SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of

CAMILLO M. SANTOMERO,

Petitioner,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT, CAROLE LACOLLA, as District Clerk of the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT and DR. DEBRA JACKSON,

Respondents.

Index No. 25405-2008

REPLY AFFIRMATION IN SUPPORT OF MOTION PURSUANT TO 4/30/09 ORDER

Assigned to the Honorable Barbara Gunther Zambelli, A. J. S. C.

ROBERT A. STERNBACH, an attorney duly admitted to practice in New York State, affirms under the penalties of perjury as follows:

1. I respectfully submit this Reply Affirmation (A) in further support of Petitioner's Motion, pursuant to the April 2009 Order (the "Motion"),[1] for an Order (i) directing Respondents to produce all of the Additional Records in unredacted form, or, in the alternative, directing Respondents to deliver all of the Additional Records, in unredacted form, to the Court for *in camera* inspection; and (ii) awarding Petitioner his attorneys' fees in this proceeding; and (B) in response to (i) the Affirmation in Opposition of Respondents' attorney, Edward J. Philips

[1] Capitalized terms not defined in this Reply Affirmation have the meanings defined in Petitioner's moving Memorandum of Law, dated August 20, 2009.

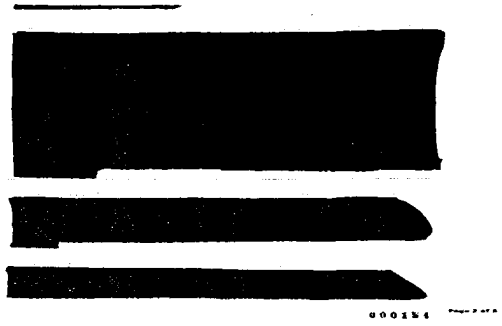
("Philips Opp. Affirmation"); (ii) the Affidavit of Susan Elion Wollin, sworn to September 29, 2009 ("Wollin Opp. Aff."); (iii) the Affidavit of Barbara Grossman, sworn to September 29, 2009 ("Grossman Opp. Aff."); and (iv) Respondents' Memorandum of Law in Opposition to Motion ("Respondents' Opp. Mem."), both dated October 1, 2009.

Preliminary Statement

2. Respondents hope to avoid disclosure of the non-exempt portions of hundreds of completely or almost completely blacked-out pages of Additional Records by avoiding their statutory obligation to prove that all of the vast amount of redacted material "fall[s] wholly within" a FOIL exemption. *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985).

3. To achieve this unworthy objective, Respondents concoct an irrelevant and self-serving narrative in which they suggest that their purported offer to informally discuss a few of the Additional Records somehow absolved them of their burden; in which they improperly claim that Petitioner had the burden of "demanding" that they comply with their statutory obligations at the conference at which the Court ordered them to supply the Additional Records to Petitioner; and in which they disingenuously suggest that the only redacted materials "in dispute" are contained in those few Additional Records that Petitioner specifically highlighted — solely as illustrative examples — in his moving Memorandum of Law.

4. In essence, Respondents ask Petitioner and this Court to accept — based on a single sentence in their counsel's Affirmation — that Respondents have scrupulously disclosed all "objective information," *Gould v. New York City Police Department*, 87 N.Y.2d 267, 276 (1996), embedded in scores, if not hundreds, of pages of redacted material that look like this:



— and that, in doing so, Respondents properly distinguished between "facts" and "opinions," with any doubt to be resolved in favor of disclosure[2] — despite their earlier, patently unreasonable (mis-)"interpretation" of Petitioner's FOIL request.

5. Respondents cannot succeed. As we discuss below, it is evident, even from Respondents' discussion of the few documents specifically highlighted on this Motion, that they have not scrupulously adhered to the law's requirement that all objective information contained within records claimed to be subject to the intra-agency or attorney-client privilege be disclosed to Petitioner; they have misinterpreted the distinction between facts and opinions; and have no basis for withholding communications from or to non-agency third-parties, including Mark Slivka.

6. Accordingly, this Court should require disclosure of all the Additional Records, or, at a minimum, should require that all the Additional Records be delivered to the Court, in unredacted form, for *in camera* inspection.

