



2764-15

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

INVESTIGATIVE POST, INC.,

Petitioner,

v.

FORT SCHUYLER MANAGEMENT CORP.,

Respondent.

VERIFIED PETITION

Oral Argument Requested

Index No. _____

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ALBANY, NY
CLERK OF COUNTY COURTS

Petitioner, Investigative Post, Inc., by and through its undersigned attorneys, Hiscock & Barclay, LLP (Joseph M. Finnerty and Karim A. Abdulla, of counsel), for its Verified Petition, states as follows:

Introduction

1. This proceeding is brought pursuant to Article 78 of the N.Y. Civil Practice Law & Rules (“CPLR”), and New York’s Freedom of Information Law (“FOIL”), Article 6 of the N.Y. Public Officers Law, §§ 84-90 *et seq.*

2. Attached hereto as “Exhibit 1” and submitted herewith is Petitioner’s Memorandum of Law in support of the proceeding and relief requested.

3. At its core, this proceeding concerns access to records and information concerning a matter of extreme public interest and concern – the “Buffalo Billion” – and the deliberate efforts to withhold from public view records and information related thereto. *See* Exhibit 1 *and see* discussion, *infra*.

4. In this proceeding, Petitioner seeks judicial review of the administrative determination made by Respondent Fort Schuyler Management Corp. (“FSMC”) denying its status as an “agency” subject to FOIL.

5. As a result of FSMC’s determination that it is not subject to FOIL, Petitioner has been denied access to records requested under FOIL.

6. Accordingly, Petitioner seeks an Order: (1) declaring FSMC to be an “agency” subject to FOIL and/or that the records sought are “agency records;” (2) compelling FSMC to produce in their entirety all records requested by the FOIL request that have not already produced; (3) granting Petitioner an award of attorneys’ fees and costs in connection with the proceeding; and (4) such other and further relief as the Court may deem just and appropriate in the circumstances.

The Parties

7. Petitioner Investigative Post, Inc. ("Investigative Post") is a domestic not-for-profit corporation duly organized and existing pursuant to the laws of the State of New York, with its principal place of business at 392 Pearl Street, Suite 301, Buffalo, New York 14202.

8. Petitioner Investigative Post is the only Western New York news organization dedicated exclusively to watchdog investigative journalism. Its investigative stories are published on a dedicated website (www.investigativepost.org) and are also distributed via partnership agreements by other Western New York media outlets including but not limited to WGRZ-TV, Buffalo's Gannett-owned NBC News affiliate.

9. Respondent FSMC is a domestic not-for-profit corporation duly organized and existing under the laws of the State of New York. According to its Certificate of Incorporation, its principal place of business is 100 Seymour Road, Utica, New York 13502. Its website, www.ftsmc.org, indicates contact with the corporation should be directed to the SUNY Polytechnic Institute, 257 Fuller Road, Albany, New York. The Secretary of State's information for FSMC indicates service of process, if effected by the Secretary, will be made on the General Counsel of the Research Foundation of SUNY in Albany. The General Counsel of FSMC is Carl Kempf. Mr. Kempf, as discussed *infra*, responded to Mr. Heaney's FOIL requests on behalf of both the SUNY Research Foundation and FSMC. In each and every one of these FOIL-related communications -- including his determination that FSMC is not subject to FOIL and other actions at issue in this proceeding -- Mr. Kempf identified his address as 257 Fuller Road, Albany, the same as the SUNY Polytechnic Institute. The Research Foundation of SUNY lists FSMC as an "Affiliated Corporation" formed by the Research Foundation in partnership with the SUNY IT Foundation. See www.rfsuny.org.

10. On information and belief, FSMC is a not-for-profit State University of New York ("SUNY") 501-c3 affiliated corporation that was "established by SUNY" and which, among other things,

acquires and manages properties on behalf of CNSE (formerly the Colleges of Nanoscale Science and Engineering) at the SUNY Polytechnic Institute in Albany, New York. *See* “State Funding Mechanism for Fort Schuyler Management Corporation,” published by FSMC and available on the FSMC website at <http://www.ftsmc.org/relevant-documents/>,¹ a true and correct copy of which is attached as “Exhibit 2.”

11. On information and belief, FSMC is involved in the funding and disbursement process with regard to Empire State Development Corporation funds and projects. *See* Exhibit 2.

