SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RECLAIM THE RECORDS and BROOKE SCHREIER GANZ,

Petitioners,

THE CITY OF NEW YORK and DEPARTMENT OF RECORDS AND INFORMATION SERVICES,

Respondents.

Index No 159537/2018

MEMORANDUM OF LAW IN OPPOSITION TO CROSS-MOTION TO DISMISS PETITION

Dated: December 18, 2018
New York, New York

David B. Rankin
BELDOCK LEVINE & HOFFMAN LLP
99 Park Avenue, PH/26th Floor
New York, New York 10016
t: (212) 277-5825
e: drankin@blhny.com

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I. **INTRODUCTION**

Reclaim the Records ("RtR") seeks copies of microfilms of, amongst other things the Town of Flatbush slaveholders from 1799 – 1893, Town of Flatbush Slave Reports 1818-1821, Troops – Quota in the War of Rebellion 1861 – 1865 from the Town of Ulrich, Town of Flatlands meeting notes 1705 – 1886, and deeds to the town and leases from 1843 – 1895, collectively referred to as the 'Old Town Records,' so they can digitize the records at their own cost and provide them to the public without charge. RtR is willing to pay for copies of the microfilms at issue in this matter. These records include a large number of historically significant documents which the petitioner wants to digitize and make available to anyone, for free. This is a goal which should be lauded and encouraged by the City, and encouraged, not resisted to the point of litigation.

The beginning sentence of Public Officers Law § 87 (2) ("FOIL") provides as follows: "Each agency shall, in accordance with published rules, make available for public inspection **and** copying all records." (emphasis added). The New York City Municipal Archives ("DORIS") claims that because they make the documents available for inspection, they are not required by statute to provide copies of the documents. The law uses the phrase "public inspection and copying" because the legislature intended agencies to be required to do both, allow the public to inspect and make copies, not inspect or make copies. Should the legislature have intended to use the word 'or' they easily could have, but the legislature chose to use the more expansive word 'and.' The courts which have looked at this issue have concluded that records must be both available for inspection and copying.

II. **PURPOSE OF FOIL**

The goals of the FOIL law are expansive and key to the free and open functioning of our government. It is useful to remember that:

> [FOIL] proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Thus, the statute affords the public the means to attain information concerning the day-to-day operations of State government. By permitting access to official information long shielded from public view, the act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities (see Public Officers Law, § 84). Moreover, judicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, "to hold the governors accountable to the governed." *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979).

To further these goals, FOIL provides that all records kept by a public agency are presumptively open to public inspection and copying unless specifically exempted. *New York Civil Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004). These exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records government." *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). The agency resisting disclosure must prove entitlement to one of the exceptions, meaning the agency bears the burden to resist production. *Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dep't 1992), *see also*, *Data Tree, LLC,* at 463. The respondents admit they are an agency and that the requested microfilms are records. The failure to even argue that records are subject to an exception is problematic for the respondents because in "the absence of a specific statutory protection for the requested material, the Freedom of Information Law compels disclosure…" *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980).

III. <u>AND MEANS AND</u>

The respondents maintain that because someone could go to the municipal archives and inspect the records at issue, the petitioners are not required to make copies of the records. The

Public Officers Law § 87 (2) (FOIL) states that "[e]ach agency shall … make available for public inspection **<u>and</u>** copying all records." (emphasis added). For the respondents to prevail, the Court must rule the word 'and' does not actually mean 'and,' but instead means 'or.' The Court of Appeals tells us repeatedly, that if the statute is clear on its face, that ends the inquiry. *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 251 (1987) ("It is fundamental that in interpreting a statue, a court should look first to the particular words in question, being guided by the accepted rule that statutory language is generally given its natural and most obvious meaning."); *Washington Post Co. v. New York State Ins. Dep't.*, 61 N.Y.2d 557, 565 (1984) ("When the plain language of the statute is precise and unambiguous, it is determinative."); *Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 75 (2017) ("In the absence of a statutory definition, we construe words of ordinary import with their usual meaning…") (citation omitted).