7. Respondents also misrepresent the law governing the award of attorneys' fees. To begin with, Respondents misrepresent that portion of the FOIL statute which governs the award of fees — which was amended, in 2006, to delete the requirement that the records

---

[2] "Exemptions are to be narrowly construed to provide maximum access...." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986).

requested or obtained be of "significant interest to the public." Moreover, as discussed below, Respondents inaccurately describe the case law, which indeed dictates that Petitioner has "substantially prevailed" herein; and Respondents do not even attempt to show that they had a rational basis for their failure to identify, let alone produce, the Additional Records in response to Petitioner's FOIL request. Hence, Petitioner should be awarded his attorneys' fees.

Respondents Fail To Prove That All Of Their Vast Redactions Fall Wholly Within A FOIL Exemption

8. An agency has the unavoidable statutory obligation to prove that any record withheld from disclosure falls entirely within a claimed exemption. *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986): "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption ... (citations omitted, emphasis supplied)"; *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) ("Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (emphasis added)); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985) ("While the reports in principle may be exempt from disclosure, on this record ... we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents (emphasis added))."

9. This burden applies to redactions as well as to entire documents. *See Halpern v. F.B.I.*, 181 F.3d 279 (2nd Cir. 1999); *Gordon v. F.B.I.*, 388 F.Supp.2d 1028, 1034 (N.D. Cal. 2005) ("the burden of proving the applicability of an exception ... remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document") (internal citation omitted).

10. At a minimum, the agency "must submit itemized descriptions of the context out of which specific redactions are made." *Halpern v. F.B.I.*, 181 F.3d at 294; *Church of Scientology of New York v. State*, 46 N.Y.2d 906, 908 (1979) (agency must "tender ... factual basis on which to determine whether the materials sought ... fell outside the scope of mandated disclosure"); *Buffalo Broadcasting Co., Inc. v. City of Buffalo*, 126 A.D.2d 983, 984 (4th Dept. 1987) (agency "did not allege any facts showing whether the material sought came within the exceptions").

11. This burden is particularly acute when an agency asserts an exemption for intra-agency materials, since all "objective information" contained within a record must be disclosed, even if that information is embedded or intertwined with opinions, advice, or recommendations. *See Ingram v. Axelrod*, 90 A.D.2d 568, 569 (3rd Dep't 1982) (cited with approval in *Gould*, 87 N.Y.2d at 277) ("Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion ... (citation omitted, emphasis added)"); *MacRae v. Dolce*, 130 A.D.2d 577, 578 (2nd Dept. 1987 (factual matter embedded within 'predecisional draft' must be disclosed even if 'small amount' relative to 'preponderance of estimates and opinions also contained in the document"); *Gould v. New York City Police Department*, 87 N.Y.2d 267, 276 (1996) ("Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice...").

12. Disclosure of objective information is also mandated when the agency asserts that a document may be withheld on the basis of attorney-client privilege. As with intra-agency materials, the mere fact that a record was sent to or received from an attorney does not justify withholding objective information embedded within it. *Spectrum Systems Intern. Corp. v.*

Chemical Bank, 78 N.Y.2d 371, 377 (1991) ("The privilege is of course limited to communications - not underlying facts"); *Eisic Trading Corp. v. Somerset Marine, Inc.*, 212 A.D.2d 451 (1st Dept. 1995) ("The attorney-client privilege applies only to confidential communications with counsel, not to information obtained from or communicated to third parties or to underlying factual information (citation omitted, emphasis added)"); *Matter Of Woods v. Kings County District Attorney's Office*, 8/4/95 NYLJ, p. 24, col. 5 (Sup. Ct. Kings Co.) (available on Westlaw, NYLJ Database) (District Attorney case status reports not exempt "since they are factual in nature").

13. Here, Respondents redact hundreds of pages of Additional Records in addition to those specifically highlighted by Petitioner in his moving Memorandum of Law. Scores, if not hundreds, of those records are entirely or almost entirely blacked-out. *See* list of such documents annexed as Exhibit "A" hereto. Respondents aver that "the vast majority" of these records "consist of emails in which intra-agency material was redacted." Respondents' Opp. Mem., p. 2. Hence, as the above authorities demonstrate, the single sentence in Respondents' attorney's Affirmation, *see* Philips Opp. Mem., ¶ 12, which claims, in wholly conclusory fashion, that all of these redactions are proper, cannot possibly suffice to meet Respondents' burden of proof.

