

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM XXXII

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In the Matter of the Application of

RETURN DATE: 5/1/97
SUB. DATE: 5/29/97

GEORGE R. SIMPSON,

MOT. #001, 002
MG, MD CASE DISP

Petitioner,

For Judgment Pursuant to CPLR
Article 78,

BY: MARY M. WERNER
SUPREME COURT JUSTICE

-vs-

INDEX NO. 24501/96

THE TOWN OF EAST HAMPTON, NEW YORK,
CATHY LESTER, As Supervisor, FRED
OVERTON, As Assessor, BONNIE
ENGLEHARDT, as Data Processing
Supervisor, ROBERT SAVAGE, as Town
Attorney and Appeals Officer for
Freedom of Information Requests,
-against-

GEORGE R. SIMPSON
PETITIONER, PRO SE

GARY N. WEINTRAUB, ESQ.
ATTORNEY FOR RESPONDENT
Special Town Attorney
Town of East Hampton
Caputi, Weintraub & Neary
50 Elm Street
Huntington, NY 11743

Respondents.

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This Article 78 proceeding seeks to vacate the decision of the Town of East Hampton to charge petitioner George Simpson ("petitioner") \$500.00 for records he seeks pursuant to the Freedom of Information Law ("FOIL") (Public Officers Law Art. 6). By short form order dated January 21, 1997, the Hon. Lester E. Gerard set the matter down for a hearing to determine the actual cost of reproduction of the requested computer records (Public Officers Law §87[1][b][iii]).

At the hearing before Justice Gerard, held on March 10, 1997, respondents' counsel indicated that he now believed the actual cost for the Town to reproduce the records to be \$179. He produced a witness, one Bonnie Englehardt, an Administrative Assistant in the

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Assessor's Office and an Assistant Administrator for the Central Data Processing portion of the Assessor's Office to testify as to the actual cost of production of the requested records. Ms. Englehardt arrived at the cost by obtaining from Wang the volts and amps for each piece of computer equipment necessary to reproduce the records and then contacting LILCO to verify the cost per hour for each piece of equipment. According to her calculations it would cost the following:

VS 5000	-	\$2.99/hour
UPS	-	\$1.69/hour
Tape Drive	-	\$5.44/hour

To these energy costs, Ms. Englehardt then added an hourly cost of \$15.39 for the maintenance contract. She further testified that it would take 5 1/2 hours to reproduce the records sought by Mr. Simpson. The total cost per hour of \$25.48 x 5.5 hours equals \$140.14, to which she added \$32.00 for the cost of the magnetic tape for a grand total of \$172.14. This number is somewhat lower than the amount counsel represented to the court earlier in the hearing.

At the hearing respondents' counsel raised the issue of whether petitioner was entitled to the records at all since he admittedly wanted the records for a commercial enterprise. Justice Gerard directed the submission of memoranda of law on this issue. However, before rendering a decision, Justice Gerard recused himself by short form order dated March 28, 1997. The case was then randomly reassigned to this Justice.

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Petitioner brought this proceeding to the court's attention when he submitted for signature an order to show cause seeking to hold Cathy Lester, Fred Overton, Jeanne Nielsen and Amy Rivera in contempt for failing to appear at the March 10, 1997 hearing pursuant to various subpoenas allegedly served upon these individuals. The court directed a hearing be held on May 1, 1997 so the court could determine all outstanding issues including the validity of the FOIL requests, the appropriate fees to be charged and contempt. The court later directed petitioner and respondent's counsel to appear for a conference on May 15, 1997 to determine the manner in which this matter would proceed.

At the May 15, 1997 conference, the court held that the information sought by petitioner did not fall under the personal privacy exemption of FOIL despite the fact that he sought the information for commercial purposes. The court, in so holding, noted that assessment records are public records (RPTL §516.2) and that transfer reports are no longer unavailable for public inspection (RPTL §574(5)). Significantly, respondents' counsel indicated that respondents decided to oppose petitioner's request because petitioner was so rude. There was also some indication that the respondents had provided this information in the past to others, which respondents later confirmed at the May 29, 1997 hearing.

The court then adjourned the proceeding to May 29, 1997 to allow petitioner to submit evidence as to the actual cost of reproduction. The court would then address any remaining issues. By short form order the court directed all those individuals whom

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petitioner sought to compel to appear at the previous hearing to appear at the adjourned hearing. Three of these individuals, Cathy Lester, Fred Overton and Robert Savage are named parties in this proceeding. While respondents' counsel represented that he filed a notice of appeal that would entitle him to an automatic stay of this court's order, he nonetheless produced all those directed in the order except the Town Attorney, Robert Savage, who apparently was on vacation. At the hearing on May 29, 1997, respondents presented its revised numbers through Bonnie Englehardt and James Biggers from the Long Island Lighting Company. The court accepts the following energy costs:

<u>Item</u>	<u>Cost Per Hour</u>	<u>Cost per 5 Hours</u>
VS 5000 -	\$0.1104/hour	\$0.6072
Tape Drive -	\$0.1840/hour	\$1.0120
4230 WS -	\$0.0184/hour	\$0.1012
4230A WS -	\$0.0184/hour	\$0.1012
SCSCI Drive -	\$0.0368/hour	\$0.2024
Lights -	\$0.0563/hour	\$0.3098
AC Fan -	\$0.0294/hour	\$0.1619
Compressor -	<u>\$0.6182/hour</u>	<u>\$3.4003</u>
TOTALS:	\$1.07	\$5.90

The Court rejects the addition of \$15.08 per hour for the maintenance contract and accepts the testimony of petitioner's expert that maintenance costs of the computer equipment should not be included. The cost to the Town for its maintenance contract is a fixed cost that does not increase simply because the Town is running an additional job. Thus, the actual cost to the Town for reproducing the records is unaffected by its maintenance contract. Since the cost of the tape is \$32.00, the total cost that respondent may charge for the job is \$32.00 + \$5.90 or \$37.90.