12. On October 11, 2013, the Board of Directors of FSMC, by unanimous vote, authorized FSMC, in conjunction with CNSE, to conduct a competitive process to procure developer services by issuing a request for proposals to establish a strategic research, technology outreach, business development, manufacturing, and education and workforce training partnership with a qualified developer or developers in the Greater Buffalo Area. *See* “Summary of the Competitive Procurement Conducted by Fort Schuyler Management Corporation for the Awards Under the Request for Proposals for a Qualified Developer in the Greater Buffalo Area” at pp. 2-3, published by FSMC and available on the FSMC website at <http://www.ftsmc.org/relevant-documents/>, a true and correct copy of which is attached as “Exhibit 3.” Pursuant to this Board authorization, on October 15, 2013, the President of FSMC, Alicia Dicks, on behalf of FSMC and “in conjunction with SUNY CNSE,” issued a request for proposals (“RFP”) and a request for developer qualifications (“RFQ”) in the Greater Buffalo Area. *Id.* at p. 4.²

¹ On information and belief, it should be noted, however, that the “Relevant Documents” posted by FSMC on its website were not published until after Investigative Post initiated its inquiries for information and only after multiple FOIL requests by Investigative Post. As detailed below, despite the publication of these documents, FSMC continues to maintain its position that it is not subject to FOIL. In any event, these documents are not the core documents requested and which would reveal the selection process that resulted in the designation of the Buffalo Billion developers. *See* ¶ 35, *infra*.

² As originally issued on October 15, 2013, FSMC’s requests included the following developer requirement:

2. DEVELOPER REQUIREMENTS

A. FSMC, in conjunction with SUNY CNSE, is seeking a local DEVELOPER in the Greater Buffalo Area with the expertise, commitment, and business values needed to function as a strategic partner to rapidly and effectively advance the construction and operation of research, technology outreach, business development, manufacturing, and education and training hubs, as well as partner with FSMC and SUNY CNSE on strategic economic development initiatives. A proven record in

13. It is Petitioner's position that FSMC is subject to New York State's FOIL, New York Public Officers Law, Article 6, §§ 84 *et seq.* See Memorandum of Law (Exhibit 1); *see also* March 3, 2015 Advisory Opinion by the State of New York, Department of State's Committee on Open Government, a true and correct copy of which is attached as "Exhibit 4."

14. Based on information provided to Mr. Heaney by the SUNY Research Foundation, one of the State entities that established FSMC, *see* discussion *infra* and "Exhibit 10," and/or Mr. Kempf, the public records at issue reside in the possession, custody and/or control of FSMC.

Factual Background

Jim Heaney and The Buffalo Billion

15. Investigative Post was formed on November 15, 2011. *See* New York State Department of State Division of Corporations Entity Information for Investigative Post, Inc., a true and correct copy of which is attached as "Exhibit 5." It began publishing news on February 22, 2012.

16. Investigative Post's Editor and Executive Director is Jim Heaney ("Mr. Heaney").

17. Mr. Heaney is a veteran journalist with over three decades of experience as investigative reporter including, but not limited to, 25 years as an investigative journalist with *The Buffalo News*.

18. His work over the years has focused on government, urban and economic issues including but not limited to: racial discrimination and political favoritism at the Buffalo Municipal Housing

successfully implementing large-scale projects within the public-private partnership organizational context is essential. The successful DEVELOPER must demonstrate its ability to meet the following OWNER requirements:

Over 50 years of proven experience and successful track record in the construction and operation of mixed-use facilities and buildings, including Class A office space, electronic classrooms and conference rooms, high tech laboratory space, and advanced cleanroom infrastructure in the Greater Buffalo Area, with emphasis on nanotechnology, medical, and green energy infrastructure and facilities.

Location of headquarters and major operations in the Greater Buffalo Area, with extensive knowledge and demonstrated know how of the local real estate market and business and financial drivers in the Greater Buffalo Area.

This criteria would have limited the eligible pool of qualifying companies to one (1): LP Ciminelli, whose president, Louis Ciminelli, had contributed \$96,500 to Governor Andrew Cuomo during his two races for Governor. After questions and complaints arose among the public, the years-in-business requirement was later reduced to 15 years, with FSMC attributing the 50-year requirement to a "clerical error."

Authority; exposing Buffalo's biggest slumlords and their lenient treatment by the City's Housing Court; and conducting an exhaustive analysis of Buffalo public schools, tracking disparities in student achievement and detailing the deplorable condition of many school buildings.

19. Mr. Heaney also pioneered *The Buffalo News*' use of surveys to grade the performance of elected officials and produced a series of investigations related to economic development, including the failings of the state Empire Zone program and the city's squandering of federal block grant funds.

20. Mr. Heaney also has investigated and reported on State authorities, exposing waste and abuse at the Thruway Authority and New York Power Authority.