14. To begin with, it is self-evidently highly unlikely that pages and pages of completely or almost-completely blacked-out material are entirely free of objective information, as Respondents claim, even if they also contain some exempt material. *Ingram v. Axelrod, supra; MacRae v. Dolce, supra.*

15. Moreover, as discussed in detail below, Respondents' own description of the records previously highlighted by Petitioner confirms that they cannot be trusted accurately to distinguish between "facts" and "opinions," or scrupulously to disclose any objective

information that may be contained within a record that may also contain opinions, narrowly construing any exemptions "... to provide maximum access...," *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986) — as could be expected based on their mis-"interpretation" of Petitioner's intitial FOIL request, which may be characterized as irrational, at best.

16. Likewise, Respondents apparently contend that just because a record was "sent to/from counsel," Respondents' Opp. Mem., p. 2, it may be withheld in its entirety, regardless whether it contains objective information which must be disclosed. See also Respondents' description of records *387-88: "In addition, record *387-388 was provided via email to John H. Gross, Esq., and therefore the information it contains also falls within the attorney-client privilege (emphasis added)." Philips Opp. Aff., ¶ 35. This is simply contrary to the law. Sending a record to counsel does not shield the objective information it contains from disclosure. *Spectrum Systems Intern. Corp. v. Chemical Bank, supra; Eisic Trading Corp. v. Somerset Marine, Inc., supra*; *Matter Of Woods v. Kings County District Attorney's Office, supra.*

17. Nevertheless, Respondents claim they may avoid proving that all redactions in the Additional Records consist wholly of exempt material based on the inaccurate, self-serving and largely irrelevant "procedural path" concocted in the Philips Affirmation. This claim is totally without merit.

Respondents' Offer To Informally "Confer" Regarding The Redactions Could Not Absolve Them Of Their Statutory Burden Of Proof

18. Respondents contend (Philips Affirmation, ¶¶ 10, 13, 14) that Petitioner should somehow be penalized for doing precisely what the April 2009 Order directed the parties to do

— that is, resolve any "outstanding issues"[3] after production of the Additional Records by way of formal briefing — rather than succumb to Respondents' invitation to resolve such issues as Respondents would prefer, by way of informal "discussion" or "conference." However, Petitioner manifestly had no duty to waive his rights by acceding to an informal procedure that would have given Respondents free rein unilaterally to determine the propriety of their own redactions — particularly given Respondents' past history of misinterpreting matters.

Petitioner Had No Duty To Demand That Respondents Comply With Their Statutory Burden

19. Respondents further appear to suggest that they should be relieved of their statutory burden to prove the validity of all the redactions because, at the Court conference that preceded the April 2009 Order, Petitioner purportedly "did not request that each redaction ... be catalogued with respect to the exemption(s) claimed, and the undersigned counsel indicated that such a itemization [sic] would not be forthcoming...." Philips Affirmation, ¶ 9. However, Petitioner had no duty, at the conference or at any other time, specifically to demand that Respondents comply with the requirements imposed on them by law; nor do I recall the statement allegedly made by Respondents' counsel. In any event, nothing in the April 2009 Order relieves Respondents of their legal duties, or deprives Petitioner of any of his legal rights.

Respondents Did Not Comply With Their Burden By Identifying The Sender, Recipient, Date and Time and "Subject Line" Of The Redacted Emails

20. The Philips Affirmation suggests that, merely by identifying the sender, recipient, date and time and "subject line" of redacted emails, Respondents met their burden of proving that the body of the document is wholly free of objective information, or other information that

[3] April 2009 Order, Exhibit "3" to the moving Sternbach Affirmation.

should be disclosed. As the foregoing discussion makes clear, this cannot be true, particularly in the case of the many pages of text that are entirely blacked out. Petitioner must be provided with all objective information embedded or intertwined within the Additional Records, regardless whether some documents also contain opinions or advice, and regardless whether those documents were sent to or received from an attorney.

