

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ONTARIO

CANANDAIGUA MESSENGER, INC.,

Petitioner,

-vs-

DECISION

Index No. 90259

KAY WHARMBY, as RECORDS ACCESS OFFICER  
OF THE CITY OF CANANDAIGUA; DENNIS A. MORGA,  
as PRESIDENT OF THE CANANDAIGUA  
RECREATION DEVELOPMENT CORPORATION; and  
CANANDAIGUA RECREATION DEVELOPMENT  
CORPORATION,

Respondents.

Present: Hon. Frederic T. Henry, Jr.  
Acting Supreme Court Justice

Appearances: Neil H. Rivchin, Esq.  
Attorney for Petitioner

Daniel O'Brien, Esq.  
Attorney for Respondents Morga and  
Canandaigua Recreation Development Corporation

The petitioner seeks an order pursuant to CPLR Article 78 compelling the respondents to produce all records requested by the petitioner pursuant to Article 6 of the Public Officer's Law (New York State Freedom of Information Law) and to open all meetings of the respondent Canandaigua Recreation Development Corporation (CRDC) to the public pursuant to Article 7 of the Public Officers Law (New York Open Meetings Law). Additionally, the petitioner seeks an order invalidating all actions taken at illegally closed CRDC meetings pursuant to Public Officers Law §107(1) and awarding the petitioner reasonable attorney's fees and the costs and disbursements of this proceeding pursuant to Public Officers Law §107(2).

Kay Wharmby, as Records Access Officer of the City of Canandaigua, has moved for an order dismissing the petition upon the grounds that it is legally insufficient pursuant to CPLR 7801(1) on the basis that the petitioner has failed to exhaust its administrative remedies with respect to the City of Canandaigua by failing to appeal a determination of the Records Access

Officer pursuant to Public Officers Law §89(4)(a).

Pursuant to the provisions of its June 17, 1999 Resolution #99-083, the Canandaigua City Council unanimously voted to authorize the creation of a not-for-profit local development corporation pursuant to §1411 of the NYS Not-For-Profit Corporation Law, known as the Canandaigua Recreation Development Corporation (CRDC) to oversee the design, construction and operation of the proposed Roseland Waterpark. On or about July 21, 1999, pursuant to City Council resolutions, the CRDC was incorporated. Among its stated purposes were "...lessening the burdens of government and acting in the public interest." Specifically, Article III(c) of CRDC's Certificate of Incorporation, provides that "The Corporation is a Type 'C' Corporation under §201 of the N-PCI, the purpose and lawful object of which is to act for the public purpose in financing the development of a water theme park recreation facility in the City of Canandaigua, New York....." (Emphasis added).

Although the Certificate of Incorporation for the CRDC as amended provides that "the City of Canandaigua, New York shall incur no financial responsibility or liability whatever for the acts of this Corporation....," Article V of the Amended Certificate guarantees the input of the City by requiring that the Board of Directors include the Canandaigua City Manager, the City Director of Development and Planning and three individuals who are appointed by and serve at the pleasure of the Canandaigua City Council. Additionally, the amended certificate designates the New York Secretary of State as agent of the corporation upon whom process may be served and directs such process be mailed to CRDC "c/o Office of City Manager, City Hall, Two North Main Street, Canandaigua, New York."

Resolution #99-064, entitled "A Resolution Providing Approvals and Other Actions Towards the City of Canandaigua Assisting the Canandaigua Recreation Development Corporation In Financing the Roseland Water Park Project" was passed by the Canandaigua City Council on May 6, 1999. The resolution states that "the Corporation desires to construct an aquatic recreation center" and "has requested the City to assist the Corporation in financing a project...." The Resolution further acknowledges that the City intends to assist in financing the project by authorizing the Corporation to issue bonds on behalf of the City in accordance with Internal Revenue Service Ruling 63-20 so that the Bonds would qualify as tax-exempt obligations. In addition to assisting the financing of the project the City also agreed to

appropriate \$395,000 for, and undertake the construction of, certain capital improvements associated with the park.

The Resolution recognizes that it is in the best interests of both the City and its citizens that the project be undertaken and that providing the facility "is a proper public purpose." Under the Resolution the City would "accept fee title to the property financed by the Bonds, including all additions thereto, upon payment of the Bonds in full...." The City also retained the option to purchase the project at any time while the bonds are outstanding for an amount sufficient to redeem the amount outstanding on the bonds. The CRDC's Certificate of Incorporation at Article VIII also provides that "upon dissolution of the Corporation, title to or other interest in any real or personal property that is owned by the Corporation at such time, after paying or making provisions for the payment of all of the liabilities of the Corporation, without consideration of whatsoever kind or nature, shall vest in or be transferred to the City of Canandaigua, New York."

