

**Matter of O'Malley v Board of Fire Commr. of the
Brentwood Fire Dist.**

2015 NY Slip Op 30477(U)

March 24, 2015

Sup Ct, Suffolk County

Docket Number: 0000002-2015

Judge: John H. Rouse

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INDEX NO. 000002-2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 02/06/15
ADJ. DATE: 02/25/15
Mot. Seq. 001-MG

MOTION DATE: 02/06/15
ADJ. DATE: 02/25/15
Mot. Seq. 002-MD

MOTION DATE: 02/06/15
ADJ. DATE: 03/18/15
Mot. Seq. 003-MD

In the Matter of the Application of MICHAEL O'MALLEY,

Petitioner

DECISION & ORDER

for a Judgment Pursuant to Article 78 of the CPLR

-against-

BOARD OF FIRE COMMISSIONERS of the BRENTWOOD
FIRE DISTRICT; BRENTWOOD FIRE DISTRICT, and
BRENTWOOD FIRE DEPARTMENT,

Respondents

TO:

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Upon the reading and filing of the following papers in this matter: (1) Notice of Petition dated December 30, 2014 and Petition, verified by Michael O'Malley on December 30, 2014, the Affidavit of Michael O'Malley dated December 30, 2014, the Affirmation of Leland S. Solon, Esq., dated December 30, 2014 and Exhibits A-H attached thereto, and the attached Affirmation of Service dated January 13, 2015; (2) Notice of Motion to Dismiss dated February 14, 2015, the Affirmation of Robert J. Flynn, Jr., Esq., dated February 14, 2015 and the Affidavit of Eric Raudies dated February 9, 2015; (3) Notice of Motion to Dismiss dated February 5, 2015, Amended Notice of Motion to Dismiss dated February 17, 2015, Affidavit of Javier Valentin notarized before Bradley M. Pinsky, Esq. on January 30, 2015, the Affidavit of Bradley M. Pinsky, Esq. dated February 5, 2015, and a second Affidavit by Bradley M. Pinsky, Esq., dated March 5, 2015, and two Affidavits of Service by Mail dated February 12, 2015 and March 6, 2015; it is:

ORDERED that the petition (Seq. #001) is granted; and it is further

ORDERED that the Brentwood Fire District, by its Board of Fire Commissioners, through an exercise of its authority over the Brentwood Fire Department, as provided by Town Law § 176 (11) or otherwise, is directed to produce to the Petitioner for his inspection the following:

1. For the period 04/01/2010 through 03/31/2012, copies of all bank statements for all bank accounts of any kind used by the Brentwood Fire Department, including any/all accounts at Suffolk Federal Credit Union, Capital One Bank, Island Federal Credit Union, American Express and any other institution or credit card provider.
2. For the period 04/01/2010 through 03/31/2012, copies of all cancelled checks written on any bank account used by the Brentwood Fire Department.
3. For the period 04/01/2010 through 03/31/2012, copies of all bank statements for all Brentwood Fire Department Chiefs' accounts.
4. For the period 04/01/2010 through 03/31/2012, copies of all cancelled checks written on any bank account used by the Brentwood Fire Department Chiefs' accounts.
5. Copies of all tax returns drafted, prepared, or filed by the Brentwood Fire Department for the years 2010 and 2011.

and it is further

ORDERED that the Brentwood Fire District shall inform the Petitioner of the cost of reproduction of the documents it has been ordered by this Court to produce for inspection, as said cost is limited by Public Officers' Law; and it is further

ORDERED that the Brentwood Fire District is directed to produce the described records for inspection by the Petitioner, or at Petitioner's election by his counsel, no later than five business days after service of a copy of this decision and order together with notice of entry is made upon the Brentwood Fire District; and it is further

ORDERED that the Brentwood Fire District is directed to inform the Petitioner of the cost of reproduction of the documents it has been ordered by this Court to produce for inspection no later than five business days after service of a copy of this decision and order together with notice of entry is made upon the Brentwood Fire District and upon payment of that fee will tender the documents to the Petitioner or his counsel; and it is further