All Redactions In The Additional Records Are "In Dispute"

21. Perhaps the most pernicious aspect of Respondents' opposition to the Motion is their suggestion that Petitioner is challenging only the redactions made in the documents specifically enumerated in Petitioner's moving Memorandum of Law.[4] Nothing can be further from the truth. As Petitioner's moving Memorandum of Law made clear, the documents specifically enumerated and discussed therein were intended to be illustrative only. To prevent any possible misconception, Petitioner confirms that all redactions contained in the hundreds of documents listed on Exhibit "A" annexed hereto are "in dispute."[5]

Respondents' Discussion Of The Illustrative Documents Shows They Have Misapprehended Their Legal Responsibilities

22. With that in mind, we turn to Respondents' discussion of the documents Petitioner highlighted, for illustrative purposes, in his moving Memorandum of Law. This discussion confirms that Respondents have misapprehended their obligations under the FOIL statute and have almost certainly multiplied these failures many times over in the hundreds of remaining Additional Records.

---

[4] Thus, perhaps in an attempt to forestall scrutiny of the vast numbers of remaining documents, Respondents assert that they provided the Court with unredacted copies of these documents in connection with this Motion.

[5] In that regard, Petitioner takes particular exception to Respondents' claim that he "intended to create the false appearance that more documents are at issue than is really the case." Philips Affirmation, p. 10, fn. 4. First, it is not obvious, particularly with redacted records that are formatted differently, whether given documents are duplicates or not. Second, as stated above, all the redactions are at issue.

Records *413-14

23. Respondents' attempt to justify the redactions they made to Records *413-14 shows they cannot be trusted to properly distinguish between facts and opinions in the Additional Records, or to scrupulously disclose all objective information within records that may also contain opinions.

24. In the unredacted portion of Records *413-14, Dr. Jackson states that she is identifying, with no uncertainty as to status, teachers who "let their certification lapse" (*413) and who are therefore "uncertified" (*414). Nonetheless, despite Dr. Jackson's own classification of the teachers' status in her email as a pure matter of fact, Respondents seek to justify their redaction of the list on the ground that whether a teacher is certified is a mere matter of "opinion," not fact. *See* Philips Affirmation, 39. Respondents cite no authority for this statement.

25. Respondents also seek to justify redaction of the list of uncertified teachers in *414 on the ground that "it is not within the scope of Petitioner's FOIL request" — a questionable interpretation, at best, given Respondents' own production of the document as being within the scope of the "dispute" and the numerous other records that indicate that the issue of teacher certification was one of the areas of friction between Jackson and the Board. At a minimum, Respondents' classification of this list as "not within the scope" of the dispute bespeaks their propensity to construe the exemptions to FOIL as broadly as possible, the very opposite of what is required.

Records *444-445

26. The sole description of Records *444-445 in the Wollin Opp. Aff. is that that they "contain an email that I sent to the other members of the Board of Education concerning former

Superintendent Debra Jackson." The Philips Opp. Aff. (¶ 42) states, concerning these records: "her email contained her opinions ... and therefore was redacted." However, Respondents' description does not show the absence of any facts or "objective information" in the email, which must be disclosed.

27. Respondents also claim that the email should be redacted because it "related the substances of Ms. Wollin's communications with Attorney Gross, and therefore is also exempt by reason of the attorney-client privilege." That, however, is a misreading of the privilege, since there is no claim that the email itself was sent to or received from Attorney Gross. Further, as stated above, objective information contained within the email would not in any event be protected by the attorney-client privilege.

Records *460-61

28. The Wollin Opp. Aff. avers that Records *460-61 "contain notes I prepared for an executive session Board of Education meeting with an attorney relating to former Superintendent Jackson's job performance. The notes reflected my personal thoughts and highlighted matters that I wished to discuss with counsel." The Philips Opp. Aff. states that these records were "redacted because it contains her opinions, impressions and recommendations (emphasis added)." However, as the Court held in *Ingram v. Axelrod, supra*, merely because a record may contain "personal thoughts" or "opinions" does not exempt facts or objective information that are also contained within the record. As with Records *444-45, Respondents' description does not show that facts or "objective information," which must be disclosed, are not embedded in the email.[6]

[6] Petitioner takes strong exception to the statement in Respondents' Opp. Mem., p. 5, that he has "deliberately mischaracterized" these records, as well as Records *271 and 275. Respondents have no basis for their

Records *156 and *463

29. Respondents admit that, at the time Mr. Slivka sent these emails to other members of the Board, he was not on the Board, nor was he a member of the agency. Philips Affirmation, ¶ 26. Nevertheless, Respondents argue that these emails were properly redacted because they contain "impressions and opinions" that were conveyed to Mr. Slivka by an agency member at a time when Mr. Slivka was on the Board. Respondents cite no authority for this argument.

