

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of	:	
	:	Index Number:
FELIX PROCACCI,	:	
	:	<u>613799/2022</u>
Petitioner,	:	
	:	
-against-	:	<u>VERIFIED</u>
	:	<u>AMENDED PETITION</u>
TOWN OF HEMPSTEAD	:	
	:	
Respondent.	:	
	:	
For a Judgment Pursuant to Article 78 of	:	
the Civil Practice Law and Rules.	:	
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TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU:

The verified amended petition of FELIX PROCACCI respectfully shows to this Court:

1. Petitioner, FELIX PROCACCI resides at 1165 Barnes St, Franklin Square, New York 11010, located in the County of Nassau.
2. Petitioner is appearing *pro se* on the matter presented in this Amended Petition and is fully familiar with the facts and circumstances surrounding them.
3. Respondent, TOWN OF HEMPSTEAD, hereinafter referred to as “the Town”, is a municipal corporation organized and existing under the laws of the State of New York

with its principal place of business located at One Washington Street, Hempstead, New York, County of Nassau.

4. This proceeding is brought pursuant to Article 78 of the Civil Practice Law and Rules in the nature of mandamus to compel Respondent to comply with all applicable provisions of New York State's Freedom of Information Law, hereinafter referred to as "FOIL", Article 6 (§§ 84-90) of New York State Public Officers Law (hereinafter "PBO").
5. This Court has jurisdiction under Section 7801 et seq. of the New York Civil Practice Law and Rules ("CPLR").
6. Venue is proper in Nassau County pursuant to CPLR §§ 506(b) and 7804(b).

Overview of Amended Petition

7. The Petition on this matter was served upon the Respondent on October 14, 2022 with a return date of December 5, 2022.
8. The Petition requested that the Respondent comply with the Freedom of Information Law, hereinafter referred to as FOIL, by providing a legal response for two (2) FOIL requests.
9. At the time this Amended Petition was filed, the Respondent has not replied to the Petition.

Overview of Amended Petition-continued

10. Since the Respondent has not issued a reply, this Amended Petition is proper according to NY CPLR R3025 which states in pertinent part:

Rule 3025. Amended and supplemental pleadings. (a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, *or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.*

11. This Amended Petition asks the court to require the Respondent to comply with the Freedom of Information Law for FOIL request #2022105832 in addition to the two FOIL requests mentioned in the Petition, #202107362 and #2022103760.

NYS FREEDOM OF INFORMATION LAW

Enforcement

12. The State Legislature has not granted any government agency investigatory or enforcement authority over any provision of the Freedom of Information Law. Enforcement of this Law is solely through the initiation of a Civil Practice Law and Rules Article 78 proceeding in the state Supreme Court.

Legislative Declaration, PBO §84

13. The purpose of the Freedom of Information Law as stated in its Legislative Declaration PBO §84 shown below (emphasis added), is to make government accountable to the public.

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. ***The more open a government is with its citizenry, the greater the understanding and participation of the public in government.***

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.***

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. ***The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.***

NYS FREEDOM OF INFORMATION LAW-CONTINUED

Timeline for Processing FOIL Request, PBO §89(3)(a)

14. PBO §89(3)(a), in pertinent part says: *"If an agency determines to grant a request **in whole or in part**, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgment of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days **and a date certain within a reasonable period**, depending on the circumstances, when the request will be granted in whole or in part."*

Implicit Denial of a FOIL Request

15. In this matter, Petitioner refers to an implicit denial when the Respondent failed to respond to a FOIL request in accordance with PBO §89(3).

Appeal of a FOIL Denial, PBO §89(4)(a)

16. PBO §89(4)(a) in pertinent part says: *"... any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal **fully explain in writing** to the person requesting the record **the reasons for further denial**, or provide access to the record sought".*

NYS FREEDOM OF INFORMATION LAW-CONTINUED

Agency is Required to Send FOIL Appeals to the Committee on Open Government, PBO §89(4)(a)

17. PBO §89(4)(a) in pertinent part says: *"...each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon".*
18. The structure and mission of the Committee on Open Government (hereinafter "COOG") is defined in PBO §89(1) and §89(2). These provisions do not provide the COOG any enforcement authority.

Willful Concealment of Records is a Violation, PBO §89(8)

19. PBO §89(8): *"Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."*

NEW YORK STATE PENAL CODE VIOLATION

20. According to Article 10 of New York State's penal code, a violation is an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.

NEW YORK STATE PENAL LAW
Obstructing Governmental Administration §195.05

21. According to Article 195 of New York State's penal code §195.05, a person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration. Obstructing governmental administration is a class A misdemeanor.

