

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X	:	
In the Matter of,	:	
	:	
NEW YORK CIVIL LIBERTIES UNION; and	:	Index No. _____
AMERICAN CIVIL LIBERTIES UNION,	:	
	:	
Petitioners,	:	
	:	
-against-	:	
	:	
VILLAGE OF KIRYAS JOEL,	:	
	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules.	:	
-----X	:	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

This Article 78 petition seeks to vindicate the right of the public and of the petitioners, the New York Civil Liberties Union (“NYCLU”) and the American Civil Liberties Union (“ACLU”) (collectively “Petitioners”), to learn about the creation, financing, operation, and maintenance of a gender-segregated park, most likely the first in the country, by the Village of Kiryas Joel (“the Village”). The park reportedly consists of separate play areas and walking paths, divided by gender, including two play areas with red and pink equipment for girls and two play areas with blue equipment for boys. Media reports quote Village officials discussing the involvement of the local government and the “Committee of Modesty” in the creation and operation of the park.

These reports raise serious concerns for the Petitioners that the Village is using public resources to exclude certain groups from accessing portions of the park or the site altogether in the name of religion, thus violating the Equal Protection Clause and the Establishment Clause of the United States Constitution, as well as applicable state laws. The Petitioners therefore sought documents and records concerning the park from the Village under the Freedom of Information Law (“FOIL”). Specifically, the Petitioners sought records relating to the construction and operation of the park and ownership and financing of the property, as well as records relating to Village structure and outside public financing that would shed light on how government and taxpayer dollars might have been used to support the park.

The Village denied the Petitioners’ request in full and refused to produce a single responsive document. In doing so, the Village failed to comply with the mandates of FOIL by disregarding certification and notification requirements and withholding documents that the

Village is obligated by law to maintain. The Petitioners subsequently filed an appeal that the Village failed to acknowledge, much less to answer substantively.

This Article 78 seeks to uncover records that the Village refuses to identify and produce. After exhausting administrative remedies, the Petitioners now seek judicial relief to compel the Village of Kiryas Joel to comply with its legal obligation to perform a diligent search and produce all records responsive to the Petitioners' request.

FACTS AND PROCEDURAL HISTORY

Kiryas Joel is an independent village incorporated in 1977 and entirely contained within the town of Monroe. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 690-91 (1994). The residents of Kiryas Joel, including government officials, are all members of the Satmar Hasidic sect of Judaism. *Id.* Religion is pervasive throughout all aspects of Village life, both public and private. *See generally id.* at 690-92.

The Village derives its name from the town where the first Grand Rabbi of the Satmar sect, Rabbi Joel Teitelbaum, founded the community. *Grumet*, 512 U.S. at 691. According to Kiryas Joel Voice, www.kjvoice.com, a website that serves as a "clearinghouse for information and communication concerning the Kiryas Joel community," the Village was founded for the purpose of providing housing for lower-income observant Jewish families who could not afford sufficient residential space in Williamsburg, Brooklyn. *Early Stirring*, Kiryas Joel Voice.¹ The website provides countless other examples of the significant role Satmar Hasidic Judaism plays in Village life. *See Kiryas Joel's Biggest Industry: Education*, Kiryas Joel Voice (describing "Torah education" as "a focal point of life at Kiryas Joel");² *A Model Community*, Kiryas Joel

¹ Available at <http://www.kjvoice.com/aboutkjDet.asp?ARTID=3> (last visited Nov. 25, 2013) and attached as Exhibit A to the Affirmation of Brooke Menschel, dated December 10, 2013 ("Menschel Aff.")

² Available at <http://www.kjvoice.com/aboutkjDet.asp?ARTID=10> (last visited Nov. 25, 2013) and attached to the Menschel Affirmation as Exhibit B.

