

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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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

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Index No. 3859/2017

**VERIFIED PETITION**

Petitioner Empire Center for Public Policy (“Empire Center”) for its petition and complaint against Respondent Malverne Union Free School District (“Malverne School District”) alleges as follows:

**Introduction**

1. Petitioner 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.

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

3. The Empire Center 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.

4. The Empire Center obtains collective bargaining agreements through regular requests under the Freedom of Information Law (“FOIL”)–Public Officers Law §§ 84-90.

### **Parties**

5. Petitioner Empire Center for Public Policy is a non-partisan, non-profit organization based in Albany, New York and qualified as tax exempt under 26 U.S.C. § 501(c)(3).

6. Respondent Malverne School District is an “agency” within the meaning of Public Officers Law § 86(3).

### **Jurisdiction and Venue**

7. This Court has jurisdiction under CPLR 7804(b) and 506(b) because all actions at issue in this case took place within Nassau County.

8. Jurisdiction and venue are proper under CPLR 7804(b) and 506(b) because respondent has its principal office within Nassau County.

### **Statement of Facts**

9. On July 3, 2017, petitioner 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 con-

tract (or any agreement) between the Malverne School District and its superintendent (“FOIL Request”). (A true and correct copy of the FOIL Request is attached as Exhibit A.)

10. 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.

11. On July 31, 2017, petitioner appealed the denial of its FOIL Request under FOIL § 89(4)(a) to the Record Access Officer. (A true and correct copy of the FOIL appeal is attached as Exhibit B.)

12. 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.” (A true and correct copy of the 8/3/17 email message is attached as Exhibit C.)

13. 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. (A true and correct copy of the 8/18/17 email message is attached as Exhibit D.)

14. On August 22, 2017, Empire Center called and spoke with the Record Access Officer, who stated that that a complete response would be sent in the next week.

15. On September 28, 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. (A true and correct copy of the 9/28/17 email message is attached as Exhibit E.)

16. On October 13, 2017, Empire Center called and spoke with the Record Access Officer who represented that the contracts sought by the FOIL Request had been mailed that day.

17. Empire Center asked in the same conversation that the contracts be sent in their electronic forms via email, as requested in the original FOIL Request, and the Record Access Officer agreed to email the contracts.

18. Empire Center has not received copies of the contracts by mail or by email.

19. 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 (and earlier).

20. 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. (A true and correct copy of the FOIL request is attached as Exhibit F.)

21. Malverne School District did not respond.

22. On March 18, 2016, Empire Center sent a letter to Malverne School District appealing the constructive denial of its information request under FOIL. (A true and correct copy of the FOIL appeal is attached as Exhibit G.)

23. Malverne School District did not respond to the FOIL appeal.

24. 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. (A true and correct copy of the FOIL request is attached as Exhibit H.)

25. Malverne School District did not respond.

26. On July 25, 2016, Empire Center sent a letter to Malverne School District appealing the constructive denial of its information request under FOIL. (A true and correct copy of the FOIL appeal is attached as Exhibit I.)

27. Malverne School District did not respond to the FOIL appeal.

28. 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. (A true and correct copy of the FOIL request is attached as Exhibit J.)

29. Malverne School District did not respond.

30. On January 26, 2017, Empire Center sent a letter to Malverne School District appealing the constructive denial of its information request under FOIL. (A true and correct copy of the FOIL appeal is attached as Exhibit K.)

31. Malverne School District did not respond to the FOIL appeal.

32. In 2016 and 2017 Malverne School District failed to respond to four separate FOIL requests for its contract (or agreement) with its teachers, and one request for its contract (or agreement) with its superintendent.

33. 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.

### **Cause of Action: Article 78**

#### **Review of Wrongful Denial of FOIL Request**

34. Petitioner repeats and re-alleges paragraphs 1 through 33 as if fully set forth in this paragraph.

35. Article 78 is the appropriate method of review of agency FOIL request determinations.

36. Petitioner has a right under FOIL to the records requested.

37. Petitioner has sought and has been constructively denied production of records reflecting the conduct of official business.

38. Respondent's failure to produce documents under the circumstances of the requests is not justified under FOIL.

39. Respondent by its actions has refused repeatedly to perform its duty of disclosure.

40. Respondent has failed to invoke any exemptions from production under FOIL and failed to produce any records sought by petitioner.