Overview of the Proceeding

22. Court intervention is sought in this matter for the following purposes:
- (a) to order the Respondent to provide the records requested for three FOIL requests referred to by numbers #202107362, #2022103760, and #2022105832.
 - (b) to order the Respondent to submit the FOIL appeals and their associated determinations for FOIL numbers #202107362, #2022103760, and #2022105832 to the Committee on Open Government (hereinafter "COOG") in accordance with PBO §89(4)(a).

(c) a ruling that the Respondent committed a violation, as defined by PBO §89(8), by intentionally concealing records associated with FOIL #202107362 and #2022105832.

(d) for the Court to review the records being withheld from the Petitioner regarding FOIL # 2022103760 to determine which records or portions of said records, if any, can legitimately be provided to the Petitioner.

(e) an order that the Respondent provide a legal response to Petitioner's appeals for FOILs #202107362, #2022103760 and #2022105832.

FOIL #202107362, Request for All TV Advertising Records in 2020

23. On August 16, 2021, Petitioner made a FOIL request for all records pertaining to the Town's Television Advertising in 2020. FOIL request is attached hereto as Exhibit A. Petitioner also provides a sworn affidavit attached hereto as Exhibit B attesting to the fact that he viewed TV commercials produced by the Town in 2020.
24. On September 20, 2021 (over 20 business days later), Petitioner appealed the implicit denial of FOIL #202107362 to the Town's FOIL appeals officer Donald Derham (hereinafter "Mr. Derham"). Petitioner's September 20, 2021 FOIL appeal is attached hereto as Exhibit C.
25. On September 20, 2021, Petitioner received an email from the Town's FOIL Officer Marie Jerome (hereinafter "Ms. Jerome") saying that the Town will provide these records by November 2, 2021. Said email is attached hereto as Exhibit D.

26. On December 13, 2021, Petitioner again sent a FOIL appeal to Mr. Derham.
Petitioner's December 13, 2021 FOIL appeal (the second appeal) is attached hereto as Exhibit E.
27. On January 20, 2022, Petitioner received a response from Ms. Jerome indicating there were no records responsive to FOIL #202107362. The Town's January 20, 2021 response is attached hereto as Exhibit F.
28. On January 21, 2022, Petitioner appealed the January 20, 2022 denial to Mr. Derham.
Petitioner's January 21, 2022 FOIL appeal (the third appeal) is attached hereto as Exhibit G.
29. On March 2, 2022, Mr. Derham responded to Petitioner's FOIL appeal indicating **records do exist** for Television advertising in 2020.
Mr. Derham writes: *"If you want responsive documents about the Town's television expenses, please let me know".*
A copy of Mr. Derham's March 2, 2022 email is attached hereto as Exhibit H.
30. On March 2, 2022, Petitioner responded to Mr. Derham with an email saying he wanted the records responsive to the Town's television expenses in 2020. A copy of Petitioner's March 2, 2022 email is attached hereto as Exhibit I.
31. In an email dated December 7, 2022, Mr. Derham indicated that the Town will provide the responsive documents for FOIL #202107362, writing, in pertinent part, *"The Town will provide you with responsive documents for the Covid television advertising part of your petition".*

32. **It is important to note** that the documents requested in FOIL #202107362 is for "*all records pertaining to ALL Television advertising by the Town of Hempstead that aired in 2020*" (see Exhibit A) not just "Covid television advertising" as Mr. Derham wrote in said December 7, 2022 email.
33. As of the date this matter was filed with the Court (**over a year later**), the Town has not provided the records for FOIL #202107362. According to Mr. Derham's email provided in Exhibit H, **these records do exist**.
34. Petitioner asks the Court to order the Respondent to provide all records responsive to FOIL request #202107362 and to provide a detailed reason for the denial or portion of each record being denied as required by PBO §89(4)(a).
35. The evidence provided in this Petition shows the Town has and continues to willfully conceal the records pertaining to FOIL #202107362 and is guilty of a violation in accordance with PBO §89(8).

FOIL #2022103760: Evidence Gathered for Ethics Complaint

Background

36. On October 18, 2021, Petitioner filed an ethics complaint against a Town employee. Said ethics complaint is attached hereto as Exhibit J.
37. On May 18, 2022, Petitioner received a formal response from the Town's Ethics board regarding said Ethics complaint. This letter is attached hereto as Exhibit K.

NOTE: The letter is dated March 3, 2022, but Petitioner did not receive it until

May 18, 2022. Evidence showing that the email containing the response was sent on May 18, 2022 is attached hereto as Exhibit L.