Voice (stating that the Village is built around “traditional values” and the “customs of Hasidic and Orthodox Jewish life”);³ Frequently Asked Questions, Who are the Satmar Chasidim?, Kiryas Joel Voice (describing Rabbi Joel Teitelbaum’s son Rabbi Aaron Teitelbaum as the Village Grand Rebbe who is consulted on all Village affairs).⁴

Over the last quarter-century, the Village has faced numerous legal challenges as a result of excessive entanglement between religion, specifically the Satmar Hasidic sect of Judaism, and all aspects of Village life. Perhaps most famously, in 1994 the United States Supreme Court determined that a law creating a publicly-funded school district within the Kiryas Joel borders amounted to an unconstitutional “fusion of governmental and religious functions.” *Grumet*, 512 U.S. at 696. The Court concluded that the law, aimed at allowing local children with special needs to attend public school without leaving their religious enclave, violated the Establishment Clause of the First Amendment. *Id.*

A federal court has also struck down an effort to promote gender segregation in the Village in the name of religion. In 1986, the United States District Court for the Southern District of New York struck down a scheme, advanced by Village officials, which prevented female drivers from operating public school buses in the Village. The court found that the scheme had “the primary effect of advancing Hasidic religious beliefs,” would result in disparate treatment of female bus drivers, and violated both the Establishment Clause of the First Amendment and the Title VII ban on sex discrimination in employment. *Bollenbach v. Board of Educ. of Monroe-Woodbury Cent. School Dist.*, 659 F. Supp. 1450, 1475 (S.D.N.Y. 1987).

³ Available at <http://www.kjvoice.com/aboutkjDet.asp?ARTID=13> (last visited Nov. 25, 2013) and attached to the Menschel Affirmation as Exhibit C.

⁴ Available at <http://www.kjvoice.com/faq.asp> (last visited Nov. 25, 2013) and attached to the Menschel Affirmation as Exhibit D.

In the spring of 2013, media sources reported on the opening of a gender-segregated park on over 280 acres of Village-owned unincorporated land in the Town of Monroe for use by the residents of Kiryas Joel. *See, e.g.,* Jane Gayduk, *No More Play Dates? Sex-Segregated Park Opens in New York*, N.Y. Observer, Apr. 12, 2013;⁵ Shlomo Greenberg, *Park of Kiryat Yoel: Blue for Boys, Red for girls*, Behadrey Haredim (Apr. 13, 2013, 7:59 PM).⁶ The media reported that the park was funded through “special financing” from the mayor, and that the Village government was intimately involved in planning the park. *Id.* The park appears to be located on publicly owned Village property purchased more than a decade ago and identified a year before the park opened when regional newspaper the Times Herald-Record first reported on construction of the park for the use of Kiryas Joel residents. *See* Chris McKenna, *Kiryas Joel Park Construction Advances*, Times Herald-Record, March 31, 2012.⁷ Orange County property records show that the Village owns at least 90 acres of property in the area described and pictured in the Times Herald-Record article and other media reports. *See* Orange County property records, attached to the Menschel Affirmation as Exhibit H. The corresponding Orange County tax map shows that the Village owns all of the property where the park sits and in the immediately surrounding area. *See* Tax Map, Orange County-New York.⁸

According to one community activist, the park provides a unique resource for the Kiryas Joel community, who now have access to a “park which is fully sex segregated, according the strict laws of true Torah Jews.” Daily Mail Reporter, *Ultra-Orthodox Jewish Village in New York*

⁵ Available at <http://observer.com/2013/04/kiryas-joel-sex-segregated-park-opens-in-new-york/> and attached to the Menschel Affirmation as Exhibit E.

⁶ Available at <http://www.bholworld.com/ArticlePrintEng.aspx?id=53243> and attached to the Menschel Affirmation as Exhibit F.

⁷ Available at <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20120331/NEWS/20310329> and attached to the Menschel Affirmation as Exhibit G.

⁸ Available at <http://propertydata.orangecountygov.com/imate/quickstream.aspx?file=PDFMAPS/334089/002000.PDF> and attached to the Menschel Affirmation as Exhibit I.

Builds Children's Playground Where Genders are Strictly Segregated, Mail Online (Apr. 14, 2013, 4:58 PM EST).⁹ Photographs of the park published on the Behadrey Haredim website confirm that visitors are greeted by a large sign, in Yiddish, laying out the principles of modesty that should be observed inside the park. Greenberg, *supra* (Menschel Aff. Ex. F). One of the Yiddish signs reportedly warns visitors to “maintain gender separation in all public areas.” Daily Mail Reporter, *supra* (Menschel Aff. Ex. J). Once inside, park-goers are divided into four gender-segregated zones, accessible by gender-segregated walking paths: blue facilities are designated for boys, red and pink for girls. Two separate areas with color-coded red and pink and blue equipment are reserved for young girls with mothers and young boys with fathers. *See* Gayduck, *supra* (Menschel Aff. Ex. E); Greenberg, *supra* (Menschel Aff. Ex. F); Daily Mail Reporter, *supra* (Menschel Aff. Ex. J); *see also* Satellite Images, Google Maps (showing the color-coded equipment in the park and plotting the Village-owned property in the area according to the Orange County property database).¹⁰