On or about October 25, 2000, the petitioner's reporter, Bryan Mahoney, made a written request upon respondent CRDC pursuant to the NYS Freedom of Information Law (FOIL) for copies of the meeting minutes of respondent CRDC's Board of Directors from its inception to the present time and for a copy of "any contracts, agreements or memoranda regarding the management of Roseland Water Park, including compensation for individuals and/or corporations in charge of its day-to-day operations." On or about November 1, 2000, respondent CRDC, by its attorney, Theodore A. Trespasz, Esq., notified the petitioner in writing that it was denying its FOIL request on the grounds that the CRDC is a private corporation and not subject to New York's Freedom of Information Law. At its meeting on November 14, 2000, the Board of Directors of CRDC formally voted to close all of its meetings to the general public and the press.

At the outset it is clear that Articles 6 and 7 of the Public Officer's Law are based on an overriding principal that the processes of governmental decision-making should be open to public scrutiny. The public is entitled not only to attend and listen to the deliberation of public officials but also to have access to, and to review, the documents and statistics leading to determinations of those officials (Public Officer's Law §§84 and 100). The intent underlying the Freedom of Information Act is that public documents are "presumptively available for public inspection and

copying" (see Glens Falls Newspapers Inc. v. Counties of Warren and Washington Development Agency, 257 AD 2d 948, 949 (3d Dept 1999)). Thus "exemptions are to be narrowly construed to provide maximum access and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within FOIL exceptions by articulating particularized and specific justification for denying access" (see Laborers International Union of North America, Local Union No. 17 v. New York State Department of Transportation, \_\_\_\_\_ AD 2d \_\_\_\_\_, (719 NYS2d 354, 356 (3d Dept 2001))). As with FOIL, "the Open Meetings Law is designed to ensure that public business is conducted in an observable manner; to promote this goal, the provisions of the Open Meetings Law are to be liberally construed" (see Smith v. City University of New York, 92 NY 2d 707, 713 (1999)).

The determinative question for the purposes of FOIL is whether the CRDC comes within the definition of an "agency" which must, pursuant to Public Officer's Law §87(2), make available for public inspection and copying all records except those specifically exempted from disclosure. For the purposes of the Open Meetings Law, it must be determined whether CRDC comes within the definition of a "public body" which must, pursuant to §103 of the Public Officers Law, open its meetings to the general public.

Public Officers Law §86(3) defines agency as "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" (emphasis added). The fact that the respondent CRDC is a not-for-profit corporation is not determinative (see Encore College Bookstores Inc v. Auxiliary Service Corp of SUNY Farmingdale, 87 NY 2d 410 (1995)). The question is whether the CRDC is performing a governmental or propriety function for the City (see Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of SUNY, 92 NY 2d 357 (1998); Ryan v. Mastic Vol. Ambulance Co., 212 AD 2d 716 (2d Dept 1995) lv. den 88 NY 2d 804 (1996)).

In Matter of Buffalo News v. Buffalo Enterprise Development Corp., 84 NY 2d 488 (1994) a not-for-profit corporation formed for the purpose of encouraging economic growth in the community was determined to be an "agency" for the purpose of FOIL since it was formed by the City of Buffalo to advance the objectives of a city department, its by-laws required that

several city officials including the mayor sit on its board of directors, and it received its funding through governmental sources. Counsel for CRDC has argued that the holdings in the Buffalo News case have been tempered by holdings in Stoll v. New York State College of Veterinary Medicine at Cornell University, 94 NY 2d 162 (1999) and Farms First v. Saratoga Economic Development Corporation, 222 AD 2d 861 (1995). Both of these cases are clearly distinguishable on their facts from the Buffalo News case. In Stoll, complaints under the Cornell Campus Code of Conduct were sought pursuant to FOII, as to four statutory colleges at the University. The court noted as to those colleges, the Legislature had granted Cornell University discretion over maintenance of discipline and its disciplinary records for both the statutory and private colleges were held by the same University office and were not subject to disclosure. In Farms First, the respondent was an independent agency formed by private businessmen to further their interests and was not intertwined with municipal government. No county employee served on the board and some of its funding was from private individuals and corporations and it contracted with the county on a fee-for-services basis.

In the present case, the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged \$395,000 to finance capital improvements associated with the park. The CRDC denies that the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.

Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution

of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law.

Public Officer's Law §102(2) defines public body as "any entity for which a quorum is required in order to conduct public business and which consists of two or more members performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law." Sections 66(1) and (4) define a public corporation to include a public benefit corporation which, in turn, is defined as a "corporation organized to construct or operate a public improvement wholly or partly within the state, the profits of which inure to the benefit of this or other states, or to the people thereof."

