

STATE OF NEW YORK  
SUPREME COURT: NIAGARA COUNTY

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In the Matter of the Application of  
BUFFALO NIAGARA COALITION FOR OPEN  
GOVERNMENT, INC.

Index No.

Petitioner-Plaintiff

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

-against-

NIAGARA COUNTY BOARD OF ETHICS;  
NIAGARA COUNTY LEGISLATURE;  
COUNTY OF NIAGARA;  
REBECCA J. WYDYSH AS CHAIRMAN OF THE  
NIAGARA COUNTY LEGISLATURE;  
JAMES SPANBAUER AS CHAIRMAN OF THE  
NIAGARA COUNTY BOARD OF ETHICS

Respondents-Defendants

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**MEMORANDUM OF LAW  
IN SUPPORT OF VERIFIED PETITION & COMPLAINT**

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## **PRELIMINARY STATEMENT**

This Memorandum of Law is submitted in support of Plaintiff's Action for Declaratory Judgment and Article 78 petition which seeks disclosure of the Annual Financial Disclosure Forms pursuant to the New York Freedom of Information Law (FOIL) and to declare Local Law #2, passed in 1996, and Local Law #1 passed in 2019, by the Niagara County Legislature, titled A Code of Ethics, (hereinafter Local Law) as being void, inconsistent and preempted by the New York State Constitution and State Law.

This hybrid Article 78 petition and complaint arises out of Respondent's long documented practice of preventing the public from viewing the Annual Financial Disclosure Statements filed by county officials. Petitioner requested annual disclosure forms from 2013-2019 pursuant to FOIL. Respondents denied access to all forms except those from 2019.

Having exhausted their administrative remedies, Petitioner now seeks (1) an Order pursuant to Article 78 of the New York Civil Practice Law and Rules, directing the Respondent to produce all records responsive to Petitioner's FOIL request within twenty (20) days of the Court's order; (2) a declaration pursuant to CPLR § 3001 that Local Law Number 2 adopted in 1996 and the amendment, entitled Local Law #1, adopted on May 7, 2019 by the Niagara County Legislature are invalid and contrary to FOIL; (3) a declaration pursuant to CPLR § 3001 that the Niagara County Board of Ethics, Niagara County, the Niagara County Legislature, Respondent Wydish as successor to Wm. Keith McNall and Respondent Spanbauer acted unlawfully by withholding material that is not properly exempt from disclosure under FOIL and (4) an award to Petitioner of their costs and fees, together with such other further relief the Court deems just and proper.

## FACTS

This proceeding arises from the Respondents' improper denial of a FOIL request by the Buffalo Niagara Coalition for Open Government, Inc. ("Petitioner"). Petitioner requested Annual Financial Disclosures of for all Niagara County Legislators for the years 2013 to 2019. The Niagara County Ethics Board produced the Annual Financial Disclosures for 2019 but withheld all prior years relying on a Local Law that attempts to keep these records from public view and only permits access to the District Attorney, Ethics Board, and Sheriff. Local Law #2. The facts and circumstances of the matter are more fully set forth in the verified petition.

## Argument

### **I. The county improperly relied on the "state or federal law" exemption in denying access.**

All records of a public agency are presumptively open to public inspection. *Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp.*, 84 N.Y.2d 488, 492 (1994). The public's right of access is broadly construed and its exemptions from disclosure are read narrowly. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State of N.Y. at Farmingdale*, 87 N.Y.2d (1995). FOIL provides for enumerated exceptions to disclosure of records. N. Y. Pub. Off. Law § 87(2). The exemption at issue in this case is § 87(2)(a) which exempts records that "are specifically exempted from disclosure by state or federal statute."

The Court of Appeals has considered and rejected the argument that local ordinances can restrict access to records under § 87(2)(a). *Morris v. Martin*, 55 N.Y.2d 1026 (1982) (holding that a local New York City Law that prohibited disclosure of list of real estate sales data was not a "state or federal statute" under FOIL) *for rejected reasoning see Morris v. Martin*, 82 A.D.2d 965 (3rd

Dep't 1981).

