

1 THE COURT: In this Article 78 proceeding,
2 petitioner seeks to annul the respondents' denial
3 of Freedom of Information Law requests, an order
4 directing respondents to comply with his request
5 for information and, additionally, awarding him
6 attorney's fees.

7 The first request made was inappropriate and
8 apparently the petitioner so viewed it after the
9 request was rejected because it asked for
10 identification of households with and without
11 children. The second request, dated August 16,
12 1991, was served seeking "Penfield Central School
13 District census in form of mailing labels (as
14 reference in 6/13/91 letter from R. Mace to
15 G. Samuel), preferably including zip code and
16 carrier route sort." The second request was
17 denied on September 13, 1991.

18 Although the answer raises the statute of
19 limitations as an affirmative defense, there is no
20 factual showing that this proceeding was not
21 commenced within four months after the above
22 determinations.

23 Public Officers Law exempts from disclosure
24 under F.O.I.L. records which "are specifically
25 exempt from disclosure by State or Federal

1 statute." The burden is on the agency resisting
2 disclosure to prove that the information requested
3 is exempt (Moore v Santucci, 151 AD2d 677). As
4 was stated by the Court of Appeals in Matter of
5 Westchester-Rockland Newspapers, Inc. v Kimball
6 (50 NY2d 575), the burden of demonstrating that
7 material requested under this article is exempt
8 falls on the shoulders of one who asserts it and,
9 in the absence of specific statutory protection
10 for the requested material, this article compels
11 disclosure, not concealment. "[T]he burden lies
12 with the agency 'to articulate particularized and
13 specific justification' and to establish that 'the
14 material requested falls squarely within the ambit
15 of [the] statutory exemptions'" (Matter of Farbman
16 & Sons, Inc. v New York City Health and Hospitals
17 Corp., 62 NY2d 75, 83, quoting Matter of Fink v
18 Lefkowitz, 47 NY2d 567, 571).

19 This has not been done in this case. There
20 is simply a generalized statement by the
21 respondent that the material requested, that is
22 the names and addresses together with zip code of
23 the property owners in the Penfield Central School
24 District, is exempt from disclosure without any
25 specific reference to the basis for such

1 exemption.

2 Section 89 of the Public Officers Law,
3 Paragraph 2, subdivision (a), permits an agency to
4 delete identifying details even when it does make
5 records available, which was not done in this case
6 when the hard copy of the information requested
7 was given to petitioner previously. Paragraph
8 2(b) states that, unwarranted invasion of personal
9 privacy includes but shall not be limited to:
10 disclosure of employment, medical or credit
11 histories or personal references of applicants for
12 employment, which this is clearly not; names and
13 addresses to be used for commercial or
14 fund-raising purposes, which this is not;
15 disclosure of information of a personal nature
16 which disclosure would result in economic or
17 personal hardship to the subject party and such
18 information is not relevant to the work of the
19 agency requesting or maintaining it, which is not
20 the situation here, either; or disclosure of
21 information of a personal nature reported in
22 confidence to an agency and not relevant to the
23 ordinary work of such agency; again, this is not
24 the situation here.

25 There are other items of exemption set forth

1 in Section 87 of the Public Officers Law,
2 specifically under Paragraph 2 thereof, and I find
3 that none of those exemptions are applicable here,
4 either. All the request here requires is a
5 listing of the owners of the residences in the
6 Penfield Central School District, information
7 which could be obtained, albeit laboriously and
8 expensively, through records in the County Clerk's
9 Office or in the Town Clerk's Office in the Town
10 of Penfield. This is clearly not confidential
11 information, nor is it information which is exempt
12 under 20 US Code Section 1232.(g), which requires
13 that an agent, educational agency or institution
14 not disclose "personally identifiable information"
15 contained in the educational records, including
16 such things as the student's name, the name of his
17 or her parents, or the student's addresses. None
18 of these items are included in this request. The
19 petitioner does not seek the identification of
20 households with students nor --

21 MR. ENOS: For purposes of clarification,
22 there were two requests, both of which we appealed
23 from. The computerized list would request the
24 information of households with and without
25 children.

