

STATE OF NEW YORK
COUNTY OF MADISON SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

2011 JAN 11 P 2: 50

FILED
MADISON CO. CLERK

PATRICIA EHRLICH,

Petitioner,

DECISION AND ORDER

v.

Index No. 2010-1581

NEW ROOTS CHARTER SCHOOL, by and through
JASON HAMILTON, in his capacity as Chairman of
the Board of Trustees of New Roots Charter School,
Respondent.

RJI: 2010-0251-M

The above-entitled matter comes before the Court upon Petitioner's Notice of Verified Petition, Verified Petition and the Affidavit of Patricia Ehrlich dated June 28, 2010. Respondent submitted in response thereto a Verified Response, the Attorney Affirmation of Michael J. Livolsi, Esq. and a Memorandum of Law dated August 24, 2010, along with an Affidavit of Tina Nilsen-Hodges, an Affidavit of Sabrina Johnston and an Affidavit of Jason Hamilton dated August 23, 2010. Petitioner submitted the Reply Affidavit of Patricia Ehrlich dated August 30, 2010, the Reply Affirmation of Douglas H. Zamelis, Esq. and Petitioner's Memorandum of Law dated August 31, 2010.

On September 3, 2010, in Madison County Supreme Court Attorney Douglas H. Zamelis appeared and was heard on behalf of Petitioner. So, too, Attorney Michael J. Livolsi appeared and was heard on behalf of Respondent.

By direction of this Court dated October 14, 2010, Petitioner was directed to submit an affidavit with respect to the portion of the relief sought pertaining to attorney's fees. Petitioner submitted the Affidavit of Attorney Zamelis dated October 20, 2010, and Respondent submitted the letter of Attorney Livolsi also dated October 20, 2010 in response thereto. Upon the request of respondent this Court by letter dated October 31, 2010, advised such responsive pleadings to be submitted by not later than November 15, 2010. Respondent subsequently submitted under cover dated November 15, 2010, the Attorney Affirmation of Michael J. Livolsi, the Affidavit of Sabrina Johnston and a Memorandum of Law. Attorney Zamelis, on behalf of petitioner, submitted a letter dated November 16, 2010, in response to respondent's submissions.

The following reflects the Decision and Order of the Court:

HISTORY OF CASE

New Roots Charter School (NRCS) of Ithaca, New York, operates pursuant to a charter issued in 2008 by the State University of New York Charter Schools. Petitioner, as a former classroom teacher, had sought information from NRCS by utilizing the mechanism set forth in New York State Public Officers Law Article 6 entitled Freedom of Information Law. The petitioner made demands of NRCS by written correspondence dated April 29, 2010, May 10, 2010 and June 10, 2010. The information sought by petitioner included a listing of the Board of Trustees, enrollment applications, daily attendance records, bids for services, letters to parents and records of suspensions, expulsions and withdrawals, and other similar information. NRCS responded to such demands by correspondence commencing on May 28, 2010 and concluding on August 19, 2010. By the latter date most if not all of the demanded items had been made available to petitioner.

Petitioner also sought information from respondent as it pertained to a meeting of the Board of Trustees held on or about April 28, 2010. Petitioner asserted that this “executive session” was in contravention of Article 7 of the Public Officers Law entitled Open Meetings Law and should have been conducted during the open, public meeting.

Thereafter, by the instant Verified Petition, pursuant to Article 78 of the Civil Practice Law and Rules, petitioner sought a review of the actions of NRCS with respect to both the Freedom of Information Law and the Open Meetings Law.

LEGAL ANALYSIS

A. Freedom of Information Law

The Freedom of Information Law (FOIL), Article 6 of the Public Officers Law, was enacted by the New York State Legislature recognizing, “[t]he people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.” (POL §84, Legislative Declaration).

