

MEMORANDUM

SUPREME COURT - SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

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In the Matter of the Application of

By: Baisley, J.S.C.

COALITION OF LANDLORDS, HOMEOWNERS
AND MERCHANTS,

Dated: February 14, 2005

INDEX NO.: 00075/2001

Petitioner,

for a Judgment Pursuant to Article
78 of the Civil Practice Law and Rules

-against-

COUNTY OF SUFFOLK,

Respondent.

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PETITIONER'S ATTORNEY:
R. BERTIL PETERSON, ESQ.
TIMOTHY M. MCENANEY, ESQ.
28 E. Main Street
Babylon, New York 11702

RESPONDENT'S ATTORNEY:
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SUFFOLK COUNTY ATTORNEY
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P.O. Box 6100
Hauppauge, New York 11788

Petitioner brought this Article 78 petition seeking disclosure of certain computer records maintained by respondent. The petition relies upon Public Officers Law §§ 84 - 90, otherwise known as the Freedom of Information Law ("FOIL"). The petitioners originally made a FOIL request to the respondent which sought various data from the Suffolk County Clerk's Office, the Suffolk County Treasurer's Office and the Suffolk County Real Property Tax Service Agency ("RPTSA"). The respondent denied the FOIL request and this Article 78 proceeding followed.¹ The Court, by order (BAISLEY, J.) dated August 13, 2002, directed that a hearing be held.

The issue to be determined at the hearing was whether the respondent has the capacity to retrieve the information sought by petitioner from the Suffolk County Clerk's Office and the Suffolk County RPTSA without the necessity of creating a new record. The petitioner also requested attorney's fees.

¹ The Respondent's Post Hearing Memorandum of Law, at pages 2 through 7, sets forth the detailed sequence of events preceding the hearing.

The hearing was conducted over several days and the only witnesses that testified were Peter Schlusser, Director of Technology and Optical Imaging in the Suffolk County Clerk's Office, and Ronald J. Green, Mapping Production Developer in the Suffolk County RPTSA. At the conclusion of their testimony, petitioner's counsel requested and received an adjournment of 60 days in order to review the testimony with his experts in order to prepare his cross-examination. After the respondent's witnesses were cross-examined, petitioner called no witnesses and both sides then submitted post-hearing memoranda.

The testimony of both witnesses is credible and establishes by a preponderance of the evidence that in order to produce the information requested by the petitioner, the respondent would be required to create a record. According to the uncontroverted proof, that record would require approximately 171 days (or 34 weeks) worth of technical "man hours." Furthermore, that time devoted to the creation of the record sought by petitioner would be to the exclusion of other work normally performed by the technical staff of the Suffolk County Clerk's Office. The testimony is undisputed that the respondent would have to write new software to produce such a record, and would also have to employ outdated hardware no longer in use by respondents.

It is significant that the Suffolk County Clerk's Office makes the information sought available at public computer terminals within their office and at their website. The Suffolk County RPSTA, in recognition of the public interest in the data maintained in their office, also produces a CD-ROM available for purchase. The CD-ROM contains information on 577,000 parcels of property representing all of the towns in Suffolk, and is available as a subscription service. The current fee is a relatively modest \$175.00.

The issue is not simply one of merely redacting confidential information with a keystroke or two, as petitioner urges. Nor is the issue one of merely "changing technology" where the respondents possess electronic data rather than printed data. The evidence is clear that the agencies in question would be required to create a record at considerable expense to the taxpayers. The New York FOIL does not require that an agency create a record "not maintained or possessed" by that agency. Public Officer's Law § 89 (3), *Guerrier v. Hernandez-Cuebas*, 165 A.D.2d 218, 566 N.Y.S.2d 406 (3d Dept. 1991), appeal denied 78 N.Y.2d 853, 573 N.Y.S.2d 466.

This Article 78 petition is denied in its entirety. The petitioner's request for attorney's fees is also denied.

Settle judgment.

Dated: February 14, 2005

PAUL J. BAISLEY, JR.

J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION