

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----	X	
FELIX PROCACCI	:	
PETITIONER	:	
	:	Index No.
	:	18--xxxxxx
	:	PETITION
-against-	:	
	:	
TOWN OF HEMPSTEAD,	:	
RESPONDENT	:	
	:	
	:	
	:	
	:	
For a Judgment Pursuant to	:	
Article 78 of the Civil	:	
Practice Law and Rules	:	
-----	X	

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU:

The petition of Felix Procacci respectfully shows to this Court as follows:

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 this matter and is fully familiar with the facts and circumstances surrounding it.
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. The within proceeding is brought pursuant to Article 78 of the Civil Procedure Law and Rules in the nature of mandamus to compel Respondents to comply with all applicable provisions of the Public Officers Law, Article 6, Sections 84-90, Freedom of Information Law (hereinafter referred to as "FOIL").

RELEVANT FACTS

5. The Town's Building department fees for public records exceeds the limits specified by New York State's Freedom of Information Law.
6. New York State's Freedom of Information Law states the following **"the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute."**
7. A copy of a receipt from the Town's building department for a record request is attached hereto as Exhibit 1.
8. The Town's building department charges \$5.00 for the first copy and \$2.50 for each additional copy for records that do not exceed nine inches by fourteen inches (Hereinafter these costs will be referred to as "fees").

9. The Town prohibits the used of phographic equipment in the computer room where persons may print records from the Town's Building Department computer system.
10. The prohibition of phographic equipment in the computer room is to ensure patrons have to pay the fees charged by the Town's Building Department.
11. Pictures of signs located in the Town's Building department computer room, which show the Town prohibits the use of phographic equipment, is attached hereto as Exhibit 2.
12. A copy of the advisory opinion from the Committee on Open Government asking the Town to reconsider its practices regarding the fees for copies is attached hereto as Exhibit 3.
13. A copy of the advisory opinion (Exhibit 3) from the Committee on Open Government was sent to Town Attorney Joseph Ra.
14. A copy of the advisory opinion (Exhibit 3) from the Committee on Open Government was sent to Town Clerk Sylvia Cabana.
15. On September 4, 2018, the Petitioner presented a draft copy of this petition to the Hempstead Town Board and the Town Attorney.
16. On September 4, 2018 the Petitioner asked the Town Attorney to provide a written explanation for the fees charged by the Building Department.
17. On September 4, 2018 the Petitioner asked the Town Attorney to provide a written explanation for the photography prohibition in the Building Department Computer room.
18. As of October 2, 2018, the petitioner did not receive a written response from the Town Attorney, Joseph Ra regarding the fees charged by the Building Department.

19. As of October 2, 2018, the petitioner did not receive a written response from any Town Official regarding the fees charged by the Building Department.

LEGAL ANALYSIS

New York State – Department of State - Committee on Open Government

Public Officers Law, Article 6 Section 87(1)(b)(iii)

20. Per New York State's Freedom of Information Law the fees for copies cannot exceed 25 cents for copies that do not exceed 9 x 14 inches. The statute for fees states :

iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

c. In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee`s time is needed, or if an outside professional service would be retained to prepare a copy of the record.

New York State Public Officers Law, Article 6, Section 87

21. Public Officers Law, Article 6 Section 87(2) states “Each agency shall, in accordance with its published rules, make available for public inspection and copying all records ...”.

New York State Public Officers Law, Article 6, Section 89

22. Public Officers Law, Article 6 Section 89(3)(a) states : “When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.”

LEGAL ANALYSIS - continued

23. Public Officers Law, Article 6 Section 89(8) states : “Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation”

Complaint against Respondent, TOWN OF HEMPSTEAD

24. By overcharging for copies less than 9 x 14 inches in size the Town of Hempstead is in violation of FOIL raises legitimate issues for judicial review pursuant to CPLR section 7803.
25. By not allowing people to make copies of documents the Town of Hempstead violation of FOIL raises legitimate issues for judicial review pursuant to CPLR section 7803.
26. Petitioner has no other remedy at law.

WHEREFORE, Petitioner FELIX PROCACCI respectfully request an order compelling Respondent TOWN OF HEMPSTEAD, to comply with all relevant provisions of Article 6 of New York State's Public Officers Law, sections 84 to 90, referred to as the Freedom of Information Law together with the costs and disbursements of this action, and such other relief as the Court may find just and proper. In particular, the Petitioner requests that said Respondents pay for all costs of this legal action and order that the Town of Hempstead stop charging over twenty-five cents for copies 9 x 14 inches and under, and allow patrons to make copies of documents using photographic equipment.