News accounts state that the Village Grand Rebbe and the Committee of Modesty of Kiryas Joel supervise the park on behalf of the Village to ensure that the modesty principles are observed. *See* McKenna, *supra* (Menschel Aff. Ex. G); Gayduk, *supra* (Menschel Aff. Ex. E); *see also* Dan Levin, *A Display of Disapproval That Turned Menacing*, N.Y. Times, (Dec. 16, 2007) (reporting on the nature of Kiryas Joel's modesty committee and a surrounding controversy).¹¹ Village officials are quoted discussing how the park's gender-segregation scheme

⁹ Available at <http://www.dailymail.co.uk/news/article-2309112/Ultra-orthodox-Jewish-village-New-York-builds-childrens-playground-genders-strictly-segregated.html> and attached to the Menschel Affirmation as Exhibit J.

¹⁰ Available at <https://maps.google.com/maps?q=kiryas+joel&ll=41.32001,-74.163026&spn=0.002639,0.004056&hnear=Kiryas+Joel,+Orange,+New+York&gl=us&t=h&z=18> and <https://maps.google.com/maps?q=kiryas+joel&ll=41.319607,-74.157672&spn=0.010556,0.016222&hnear=Kiryas+Joel,+Orange,+New+York&gl=us&t=h&z=16> and attached to the Menschel Affirmation as Exhibit K.

¹¹ Available at http://www.nytimes.com/2007/12/16/nyregion/16shun.html?_r=1&pagewanted=print and attached to the Menschel Affirmation as Exhibit L.

“allow[s] the place to remain completely pure.” Greenberg, *supra* (Menschel Aff. Ex. F) (quoting Municipal Treasurer/Village Clerk/Administrator Gedalye Szegedin (“Szegedin”)) (spelled interchangeably as “Gedalia Segdin” in news reports). Mr. Szegedin also “described the park as under the supervision of the Committee of Modesty of Kiryas Joel and under the guidance of the Grand Rebbe.” Ryan Lee Hall, *Satmar Hasidic sect unveils first in the U.S. sex segregated public playground in New York*, YourJewishNews.com.¹² Another article cites Village Attorney Donald Nichol discussing the Park’s policies and procedures. McKenna, *supra* (Menschel Aff. Ex. G).

Media outlets also report that the park will be restricted to Kiryas Joel residents or the local Hassidic population. *See, e.g.*, McKenna, *supra* (Menschel Aff. Ex. G) (quoting Councilman Harley Doles saying “[m]y understanding is [the park is] only for the residents of Kiryas Joel”); Greenberg, *supra* (Menschel Aff. Ex. F) (“Foreigners who do not belong to the Orthodox stream[] are not allowed to work out and the site is reserved for locals only.”); Daily Mail Reporter, *supra* (Menschel Aff. Ex. J) (“It has also been reported that only the Satmar of Kiryas Joel will be allowed in the playground.”).

In order to confirm the reporting and obtain additional information, the NYCLU and ACLU sent a request for information under FOIL on July 23, 2013. Letter from Brooke Menschel to Gedalye Szegedin (July 23, 2013) (Menschel Aff. Ex. N) [hereinafter “Request”].

The Request sought:

1. Records relating to ownership of the land upon which the park stands.
2. Records relating to the terms of the most recent sale of the park property to the current owners.
3. Records relating to sources of funding for the purchase of the property on which the park is located.

¹² Available at <http://www.yourjewishnews.com/2013/04/26642.html> and attached to the Menschel Affirmation as Exhibit M.