In Smith v. City University of New York, supra at page 713, the Court of Appeals held that "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies." In the present case, the CRDC is clearly exercising more than an advisory function and qualifies as a public body within the meaning of the Public Officers Law. The CRDC is a formally constituted body with pervasive control over the entity it was created to administer. It has officially established duties and organizational attributes of a substantive nature which fulfill a governmental function for public benefit. As such its operations are subject to the Open Meetings Law.

Given the commitment of the CRDC to deny access to its materials and meetings even in the face of the Opinion of the State Department On Open Government, with which the determination of this Court is in agreement, the exercise of the Court's discretion to award counsel fees pursuant to Public Officer's Law §107(2) is mandated (see Gordon v. Village of Monticello, Inc., 87 NY 2d 124 (1995); Auburn Publishers Inc v. Netti, 229 AD 2d 988 (4<sup>th</sup> Dept 1996)). Since the propriety of any given action of the CRDC, beyond the denial of access, is not being challenged in this case, this Court refuses, without prejudice, to declare any action of the

CRDC void pursuant to Public Officer's Law §107(1).

The respondents are ordered to immediately provide access for inspection and copying of all non-exempt documentation requested by the petitioner. Respondent is ordered to forthwith conduct all meetings in compliance with the provisions of the Open Meetings Law with full access to the public and the media. The petitioner is awarded attorney's fees associated with the instant application against respondent CRDC, as well as statutory costs and disbursements. Petitioner's attorney is directed to submit an affidavit itemized as to date, services rendered, time expended and the hourly rates claimed for such services, reserving to respondent CRDC the right to a hearing on the reasonableness of the claimed fees.

As previously indicated, respondent Kay Wharmby moved for an order dismissing the subject petition on the grounds that it was illegally insufficient asserting petitioner failed to exhaust its administrative remedies with the City of Canandaigua by failing to appeal a determination of the Records Access Officer pursuant to Public Officers Law §89(4)(a). No one appeared at the argument of this motion for or on behalf of the moving respondent and counsel for CRDC indicated the motion was being withdrawn. Having received no formal withdrawal, the motion will be considered.

Public Officers Law §89(4)(a) provides that "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the records sought." Pursuant to Public Officers Law §89(4)(b), "a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the Civil Practice Law and Rules."

In his affidavit of April 13, 2001, Stephen C. Cole, Canandaigua City Manager and former President of the CRDC, acknowledged receiving three letters from Neil H. Rivchin, counsel for the Messenger Post Newspapers, on November 28, 2000. In paragraph 28 of said affidavit, Mr. Cole states that "The second of these letters was an appeal pursuant to 89(4)(a) of the Public Officer's Law [of the decision] denying a Messenger Post FOIL request." In

paragraph 34 he admits that the second letter was directed to him "in my capacity as then President of the CRDC." Two paragraphs later Mr. Cole states that "upon information and belief, no appeal was made pursuant to §89(4)(a) of the Public Officer's Law."

Based on Stephen C. Coles' affidavit, it appears that the petitioner did appeal the denial to the President of the CRDC within thirty days as required by statute. However, what is not clear from his affidavit is any assertion that he took any action on the appeal within ten days as required by statute. Failure to respond to the petitioner's appeal is deemed a denial of the appeal and an exhaustion of the petitioner's administrative remedies (see DeCoise v. City of Buffalo, 239 AD 2d 949 (4<sup>th</sup> Dept 1997); VanSteenburg v. Thomas, 242 AD 2d 802 (3<sup>rd</sup> Dept 1997) lv den 91 NY 2d 803 (1997)). The instant Article 78 proceeding was appropriately commenced after the petitioner exhausted the necessary statutory administrative remedies. Therefore, respondent Wharmby's motion to dismiss is denied.

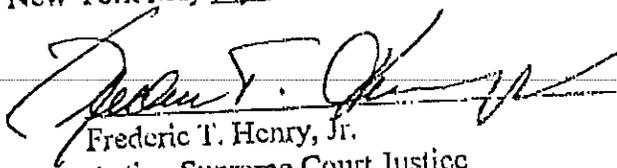
In an affidavit of Canandaigua City Manager Stephen C. Cole, sworn to April 13, 2001, he states the City did respond to FOIL requests but it took him "some time to gather the missing papers that I had related to the CRDC from my files at City Hall." He attached those papers to his affidavit stating they were "inadvertently forgotten until the commencement of this litigation."

In a Memorandum of Law dated April 19, 2001 submitted by petitioner's counsel, a footnote at page two states, "The Messenger considers its proceeding against respondent Kay Wharmby as moot" in view of documents submitted with the affidavit of Stephen C. Cole.

In view of this assertion, the action against respondent Kay Wharmby is dismissed as moot.

Submit order.

Signed at Canandaigua, New York May 11, 2001.

  
Frederic T. Henry, Jr.  
Acting Supreme Court Justice