21. His investigations also have included politicians, including Buffalo Common Council members, State Senators, and gubernatorial candidates. In short, Mr. Heaney embodies the true definition of a watchdog journalist.

22. Mr. Heaney's investigation of Buffalo's misuse of block grant funds won *Governing Magazine*'s national reporting award in 2005. More recently, the New York State Associated Press selected Mr. Heaney's "Outrages & Insights" as the State's best newspaper blog in 2010. Over his career, Mr. Heaney has won more than 20 journalism awards and was a finalist for the 1993 Pulitzer Prize for investigative reporting.

23. In late 2012 Governor Cuomo announced the commitment by the State to invest \$1 billion of public funds in the Buffalo area economy, the stated purpose of which was "to create thousands of jobs and spur billions in new investment and economic activity over the next several years." See <http://buffalobillion.ny.gov/about-buffalo-billion>. This became known as "the Buffalo Billion."

24. As an "historic" commitment of public funding (*id.*), the announcement garnered the interest of many news organizations and reporters, including but not limited to Mr. Heaney, Investigative Post and its Gannett-owned partner, WGRZ-TV.

25. Given his background as an investigative reporter and watchdog journalist, Mr. Heaney as Editor and Executive Director on Investigative Post was extremely interested in how the Buffalo Billion process would play out: where would the money come from; where would it go; who was making these decisions; how the decisions were being made; and what oversight protocols were in place?

The Investigation and Investigative Post's Attempts to Obtain Records

26. It was in this context that Mr. Heaney and the Investigative Post began making inquiries, with Mr. Heaney seeking out public records concerning the award of contracts and the disbursement of the public's money.

27. Mr. Heaney became aware that, while some limited information concerning the Buffalo Billion was available, much of the information was not readily accessible. This included finding answers to questions concerning the solicitation of bids for projects, the Request for Proposal ("RFP") process, and the criteria and process of awarding contracts. In short, although the Buffalo Billion involved the historic commitment of \$1 billion in public funding, the process was byzantine and far from transparent.

28. As part of his investigation, Mr. Heaney on June 9, 2014 contacted Dr. Alain Kaloyeros to follow-up on documentation concerning two major Buffalo Billion projects, the technology hub in Key Center in downtown Buffalo (dubbed the "IBM" project as IBM is slated to be the first tenant) and the SolarCity project (dubbed "Riverbend" due to its location on the City's riverfront) for which McGuire Development and LP Ciminelli (two private entities), respectively, were selected as the winning contractors. See June 9, 2014 email from Mr. Heaney to Dr. Kaloyeros, a true and correct copy of which is attached as "Exhibit 6." This was an 'informal' request for information, not a formal FOIL request. This informal email request followed an earlier phone conversation with Mr. Kaloyeros in which he made a verbal commitment to provide documents related to the selection process.

29. On information and belief, Dr. Kaloyeros is the Vice Chairperson of FSMC, and CEO and Officer in Charge of SUNY Polytechnic Institute. See <http://www.ftsmc.org/boardofdirectors/>.

30. Receiving no response to his June 9 request, on June 24, 2014 Mr. Heaney followed up with Dr. Kaloyeros. *See* June 24, 2014 email from Mr. Heaney to Dr. Kaloyeros, a true and correct copy of which is attached as “Exhibit 7.” This too was an ‘informal’ request for information, not a formal FOIL request.

31. The June 24 request also was ignored.

32. As a result, on July 25, 2014 Mr. Heaney followed up yet again with Dr. Kaloyeros informally requesting the information and advising that he would prefer to avoid a formal FOIL request. *See* July 25, 2014 email from Mr. Heaney to Dr. Kaloyeros, a true and correct copy of which is attached as “Exhibit 8.”

33. This request also went unanswered.

The FOIL Request to the SUNY Research Foundation and the Categories of Records Requested

34. Undeterred, on July 30, 2014 Mr. Heaney as Editor and Executive Director of Investigative Post made a formal FOIL request for two categories of documents.

35. The first category of documents concerned the process and selection of developers awarded contracts for the proposed Buffalo Billion projects: in the language of the July 30 FOIL request, “[d]ocuments related to the selection process used to designate LP Ciminelli and McGuire Development³ as developers of several Buffalo Billion projects in Buffalo,” including, but not limited to:

- The names and titles/affiliations of members of the selection committee;
- Minutes of meetings conducted by the selection committee and, subsequently, the Fort Schuyler Management Corp.;
- Proposals submitted by companies that responded to the RFP or RFQ;
- Any staff or committee analysis of the proposals, including a ranking of candidates; and
- Any staff or committee recommendation on which firms to hire.

