

Judges Call for Common Sense in Responding to FOIL Requests

The Court of Appeals yesterday sent a not-so-subtle message to government agencies dealing with requests for information under the Freedom of Information Law: Be reasonable and do not waste the courts' time.

In a unanimous decision, the judges found themselves "at a loss to understand" why *Matter of Schenectady County Society for the Prevention of Cruelty to Animals v. Mills*

, 163, ever got to any court, let alone the state's highest.

Judge Robert S. Smith suggested that if the state Department of Education had been reasonably accommodating and more "sensitive" to its obligations under the Freedom of Information Law (FOIL), it would have saved everyone—itsself included—a lot of hassle.

"Lawyers for both sides have submitted briefs and argued the case in three courts, demanding the attention of 13 judges, generating four judicial opinions and resulting in a delay in disclosure of almost four years," Judge Smith wrote. "It is our hope that the Department [of Education], and other agencies of government, will generally comply with their FOIL obligations in a more efficient way."

The case dates back to 2008, when the Society for the Prevention of Cruelty to Animals asked the department for the names and addresses of all licensed veterinarians and veterinary technicians in Schenectady County.

The department provided names and municipalities, but refused to reveal street addresses, maintaining that some were home addresses and disclosing that information would constitute an unwarranted invasion of personal privacy.

When the SPCA then asked for business addresses only, the Department of Education responded that its computer files were not configured in a way that it could distinguish between business and residential addresses, and denied the FOIL request.

That resulted in an administrative appeal, which the SPCA lost; a trip to Supreme Court, which dismissed the petition; and an appearance at the Appellate Division, Third Department, which split 3-2 but held for the SPCA.

The 3-2 vote gave the department an appeal as of right to the Court of Appeals, which finally issued the last word yesterday.

Judge Smith said there is no question that the business addresses are public information.

"It seems obvious to us that, if the Department does not want to supply home addresses, it should simply delete them from the list," Judge Smith said.

The court said that even if the department's computer database does not distinguish between business and home addresses, the agency could have asked the licensees, a chore it said "should not be a burdensome task because the number of licensed veterinarians in

Schenectady County" includes only 72 names.

It stressed that even if the home addresses are not subject to FOIL disclosure, the state cannot withhold an entire record when it can, "without unreasonable difficulty," redact the record to remove exempt information.

"We hold that an agency responding to a demand under the Freedom of Information Law (FOIL) may not withhold a record solely because some of the information in that record may be exempt from disclosure," Judge Smith wrote in an opinion joined by his six colleagues—Chief Judge Jonathan Lippman and Judges Carmen Beauchamp Ciparick, Victoria A. Graffeo, Susan Phillips Read, Eugene F. Pigott Jr. and Theodore T. Jones.

Robert J. Freeman, executive director of the Committee for Open Government in the Department of State, said the Court in its decision yesterday is "telling government agencies to use common sense when dealing with Freedom of Information Law requests."

Attorney's fees are obtainable when an agency denies a FOIL request and has no reasonable basis for doing so, and in recent months the Appellate Division, Third Department, in Albany has demonstrated willingness to grant them.

In three separate cases since July, the Third Department has overruled lower courts and opened the door to counsel fees. (See *New York State Civil Liberties Union v. City of Saratoga Springs*

, 87 AD3d 336; *New York State Defenders Association v. New York State Police*

, 87 AD3d 193; and *Matter of Hearst Corp. v. City of Albany*

, 511942, which was decided just last week).

Mathew B. Tully of Tully Rinckey in Albany, which represents the SPCA, described yesterday's holding as "a complete slam dunk for the SPCA."

"This is David v. Goliath, but David has a high-powered law firm in us," Mr. Tully said. "Most often nonprofits don't have the resources to fight."

Mr. Tully said he intends to return to court to seek counsel fees, which he said will exceed \$100,000. However, Mr. Tully said he has offered to waive the fees if the state will purchase an animal control van and car for the SPCA, at a total cost of about \$66,000.

"If they want to litigate it, we'll litigate it and Tully Rinckey will make a lot of money," Mr. Tully said. "But that is not the goal. The goal is to help animals in Schenectady County. Rather than having the fees go to buy me a Mercedes, I'd rather they go to the SPCA to help animals."

The Department of Education was represented by Assistant Solicitor General Frank K. Walsh. The Attorney General's Office declined to comment.

Jonathan Burman, a spokesman for the Department of Education, said the agency's objective in denying the FOIL request was simply "to protect the personal privacy rights of New York's licensed professionals."

He added, "We are naturally disappointed with the Court's ruling, but we will—of course—comply with it."

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