30. Emails sent by Mr. Slivka, or received by him, at a time when he was unaffiliated with the agency enjoy no more protection than emails sent by, or received by, any other third-party member of the public. The fact that Respondents were communicating with Mr. Slivka at all about purportedly privileged matters at a time when he was no longer an agency member speaks volumes about the care Respondents exercised to maintain the confidentiality of these communications.

31. Indeed, Respondents' continued dissemination of confidential matters to members of the Board, even after they had ceased to function in that capacity, is adverted to in the unredacted communication from former Board member Elin Sullivan which Respondents produced as record *468. In this email, Ms. Sullivan states: "In light of the above, I was shocked to learn some weeks ago that the Board had asked Debra to leave, virtually immediately.... However, in recent weeks, information that I have gathered from former and current board members points to something very different....In realizing that the staff and community is going to want to know how this could be happening so close upon the heels of a contract extension, I have heard from two current Board members that this can be explained by the fact that Mark and Paula withheld information from their fellow Board members [emphasis

assertion that only a list published by the District Clerk can qualify as a "meeting agenda."

added]."

Records *1-2, 63, 79, 80-1, 271, 275, 312-20, 387-88, 405-6, 413-14

32. Respondents aver, with respect to all these records, that, to the extent they contain "factual information," "such information was not redacted." See Philips Opp. Affirmation, ¶ 22. However, as stated above, Petitioner questions whether Respondents have properly interpreted the meaning of "factual information," whether they have properly distinguished between "facts" and "opinions," whether they have been scrupulous in seeking to provide all objective information, even if intertwined with opinions, and whether, as a general matter, they have interpreted "objective information" as broadly as possible, as they should have.

Record *517

33. Respondents claim, in conclusory fashion, that *517 is wholly exempt merely because it was sent by Attorney Gross — a conclusion which, as we have shown above, is not correct. Furthermore, although Respondents claim that the document attached to the email has not been produced "because it has not been located," Philips Opp. Aff., ¶ 46, Respondents do not certify that they made any effort to obtain the document from Attorney Gross.

Records *78-81

34. The extensive list of teachers to which these communications were sent indicates that, in addition to containing factual material, they may constitute "instructions to staff that affect the public," which must also be disclosed on that ground. Public Officers Law § 87[2][g][ii]; *Miller v. New York State Dept. of Transp.*, 58 A.D.3d 981, 985 (3rd Dept. 2009).

Respondents Misconstrue The Attorneys' Fees Portion Of The Statute

35. Respondents claim Petitioner is not entitled to attorneys' fees because he has not "substantially prevailed" and because the records he has obtained, they claim, are not of

"significant interest to the public." Respondents make no attempt to assert that they had a reasonable basis for withholding these records in the first place. Respondents both misconstrue and misrepresent the governing statute.

36. To begin with, Respondents misrepresent the statute. Public Officers Law § 89[4][c], as amended by the Laws of 2006, c. 492, § 1, provides:

> The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:
>
> i. the agency had no reasonable basis for denying access; or
>
> ii. the agency failed to respond to a request or appeal within the statutory time.

Thus, contrary to Respondents' assertion on page 9 of their opposing Memorandum, the statute no longer requires the records involved to be of "significant interest to the public."[7] *See Reese v. Daines*, 20 Misc.3d 1145(A) at *12 (Sup. Ct. Erie Co. 2008), *aff'd as modified*, 62 A.D.3d 1254 (4th Dep't 2009) (noting that "A former requirement, i.e., that 'the record involved was, in fact, of clearly significant interest to the general public,' has been deleted from the statute (see L 2006, ch 492, § 1).")

37. Hence, although Petitioner is confident that the records he has obtained by way of this litigation are, in fact, of significant interest to the public, that factor should no longer be determinative of the Court's decision to award attorneys' fees.