As is relevant here POL Section 89 sets forth those procedural mechanisms by which a member of the public may seek to access information from a state entity, the conditions under which the entity may deny such access and the manner by which the aggrieved party may then seek redress or review of such denial.¹ Resort to the courts may be had by a party upon the completion of an

¹Education Law §2854(1)(e) “[a] charter school shall be subject to the provisions of articles six and seven of the public officers law.” Additionally, it should be noted that there has been no challenge raised to the applicability of Article 6 or 7 to NRCS as a New York State Charter School.

administrative appeal or a “constructive denial” of an appeal.²

Procedurally, upon receipt of a “written request for a record” the recipient “shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances, when such request will be granted or denied” within **five business days** of such receipt. (POL §89(3)(a). Should a request be denied, the party seeking the information must pursue an appeal within thirty days of such denial to the person designated to hear the appeal, and such person then has **ten business days** in which to respond to the appeal. (POL §(4)(a). Thereafter, an Article 78 proceeding may be commenced to seek review of the appeal. (POL §89(4)(b).

A review of the respondent’s compliance with Subdivision 89(4) demonstrates a substantial failure on its part to timely comply with the requests. Specifically, of the seven written requests dated April 29, 2010, the respondent failed to timely respond to any of these requests within five business days of receipt. For example, the April 29, 2010, request seeking a listing of the membership of the Board of Trustees for NRCS was responded to by letter dated May 28, 2010 simply advising that the information sought will be available on the school’s website by June 4, 2010. This response was approximately twenty business days after the request. The request of April 29, 2010 seeking enrollment applications for the period of April 9, 2009 through May 26, 2010; daily attendance records from March 25, 2010 through May 26, 2010; correspondence to parents between August 8, 2009 and May 25, 2010; a sprinkler system contract and various invoices for the period of July 1, 2010, was not responded to until May 28, 2010. Again, approximately twenty business days had elapsed since receipt of the request. These responses advised that some of these records were not in existence, that some would be provided at a later date and that others were being “looked into” by the author of the response. The controlling provision does not permit a recipient to respond to a written request that such is being “looked into” without providing a date upon which such will be made available or that such is otherwise unavailable.

The only timely response by NRCS with respect to the April 29, 2010 requests was that of May 7, 2010 which advised that no bidding documents were in existence with respect to food, etc., and that the West Haven Farm invoices would be available by June 4, 2010.

The May 28, 2010, responses were untimely in the first instance given the requirement that the recipient is to respond within five business day of receipt as set forth in POL §89(3)(a). Any reliance here by respondent that it was entitled to the twenty business day “extension” contained in POL §89(3)(a) is misplaced as NRCS did not acknowledge receipt of the petitioner’s requests within five business days. “[I]f circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgment of the receipt

²Contrary to respondent’s position, petitioner does have standing to commence the instant action. (See Norton v. Town of Islip, 17 AD3d 468, 2nd Dpt. 2005; POL §89(4)(a), (b).

of the request, the agency shall state, in writing, both the reason for the inability to grant the request within the twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.” (See POL §89(3)(a), emphasis added).

Here, NRCS simply failed to timely respond to two of the written requests of April 29, 2010 and did not comply with the mechanism in place pursuant to Article 6 of the Public Officers Law.

As to the written requests of May 10, 2010, NRCS failed to timely respond to the request within the statutory time frame in the first instance, i.e., five business days. Though it appears that the requested information was subsequently granted in writings dated May 28, 2010 and that this written response was timely in that it was within the twenty business day extension, it was incumbent upon NRCS to have initially responded within five business days to the written request; something which was not done. Had NRCS responded to petitioner in five business days from the receipt of the written request and “acknowledged receipt of the request” NRCS would have been entitled to the additional twenty business days in which to further respond to the request. Such did not occur here.

As to the June 10, 2010, written request of petitioner seeking information pertaining to student suspensions, expulsions and withdrawals, NRCS did not respond until June 28, 2010. Again, while within the twenty business day “extension” provided by statute NRCS failed to timely respond to the written request within the required five business days as such response was approximately eleven business days after receipt.

Substantively it appears from a review of the pleadings that petitioner has been provided with those records which respondent consented to provide or was initially advised that access was denied.³ The Court notes, however, that these subsequent grants of access and denials came after the filing of the Article 78 Verified Petition. However, with respect to enrollment applications received between April 9, 2009, and May 26, 2010, and letters to parents occurring between August 1, 2009, and May 25, 2010, as requested by petitioner in her April 29, 2010, written request, NRCS responded untimely by letter dated May 28, 2010, that the first set of records would be available by June 18, 2010, and that further review would need be made with respect to the second set of records. (Respondent’s Exhibit 0).

