

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF COLUMBIA

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MICHAEL SCHROM and  
KEVIN DELAHANTY,

Petitioners,

**VERIFIED PETITION**

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law & Rules and other relief

Index No. \_\_\_\_\_

-against-

THE COUNTY of COLUMBIA, New York,

Respondent.

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Petitioners MICHAEL SCHROM, and KEVIN DELAHANTY respectfully allege as follows:

**NATURE OF PROCEEDING**

1. This proceeding is brought pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”), to compel the County of Columbia to produce, for Petitioners’ review, all records requested by Petitioners in Petitioners’ request to the County of Columbia for records, made pursuant to the New York State Freedom of Information Law (NYS Public Officers Law Article 6), dated August 21, 2013.
2. As set forth more fully below, this proceeding challenges the failure of Respondent County of Columbia to comply with its legal duties pursuant to Article 6 of the New York State Public Officers Law, consisting of sections 84 through 90 of such Law, and known as the Freedom of Information Law (hereinafter “FOIL”), in that Respondent’s

handling of Petitioners' request and appeal was not in accordance with law, and Respondent failed to produce records for review at a time when they were required by law to have been produced and made available for Petitioners' review.

### **JURISDICTION**

3. This Court has jurisdiction over this matter pursuant to CPLR Article 78.
4. Authorization to bring this proceeding is specifically granted pursuant to paragraph (b) of subdivision four of section 89 of the Public Officers Law (Freedom of Information Law), which provides that a person denied access to a record in an appeal determination under paragraph (a) of that subdivision, as is alleged herein by Petitioners, may bring a proceeding for review pursuant to Article 78 of the CPLR.
5. This special proceeding is commenced within four months of the time of the appeal determination and other events, determinations, or actions that are the subject of this action.
6. Venue is proper in Columbia County pursuant to CPLR § 506(b) as the county where Respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, where the material events took place, and where the principal office of the respondent is located.

### **PARTIES**

7. Petitioner Michael Schrom resides at 66 Old Mill Road, Ghent, New York. He filed, through his attorney, Kenneth J. Dow, Esq., a Freedom of Information Law request that is the subject of this proceeding.

8. Petitioner Kevin Delahanty resides at 289 Tipple Road, Ghent, New York. He filed, through his attorney, Kenneth J. Dow, Esq., a Freedom of Information Law request that is the subject of this proceeding.
9. Respondent County of Columbia is a municipal corporation in the State of New York, which was the recipient of the Freedom of Information Law request that is the subject of this proceeding. Such County has, upon information and belief, a principal office at 401 State Street, Hudson, NY.

### **FACTS**

10. Upon information and belief, Respondent has taken numerous actions over recent years related to plans or proposals to acquire, through eminent domain or otherwise, real property abutting the Columbia County Airport (hereinafter "Airport.").
11. Upon information and belief, officials, employees, and agents of Respondent have, in recent months, taken steps and made public statements indicating that plans or proposal to acquire such lands may be approaching fruition or even be imminent.
12. In particular, an article published by the Register-Star on or about August 17, 2013, entitled "Board receives FAA letter" states that Respondent "bid out attorney services to handle eminent domain proceedings against the owners of Meadowgreens Golf Course in connection with a project to expand a safety zone for the Columbia County Airport in Ghent." (Exhibit A)
13. Another article published by the Register-Star on or about October 2, 2013, entitled "Bassin calls for tabling airport expansion plan" includes this passage: "Eminent domain remains under discussion between supervisors, [Respondent's Chairman of the Board of Supervisors Patrick] Grattan said." (Exhibit B)

14. Upon information and belief, as reported by the Register-Star newspaper and elsewhere, Respondent has offered the owner of such lands \$629,000 in order to purchase such lands and certain associated easements. (Exhibit C)
15. Upon information and belief, the owner of such lands has rejected the offer of \$629,000 as inadequate. (Exhibit C)
16. Upon information and belief, Respondent had scheduled for August 14, 2013 a public hearing on the matter of the proposed acquisition of such lands by eminent domain. (Exhibit C)
17. Upon information and belief, on or about July 31, 2013, such scheduled public hearing was cancelled.
18. Article 6 of the New York State Public Officers Law, consisting of sections 84 through 90 of such Law, is known as the Freedom of Information Law (hereinafter "FOIL").
19. Subdivision two of section 87 of FOIL requires that "[e]ach agency shall...make available for public inspection and copying all records," subject to certain enumerated exceptions.
20. Section 86 of FOIL includes within the definition of "agency" "any...public corporation...or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof..."
21. Respondent County of Columbia is a public corporation performing a governmental function..."
22. For purposes of FOIL, Respondent County of Columbia is an "agency" subject to such Law.
23. Upon information and belief, Respondent has previously responded to other FOIL requests in a manner that acknowledges that Respondent is subject to FOIL.