38. Respondents also argue that "... the standard for 'substantially prevailing' under FOIL is higher than under federal law," Respondents' Opp. Mem. at 11, but provide no support

---

[7] Subd. 4, par. (c), subpar. i. L.2006, c. 492, § 1, substituted "the agency had no reasonable basis for denying access; or" for "the record involved was, in fact, of clearly significant interest to the general public; and".

for this conclusion. Contrary to Respondents' assertion, the standard for determining whether a party has "substantially prevailed" under both Federal and New York is the same: whether the commencement of litigation caused the agency to produce records, as is the case here. *See Stop the Madrassa Community Coalition v. New York City Dept. of Educ.*, 20 Misc.3d 1116(A) at *3 (Sup. Ct. N.Y. Co. 2008) ("However, the actual question in determining whether a party substantially prevailed in a FOIL request is whether it was the initiation of their proceeding which brought about the release of the documents"); *Friedland v. Maloney*, 148 A.D.2d 814, 538 N.Y.S.2d 650, 651-2 (3rd Dept. 1989) (holding that petitioner did not "substantially prevail" where "it cannot be said as a matter of law that the Department released the documents and records because of the commencement of litigation"); *William J. Kline and Son, Inc. v. Fallows*, 124 Misc.2d 701, 705 (Sup. Ct. Montgomery Co. 1984) ("Whether a party has substantially prevailed is to be determined by looking at the situation prior to the commencement of suit, the situation as it presently exists, and the effect the litigation had, if any, in bringing about the change"; declining to award fees because records were released prior to agency's service and filing of answer to petition).

39. The sole case cited by Respondents in support of their claim that the standard for determining whether a party has "substantially prevailed" is higher under New York than under Federal law is *Henry Schein, Inc. v. Eristoff*, 35 A.D.3d 1124 (3rd Dept. 2006). However, Schein stands only for the proposition that the "substantially prevailed" standard is not absolutely inflexible, where the agency voluntarily produces the overwhelming majority of records.

40. In *Schein*, the agency initially provided petitioner with 1,121 documents in response to its request; prior to commencement of the FOIL proceeding, it produced another 5 pages; after commencement of the proceeding, it voluntarily produced another 101 pages after

petitioner produced a power of attorney form showing that it had standing to make the request; and, after an in camera review of the remaining 181 responsive documents, the Court directed the agency to produce 17 additional pages. Under those circumstances, the Court stated that the direction to release about 1% of the records at issue did not "necessarily indicate that petitioner 'substantially prevailed' in the dispute...." 35 A.D.3d at 1126.

41. In this case, regardless of whether the Court orders Respondents to make any further disclosures — although, as Petitioner has said above, there is certainly ample reason to do so — it is indisputable that Petitioner obtained the vast majority of records responsive to his request only because he commenced this proceeding. Hence, under any interpretation of the governing authorities, Petitioner must be deemed to have "substantially prevailed." Moreover, Respondents had no reasonable basis for their initial denial of access to the 519 pages of Additional Records they produced in response to the Court's March 2009 and April 2009 Orders, and Respondents do not even attempt to argue otherwise. Petitioner is therefore entitled to his attorneys' fees in this proceeding.[8]

Conclusion

42. Respondents' obfuscations cannot hide their failure to provide any concrete

[8] Respondents strain to explain away *Cross-Sound Ferry Services Inc. v. Department of Transp.*, 219 A.D.2d 346, 351 (3rd Dept. 1995) and *Powhida v. City of Albany*, 147 A.D.2d 236, 239 (3rd Dept. 1989), cited in Petitioner's moving Memorandum of Law, but their efforts to distinguish these cases are unavailing. In *Cross-Sound Ferry Services*, the Court did not affirm "only that portion of an attorney's fee award that was based upon the agency's failure to provide any substantive response to the Petitioner's FOIL request," as Respondents claim (Respondents' Opp. Mem. at 10). Rather, the Court held that the agency was not "substantially justified" in denying access to records sought in connection with two FOIL requests, to the extent the agency failed to proffer a reasonable explanation for withholding the records, and held that the petitioner had substantially prevailed by obtaining records as a result of the litigation. That is exactly the case here — Respondents do not, and cannot, proffer a reasonable explanation for their failure to identify the Additional Records in response to Petitioner's FOIL request. Respondents' attempt to distinguish *Powhida* is even weaker. Petitioner cited Powhida in his moving Memorandum for the proposition that a petitioner will be deemed to have "substantially prevailed" if the initiation of the proceeding results in the release of records. Respondents do not contest that this is the holding of *Powhida*, but claim that *Powhida* "simply does not resemble the instant matter." Respondents' Opp. Mem. at *id.* Respondents' characterization of the case has nothing to do with the proposition for which Petitioner cited it.

