

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

RECLAIM THE RECORDS and BROOKE
SCHREIER GANZ,

Petitioners,

**VERIFIED PETITION PURSUANT TO
ARTICLE 78 OF THE NEW YORK
PRACTICE LAW AND RULES**

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

Respondents.

Index No. _____

I, David B. Rankin, an attorney duly licensed to practice law in the Courts of the State of New York, hereby verify and affirm, under the penalties of perjury, the following is true and correct:

PRELIMINARY STATEMENT

1. I am counsel for the petitioners, Reclaim the Records and Brooke Schreier Ganz, as such, I am familiar with the facts and procedural history of this action.

2. Pursuant to the Freedom of Information Law (“FOIL”) and Article 78 of the New York Civil Law and Rules, the undersigned, petitioner Brooke Schreier Ganz and Reclaim the Records (“Ms. Ganz”), seeks an order directing respondents The City of New York (“City”) and Department of Records and Information Services (“DORIS”) to produce a complete copy of the approximately 143 microfilm rolls of the Kings County (Brooklyn) "Old Town" records originally created by St. Francis College and given to the New York City Municipal Archives with other materials circa 1988.

3. Reclaim the Records wants to make these documents available to the public. Reclaim the Records will digitize the microfilms and put them online for free public use.

4. The requested records exist on microfilm currently accessible to the public only on location at the Municipal Archives. Petitioner has agreed to pay the cost of copying the rolls of microfilm, so they may be accessible to her and the public without travel to the Municipal Archives.

5. Respondent DORIS denied petitioner's request after itself acknowledging the records contain information already in the public domain and yet declared the records not subject to FOIL.

6. As petitioner has exhausted all administrative remedies, petitioner respectfully requests the Court order respondent to produce the records in accordance with the law of FOIL and the guidance of the State of New York Department of State Committee on Open Government.

STATEMENT OF FACTS

7. On July 17, 2018, Ms. Ganz sent a FOIL request to the FOIL Records Access Officer at DORIS on behalf of Reclaim the Records. See Email Request Exhibit A.

8. The request sought copies of approximately 143 microfilm rolls of the Kings County (Brooklyn) "Old Town" records originally created by St. Francis College and given to the New York City Municipal Archives with other materials circa 1988. Ms. Ganz's letter indicated she was not requesting the materials for any commercial or for-profit purpose, but to assist in genealogical research. She also inquired as to the cost of production of the records.

9. By email dated July 31, 2018, DORIS denied the request, but failed to enumerate which FOIL exception they understood to be a basis for that denial. Curiously, they stated that, "[y]our request under the Freedom of Information Law (FOIL) is being closed because the records are publicly available." See Exhibit B.

10. On August 6, 2018, the undersigned appealed this denial reminding the agency that “[u]nder FOIL, “[a]n agency’s records ‘are presumptively open to public inspection, without regard to need or purpose of the applicant.’” *Beechwood Care Ctr. v. Signor*, 5 N.Y.3d 435, 440 (2005) (quoting *Matter of Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994)). “When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.” *Id.* at 440-41 (citing Public Officers Law § 87(2)). “In the event that access to any record is denied pursuant to [section 87(2)], the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two.” Public Officers Law § 89(4)(b).” See Exhibit C.

11. By letter dated August 21, 2018, the administrative appeal was denied, on the basis, again, that the record were publicly available, but failing to explain how being publicly available exempted the records from a FOIL request. See Exhibit D.

JURISDICTION AND VENUE

12. This proceeding pursuant to Article 78 of the Civil Practice Law and Rules is the proper mechanism for seeking judicial review of a state agency’s determination with respect to a FOIL request. N.Y. Pub. Off. § 89(4)(b).

13. Respondent DORIS is an agency of respondent CITY subject to FOIL.

14. The undersigned has exhausted respondent DORIS’s internal appeals process, and the instant petition has been filed within the four-month period thereafter specified in C.P.L.R. § 217(1).

15. Both respondents DORIS and CITY have their central offices located in the County of New York. Venue therefore is proper in this Court. C.P.L.R. §§ 7804(a), and 506(b).

ARGUMENT

16. When a State or municipal agency makes a determination which is arbitrary and capricious, the aggrieved party may challenge that determination in an Article 78 petition. C.P.L.R. § 7803(3).

17. In rejecting the request for copies of documents already publically accessible - but only on microfilm at the Municipal Archives - respondent DORIS incorrectly asserted the requested records were not subject to FOIL and failed to provide any additional "articulation of a particularized and specific justification for denying access" as required to establish the applicability of an exemption. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562 (1986); *DJL Restaurant Corp. v. Department of Bldgs.*, 273 A.D.2d 167 (1st Dep't 2000).

18. The argument advanced by DORIS was considered by Robert J. Freeman from the New York State Committee on Open Government and rejected stating that:

In consideration of the language of the law and its interpretation by the courts, I respectfully disagree with Mr. Cobb's response. In this regard, I offer the following comments.

First, the Freedom of information Law (FOIL) pertains to all government agency records, and §86(4) of that statute defines the term "record" to mean "any information kept, held, filed, produced or reproduced by, with or for an agency ... in any physical form whatsoever " Based on that provision, it is clear in my opinion that the microfilms at issue constitute "records" that fall within the scope of FOIL and are subject to rights of access.

Second, the correspondence between you and Mr. Cobb indicates that the content of the records sought is clearly public. Although he wrote that the indices are neither subject to FOIL nor available for purchase, in the same paragraph, he added that they "are available to the public, at no cost, in our facility at 31 Chambers Street, and in some instances, they are available online at no cost." For the reason expressed above, all government agency records fall within the scope of FOIL, and §87(2) has since its enactment required that accessible records be made available for

inspection and copying. Further, pursuant to §89(3)(a), agencies must copy accessible records upon payment of the requisite fee.

See Exhibit E.

19. Unfortunately, in *Ganz v. The City of New York, et al.* (N.Y. Co. Index No. 101643/2015) DORIS forced Ms. Ganz and the undersigned to litigate this exact issue. DORIS took the position that because one could walk down to the archive and receive a public record, the did not need to respond to a FOIL request. That matter settled with the defendants providing the requested records. It is an inefficient use of tax payer resources to have the defendant agency knowingly force us to litigate the issue again.

REQUEST FOR RELIEF

WHEREFORE, the undersigned petitioner respectfully requests this Court enter an Order directing respondent DORIS to produce the requested microfilm copies; awarding the undersigned legal fees and expenses incurred in making the instant petition for relief; and awarding such other and further relief as the Court may deem just and proper.

Dated: October 15, 2018
New York, New York

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP



By: _____

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Office of the Commissioner
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New York, New York 10007

Supreme Court, State of New York
County of New York
Motion Submission Term, Room 130
60 Centre Street
New York, New York 10007

ATTORNEY'S VERIFICATION

I, David B. Rankin, an attorney duly admitted to practice before the Courts of the State of New York, affirm the following to be true under the penalties of perjury:

I am the attorney of record for the Petitioner.

I have read the annexed Petition and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My beliefs, as to those matters therein not stated upon knowledge, are based upon facts, records, and other pertinent information contained in my files.

This verification is made by me because Petitioner does not reside in the county where I maintain my offices.

Dated: October 15, 2018
 New York, New York

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP



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