4. Records relating to all sources of funding for construction and operation of the park, including the sources of any special financing received for the construction and operation of the park.
5. Municipal ordinances, policies, regulations, rules, or records relating to the governance and operation of the park.
6. Records relating to segregation of males and females within the park, and the enforcement of such segregation.
7. Records relating to exclusion of any group of people from the park.
8. Records relating to any groups, organizations, or entities involved in the operation of the park
9. Records relating to the relationship between the “Committee of Modesty of Kiryas Joel” and any governmental unit, including but not limited to records of funding or staffing that the Village of Kiryas Joel provides to the Committee of Modesty of Kiryas Joel.
10. Incorporation documents for the Village of Kiryas Joel.
11. Records describing the governance structure of the Village of Kiryas Joel.
12. Records describing the role of the Town of Monroe in the governance of Kiryas Joel.
13. Records relating to any funds provided by the Town of Monroe to the Village of Kiryas Joel from January 1, 2008 through present, including but not limited to the amount of any such revenue and any conditions on the use of such revenue.
14. Records relating to routine allocations, grants, or special funding requested or received since 2000 from county, state, or federal agencies concerning proposed or actual village improvements, including but not limited to the State’s 2001 grant to the Village.

See id. The Request attached two media reports as a reference. *See id.*

The Village rejected the Petitioners’ request. *See* Letter from Donald Nichol to Brooke Menschel (August 9, 2013) (Menschel Aff. Ex. O) [hereinafter “Response”]. In a letter dated August 9, 2013,¹³ Village Attorney Donald Nichol did not address the individual requests or certify, as required, that the Village had conducted a diligent search for responsive records. Instead, Mr. Nichol, on behalf of the Village, asserted blanket ignorance of the park, saying only that “the Village has no information regarding” the park described in the Request, that there are “no records meeting [Petitioners’] requirements” and that “the Village has no gender-segregated public park located on approximately 280 acres of property.” Response (Menschel Aff. Ex. O).

¹³ The Village’s response came well beyond the five-day time limit imposed under FOIL. *See* Response (Menschel Aff. Ex. O).

The Village also claimed that “the Village has never enforced any segregation of any type” and “is not aware of any ‘Committee of Modesty of Kiryas Joel.’” *Id.* Finally, Mr. Nichol accused the NYCLU and ACLU of defamation, claiming that even a request under FOIL for records concerning widely-reported gender segregation amounted to defaming the Village. *Id.*

Although the Response did not include information about Petitioners’ right to appeal,¹⁴ the Petitioners filed an administrative appeal on August 28, 2013. Letter from Brooke Menschel to Mayor Abraham Wieder and Clerk Gedalye Szegedin (August 28, 2013) (Menschel Aff. Ex. P) [hereinafter “Appeal”]. As the Village failed to provide the proper notification on the appellate procedure, and the Village does not appear to have a FOIL Appeals Officer, the Petitioners directed the Appeal to Village Mayor Abraham Wieder and Deputy Clerk Gedalye Szegedin, with a copy to the Village Attorney. *See id.* The Appeal cited various state laws and public statements indicating that the Village possesses at least some, and likely many, of the requested records, and cited the FOIL rule that requires the Village to certify that it conducted a diligent search for responsive records. *Id.* The Village failed to respond to or even acknowledge the Appeal. *See id.*

ARGUMENT

I. THE FREEDOM OF INFORMATION LAW ESTABLISHES A BROAD RIGHT OF PUBLIC ACCESS TO GOVERNMENT RECORDS THAT CAN BE ENFORCED VIA ARTICLE 78.

The New York State legislature, in enacting the Freedom of Information Law, created a broad right of public access to government records in order to foster transparency and

¹⁴ The Second Department has previously admonished the Village school district for failing to meet “its responsibility to advise the petitioner that [appellate] review was available, and of the procedures for securing it.” *Orange County. Publications v. Kiryas Joel Union Free School Dist.*, 724 N.Y.S.2d 167, 168 (2d Dep’t 2001)(citation omitted). Despite the Appellate Division decision, Kiryas Joel once again failed to “advise Petitioners of the] right to appeal to the person or body designated to determine appeals,” and to identify “by name, title, business address and business telephone number” the appropriate appellate officer as required by 21 N.Y.C. R.R. § 1401.7(b).

accountability in government. N.Y. Pub. Off. Law § 84; *see also* *Town of Waterford v. N.Y. State Dept. of Environmental Conservation* 18 N.Y.3d 652, 656-57 (2012); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565-66 (1986) (“The Freedom of Information Law expresses this State’s strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies.” (citation omitted)). Indeed, this commitment to open government is captured in the statute’s legislative declaration:

[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. . . . The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

N.Y. Pub. Off. Law § 84. Because FOIL “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,” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979), the law requires state and municipal agencies to make available for public inspection and copying all agency records except those that fall within one of the statute’s ten narrowly drawn exemptions. *See* N.Y. Pub. Off. Law § 87(2)(a)-(j); *see also* *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274-75 (1996).