By June 10, 2010 petitioner appealed this “denial” of her written requests for the items requested above. (Respondent’s Exhibit W). Petitioner’s appeal was in all respects timely and any suggestion of the untimeliness of such appeal has not been raised by respondent. (POL §(4)(a).

Thereafter, by letter dated July 9, 2010, NRCS specifically denied petitioner’s access to the two

³Respondent provided subsequent responses to petitioner as to various written requests either denying the request, advising that no such records existed or that certain requested records would be available for the petitioner to obtain by a date certain.

records set forth above, i.e., enrollment applications and parental letters, asserting that such were excepted from FOIL by §87(2)(g) thereof. (Respondent's Exhibit S). However, this was not in response to petitioner's appeal of June 10, 2010, but, rather, an amplification of NRCS's initial written response of May 28, 2010.

Subsequently, by letter dated August 18, 2010, authored by Principal Tina Nilsen-Hodges on behalf of the Board of Trustees and in response to the June 10, 2010, appeal of petitioner, the records set forth above were made available to petitioner. (Respondent's Exhibit Z). It must be noted that this response to the June 10, 2010, appeal by petitioner was well beyond the ten business days permitted by FOIL in which to respond to an appeal. (See POL §(4)(a). It should also be noted that the petitioner's remaining appeals were all responded to by NRCS on or about August 18 and August 19, 2010, some forty-eight business days after the appeal was taken, and were, again, well beyond the time frame contemplated by the controlling statute.⁴

While it is clear that the respondent was derelict in its responses to petitioner's written requests and appeals it is also quite clear that respondent had either provided the information sought by petitioner or provided a written denial of such prior to the appearance in Madison County Supreme Court on September 3, 2010, and prior to the filing of the responsive pleadings after the aforesaid responses by NRCS. The question then is whether the Article 78 action is now moot.

The Court of Appeals in 1980 held that a proceeding may be dismissed when "considering questions which, although once live, have become moot by passage of time or change in circumstances." (See Hearst Corp. v. Clyne, 50 NY2d 707, 714, 1980). Thus, the present Article 78 proceeding became moot once the respondent provided responses to the petitioner's FOIL requests.

Here, whether petitioner is satisfied with the responses provided or not it is evident that each of the written requests as submitted by the petitioner, as well as the appeals which are the subject of this proceeding, have been addressed by the respondent during the pendency of this proceeding. Therefore, once responded to by the recipient the issue before the court is no longer a "live" action and is otherwise deemed moot. (See Corvetti v. Town of Lake Pleasant, 239 AD2d 841, 3rd Dpt. 1997). If dissatisfied with the responses made to the written requests during the pendency of the Article 78 proceeding, petitioner is required to then exhaust its administrative remedies first before seeking court intervention. Thus, those responses of the respondent for which petitioner is dissatisfied, and which occurred after the filing of the Article 78 action, must be addressed by way of a FOIL appeal rather than the pending action. (See Braxton v. Commissioner, New York City Police Department, 283 AD2d 253, 1st Dpt., 2001; Almodovar v. Altschuller, 232 Ad2d 700, 3rd Dpt. 1996; DiRose v. New York State Division of Parole, 222 AD2d 900, 3rd Dpt. 1995).

⁴The papers also reference an appeal taken by petitioner in January 2010 which was not addressed by NRCS until August 2010.

However, though this portion of the petitioner's relief is found to be moot, such does not end the inquiry of this Court as it relates to petitioner's request for attorney's fees and costs, as such may be considered and decided by this Court even if the action is moot. (See Global Tel*link v. State of NY Dept. of Correctional Services, 68 AD3d 1599, 3rd Dpt. 2009; citing Powhinda v. Albany, 147 AD2d 236, 3rd Dpt. 1989; Newton v. Police Dept., 183 AD2d 621, 1st Dpt. 1992).

a. Attorney Fees

FOIL §89(4)(c) provides for the discretionary granting of attorney fees and costs where a party has "substantially prevailed" against the agency and where:

- (a) the agency had no reasonable basis for denying access; **or**
- (b) the agency failed to respond to a requests or appeal within the statutory time. (Emphasis added).