41. Respondent has failed to provide any information to meet its burden under FOIL to provide specific and particular reasons for withholding the records requested.

42. By operation of FOIL, the Malverne School District has denied the FOIL Request.

43. Petitioner has exhausted its administrative remedies and has no other remedy at law.

44. Petitioner has not made any prior application for the relief requested.

### **Relief Requested**

45. Petitioner respectfully requests that this Court issue an order:

- a. Declaring that (i) the respondent acted unlawfully in failing to produce records in response to the FOIL Request; and (ii) the respondent must release the requested records;
- b. Directing respondent to produce to petitioner within five days of the date of the order, the records requested in the petitioner's FOIL Request;

- c. Awarding attorneys' fees and costs reasonably incurred in this litigation as allowed under FOIL; and
- d. Granting such other and further relief as this Court may deem just and proper.

Dated: Albany, New York  
December 13, 2017

Respectfully submitted,



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Cameron J. Macdonald  
Government Justice Center  
100 State Street, Suite 410  
Albany, New York 12207  
(518) 434-3125  
cam@govjustice.org

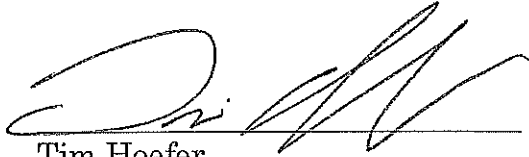
*Counsel for Petitioner*

**VERIFICATION**

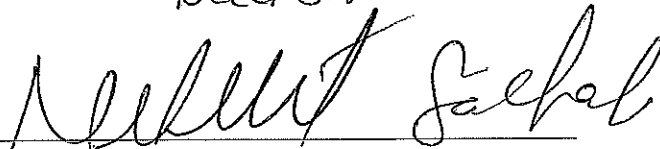
STATE OF NEW YORK        )  
                                      :SS  
COUNTY OF ALBANY        )

Tim Hoefler, being duly sworn, deposes and says:

I am the Executive Director of Empire Center for Public Policy, Petitioner in the above-captioned action. I have reviewed the foregoing Petition and know its contents to be true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe it to be true.

  
Tim Hoefler

Sworn to and subscribed before me  
this 13 of ~~November~~, 2017  
*December*

  
Notary Public

NISCHINTH D. SADHAK  
Notary Public, State of New York  
No. 01SA6213816  
Qualified in Saratoga County  
Commission Expires November 23, 2021



EMPIRE  CENTER

July 3, 2017

FOIL Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

To: FOIL Officer,

Pursuant to the state Freedom of Information Law, we are requesting current copies of:

1. The contract (or any agreement) between the school district and the bargaining unit representing its teachers (including all appendices, salary grade tables, side letters and other attachments); and
2. The contract (or any agreement) between the school district and the school superintendent (including all appendices, side letters and other attachments).

The Empire Center currently has on record the contract between the school district and the bargaining unit representing its teachers, inclusive of any or all memorandums, that expired on 6/30/2013 as well as the contract between the school district and the school superintendent, inclusive of any or all memorandums, that expired on 6/30/2017. If no further information is available than is already on record with the Empire Center, we would appreciate information regarding the anticipated completion date of said contract(s).

We are requesting the information via email in an Adobe Acrobat (.pdf) file. Unless the original file was generated on a typewriter, these files should be provided in the requested format as directed by law (Ch. 223 of 2008).

We look forward to your acknowledgement of this request within five business days of receipt as required by law. If you have questions, please contact me by phone (518-434-3100) or email ([data@seethroughny.net](mailto:data@seethroughny.net)). Thank you in advance for your assistance.

Sincerely,



Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 410  
Albany, NY 12207  
Email: [data@seethroughny.net](mailto:data@seethroughny.net)  
(office): 518.434.3100  
(fax): 518.434.3130

July 31, 2017

FOIL Appeals Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

FOIL Appeals Officer:

On July 3, 2017, we mailed a Freedom of Information Law request to your school district (attached).

Within five business days upon receipt of our request, New York State law states the organization must grant access to the records, deny access or acknowledge the request. That deadline has passed. We have received no reply from your school district.

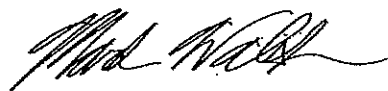
The law says failure to meet the five-day deadline constitutes a denial of records access. I am writing to you to appeal the district's failure to provide access to public records. If you personally do not handle your district's FOIL appeals, please forward this letter to the appropriate person.