DATED: Nassau County, New York
October 3, 2018

Respectfully submitted,

Felix Procacci
Pro Se
1165 Barnes Street
Franklin Square, New York 11010
(516) 233-1562

EXHIBIT 1

Typical Receipt for Record Copy NOT EXCEEDING 9 x 14 inches

TOWN OF HEMPSTEAD
PHOTOCOPY 5.00
ITEM 1
\$ 5.00
19:35
01 9885D 05-04-18

DATE 5/4/18

**DEPARTMENT OF BUILDINGS
TOWN OF HEMPSTEAD**

*** PRINTS NOT PICKED UP IN 30 DAYS WILL BE DESTROYED ***

RECEIVED FROM Ron Gordon

\$ 5.00

W117623

For Photostating

RECEIPT No **72010**

EXHIBIT 2

Picture of Building Department Computer Room with Signs Prohibiting any form of Photography



EXHIBIT 3

Adivisor Opinion from the Committee on Open Government asking the Town to reconsider its practices regarding costs of FOILed records and its prohibition of photography in the Town's Building Department

COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
TELEPHONE: (518) 474-2518
FAX: (518) 474-1927
WWW.DOS.NY.GOV/COOG

COMMITTEE MEMBERS

ROANN M. DESTITO
PETER D. GRIMM
M. JEAN HILL
KATHY HOCHUL
HADLEY HARRIGAN
ROBERT MUJICA, JR.
ROSSANA ROSADO
DAVID A. SCHULZ
STEPHEN B. WATERS
MEREDITH S. WEILL

CHAIRPERSON

FRANKLIN H. STONE
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 20, 2018

TO: Rori Gordon (rori@billydeans.com)
FROM: Robert Freeman, Executive Director *RJF*
CC: Sylvia Cabana, Town Clerk (scabana@tohmail.org)
Joe Ra, Town Attorney (denivod@tohmail.org)
RE: Advisory Opinion - Fees

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

I have received your letter in which you requested an advisory opinion concerning certain practices of the Town of Hempstead.

You referred to the "computer issue in the building department" and the fee for copies. It is assumed that the fee at issue involves the situation in which there is a computer-generated document. You wrote that in that circumstance, "the first copy is \$5.00 regardless of the size, all the copies thereafter are \$2.00." You added that you "wanted to video the procedure, but there are signs specifying that: "Use of cellphones, cameras or any other form of photography is not permitted in this area."

In this regard, I offer the following comments.

First, the specific language of the Freedom of Information Law (FOIL) and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b)(iii) of FOIL states that an agency's rules must refer to "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:



Department
of State

EXHIBIT 3 – continued

Ms. Gordon
Page 2

"Except when a different fee is otherwise prescribed by statute:

(a) An agency shall not charge a fee for the following:

(1) inspection of records for which no redaction is permitted;

(2) search for, administrative costs of, or employee time to prepare photocopies of records;

(3) review of the content of requested records to determine the extent to which records must be disclosed or may be withheld; or

(4) any certification required pursuant to this Part." (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Based on paragraph (c), in determining the actual cost of reproducing a record, an agency may include only:

- i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
- ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
- iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record."

Accordingly, when no other statutory fee provisions apply (in this case there are none), paper copies of documents up to 9x14 inches are required to be provided at a fee of not more than \$0.25 per photocopy. No other fee may be assessed when a request is made for photocopies.

An agency is prohibited from charging a "clerical fee" or a fee for the time it takes an employee to locate paper records that are responsive to a request. Similarly, if it takes an employee less than two hours to prepare an electronic record, or paper records larger than 9 x 14 inches, the agency would be prohibited from charging an hourly fee. On the other hand, should it require more than two hours of employee time for the preparation of an "other" record, the agency would be permitted to charge an appropriate hourly rate. If records stored electronically can be generated and printed in less than two hours, the fee would be based on the cost of paper. Most agencies in that situation waive the fee, for the cost of carrying out tasks associated with charging a fee ordinarily involve a greater cost than the amount of the fee.

Lastly, since its enactment, FOIL has given the public the right to "inspect and copy" records. In our view, there is no basis for precluding the public from copying records through the use of an I-pad, a phone, a camera or by taking notes. Section 87(2) of FOIL specifies that accessible records must be made available for inspection and copying. I note, too, that §§87(1)(b)(iii) and 89(3) indicate that the only fee that an agency can charge involves its reproduction of records at the request of an applicant. Further, the regulations promulgated by

EXHIBIT 3 – continued

Ms. Gordon

Page 3

the Committee on Open Government, specify that no fee may be charged for the inspection of records.

In short, there is no prohibition concerning the use of a camera, a phone or an I-pad to photograph records. Moreover, the use of devices of that nature, due to their size and independent power source, would not involve any use of agency resources or disruption of its activities different from inspection of records.

In good faith, I note that it has been held that a rule prohibiting the use of one's own photocopier has been found to be valid and reasonable when such use would cause disruption (see Murtha, supra). However, the use of a camera is different, for there would be no use of an agency's space or electricity, and there would be no distinction in terms of the agency's efforts in retrieving the records between the more traditional inspection of records and the use of a camera or I-pad. In short, I believe that a prohibition regarding the use of a camera, a phone or I-pad would be unreasonable and inconsistent with law.

To encourage the Town to reconsider its practices, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.