justification for redactions to hundreds of pages of the Additional Records. Their discussion of the few records that Petitioner offered as illustrations confirms that much non-exempt material remains to be disclosed. Accordingly, the Court should direct Respondents to produce all Additional Records to Petitioner in unredacted form, or, at a minimum, should order Respondents to deliver all the Additional Records to the Court for in camera inspection. Moreover, since Petitioner has already satisfied the statutory criteria for an award of attorneys' fees, the Court should award them.

Dated: New York, New York
October 22, 2009

ROBERT A. STERNBACH

Exhibit A

*3	no justification for redactions
*4	no justification for heavy redactions
*5	no justification for redactions
*6	no justification for redactions
*7-8	no justification for heavy redactions
*10	no justification for heavy redactions
*11	no justification for redaction
*13	no justification for complete redaction
*14	no justification for heavy redactions
*16-17	no justification for heavy/complete redactions
*18	no justification for complete redaction
*19	no justification for complete redaction
*20	no justification for redactions
*21	no justification for redaction
*21	msg to r sussman (3rd party) s/n/b redacted
*22	no justification for redaction
*25	no justification for redaction
*26	no justification for redaction
*27	no justification for heavy redactions
*28	no justification for redaction
*29-32	no justification for virtually complete redactions
*34-35	no justification for redactions
*36-37	no justification for complete redactions
*38-39	no justification for heavy/complete redactions
*40	no justification for redaction
*42	no justification for heavy redactions
*43	no justification for complete redactions
*45	no justification for heavy/complete redactions
*46-47	no justification for heavy/complete redactions
*49	no justification for redactions
*51	no justification for redactions
*52	no justification for heavy redactions
*53-54	no justification for complete redactions
*56	no justification for heavy/complete redactions
*57	no justification for heavy/complete redactions
*58	no justification for complete redactions
*59-64	no justification for heavy/complete redactions
*65	no justification for complete redactions
*70-81	no justification for heavy/complete redactions
*83	no justification for complete redactions
*85-86	no justification for heavy/complete redactions
*88	no justification for complete redaction
*89-90	no justification for complete redactions
*92	no justification for heavy/complete redactions
*94-96	no justification for heavy/complete redactions
*98	no justification for complete redactions
*99-103	no justification for heavy/complete redactions
*104-109	no justification for heavy/complete redactions
*110-112	no justification for heavy/complete redactions
*214-220	no justification for heavy redaction
*222-225	no justification for heavy/complete redaction
*226-228	no justification for heavy redaction
*229-231	no justification for heavy redaction
*232-233	no justification for heavy redaction
*234	no justification for redaction
*235	no justification for redaction
*236	no justification for redaction
*237-241	no justification for heavy/complete redaction
*242	no justification for redaction
*244	no justification for redaction
*245	no justification for heavy redaction
*247	no justification for heavy redaction
*248-251	no justification for heavy redaction
*308-309	no justification for heavy/complete redaction
*312-320	no justification for heavy/complete redaction
*323-324	no justification for complete redaction
*325	no justification for redaction
*326-327	no justification for heavy redaction
*328-330	no justification for heavy/complete redaction
*334	no justification for redaction
*335	no justification for redaction
*337	no justification for heavy redaction
*339	no justification for heavy redaction
*340-346	no justification for heavy/complete redaction
*348	no justification for redaction
*350	no justification for redaction
*351	no justification for redaction
*353	no justification for complete redaction
*354-355	no justification for heavy redaction
*356	no justification for redaction
*358	no justification for heavy redaction
*359	no justification for redaction
*361-362	no justification for heavy redaction
*363-365	no justification for heavy redaction
*368-372	no justification for heavy/complete redaction
*373	no justification for heavy redaction
*374	no justification for redaction
*375-377	no justification for heavy/complete redaction
*378	no justification for redaction
*380	no justification for redaction
*382	no justification for heavy redaction
*383	no justification for complete redaction
*385	no justification for heavy redaction
*387-402	no justification for heavy/complete redaction
*403	no justification for redaction
*404	no justification for heavy redaction
*405-407	no justification for heavy/complete redaction
*409	no justification for redaction

