

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
In the Matter of  
EMPIRE CENTER FOR PUBLIC POLICY,

Index No. 3859/2017

Petitioner,

-against-

ANSWER

MALVERNE UNION FREE SCHOOL DISTRICT,  
Respondent,

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

Respondent, MALVERNE UNION FREE SCHOOL DISTRICT (“DISTRICT”), by its attorneys, Frazer & Feldman LLP, as and for its Answer to the Petition herein respectfully shows the Court and alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraphs “1,” “2,” “3,” “4,” and “5” of the Petition.
2. Admits the allegations contained in Paragraphs “6,” “7,” and “8” of the Petition.
3.
  - a. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph “9” of the Petition.
  - b. Affirmatively alleges that the Records Access Officer never received Petitioner’s July 3, 2017 request (Petition Exhibit A).
4.
  - a. Denies the allegations contained in Paragraph “10” of the Petition.
  - b. Affirmatively alleges that the District had no notice of the Petitioner’s request.
  - c. Further affirmatively alleges that the District did not respond to Petitioner’s July 3, 2017 request because the Records Access Officer never received it.
5.
  - a. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph “11” of the Petition.
  - b. Admits receiving a copy of Petitioner’s July 31, 2017 letter (Petition Exhibit B).
6. Admits the allegations contained in Paragraphs “12,” “13,” and “14” of the Petition.
7.
  - a. Denies knowledge or information sufficient to form a belief as to the truth of

allegations contained in Paragraph "15" of the Petition.

- b. Admits receiving a copy of Petitioner's September 28, 2017 email (Petition Exhibit E).
8. Admits the allegations contained in Paragraphs "16," and "17" of the Petition.
9. a. Denies the allegations contained in paragraph "18" of the Petition.
- b. Alleges that, as requested, Petitioner received the requested documents by email on December 20, 2017.
  - c. Further affirmatively alleges that the email transmittal of the requested documents by the District Business Administrator expressed sincere apologies for the inadvertent clerical oversight of not providing the requested documents in a timely fashion, as well as the Business Administrator's request that any other unfulfilled FOIL requests be forwarded (and copies of any future FOIL requests be sent) to him. The Business Administrator also provided his office phone number and email address for the Petitioner's use in contacting him. (See Exhibit "1" hereto.)
10. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "19" of the Petition.
11. Admits the allegations contained in Paragraphs "20," and "21" of the Petition.
12. a. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "22" of the Petition.
- b. Admits receiving a copy of Petitioner's March 18, 2016 letter (Petition Exhibit G).
13. Admits the allegations contained in Paragraphs "23," "24," "25," "26," "27," "28," and "29" of the Petition.
14. a. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "30" of the Petition.
- d. Affirmatively alleges that the Records Access Officer never received Petitioner's January 26, 2017 appeal (Petition Exhibit K).
15. Admits the allegations contained in Paragraphs "31," and "32" of the Petition.
16. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "33" of the Petition.

17. Respondent repeats and re-alleges each denial set forth above with the same force and effect as if fully set forth herein at length and to the extent that the allegations to which said denials are addressed are repeated and/or re-alleged by Paragraph " 34" of the Petition.
18. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "35" of the Petition.
19. Admits the allegations contained in Paragraph "36" of the Petition.
20. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "37," "38," and "39" of the Petition.
21.
  - a. Denies the allegations contained in Paragraph "40" of the Petition.
  - b. Admits that the District has never invoked any exemptions from production of the requested records under FOIL.
  - c. Affirmatively alleges that the records requested by Petitioner were provided, as requested, on December 20, 2017.
22. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph "41," "42," "43," and "44" of the Petition.
23. Denies that Petitioner is entitled to any of the relief sought in Paragraph "45" of the Petition.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE  
AND OBJECTION IN POINT OF LAW**

24. That by virtue of the fact that the records requested by Petitioner were provided on December 20, 2017, the matter before the Court has been rendered moot thereby requiring the Petition to be denied and dismissed.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE  
AND OBJECTION IN POINT OF LAW**

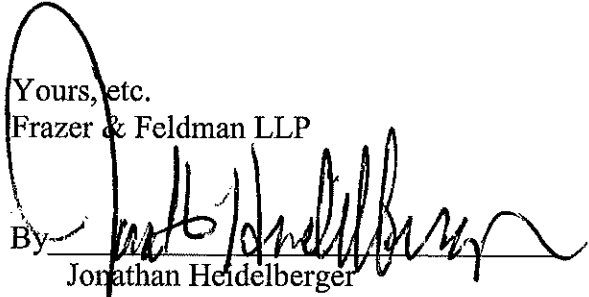
25. That the purpose of FOIL is to make governmental records available to the public.
26. The District's records access officer has never taken the position that the records sought by Petitioner were exempted from disclosure.