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Respondents did not dispute that since Bonnie Englehardt has, for now, chosen to accept compensatory time for running the program (which must be done after office hours) there is no personnel cost to consider. This does not preclude Ms. Englehardt, or any other Town employee who may stay after hours to run the program, from opting to take overtime in lieu of compensatory time, which would be an additional cost that respondents would be entitled to collect.

The court denied petitioner's motion for contempt noting that most of those directed to appear did in fact appear. Moreover, the court notes that petitioner did not actually call any of these individuals to testify.

At the hearing the court denied that part of the petitioner's application seeking damages since neither FOIL nor CPLR Article 78 provides for damages. The court also held that since petitioner was not represented by counsel he was not entitled to attorney's fees under Public Officers Law §89(4)(c). (Leeds v. Burns, 205 AD2d 540, 613 NYS2d 46 [2d Dept. 1994] leave to appeal den. 84 NY2d 811, 622 NYS2d 914). Nor is he entitled to litigation costs (beyond statutory costs) since the records involved are not of "clearly significant interest to the general public" (Public Officers Law §89[4][c][i]). Finally, there is no evidence that any Town official or employee willfully concealed or destroyed a record to prevent its public inspection, which would be a violation under Public Officers Law §89(8).

However, the court did note on the record its grave concern for the manner in which the Town of East Hampton handled this

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matter and put respondents on notice that it was sua sponte considering sanctions under 22 NYCRR part 130-1.1 for the Town's frivolous conduct. The Court gave the Town a reasonable opportunity to be heard (22 NYCRR Part 130-1.1[d]).

Under Part 130-1.1 the court may award costs or impose sanctions upon any party or attorney who engages in frivolous conduct, which is defined as conduct " * * * completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or * * * undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR Part 130-1.1[c]).

The court notes that the conduct of the Town slipped perilously close to frivolous in that the Town: 1) made no sincere effort to figure the actual cost of reproduction of the records until finally forced by the court some 10 - 11 months after the initial request for the records; and 2) more repugnantly, chose to oppose petitioner's request simply because certain Town officials and employees do not like Mr. Simpson and his attitude, despite the fact that it admitted it provided identical information to others in the past.

Petitioner originally sought this information on July 11, 1996. This is public information that petitioner is absolutely entitled to inspect and reproduce. It is now June 1997. The action of the Town has delayed the petitioner from obtaining his rightful access to public records in accordance with the law for nearly one year.

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If as counsel indicated, Town officials and employees "got their dander up" in response to petitioner's persistence, this is quite disturbing. Public officials and employees are sworn to serve the public. Not every member of the public meekly accepts preposterous FOIL reproduction costs. Not every member of the public will disappear quietly when given negative responses to inquiries. Some individuals will persist and some of these folks may become difficult and harsh. They may be disrespectful. This unfortunately is a reality. If petitioner did indeed by his behavior get the Town's "dander up," this does not excuse the Town from complying with the law.

If it is true that Town employees allowed their personal dislike for Mr. Simpson to fuel this litigation, then not only did Mr. Simpson suffer the consequences, but so did the residents of East Hampton who must of course pay for the litigation costs. It is the Town residents who are ultimately responsible for paying counsel who was hired to handle a simple FOIL request. It is the Town residents who must pay because their elected officials and public servants were unable to dispassionately discharge their duties.

This court has decided not to impose sanctions, in part to avoid further penalizing the Town residents and in part because the Town officials and employees did appear on May 29, 1997 showing that they finally recognized their responsibilities with respect to this matter. However, the court cautions respondents that elected officials and public employees are charged with a higher standard of conduct. While they may find certain individuals unpleasant and

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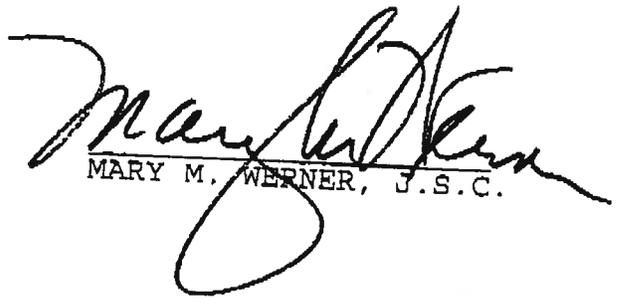
contrary, they are charged with upholding the law and must put aside personal feelings, if necessary, to discharge their responsibilities.

In sum, the petition is granted to the extent that respondents are directed to provide the information requested by petitioner at a cost of \$37.90. Petitioner's application for damages is denied as is his motion for contempt.

Both petitioner and respondents are advised to comport themselves with dignity and to treat each other with respect and courtesy.

It is Ordered that this constitutes the decision and judgment of the court and that petitioner shall recover from respondents costs and disbursements in the sum of \$_____ as taxed by the clerk and petitioner shall have execution therefor.

Dated: 6/4/97


MARY M. WERNER, J.S.C.