

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

425

CA 20-01056

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF JOSEPH SAPIENZA, AFFORDABLE
ELECTRICAL SERVICES BY SAPIENZA ELECTRIC, INC.,
AND RUPP BAASE PFALZGRAF CUNNINGHAM LLC,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (WILLIAM P. MATHEWSON OF
COUNSEL), FOR RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CHAD A. DAVENPORT OF
COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Erie County (John F. O'Donnell, J.), entered February
5, 2020 in a proceeding pursuant to CPLR article 78. The judgment
awarded petitioners attorney's fees and costs.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: In this CPLR article 78 proceeding to compel
respondent to comply with petitioners' requests pursuant to the
Freedom of Information Law ([FOIL] Public Officers Law art 6),
respondent appeals from a judgment determining that petitioners
substantially prevailed in the proceeding and awarding petitioners
attorney's fees and costs. We affirm.

Contrary to respondent's contention, we conclude that petitioners
properly brought this proceeding after respondent failed to meet its
anticipated date for producing documents in response to one of
petitioners' FOIL requests and ignored petitioners' additional FOIL
requests. Respondent's failure to timely respond to petitioners' FOIL
requests constituted a denial of access (see Public Officers Law § 89
[3] [a]; [4] [a]) and gave petitioners grounds to commence an article
78 proceeding for review thereof (see *Matter of New York Times Co. v
City of N.Y. Police Dept.*, 103 AD3d 405, 406 [1st Dept 2013], *appeal
dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854 [2013]).

We reject respondent's contention that petitioners failed to
exhaust their administrative remedies prior to commencing the instant
proceeding. The Public Officers Law provides that "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" (§ 89 [4] [a]). Here, petitioners exhausted their administrative remedies by timely sending letters to respondent objecting to its denial of their requests and asking it to consider their letter appeals pursuant to Public Officers Law § 89 (4) (a) (see *Matter of Purcell v Jefferson County Dist. Attorney*, 77 AD3d 1328, 1329 [4th Dept 2010]).

We reject respondent's contention that petitioners were not entitled to attorney's fees because they did not "substantially" prevail within the meaning of FOIL's fee-shifting provision (Public Officers Law § 89 [4] [c] [i]). To the contrary, petitioners received a complete response to their requests only after commencing the instant proceeding (see *Matter of Whitehead v Warren County Bd. of Supervisors*, 165 AD3d 1452, 1453-1454 [3d Dept 2018]; *Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195 [3d Dept 2011]). Finally, we see no reason to disturb Supreme Court's award of attorney's fees and costs.