Here, petitioner asserts that it had "substantially prevailed" in this action as evidenced by the respondent's release of information pursuant to petitioner's long standing and unanswered written requests and appeals. Petitioner takes the position that respondent's initial request for an adjournment was merely for the purpose of responding to these written requests and appeals prior to respondent's answer to the verified petition.

Petitioner further alleges that respondent did not have a reasonable basis upon which to deny the release of the requested information especially where respondent "re-thought" its position and subsequently disclosed such information. Additionally, petitioner asserts that respondent's failure to disclose the information pertaining to the sprinkler system was "disingenuous" given that petitioner had reasonably described such contract even though it may have been with the "Historic Clinton House, LLC" rather than "Travis and Travis." Finally, petitioner asserts that respondent's repeated failure to timely respond to either its written requests or its appeals is evidence of a pattern of dilatory tactics on the part of respondent engaged in with a view towards frustrating petitioner's access to the information sought.

Respondent takes the position that the petitioner has not "substantially prevailed" as the records sought were not of "clearly significant interest to the general public" (See Matter of Beechwood Restorative Care Center v. Signor, 5 NY3d 435); that the commencement of the action was not the "catalyst" for the production of the long awaited documents and that the respondent acted in good faith in addressing the written requests and appeals of petitioner.⁵ Respondent avers that even if petitioner were to have met the standards set forth above the granting of attorneys fees and costs is discretionary and the court, under these circumstances, should not award such.

⁵The 2006 legislatively enacted modifications to this provision eliminated the need for the petitioner to demonstrate that the records were "clearly of significant interest to the general public." (L.2006, c. 492 Legislation)

This Court, upon a review of the nature of the documents sought to be disclosed, the chronology of receipt of written requests/appeals and the timeliness or lack of timeliness on behalf of respondent in responding thereto, as well as the interplay between the commencement of the instant Article 78 action and the disclosure/response by respondent to the written requests/appeals, finds that the petitioner has substantially prevailed given the nature of the information sought herein pursuant to FOIL.

So, too, in order to grant the relief sought by petitioner it must be demonstrated that “it was the initiation of the [Article 78] proceeding which brought about the release of the documents.” (See Friedland v. Maloney, 148 AD2d 814, 3rd Dpt. 1989; Powhida v. Albany, 147 AD2d 236, 3rd Dpt. 1989). Here, while petitioner’s assertion that respondent’s request for an adjournment was for the purpose of permitting NRCS sufficient time to respond to the requests/appeals, and while recognizing that the timing of such responses is not coincidental, given this record, as a matter of law, petitioner’s Article 78 “brought about the release of the records.” Though respondent had begun efforts to distill out the very information sought by petitioner well prior to the receipt of the written requests for disclosure upon NRCS, as evidenced by the ongoing communication between NRCS and its computer program provider in an effort to obtain the mechanical knowhow by which to access this information within the school’s data bank, the statutory language of Article 7 had anticipated the necessity of where NRCS could have “engage[d] an outside professional service to provide copying, programming or other services required to provide the copy...” (POL §893(a). While it may be that NRCS did not act in “bad faith” with respect to the speed at which it sought to discern and distill the information from its computer records, it is also quite clear that NRCS did not take those efforts necessary to timely address this issue so as to provide a timely response to the written requests. (See Stop the Madrassa Community Coalition, et al. V. New York City Department of Education, 20 Misc.3d 1116(A), 2008 WL 2686151, S.Ct. New York County, 2008).