ORDERED that the Court hereby awards the Petitioner costs, disbursements and reasonable attorneys fees to be paid by the Brentwood Fire District in an amount to be determined upon **inquest to be held on Wednesday, April 29, 2015 at 2:00 o'clock in the afternoon in Part 12 located on the second floor of the Courthouse Annex at 1 Court Street, Riverhead, New York**; and it is further

ORDERED that all counsel are directed to review *22 NYCRR Part 130* with the understanding that, aside from the attorneys fees that will be awarded upon this petition after inquest, the court will impose costs and/or sanctions upon any counsel or party that hereafter engages in frivolous conduct as proscribed by the rules of court; and it is further

ORDERED that the Petitioner is directed to serve upon all Respondents, in the manner provided by CPLR § 2103, a copy of this decision and order together with notice of entry, as soon as is practicable.

DECISION

The Petition and Motions Before this Court

The Petitioner commenced this Article 78 proceeding (Mot. Seq. #001) on January 2, 2015 to obtain the records that have not been produced by the Brentwood Fire Department together with costs, disbursements and reasonable attorney's fees.

The Respondents Board of Fire Commissioners of the Brentwood Fire District and Brentwood Fire District have moved (Mot. Seq. #002) to dismiss the Petition against them upon the ground that they do not possess the records and cannot be ordered to produce what they do not possess.

The Respondent Brentwood Fire Department has moved (Mot. Seq. #003) to dismiss Petition on the ground that it has not been properly served with the Petition.

The Allegations of the Petition:

The Petitioner, by certified letter mailed on September 29, 2014 to the Chief of the Brentwood Fire Department, Javier Valentin, a Freedom of Information Law (FOIL) request for the production and/or inspection of certain banking records for the Brentwood Fire Department. The return receipt submitted to the Court indicates this letter was received by the Brentwood Fire Department on September 30, 2014.

By letter dated October 17, 2014 the Chief of the Department acknowledged receipt of the request and advised the Petitioner that he was in the process of reviewing and investigating the request, and would respond within "approximately 20 days" with either a written determination, or an estimate of additional time needed to reach a determination.

The Petitioner alleges that, by letter dated October 20, 2014, he wrote to the Chief of the Fire Department that he wished to appeal what he considered to be a denial of his request by virtue of the Fire Department's failure to respond to the request delivered on September 30, 2014. (This correspondence was apparently conveyed to the Board of Fire Commissioners for the Brentwood Fire District.)

The Fire District, by letter dated October 21, 2014, advised the Petitioner that the appeal was premature because the Department was in the process of "*completing the FOIL procedure.*"

On December 4, 2014, the Petitioner, by letter to the Fire Chief copied to the Board of Fire Commissioners, advised that he had still not received any response to the original FOIL request made on September 30, 2014. The Board of Fire Commissioners, by letter dated December 17, 2014, responded to the December 4th appeal by advising the Petitioner that the Fire Chief is a "*voluntary officer in a very demanding position. Nevertheless, we have advised the Chief to respond to the FOIL as soon as possible.*"

The Respondents' Motions

The Fire District

The Brentwood Fire District has appeared by counsel in this special proceeding, but did not submit an answer to the verified petition. Fire District has made a motion to dismiss without admitting or denying any of the allegations in the petition, but instead alleges that none of the records at issue are its records and that the Fire Department is out of its control. *See Affidavit of Brentwood Fire Commissioner Eric Raudies dated February 9, 2015.* The Petitioner correctly cites the comprehensive authority granted to the Fire District over the Fire Department by Town Law § 176 (11). The nature and scope of the exercise of this authority is permissive, not

mandatory. However, it is plain from the uncontested allegations in the verified petition that Evans U. Sismanson, III, Secretary of the Brentwood Fire District, by letter dated October 21, 2014, advised the petitioner that his “*appeal*” from the Fire Department’s denial of his FOIL request “*is premature*” The Respondent District does not allege that the Sismanson letter was unauthorized. Similarly, the Brentwood Fire District does not disavow the Sismanson letter dated December 17, 2014 in which the Brentwood Fire District again concluded there had been no denial of the petitioner’s FOIL request that was appealable.