A true and correct copy of the July 30, 2014 FOIL request is attached as “Exhibit 9.”

³ As indicated, *see* footnote 2 *supra*, Ciminelli contributed \$96,500 to Gov. Cuomo’s campaigns. McGuire Development contributed \$2,000 to the Governor prior to its selection as a Buffalo Billion developer and another \$25,000 immediately after FSMC selected it as a developer. *See* Exhibit 28.

36. The second category of requested records were those concerning the projects themselves:

all original and amended contracts and/or memorandum of understandings between state and/or foundation entities and the following companies as they relate to the Buffalo Billion:

- SolarCity;
- Silevo;
- Soraa;
- Albany Molecular Research; and
- PerkinElmer;

as well as “any contracts or [memoranda of understanding] between any state/foundation entity and the developers of the Conventus Building on the Buffalo Niagara Medical Campus” as this project also was involved in the Buffalo Billion initiative. *Id.*

37. The July 30 FOIL request was sent to the designated FOIL address for the Research Foundation of SUNY (FOIL@rfsuny.org). *Id.*

38. Because of the lack of public records, it was Mr. Heaney’s understanding and belief at the time of his July 30 FOIL request that project and developer selection was spearheaded by the Research Foundation of SUNY (the “Research Foundation” or “Foundation”).

39. This belief was informed by the fact that a confidential source previously had provided the Investigative Post with a draft copy of one of the project agreements, which named the Research Foundation as a contracting party. On this basis, Mr. Heaney reasonably assumed that the Foundation had the lead role in both developing the projects and the developer selection process.

40. The belief as to the Foundation’s role was further informed by the fact that the Certificate of Incorporation for FSMC was filed by the Research Foundation of SUNY (the “Research Foundation” or “Foundation”). *See* New York State Department of State Entity Information for FSMC, a true and correct copy of which is attached as “Exhibit 10,” identifying the address to which the Department of State would mail process as “[FSMC] C/O OFFICE OF GENERAL COUNSEL, RESEARCH

FOUNDATION OF SUNY, P.O. BOX 9, 5TH FLOOR, ALBANY, NEW YORK, 12201-0009;" *See also*, e.g., Committee on Open Government Advisory Opinion, Exhibit 4, at p. 4.

41. Accordingly, Mr. Heaney directed Investigative Post's FOIL requests to the Foundation.

42. On August 20, 2014 Mr. Heaney made an additional FOIL request to the Research Foundation specific to the IBM and Riverbend projects and the selection of LP Ciminelli and McGuire Development, requesting:

copies of any contracts, MOUs, etc. between the Research Foundation for the State University of New York, the Fort Schuyler Management Corp., or any other state entities and LP Ciminelli and McGuire Development, or any of their affiliates, related to Buffalo Billion projects. LP Ciminelli has been selected to develop the Riverbend project in Buffalo and McGuire a project to accommodate IBM, and it is contracts, MOUs, etc. related to that work that I seek.

A true and correct copy of the August 20, 2014 FOIL request is attached as "Exhibit 19."

43. On August 26, 2014, Peter Taubkin, Records Access Officer for the Research Foundation, acknowledged the August 20 FOIL request stating that the Research Foundation "complies with FOIL" and advising that it would review its records and respond to the request within 20 business days.⁴ A true and correct copy of the Research Foundation's August 26, 2014 FOIL acknowledgment letter is attached as "Exhibit 20."

The Research Foundation's Limited Production

44. On September 16, 2014 – well beyond the requirement of Public Officers Law §89(3)(a) that responsive records be provided within 20 business days – the Foundation finally produced a limited population of records responsive to the July 30, 2014 FOIL request.

⁴ It is uncontroverted and, indeed, incontrovertible that the Research Foundation is subject to FOIL. *See* Exhibit 20; *see also*, e.g., Committee on Open Government Advisory Opinion, Exhibit 4, at p. 4, citing *Siani v. Research Foundation of the State University of New York*, Index No. 6976-06 (Sup. Ct. Albany Co. 2007).

45. On that date, Carl J. Kempf III, Associate Vice President for Policy and Regulatory Affairs for SUNY Polytechnic Institute⁵ ("Mr. Kempf"), acting on behalf of the Foundation, provided Mr. Heaney with a series of seven emails attaching three heavily redacted project agreements, three heavily redacted memoranda of understanding concerning the projects, a redacted project agreement amendment, a heavily redacted joint development agreement, and five unredacted "form" confidentiality/non-disclosure agreements. True and correct copies of the seven September 16, 2014 emails, with attachments, are attached as "Exhibit 11" through "Exhibit 17." Documents or information related to the first requested category of records (*i.e.*, those concerning the developer selection process) were not provided.