The legislature reemphasized the breath of the statute and narrowness of the exemptions when expanding the law in 2008:

The legislation supports the position that has been taken in numerous court decisions that government records in all forms, including non-paper records, are preemptively open for public inspection and copying unless those records fall within a specific statutory exemption. The courts also have repeatedly ruled that these exemptions are to be narrowly construed.

Legislative Memo, Justification for A.809-C, 231st Sess., Reg. Sess. (2008).

An agency seeking to withhold records “bear[s] the burden of demonstrating that the requested material falls squarely within an exemption by articulating a particularized and specific

justification for denying access.” *Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292 (3d Dep’t 2009); *see also Capital Newspapers*, 67 N.Y.2d at 566; *M. Farbman & Sons v. N.Y. City Health & Hospitals. Corp.*, 62 N.Y.2d 75, 80 (1984). The “agency does not have carte blanche to withhold any information it pleases” *Fink*, 47 N.Y.2d at 571 (citation omitted).

Where an agency denies access to records sought under FOIL, the statute provides for an administrative process whereby a person may appeal the agency’s initial denial and, upon further denial by the agency, may initiate a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules for judicial review of the denial. N.Y. Pub. Off. Law § 89(4)(a)-(c). In such a proceeding, the agency bears the burden of proving that the records sought fall within FOIL’s statutory exemptions, *id.* § 89(4)(b), and a court may assess reasonable attorneys fees and other litigation costs against the agency when the person has substantially prevailed and the agency had no reasonable basis for denying access, *id.* § 89(4)(c).

In accordance with the FOIL statute, the Petitioners’ challenge Kiryas Joel’s blanket withholding of responsive records concerning the park and seeks release of these records via this Article 78 proceeding.

II. THE COURT SHOULD REQUIRE A DILIGENT SEARCH FOR RESPONSIVE RECORDS BECAUSE THE VILLAGE’S RESPONSE IS PROCEDURALLY DEFICIENT.

The Response to the Petitioners’ Request—a blanket denial of any knowledge about the park or the Committee of Modesty and a claim that no responsive records exist—plainly failed to meet the Village’s obligations under FOIL. The Village flouted its obligations, stating only that:

[T]here are no records meeting your requirements. The Village has no “gender-segregated public park located on approximately 280 acres of property.” Thus, the Village has no information regarding such a facility. . . . The Village is not aware of any “Committee of Modesty of Kiryas Joel”. We are aware of no connection of such an entity with any governmental unit.

Letter from Donald G. Nichol to Brooke Menschel, Aug. 9, 2013 (Menschel Aff. Exhibit O).

Since the Village did not “disclose the record[s] sought[or] deny the request and claim a specific exemption to disclosure,” the Village was required to “certify that it does not possess the requested document[s] and that [they] could not be located after a diligent search.” *See Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 440-41 (2005) (citing, *inter alia*, N.Y. Pub. Off. Law § 89(3)). The Village made no such certification. Rather, the Village simply refused to produce any records without confirming that a search had even been conducted.

Certification of a diligent search is critical to allow the court to evaluate whether a government agency fulfilled its obligations under FOIL where, as here, the agency claims that no records exist. When evaluating the validity of an agency determination that no responsive records exist, the Second Department has held that it looks to evidence in the record to decide whether the determination was arbitrary and capricious. *Oddone v. Suffolk County Police Dept.*, 96 A.D.3d 758, 761 (2d Dep’t 2012). Without a sufficient statement or certification of a diligent search, the court cannot conduct an evaluation of the agency’s determination. *See id.* For example, the *Oddone* court found that a mere assertion by the Appeals Officer that he had “been informed” by an unidentified source that a diligent search had been conducted was insufficient to evaluate whether his determination that all responsive records had been produced was arbitrary and capricious. *Id.* The Third Department came to a similar conclusion in *Matter of De Fabritis v. McMahon*, 301 A.D.2d 892, 893-94 (3d Dep’t 2003). In that case, the Appellate Division found that a lower court’s reference to an agency’s assertion that it had provided all pertinent responsive material did not allow the court, absent other evidence in the record, to evaluate whether the agency fulfilled its FOIL obligation of a diligent search.

