

December 27, 1978

**Justice Derounian**

**ZALESKI v. HICKSVILLE UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION OF HICKSVILLE UNION FREE SCHOOL**—In this article 78 proceeding, petitioner seeks an order, *inter alia*, directing the respondent to comply with his requests for "records" pursuant to the provisions of the "Freedom of Information Law" (Public Officers Law, Article 6, sec. 84-90) and the Rules and Regulations contained in 21 NYCRR section 1401.1 to 1401.10 which were promulgated by the Committee on Public Access to Records pursuant to the authority granted in Public Officers Law Section 89(1)(b)(iii).

Essentially, the proceeding arises as a consequence of the respondent's failure to comply with the petitioner's requests for four sets of "records." The relief sought, however, is more properly described as both procedural and substantive in nature.

Initially, the court must consider the statute of limitations defense interposed by respondent with respect to the records sought by petitioner in his two requests of May 1, 1978. This defense is raised only with respect to those two requests and does not affect the procedural relief sought nor the records sought by petitioner's first two requests. It must be noted, however, that, even if this proceeding were time barred with respect to these two requests, there is nothing to prevent petitioner from making a new request for the identical information and starting the appeals process anew upon any denial.

On May 1, 1978, petitioner sent two requests in writing for "records" to Ms. Egan, the records access officer for respondent. On May 3, 1978, Mr. Hill, respondent's superintendent and district appeals officer, wrote to petitioner concerning these requests, stating that the records would not be produced since they were the subject of various court actions in progress. On June 5, 1978, petitioner wrote to Mr. Hill, requesting that all of his requests, including the two of May 1, be reviewed by Mr. Hill in his capacity as district appeals officer. This proceeding was subsequently commenced by service of the notice of petition and petition upon respondent on Sept. 14, 1978, which is within four months of June 5, 1978, but not May 3, 1978.

Upon an application of the pertinent provisions of 21 NYCRR Section 1401, it is apparent that the statute of limitations does not bar this court from considering the appropriateness of the two requests.

Section 1401.2(b)(1)(ii) of 21 NYCRR makes it the duty of the records access officer (Ms. Egan) to either supply the records or deny the request in writing with the reasons therefor. Ms. Egan never responded to the May 1, requests although, on May 3, Mr. Hill, as noted, did. Although urged by respondent, Mr. Hill's letter cannot be considered a denial on appeal from which the four-month statute of limitations would run since it was the duty of Ms. Egan to initially respond to the requests. At best, it can be considered an acknowledgment, pursuant to 21 NYCRR Section 1401.5(d), of the request's receipt by the agency from which an appeal lies if the records or a denial of access thereto is not forthcoming within ten days thereafter. The time to appeal would be within thirty days after the elapse of the ten days period after acknowledgment. In this light, this proceeding is timely since, on June 5, petitioner appealed to Mr. Hill in his capacity as district appeals officer.

Although this approach leaves much to be desired, to consider the denial by Mr. Hill a denial on appeal is to allow the respondent to disregard the procedure contained in 21 NYCRR Section 1401 and then, in turn, strictly enforce the statute of limitations against petitioner. Therefore, from an equally literal application of the law, the response by Mr. Hill must be considered either an acknowledgment as mentioned above, or must be treated as a nullity and disregarded as no response, at which point the provisions in 21 NYCRR Section 1401.7(c) and (d) would apply, again making this proceeding timely. It should be noted that, no matter how one interprets this response, it contained no statement advising petitioner of his right to appeal as required in 21 NYCRR Section 1401.7(b). Further, respondent never forwarded notice of such appeal to the Committee on Public Access to Records as per 21 NYCRR Section 1401.7(f) and Public Law Section 89(4)(a).

Accordingly, the court determines that the time to commence this proceeding was four months after June 12, 1978, in light of the seven days allowed the appeals officer within which to respond to the appeal. As such, the proceeding is not barred with respect to the two requests of May 1, 1978.

Turning now to the issue of the substance of the four requests, Public Officers Law Section 89(4)(b) places the burden upon the agency involved of proving that the records fall within one of the exemptions under Public Officers Law, Section 87(2) and thus are not obtainable. It is clear that the respondent has failed to meet this burden.

With respect to the first and second of petitioner's requests, i.e., tapes of public Board meetings and purchase orders showing payments to respondent's attorney, Mr. Campanella, and his associates, respondent objects that to produce these records may be burdensome and involve personnel costs for which petitioner has not offered to pay. There is no exemption provided in Public Officers Law, Section 87(2) for requests which may be burdensome and 21 NYCRR Section 1401.8(c)(3) specifically provides that the agency may not include personnel salaries in assessing reproduction costs. Accordingly, the court finds no merit to respondent's objections and directs that these records be produced within twenty days after the entry of the order herein.

Beyond the statute of limitations defense already found to be deficient with respect to petitioner's third and fourth requests, respondent further objects to these requests on the basis that petitioner had previously sought substantially the same material in an arbitration proceeding by means of a subpoena which was quashed by order of Mr. Justice Kelly and, in a proceeding before Perb which was subsequently dismissed. There again is no applicable exemption contained in Section 87(2) corresponding to respondent's objections. Further, the subpoena was quashed by Mr. Justice Kelly on grounds which have no relevance to the instant requests. Accordingly, the court finds no merit to respondent's objections and directs that these records be produced within twenty days after the entry of the order herein.

Petitioner also asks this court to direct the respondent to comply with the procedural format contained in the Public

Officers Law and 21 NYCRR Section 1401 for the processing of requests for information. The court shall treat each item of relief requested by petitioner in the order presented in the petition.

First, petitioner asks that the respondent be directed to keep and maintain an up-to-date list of records available for copying. Public Officers Law Section 87(3)(c) and 21 NYCRR 1401.6 provide that an agency shall maintain a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available for public inspection under the law. The list must be sufficiently detailed to permit identification of the records sought and must be updated at least twice per year. 21 NYCRR Section 1401.2(b)(1) makes it the duty of the records access officer to insure that the agency maintain the subject matter list up to date.

Second, the petitioner asks that the court direct respondent to appoint a records access officer who is available during all normal working hours. While there is no specific requirement in the law that this be done, it should be noted that 21 NYCRR 1401.4 directs that the agency must accept requests for public access to records during all hours they are regularly open for business. This means that, even if the respondent's records access officer is not available, the agency still must accept requests and produce records during their normal working hours. Further, 21 NYCRR 1401.2(b)(3)(i) makes it a duty of the records access officer to "promptly" make the records available for inspection and 21 NYCRR 1401.5(b) requires that the agency respond to the request within five business days of its receipt, either making the record available or denying its access. As noted, this is the duty of the records access officer. Accordingly, while it is not the direction of this court that respondent must appoint a records access officer who is available during all normal working hours, it is the direction of this court that respondent accept, process, produce or deny access to its records in compliance with the process and time constraints cited above and contained in 21 NYCRR 1401 and the Public Officers Law. Although respondent may well be able to do this without having its records access officer available during all normal working hours, it would appear that the far easier and more economical procedure would be to have its records access officer available during all normal working hours. It is not an excuse nor a justification for not processing requests for records promptly that this person is available only one day per week.

Third, petitioner requests that the respondent be directed to process all requests for records within five business days of their receipt. Quite obviously this was not done in the past with petitioner's requests. Section 89(3) of the Public Officers Law and 21 NYCRR 1401.5(b) and (d) require that an agency shall, within five business days after its receipt, respond to the request by producing the record, denying access to it, or acknowledging receipt of the request with a statement as to when the request will be granted or denied. After acknowledgment, it may be construed as a denial of access to the record unless within ten days thereafter the request is either granted or denied.

Fourth, petitioner requests that respondent be directed to process all appeals within seven business days after their receipt. Section 89(4)(a) of the Public Officers Law and 21 NYCRR 1401.7(g) require that the district appeals officer shall render his decision within seven business days after the receipt of the appeal.

Fifth, petitioner requests that respondent be directed to notify the Committee on Public Access to Records of all appeals and determinations thereon. Again, this is a requirement contained in Section 89(4)(a) of the Public Officers Law and 21 NYCRR 1401.7(f) and (g).

Finally, petitioner requests that the respondent be directed to appoint a records access officer with the authority to grant access to records. This issue arose as a result of respondent's decision to check all requests with its Board president before acting on them. The clear intent and direction of 21 NYCRR 1401.2 is for the records access officer to have the authority to grant or deny access to

records of the agency. In fact, 21 NYCRR 1401.2(a) specifically makes it a duty of the records access officer to coordinate agency response to public requests for access to records, while 21 NYCRR 1401.2(b)(3)(i) and (ii) makes it a responsibility of the records access officer to either make the records promptly available for inspection or deny their access in writing with the reasons therefor. Accordingly, it is the opinion of this court that the applicable provisions of the law require the records access officer to have the authority to grant or deny access to records. Settle judgment.