46. While the records, as provided, were partially responsive to the July 30 FOIL request (concerning contracts and/or memoranda of understanding between state and/or foundation entities and SolarCity, Silevo, Soraa, Albany Molecular Research, and PerkinElmer (*see* ¶ 36, *supra*)), they were of limited utility as they were heavily redacted.

Non-Disclosure of Documents Regarding Buffalo Billion Contractor Selection Processes

47. Moreover, the records provided did not shed any light on the developer selection process concerning the IBM and Riverbend projects and the ultimate selection of LP Ciminelli and McGuire Development (*see* ¶ 35, *supra*).

48. Accordingly and immediately following the receipt of Mr. Kempf's September 16, 2014 FOIL disclosures, Mr. Heaney telephoned Mr. Kempf to inquire about the lack of production of records concerning the developer selection process.

⁵ Mr. Kempf also identifies himself as Counsel for Fuller Road Management Corporation. *See* September 18, 2014 email from Mr. Kempf to Mr. Heaney advising of the FOIL appeal deadlines with respect to the September 16, 2014 FOIL responses, a true and correct copy of which is attached as "Exhibit 18." In addition, Mr. Kempf is identified as General Counsel to FSMC. *See* FSMC website at <http://www.ftsmc.org/managementteam/>.

49. Mr. Heaney was advised during this call that records concerning the developer selection process were in the possession of FSMC, not the Research Foundation, and that Mr. Heaney should direct his inquiries for such information to FSMC.

50. For the purpose of identifying FSMC's FOIL officer, Mr. Heaney followed up by "Googling" FSMC and locating the website.

51. At the time, the FSMC website Mr. Heaney looked at was uninformative and provided no contact information.

52. Accordingly, Mr. Heaney on September 17, 2014 followed up with Mr. Kempf requesting contact information for FSMC, the name phone number and email address of its FOIL officer and/or that of the executive director. A true and correct copy of Mr. Heaney's September 17, 2014 inquiry to Mr. Kempf is attached as "Exhibit 21." Mr. Heaney requested an immediate response to his inquiry. *Id.*

53. No immediate response was forthcoming.

54. Instead, by email correspondence dated September 24, 2014, Mr. Kempf on behalf of the Research Foundation simply advised Mr. Heaney that the Foundation was unable to locate any records within the scope of the August 20 FOIL request. A true and correct copy of Mr. Kempf's September 24, 2014 email communication is attached as "Exhibit 22."

55. However, Mr. Heaney's continued attempts to look behind the curtain and probe the selection process apparently struck a nerve within FSMC, as they resulted on November 7, 2014 in a heated email exchange between Mr. Heaney and Dr. Kaloyeros in which Dr. Kaloyeros accused Mr. Heaney of engaging in threats and acts of "terrorism." True and correct copies of this email exchange are attached as "Exhibit 23."

The FOIL Request to FSMC at Issue in this Proceeding

56. Mr. Heaney made repeated efforts and attempts over a period of six months (June through November 2014) to obtain records and information concerning the selection process involving the IBM and Riverbend projects, and the selection of LP Ciminelli and McGuire Development as developers.

57. These efforts proved fruitless: the requests either were ignored, or Mr. Heaney was advised that the Research Foundation did not have the records.

58. On information and belief, the refusal to provide the records was the result of deliberate stonewalling and obfuscation.

59. Having been advised that the records were in the possession of FSMC, Mr. Heaney on November 20, 2014 sent a FOIL request directly to FSMC as follows:

"I request, under the state FOI law, the following documents related to the selection process used to designate LP Ciminelli and McGuire Development as developers of several Buffalo Billion projects in Buffalo as administered by Fort Schuyler Management Corp.

The requested records include:

- The names and titles/affiliation of members of the selection committee.
- Proposals submitted by companies that responded to the RFP or RFQ.
- Any staff or committee analysis of the proposals, including a ranking of candidates.
- Any staff or committee recommendation on which firms to hire.
- Minutes of meetings conducted by the selection committee and, subsequently, the Fort Schuyler Management Corp. where selection votes were taken.

I previously requested these documents from the SUNY Research Foundation, but was informed your corporation possesses them.

In addition, I request the following related to Buffalo Billion work:

- All documents related to the process used to select the Conventus Building as the location to place AMRI.
- All contracts, change orders, MOUs or other written agreements between Fort Schuyler Management Corp. and LP Ciminelli, r.e.

Riverbend; McGuire Development, r.e. Key Tower; and the developer of record for the Coventus Building/AMRI project.

