SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of	:	
NEW YORK CIVIL LIBERTIES UNION,	:	
Petitioner,	:	Index No. _____
-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	:	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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New York, New York

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PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of Petitioner, the New York Civil Liberties Union ("NYCLU"), and the right of the public under the Freedom of Information Law ("FOIL") to have access to records created and held for a public agency by private contractors. Specifically, the records are about Respondent Suffolk County's display of advertisements on County buses. Concerned about political censorship after Suffolk County denied a group promoting marriage for same-sex couples the ability to run ads on Suffolk County's buses, Petitioner submitted a FOIL request to Respondents seeking records related to advertisements approved and rejected by the County.

Respondents replied to Petitioner's request, stating that no records existed regarding ads the County had approved or denied. Following an administrative appeal, Respondents disclosed only one record responsive to Petitioner's request, asserting that FOIL did not require the County to prepare records it did not possess or maintain.

However, a review of the contracts between Suffolk County and the advertising contractors who facilitate the County's advertising makes it clear that the contractors are required to produce and keep written contracts of every transaction with individual advertisers on behalf of the County, and, the contractors are obliged to maintain—for seven years—a file of all contracts with advertisers and to submit a copy of any new contracts with advertisers to the County on a monthly basis. As a result, even if Respondents are not in physical possession of documents responsive to Petitioner's request, responsive records do exist and are required to be in the possession of the private contractors.

A plain reading of FOIL shows that Respondents have failed to comply with their affirmative duty under FOIL to locate responsive records in the possession of the private

contractors and disclose those documents to Petitioner. Therefore, Petitioner seeks relief from this Court.

STATEMENT OF FACTS

The NYCLU's mission is to defend civil liberties and civil rights in New York and to preserve and to ensure government openness. For over fifty years, the NYCLU has been involved in litigation and public policy on behalf of New Yorkers, fighting against discrimination and advocating for individual rights and government accountability. New York's Freedom of Information Law is a crucial vehicle in the organization's efforts to ensure the accountability of the government, monitor state and municipal agencies, learn about governmental policies and, when appropriate, challenge the legality of problematic policies. *See* Affirmation of Matthew Faiella ¶ 2 (Dec. 28, 2009) (hereafter "Faiella Aff.").

According to news reports, 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 post an 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. Mr. Biscardi approved the ads, and the Coalition made appropriate payments. On or around May 22, 2009, however, the NYCLU learned that Suffolk County had rejected the proposed ad. *See* Faiella Aff. ¶ 3.[1] 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." *Id.* Indeed, the County's policy bans "advertisements and images depicting political advertisement or endorsement of any sort." *See* Faiella Aff. ¶ 6.

[1] Reid Epstein, *Ad for Bus Rejected Due to Political Nature*, Newsday, May 22, 2009 at A33 (attached as Exhibit 1 to Faiella Aff.).

The NYCLU, however, learned that an ad from Birthright, a non-profit, "pro-life," pregnancy counseling organization, ran on Suffolk County buses, *see* Faiella Aff. ¶ 4,[2] and was therefore concerned about the County's rejection of the Coalition's advertisement. In particular, the NYCLU worried that the County's policy prohibiting political advertisements was not being applied consistently, and may have been applied in a manner that discriminated based on political viewpoint, in violation of the First Amendment.

As a result of its concerns, on June 3, 2009, the NYCLU filed FOIL request for records relating to Suffolk County's advertising policies and past ads that the County approved or denied during the past two years. *See* Faiella Aff. ¶ 5.

On July 16, 2009, Respondents informed the NYCLU that no records existed regarding ads the County had approved, and that *one* record existed concerning an ad the County had rejected but that record was "prepared in conjunction with an attorney-client relationship and [wa]s privileged under Section 4503 of the Civil Practice Law and Rules (CPLR) and [wa]s deemed confidential work-product under section 3101(c) of the CPLR." *See* Faiella Aff. ¶ 8.

Following an administrative appeal, Respondents did provide one responsive document—the advertisement from the Long Island LGBT Coalition that was rejected—but asserted that no other responsive documents were in its possession. Respondents rejected the NYCLU's contention that they had made an inadequate search for relevant records, stating, "It is well settled that FOIL does not require an entity to prepare records it does not possess or maintain." *See* Faiella Aff. ¶¶ 9-10.

On September 30, 2009, the NYCLU submitted a second FOIL request to Suffolk County for contracts between the County and the advertising contractor, GOA, as well as any additional

[2] That advertisement is attached as Exhibit 2 to the Affirmation of Matthew Faiella.

contracts with advertising agencies in the past five years. *See* Faiella Aff. ¶ 11. On October 21, 2009, following an administrative appeal necessitated by Respondents' failure to respond to the September 30, 2009 request, the County disclosed its contracts with GOA, as well as a company called Signal Outdoor Advertising ("SOA"), which had provided advertising services from April 1, 2002 to December 31, 2007, after which GOA began providing such services to the County. *See* Faiella Aff. ¶¶ 12-13.