The statute goes on to specify that the agency may not bill more than 25 cents per copied page, that the hourly salary of the individual making copies of a record will be set at the hourly salary attributed to the lowest paid agency employee, and that administrative and search time may be charged for requests that require at least two hours of agency employee time to prepare the copy. *See* Public Officers Law § 87 1.(b)iii, 1.(c)i, and 1.(c)iv. Further, Public Officers Law § 89 3(a) mandates that upon payment of the copying fee, the "entity shall provide a copy of such record." These specific directions on the process and mandate of copying records would be significantly less relevant if agencies were only required to allow individuals to inspect records.

Should the Court wish to look beyond the plain language of the statute, the case law unsurprisingly tells us that 'and' really does mean 'and.' This exact issue was litigated in *The Matter of Archdeacon v. Town of Oyster Bay*, 12 Misc. 3d 438 (Nassau Co. Sup. Ct. 2006). The issue in *Archdeacon* was the tension between the Code of the Town of Oyster Bay § 30-16, which

specifically provided that the records in question only be available for inspection and was silent on the issue of copying, and the New York State FOIL, which provides for inspection and copying. The Court concludes that "FOIL is to provide government records for both inspection and copying and the court finds that there is no rational basis for denying copying of documents which the statute authorizes petitioner to inspect." *Archdeacon*, 12 Misc. 3d at 446. The copies of the records were Ordered.

The issue again was specifically litigated in *The Matter of Herbsman v. Murray*, (J. Iannacci, Nassau Co. Sup. Ct. November 19, 2015). There, as here, the respondents were allowed inspect records, but the request for copies was denied. Rankin Affirmation ("Rankin"), Ex. 1. The Court concluded that "Public Officer's Law § 87 [2] is abundantly clear in its mandate that a municipal agency shall make all records available for inspection **and** copying." (emphasis in original, citation omitted). Rankin Ex. 1 – *Herbsman* at 2. These are the only cases which the petitioner is aware of which squarely address this issue.

The Committee on Open Government ("COG") reviewed the respondent's position that merely making the records available for inspection, relieves them of their obligations to produce copies, and flatly rejected it. Prior to the previous litigation between these parties, Ms. Ganz, the representative of the petitioner, requested an opinion from COG on the correctness of DORIS's refusal to provide copies because there was an opportunity to inspect. Robert J. Freeman, the executive director of COG,[1] correctly read the statute to state that "accessible records be made available for inspection and copying" and rejected the argument being advanced by DORIS that

[1] Mr. Freeman has worked for the COG since its creation in 1974 and was appointed to be its executive director in 1976. He received his law degree from New York University and is a nationally acknowledged expert on the New York State FOI law.

the word 'and' should be read to mean 'or.' Rankin Ex. 2 – COG Advisory Opinion 19195, October 30, 2014.

Providing for inspection "and" copying is also rational from a policy perspective. Should agencies be allowed to merely make records available for inspection, the agencies could dictate the terms of that inspection in such a way as to essentially place the records beyond the grasp of FOIL. Then there would have to be a body of law developed which would determine if the access for inspections were reasonable.

The two cases which the respondents cite to support their proposition that the word 'and' means 'or' do not stand for the proposition for which they are cited. In *Sell v. New York City Sept of Educ.*, 2014 N.Y. Slip Op 31340(U)(N.Y. Sup. Ct. 2014), the respondents emailed links to the documents to the petitioner. The court determined that, "[if] petitioner already possess a copy of the documents, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot." *Sell,* 2014 N.Y. Slip Op 31340(U) at *11 (internal citations omitted). Further, the court ordered an *in camera* review of all document which "were not already in the possession of the petitioner." *Id.* at *13. *Sell* clearly does not stand for the proposition that publicly available documents are not subject to FOIL as represented by the respondent. Respondent's Brief at 5.