· A current roster of the board of directors of the Fort Schuyler Management Corp.

· A copy of the mission statement of the corporation, if one exists.

Please send material as it becomes available, rather than waiting until you have collected all of it. Given that most, if not all of what I requested involves readily available documents, I ask that you process my request in an expedited fashion."

A true and correct copy of the November 20, 2014 FOIL request is attached as "Exhibit 24."

60. Despite the fact that Mr. Heaney had been requesting this information for months, had sought an expedited response, and had specifically been advised by Mr. Kempf to seek the records from FSMC, the records remained hidden from view.

61. By email dated November 28, 2014, a true and correct copy of which is attached as "Exhibit 25," Mr., Kempf, while acknowledging the November 20 FOIL request, took the position that "FSMC is not an Agency (as defined under FOIL Section 86.3) and, therefore is not subject to FOIL." As set forth in the Notice of Petition and attached Memorandum of Law, this is the primary issue in this proceeding, *i.e.*, whether FSMC is an "agency" subject to FOIL.

62. Mr. Kempf continued, advising that although FSMC was not required to do so (because it was not subject to FOIL), it would review the request and issue a response "on or before December 29, 2014." *Id.*

63. Although responsible for \$1 billion in public money, FSMC's response was, in essence, 'we don't have to tell you anything, but we might at some later date if it suits us.'

64. Undeterred, on December 19, 2014, Courtney French (in-house counsel for Gannett Co., Inc., the parent company of WGRZ-TV) on behalf Mr. Heaney and Investigative Post appealed the denial of November 20, 2014 FOIL request, rejecting FSMC's position that it was not subject to FOIL. A true and correct copy of Ms. French's December 19, 2014 FOIL appeal letter is attached as "Exhibit 26."

65. On December 22, 2014 Mr. Kempf responded to the December 19 FOIL appeal. A true and correct copy of Mr. Kempf's December 22 communication is attached as "Exhibit 27."

66. Mr. Kempf rejected the appeal in its entirety and treated it as premature and a nullity; in FSMC's view, the November 28, 2014 statement denying FOIL applicability to FSMC was not a denial of the November 20 FOIL request. *See* Exhibit 27.

67. Firmly believing the public had the right to know how its money was being spent – and, just as importantly, how records and information were being hidden from view – the Investigative Post on December 22, 2014 published the article "Suppression of Buffalo Billion spending records." The story was published on the Investigative Post website, that of independent news organization City & State, and portions were broadcast and published by WGRZ. True and correct copies of the December 22, 2014 story written by Mr. Heaney and published by Investigative Post and City & State are attached as "Exhibit 28" and "Exhibit 29."

68. In the December 22 story, Mr. Heaney detailed his efforts to obtain the information, the importance of transparency, and the inexplicable resistance to disclosure demonstrated by FSMC. *See* Exhibits 28 and 29.

69. Immediately following the story, Mr. Kempf on December 24, 2014 on behalf of FSMC – in what can only be described as a bold showing of hubris, contempt and "bullying" – issued a retaliatory FOIL request to Investigative Post seeking the disclosure of the names and addresses of any person or entity who had provided a gift, contribution or grant to Investigative Post during 2012, 2013 and 2014, as well as the dates and amounts of such gifts, contributions or grants. A true and correct copy of FSMC's FOIL request is attached as "Exhibit 30."

70. That same day, Mr. Kempf on behalf of FSMC issued a "cease and desist" letter to Gannett demanding that WGRZ remove from its website the "Suppression of Buffalo Billion spending records" story. A true and correct copy of Mr. Kempf's December 24, 2014 letter is attached as "Exhibit 31."

71. In the letter, Mr. Kempf claims that the December 22, 2014 story contained “inaccurate, misleading and/or false statements.” *Id.*

72. In support of his argument Mr. Kempf claims, among other things, that Mr. Heaney knew or should have known more about FSMC, its role, and the developer selection process because “FSMC publishes project related information on its website at <http://www.ftsmc.org/>.” *Id.* at p. 3. However, the FSMC website does not publish the core selection process documents that detail how LP Ciminelli and McGuire Development were selected. Rather, at the time it included merely a self-serving summary document describing FSMC’s version of the process. This is a far cry from producing the process documents themselves that would allow the public to examine and judge the integrity of the process and the selections.

73. Mr. Kempf’s claims are illusory, at best, giving the misimpression of transparency where none exists.

74. As described above, during the entire period of investigation by Mr. Heaney up through the publication of the December 22, 2014 story, FSMC had taken the position it was not subject to FOIL and, indeed, had not provided any responsive records, and the FSMC website was devoid of substantive content.

