation. In addition to ignoring Empire Center's requests, Malverne School District made promises it did not keep and repre-

sented that it had mailed documents that Empire Center never received. Despite its diligent efforts to obtain records from Malverne School District, Empire Center has been forced to commence litigation and should be awarded its attorney's fees and costs. *Legal Aid Soc. v. New York State Dept. of Corrections and Community Supervision*, 962 N.Y.S.2d 773, 776 (3d Dept 2013) (petitioner that never received a responsive reply to its request or its appeals prior to Article 78 proceeding conduct despite diligent pursuit had been subjected to the exact which the counsel fee provision seeks to deter.)

Fees and costs should be awarded even if Malverne School District discloses the contracts Empire Center requested after this proceeding has commenced. *See, e.g., Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67 (2017) (petitioner substantially prevailed by obtaining redacted documents in Article 78 proceeding where agency had made no disclosures prior to commencement.) FOIL § 89(4)(c) was added to the Public Officers Law for the precise purpose of stopping agencies from taking “a ‘sue us’ attitude in relation to providing access to public records.” *New York Civ. Liberties Union*, 926 N.Y.S.2d at 734 (*quoting* Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73).

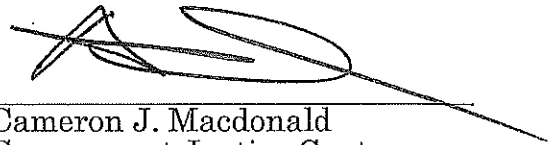
Regardless of its intent, Malverne School District has demonstrated a clear disregard of its responsibility to be open and transparent. Litigation should not be required to compel disclosure of documents as simple and straightforward as labor and employment contracts. And this Court should award Empire Center its reasonable attorney's fees and litigation costs for this matter.

Conclusion

Petitioner Empire Center respectfully requests an order granting the relief sought in its Verified Petition.

Dated: Albany, New York
December 13, 2017

Respectfully submitted,



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