

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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In the Matter of :
 :
NEW YORK CIVIL LIBERTIES UNION, :
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 :
Petitioner, :
 :
-against- :
 :
COUNTY OF SUFFOLK, :
PHYLLIS SEIDMAN in her official capacity as :
Freedom of Information Officer for Suffolk County, :
and STEVE LEVY in his official capacity as :
Suffolk County Executive, :
 :
Respondents. :
 :
For a Judgment Pursuant to Article 78 :
Of the Civil Practice Law and Rules :
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Index No. _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 proceeding seeks to vindicate the right of the petitioner New York Civil Liberties Union and of the public under the Freedom of Information Law to have access to Suffolk County records regarding advertising on County buses. The NYCLU sought these records after news reports that the County had denied a group promoting marriage for same-sex couples that ability to run its ads on County buses. Hoping to discover whether the County consistently denied ads it deemed to contain political speech, the NYCLU sought, *inter alia*, records of ads the County approved to run on its buses for the prior two years.

2. Despite multiple attempts on the NYCLU's part to obtain from the County records concerning advertisements placed on County buses, the County has refused to produce such records by asserting it is not required to prepare records that it does not create or maintain. However, according to the County's contracts with multiple advertising agencies, the County requires these outside entities to create and maintain, for the County, the ads that the County allows to run on its buses.

VENUE

3. Pursuant to C.P.L.R. §§ 506(b) and 7804(b), venue in this proceeding lies in Suffolk County, the judicial district in which Respondents took the action challenged here and where the offices of Respondents are located.

PARTIES

4. Petitioner New York Civil Liberties Union is a not-for-profit corporation that defends civil rights and civil liberties, and ensures government openness in New York.

5. Respondent County of Suffolk is a municipality subject to the requirements of the Freedom of Information Law ("FOIL").

6. Respondent Phyllis Seidman is a public officer who is named in her official capacity as the Freedom of Information Officer for Suffolk County.

7. Respondent Steve Levy is a public officer who is named in his official capacity as the Suffolk County Executive.

FACTS

8. The NYCLU's mission is to defend civil liberties and civil rights, as well as to ensure government openness in New York. For over fifty years, the NYCLU has been involved in litigation and public policy on behalf of New Yorkers, advocating for individual rights and government accountability, while combating discrimination. The NYCLU long has been concerned about the potential for discrimination on the basis of sexual orientation. The NYCLU has also historically opposed conduct by government agencies that deny to unpopular speakers and controversial organizations equal access to engage in expressive activity.

9. In late April 2009, the Long Island LGBT Coalition ("Coalition"), a group dedicated to promoting the visibility of the Long Island Gay, Lesbian, Bi-Sexual and Transgender community, applied to a post pro-marriage advertisement on the sides of Suffolk County buses. The Coalition worked with Kevin Biscardi of Gateway Outdoor Advertising ("GOA"), the private company responsible for coordinating ads on the County's buses. Working with Mr. Biscardi, who told the Coalition that its ad could run on County buses, the Coalition made appropriate payments. However, on or around May 22, 2009, the NYCLU learned that Suffolk County had rejected the proposed ad. In media coverage of the denial, the County Attorney stated that the ad was about a "political issue" and that the County "[tries] to keep it plain vanilla on the buses."

PROCEDURAL HISTORY

10. Concerned that the County denied the LGBT Coalition's ad because of its content and viewpoint, on June 3, 2009 the NYCLU filed a FOIL request for records relating to Suffolk County's advertising policies and practices. Specifically, the NYCLU requested: (1) written policies or memoranda concerning the county's policies for non-county entities seeking to advertise on county buses; (2) standard operating procedures relating to advertising on county property; (3) a copy of another ad with political content that had been posted on Suffolk County buses in the recent past; (4) a document or documents listing or identifying the ads that Suffolk County had approved since May 1, 2007 and, with respect to each ad, the entity or individual sponsoring that ad; and (5) a document or documents listing or identifying the ads that Suffolk County had denied since May 1, 2007 and, with respect to each ad, the entity or individual sponsoring that ad.

11. On June 10, 2009, Suffolk County Freedom of Information Officer Phyllis Seidman responded to the NYCLU's request. Ms. Seidman provided one page for item #1 and item #3 above, stated that there were no responsive documents for item #2, and requested more time to search for documents under items #4 and #5.

