

8

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 22**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**In the Matter of an Article 78 Proceeding
TIMOTHY ARCHDEACON,**

**Motion Sequence #001, #002
Submitted January 10, 2006
XXX**

Petitioner,

-against-

INDEX NO: 17744/05

**TOWN OF OYSTER BAY and TOWN OF OYSTER
BAY BOARD OF ETHICS and JOHN VENDITTO,
Supervisor for the Town of Oyster Bay and
GREGORY J. GIAMMALVO, Attorney for the Town
of Oyster Bay,**

Respondents.

The following papers were read in this matter:

| | |
|---|----------|
| Notice of Petition and Petition (# 001)..... | 1 |
| Notice of Motion to Dismiss in Point of Law (# 002)..... | 2 |
| Affirmation in Opposition..... | 3 |

Requested Relief

In this Article 78 proceeding, petitioner, TIMOTHY ARCHDEACON, seeks a judgment annulling the final determination of respondents which denied petitioner's request to copy the annual statement of financial disclosure pursuant to the Code of the Town of Oyster Bay §30-16(M)(1), and alleges that said determination violates New York Public Officers Law (POL) §87(2). Petitioner further seeks an order directing respondents to

provide him with such documents, pursuant to POL§89(4)(c), and to pay reasonable attorney's fees and litigation costs for this proceeding.

Respondents, TOWN OF OYSTER BAY (hereinafter referred to as the "TOWN"), TOWN OF OYSTER BAY BOARD OF ETHICS (hereinafter referred to as the "BOARD OF ETHICS"), JOHN VENDITTO, Supervisor for the Town of Oyster Bay (hereinafter referred to as the "SUPERVISOR"), and GREGORY J. GIAMMALVO, Attorney for the Town of Oyster Bay (hereinafter referred to as the "TOWN ATTORNEY"), move to dismiss the petition, pursuant to CPLR §3211(a)(7) and § 7804(f), based upon an objection in point of law. Respondents assert that 1) the Rules and Regulations of the State of New York explicitly prohibits the photocopying of annual statements of financial disclosure (9 NYCRR 9978.6 [c] and [d]); 2) the TOWN Code §30-16(1)(M) is not arbitrary or capricious with respect to public inspection of documents without photocopying; 3) the petition fails to state a cause of action; and 4) the petitioner's claim is time barred. The matter is determined as follows:

Background

Petitioner states that this matter arises under Article 6 of the New York Public Officers Law, commonly referred to as the Freedom of Information Law, §84, et seq. (hereinafter referred to as "FOIL"). It appears that on April 21, 2005, petitioner submitted a written request to the TOWN and the BOARD OF ETHICS for, *inter alia*, a copy of the current annual statement of financial disclosure for all members of the TOWN Board, as allowed under Article 18, §813, of the New York State General Municipal Law (GML), entitled Conflicts of Interest. GML §813 established a temporary state commission on local

government ethics with defined functions, powers and duties, to, *inter alia*, make available forms for financial disclosure required to be filed pursuant to GML §812, to review the completed forms, to receive complaints alleging violations, and to permit any person required to file a financial disclosure statement to delete from the copy made for public inspection one or more items of information. The statute provided that the temporary commission was to advise and assist any local agency in establishing rules and regulations relating to possible conflicts between private interests and official duties of present or former local elected officials, political party officials and local officers and employees. The Codification of §813 reflects that the section expired on December 31, 1992, when the assignment and development of powers, duties and functions from the temporary state commission was transferred to the respective boards of ethics or other governing bodies.

By letter, dated April 27, 2005, the TOWN Clerk acknowledged receipt of petitioner's FOIL request, # 13274, and thereafter, by letter dated May 20, 2005, petitioner was notified that the FOIL documents were available for inspection at the TOWN Clerks Office, located in Oyster Bay. Also included with the letter was a BOARD OF ETHICS form entitled "Request for Public Inspection", which required petitioner's signature prior to inspection of the records. The form clearly stated that the records were not available for photocopying, although handwritten notes could be taken, and that the statement of financial disclosure could not be removed from the custody and control of the statements Access Officer. Thereafter, by letter dated May 23, 2005, petitioner's counsel wrote to the TOWN ATTORNEY and to the TOWN Clerk advising that, pursuant to Section 187-6 D of the TOWN Code of Ethics (hereinafter referred to as the "ETHICS CODE"), petitioner had elected to treat the non-production of documents as a denial of access, with the letter to

serve as an appeal thereof, pursuant to Section 187-7 of the ETHICS CODE. Respondents state that no written response to this appeal letter was ever made by the TOWN.