FOIL #2022103760

38. On May 23, 2022, Petitioner submitted a FOIL request for all records gathered by the Ethics Board during its investigation specifically asking for all information referenced in the Ethics Board reply dated March 3, 2022. This FOIL request was assigned #2022103760 by the Town. This FOIL request is attached hereto as Exhibit M.
39. On June 22, 2022, Petitioner received a response from Ms. Jerome indicating there were no records regarding the specific information requested (items 1 through 9 as shown in Exhibit M) and that they are **"following up on item 10"** which was a request for all other information not in items 1 through 9. Ms. Jerome's response is attached hereto as Exhibit N.
40. On July 5, 2022 Petitioner appealed the implicit FOIL denial to Mr. Derham. This FOIL appeal is attached hereto as Exhibit O.
41. On July 22, 2022, Petitioner resent the appeal shown in Exhibit O to Mr. Derham, writing: ***"Mr. Derham, On July 3rd I sent you the attached FOIL appeal dated July 5, 2022. I have not received any response from you. It is past due. Can you please let me know the status of this request?"***

42. On July 29, 2022, Ms. Jerome denied Petitioner's FOIL request in its entirety on two grounds **without specifying which records fall under each category**. The two categories are 1) an unwarranted invasion of personal privacy, and 2) deliberative process privilege. Ms. Jerome's denial is attached hereto as Exhibit P.
43. From information and belief, Ms. Jerome was responding to Petitioner's July 5, 2022 FOIL appeal to Mr. Derham because Petitioner did not communicate with Ms. Jerome regarding FOIL request #2022103760 after her June 22, 2022 response (Exhibit N).
44. From information and belief, Ms. Jerome does not have the legal background to have written the response provided to the Petitioner on July 29, 2022 (Exhibit P) and that response was written by an attorney.
45. The only records Ms. Jerome could be referring to in her July 29, 2022 response (Exhibit P) is item 10 of FOIL # 2022103760 (Exhibit M page 1) since Ms. Jerome had already indicated that there are no records responsive for items 1 through 9 (Exhibit N).
46. On July 31, 2022, Petitioner appealed Ms. Jerome's denial to Mr. Derham. This second appeal for FOIL # 2022103760 is attached hereto as Exhibit Q.
47. In an email dated December 7, 2022, Mr. Derham implied that the Town will not provide the responsive documents for FOIL #2022103760, and the decision will be left to the court writing, in pertinent part: ***"This will leave the remaining part, document relating to the ethics complaint initiated by you for decision by the judge."***
48. Petitioner is asking that the Court to examine the records responsive to FOIL #2022103760 (which Ms. Jerome says exist) to determine which of these records or

portions thereof, the Petitioner is legally allowed to have access to and provide those records to the Petitioner.

49. For each record or portion of a record denied, Petitioner asks the court to order the Respondent to provide a detailed reason for the denial of each record or portion of each record being denied as required by PBO §89(4)(a).
50. If these records do not accurately reflect the facts asserted in the Respondent's Ethics Board response as shown in Exhibit K, Petitioner asks the Court to rule that the Town's Ethics Board obstructed the administration of the Town's Ethics Law by not doing a proper investigation of the Petitioner's complaint, violating Penal Law §195.05, Obstructing Governmental Administration in the Second Degree.

FOIL #2022105832: Data Town Provided to Moody's

51. On September 6, 2022, Petitioner submitted a FOIL request for the records the Town provided to Moody's to produce a credit opinion report for 2022. This FOIL request was assigned #2022105832 by the Town. This FOIL request is attached hereto as Exhibit R.
52. On October 6, 2022, Ms. Jerome informed me that the records for FOIL #2022105832 could not be provided until October 31, 2022. Ms. Jerome's response is attached hereto as Exhibit S.
53. On October 24, 2022, Ms. Jerome provided Petitioner with a partial response to FOIL #2022105832 which is attached hereto as Exhibit T. This record, dated August 22, 2022 is the Financial Presentation made to Moody's Investment Services.

54. On October 24, 2022, Petitioner emailed Ms. Jerome informing her the FOIL response, provided in Exhibit T, references another document referred to as "Reference Document" and Petitioner did not receive this document and requested said "Reference Document". Petitioner's email to Ms. Jerome is attached hereto as Exhibit U.
55. On October 25, 2022, Ms. Jerome emailed Petitioner only page 3 of the "Reference Document" which was dated October 25, 2022. Said email and its attachment containing a single page is attached hereto as Exhibit V.
56. On October 25, 2022, Petitioner emailed Ms. Jerome notifying her that Petitioner only received one page of the "Reference Document" and that page provided was dated October 25, 2022 even though the presentation was dated August 22, 2022. Petitioner asked Ms. Jerome to provide all the pages of the "Reference Document". Petitioner's email to Ms. Jerome is provided in Exhibit W.
57. On November 2, 2022, Petitioner appealed the implicit denial of FOIL #2022105832 to Mr. Derham. Petitioner's FOIL appeal is attached hereto as Exhibit X.
58. In an email dated December 9, 2022, Mr. Derham writes in pertinent part: *"I'm working with the Comptroller to obtain the "reference document" and review it. Moody's has invoked "trade secrets," but until I see the document I won't know whether that advisory applies."*
59. The evidence provided in this Petition shows the Town is willfully concealing the records pertaining to FOIL # 2022105832 and is guilty of a violation in accordance