Local Laws are not “state statutes” within the meaning of the Public Officers Law and therefore cannot amend or supersede the requirements of FOIL. *Archdeacon v. Town of Oyster Bay*, 813 N.Y.S. 2d 289 (Sup. Ct. Nassau Co. 2006). A statute is an enactment of the state legislature or congress signed by the governor of New York. *Sheehan v. City of Syracuse*, 137 Misc.2d 438, 440 (Sup. Ct. Onondaga Co. 1987). A local or agency enactment cannot trump the requirements of a state statute. *see Zuckerman v. New York State Bd. Of Parole*, 53 A.D.2d 405, 407 (3d Dep't 1976). The Appellate Division Fourth Department, held that a local law prescribing a new fee for access to records was not a “statue” under a different provision of FOIL. *N.Y. Central Mutual Fire Insurance Company v. Town of Cheektowaga*, 13 A.D.3d 1189 (2004).

In a remarkably similar case, the Supreme Court Westchester County held that a local ethics code passed by the City of White Plains could not restrict access to records related to a local ethics board's investigation. *Journal News, Matter of v. City of White Plains*, 975 N.Y.S.2d 144, at \*4 (2011 unreported). “FOIL's statutory disclosure requirements pre-empt any conflicting confidentiality requirements contained in a local ordinance such as the one at issue here.” *Journal News, Matter of v. City of White Plains* at \*4. The City of White Plains withheld documents related to an ethics investigation and attempted to rely on its local ethics code which denoted all documents “confidential.” *id.*

The New York State Committee on Open Government is a state agency with the power to issue advisory opinions about the scope of the Freedom of Information Law. The Committee on Open Government has twice considered the validity of Niagara County Ethics Code's wholesale restriction on public access. New York State Committee on Open Government Advisory Opinions



(FOIL-AO-9826 January 3, 1997) *and* (Opinion to Buffalo Niagara Coalition for Open Government November 6, 2019) (Appendix). Both times the New York State Committee on Open Government has advised that the restriction conflicts with FOIL. In 1997 the Committee on Open Government reviewed the legislative history and accompanying documents related to General Municipal Law Article 18 and concluded “the governing statute is the Freedom of Information Law.” (FOIL-AO-9826)(Appendix). The Committee on Open Government indicated that a municipality did not have the power to enact a law that would affect a substantive right of access covered by FOIL. *id.* It opined that annual financial disclosures were subject to disclosure but may be partially redacted consistent with other explicit exemptions found in FOIL. *id.* In 2019 the Committee on Open Government concluded that “all County financial disclosure forms should be disclosed in response to a FOIL request in the same manner as those filed in 2019.” Opinion to Buffalo Niagara Coalition for Open Government November 6, 2019)(Appendix). “In short, a local law, such as the County Code of Ethics, is not a “state statute” and cannot confer, require or promise confidentiality.” *id.*

Niagara County Ethics Code restrictions are municipal laws and do not qualify as “state or federal laws” under 87(2)(a).

## **II. Niagara County local laws are invalid and conflict with FOIL**

### **(A) A declaratory judgment in conjunction with an Article 78 proceeding is the appropriate procedural mechanism.**

“Declaratory judgments can be sought in tandem with proceedings instituted under Article 78.” 4E N.Y. Prac., Com. Litig. In New York State Courts § 119:32 *citing Harris v. Town Bd. Of Riverhead*, 73 A.D.3d 922 (2d Dep’t 2010). One type of action can be converted into the other at the court’s discretion. *Dubois v. Town Bd. Of New Paltz*, 35 NY2d 617 (1974). A declaratory

action was the appropriate procedural mechanism to challenge a local law setting a fee higher than established by FOIL. *Sheehan*, 137 Misc.2d 428.

**(B) Petitioner has standing in a declaratory judgment action**

Petitioner has standing in this Article 78 proceeding because Petitioner has a particularized grievance flowing from the application of the local laws. That is, Petitioner has been denied access to documents it seeks under the Freedom of Information Law and expects to have future requests denied. Petition ¶¶ 26-30 *see N.Y. Central Mutual Fire Insurance Co. v. Town of Cheektowaga*, 13 A.D.3d 1189 (4th Dep't 2004). In *Mutual Fire Insurance* an insurance company had standing to seek a declaration invalidating a local law setting a fee in excess of the fees prescribed by FOIL because it had been charged a fee higher than the fee set by FOIL and expected to request future documents covered by the excessive fee. Similarly, Petitioner has been denied access to records under FOIL and expects to be barred from future access.