*115-118	no justification for heavy redactions
*119-123	no justification for heavy redactions
*124-132	no justification for heavy/complete redactions
*133	no justification for redaction
*134-136	no justification for heavy/complete redactions
*137	no justification for redaction
*138	no justification for heavy redaction
*140-141	no justification for heavy/complete redaction
*147	no justification for redaction
*148	no justification for redaction
*153-155	no justification for complete redaction
*156	no justification for redaction
*157	no justification for redaction
*160	no justification for heavy redaction
*161	no justification for complete redaction
*163-166	no justification for heavy/complete redactions
*168	no justification for redaction
*169	no justification for redaction
*170-172	no justification for heavy redaction
*173-174	no justification for heavy/complete redaction
*175	no justification for redaction
*177	no justification for heavy redaction
*180-183	no justification for heavy redaction
*184-185	no justification for complete redaction
*186	no justification for heavy redaction
*187	no justification for redaction
*188	no justification for complete redaction
*190-191	no justification for heavy redaction
*192	no justification for heavy redaction
*193	no justification for redaction
*196	no justification for redaction
*197	no justification for redaction
*198	no justification for heavy redaction
*199-200	no justification for heavy redaction
*201	no justification for redaction
*203	no justification for redaction
*205-209	no justification for complete redaction
*210	no justification for redaction
*211-213	no justification for complete redaction
*411	no justification for redaction
*412	no justification for redaction
*413-414	no justification for heavy/complete redaction
*415	no justification for heavy redaction
*416	no justification for redaction
*417-420	no justification for heavy/complete redaction
*421	no justification for redaction
*422	no justification for redaction
*423	no justification for redaction
*424-425	no justification for heavy/complete redaction
*427	no justification for redaction
*429-445	no justification for heavy/complete redaction
*447-450	no justification for heavy/complete redaction
*451	no justification for heavy redaction
*452	no justification for heavy redaction
*453	no justification for redaction
*454	no justification for heavy redaction
*455	no justification for heavy redaction
*456	no justification for heavy/complete redaction
*458	no justification for heavy redaction
*459-461	no justification for heavy/complete redaction
*463	no justification for redaction
*464-466	no justification for heavy/complete redaction
*470	no justification for complete redaction
*471	no justification for redaction
*472	no justification for heavy redaction
*473-474	no justification for heavy redaction
*476	no justification for heavy redaction
*478	no justification for heavy redaction
*479	no justification for redaction
*480-481	no justification for heavy/complete redaction
*501	no justification for heavy redaction
*505-509	no justification for heavy/complete redaction
*510-511	no justification for heavy/complete redaction
*512	no justification for heavy redaction
*513-516	no justification for heavy redaction
*517	no justification for redaction
*518	no justification for heavy redaction
*519	no justification for heavy/complete redaction

AFFIRMATION OF SERVICE

ROBERT A. STERNBACH, an attorney duly admitted to practice in the courts of New York, affirms under the penalties of perjury as follows:

That deponent is a principal of the Law Office of Robert A. Sternbach, is over 18 years of age, is not a party to the within action, and resides in the State of New York. And that, on October 22, 2009, he served the within

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION PURSUANT TO 4/30/09 ORDER on

KEANE & BEANE, P.C.
Attorneys for Respondents
445 Hamilton Avenue
White Plains, New York 10601
(914) 946-4777

the foregoing address having been designated for such purpose by the preceding papers in this action, by depositing a true and correct copy of the same, enclosed in properly addressed post-paid wrapper, in an official depository maintained and exclusively controlled by the United States Post Office in New York City.

Dated: New York, New York
October 22, 2009

ROBERT A. STERNBACH