with PBO §89(8). The records provided by the Town to Moody's in the presentation are Town records (not Moody's records) and are therefore subject to FOIL.

60. For arguments sake, even if the "Reference Document" contains trade secrets, as the Town alleges, the purported trade secrets could have been redacted. In any case, there was no legal reason to withhold the records from the Petitioner for over a month. The document provided to the Petitioner was only eight (8) pages (Exhibit T).
61. Petitioner asks the Court to order the Respondent to provide all records responsive to FOIL request #2022105832 and to provide a detailed reason for the denial or portion of each record being denied as required by PBO §89(4)(a).

Sending FOIL Appeal Information to the COOG

62. On October 5, 2022, Petitioner requested a list of all FOIL appeals the Town of Hempstead submitted to the COOG in 2022 in accordance with PBO §89(4)(a). A copy of this request is attached hereto as Exhibit Y.
63. On October 6, 2022, Petitioner received a response from the COOG which indicated that the Town of Hempstead has not submitted any FOIL appeals to the COOG in 2022. A copy of the COOG's response is attached hereto as Exhibit Z.
64. From information and belief, the Town has not sent any of the FOIL appeals associated with this matter to the COOG violating PBO §89(4)(a).

WHEREFORE, Petitioner, FELIX PROCACCI, respectfully requests the Court to issue an order directing the Town to provide the records responsive to FOIL request #202107362 and to rule that the Town committed a **violation** in accordance with PBO §89(8) for willfully concealing these records. On March 2, 2022 over 9 months ago, Respondent acknowledged that these records exist and it has been over a year since the Petitioner requested these records.

In regards to FOIL #2022103760, Petitioner asks the Court issue an order directing the Town to provide all responsive records to the Court and for the Court to examine these records to determine which of these records, if any, the Petitioner is legally allowed to have access to and issue an order directing the Town to provide those records and to provide a detailed reason for the denial or portion of each record being denied as required by PBO §89(4)(a).

Petitioner also asks the Court to verify these records reflect the facts asserted in the Town's Ethics Board response in Exhibit K. If these records do not correspond to the facts asserted by the Town's Ethics Board, Petitioner asks the Court to rule that the Town violated Penal Law §195.05, Obstructing Governmental Administration in the Second Degree.

In regards to FOIL request #2022105832, the Petitioner requests the Court to order the Respondent to provide all responsive records and to provide a detailed reason for the denial or portion of each record being denied as required by PBO §89(4)(a). The Petitioner also asks the Court to rule that the Town committed a **violation** in accordance with PBO §89(8) for willfully concealing these records. The records requested for FOIL #2022105832 were presented to Moody's Investment Services on August 22, 2022 and the Town has not provided any legal reason for delaying the release of these records.

The Petitioner also asks the Court to issue an order directing the Town to send the FOIL appeals and their determinations for FOIL requests #202107362, #2022103760, and #2022105832 to the Committee on Open Government in accordance with §89(4)(a).

Finally, the Petitioner asks the Court to order the Respondent to pay all costs of this legal action as required by the Freedom of Information Law PBO §89(4ci) and §89(4cii) together with any other relief the Court deems just and proper. In each of the FOIL requests presented in this matter, the Town has not provided legal responses to any of the Petitioner's FOIL appeals.

DATED: Nassau County, New York

December 12, 2022

Respectfully submitted,

Felix Procacci

Felix Procacci, Pro Se
1165 Barnes Street
Franklin Square, New York 11011
(516) 233-1562

Benedetta Regina
NOTARY PUBLIC - STATE OF NEW YORK
Registration No. 01RE6089989
Qualified in Nassau County
Commission Expires 6/4/23

FELIX PROCACCI, being duly sworn, deposes and says: I am the Petitioner in this proceeding.

I have read the foregoing Verified Amended Petition and know the contents thereof, which are true to my own knowledge, except for those matters alleged upon information and belief, which I believe to be true.

Sworn to before on the

12th day of December, 2022

Benedetta Regina
NOTARY PUBLIC

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Felix Procacci
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