**(C) Niagara County's local laws are inconsistent with FOIL**

FOIL Governs the substantive law of disclosure. *Town of Oyster Bay*, 813 N.Y.S. 2d at 446. No local law may expand the narrow exceptions to FOIL. *id.* Courts have consistently declined to permit local laws or agency regulations to qualify as state or federal statutes within the meaning of FOIL. *Morris v. Martin*, 55 N.Y.2d 1026; *Mutual Fire Insurance*, 13 A.D.3d 1189; *Journal News*, 975 N.Y.S.2d 144, at \*4; *Sheehan v. City of Syracuse*, 137 Misc.2d 438, 440; and *Zuckerman v. New York State Bd. Of Parole*, 53 A.D.2d at 407. Even where local laws have potentially provided for more disclosure than FOIL, courts have interpreted FOIL as the controlling statute so as not to frustrate the comprehensive statutory scheme of FOIL. *Turner v. Dep't of Finance of City of N.Y.* 242 A.D.2d 146 (1st Dep't 1998). In *Turner* the Appellate Division interpreted the language of the New York City Charter so as to give effect to the statutory scheme

of FOIL which requires a presumption of disclosure and the application of specific statutory exemptions within FOIL. *id*; see also *Xerox Corp v. Town of Webster*, 65 N.Y.2d 131 (1985) (interpreting FOIL as the law governing disclosure rather than General Municipal Law section 51).

A local law that is inconsistent with a state statute is invalid. *Consolidated Edison Company of N. Y. v. Town of Red Hook*, 60 N.Y.2d 99 (1983). No local legislative body is empowered to enact laws or regulations which supersede state statutes. *Board of Education of City School District of City of New York v. Mills*, 250 A.D.2d 122 (3rd Dep't 1998). A local law is inconsistent with a state statute where there is an express conflict between the two. *Ba Mar, Inc. v. County of Rockland*, 164 A.D.2d 605 (2d Dep't 1991). Inconsistency has also been found where local laws prohibit what would be permissible under the State law or impose prerequisite additional restrictions. *Penny Lane/East Hampton v. County of Suffolk*, 191 A.D.2d 19, 23-24 (2d Dep't 1993).

Niagara County's Local Laws are inconsistent with FOIL because the local laws purport to seal all financial disclosure records from disclosure under FOIL. Niagara County Local Law #2 of 1996 and Local Law # 1 of 2019 are invalid insofar as they seal, make confidential, or otherwise prohibit release of documents otherwise subject to FOIL.

**(1) FOIL Governs the Substantive Scope of Disclosure**

FOIL determines whether and to what extent local financial disclosure forms may be disclosed. *Town of Oyster Bay*, 12 Misc.3d at 446. *Town of Oyster Bay* considered the application of FOIL and General Municipal Law Article 18 and determined that FOIL governed disclosure. *id*. *Oyster Bay* cited with approval the detailed analysis of the Committee on Open Government in an Advisory Opinion. *id* see Committee on Open Government Advisory Opinion (FOIL-AO-7731

May 28, 1993) (interpreting a since amended Article 18)(Appendix). The Committee on Open Government has repeatedly considered whether FOIL or Article 18 controls access to annual financial disclosures and has determined that FOIL is the governing statute. New York Committee on Open Government Advisory Opinions (FOIL-AO-9826); (FOIL-AO-10481); (FOIL-AO-13559) (Appendix) *and* (Opinion to Buffalo Niagara Coalition) (specifically opining that Niagara County's Law was invalid and the financial disclosures are subject to disclosure) (Appendix).