24. Upon information and belief, Respondent regularly acknowledges its status as an “agency” by its manner of handling FOIL requests addressed to it.
25. An email from Respondent’s Records Access Officer to petitioners’ attorney noted that “Brent Stack ACA [Assistant County Attorney] deals with all FOIL requests.” (see Exhibit D)
26. Upon information and belief, Gail DiCosmo is the Clerk of the Board of Supervisors of Columbia County.
27. Upon information and belief, Gail DiCosmo is the Records Access Officer for Respondent County of Columbia.
28. Upon information and belief, Records Access Officer Gail DiCosmo can be contacted at her official county email address of “gail.dicosmo@columbiacountyny.com”.
29. At approximately 8:38 AM on August 21, 2013, Petitioners, through their attorney, submitted to Respondent, via email addressed to “gail.dicosmo@columbiacountyny.com” a detailed request for records in possession of Respondent, pursuant to FOIL (A copy of the email is attached as Exhibit D; a copy of such FOIL request is attached as Exhibit E)
30. Such FOIL request sought, *inter alia*, records related to the Columbia County Airport and, particularly, records that may be relevant to the proposed acquisition by Respondent of land abutting the Airport, whether by eminent domain or otherwise.
31. At approximately 11:26 AM on August 21, 2013, Petitioners’ attorney received a reply email stating that the FOIL request had been received. (Exhibit D)
32. Such reply email stated that the FOIL request was being forwarded to the County Attorney’s Office.

33. Such email stated that Assistant County Attorney Brent Stack “deals with all FOIL requests.”
34. Petitioners’ FOIL request was effectively filed with and received by Respondent on August 21, 2013.
35. As of September 11, 2013, Petitioners’ attorney had received no further communication from Respondent in regard to the August 21 FOIL request.
36. At approximately 3:57 PM on September 11, 2013, Petitioners, through their attorney, submitted to Respondent, via email addressed to Clerk of the Board of Supervisors Gail DiCosmo at “gail.dicosmo@columbiacountyny.com” an appeal, consisting of a document headed “Appeal of Denial of FOIL Request” and a copy of the original FOIL request, addressed to the Columbia County Board of Supervisors, pursuant to section 89(4)(a) of FOIL. (Exhibit F)
37. Although it was in no way required, the appeal included statements of law that expressly set out the requirements and options of Respondent and the Board of Supervisors in response to the appeal.
38. At approximately 10:26 AM on September 12, 2013, Petitioners, through their attorney, submitted to Respondent, via email addressed to “gail.dicosmo@columbiacountyny.com” a message calling to Ms. DiCosmo’s attention the fact that an appeal had been submitted late the previous afternoon and requesting acknowledgment that such appeal had been received. (Exhibit G)
39. At approximately 2:13 PM on September 12, 2013, Petitioners’ attorney received a reply email stating that the appeal had been received and would be forwarded to the proper person. (Exhibit G)

40. Petitioners' FOIL appeal to the Board of Supervisors was effectively filed and received on September 12, 2013.
41. Petitioners' attorney subsequently received a letter from the Office of the Columbia County Attorney, dated September 17, 2013, referencing "Appeal of Denial of FOIL Request," and signed by Assistant County Attorney Brent Stack, which stated, among other things, that "[t]his office is in receipt of the above-referenced appeal." (Exhibit H)
42. Such letter, while stating that "your FOIL request has not been denied," nevertheless also stated that "[i]t is anticipated that the records you have sought will be available for your inspection within 45 to 60 days."
43. This reply does not conform to the requirements of FOIL section 89(4)(a), which sets out the required actions and options of the body to which an appeal is addressed.
44. Upon information and belief, as of October 2, 2013, no further communication from Respondent—whether from Assistant County Attorney Brent Stack, the Office of the County Attorney generally, Records Access Officer Gail DiCosmo, or otherwise—has been received in connection with this matter by Petitioners or Petitioners' attorney.
45. As of October 2, 2013, (four business days after the end of the 10 business day period in which a proper response to an appeal must be issued), no lawfully sufficient response to the appeal had been received from Respondent by Petitioners.
46. Respondent has violated its legal duties and obligations in relation to handling and responding to Petitioners' appeal, as set out in paragraph (a) of subdivision four of section 89 of FOIL.
47. Paragraph (b) of subdivision four of section 89 of FOIL expressly provides that "Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial."

48. As of October 2, 2013, twenty-nine days after the filing of Petitioners' August 21 FOIL request, Respondent has not produced any records in response, even though records described in such FOIL request have been referenced or spoken about by officials of Respondent in news articles or otherwise. (Exhibits A, B, C, I)
49. Upon information and belief, Respondent, its employees, officials, and agents, have a history of failing to disclose information and records related to the Airport and possible plans related to the Airport, including the acquisition of lands and easements, whether by eminent domain or otherwise.
50. On or about September 24, 2013, a news article was published by the Register-Star entitled "Supervisor wants straight talk on Columbia County Airport Plans." (Exhibit J)
51. Such article describes Ancram Supervisor Art Bassin's frustration with the County's persistent failure to provide factual documentation—even to elected supervisors—in relation to a proposal to acquire by eminent domain land abutting the airport.
52. Such article included the following passage: "Bassin said he was looking for 'substantiation' on the issue that has been going on for years. 'We need to stop the bull---,' Bassin said." (Underline added).
53. Upon information and belief, on or about September 26, 2013, Ancram Supervisor Art Bassin circulated to County Supervisors and to the public a letter, entitled "Airport Issues and Questions" addressed from Mr. Bassin to Kenneth Flood, Respondent's Commissioner of Economic Development, seeking detailed factual information related to the Airport. (Exhibit K)
54. Such letter included the following passage: "Before the County spends any more time or money on the eminent domain process, we need unambiguous answers to the

questions that have been asked multiple times, but never adequately answered.”

