

State of New York
Supreme Court County of Livingston

**Please Don't Destroy Geneseo,
William S. Lofquist and M. Corrin Strong,**

Petitioners,

v.

**Weston Kennison, Supervisor of the Town of Geneseo
and the Town of Geneseo,**

Respondents.

Petitioner's Memorandum of Law

Index No. 448-2007

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Preliminary Statement

Petitioners are proceeding in this matter pro se and therefore do not have the familiarity with legal procedures or access to the same legal resources as respondents. We merely ask that the court take a common sense approach to the facts of this case and recognize that something is seriously wrong with Respondent's account of these facts.

Boiling it all down, the Respondents case seems to suffer from a series of flaws:

1. The Town has not properly maintained significant public records; and/or
2. The Town has not properly responded to repeated and clearly stated requests for disclosure of these public records under the NYS Freedom of Information Law.
3. The Town has sought to characterize these records as not significant and as properly destroyed, despite available Town records in the form of attorney billing records and other evidence that indicate the contrary;
4. Despite all this, the Town has sought the benefit of a presumption that its actions are consistent with its responsibilities under the Freedom of Information Law and the Local Government Records Law.

In this Memorandum of Law we will take up each of these assertions at the appropriate time. We will also respond to other assertions and defenses asserted by Respondent. To make it easier to follow we will use the same numbering system used in Respondent's Memorandum of Law.

Statement of Facts

We take issue with Respondent's assertion that the word "correspondence" is somehow unclear. An examination of Underberg and Kessler's billing records (Petitioner's Exhibit A) show that the bills were very clear and consistent in distinguishing between correspondence, which in this context almost certainly refers to a written letter sent or received either by regular mail or fax, and other types of communication which are identified in the bills as "e-mail", "telephone call" or "telephone conference."

As discussed further below, we believe the totality of facts surrounding the sought records establishes a strong case that they did in fact exist, may still exist in some form and were not of "no fiscal, legal or administrative value" as alleged by the Respondents.

Argument

Point 1: Standing of Petitioners PDDG and Corrin Strong

Although the standing of these two petitioners is not critical to the survival of our case, we would simply note that the case cited by Respondents (Norton v. Town of Islip) upheld the standing of a Petitioner

who did not make the original FOIL request because the request was made on his behalf. In making that holding the court also noted that, "FOIL is to be liberally construed."

In this case, the facts recited in our petition establish that Petitioner Lofquist was acting on behalf of PDDG and in concert with Corrin Strong when he made the original FOIL request. Petitioners Lofquist and Strong worked together and on behalf of PDDG in making a series of different FOIL requests. They shared the results of these FOILs, analyzed and publicized them with other members of PDDG and jointly decided which further documents to seek with additional FOILs. This division of labor was a natural and efficient way to handle the matter, but did not mean that Mr. Lofquist was acting alone.

Point 2: The Claim for Relief under FOIL should be Dismissed

We believe the billing records we have submitted in Petitioner's Exhibit A, as more fully discussed below, establish sufficient facts to believe that the records sought did in fact exist at one time and may still exist in some form. Therefore we believe that under *Key v. Hynes* we are entitled to more than a bare certification that the records can now not be found.

We also contend that the circumstances of this case raise an issue of fact as to whether a diligent search has, in fact, ever been conducted. On this point, we do not find the previously supplied certification of the Town Clerk or the newly provided affidavits of the clerk and respondent's attorney persuasive.

We note that the Clerk's first certification provided to us on February 20, 2007 certified only that she had searched "the town's records." Since the clerk's office is located in Geneseo and most of the sought correspondence was between the Developer and the Town's attorneys, whose offices are located in Rochester, it is perhaps not surprising that she found nothing in the files under her direct control.

In the most recent round of certifications provided by new affidavits submitted on the eve of the court's conference, we again find the certifications less than complete and convincing. For example, Attorney Hull affirms that he "personally searched the client files maintained by Underberg and Kessler LLP on three occasions in relation to these records. Documents in either written or electronic form corresponding to the dates, subject matter and correspondents, either exactly or approximately, were not found."