**(2) Article 18 of the General Municipal Law Must be Interpreted in Light of FOIL**

Article 18 of the General Municipal Law does not grant Niagara County the power to exempt annual financial disclosures from FOIL. Niagara County passed Local Law #2 of 1996 and Local Law #1 of 2019 pursuant to Article 18 of the General Municipal Law. Article 18 of the General Municipal Law is a law designed to prevent financial conflicts and other conflicts of interest in local government. *see* Gen. Mun. Law § 800 *et. seq.*. Article 18 requires localities with a population of greater than 50,000, such as Niagara County, to require that certain elected officials complete and file annual financial disclosure forms. §§ 810-812. In order to effectuate the requirement that annual financial disclosure statements are completed and filed, a locality “shall have, possess, exercise and enjoy all the rights, powers and privileges attendant thereto which are necessary and proper *to the enforcement of such requirement.*” § 811(1)(c)(emphasis added). Thus, all rights conferred by the statute must be in furtherance of the goal of completing and filing annual financial disclosures.

The locality is permitted “to provide for the public availability of items of information to be contained on such form of statement of financial disclosure, the determination of penalties for violation of such rules or regulations, and such other powers as are warranted under the circumstances existing in its county, city, town or village.” § 811(1)(c). The locality is only



to the annual disclosure requirement of § 811(1)(c) found no county that completely restricted access to annual financial disclosures. At most, some counties redact the value of an official's holding. *see e.g.* Rockland County Code § 66-14(A)(4) (Appendix). This approach is a vestige of since repealed General Municipal Law § 813 but is consistent with the application of existing FOIL exemptions. *see* (FOIL-AO-9826)(Appendix). Prohibiting access to all information in annual financial disclosures is inconsistent with FOIL and the purpose of General Municipal Law Article 18.

Here Local Law #2 of 1996 and Local Law #1 of 2019 conflict with FOIL because they prohibit all public disclosure of annual financial disclosures. This prohibition exceeds the scope of the exemptions controlled by FOIL and is therefore inconsistent. Thus, the local laws are invalid and preempted and the officials and entities relying on the local laws to deny access acted unlawfully.

### **(3) Niagara County Laws Undermine and Conflict with the State Policy of Liberal Disclosure.**

FOIL is an expression of "this State's strong commitment to open government and public accountability." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986). Its purpose is "to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence, and abuse." *Encore College Bookstores. Inc. v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 416, (1995). "FOIL is based on the overriding policy consideration that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (internal quotations omitted).

In enacting FOIL, the New York State Legislature declared that "a free society is maintained when government is responsive and responsible to the public and when the public is aware of governmental actions." N.Y. Pub. Off. Law § 84. It further declared that "the government is the public's business and . . . the public, individually and collectively and represented by a free press, should have access to the records of government . . ." *id.* It is well-established that "FOIL is to be liberally construed and its exemptions narrowly interpreted" in order to afford the public "maximum access to the records of government." *Capital Newspapers Div. of Hearst Corp v. Whalen*, 69 N.Y.2d 246, 252 (1987).

The Niagara County Local Laws unduly and improperly restrict the public's access to precisely the information it needs in order to "make informed decisions" and to "facilitate exposure of waste, negligence, and abuse." *Encore*, 87 N.Y.2d at 416. In sum, allowing these Local Laws to stand would have a profound impact on the public's ability to obtain access to information concerning possible misconduct of its government in derogation of the fundamental purposes underlying FOIL and "this State's strong commitment to open government and public accountability." *Burns*, 67 N.Y.2d at 565. Thus, the court should interpret exception 87(2)(a) and the Local Laws in the context of the State's overall statutory scheme favoring disclosure and invalidate the Local Laws.

#### **(4) Public annual financial disclosures are necessary to prevent and expose Corruption**

Local politicians have repeatedly confirmed the necessity of public disclosure of their financial interests. For example, a city councilman in Rochester, NY was criminally prosecuted for conflicted business dealings that were partially disclosed on his financial disclosure forms. *See Rachel Barnhart, City Heavily Redacts Financial Disclosure Forms*, October 31, 2018 (Appendix)

The Mayor of Mount Vernon was fined for failing to disclose certain financial interests in his

annual disclosure form and later convicted of public corruption charges. *Board of Ethics v. Thomas*, 64 Misc. 1015 (Westchester Co. 2019) and Jonathan Bandler, *Former Mount Vernon City Lawyer Lawrence Porcari guilty on corruption charges*, December 16, 2019 (Appendix). Several officials in Nassau County and the Town of Oyster Bay were prosecuted for honest services fraud related to a no show job several years after the court ordered that financial disclosures were not exempt from disclosure. *see Oyster Bay*, 813 N.Y.S. 2d 289; Department of Justice, *Former Nassau County Executive Edward Mangano and His Wife Linda Mangano Convicted of Corruption and Related Charges by a Federal Jury*, March 8, 2019; and Adina Genn, *Oyster Bay Supervisor to Resign*, January 3, 2017. These examples, some occurring in the very localities where the public's right to annual financial disclosures have been litigated, indicate the necessity of invalidating local attempts to limit disclosure.