Section 89(4)(a) of the law gives the "chief executive" (or person handling FOIL appeals) 10 business days to explain fully in writing reasons for denial, or provide the records sought. The organization must file copies of the appeal and the determination with the Committee on Open Government at the New York Department of State in Albany.

The records sought are clearly accessible under FOIL. Please be advised that FOIL now authorizes a court to award attorney fees when an applicant has substantially prevailed and the agency has failed to provide the document(s) within the limits imposed by the law.

We look forward to your prompt response. Thank you.

Sincerely,



Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 410  
Albany, NY 12207  
518.434.3100 (o)  
518.434.3130 (f)  
Email: [data@seethroughny.net](mailto:data@seethroughny.net)

Ridley, Lisa  
Foil dated July 3, 2017  
To: data@seethroughny.net

August 3, 2017 at 1:45 PM



Hello Mr. Michael Walsh ,

I am in receipt of your appeals letter , of which I received today.  
However, I have no record of receiving a FOIL REQUEST dated July 3, 2017.

Now that I have a copy that was included along with the appeal letter , our district is in receipt of such request  
And will expedite the review and retrieve any such documents via email as soon as possible.

I can be reached at 516-887-6483 Mon- Friday 9:30am to 1:30pm

Lisa Ridley  
District Clerk  
Record Access Officer

Found in Sent - STNY Data Mailbox



**STNY Data**

August 18, 2017 at 1:52 PM



Re: FOI dated July 3, 2017

To: Ridley, Lisa

Hello Lisa,

I am just checking in on the status of my request.

Best,

*Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 410  
Albany, NY 12207  
(o): 518.434.3100, ext. 107  
(f): 518.434.3130*

See More from Ridley, Lisa

Found in Sent - STNY Data Mailbox

September 26, 2017 at 5:08 PM



**STNY Data**

Re: Foil dated July 3,2017

To: Ridley, Lisa

Hello Lisa,

Please respond to the FOIL request/appeal. This will be my last attempt to reach out to you, as the next step is to file an Article 78.

Best,

*Mark Welsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 410  
Albany, NY 12207  
(o): 518.434.3160, ext. 107  
(f): 518.434.3130*

See More from Ridley, Lisa

EMPIRE  CENTER

February 24, 2016

FOIL Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

To: FOIL Officer,

Pursuant to the state Freedom of Information Law, we are requesting a current copy of the contract (or any agreement) between the school district and the bargaining unit representing its teachers (including all appendices, salary grade tables, side letters and other attachments).

The Empire Center currently has on record the contract between the school district and the bargaining unit representing its teachers, inclusive of any or all memorandums, that expired on 6/30/2013. If no further information is available than is already on record with the Empire Center, we would appreciate information regarding the anticipated completion date of said contract(s).

We are requesting the information via email in an Adobe Acrobat (.pdf) file. Unless the original file was generated on a typewriter, these files should be provided in the requested format as directed by law (Ch. 223 of 2008).

We look forward to your acknowledgement of this request within five business days of receipt as required by law. If you have questions, please contact me by phone (518-434-3100) or email ([data@seethroughny.net](mailto:data@seethroughny.net)). Thank you in advance for your assistance.

Sincerely,

Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 600  
Albany, NY 12207  
518.434.3100 (o)  
518.434.3130 (f)

March 18, 2016

FOIL Appeals Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

FOIL Appeals Officer:

On February 24, 2016, we mailed a Freedom of Information Law request to your school district.

Within five business days upon receipt of our request, New York State law states the organization must grant access to the records, deny access or acknowledge the request. That deadline has passed. We have received no reply from your school district.

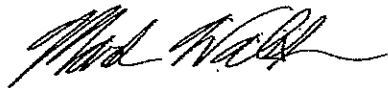
The law says failure to meet the five-day deadline constitutes a denial of records access. I am writing to you to appeal the district's failure to provide access to public records. If you personally do not handle your district's FOIL appeals, please forward this letter to the appropriate person.

Section 89(4)(a) of the law gives the "chief executive" (or person handling FOIL appeals) 10 business days to explain fully in writing reasons for denial, or provide the records sought. The organization must file copies of the appeal and the determination with the Committee on Open Government at the New York Department of State in Albany.