Based upon the uncontested allegations The Chief of the Brentwood Fire Department is or has acted as the records access officer as required by *21 NYCRR 1401.2*. None of the Respondents have provided the Court with any FOIL rules or regulations adopted in conformity with law. The Board of Commissioners appears to have acted in the capacity of the body to hear an appeal as required by *Public Officer’s Law § 89(4) and 21 NYCRR 1401.2*, again, neither the Department nor the District have provided the Court with any rules or regulations adopted in conformity with law. However, the uncontested allegations that The Brentwood Fire District rendered determinations concerning whether inaction by the Chief of the Fire Department constituted a denial subject to appeal reflects that the Board of Fire Commissioners did assert its authority as provided by Town Law § 176 (11).

The failure of the Brentwood Fire Department to acknowledge receipt of the FOIL request within five days as required by law constituted a denial of the request, the appeal of this denial to the Board of Commissioners was ripe for review and it was error to refuse to review the denial. *See Public Officers’ Law § 89 (3); and 21 NYCRR 1401.7(c) “If an agency fails to respond to a request as required in section 1401.5 of this Part, such failure shall be deemed a denial of access by the agency.”*

The failure of the Chief to provide any meaningful determination at all from September 30, 2014 through the extended period to December 4, 2014 constituted a continued denial and it too was appealable. *Public Officers’ Law § 89 (3) and 21 NYCRR 1401.7(c)*. The Board of Commissioners for the Brentwood Fire District did not afford the Petitioner any relief from the unauthorized and unjustified delay by the Brentwood Fire Department when it failed to either direct that the records be made available for inspection or, in the alternative, make a determination that the records were not subject to inspection. Instead, the Board of Commissioners defended the delinquency by the Fire Department and indicated that it had advised the Fire Department to “respond to the FOIL [request] as soon as possible.”

The Petitioner exhausted all reasonable efforts to obtain either the records or a final determination on his FOIL request made on September 30, 2014, and this Article 78 proceeding was commenced on January 2, 2015.

The determinations rendered on October 21, 2014 and on December 17, 2014 by the Board of Fire Commissioners for the Brentwood Fire District were incorrect as a matter of law.

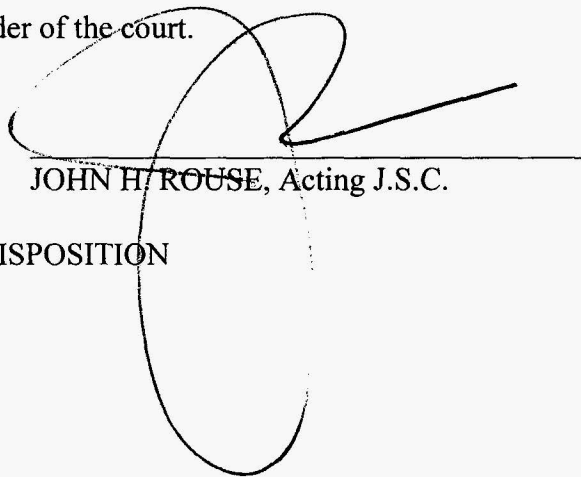
In some instances it would be appropriate to remand the matter to the Board of Fire Commissioners for its determination. However, the specific records that were the subject of the Petitioner's FOIL request, the records that constitute proof of the expenditure of Fire Department funds, are presumptively open to inspection and no exemption from disclosure has been advanced. *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575 (1980). Accordingly, the Fire District in accordance with its authority under Town Law § 176 (11) and the Order of this Court, is directed to produce the demanded records for inspection by the Petitioner, and to advise the Petitioner of the cost of reproduction of those records should Petitioner elect to have the records provided to him.

The Fire Department

The Brentwood Fire Department has not answered the Petition, but submits a pre-answer motion to dismiss for lack of personal jurisdiction. *CPLR §§ 3211 and 404*. The Brentwood Fire Department contends it is a not-for-profit corporation and that service upon it was not effected in accordance with law. This Court's determination with respect to the Fire District has accorded full relief to the Petitioner. The Fire District can address this matter with the Fire Department in the exercise of its authority under Town Law § 176 (11). Accordingly, the motion to dismiss is denied as moot.

The foregoing shall constitute the decision and order of the court.

Dated: March 24, 2015



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION