

SUPREME COURT
COUNTY OF YATES STATE OF NEW YORK

COPY

ROBERT HAWLEY,
Petitioner,
-against-

DECISION AND ORDER

THE VILLAGE OF PENN YAN, THE MAYOR
AND VILLAGE BOARD OF TRUSTEES OF
THE VILLAGE OF PENN YAN,

Index No. 04-290

Respondents.

Gates & Adams, P.C., by
Anthony J. Adams, Jr., Esq.
Attorneys for the Petitioner

Harris Beach LLP, by
Edward P. Hourihan, Esq.
Attorneys for the Respondents.

Bender, Acting J.

The above named petitioner filed a Freedom of Information Request seeking telephone records for the cell phone provided to the Mayor of the Village of Penn Yan by the Village. Copies with all telephone numbers deleted were thereafter provided. The petitioner appealed, demanding the redacted numbers be provided. The appeal was denied by a committee consisting of three of the six trustees of the village board, which had been appointed by the mayor to hear the appeal.

The petitioner, initially proceeding *pro se*, thereafter petitioned this court, asking for relief in two forms: A declaration that the appeal committee was improperly established and thus declaring its decisions void, and an order directing the Village Board to provide the information requested without redaction of the phone numbers.

The respondents now move to dismiss the petition, purportedly pursuant, per the notice of motion, upon CPLR 7804(f). The motion further, despite asking that the petition be dismissed, requests the court review the calls to determine which it believes should be released. It finally

seeks an order enjoining the petitioner from bringing further pro se proceedings against the Village of Penn Yan, its officers and others, without first obtaining court permission.

The petition was originally stated to be returnable on October 14, 2004, but on that date was adjourned, the motion having been scheduled for November 12, 2004. It was suggested in the meantime that the respondents would do well to particularize which of the calls they maintained were exempt from disclosure, and why.

The petitioner thereafter retained counsel, and has now moved to amend the petition to seek an award of attorneys' fees as well as costs and disbursements.

In its motion papers the respondents argues that it should be exempt from production of any of the numbers, stating through the affidavit of the mayor that part of his "mayoral duties is to field telephone calls concerning anonymous complaints and confidential questions from Village residents. Because the telephone bills requested by the petitioner included calls to private individual concerning personal and/or confidential matters, the Village produced copies of the bills that were redacted to obscure the telephone numbers of the call recipients and protect their privacy." [October 8, 2004 affidavit of Douglas G. Marchianda, Jr., para. 5]. No specifics were provided however, including identification of which of the redacted numbers might fit within the asserted "personal and/or confidential matters."

Subsequent to October 14th an additional affidavit was provided from the village clerk stating that it was village policy to allow the mayor to make personal calls on his village issued telephone, "so long as the number and length of calls did not interfere with the efficient operation of the Village or incur significant overage charges." She thereafter alleges from her personal knowledge that this policy was not violated. [November 9, 2004 affidavit of Linda K. Banch, para. 7]. Her affidavit however, gave no insight into how release of those numbers would "constitute an unwarranted invasion of personal privacy..." POL 87(2)(b).

Ms. Banch's affidavit was forwarded with the cover letter from Edward P. Hourihan, Esq. In it he references an enclosed "annotated copy of ... [the telephone] records for the Court's *in camera* review.... which have been highlighted, with handwritten notations by Mayor Marchionda...." Of the over 400 calls made or received, notations exist for approximately 100 of

them. Many are identified as having been made to specified family members of the mayor, and less than a dozen are indicated as unlisted or possibly unlisted numbers. Even at that, no affidavit was provided from Mayor Marchionda or anyone else to confirm any of the notations, or that he in fact even made the notations. The letter further goes on to suggest that release of the numbers would be a tortious invasion of the private lives of those with whom the mayor conversed.

The respondents rely upon POL 87(2)(b) which allows for denial of requests made under the Freedom of Information Law if "disclosure would constitute an unwarranted invasion of personal privacy under the provisions of subdivision 2 of section 89....." That later section states an unwarranted invasion of personal privacy includes, but shall not be limited to certain enumerated items.

More importantly, POL section 89(4)(b) states "the agency involved shall have the burden of proving that such record falls within the provisions of such subd. 2." This they have failed to do. The motion papers allege the numbers should be precluded from disclosure for purely conclusory reasons, (Matter of Key v. Hynes, 205 AD 2d 779) and nothing beyond counsel's letter and the unsigned, unsworn annotations on the photocopy of the telephone bills support the argument that any of the numbers were confidential. Further, nothing in the numbers otherwise reveals anything of a personal nature.

"In the case of calls made by a county executive or others in similar positions, phone calls are made to a great variety of persons in a broad variety of context. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), the calls made by the county executives office involve an assortment of issues and persons who do not fall with any special identifiable class or status. If that is so, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of the call or the conversation." [Committee on Open Government; Opinion F10270, August 12, 1997]

As noted above, it is only when disclosure constitutes an unwarranted invasion of person privacy that disclosure may be denied. POL 87(2)(b). The Freedom of Information Law is based

upon 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 NY 2d 567, 571)...all agency records are presumptively available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in Public Officers Law section 87(2). (Citations omitted.)" Newsday Inc. v. State of NY Dept. of Transportation, 1 Misc. 3d 321, 322. As also stated, the burden is upon the respondents to show the exemption exists, and to do so with particularity. POL 89(4)(b), Matter of Key v. Hynes, supra.

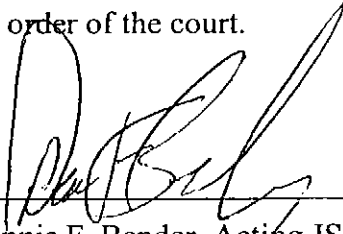
The motion to dismiss is denied. The respondents shall submit their answer in accordance with CPLR 7804(f).

The other motions of the respondents are denied. That for a determination by the court of which numbers should be released asks the court to assume what in the first instance is the respondents' obligation. The motion which seeks to restrict the petitioner's future actions is likewise denied. Predicated upon the respondents' offerings to date, there is nothing to suggest that the petitioner will not be successful at least in part. The respondents may view the petitioner as mettlesome and guided by ill motives, but such is not by itself sufficient to justify the relief they request.

The petitioner's cross motion to amend his petition is granted.

This constitutes the decision and order of the court.

Dated: November 30, 2004



Dennis F. Bender, Acting JSC