Those contracts show that the contractors are required to produce and keep written contracts of every transaction with individual advertisers on behalf of the County. *See* Faiella Aff. ¶¶ 15. Moreover, the contractors are obliged to maintain, for seven years, a file of all accounts, records, and documents relevant to its contract with the County, and to submit a copy of any new contracts with advertisers to the County on a monthly basis. *Id.* Thus, the plain language of the contract suggests that GOA and SOA not only maintain copies of contracts with individual advertisers on behalf of the County, but also have copies of the ads themselves, since the contractors were responsible for preparing the ads for posting on County buses.

ARGUMENT

I. RESPONDENTS HAVE VIOLATED FOIL BY FAILING TO LOCATE AND DISCLOSE RESPONSIVE RECORDS.

Because the contractors are required, pursuant to their contracts with Respondents, to produce and maintain certain documents, those documents constitute "records" under FOIL and Respondents must retrieve the records from the contractors in order to satisfy Petitioner's June 3 FOIL request. This conclusion is compelled by the plain language of FOIL and the Court of Appeals' decision in the seminal case of *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995). Documents produced by a private contractor on behalf of a state agency *are* records under FOIL. Even if

those records are in the possession of the private contractor, the state agency has a duty to retrieve the records and turn them over pursuant to a valid FOIL request. Indeed, if FOIL were interpreted to permit state agencies to shield records by merely delegating responsibility to or storing them with private contractors, the very purpose of FOIL would be undermined. As a result, Respondents have an affirmative duty under FOIL to locate responsive records in the possession of the private contractors and disclose those documents to Petitioner.

A. Documents Produced by Private Contractors for Use by a Public Agency are "Records" Under FOIL.

The plain language of FOIL indicates that documents prepared by private contractors, when produced for a public agency, are "records" under FOIL. FOIL defines a "record" as:

> [A]ny information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

N.Y. Pub. Off. Law § 86(4).

In *Encore College*, the Court of Appeals considered the scope of § 86(4), specifically asking whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute[s] a 'record' that is presumptively discoverable under FOIL." *Encore*, N.Y.2d at 414. There, a private bookstore (Encore Books) filed a FOIL request with the State University of New York ("SUNY"), "seeking disclosure of the booklist compiled by Barnes & Noble for the 1993 spring semester." *Id.* at 416. SUNY rejected the request, stating that it did not possess the booklist. Indeed, the booklist was in the possession of the Auxiliary Service Corporation of the State University of New York Agricultural and Technical College at Farmingdale (ASC), a private, not-for-profit corporation created "to establish, operate, manage and promote educationally related services for the benefit of the [SUNY] Campus

Community, including faculty, staff and students in harmony with the educational mission and goals of the College." *Id.* at 415. ASC had, in turn, hired Barnes & Noble as a subcontractor to run the bookstore. *Id.*

On appeal, the Appellate Division, First Department, 212 A.D.2d 418 (1st Dep't 1995), citing *United States DOJ v. Tax Analysts*, 492 U.S. 136 (1989), a Supreme Court case concerning the scope of the federal Freedom of Information Act ("FOIA"), affirmed the denial, holding that SUNY was "not obligated under FOIL to produce material neither created by it nor within its possession and control." *Encore*, 87 N.Y.2d at 416. The Court of Appeals, however, granted leave in the case to determine whether the list sought by Encore was a "record" under FOIL. *Id.* at 417.

In evaluating this question, the Court first distinguished the definition of "records" under FOIL and the definition of "records" under FOIA.

> To be sure, New York's Freedom of Information Law is patterned after the Federal Freedom of Information Act (FOIA), which requires production of "agency records." FOIA, however, contains no definition of the term "records."[3] Thus, although the scope of "agency records" under FOIA has been limited by the courts to material (1) created or obtained by the agency, and (2) in the agency's control, this construction rested in part on the definition of "records" contained in two similar Federal statutes: The Records Disposal Act (defining "agency records" as documents "made or received by an agency") and the Presidential Records Act of 1978 (defining "Presidential records" as material "created or received by the President"). Manifestly, these definitions are far more circumscribed than the definition of "records" added to FOIL in 1977.
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> We therefore decline to adopt the narrow definition of "records" adopted by the Federal courts.

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[3] FOIA *does* contain a definition of records today, which was added as part of the Openness Promotes Effectiveness in Our National Government Act of 2007. The definition reads: "(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C. § 552(f)(2).

