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STATE OF NEW YORK
SUPREME COURT

RENSSELAER COUNTY CLERK
COUNTY OF RENSSELAER

In the Matter of the Application of

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TROY, N.Y.

C.B. SMITH, and UNITED FOOD and
COMMERCIAL WORKERS' LOCAL NO. ONE,

Petitioners,

For a Judgment Pursuant to Article 78
of the CPLR

-against-

The County of Rensselaer, John L. Buono,
as Rensselaer County Executive,
Rensselaer County Industrial Development
Agency, G. Glen King, as the Rensselaer
County Industrial Development Agency
Records Access Officer, and David R. Dudley,
as Counsel to the Rensselaer County
Industrial Developmental Agency,

Respondents.

Supreme Court, Rensselaer County Motion Term
RJI No.: 41-1156-92

APPEARANCES:

MALKIN & ROSS

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ROBERT A. SMITH, Rensselaer County Attorney

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JOHN L. BUONO
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DONOHUE, SABO, VARLEY & ARMSTRONG, P.C.

Attorneys for Respondents RENSSELAER COUNTY
INDUSTRIAL DEVELOPMENT AGENCY; G. GLEN KING; and
DAVID R. DUDLEY
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Albany, NY 12212-5056

DECISION AND ORDER

SPAIN, J.

In this Article 78 proceeding the petitioners move for an

order vacating and prohibiting enforcement of respondent Rensselaer County Industrial Development Agency's (hereinafter "IDA") decision of August 19, 1992 which denied petitioner C. B. Smith's (hereinafter Smith) request made pursuant to New York Freedom of Information Law (Public Officers Law Section 84). Petitioners also seek an order directing respondents to provide copies of the documents specified in Smith's July 6, 1992 Freedom of Information request. Respondents IDA, G. Glen King (hereinafter "King"), as the IDA Records Access Officer, and David R. Dudley (hereinafter "Dudley"), as counsel to the IDA answer and oppose the petition. Respondents County of Rensselaer (hereinafter "County") and John L. Buono, as Rensselaer County Executive (hereinafter "County Executive"), answer and cross-move for an order, pursuant to CPLR Section 3211(a)(7), dismissing the complaint for failure to state a cause of action and, further, for sanctions against the petitioners for instituting a frivolous action. The petitioners oppose the cross-motion.

Petitioner Smith's written Freedom of Information Law (FOIL) request dated July 6, 1992 states in part as follows: "I hereby request copies of the following documents: Copies of all itemized bills prepared and submitted by IDA Attorney David Dudley or his law firm for any and all IDA projects January 1, 1986 to date, for legal services rendered in his capacity as Counsel to the IDA."

In response to Smith's July 6th request King, in a letter dated July 9th, acknowledged Smith's request and enclosed "two itemized bills from David Dudley and Associates found in the RCIDA

files". On July 16th Smith responded and acknowledged receipt of the two itemized bills and suggested that, although the IDA might not possess the remainder of the itemized bills, Dudley, as the IDA attorney, should be directed by the IDA to make said records available. King's response of July 29th acknowledges receipt of Smith's July 16th letter and states "Please be advised that I have already responded to your FOIL request".

Smith then appealed King's decision to the IDA. The IDA met in a special meeting on August 18, 1992 and, as stated in King's August 19, 1992 letter, "voted to uphold the Records Access Officer's determination on the grounds that the records you seek are neither maintained or possessed by the agency. The agency has provided you with all itemized bills from its legal counsel, David Dudley, that are maintained by and in the possession of the agency. The RCIDA does not require its legal counsel to prepare itemized bills." The instant proceeding was then commenced.