### **III. Petitioner is Entitled to Legal Fees**

Petitioner is entitled to an award of attorney's fees and costs. *see* Public Officers Law § 89(4)(c). The fee-shifting provision of FOIL is specifically intended to "create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL." *Matter of N.Y. Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011) (quoting Senate Introducer's Mem. In Support, Bill Jacket, L. 2006 ch. 492 at 5).

Under FOIL, as recently amended, the Court "shall" make an award of attorney's fees when the petitioner has "substantially prevailed and the court finds that the agency had no reasonable basis for denying access." Public Officers Law § 89(4)(c)(ii). Where the petitioner prevails, the trial court is required to make a finding as to whether the agency had a reasonable basis to withhold the required records. *Reiburn v. New York City Dep't of Parks and Recreation*, 171 A.D.3d 670



(1st Dep't 2019). If the agency did not have a reasonable basis then attorney fees are mandatory. *id.* The court may look to the settled scope of exemptions to FOIL to determine whether withholding documents is unreasonable. *see Acme Bus Corp. v. County of Suffolk*, 136 A.D.3d 896 (2d Dep't 2016). In *Acme Bus Corp.* the court found that there was no reasonable basis to withhold documents where the requested documents did not fall within an established FOIL exemption and the agency gave only "conclusory assertions that certain records fall within a statutory exemption." *id.* at 898.

Here Respondents lack a reasonable basis to withhold the documents requested. The local ordinances are not a "state or federal statute" under Public Officers Law § 87(2)(a) and all of the available legal authority indicates that Niagara County's local ordinances do not affect the substantive scope of FOIL. Niagara County relied on the substantial cost of a legal challenge to their local laws to hide annual financial documents from public view for decades. Awarding attorney fees serves the interest of the fee shifting provision of Public Officers Law 89(4)(c).

A public interest organization and law firm is entitled to legal fees in the same manner as the private bar. *see NYCLU v. City of Saratoga Springs*, 87 A.D.3d 336. As such, Petitioner, pursuant to Public Officers Law § 89(4)(c) is entitled to an award of attorney's fees and other litigation costs reasonably incurred.

## **CONCLUSION**

Respondents improperly withheld annual financial disclosures from Petitioner. The Annual Financial Disclosures are subject to disclosure under FOIL and do not fall within any of FOIL's explicit exemptions. The Niagara County Local Laws do not grant Respondents the power to

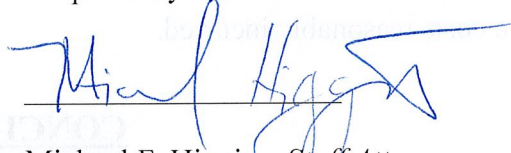
withhold the requested documents and are invalid. For the reasons stated above, Petitioner respectfully requests that this court:

- (1) Order the Niagara County Board of Ethics to produce all records responsive to Petitioner's FOIL request within twenty (20) days of the Court's order;
- (2) Declare that Local Law Number 2 adopted in 1996 and the amendment, Local Law #1, adopted on May 7, 2019 by the Niagara County Legislature are invalid and contrary to FOIL;
- (3) Declare that the Niagara County Ethics Board, Niagara County, the Niagara County Legislature, Respondent Wydish and Respondent Spanbauer acted unlawfully by withholding from Petitioner material that is not properly exempt from disclosure under FOIL;
- (4) Award Petitioner its costs and attorney's fees pursuant to Public Officers Law § 89(4)(c); and
- (5) Award Petitioner such other and further relief as the Court deems just and proper.

Dated: Amherst, New York

February 13, 2020

Respectfully Submitted



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