We note that no dates for these alleged searches are given. We also note that in an affidavit provided by Petitioner Lofquist it is reported that in at least one case, the town provided documents sought in our request long after certifying that they could not be found.

We have no knowledge of the internal procedures used by Underberg and Kessler, but it seems reasonable to think that a firm of its size and sophistication would have multiple electronic back-up systems to assure that significant documents, such as these, are not lost. We respectfully request that, at the very least, the court order a much more detailed affidavit from Respondent's attorney or a representative of his firm explaining the systems that are in place to back up documents created on firm computers as well as for archiving e-mails, letters and faxes sent or received by the firm. And we further request, that said affidavit certify that all such back-up systems, not just the "client's file" were searched.

In the alternative, we request that the court order some form of discovery so that the facts surrounding the record keeping procedures of respondent's attorneys can be established.

Point 3: Failure to State a Cause of Action under the Arts and Cultural Affairs Law

We concede that the Arts and Education Law may not provide a private cause of action. On the other hand, when the Respondents appear to be engaged in a course of conduct that constitutes a clear violation of the regulations under that law and which also has the affect of avoiding the clear intent of the FOIL law to provide for open government and the fullest possible disclosure of public documents, it seems there should be a remedy for aggrieved citizens besides seeking a slap on the wrist from the Commissioner of Education.

Again, as pro se litigants we are not aware of the full powers of the court to act in this matter. A few possible remedies that come to mind, if the court should find the facts to warrant, are:

1. A public finding of a violation of both the FOIL and Arts and Cultural Affairs laws by the Respondents and an awarding of the costs of this proceeding to Petitioners.
2. An injunction requiring the Respondents to preserve all currently existing and future records in this matter according to the Arts and Cultural Affairs Law.
3. A finding that Respondent's attorneys have not represented their clients within the bounds of the law and a referral of the matter to the appropriate Ethics Committee with a recommendation for disciplinary action.

Point 4: Petitioners claim should be dismissed on the merits

We concede that we have never seen and don't know the exact contents of the missing documents. If we did, it would be unnecessary to FOIL them in the first place. By considering the totality of the known facts surrounding these records, however, it is possible to infer that they are in fact significant public records within the meaning of the regulations.

Respondents cite Schedule MU-1 Section 10.10 (c) in making their case that the records were not required to be retained. Paragraph 10 needs to be read in its entirety to understand what "non-significant" really means. The regulations set up three categories of correspondence according to their significance.

1. Section 10 (a) concerns correspondence "documenting significant policy or decision making ..." These records are required to be retained permanently.
2. Section 10 (b) concerns correspondence "containing routine legal, fiscal or administrative information." These records are required to be retained for 6 years.

3.. Finally, Section 10 (c) concerns correspondence, “of no fiscal, legal or administrative value.” The regulations then give specific examples of these “(letters of transmittal, invitations and cover letters).”

We believe, as further outlined below, that under this regulatory scheme, the records we seek mainly fall into category (b) (which must be retained for 6 years) or in some cases may fall into category (a) (which must be kept permanently). We are also willing to stipulate that if any of the records were, in fact, in category (c) that we are not interested in getting copies of them. On the other hand, we submit that if the correspondence sought were in fact cover letters or letters of transmittal, that our request extends to any documents or attachments transmitted therewith.

A closer look at some of the individual records sought demonstrates that they are unlikely to fall into category (c). For example:

1. Missing Documents (a.) and (b.) as numbered in Petitioners Exhibit B and identified in the Underberg and Kessler billing records as “Correspondence to T. Ferrera regarding Cultural Resource Studies” (March 24, 2005) and “e-mail correspondence to T. Ferrera and D. Jerum regarding formal submittal” (March 26, 2005) were part of a billing record that also included “telephone conference with T. Ferrera.” Messrs. Ferrara and Jerum are principals in a real estate development company that served as the Developer's key agents in approaching the town and developing an application for the project. This work by the Town's attorneys over two days took a total of 1.4 hour of billable time to complete, a length of time inconsistent with the characterization of these documents as routine or trivial. Further, the notation on both day's bills that the correspondence and discussions were about “site plan submittal issues” belies the claim that the documents involved were in any way similar to “letters of transmittal, invitations or cover letters” unless there were significant documents being transmitted therewith.

