

SHORT FORM ORDER  
To commence the statutory  
time period for appeals as  
of right [CPLR 5513 (a)],  
you are advised to serve a  
copy of this order, with  
notice of entry upon all parties.

ON 8/19, 1996  
WESTCHESTER  
COUNTY CLERK

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF WESTCHESTER

PRESENT: HON. NICHOLAS COLABELLA  
J.S.C.

In the Matter of the Application of  
LUCILLE HELD,

Petitioner,

For a Judgment Pursuant to CPLR  
Article 78 and Sectin 3001

- against -

TOWN OF HARRISON, PHILIP MARRACCINI,  
as Supervisor, TOWN OF HARRISON,  
and PHILIP MARRACCINI, BRUNO STRATI,  
PAT VETERÈ, OLIVER ANGELONE and MARY  
RIGUZZI, collectively constitiuting the  
Town Board of Harrison, and Town Clerk  
and Records Access Officer, Norma  
Ponce,

Respondents.

DECISION/ORDER  
& JUDGMENT

INDEX NO.  
18653/95

MOTION DATE  
5/1/96

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RECEIVED  
LAW DEPT.  
TOWN-VLG. OF HARRISON, NY

The following papers numbered 1-6 were read on petition.

Papers Numbered

Notice of Petition, Petition-Affidavits	<u>1-4</u>
Answer	<u>5</u>
Replying Affidavits	<u>6</u>

EXHIBIT

1

2

In an article 78 proceeding, petitioner seeks to annul determinations by respondents denying requests for disclosure of public documents identified as requests 55/95, 44/95, 50/95 and 9/95, and other incidental relief.<sup>1</sup>

Petition is dismissed as to requests 55/95, 44/95 and 50/95.

Although petitioner alleges she appealed the determination by the clerk with respect to these requests by letter dated July 26, 1995,<sup>2</sup> the letter fails to qualify as an appeal as it is directed to the clerk, not a person or board designated to hear appeals. The letter also only constituted a clarification of the documents sought from the clerk in response to her answer to petitioner that she was unable to identify the documents. The failure to respond to petitioner's request, as clarified, however, is deemed a denial [21 NYCRR 1401.7(c)] which petitioner could have appealed [21 NYCRR 1401.7(d)]. Petitioner did not file an appeal, and therefore, did not exhaust her administrative remedies.

Petition is granted as to request 9/95 to the extent that the matter is remanded to respondents for compliance with petitioner's request. The town shall furnish the requested documents within 30 days of service of this Order. If relevant documents cannot be located, after a diligent search, the town shall provide an explanation as to why a response cannot be made.

Although the respondent's answer denies receiving petitioner's appeal by letter dated February 17, 1995,<sup>3</sup> the bare denial is insufficient where petitioner has documented delivery by copies of envelopes date-stamped as received by the clerk on February 21, 1995 with letters from two members of the town board, Vetere and Strati, admitting receipt of the letter appealing the denial of request 9/95. The failure to respond to the appeal is deemed a denial of the appeal. Therefore, petitioner exhausted her administrative remedies (Floyd v. McGuire, 87 A.D.2d 388).

On the merits, the clerk's determination, that no records exist, is belied by the documentary evidence submitted by petitioner in the form of checks indicating payment by respondents to the company in question.

The foregoing constitutes the decision, order and judgment of the Court.

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<sup>1</sup>Although petitioner refers to a number of other requests in various papers submitted in this proceeding, the petition is limited to these four requests.

<sup>2</sup>Exhibit 5 to petition.

<sup>3</sup>Exhibit 7 to petition.

FILED  
AND  
ENTERED  
ON 12/17, 1996  
WESTCHESTER  
COUNTY CLERK

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COUNTY OF WESTCHESTER  
PRESENT: HON. NICHOLAS COLABELLA  
J.S.C.

-----x

In the Matter of the Application of  
LUCILLE HELD,

Petitioner,

For a Judgment Pursuant to CPLR  
Article 78 and Section 3001

- against -

TOWN OF HARRISON, PHILIP MARRACCINI,  
as Supervisor, TOWN OF HARRISON,  
and PHILIP MARRACCINI, BRUNO STRATI,  
PAT VETERE, OLIVER ANGELONE and MARY  
RIGUZZI, collectively constituting the  
Town Board of Harrison, and Town Clerk  
and Records Access Office, Norma  
Ponce,

Respondents.