27. The discretionary authority<sup>1</sup> of the Court to award attorney's fees to a party prevailing in a proceeding brought to obtain documents under FOIL is intended to ensure compliance with the law.
28. The purpose of FOIL is not, nor should it be, to publically embarrass or humiliate an individual employee of a governmental agency, nor the agency itself, on account of the actions of that employee.
29. Upon information and belief, Petitioner's motivation in declining to withdraw the Petition once the requested documents were provided stems from its eagerness to publicize its "triumph" over the only one of "382 school districts" from which it requested and hadn't obtained such records. (See, Paragraph "32" of the Petition.)
30. Where, as here, the documents requested have been provided and the records access officer acknowledges that any failure to comply with FOIL is attributable to her alone, it is respectfully submitted that the Court's discretion should not be invoked to publically embarrass, humiliate or punish either that employee or the agency.

WHEREFORE, the Respondent, Malverne Union Free School District respectfully prays that the Petition herein be denied and dismissed.

Dated: Garden City, NY  
February 13, 2018

Yours, etc.  
Frazer & Feldman LLP

By   
Jonathan Heidelberger  
*Attorneys for Respondent*  
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Garden City, NY 11530  
(516) 472-7777  
[jheidelberger@ffedlaw.com](mailto:jheidelberger@ffedlaw.com)

To: Cameron J. Macdonald, Esq.  
Government Justice Center  
*Attorney for Petitioner*  
100 State Street, Ste. 410  
Albany, NY 12207  
(518) 434-3125  
[cam@govjustice.org](mailto:cam@govjustice.org)

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<sup>1</sup> Section 89(4)(c) of the Public Officers Law was amended effective December 13, 2017 to require the award of attorney's fees where an agency has denied access to public records where the "... court finds that the agency had no reasonable basis for denying access." However, where, as here, an agency has "...failed to respond... within the statutory time..." the award of attorney's fees remains discretionary.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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EMPIRE CENTER FOR PUBLIC POLICY,

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Petitioner,

-against-

AFFIDAVIT IN OPPOSITION

MALVERNE UNION FREE SCHOOL DISTRICT,  
Respondent,

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

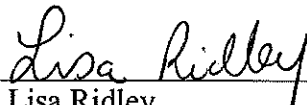
-----X  
STATE OF NEW YORK )  
 ) ss;  
COUNTY OF NASSAU )

LISA RIDLEY, being duly sworn, deposes and says:


1. I am the part time District Clerk of the Respondent Malverne Union Free School District (“DISTRICT”) and the District’s Records Access Officer under the Freedom of Information Law.
2. I am aware that the Petitioner has made several requests for copies of the District’s contracts with its teachers and its Superintendent of Schools.
3. I have never said, in words or substance that the records sought by the Petitioner were exempt from disclosure.
4. No one has ever directed me not to provide Petitioner with the records it requested.
5. On the contrary, I have told representatives of the Petitioner that the records they requested would be forthcoming.
6. I have a vague recollection of having provided the records sought to the Petitioner at least once – but my recollection may be merely a manifestation of my intention(s) to provide the records.
7. As indicated in response to Paragraphs 9 and 30 of the Petition, I have no record of receiving either Petitioner’s request of July 3, 2017 or its “appeal” of January 26, 2017.

8. In any case, I acknowledge that I did not provide the records requested in a timely fashion. I am informed that the requested records were provided no later than December 20, 2017.
9. I recognize that it may not be an adequate excuse, however, the pressure of completing other tasks for which I am responsible and the limited time available, prompted me to repeatedly defer compliance with Petitioner's request(s).
10. Unfortunately, with the passage of time, I concede that Petitioner's request for the records sought was not addressed in a timely fashion.
11. I apologize to the Petitioner for failing to provide the requested documents in a timely fashion.
12. More significantly, I apologize to the District and its residents for my failure. It certainly was not my intention to prevent Petitioner from obtaining these records, nor for my employer to be publically humiliated by virtue of being made a party to a lawsuit like this one – let alone being asked to pay Petitioner's legal fees in connection with this lawsuit.

WHEREFORE, I respectfully request that the Petition be denied and dismissed.