As an aside, it is clear that NRCS failed to timely respond to petitioner’s written requests and appeals pursuant to FOIL. The illness of the FOIL officer, while unfortunate, does not relieve respondent from timely addressing requests or appeals. Further, as set forth above, FOIL specifically contemplated by its language a situation where the accessibility of computer information may be problematic due to programming. However, this language directs the recipient to take those steps necessary to make such information available in a timely fashion even if occasioned by the employment of additional staff to accomplish this goal. Therefore, the respondent’s reliance upon these events is not sustainable and respondent should have taken those steps necessary to have timely addressed petitioner’s requests and appeals. So, too, respondent’s reliance upon the position that its response to petitioner that there were no Travis and Travis contracts is counterintuitive given the petitioner’s written request. This request sought the disclosure of the sprinkler system contract, albeit with Travis and Travis. The written request, coming on the heels of the Board of Trustee’s vote to engage in such a contract, was of sufficient temporal nexus and had been sufficiently and “reasonably described” by petitioner such that respondent should have disclosed timely the Clinton House contract rather than simply stating it had no such a contract, i.e., that existing between respondent and Travis and Travis. To

find otherwise would elevate form over substance and, given the legislative intent of FOIL, would permit a hyper technical interpretation of FOIL which is the antithesis to the liberal construction it is otherwise entitled to.

Based on the record here NRCS did not, in some instances, have a reasonable basis upon which to deny petitioner the information sought. Further, this Court finds that respondent had failed to respond to the petitioner's written requests for disclosure as well as petitioner's appeals in a timely fashion.

Therefore, while the granting of attorneys fees and costs is discretionary with this Court, given the facts and circumstances of this matter, not the least of which is the respondent's pattern of neglect in responding to both the written requests and the appeals of the petitioner in a timely fashion, such are warranted.

By Affidavits submitted on November 15, 2010, NRCS for the first time raises an alleged failure of the Plaintiff to pay photocopying fees as defense to an Order granting attorney's fees to Plaintiff. NRCS takes the position that payment of photocopying fees is a **prerequisite** to obtaining attorney's fees. However, none of the cases cited by NRCS supports such a position, nor has this Court found any such support in its review of the relevant statutory and caselaw.

NRCS relies heavily upon Matter of Fenstermaker v. Edgemont Union Free School Dist., 21 Misc3d 1118A, 873 NYS2d 233 (Sup.Ct, Westchester Cty. 2006) for the proposition that attorney's fees cannot be granted to a party who has not paid copying fees relative to FOIL requests. Such reliance is misplaced. In Fenstermaker, *supra*, the Plaintiff had brought an Article 78 proceeding to review the School District's FOIL fee collection process. That Plaintiff had requested on January 31, 2006, some sixty categories of financial documents spanning the period from January 1, 2001 through December 31, 2003. The Respondent School District had gathered those documents (48 boxes full) for copying by April 3, 2006, a mere 61 days after the FOIL request. The Plaintiff refused to pay the \$4,666.25 copying charges because they were \$.25 per page (statutorily allowable) and he wanted the documents copied by his choice of services for \$.15 per page. Not only did the Respondent School District refuse to turn over the voluminous response to the Plaintiff's January FOIL request, they also refused to comply with a second June 2006 FOIL request until the copying charges were paid. Under these extreme circumstances, the Westchester Supreme Court found Plaintiff's Article 78 action to be frivolous and the Respondent was entitled to payment before documents would be provided under either FOIL request.

In marked contrast is the instant case, wherein NRCS did not request payment of the \$43 in copying fees until October 1, 2010, well after Plaintiff filed the present Article 78 proceeding and the parties' September 3, 2010, Court appearance thereon. The record is devoid of any prior demand for payment for FOIL photocopying expenses made by NRCS to Plaintiff. Likewise, there are no notices to Plaintiff prior to commencement of the present action that future FOIL requests would not be granted until outstanding balances for copying fees were paid.

NRCS' characterization of Plaintiff's "refusal" to pay is also without merit. The letter dated October 6, 2010, upon which NRCS bases its unclean hands doctrine argument, sets forth the Plaintiff's belief that she was not required to pay for the photocopying of documents which she wished to merely inspect pursuant to FOIL Section 87(1),(2) and 89(3). Those provisions of FOIL do in fact support Plaintiff's position. There was a disagreement between the parties as to whether or not Plaintiff had to pay for the photocopying of **redacted** documents. While NRCS is correct in its interpretation of the statutory provisions in that Plaintiff is responsible for payment of photocopying of documents that must necessarily be redacted, Plaintiff's position cannot be said to be in bad faith, nor the basis for imposition of the doctrine of unclean hands.