In what respondents describe as a second set of FOIL requests, petitioner, by letter dated June 24, 2005, once again requested a complete copy of the same annual financial disclosure statements for all current members of the TOWN Board, and also referred respondents to a Public Officers Law Advisory Opinion from the State of New York Department of State Committee on Open Government, issued by Executive Director Robert Freeman (FOIL-AO-13559 August 19, 2002), which petitioner claims held that "whenever access to a record is granted, photocopying of that record must also be granted". On June 24, 2005, the TOWN forwarded a letter acknowledging receipt of the information requested (FOIL Request, # 13378), and by letter dated July 25, 2005, advised petitioner that the records were available for inspection. Once again, a BOARD OF ETHICS "Request of Public Inspection" Form was included as well as a letter from the BOARD OF ETHICS Chairman which informed petitioner that the TOWN was not mandated by FOIL to provide photocopies of the requested information. On August 1, 2005, petitioner sent a letter to the TOWN Clerk stating that the BOARD OF ETHICS letter denied him access to photocopies of the financial disclosure statements and that petitioner deemed the letter to be a notice of appeal to the TOWN. Petitioner asserted that, according to Executive Law § 94(17), he was entitled to complete photocopies of the financial disclosure statements and that the only items the law allows to be omitted are the specific monetary values contained therein.

By letter dated August 5, 2005, the TOWN denied petitioner's appeal and reiterated that the requested documents were available for inspection only, and not photocopying. The TOWN ATTORNEY stated that the Executive Law cited by petitioner only applied to financial disclosure statements filed by statewide elected officials, state officers and employees who file with the State Ethics Commission, and clearly indicated that those statements were only available for inspection, not copying. Moreover, the TOWN ATTORNEY pointed out that GML §811 (1)(c) authorized the governing body of a municipality to establish "rules and regulations pursuant to local law, ordinance or resolution, which rules or regulations may provide for the public availability of items . . .and such other powers as are confirmed on the temporary state commission on local government . . ." and that GML §811(1)(d) gave a local BOARD OF ETHICS the same ability to promulgate rules and regulations as the commission.

Petitioner's Contentions

In support of the instant petition to annul respondents final determination, which petitioner claims is the August 5, 2005 denial, counsel for petitioner asserts that he is entitled to a copy of the records under FOIL, pursuant to Public Officers Law §87(2), which provides as follows:

2, Each agency shall, in accordance with 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; (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article; (c) if disclosed would impair imminent contract awards or collective bargaining negotiations; (d) are trade secrets . . .; e) are compiled for law enforcement purposes . . . (emphasis supplied).

Petitioner urges that it is well settled law that FOIL is to liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to government records. Citing *Miller v Incorporated Village of Freeport*, 81 Misc 2d 81, 365 NYS2d 444 (Sup. Nassau Co. 1975), *affd.* 51 AD2d 765, 379 NYS2d 517 (2nd Dept. 1976), in which the Court annulled the Village's decision denying petitioners request to copy Village records, petitioner argues that it was the legislative intent under FOIL to provide government records for both inspection and copying and urges that respondents denial of petitioner's request to inspect and copy records violates POL §87(2) and "this State's strong commitment to open government and public accountability", citing *Capital Newspapers v Burns*, 67 NY2d 562, 505 NYS2d 576, 496 NE2d 665 (C.A. 1986) and *Gould v New York City Policy Department*, 89 NY2d 267, 653 NYS2d 54, 675 NE2d 808 (C.A. 1996). In *Capital Newspapers*, the Court of Appeals, motivated by the "public's right to know", found that all records of a public agency are presumptively open to public inspection and copying unless otherwise exempted by FOIL. *Capital Newspapers v Burns*, *supra*; *see also*, *Gould v New York City Policy Department*, *supra*. The Court of Appeals held that the agency seeking to prevent disclosure has the burden of demonstrating that the requested material falls within a FOIL exemption and they must articulate a particularized specific justification for denying access to the requested documents. *Capital Newspapers v Burns*, *supra*. Petitioner concludes that respondents lacked a reasonable basis to deny his request for a copy of the subject records.

Respondents Contentions

In support of the motion to dismiss the petition, respondents point to GML §813 (18)(a)(1) with specific regard to the photocopying of financial disclosure statements, which provides in pertinent part as follows:

a. Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:

(1) the information set forth in an annual statement of financial disclosure filed pursuant to local law, ordinance or resolution or filed pursuant to section eight hundred eleven or eight hundred twelve of this article except the categories of value or amount which shall remain confidential (emphasis supplied).

It is respondents' position that this section of law expressly exempted the temporary state commission on local government ethics from the FOIL requirements set forth in POL §86, and reiterates that GML §813 (18)(a) clearly provides that financial disclosure statements are available for public inspection, only, with no mention of photocopying. Respondents state that the TOWN adopted its CODE and modeled its provisions after those set forth in GML §813. Therefore, Section 30-16(M)(1) of the CODE allows for public inspection as follows:

Code Section 30-16, Powers and Duties of Board of Ethics. In addition to those powers and duties previously granted, the Board of Ethics shall have the following additional powers and duties when dealing with financial disclosure requirements:

M. Make available for public inspection the following records:

(1) The information set forth in an annual statement of financial disclosure filed pursuant to this Article, except the categories of value or amount, which shall remain confidential. (emphasis supplied).