Id. at 418.

Instead, the Court of Appeals found that the expansive definition of "records" under FOIL included documents produced by, and in the possession of, private contractors, when said records were produced "for" a state agency. Thus, the Court concluded:

> Because ASC receives a copy of the booklist compiled by its subcontractor, Barnes & Noble, to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a government agency. In other words, the booklist information is "kept" or "held" by ASC "for an agency" (Public Officers Law § 86 [4]). Thus, as noted above, the information falls within the unambiguous definition of the term "records" under FOIL, and SUNY is obligated to retrieve it and provide it to the requesting party.

Id. at 417.

The *Encore* Court added that to permit agencies to shield documents from disclosure by farming out state functions to private companies would, "undermine the legislative objective to provide maximum disclosure." *Id.* at 418.

In the instant case, the requested records are documents that the County's contractors are required to create and hold for the County. Indeed, the contracts between the County and its contractors state, "Every transaction between the Contractor and an advertiser or advertising agency for the display of advertising pursuant to this project shall be contained in a written contract." *See* Faiella Aff. ¶ 15.[4] Moreover, the contracts also include a provision requiring the contractors to maintain a file of all contracts with advertisers and provide a copy of any new contracts with advertisers to the County on a monthly basis. *Id.* Thus, because the documents produced by the contractors were produced and held for an agency, they are "records" subject to disclosure under FOIL.

[4] Attached as Exhibits 13-14 to Faiella Aff.

B. Records Need Not be in the Physical Possession of an Agency to be Discoverable Under FOIL.

Respondent also erroneously asserted in its response to Petitioner's administrative appeal "that FOIL does not require an entity to produce records it does not possess or maintain." *See* Faiella Aff. ¶ 3 (referring to Respondent's administrative appeal, which cited N.Y. Pub. Off. Law § 89(3); *Matter of Franklin v. Schwartz*, 57 A.D.3d 338 (1st Dep't 2008), *Asian Am. Legal Defense & Educ. Fund v. New York City Police Dept.*, 56 A.D.3d 321 (1st Dep't 2008)). Rather, given the holding in *Encore*, Respondent has misinterpreted New York case law and, as a result, failed to perform its duties under FOIL in a manner consistent with a sound understanding of the statute.

In *Encore*, the Court rejected SUNY's claim that disclosure turns solely on whether the requested information is in the physical possession of the agency, stating, "SUNY's contention...ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency.'" *Id.* at 417 (quoting N.Y. Pub. Off. Law § 86(4)). Indeed, once the *Encore* court held that the booklist was in fact a "record" under FOIL, there was no question that the agency had an affirmative duty to retrieve the responsive records. *Id.* at 418.

Likewise, in *Matter of C.B. Smith v. County of Rensselaer*, the court found that records maintained by an attorney retained by an industrial development agency were subject to FOIL, even though the agency did not physically possess the records. The court determined that because the records were generated by the attorney in his capacity as counsel to the agency, records of payment in his possession were subject to rights of access conferred by FOIL. *See Matter of C.B. Smith v. County of Rensselaer* (Sup. Ct. Rensselaer Cty. May 13, 1993) (unreported decision attached as Exhibit 15 to Faiella Aff.).

Additionally, the cases cited by Respondent for the proposition that "FOIL does not require an entity to produce records it does not possess or maintain," bear no relation to the facts at hand in our case. In *Franklin*, 57 A.D.3d 338, the issue was whether the documents existed *at all*, not whether or not they existed outside the agency. Indeed, because the requested records in *Franklin* could only have been in the possession of the District Attorney's office, once the DA had made an exhaustive search of his records and concluded that the records did not exist, the dispute was at an end. There was no issue concerning outside entities, like Gateway or Signal, having the responsive records. Likewise, in *Asian-American Legal Defense Fund*, 56 A.D.3d 321, the requested records, if they existed at all, could *only* be in the possession of the NYPD. Once the NYPD explained that the records were not in its possession, the court was satisfied that the records did not in fact exist. Therefore, the NYPD's denial of the Fund's FOIL request was upheld.

What these cases ultimately stand for is the fact that agencies are not required to *prepare* documents not in their possession. *See N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. Novello*, 13 A.D.3d 958 (3d Dep't 2004) (holding an agency is not required to *prepare* any record not in its possession). However, as here, in situations in which responsive records are available and require no "preparation," but merely the act of retrieval, *Encore*'s central holding governs.

In the instant case, the contracts between Respondents and their advertising contractors show that the contractors are obligated to create certain records and to share those records with Respondents on a periodic basis. Thus, *even if* Respondents do not have physical possession of responsive records, Respondents have an affirmative duty under FOIL to retrieve responsive records from its advertising contractors and disclose their findings to Petitioner.