For all of the foregoing reasons, NRCS's request that Plaintiff be denied attorney's fees for failure to first pay photocopying fees, which she had not been assessed before commencement of the instant action, is denied on both statutory and equitable grounds.

B. OPEN MEETINGS LAW

Public Officers Law Article 6 is entitled "Open Meetings Law" (hereinafter OML). The legislative declaration set forth at §100 thereof states that,

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.

Thus, every meeting wherein "public business" is discussed must be done so in an "open and public manner." However, exceptions to this rule are statutorily set forth at Public Officers Law (POL) §103 as it relates to executive sessions. In particular, POL §103(a) permits a public entity's meeting outside of the public's presence when in conformity with POL §105. Subdivision 105 permits a public body to conduct such a meeting upon a majority vote to do so made in public and only upon the vote first being prefaced by a "motion identifying the general area or areas of the subject or subjects to be considered." This subdivision thereafter specifically enumerates those "areas" or "subjects" which may be taken up in an executive session. A violation of this particular provision if found to be intentional and/or material may result in a court, upon a review pursuant to Article 78 of the Civil Practice Law and Rules, nullifying any action so taken and, under certain circumstances, awarding costs and reasonable attorneys fees to the successful party.

Here, petitioner asserts that respondent's Board of Trustees (BOT) "has violated various provisions of the Open Meetings Law ("OML"), including failing to provide notice of dates,

times, and places of meetings, and entering into executive session for purposes not authorized by OML.”⁶ Specifically, petitioner asserts that NRCS had failed to comply with POL §104 as it relates to the manner by which NRCS provided notice of such meetings. Further, and in particular, petitioner asserts that respondent failed to comply with POL §§103(a) and 105 by entering into executive session for an unauthorized purpose on April 28, 2010.

Respondent takes the position that it has complied with the relevant statutory directives as it pertains to notice and conducted itself in conformity with the OML with respect to the April 28, 2010, BOT meeting.

On April 28, 2010, the BOT met for an “Emergency Meeting and Executive Session” as designated by the minutes of the Board.⁷ The meeting was called to order at 5:32 PM and Jason Hamilton advised that the “agenda for this emergency meeting was to consider and vote on the proposed sprinkler system contract.” Thereafter, T. Turecek “moved that we adjourn to Executive Session, as this discussion involves the sale of real property (see section 105.H of Open Meetings law Article 7).” (Hamilton Affidavit, Exhibit A).

The motion for commencement of an executive session was passed and the BOT conducted discussions outside of the public’s presence from 5:34 PM until 5:42 PM. The Board then returned and approved the “sprinkler system contract, for a new sprinkler system to be installed in the Clinton House this summer, managed by Frost Travis.” The meeting was thereafter adjourned.

Petitioner asserts that the executive session did not comply with the OML as it did not adequately address the subject matter which was to be addressed and was not a permissible topic for which an executive session may be held. Respondent asserts that the BOT adequately apprised the public of the subject matter which was to be addressed, discussed the “sale” of real property, albeit a lease, and awarded a contract, all of which are permitted to be addressed in executive session.

POL §105(1) permits executive session to occur when an affirmative vote is taken on a “motion identifying the general area or areas of the subject or subjects to be considered.” Those areas deemed appropriate for executive session are enumerated at Subdivision 1 (a-h) and such listing is exclusive.

Upon a review of the submissions the respondent’s position that the subject area identified by Jason Hamilton sufficiently comported with the above-referenced provisions is, generally, an accurate assessment. Hamilton, according to the minutes, informed those present that the agenda was to “consider and vote on the proposed sprinkler system contract.” Board member Turecek

⁶Ehrich affidavit of June 28, 2010 at ¶35.