1 THE COURT: I will not grant the application
2 insofar as it seeks identification of which
3 households have children.

4 MR. ENOS: I wanted to clarify to the Court
5 that I didn't wish the Court to remain under that
6 impression.

7 THE COURT: Thank you, I appreciate your
8 candor.

9 Respondents cite authority holding that it
10 cannot be compelled to disclose information about
11 its employees or about its students. However, all
12 of the cases cited, whether involving employees or
13 students, involve requests for information
14 pertaining only to students or only to employees.
15 These authorities do not support respondents'
16 contention that it cannot be compelled to release
17 mailing addresses for every household in the
18 district simply because some of those households
19 may include students and/or employees. This would
20 stretch the exemption to unsupported lengths.

21 The respondents contend that they are unable
22 to put the information requested on computer
23 disks. There is no affidavit from BOCES, which
24 operates the computer in which the information is
25 stored, to indicate this. Whatever manner the

1 respondent is able to extract the information for
2 its own mailings in connection with mailing labels
3 should be made available to respondent. If this
4 is going to be at some cost, then petitioner will
5 bear the costs of obtaining or of transferring
6 this information to a computer disk.

7 MS. BURGESS: Your Honor, can I make a
8 clarification because I don't want you to think
9 that we're misleading the Court. We didn't
10 contend and that is why I didn't get an affidavit
11 from BOCES that they couldn't do it and we would
12 never contend that because we have access to BOCES
13 information. Our argument, number one, we need
14 not, simply because it is provided to us, we need
15 not provide it in the form and format and content
16 to anyone and, secondly, we need not compile it
17 under F.O.I.L. in specific manner. So, I don't
18 want you to think we were claiming that we didn't
19 have access to it in that form or format.

20 THE COURT: Thank you, I appreciate that.

21 An agency which maintains in a computer
22 format information sought by a F.O.I.L. request
23 may be compelled to comply with the request to
24 transfer information to computer disks or tape
25 (Matter of Brownstone Publishers v New York City

1 Department of Buildings, 166 AD2d 294).

2 It is significant in my view that in that
3 case the agency did have available a hard copy
4 totaling over one million pages. The court there
5 held that the Freedom of Information Law gave the
6 right to ask for the records in computer disk or
7 tape form provided the publishing company paid for
8 obtaining the information in that form.

9 With respect to the reason for the instant
10 request, the petitioner indicates that he seeks
11 the information for a public purpose having to do
12 with school matters; to discuss such matters as
13 school budgets that must be voted upon by all
14 residents of the district. I find that these are
15 proper areas of public concern.

16 Attorney's fees and litigation costs may be
17 recovered in the F.O.I.L. proceeding if three
18 requirements have been met: one, the petitioner
19 must "substantially prevail"; two, the agency must
20 have "lacked a reasonable basis in law" for
21 withholding the information; and three, the
22 information must be of "clearly significant
23 interest to the general public." These are the
24 requirements set forth in Section 89,
25 Paragraph 4(c) of the Public Officers Law. I find

1 that all of these conditions have been met. The
2 petitioner has substantially prevailed; the agency
3 has totally failed to show that it had a
4 reasonable basis in law for withholding the
5 information; and the information requested is of a
6 significant interest to the general public. For
7 that reason, the petitioner's application for
8 attorney's fees is granted. I don't know that
9 there is an affidavit, have you submitted an
10 affidavit?

11 MR. ENOS: Since the time was not completed
12 yet, it was not submitted, the rate is \$90 an
13 hour. Obviously at this point there's
14 approximately fifteen hours and I can provide that
15 more specifically to the Court prior to the entry
16 of the order.

17 THE COURT: Very well, I think that the rate
18 of \$90 an hour is more than reasonable and if you
19 will provide a detailed itemization of your hours
20 of service, Mr. Enos, I will grant your
21 application for attorney's fees and disbursements
22 and you may include a provision for such
23 attorney's fees in the order.

24 MR. ENOS: Thank you, Your Honor.

25 THE COURT: I'd like a transcript of this

1 attached to the order. Why don't you send me the
2 original order and I will wait for two or three
3 days for counsel to raise any objections or
4 suggestions and if I don't hear it I will sign the
5 order.

6
7 * * * * *
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Richard Bianchi, certify that I am an Official Court Reporter, Supreme Court, at Rochester, Monroe County, New York, duly appointed;

That I reported in stenotype shorthand the proceedings had in Supreme Court on the 11th day of December, 1991, before the Honorable David O. Boehm, Supreme Court Justice, in the matter of Gene Samuel versus Richard E. Mace, Sr. and Penfield Central School District;

And the foregoing transcript, pages numbered 1 through 10, is a true, accurate and complete record of those shorthand notes.



Richard Bianchi

DATED AT: Rochester, New York
this 18 day of December, 1991.