Kiryas Joel's statement is similarly deficient. It does not provide a basis for this court to evaluate whether the Village has, in fact, met its FOIL obligation to locate—through a diligent search—and produce responsive records. In fact, the Village's response did not even indicate that the Village or any of its officials or employees conducted a search, much less provide evidence that Mr. Nichol has the personal knowledge of a diligent search required to comport with the requirements of FOIL.¹⁵ Since the Village's response is procedurally deficient for lacking a certification, this Court should instruct the Village to undertake a diligent search for responsive records and produce them within 30 days.

III. THE COURT SHOULD REQUIRE THE VILLAGE TO PRODUCE RESPONSIVE RECORDS AFTER A DILIGENT SEARCH BECAUSE THE VILLAGE'S RESPONSE THAT IT HAS NO RECORDS IS NOT CREDIBLE.

Even beyond procedural deficiencies, the Village response is still invalid because it is abundantly clear that the Village never undertook the required diligent search to produce responsive records. The Village claimed in its response that it is not aware of the park or of the Committee of Modesty and that it had no responsive records. Both claims are implausible as the Petitioners provided information sufficient to identify the subject matter of the request, and evidence indicates that the Village maintains at least some responsive records. This Court should compel the Village to conduct a diligent search and produce responsive documents.

A. The Village's Claimed Ignorance of the Park and the Committee of Modesty is Implausible.

To the extent that the Village denied the Request because it claims ignorance of its subject, the denial is improper. Petitioners reasonably described the requested records in accordance with FOIL and have independently confirmed the existence of the park. Further,

¹⁵ A "diligent search" must include a search of all documents in a Village official's files. Records maintained by Village officials in different locations, including those maintained by the Village Attorney Mr. Nichol, constitute "records" under FOIL and must be produced. *See* N.Y. Gen. Mun. Law § 51; Comm. on Open Gov. Adv. Op. 10016 (Apr. 7, 1997), <http://docs.dos.ny.gov/coog/ftext/f10016.htm>.

Village officials have been reported to possess knowledge of both the park and the Committee of Modesty.

Under FOIL, Petitioners are required to “reasonably describe[]” the requested records so that the agency can conduct a diligent search for the records. N.Y. Pub. Off. Law § 89(3)(a); *see also Farbman & Sons v. New York City Health & Hospitals.*, 62 N.Y.2d 75, 83 (N.Y. 1984) (holding that CPLR 3120’s discovery requirement that documents be “specifically designated” does not apply to FOIL, which only requires that the documents be “reasonably described”). In the Request, Petitioners described the approximate size and location of the park, provided photos of the site, and enclosed two articles in which Village officials acknowledged the existence of the park and the Committee of Modesty. Such a detailed description more than adequately provides a basis for the Village to search for responsive records.

Further, Petitioners have confirmed that the park described in the FOIL Request exists in the approximate location described in the Request. Orange County property records show that the Village owns more than 90 acres of property on at least four different plots in the immediate area surrounding the park. Orange County Property Records (Menschel Aff. Ex. H); Tax Map (Menschel Aff. Ex. D); Satellite Images, Google Maps (Menschel Aff. Ex. K). The park, including the color-coded playground equipment, can be seen from the road adjoining the property. Affirmation of Mariko Hirose, dated December 10, 2013 ¶ 4. Satellite images show the park, and the red and pink and blue playground equipment, in the middle of the four properties. *Id.*; Satellite Images, Google Maps (Menschel Aff. Ex. K); Greenberg, *supra* (Menschel Aff. Ex. F).

The existence of the park and the Committee of Modesty has been confirmed by the very same Village officials who received and/or responded to the Petitioners’ Request. The Village

clerk who received both the original Request (and who fills dual roles as the Village treasurer) “described the park as under the supervision of the Committee of Modesty of Kiryas Joel and under the guidance of the Grand Rebbe.” Ryan Lee Hall, *Satmar Hasidic Sect Unveils First in the U.S. Sex Segregated Public Playground in New York*.¹⁶ The region’s leading newspaper, The Times Herald-Record, cited Village Attorney Nichol, who authored the letter denying the Request, saying that he expected the park to be open to anyone but used primarily by Kiryas Joel’s Hasidic population. McKenna, *supra* (Menschel Aff. Ex. G).