⁷Exhibit A of the Jason Hamilton Affidavit dated August 23, 2010.

then moved, pursuant to the statute, to conduct an executive session “as this discussion involves the sale of real property” and apparently referenced Section 105.H of the OML.⁸

Procedurally, the BOT was required to vote in an open meeting upon a motion made identifying the areas to be addressed in executive session which would fall within the enumerated provisions contained within §105(1). However, it is the motion which must set forth the substance of the basis upon which executive session is called rather than preparatory language. Here, the board member’s motion to address the “sale of real property” and not the awarding of a contract for the sprinkler system, specifically.

In the first instance, the motion itself was insufficient in its description of that which the BOT was to discuss in executive session. Further, the mere recitation of the section of §105(1) upon which the BOT relied was also insufficient. (See Gordon v. Village of Monticello, 207 AD2d 55, 57-58, 3rd Dpt. 1994). The initial discussion of a sprinkler system contract does not necessarily equate with a prospective discussion concerning the sale of real property. And while respondent’s position that the true intention of the executive session was to avoid an impact upon the viability of the existing lease agreement between NRCS and Clinton House the record is devoid of any showing that “publicity would substantially affect the value of the property”, or, as in this case, the lease. (See POL §105(1)(h); Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School District, 66 AD2d 51, 3rd Dpt. 1979). Further, the section relied upon by respondents pertains to “the proposed acquisition, sale or lease of real property...” In the context in which the sprinkler system was discussed it cannot be concluded that the executive session pertained to the “the proposed acquisition, sale or lease of real property...” Rather, at best, it can be said that the executive session merely discussed the implication of the installation of a sprinkler system in the already leased premises and what, if any, such impact may have on the existing lease agreement. Finally, while respondent’s reliance upon the language of POL 105(1)(f) specifically pertaining to the “employment” of a “corporation” is not squarely on all fours with what had actually been discussed in executive session, this Court finds such reliance to be more consistent with that which occurred rather than reliance upon Subdivision (1)(h) thereof. However, reliance on 105(a)(h) was specifically addressed by the BOT prior to its voting on the motion to convene an executive session and reliance now premised upon 105(a)(f) can only be viewed by this Court, given the record, as justification *post hoc ergo propter hoc*.

Therefore, based upon the foregoing, this Court does not find that NRCS fully complied with Section 105 of the OML with respect to the April 28, 2010, executive session.

a. Attorney Fees

Open Meetings Law §107(2) permits a court to award reasonable attorney fees and costs to the prevailing party in its discretion:

In any proceeding brought pursuant to this section, costs and reasonable attorney fees

⁸It should be noted that there is no such section as 105H and this Court finds such to be a reference to Section 105(1)(h) of the POL.

may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held. (Emphasis added).

Absent a finding of a material violation or substantial private deliberations the award of attorney fees and costs is discretionary. Here, however, this Court does not choose to exercise its discretion by awarding attorney fees and costs as the failure to adequately comply with the statutory directives of the Open Meetings Law was not, on this record, performed in bad faith. Further, this Court finds that additional remedies exist by which to address the BOT's deficiencies in this area rather than the imposition of fees and costs.

Conclusion

Therefore, based upon the foregoing and the relevant law of this state, it is

ORDERED, that petitioner's application with respect to the First Cause of Action is **DENIED IN PART** as moot, and it is further

ORDERED, that petitioner's application with respect to the First Cause of Action seeking attorney fees and costs is **GRANTED** and an inquest will be scheduled for the purpose of establishing same, and it is further

ORDERED, that petitioner's application with respect to the Second Cause of Action is **GRANTED IN PART**, and the respondent **shall** comply fully with all provisions of Article 6 and Article 7 of the Public Officers Law; and it is further

ORDERED, that the Board of Trustees of New Roots Charter School, its Executive Staff, including the Records Access Officer, **shall** participate, within sixty (60) days of the entry of this Decision and Order or within a reasonable time thereafter, in training sessions imposed by the Public Officers Law Article 6 and Article 7 as conducted by the staff of the Committee on Open Government; and it is further

ORDERED, that petitioner's application with respect to the Second Cause of Action as it pertains to attorney fees and costs is **DENIED**.

ENTER

DATED: January 11, 2011
Wampsville, New York



Hon. Donald F. Cerio, Jr., A.J.S.C.