The records sought are clearly accessible under FOIL. Please be advised that FOIL now authorizes a court to award attorney fees when an applicant has substantially prevailed and the agency has failed to provide the document(s) within the limits imposed by the law.

We look forward to your prompt response. Thank you.

Sincerely,



Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 600  
Albany, NY 12207  
518.434.3100 (o)  
518.434.3130 (f)

July 1, 2016

FOIL Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

To: FOIL Officer,

Pursuant to the state Freedom of Information Law, we are requesting a current copy of the contract (or any agreement) between the school district and the bargaining unit representing its teachers (including all appendices, salary grade tables, side letters and other attachments).

The Empire Center currently has on record the contract between the school district and the bargaining unit representing its teachers, inclusive of any or all memorandums, that expired on 6/30/2013. If no further information is available than is already on record with the Empire Center, we would appreciate information regarding the anticipated completion date of said contract(s).

We are requesting the information via email in an Adobe Acrobat (.pdf) file. Unless the original file was generated on a typewriter, these files should be provided in the requested format as directed by law (Ch. 223 of 2008).

We look forward to your acknowledgement of this request within five business days of receipt as required by law. If you have questions, please contact me by phone (518-434-3100) or email ([data@seethroughny.net](mailto:data@seethroughny.net)). Thank you in advance for your assistance.

Sincerely,



Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 600  
Albany, NY 12207  
518.434.3100 (o)  
518.434.3130 (f)



July 25, 2016

FOIL Appeals Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

FOIL Appeals Officer:

On July 1, 2016, we mailed a Freedom of Information Law request to your school district.

Within five business days upon receipt of our request, New York State law states the organization must grant access to the records, deny access or acknowledge the request. That deadline has passed. We have received no reply from your school district.

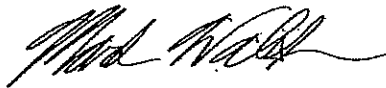
The law says failure to meet the five-day deadline constitutes a denial of records access. I am writing to you to appeal the district's failure to provide access to public records. If you personally do not handle your district's FOIL appeals, please forward this letter to the appropriate person.

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We look forward to your prompt response. Thank you.

Sincerely,



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Albany, NY 12207  
518.434.3100 (o)  
518.434.3130 (f)  
Email: [data@seethroughny.net](mailto:data@seethroughny.net)

January 4, 2017

FOIL Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

To: FOIL Officer,

Pursuant to the state Freedom of Information Law, we are requesting a current copy of the contract (or any agreement) between the school district and the bargaining unit representing its teachers (including all appendices, salary grade tables, side letters and other attachments).

The Empire Center currently has on record the contract between the school district and the bargaining unit representing its teachers, inclusive of any or all memorandums, that expired on 6/30/2013. If no further information is available than is already on record with the Empire Center, we would appreciate information regarding the anticipated completion date of said contract(s).

We are requesting the information via email in an Adobe Acrobat (.pdf) file. Unless the original file was generated on a typewriter, these files should be provided in the requested format as directed by law (Ch. 223 of 2008).

We look forward to your acknowledgement of this request within five business days of receipt as required by law. If you have questions, please contact me by phone (518-434-3100) or email ([data@seethroughny.net](mailto:data@seethroughny.net)). Thank you in advance for your assistance.

Sincerely,



Mark Walsh - Data Analyst  
Empire Center for Public Policy  
100 State Street, Suite 410  
Albany, NY 12207  
Email: [data@seethroughny.net](mailto:data@seethroughny.net)  
518.434.3100 (o)  
518.434.3130 (f)

January 26, 2017

FOIL Appeals Officer  
Malverne Union Free School District  
301 Wicks Ln  
Malverne, NY 11565

FOIL Appeals Officer:

On January 4, 2017, we mailed a Freedom of Information Law request to your school district (attached).

Within five business days upon receipt of our request, New York State law states the organization must grant access to the records, deny access or acknowledge the request. That deadline has passed. We have received no reply from your school district.

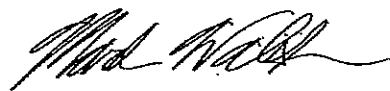
The law says failure to meet the five-day deadline constitutes a denial of records access. I am writing to you to appeal the district's failure to provide access to public records. If you personally do not handle your district's FOIL appeals, please forward this letter to the appropriate person.

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We look forward to your prompt response. Thank you.

Sincerely,



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