The other case which respondents claim to hold that they are not required to copy the records is a dispute between the two parties before Your Honor. On March 16, 2016, RtR filed an Article 78 proceeding requesting microfilms from DORIS ("*RtR I*"). In response to the filing of that action, DORIS allowed the microfilms at issue to be copied for a fee. The litigation continued

for a determination of whether fees were appropriate. The court ultimately determined that fees were not appropriate.

Respondents' estoppel argument is misplaced for many reasons. This matter is not bared by the doctrine of collateral estoppel because none of the elements required for estoppel are present.

> Required for application of the doctrine in either type proceeding are that the issue as to which preclusion is sought be identical with the issue decided in the prior proceeding, that the issue have been necessarily decided in the prior proceeding, and that the litigant who will be held precluded in the present proceeding have had a full and fair opportunity to litigate the issue in the prior proceeding The burden of establishing the first two elements rests upon the proponent of preclusion, but as to the lack of a full and fair opportunity to contest, the burden is on the opponent.

Capital Tel. Co. v Pattersonville Tel. Co., 56 N.Y.2d 11, 17-18 (1982) (Citations omitted).

First, this litigation is different from *RtR I* because in *RtR I*, the records had already been produced and the only issue which was litigated was the matter of attorneys' fees. "[I]n a good faith effort to come to an amicable conclusion in light of Petitioner commencing the instant petition, agreed to and in fact did provide to Petitioner copies of the Microfilm at her expense. […] … Respondent's good faith effort in copying the Microfilm to Petitioner renders the petition directing Respondents to provide the Microfilm as moot, and for these reasons Petitioner is not entitled to attorneys' fees under POL 89(4)(c)(i)." *Brooke Schreier and Reclaimtherecords.org. v. The City of New York et. al.* (J. Mendez, N.Y. Sup. Ct., May 27, 2016). Rankin, Ex. 3 – RtR at 2. Further, the issue of if 'and' actually means 'or,' which we maintain was not decided, was not "necessarily decided" in the previous litigation, as the only matter before the court was the issue of fees. The issue of the propriety of the initial denial was not before the court as all of the records

at issue had been produced. The petitioner did not brief the issue of the original denial as the denial had been cured. The motions were on the issue of attorneys' fees. Rankin Aff. ¶ 4.

The respondents did not raise the issue of estoppel in their administrative denials, therefore it is an argument which is unavailable to them in this litigation. *Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 74 (2017) ("[J]udicial review of an administrative determination is limited to the grounds invoked by the agency" and "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.") (citations omitted).

IV. ATTORNEYS' FEES

The respondents' attorneys' fee analysis is partially correct. Should the court determine that RtR is not entitled to copying of the microfilms at issue, fees should not be awarded. However, the remainder of the respondents' fee analysis is incorrect. There was some debate about how FOIL fee disputes should be analyzed when a party produced documents after an Article 78 had been filed. The dispute is over. The Court of Appeals stated that where a party produced "no disclosures, redacted or otherwise, prior to the commencement of this CPLR article 78 proceeding" and subsequently produced the requested records, attorneys' fees should be awarded. *Madeiros,* 30 N.Y.3d at 79. Should the court determine that RtR is entitled to copies of the microfilms at issue in this matter, they are also entitled to their reasonable attorneys' fees.

V. CONCLUSION

The respondents ask the court to rewrite the New York State FOIL. The Court should not take that opportunity. When a statute is clear, the words' plain meanings must be applied. The

word ‘and’ does not mean ‘or.’ DORIS should be directed to provide an invoice for the copying costs of these records so RtR can digitize the records and provide them to the public.

Dated: December 18, 2018
New York, New York

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP

By:___________________________

David B. Rankin
99 Park Avenue, PH/26th Floor
New York, New York 10016
(212) 490-0400