STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of
PETER A. REESE and ELLEN REESE,
49 Starin Avenue
Buffalo, New York 14214

Petitioner

against

EDWARD J. MAHONEY and PHILIP D. SMOLINSKI,
constituting the Board of Elections in
the County of Erie,

Respondents

PETER A. REESE, Petitioner, pro se
and for ELLEN REESE, Petitioner

EUGENE F. PIGOTT, JR., Erie County
Attorney (J. R. DREXELIUS, JR.,
Assistant County Attorney, of counsel)
for Respondents

MEMORANDUM AND ORDER

KASLER, J.

Petitioners bring this action pursuant to Article 6 of the Public Officers Law, otherwise known as the Freedom of Information Law (FOIL), seeking, inter alia, certain records of the Board of Elections in the County of Erie. Specifically, petitioners are requesting copies in the form of magnetic computer tapes of voter history information and voter phone numbers for all townships and cities in Erie County and that they be supplied at the reasonable cost of transcription not

in excess of $100.00 per reel of tape. Additionally, petitioners are requesting that respondent Board of Elections in the County of Erie 1.) be directed to comply with §87, subd 3 (c) of the Public Officers Law; 2.) be directed to refrain from denying petitioners or others from rights of access to agency records; and 3.) be required to accept United States currency in the form of bills and coins in payment of fees due for copies of agency records. Respondent Board of Elections in the County of Erie takes the position that petitioners have failed to exhaust their administrative remedies and in any event the computer tapes including voter history and telephone numbers are not subject to disclosure, as constituting an unwarranted invasion of personal privacy (§87, subd 2-b, Public Officers Law).

By an Application for Public Access to Records, dated December 30th, 1983, directed to the Records Access Officer of the Erie County Board of Elections, petitioners requested to obtain a copy of "Voter history computer tapes with phone numbers for all registered voters in all townships and cities in Erie County." By letter, dated January 6th, 1984, the heads of that entity, Commissioners Edward J. Mahoney and Philip D. Smolinski acknowledged receipt of petitioners' application and agreed, upon receipt of the sum of six hundred dollars ($600) in certified check or money order form, to furnish a magnetic tape of registered Erie County voters containing certain identifying data, albeit not that specific data which

petitioners had requested. By letter, dated January 30th, 1984, petitioners repeated their request and notified Commissioners Mahoney and Smolinski, in pertinent part, ". . . if your letter of January 6th, 1984, is intended to indicate that you are not in possession of voter history or phone number information . . . this letter is a written appeal of your denial of access to that information. On appeal of this letter, you will have seven days to explain your denial in writing." By a three page letter, dated February 15th, 1984, Commissioners Mahoney and Smolinski fully explained in writing to petitioners their reasons for denying them access to the records sought. Thereafter, this Article 78 proceeding was commenced to compel production in accordance with petitioners' request.

At the outset, respondents' contention that petitioners have failed to exhaust their administrative remedies must be disposed of. Section 89, subdivisions 3 and 4 (a) and (b) of the Public Officers Law sets forth the procedure to be followed for parties to both apply for records and appeal the denial of their access. In applying that appeals procedure to petitioners' actions here, as stated above, it is abundantly clear that petitioners have fully complied with these statutory provisions and are entitled to bring this proceeding for review of such denial. Unnecessary to such determination but worthy of comment is the consideration of respondents' reliance upon Erie County Local Law No. 8-1978, Section 8, subdivisions (f) and (g). Given the scope, history and legislative

declaration of FOIL, it is apparent that the Legislature has evidenced its intent to preempt the field of regulation. Additionally, the "prerequisite 'additional restrictions'" on rights under State law (F. T. B. Realty Corp. v Goodman, 300 NY 140,147 - 148) which Local Law No. 8-1978 imposes, namely, a two-tiered appeals procedure before Article 78 CPLR review can be had, would be sufficient to invalidate the local law (See Con Ed v Town of Red Hook, 60 NY2d 99), as being inconsistent with the state law's single tier appeals procedure. Accordingly, respondents' reliance upon the local law in support of their argument that petitioners have failed to exhaust their administrative remedies is misplaced.