DECISION/ORDER

INDEX NO.  
18653/95

MOTION DATE  
10/4/96

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The following papers numbered 1-39 were read on this motion by  
petitioner to reargue so much of an Order and Judgment of the Court  
dated August 7, 1996 as dismissed a portion of the petition to  
compel compliance with requests under the Freedom of Information  
Law and to award fees.

Papers Numbered

Notice of Motion-Affidavits-Exhibits \_\_\_\_\_ 1-23  
Answering Affidavits, Exhibits \_\_\_\_\_ 34  
Replying Affidavits \_\_\_\_\_ 35-39

Leave to reargue is granted and, upon reargument, the Court vacates so much of the Order and Judgment dated August 7, 1996 as dismissed the petition with respect to requests 49/95, 50/95 and 55/95.<sup>1</sup>

The foregoing were mistakenly dismissed on the basis that petitioner failed to exhaust her administrative remedies. Notwithstanding certain printed language on a form with respect to an appeals officer, respondents now concede that they have never designated an appeals officer. The printed language with respect to appeals officer, therefore, was incorrect and misleading. Further, while respondents are correct that, in the absence of an appeals officer, appeals may be taken to the Town Board or the Town Supervisor [see, 21 NYCRR 1401.7(a)], respondents do not controvert petitioner's claim that she was never advised of her right to appeal to the Town Board or Town Supervisor.

The foregoing violated 21 NYCRR 1401.7(b) which states that "(d) denial of access shall be in writing stating the reason therefor and advising the person denied access to his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number." Under the circumstances, having failed to properly advise petitioner of the availability of an administrative appeal to the Town Board or Town Supervisor and having failed to demonstrate that procedures for such an appeal have even been established, respondents cannot be heard to complain that petitioner failed to exhaust administrative remedies (Barrett v. Morgenthau, 74 N.Y.2d 907, 909).

Petition is granted with respect to requests 49/95 and 50/95 to the extent there are records pertaining to the alleged implementation of an automated answering system. Respondents have failed to dispute the claim by petitioner that the system has been automated.

Petition is granted with respect to request 55/95. Although the request was originally denied on the basis that the requested documents could not be identified, respondents concede in their answer that the records are discernible based on a newspaper account.

The matter is remanded to respondents for compliance with requests 49/95, 50/95 and 55/95 within thirty days of service of this Order. If relevant documents cannot be located, after a diligent search, the Town shall provide an explanation as to why a response cannot be made.

The Court adheres to its denial of petitioner's request for costs in the exercise of its discretion. Respondents, however, are

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<sup>1</sup>Request 49/95 was mistakenly referred to in the prior Order as request 44/95.

cautioned to establish a procedure for advising applicants under the Freedom of Information Law of their right to administrative appeal and to implement a procedure for effective administrative review of such appeals by the appropriate body or officer.

It is inexcusable that petitioner was not properly told of her right to appeal the denial of the above requests and that several administrative appeals by petitioner that were taken were apparently ignored. Such appeals, having been filed, should have been placed on the agenda of the Town Board for its determination. Further, respondents have apparently violated Public Officers Law section 89(4) which requires that copies of appeals and their determination be forwarded to the Committee on Open Government.

This Order amends the Order and Judgment dated August 7, 1996.

The Court has not considered the September 24 and October 2, 1996 letters from petitioner requesting that the Court adjudicate respondents in contempt for violation of the August 7, 1996 Order and Judgment. A contempt application is not properly before the Court.

Dated: White Plains, NY  
December 12, 1996

  
\_\_\_\_\_  
Nicholas Colabella  
Supreme Court Justice

LUCILLE HELD  
Pro-se Petitioner  
83 Pleasant Ridge Road  
Harrison, NY 10528

ROBERT S. WEININGER  
Attorney for Respondent Town  
1 Heineman Place  
Harrison, NY 10528