Respondent King has provided the Court with a copy of a letter to Smith dated October 2, 1992, with an attachment which sets forth "the fees received by Mr. Dudley's firm as RCIDA Legal Counsel from January 1, 1986 through the date of your requests." Dudley, in an affidavit dated November 20, 1992 states, "As a general matter I receive no compensation from the RCIDA. All fees that I receive in connection with bonds issued by the RCIDA are negotiated with and paid by each individual applicant. These fees are paid directly to me by the applicant at the time of closing. Since this is a matter which is negotiated between myself and the particular applicant I

don't send any invoice or bill to the RCIDA and I am not required to do so. Any invoice or bill which I submit to an individual bond applicant is not subject to the New York Freedom of Information Law on the additional ground that it is not a "record" as that term is defined in Section 86 of the Public Officers Law. I note that the petitioners in this proceeding have already received the information regarding the amounts of fees paid to me by the applicants in connection with the RCIDA projects which I have overseen during my tenure."

Upon review of the aforementioned statements the Court questions the reasoning of the IDA and its attorney. Who, if anyone, does the IDA believe has power of review over the actions of the counsel to the IDA? Dudley's fees were generated in his capacity as IDA counsel. He did not, nor does not, represent the applicants before the IDA. His client was, and is, the IDA.

Public Officers Law Section 87(2)(a) states, "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: (a) are specifically exempted from disclosure by state or federal statute;". This Court is not aware of, nor has it been apprised of, any exemption in the instant matter.

The IDA was formed pursuant to General Municipal Law Section 903-d. As stated therein, "The agency, its members, officers and employees and its operation and activities shall in all respects be governed by the provisions of title one of article eighteen-A of

this chapter." The counsel for the IDA, although not a member or officer, clearly comes under the authority of the IDA. He is part of IDA's "operation and activities".

In his response to the petition Dudley further states: "[a]s appointed Counsel to the RCIDA I am not an employee of Rensselaer County or the RCIDA. I am also not a member or officer of the RCIDA. Therefore, I am not required to respond to requests made under the New York Freedom of Information Law as I am not an officer, employee, or member of an "agency" as that term is defined in Section 85 of the Public Officers Law. Thus I am not a proper defendant in this Article 78 proceeding. . .". As the attorney for an agency who derives a substantial amount of compensation from services performed by him in conjunction with that agency, Dudley's records relating to fees received in connection with bonds issued by that agency should be accessible to that agency. It is the Court's opinion that Dudley's records relating to each transaction in question are the agency's records within the meaning of Section 86 of the Public Officers Law.

The Legislature, in enacting FOIL, has clearly stated its purpose ". . .it is incumbent upon the state and its localities to extend public accountability wherever and whenever possible" Public Officers Law, Section 84. In failing to direct Dudley to release all of the information requested the IDA has failed to meet its obligation under FOIL.

Accordingly, Smith's petition is hereby granted. The IDA shall direct Dudley to provide the IDA with copies of all itemized

bills prepared and submitted by Dudley or his law firm to each particular project applicant for any and all IDA projects from January 1, 1986 to July 6, 1992. Upon receipt of said documents the IDA shall make them available to Smith pursuant to FOIL.

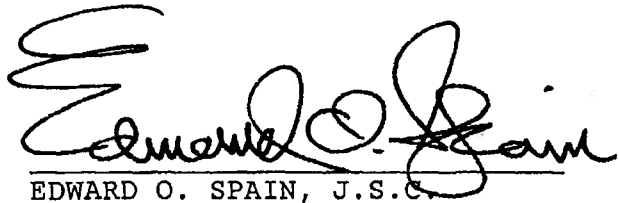
The cross-motion to dismiss on behalf of the County of Rensselaer and John L. Buono, as Rensselaer County Executive, is granted. The County Executive's authority under Section 903-d of the General Municipal Law to appoint members of the IDA does not make him a necessary party. Neither the County or the County Executive are necessary parties to this proceeding. Furthermore, as to said respondents, the petition fails to state a claim or a cause of action. Accordingly, as to said respondents, the petition is hereby dismissed and costs and disbursements are hereby awarded to said parties.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to the attorneys for petitioners. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section, respecting filing, entry and notice of entry.

SO ORDERED.

DATED at Troy, New York
May 13, 1993


EDWARD O. SPAIN, J.S.C.