Turning now to the question of petitioners' request for computer tapes including voter history and telephone numbers, it is respondents' position that these records are exempt from disclosure as constituting an unwarranted invasion of personal privacy and therefore, while maintained by the agency, such information should not be subject to disclosure. Specifically, respondents claim that voters' phone numbers would be used for commercial or fundraising purposes, such information is not required to be maintained under the Election Law and that disclosure of such information which is not relevant to the work of the Board would result in personal hardship to the individual voter. With respect to the voter history information, respondents claim again that such information would be used for commercial and fundraising purposes and, in any event, due to

the lack of completeness of transferring the full voter history information data onto the computer tapes, the Board is not required to create a record. See Public Officers Law, §89 (3). Respondents concede, however, that the "Registration Poll Record" (See Court Exhibit No. 1), upon which respondents maintain the telephone number and voting history of the voter, is a public record and open to public inspection (See Sections 3 - 200 and 5 - 500, subd 5, of the Election Law).

The Court of Appeals, in Matter of M. Farbman and Sons, Inc. v New York City Health and Hospitals Corp., et al., ____ NY2d _____, decided May 10th, 1984, (Slip Opinion No. 179, pp 3-4), stated:

> "FOIL implements the legislative declaration that 'government is public business' (Public Officers Law §84), and imposes a broad standard of open disclosure upon agencies of the government. The statute 'proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.' (Matter of Fink v Lefkowitz, 47 NY2d 567, 571.) In furtherance of the legislative objective, all records of an agency are presumptively available for public inspection and copying, unless they fall within one of eight categories of exemptions. (Public Officers Law §87, subd 2.) To give the public maximum access to records of government, these statutory exemptions are narrowly interpreted, and the burden of demonstrating that requested material is exempt from disclosure rests on the agency. (Matter of Washington Post Co. v New York State Insurance Dept, ____ NY2d _____ [decided March 29, 1984]. FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 581.) Full disclosure by public agencies

is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request."

The informational data sought by petitioners are compiled by respondents on a record, the "Registration Poll Record", which is, admittedly, a public record. Given the public record status of the "Registration Poll Record", upon which respondents maintain the data which petitioners are seeking, it matters not that the Election Law fails to require respondents to maintain the phone number of the voter. For, as a general rule, the fact that a record is kept, although not required to be kept, brings the record within the scope of rights to access. As was stated in an analagous situation involving assessment records, equally applicable to both the voter history and phone number information sought here "[i]t appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information." Matter of Szikszay v Buelow, 107 Misc2d 886, 893. It should be noted in conjunction with the above that respondents' argument that release of such information would readily be used by political consultants or candidates for resale on a commercial or fundraising basis is speculative,

flies in the face of the public record status of the "Registration Poll Record", and is insufficient to overcome petitioners' interest in obtaining the records (See Teachers Assn. v Ret. System, 71 AD2d 250).

Considering then the legislative purpose behind FOIL and the public document-status of the "Registration Poll Record" it was therefore improper for respondents to deny petitioners' request for computer tapes including telephone numbers and voter history. It should be noted, however, that respondents need only supply to petitioners that voter history information which had already been transferred onto computer tapes at the time of petitioners' application, dated December 30th, 1983.

Inasmuch as Sections 5 - 602 and 5 - 604 of the Election Law apply only to published lists not being sought by petitioners, the "actual cost of reproducing any other record" standard, as set forth in §87, subd 1 (b) iii of the Public Officers Law, applies and respondents are hereby directed to make the requested computer tapes available at the cost of One Hundred Twenty-five ($125.00) Dollars per reel; said amount representing, by respondents' own concession in paragraph 15 of their affidavit, the actual cost of reproduction.

Finally, because respondents have failed to provide a reasonable and rationale basis to justify their policy of requiring payment of fees for copying of records in the form of only bank checks or money orders, it is further directed that respondents be required to accept United States currency in the form of bills and coins in payment of fees due for copies of records in addition to bank checks or money orders.

As stated above, the foregoing constitutes the opinion, decision and order of the court and the petition is hereby

granted to the extent of requiring respondents to make available to petitioners copies of computer tapes including voter telephone numbers and voter history information, as previously discussed, at a cost of One Hundred Twenty-five ($125.00) Dollars, per computer tape reel, to be paid in the form of either United States currency, in bills or coins, bank check or money order.

It is so ordered.

DATED: Buffalo, New York
June 28, 1984

Theodore S. Kasler

THEODORE S. KASLER
Justice of Supreme Court