(Underline added).

55. Upon information and belief, beginning on or about February 11, 2013, non-party affiant Patricia Matheney submitted to Respondent FOIL request for records in connection with the Columbia County Airport. (See accompanying Matheney Affidavit)
56. Upon information and belief, subsequent to February 11, 2013, non-party affiant Patricia Matheney submitted to Respondent clarifications and additional FOIL request for records in connection with the Airport. (Matheney Affidavit)
57. Upon information and belief, Respondent, as of October 1, 2013, has produced very few records and breached its legal obligations in response to the Matheney FOIL requests of February, 2013, *et. seq.* (Matheney Affidavit)
58. Upon information and belief, Respondent failed to respond to non-party affiant Matheney’s requests in accordance with law, gave her a runaround for several months, told her to hire an attorney, and gave strong reason to believe that absent legal action, it would not, of its own accord, fulfill its obligations under FOIL to produce records related to the Airport. (Matheney Affidavit Exhibits D, E, F).

### **FIRST CAUSE OF ACTION**

59. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 58 with the same force and effect as though fully set forth hereat.
60. Respondent’s failure to conform to the requirements of FOIL section 89(3) constitutes a denial of Petitioners’ request for records.

61. Respondent's failure to conform to the appeal requirements of FOIL section 89(4)(a) constitutes a denial of appeal in relation to Petitioners' request for records.
62. Respondent has not fully explained in writing to Petitioners the reasons for denial, as is required by law [FOIL § 89(4)(a)] in connection with the denial of Petitioners' request.
63. The records requested are presumptively subject to disclosure to Petitioners.
64. Respondent has not acted to overcome, or even to attempt to overcome, such presumption.
65. All records requested are therefore subject to disclosure to Petitioners.
66. Accordingly, Respondent's denial of records on appeal is in violation of lawful procedure or affected by errors of law, constitutes an abuse of discretion, and is a violation of law.

### **SECOND CAUSE OF ACTION**

67. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 66 with the same force and effect as though fully set forth hereat.
68. The records requested are in fact subject to disclosure to Petitioners.
69. Therefore, even if Respondent had explained in writing the reasons for denial, such denial would be in violation of lawful procedure or affected by errors of law, constitute an abuse of discretion, and be a violation of law.

### **THIRD CAUSE OF ACTION**

70. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 69 with the same force and effect as though fully set forth hereat.
71. Because Respondent did not—and indeed could not—lawfully issue a denial in relation to Petitioners' appeal, Respondent was required by statute [FOIL § 89(4)(a)] to provide

access to the records sought by Petitioner within ten business days of receipt of Petitioners' appeal.

72. Respondent's failure to provide access to the records sought by Petitioner, within ten days of receiving Petitioners' appeal, constitutes a failure by Respondent to perform a duty enjoined upon it by law.

**RELIEF REQUESTED**

**WHEREFORE**, Petitioner requests the entry of a judgment, as follows:

- (1) ordering the County of Columbia to produce for Petitioners' review, within five (5) business days, all records requested by Petitioners in Petitioners' request to the County of Columbia for records, made pursuant to the New York State Freedom of Information Law (NYS Public Officers Law Article 6), dated August 21, 2013;
- (2) awarding to Petitioners their reasonable attorney's fees, costs and disbursements;
- (3) granting such other and further relief as this Court deems just and proper.

Dated: Mellenville, NY  
October 2, 2013

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Kenneth J. Dow, Esq.  
22 County Route 9  
Mellenville, NY 12544  
(518)817-7394  
*Attorney for Petitioners*

**VERIFICATION**

STATE OF NEW YORK     )

COUNTY OF COLUMBIA   ) ss:

Michael Schrom, being duly sworn, deposes and says that he is a Petitioner in the above-named proceeding; that deponent has read the foregoing Petition and knows the contents thereof; and that the foregoing Petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

\_\_\_\_\_  
Michael Schrom

Sworn to before me this  
2<sup>nd</sup> day of October, 2013

\_\_\_\_\_  
Notary Public

**VERIFICATION**

STATE OF NEW YORK                    )

COUNTY OF NEW YORK                ) ss:

Kevin Delahanty, being duly sworn, deposes and says that he is a Petitioner in the above-named proceeding; that deponent has read the foregoing Petition and knows the contents thereof; and that the foregoing Petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

\_\_\_\_\_  
Kevin Delahanty

Sworn to before me this  
2<sup>nd</sup> day of October, 2013

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Notary Public