75. By the December 24 letter, FSMC maintained its position that it was not subject to FOIL. *See* Exhibit 31 at p. 4.

76. A copy of FSMC’s threatening December 24 letter also was sent to City & State (which too had published the December 22 story (*see* Exhibit 29)). A true and correct copy of the December 24 transmittal letter to City & State is attached as “Exhibit 32.” In the transmittal letter, Mr. Kempf sought publication of FSMC’s December 24 letter. *Id.*

77. On December 29, 2014, Mr. Kempf on behalf of FSMC responded to the November 20, 2014 FOIL request. A true and correct copy of the December 29, 2014 FSMC "FOIL Response" is attached as "Exhibit 33."

78. In the December 29 FOIL Response, FSMC merely referred Mr. Heaney to the FSMC website claiming that it "contains documents responsive to [the] request" and that "[i]f and when other relevant documents no longer have the potential to impair the imminent award of contracts or substantially injure the competitive position of subject entities, consideration will be given to making those documents available on the website." *Id.*

79. On its face and by its language, the December 29 FOIL Response constitutes a de facto admission that FSMC has in its possession, custody or control records responsive to the FOIL request.

80. The December 29 FOIL Response avoids mention of the issue of whether FSMC is subject to FOIL. *Id.*

81. The December 29 FOIL Response does not cite to any provisions of FOIL as a basis for withholding the requested records.⁶

82. On December 30, 2014, Investigative Post responded to FSMC's December 24 FOIL request advising that while the media organization was not subject to FOIL, all donors above \$1,000 were listed at the company's website. A true and correct copy of the December 30, 2014 response letter is attached as "Exhibit 34."

83. On December 31, 2014, WGRZ responded to FSMC's December 24 "cease-and-desist" letter. A true and correct copy of the December 31, 2014 response letter is attached as "Exhibit 35."

84. Per its December 31 response letter, WGRZ determined to stand by the story as it aired on WGRZ. *Id.*

⁶ It is noted, however, that the language used in the December 29 FOIL Response (*i.e.*, referring to "the potential to impair the imminent award of contracts or substantially injure the competitive position of subject entities") appears to be a reliance on Public Officers Law §§ 87(2)(c) and 87(2)(d).

85. WGRZ invited a representative of FSMC to appear for an on-camera interview to discuss the story. *Id.* On information and belief, FSMC never responded to the invitation.

86. On January 5, 2015, Courtney French on behalf Mr. Heaney and Investigative Post appealed the December 29 FOIL Response. A true and correct copy of Ms. French's January 5, 2015 FOIL Appeal is attached as "Exhibit 36."

87. By the January 5 FOIL Appeal, it is clear that despite FSMC's self-serving claim that responsive records were published on its website, many of the requested records still had not been provided or otherwise made available, including:

- Any staff or committee analysis of the proposals, including a ranking of candidates;
- Any staff or committee recommendation on which firms to hire;
- Minutes of meetings conducted by the selection committee and, subsequently, the FSMC meetings where selection votes were taken;
- All documents related to the process used to select the Conventus Building as the location to place AMRI; and
- All contracts, change orders, or other written agreements between FSMC and LP Ciminelli regarding Riverbend, McGuire Development regarding Key Tower, and the developer of record for the Conventus Building/AMRI project.

Id. Thus, FSMC blatantly continues to shroud in illegal secrecy documentation that would reveal how contractors have been selected to receive millions of dollars within the Buffalo Billion initiative.

88. The January 5 FOIL Appeal also challenged and rejected FSMC's position that it was not subject to FOIL. *Id.*

89. In correspondence dated January 20, 2015, a true and correct copy of which is attached as "Exhibit 37," Mr. Kempf on behalf of FSMC responded to the January 5 FOIL Appeal.

90. In its January 20 correspondence, FSMC maintained its position that it was not subject to FOIL. *Id.*

The State Committee on Open Government Rules FSMC is Subject to FOIL and Must Disclose Responsive Records

91. On February 4, 2015, Ms. French sought from New York's Committee on Open Government an Advisory Opinion concerning FSMC's position that it was not subject to FOIL. A true and correct copy of Ms. French's February 4 Advisory Opinion request is attached as "Exhibit 38."⁷

92. On March 3, 2015 the Committee on Open Government issued its Advisory Opinion. A true and correct copy of the March 3 Advisory Opinion is attached as "Exhibit 4."