  
\_\_\_\_\_  
Lisa Ridley

Sworn to before me this  
14 th day of February, 2018

  
\_\_\_\_\_  
Notary Public

**DENISE SHIMBORSKE**  
**NOTARY PUBLIC-STATE OF NEW YORK**  
**No. 01SH6303218**  
**Qualified in Nassau County**  
**My Commission Expires May 12, 2018**

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7. It is significant to note that Mr. Caputo never resisted Petitioner's request. He didn't offer excuses or claim an exemption. On the contrary, he supplied the records in the format requested and did so immediately.<sup>1</sup>
8. The District Business Administrator's immediate compliance is proof that the previous failure to provide the requested records was not due to a policy or practice of the District. Rather, that failure resulted solely from the shortcoming of one individual.
9. On behalf of the District I respectfully submit that since the records have been provided, the instant Petition is moot, but for Petitioner's request for attorney's fees.
10. Under subdivision 4(c) of §89 of the Public Officers Law, the award of attorney's fees to a party who substantially prevails in an Article 78 proceeding brought to enforce the provisions of FOIL, have always been a matter within the Court's discretion. That was so whether the agency: (1) failed to provide the requested records in a timely fashion or, (2) refused to provide access without a reasonable basis for doing so.
11. As a result of the enactment of Chapter 453 of the Laws of 2017 – effective December 13, 2017 - the award of counsel fees in a case where the agency refuses to provide access without a reasonable basis is no longer discretionary. Rather the statute now states that in such a case, the court "shall assess" counsel fees.
12. It is significant to note that on the facts herein, the requested records were provided on December 20, 2017 - literally one week after the statutory change became effective.
13. Therefore, assuming arguendo that the Court decides the failure to provide access stemmed from an unreasonable belief that the records were exempt from disclosure, although no such claim was ever asserted, it is submitted that the statutory amendment, by its terms, does not apply.
14. We do not disagree that the award of attorney's fees is appropriate where an agency wrongly claims records are exempt from disclosure.
15. However, this is clearly not a case in which the records access officer claimed the records were exempt from disclosure. Rather, the instant case is one in which one employee simply failed to provide the requested documents in a timely fashion.
16. The failure to provide the requested records, despite agreeing to do so, was attributable to the oversight of the District Clerk, a part-time employee of the District, who lost track of the request.

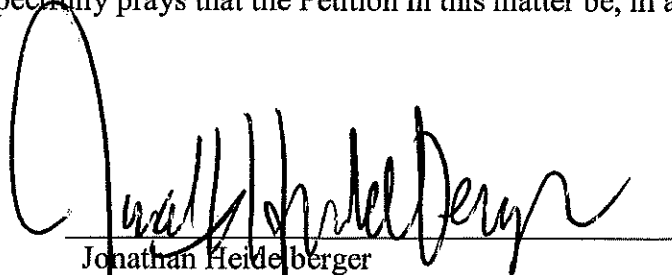
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<sup>1</sup> It is also significant to note that last evening (February 13, 2018) the District's Board of Education appointed Mr. Caputo as records access appeals officer under FOIL, in order to prevent a recurrence of what happened here.

17. As such, the award of attorney's fees in this proceeding remains subject to the Court's discretion, and Respondent respectfully asserts that on the facts herein, the Court should not award attorney's fees to Petitioner.
18. As explained in the Second Affirmative Defense, Petitioner's unwillingness to withdraw the Petition, once the requested records were provided, stems from its eagerness to publicize its victory over and embarrass one school district - out of the 382 - which it claims did not supply the requested documents. (See, Paragraph 33 of the Petition.)
19. Attached as Exhibit "2" is a copy of a news release downloaded from Petitioner's web site. As the Court will note, Petitioner's Executive Director has taken the opportunity to castigate the District by stating "Agencies like the Malverne School District must be held accountable when they continually flout the law by ignoring legitimate requests for public information."
20. Clearly, just such a press release, in the same strident and self-congratulatory tones will accompany any award of attorney's fees to Petitioner.
21. That is not the purpose for which FOIL was adopted.
22. I submit that FOIL was not intended to authorize holding a public school district up to ridicule for the failings of one part-time employee.
23. No one "flouted" anything. Rather, one part-time employee simply failed to do what she was supposed to do.
24. Your affiant, for one, hopes the Court will not add its imprimatur to Petitioner's efforts.
25. The facts herein simply do not warrant the exercise of the Court's discretion to punish the District by awarding attorney's fees.
26. Rather, on behalf of the District, its Board of Education and its taxpayers, your affiant respectfully submits that, in light of the facts presented and, in particular, the fact that the records have been provided, the Court should not award attorney's fees to the Petitioner herein.

WHEREFORE, your affiant respectfully prays that the Petition in this matter be, in all respects, denied and dismissed.

