

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

In the Matter of

ADAM CROWN,

Petitioner,

vs.

Index No. 2010-1188

DANBY FIRE DISTRICT,

Respondent.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

APPEARANCES:

SCHLATHER, STUMBAR, PARKS & SALK

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DECISION & ORDER

Mulvey, Robert C., J.

On November 9, 2010, Petitioner filed a Petition and Order to Show Cause seeking an order to compel from Respondent the production or reasonable inspection of the documents sought by Petitioner, requiring Respondent to provide a reasonable time for Petitioner to inspect the documents, permitting Petitioner to use his own copier to copy the documents or permitting Petitioner to use Respondent's copier to make copies of the documents, and awarding Petitioner his attorney fees and costs.

Respondent opposes the motion, and filed a Verified Response to Petition denying the pertinent allegations. Respondent asserts that the Petitioner had previously been provided with some of the information he requested, that Petitioner, who was previously a member of the Danby Fire Department, is merely trying to harass Respondent, and that some of the information that Petitioner seeks is confidential and therefore exempt from disclosure.

F A C T S

On April 21, 2010, Petitioner electronically submitted a request to Respondent for disclosure of certain documents pursuant to the Freedom of Information Law (New York State Public Officers Law §89). On May 24, 2010 Respondent replied to the request, agreeing to provide certain documents, denying the request for certain documents, and requiring a fee of \$0.25 per page for copies of the documents. On June 9, 2010 Petitioner responded, and requested information to submit an appeal, and indicated he would bring his own copier to copy the documents he wanted. On June 21, 2010, Respondent replied, provided the appeal information, advising Petitioner that use of personal copiers was not permitted because the fire station did not have the capacity to permit such use, and set forth a time for Respondent to go to the fire station and review the requested documents since Petitioner did not want to pay the \$0.25 copying fee for copies.

By letter dated June 28, 2010, Petitioner filed an appeal with L. Patrick Caveney, Chairman of the Danby Board of Fire Commissioners, seeking the training records for the Fire Chief and Deputy Fire Chief, and appealing the time allotted for him to review the "call sheets" (referred to herein as "response sheets"), and objecting to the "delay" in granting him access to the records. Mr. Caveney sent a letter to Petitioner dated July 12, 2010 denying the appeal. On or about November 9, 2010 Petitioner filed the within action seeking access to the disputed records, seeking a reasonable time to inspect the records, permitting Petitioner to use his own photocopier or Respondent's photocopier, and his attorney fees. Respondent, on January 11, 2011 filed a Verified Response to Petition, objecting to the relief requested by Petitioner, except that Respondent acknowledged Petitioner's right to receive the training records for 2010, and redacted copies of the response sheets so long as Petitioner paid the \$0.25 per page fee.

DISCUSSION

At issue here are two categories of records requested by Petitioner, namely, "training records of Chief Fire Officers and Assistant Chiefs 1989 - present," and "response sheets 2000 - present." It is well settled that "... government records are presumptively open to inspection and copying by the public unless they come within one of the narrowly construed exemptions of Public Officers Law §87(2)." (*Miller v. New York State Department of Transportation*, 58 A.D.3d 981, 982 (2009)). The exemptions contained in Public Officers Law §87 (2) that are relevant here pertain to records that "(a) are specifically exempted from disclosure by state or federal statute; (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article. . . ."

Respondent claimed that the training records for the Chief Fire Officer and Assistant Chiefs from 1989 to present are confidential, however, Respondent has failed to explain how the disclosure of these documents would constitute an "unwarranted invasion of personal privacy." Further, Respondent appears to have abandoned this argument in its response to the Petition. (See, Verified Response to Petition, paragraph 61). When a claimed exemption is disputed, usually the best procedure is for the records to be provided to the Court for *in camera* examination. (See, *Miller v. New York State Department of Transportation*, 58 A.D.3d *supra* at 983). However, in the matter before the Court, Respondent acknowledges that most of the requested documents were already provided to Petitioner pursuant to a previous request (See, Verified Response to Petition, paragraph 44, "the training records of fire company officers, upon information and belief, were, according to Petitioners [sic] own correspondence, provided in 2009 . . ."), and as stated above, the respondent appears to have abandoned the exemption claim with regard to these documents. Thus, these documents are subject to disclosure. However, to the extent that Respondent has already provided those records to Petitioner, Respondent is not required to produce them again. (*Walsh v Wassner*, 225 A.D. 2d 911 (1996)).

With regard to the "response sheets," Respondent states that the records contain confidential information regarding patients. Petitioner has not disputed that confidential patient information should not be disclosed. Thus, Petitioner is entitled to inspect redacted copies of these records, with the names and identifying information of the patients redacted. Respondent further claims that Petitioner can obtain the requested records from other agencies. However, the Court is not aware of any case that permits a public body to not disclose public information contained in its records simply because the same information may be available from another public body.

With regard to the redacted records, Respondent clearly has the right to charge for copies of these records as, "... petitioner has no right to inspect exempted portions of a requested record and an agency is therefore permitted to make a redacted record by first making a photocopy of the original record, and it is not irrational for the agency to impose the statutory copying fee prior to providing the redacted record for inspection" (*Brown v. Goord*, 45 A.D.3d 930, 933 (3rd Dept., 2007)).

Petitioner also seeks to require Respondent to permit Petitioner to bring his own personal copier to Respondent's facility and photocopy the records. Public Officer Law §87(1)(b) directs each agency to adopt rules and regulation regarding the availability of their records, the cost to obtain copies and the person from whom the public can obtain copies. So long as the agency's rules are rational, they should be upheld. (See, *Murtha v. Leonard*, 210 A.D.2d 411 (1994)). Here, Respondent is a small volunteer fire department. The office person volunteers her time one day per week. Additionally, Petitioner is a former member of the fire department, is alleged to have altered a document from the fire department and allegedly resigned from the fire department due to allegations that he forged a fire department document. Given the circumstances, the Court cannot say that Respondent's rule not permitting private copiers to be used is irrational.

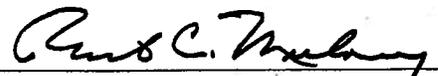
Petitioner is also seeking attorney fees for bringing this action. Public Officers Law §89(4)(C) permits the court to award reasonable attorney fees and costs if the Petitioner, "... has substantially prevailed, when: i. The agency had no basis for denying access; or ii. The agency failed to respond to a request or appeal within the statutory time." However, the awarding of attorney fees and costs is discretionary with the court. (*Powhida v. City of Albany*, 147 A.D.2d 236 (1989)). In the case at bar it cannot be said that the Petitioner has substantially prevailed. Respondent had already agreed to provide Petitioner with most of the documents Petitioner was seeking, but Petitioner failed to avail himself of the time provided to him by Respondent to review the records he had requested. Furthermore, Respondent had a legitimate basis for denying access to unredacted copies of some of the requested records. In light of the circumstances, the Court declines to award attorney fees and costs in this action.

CONCLUSION

For the foregoing reasons, the Petition is granted in part, and Respondent shall provide Petitioner with copies of the training records of the Chiefs and Assistant Chiefs of the fire department from 2009 to April 21, 2010, and the unredacted portions of the "response sheets," during Respondent's regular business; and Respondent shall provide Petitioner with such copies upon payment of the appropriate copying fee by Petitioner. The respondent shall be given forty-five days to complete redaction of the records after payment of the copying charges. The relief requested in the petition is otherwise denied.

This shall constitute the order of the Court.

Signed this 18TH day of March, 2011, at Ithaca, New York.


Hon. Robert C. Mulvey, J.S.C.