12. On June 15, 2009, Ms. Seidman, in response to a phone call from the NYCLU, forwarded the NYCLU the County's Standard Operating Procedures for use of County property for non-County purposes.

13. On July 16, 2009, Ms. Seidman wrote to the NYCLU that no records existed regarding ads the County had approved. She also stated that one record existed concerning ads the County had rejected, but asserted that the record was exempt from disclosure under FOIL based on privileges protecting attorney work-product and materials produced within an attorney-client relationship.

14. On August 14, 2009, the NYCLU administratively appealed, arguing that the County's rationale for withholding the denied ad was erroneous, and that the County had made an inadequate search for records concerning approved ads.

15. On September 2, 2009, the County responded to the NYCLU's administrative appeal by producing the previously withheld denied ad. Nevertheless the County refused to produce records concerning approved ads, asserting that it was not required to prepare records that it did not possess or maintain.

16. On September 30, 2009, NYCLU submitted a FOIL request for the contract between the county and GOA, as well as any additional contracts the County entered with advertising agencies since May 1, 2007. The NYCLU sought these contracts to determine whether records concerning the approved ads would be in the possession of the contractors and whether the contractors were required to create and maintain such records for the County. After receiving no response from the County within the statutory timeframe, the NYCLU administratively appealed.

17. On October 21, 2009, the County responded to the administrative appeal by disclosing its contracts with GOA, as well as a company called Signal Outdoor Advertising (“SOA”), which provided advertising services to the County prior to January 8, 2008.

18. The contracts between the County and GOA and SOA explicitly state that each contractor is required to produce and maintain a written contract of every transaction with individual advertisers, that the contractor must forward to the County—on a monthly basis— a copy of any new contracts with advertisers, and that the County is empowered to inspect any pertinent transactions or records related to the Agreements between the Contractors and the County.

19. On December 15, 2009, the NYCLU, contacted County Attorney Christine Malafi to request the records concerning approved ads in order to avoid litigation. However, the County did not respond to that letter.

**CAUSE OF ACTION: ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF
FOIL REQUEST**

21. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

22. Petitioner, the NYCLU, has a clear right to information about the ads that have been approved to run on Suffolk County’s buses because, pursuant to contracts the

County has entered into with outside advertising agencies, those records are created and maintained for the County. The language of FOIL and the relevant case law interpreting the definition of “record” under FOIL provide that the mere fact that a governmental agency does not physically possess certain records does not insulate those records from disclosure where the agency contracts with private entities to create and maintain those records.

23. Respondents have not produced the information sought by the NYCLU, even though that information is required to be created and maintained for the County pursuant to its contracts with outside entities.

24. Respondents have, therefore, failed to perform duties enjoined by law and have acted in an arbitrary and capricious fashion.

25. Petitioner NYCLU exhausted its administrative remedies when it appealed the County’s denial of its FOIL request and was denied access to responsive records. Petitioner has no other remedy at law.

REQUESTED RELIEF

WHEREFORE, Petitioner seeks judgment:

(1) Pursuant to C.P.L.R. § 7806, directing Respondents to comply with their duty under FOIL to perform an adequate search for the records requested in the Petitioner's June 3, 2009 FOIL request and to disclose all portions of the responsive records that are not subject to any exemption or other privilege;

(2) Awarding attorneys' fees and reasonable litigation costs as allowed under New York Public Officers Law § 89; and

(3) Granting such other and further relief as the Court deems just and proper.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION, by



COREY STOUGHTON
MATTHEW FAIELLA
CHRISTOPHER DUNN
ARTHUR EISENBERG
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, NY 10004
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Dated: New York, NY
December 23, 2009

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Corey Stoughton, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under the penalties of perjury:

1. I am the lead attorney for and an employee of the Petitioner in the within proceeding. I make this Verification pursuant to C.P.L.R. § 3020(d)(3).
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge, and all statements in the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.



COREY STOUGHTON

Dated: New York, NY
December 23, 2009

Sworn and subscribed to me
this 23rd day of December 2009

LAUREL P. BENJAMIN
Notary Public, State of New York
No. 24-4825914
Qualified in Kings County
Commission Expires *Sept* 30, 20*10*



NOTARY PUBLIC