93. Robert J. Freeman, the Committee's Executive Director, concluded in the Advisory Opinion that:

FSMC constitutes an "agency" required to give effect to FOIL, and further, that even if it is not an agency, its records are subject to the rights of access conferred by FOIL. FSMC's relationships with government and the extent to which it is under the control of and functions for the government bring its records within the scope of FOIL. This is not intended to suggest that every record sought by Mr. Heaney must be made available, but rather my belief that all such records fall within the coverage of FOIL.

Id. at p. 1.

94. In the circumstances, Investigative Post asserts that FSMC's claim that it is not subject to FOIL is patently unsupportable.

95. In the circumstances, Investigative Post asserts that FSMC's denial of access to the requested records is patently unsupportable.

96. Investigative Post has complied with and exhausted all administrative procedures and conditions pertaining to accessing FSMC's records under the provisions of FOIL.

⁷ The attachments referenced in Ms. French's Advisory Opinion request have been reproduced in the Exhibits previously identified and attached. In the circumstances, they are not reproduced as part of Exhibit 38.

**FIRST CAUSE OF ACTION: DECLARATION THAT RESPONDENT IS AN
AGENCY SUBJECT TO FOIL AND MUST PROVIDE RESPONSIVE
DOCUMENTS**

97. Petitioner repeats and realleges all of the allegations set forth above as if more fully set forth herein.

98. Petitioner commences the instant special proceeding seeking a writ of prohibition and mandamus, and all other appropriate relief pursuant to Article 78 of the CPLR and § 89(4)(b) of the Public Officers Law.

99. Based on Petitioner's good faith understanding as stated in ¶ 9, *supra*, it believes venue in the instant proceeding is appropriate in either Albany County or in Oneida County pursuant to CPLR § 7804(b) and CPLR § 506(b) because Oneida County is the location of FSMC's offices and because Albany County is where Respondent through Mr. Kempf made the determinations complained of and/or refused to perform the duties specifically enjoined upon them by law.⁸

100. Petitioner seeks to prohibit enforcement of, and to vacate, Respondent's determinations: (1) that it is not subject to FOIL; and (2) denying public access to agency records under FOIL, on the grounds that such denials result from Respondent's failure to perform a mandatory duty enjoined upon it by law and/or were affected by errors of law in that the decisions were contrary to the provisions of FOIL, and/or were arbitrary and capricious, and such other grounds for relief as may be available.

101. The instant proceeding is ripe for judicial review.

102. The instant proceeding is timely brought within four months of the final determinations complained of, Petitioner has no adequate remedy at law, and has made no prior application for the relief sought herein to any court or judicial tribunal.

⁸ In the event Respondent disagrees with Petitioner's selection of the venue, Petitioner invites Respondent to discuss the matter with counsel to resolve the venue placement without motion practice.

**SECOND CAUSE OF ACTION: AN AWARD OF PETITIONER'S ATTORNEY'S
FEES AND COSTS**

103. Petitioner repeats and realleges all of the allegations set forth above as if more fully set forth herein.

104. Petitioner is likely to substantially prevail on the merits of its claim in that Respondent's claim that it is not subject to FOIL and its denial of access to records under FOIL was a willful failure to perform its legal duties, irrational, arbitrary and capricious, and contrary to law, and that Respondent had no reasonable basis for denying access to the requested records.

105. 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.

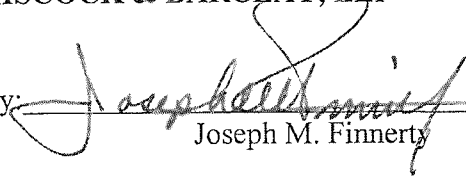
WHEREFORE, Petitioner respectfully requests entry of a Judgment:

- (1) Vacating, annulling, overruling and prohibiting the further enforcement of the determination of FSMC that it is not subject to FOIL;
- (2) Declaring that FSMC is subject to FOIL and/or is in possession of "agency records";
- (3) Directing Respondent to provide Petitioner access to the records sought;
- (4) Awarding Petitioner costs, disbursements, and attorneys' fees pursuant to Section 89(4)(c) of the Public Officers Law; and,
- (5) Awarding Petitioner such other and further relief as to the Court may seem just and proper.

DATED: May 15, 2015

HISCOCK & BARCLAY, LLP

By:


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HISCOCK & BARCLAY, LLP

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

JIM HEANEY, being duly sworn, deposes and says that he is the Editor and Executive Director of Investigative Post, Petitioner named in the above-captioned action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true; the sources of his information and the grounds of his belief as to all matters stated to be alleged on information and belief consist of his investigation into the facts and circumstances of the above-captioned action.



JIM HEANEY

Subscribed and sworn to before me
this 18th day of May, 2015



Notary Public

KARIM A. ABDULLA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Nov. 13, 20__