Dated: February 14, 2018  
Garden City, NY

  
Jonathan Heideberger



**From:** Caputo, Christopher [<mailto:ccaputo@malverne.k12.ny.us>]  
**Sent:** Wednesday, December 20, 2017 12:19 PM  
**To:** STNY Data <[data@seethroughny.net](mailto:data@seethroughny.net)>  
**Cc:** Ridley, Lisa <[lr Ridley@malverne.k12.ny.us](mailto:lr Ridley@malverne.k12.ny.us)>  
**Subject:** RE: Empire Center FOIL

Good afternoon Mr. Walsh,

This correspondence relates to the July 3, 2017 Freedom of Information Law ("FOIL") request for a copy of the contract between the Malverne Union Free School District ("District") and (1) the bargaining unit representing its teachers; and (2) the School Superintendent. Attached are the current teacher association contract and current Superintendent contract/agreement.

The District sincerely apologizes for the inadvertent clerical oversight of not providing the documents you requested in a timely manner. If there are any other unfulfilled FOIL requests that have been submitted by Empire Center, please resend a copy of the request(s) to my attention. In addition, please copy me on any future FOIL requests. You may reach me at (516) 887-6417 during normal business hours or via email at [ccaputo@malverne.k12.ny.us](mailto:ccaputo@malverne.k12.ny.us).

Thank you,

Chris

Chris Caputo  
Malverne Union Free School District  
Business Administrator  
Phone (516) 887-6417  
Fax (516) 596-2910

**From:** STNY Data [<mailto:data@seethroughny.net>]  
**Sent:** Wednesday, December 20, 2017 10:36 AM  
**To:** Caputo, Christopher <[ccaputo@malverne.k12.ny.us](mailto:ccaputo@malverne.k12.ny.us)>  
**Subject:** Empire Center FOIL

-Chris,

I received your voicemail yesterday regarding Empire Center's FOIL request to Malverne Union Free School District. According to your voicemail, you may have come across, or found, any one of four FOIL requests Empire Center has made of Malverne School District in 2016 and 2017 without receiving a response. So there is no confusion, I have attached a copy of the most recent request that I sent in July seeking the Districts contracts with its teachers and its superintendent.

Your Record Access Officer, Lisa Ridley, told me in October that the contracts responding to the July request had been mailed, but Empire Center did not receive anything by mail.

I also asked Ms. Ridley to send the contracts via email to [data@seethroughny.net](mailto:data@seethroughny.net) when we spoke in October, but have not received anything by email.

The FOIL request is straightforward, but feel free to email me if you have any questions.

-Mark



# EMPIRE CENTER

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## Empire Center files lawsuit challenging FOIL denials

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December 15, 2017 | Press Releases

Following several ignored Freedom of Information Law (FOIL) requests for its teacher and superintendent contracts, the Empire Center for Public Policy will file a lawsuit today against Malverne Union Free School District in Nassau County on Long Island. The Empire Center is being represented in this case by the Government Justice Center, an Albany-based nonprofit legal center.

The Empire Center, mainly through its SeeThroughNY.net database, has worked for years to give New Yorkers a clearer view of how their tax dollars are spent, including by providing access to collective bargaining agreements between local governments and their unionized employees.

Over the course of more than four months, Malverne School District continually ignored requests and appeals by the Empire Center for these public records. This repeats a pattern of failure to comply with FOIL requests established since the beginning of 2016 and earlier. During the past two years, Malverne School District has failed to respond to four separate FOIL requests by the Empire Center.

“The Freedom of Information Law exists to promote government transparency—something we at the Empire Center have long valued and strive every day to improve in New York. Agencies like the Malverne School District must be held accountable when they continually flout the law by ignoring legitimate requests for public information,” said Empire Center executive director Tim Hoefler.

This lawsuit comes just days after Governor Cuomo signed a critical FOIL reform bill into law, which will require agencies to pay the attorneys’ fees of plaintiffs who substantially prevail in FOIL proceedings.

*The Empire Center, based in Albany, is an independent, non-partisan, not-for-profit think tank dedicated to promoting policies to make New York a better place to live, work and raise a family.*

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## Highlights

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[@empirecenter files lawsuit challenging FOIL denials](#)

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Following several FOIL requests for its teacher and superintendent contracts, the @empirecenter will file a lawsuit today against Malvern...

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## Contact Information

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Fax: 518-434-3130

E-Mail: [info@empirecenter.org](mailto:info@empirecenter.org)

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## About the Empire Center

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The Empire Center is an independent, non-partisan, non-profit think tank located in Albany, New York. Our mission is to make New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government.

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