C. Permitting State Agencies to Effectively Shield Records From Disclosure Under FOIL by having Private Contractors Produce and Maintain Those Records Violates the Broad Right of Access the Legislature Created in FOIL.

If the records at issue in this proceeding were not discoverable under FOIL, FOIL's ability to ensure transparency and accountability of government agencies would be crippled. Robert Freeman, Executive Director of the Committee on Open Government, recently wrote:

> [FOIL] has given us the ability to avoid the pitfalls associates with privatization and its impact upon accountability. In other states, when a government agency contracts with a private firm to carry out a function on its behalf, it is not always clear that its access law applies, and often it does not. In New York, because FOIL applies to records kept by or *for* an agency, the connection and, therefore, rights of access are preserved.

Robert Freeman, "Thirty Years of FOIL," *Government, Law and Policy Journal* 11.1 (Spring 2009) (emphasis in original) (Attached as Exhibit 16 to Faiella Aff.).

Indeed, New York courts have long recognized the threat that privatization of government poses toward open government. In the case of *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 581 (1980), the Court of Appeals declared:

> [As] state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

Id. (quoting N.Y. Pub. Off. Law, § 84).[5]

[5] In *Westchester Rockland*, a village claimed that the records of its volunteer fire department's public lottery (which, incidentally, violated New York law) were not "records" within FOIL because the fire department's fund-raising activities were not related to its official fire-fighting functions. *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 578 (1980). Finding that FOIL placed the burden of demonstrating that the material requested is exempt

Thus, the Court of Appeals recoiled at the prospect of the "shielding" of government documents via private companies. As previously noted, the *Encore* Court held that to permit agencies to shield documents from disclosure through the use of private holding companies would, "undermine the legislative objective to provide maximum disclosure by enabling a government agency to insulate its records from public access by delegating responsibility for creating or maintaining particular information to a nongovernmental entity." *Encore*, 87 N.Y.2d at 418.

Thus, a ruling in favor of Respondent in this case would render FOIL ineffective by allowing government agencies to contract out government functions and then never have to disclose information about those functions to the public. To do so would transform one of the great bulwarks against government secrecy into an empty promise.

II. PETITIONER NYCLU IS ENTITLED TO ATTORNEYS' FEES

Petitioner requests attorneys' fees and reasonable litigation costs under the Freedom of Information Law. Section 89(4)(c) authorizes a court to award reasonable attorneys' fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute. *See* N.Y. Pub. Off. Law § 89(4)(c).

Section 89(4)(c) was amended in 2006, in part, to remove the previous requirement that "the record involved was, in fact, of clearly significant interest to the general public." *See, e.g.*,

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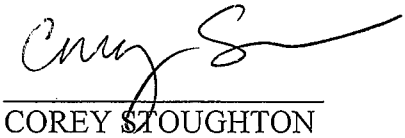
"squarely on the shoulders of the one who asserts it," the Court rejected the so-called "nongovernmental function theory," which would have withheld any documents outside the scope of the agency's "official" duties. *Id.* at 580. The Court declared, "The statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute." *Id.* at 581.

Beechwood Restorative Care Ctr. v. Signor, 808 N.Y.S.2d 568, 571-72 (2005) (rejecting fee claim under former "interest to general public" standard). The legislative history to the 2006 amendment states that "[t]his bill strengthens the enforcement of such a right [citizens' right to access certain government records via FOIL requests] by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to respond in a timely fashion or deny access *without any real justification.*" 2005 Legis. Bill Hist. N.Y. S.B. 7011 (emphasis added). Thus, the only showing that now must be made for an award of attorneys' fees under the Freedom of Information Law is that the Petitioner substantially prevailed and that "the agency had no reasonable basis for denying access." N.Y. Pub. Off. Law § 89(4)(c). Based on Respondents' failure to make a thorough and adequate search for responsive records and the inapplicability of the case law Respondents cite, as well as the clearly established precedent of *Encore*, the County lacks a reasonable basis in law for its wholesale denial of entire set of records requested in the NYCLU's request. Indeed, the NYCLU made every effort to avoid litigation, setting forth the rule established by *Encore* in a letter to Respondents urging them to produce the documents without need to resort to judicial intervention. Faiella Aff. ¶ 14. Unfortunately, that effort has not, to date, been successful.

CONCLUSION

For the foregoing reasons, the Court should direct Respondents to retrieve responsive records in the possession of the private contractors and disclose those documents to Petitioner in response to Petitioner's June 3, 2009 Freedom of Information Law request.

Respectfully submitted,



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