Respondents maintain that, like the temporary commission, the TOWN ETHICS CODE provisions are exempt from the FOIL requirements. Respondents assert that the ETHICS

CODE §30-16(M)(1) is not arbitrary and capricious and that the regulation is attempting to “strike a balance between public disclosure and the right to personal privacy” citing *John v New York State Ethics Commission*, 178 AD2d 51, 581 NYS2d 882 (3rd Dept. 1992). In John, a case of first impression in the Third Department, the Court held that certain financial data filed with the State Ethics Commission was removed from the provisions of FOIL and that limited disclosure of said data was a reasonable determination of the State Ethics Commission. In *John*, Third Department held that “in effect, the standards governing disclosure under the Executive Law are substituted for those set forth in FOIL”. Respondents argue that the standards governing disclosure under GML §813 (18)(a)(1) are identical to Executive Law §94(17)(a)(1) and, therefore, are substituted for the FOIL standards.

Additionally, respondents assert that the Rules and Regulations of the State of New York, 9 NYCRR Part 9978, allows for public inspection, not photocopying of annual financial disclosure statements. Indeed, 9 NYCRR 9978.6(c) & (d), explicitly prohibits the photocopying of an Annual Statement of Financial Disclosure upon public inspection, as well as their removal from the custody of the commission, as follows:

(c) The annual statements are not available for photocopying photographing, or mechanical duplication in any manner. Handwritten notes may be taken.

(d) No annual statement shall be removed from the custody of the commission. (emphasis supplied).

Respondents conclude that, although there is a right to public inspection, that right does not carry a corresponding right to photocopying. *John v New York State Ethics Commission, supra*.

Moreover, respondents claim that the Statute of Limitations for an Article 78 proceeding is four months pursuant to CPLR §217. It is the TOWN's position that the instant petition is untimely as petitioner was able to seek judicial review ten (10) days after the TOWN's failure to address the May 23, 2005 letter and the instant petition was brought on November 9, 2005, more than four months thereafter. Respondents urge that the second set of FOIL requests, dated June 24, 2005, did not toll the Statute of Limitations because the FOIL request was duplicative of the prior request .and that the petition should be dismissed as untimely.

In reply, petitioner argues that the numerous ambiguous communications between the parties must be held against the public body seeking to enforce the limitations period, citing *Berkshire Nursing Center, Inc. v Novello*, 13 AD3d 327, 786 NYS2d 209 (2nd Dept. 2004). In *Berkshire*, Second Department held that a determination generally becomes binding when the aggrieved party is notified and it is the burden of the party asserting the Statute of Limitations to demonstrate that it provided a decision more than four months before the proceeding was commenced. Petitioner contends that his FOIL request for redacted documentation was an ongoing process and that the final determination of petitioner's FOIL request was on August 5, 2005 and, therefore, the petition filed on November 7, 2005 was timely. Petitioner argues that no final determination was forwarded to petitioner prior to August 5, 2005 and that, subsequent to the holding in *John*, the Department of State issued an advisory opinion (Public Officers Law Advisory Opinion from the State of New York Department of State Committee on Open Government, issued by Executive Director Robert Freeman (FOIL-AO-7731 May 28, 1993) as to the availability of

a local municipality's financial disclosure statements and concluded that a municipality must, on request and on payment of the appropriate fee, provide photocopies of financial Disclosure statements. The opinion reiterates that the FOIL is the governing statute with respect to records of local board of ethics, which expressly provides for copying as well as for public inspection.

Discussion

Initially, the Court concludes that the Article 78 petition is timely. CPLR § 217(1), which sets forth the Statute of Limitations for Article 78 proceedings, provides as follows:

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty;. . .

The ambiguous and contradictory letters from respondents, at times granting petitioner the right to a copy of the records at the rate of 25 cents per page and, thereafter, precluding photocopying or duplication in any manner, did not provide petitioner with a final and binding determination until the August 5, 2005 letter denying petitioners FOIL request. The Court resolves any ambiguity created by the public body in favor of petitioner, (*Castaways Motel v Schuyler*, 24 NY2d 120, 299 NYS2d 148, 247 NE2d 124 [C.A. 1969]) and finds that petitioner's FOIL request for redacted documentation was an ongoing process and that the petition is timely.

Furthermore, after a careful reading of the submissions herein, it is the judgment of the Court that, while the above cited statutes and rules and regulations within the Executive Law and the General Municipal Law pertain to the records of the State Ethics Commission