The Petitioners’ descriptions were sufficient “for purposes of locating and identifying the documents sought.” *Farbman*, 62 N.Y.2d at 83. The Village’s claimed ignorance of the park or the Committee of Modesty is not credible in light of the extensive information that Petitioners provided and evidence that the Village is aware of, and likely owns, the park.

B. The Village’s Claim that it Does Not Possess Responsive Records is Implausible.

Further, the Court should require the Village to conduct a diligent search and produce records. The Second Department in *Oddone* held that, regardless of the validity of the certification, Petitioners can challenge the sufficiency of a search by “articulate[ing] a demonstrable factual basis to support [the] contention that the requested documents exist[] and [are] within the [Village’s] control.” *See Oddone*, 96 A.D.3d at 761 (citations omitted) (reversing dismissal of petition where petitioner alleged that other responsive records had been turned over in criminal proceedings, but not in response to the FOIL request).

Here, Petitioners have reasons to believe that the Village possesses and has control of the requested records, including that the Request sought a range of records that the Village is required to maintain. For example, as a Village incorporated under New York law, Kiryas Joel is

¹⁶ Available at <http://www.yourjewishnews.com/2013/04/26642.html> and attached to the Menschel Affirmation as Exhibit M.

required to keep “certificates of incorporation . . . for permanent inclusion in the official records of [the] village.” N.Y. Vill. Law § 2-234(2). The Request specifically asked for the “[i]ncorporation documents for the Village of Kiryas Joel.” Request (Menschel Aff. Exhibit N). Yet the Village did not produce any incorporation documents at all. Similarly, New York law requires Village officials to maintain records “to adequately document the transaction of public business.” N.Y. Arts & Cult. Aff. Law § 57.25(1). The Request sought documents likely maintained in the ordinary course of business under that provision, including “records relating to the ownership” and purchase of the park property; “Municipal ordinances, policies, regulations, rules, or records relating to the governance and operation of the park”; “records describing the governance structure of the Village”; and records relating to certain funds, allocations and grants from the Town of Monroe and any county, state, or federal agencies. Request at ¶¶ 1, 2, 3, 5, 11, 13, 14 (Menschel Aff. Exhibit N).

Further, County property records demonstrate that the Village currently owns much of the property in the area immediately surrounding the park. Orange County Property Records (Menschel Aff. Ex. H); Tax Map, Orange County-New York (Menschel Aff. Ex. I); *see also* Satellite Images, Google Maps (Menschel Aff. Ex. K)(showing the park in the middle of the three Village-owned plots of land). Accordingly, the Village is required to pay tax on those properties. N.Y. Real Prop. Tax Law § 300. Records concerning the purchase of the property and taxes paid on the property constitute records kept in the ordinary course of business and are responsive to Petitioners’ request for records relating to ownership of the park property.

The Village’s claim that there are no responsive records is simply not credible in light of significant evidence to the contrary. Accordingly, Petitioners respectfully ask this Court to order the Village to conduct a diligent search and produce responsive records within 30 days.

IV. PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES

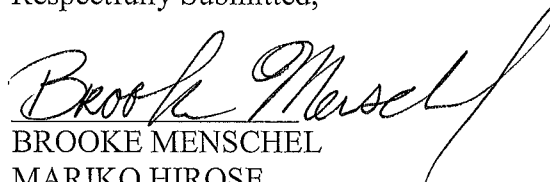
The Petitioners respectfully request an award of attorneys' fees and litigation costs pursuant to FOIL. FOIL permits a court, in its discretion, to award reasonable attorneys' and other litigation costs when the moving party has "substantially prevailed" in its Article 78 petition and the government entity had "no reasonable basis for denying access" to the records in dispute. N.Y. Pub. Off Law § 89(4)(c).

Under this standard, Petitioners need only establish that they have substantially prevailed in this Article 78 proceeding and that the Village had no "reasonable basis for denying access" to the records sought by the NYCLU and the ACLU. N.Y. Pub. Off. Law § 89(4)(c). For all of the reasons discussed above, it appears at this stage that the Village lacks any reasonable basis for denying the Request. Petitioners recognize, however, that this matter cannot be definitively resolved until the Village files its opposition, at which point Petitioners will be able to address the fee issue more completely.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court order the Village of Kiryas Joel to perform a diligent search and produce the records that the NYCLU and ACLU requested and award Petitioners their attorney's fees and litigation costs.

Respectfully Submitted,



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