2. Missing Documents (c.), (d.), (e.), (f.) and (i.) were all identified in the Underberg and Kessler billing records as correspondence between the Town's attorneys and Ken Kamlet, the in-house attorney for the Developer. The total billable hours for dealing with these correspondences which occurred on April 21, 2005, October 21 and 25, 2005, and May 17, 2006 was 2.7 hours. This length of time and the timing of the correspondence is inconsistent with a trivial communication or invitation, as further discussed below:

a. During April of 2005, the Planned Development District (PDD) Law was being drafted and discussed by Town of Geneseo. The PDD Law was critical to the Project in that a proposed project building was far too large to be permitted under the existing zoning of the Gateway District. Enacting the PDD Law allowed this proposal to be reviewed. If the sought correspondence discussed significant policy or decision making about the draft PDD law, then we submit they are class (a.) records and should have been preserved permanently.

b. In October of 2005, the Developer had just submitted its formal application for PDD status and public opposition to the proposal was beginning to build. Records already received under our FOIL requests indicate that the Town was trying to assure the developer that public protests would not delay or derail the project. Correspondence concerning the town's

involvement in expediting the review process are of great public interest and are, at the very least, class (b.) records that should have been retained for a minimum of six years.

c. In May of 2006, the Project was in the process of being reviewed by the Livingston County Planning Board and an Economic Impact Study commissioned by the Town from the Center For Governmental Research was being completed. The notes on the Town Attorney's bills indicate that the missing correspondence with Mr. Kamlet was reviewed at the same time as the County Planning Board's staff report on the project. Positions taken by the town on both the County Planning Board process and the Economic Impact Study are significant and of great public interest. These records if they document policy decisions made about the County Planning Board are certainly class (b.) documents and may be class (a.).

3. Missing document (g.) is identified in the Underberg and Kessler billing records of December 2, 2005 as "correspondence of James Coniglio with N. Madden." This is part of a billing record that reads in full : "Conference with R. Hull regarding SEQR issues; correspondence with N. Madden; review Village EIS for WalMart project." Two hours was billed for this work. Neal Madden is an attorney for Harter, Secrest, the law firm that represented WalMart during its application to build a Super Wal-Mart in the Village of Geneseo. In the context of this record, it appears Mr. Madden was consulted with respect to SEQR-related questions regarding Wal-Mart's experience in Geneseo. Therefore, it does not seem likely that the record in question could be characterized as routine or trivial.

4. Missing document (j.) is identified in the Underberg and Kessler billing records of July 20, 2006. The billing record for this date reads: "telephone conference with T. Lucey of APD Engineering regarding June 19 letter." That a billing record generated on July 20 makes reference to a letter written more than one month earlier indicates that this record was not routine or trivial and was not immediately discarded.

Similar fact patterns and inferences can be drawn about other documents sought. In addition, the affidavit of petitioner Lofquist raises additional questions about the good faith of Respondents in their handling of these matters. Taking the totality of these facts, we submit that sufficient evidence exists to raise a serious question as to whether the Respondents are entitled to the benefit of a presumption that they have been following the Freedom of Information or the Arts and Cultural Affairs laws.

Conclusion

For the foregoing reasons, we ask the court to deny Respondents request to dismiss this action and ask that a trial date be set as soon as possible along with the issuance of an order to the Respondents to either produce the missing documents or produce a more detailed affidavit from Respondent's law firm detailing the circumstances of the loss of these records and the diligence of their search for them.