At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 30th day of August 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals of right (CPLR 5513[a], you are advised to serve a copy of this order, with notice of entry, on all parties.

In the Matter of the Application of
SEAN MADDEN,

Petitioner,

For a Judgement pursuant to Article 78 of the Civil Practice Laws and Rules,

-against-

VILLAGE OF TUXEDO PARK, CLAUDIO GUAZZONI, solely in his capacity as Village of Tuxedo Trustee, and DEBBIE MATTHEWS, solely in her Capacity as VILLAGE CLERK for the Village of Tuxedo Park,

Respondents.

DECISION AND ORDER
INDEX #004229/2017
Motion date: 05/31/22
Motion Seq. 6&7

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 7 were read on the motion by petitioner to reargue this Court's Decision and Order dated February 18, 2022, and upon re-argument for an Order confirming that Respondents violated FOIL in its entirety and awarding petitioner attorneys' fees consistent with Public Officers Law §89[4](c):

Notice of Motion/ Affirmation (Ellsworth) and Exhibits A-I..... 1 - 3
Affirmation in Opposition (Zitt) and Exhibits A - F..... 4 - 6
Reply Affirmation (Ellsworth)..... 7

The Court shall not consider respondents' cross-motion for reargument pursuant to CPLR 2221[d][3] as it provides, in relevant part, that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, plaintiff effected service of the court's February 18, 2022 decision and

order on March 14, 2022 when petitioner uploaded same with notice of entry to NYSCEF (see CPLR 2103[b][2]). The thirtieth day after service was April 14, 2022, thus, respondents had until April 14, 2022, to move for leave to reargue. Respondents, having served their cross-motion for leave to reargue on May 4, 2022, renders it untimely. The affirmation and supporting documents shall be considered as opposition to petitioner's motion.

"Motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or, for some other reason, mistakenly arrived at its earlier decision " (*Barnett v. Smith*, 64 A.D.3d 669, 670–671, [2d Dept 2009] quoting *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654[2d Dept 2007] [internal quotation marks omitted]; see CPLR 2221[d]). Here, plaintiff has demonstrated that the Court mistakenly arrived at its earlier determination finding that a hearing was required before rendering a decision on the Article 78 proceeding.

Petitioner's amended petition dated September 25, 2017 alleges violations of FOIL concerning production of emails and their lists of recipients utilized by the Village, and more specifically, those maintained by respondent Trustee Claudio Guazzoni, an elected official of the Village in his private email account. The amended petition was previously dismissed by this Court by decision dated April 2, 2018 and petitioner's motion to reargue that decision was denied.

On appeal, the Appellate Division Second Department reversed the dismissal on the Second and Third FOIL requests only as they were the subject of the appeal. The Court ordered reinstatement of the amended petition and remitted to this Court for a determination on the merits. The Appellate Division found that this Court should not have granted that branch of the

motion to dismiss with respect to the Second FOIL request as further determination was needed on the issue of whether the record could be produced electronically since there was a question of fact as to whether Village employees could make reasonable efforts to provide an electronically formatted response. They further found that petitioner's appeal of the constructive denial of the Third FOIL request was timely notwithstanding respondents' challenge that it was not (see Exh. F – Appeal Decision pgs. 2&3).

On remand to this Court, respondents filed an amended answer and corrected supporting affidavits of Guazzoni and Elizabeth Doherty, corrected supplemental affirmation of Brian D. Nugent and certified record of proceedings. Respondents allege that the June 2016 Light Law Email could not be produced in electronic form through reasonable efforts in compliance with petitioner's second FOIL request and a "duplication defense" to justify their failure to provide any records responsive to the Third FOIL request. In reply, petitioner submitted the sworn affidavit of information technology expert John Morrissey to establish that the June 16 Light Law Email could be produced electronically through reasonable efforts. Petitioner also submitted the affidavits of nine Village residents to establish that response to the Second and Third FOIL requests would not result in duplication, notwithstanding that respondents' "duplication defense" is not one of the statutorily enumerated FOIL exemptions.

Petitioner argues that this Court misapprehended the law in finding that a hearing is needed to make certain determinations and/or resolve issues of fact which have either already been determined by the Appellate Division or resolved through petitioner's evidentiary proofs which are already part of the record before this Court.

Upon reconsideration of the amended petition, the Court finds petitioner is entitled to judgment as a matter of law on the Second and Third FOIL requests.

Petitioner has demonstrated that respondents violated FOIL by failing to produce the requested records in electronic form which task could be undertaken using "reasonable efforts". The Court's focus on whether the current Records Access Officer has the ability *today* to create an electronic record from the paper copy of the June 26 Light Law Email was in error. Both the Records Access Officer and Respondent Guazzoni were Village officials subject to FOIL and the requested records are agency records required to be maintained, controlled and produced by the Records Access Officer. The Village has an obligation to preserve all agency records and cannot rely on obstacles of its own making to circumvent compliance with FOIL.

Based upon the Appellate Division's decision concluding petitioner's appeal of the third FOIL request was timely, and upon reconsideration, this Court agrees with petitioner that respondents' failure to provide any responsive records is a *de facto* violation of FOIL. To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public (*see* Public Officers Law § 84). The statute is based on the policy 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 N.Y.2d 567, 571 [1979]). Consistent with the legislative declaration in Public Officers Law § 84, FOIL is liberally construed and its statutory exemptions narrowly interpreted (*see Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 46 [2007]). All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that "the material requested falls squarely within the ambit of one of [the] statutory exemptions" (*Fink*, 47 N.Y.2d at 571). Since there is no valid "duplication" defense for failure to comply with FOIL, no hearing is required to determine whether there was any such duplication.

"In order to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL, the Legislature has provided for the assessment of an attorney's fee and other litigation costs in FOIL proceedings" (*Matter of Cook v. Nassau County Police Dept.*, 140 A.D.3d 1059, 1060 [2d Dept 2016] [internal quotation marks and citations omitted]; see Public Officers Law § 89[4][c]; *Matter of LTTR Home Care, LLC v. City of Mount Vernon*, 179 A.D.3d 798, 799 [2d Dept 2020]). Thus, "[t]he court ... may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of" Public Officers Law § 89 "in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time" "If the statutory requirements have been satisfied, the determination of whether to award fees rests within the [Supreme Court's] discretion" (*see Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 79 [2017]). A petitioner has "substantially prevailed" within the meaning of the statute when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure (see id. at 79; *Matter of South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 930–931 [). (Public Officers Law § 89[4][c][i]). "A petitioner has 'substantially prevailed' within the meaning of Public Officers Law § 89(4)(c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure" (*Matter of McDevitt v. Suffolk County*, 183 A.D.3d at 828, *quoting Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d at 79).

Based upon the foregoing, it is hereby

ORDERED that petitioner's motion to reargue is granted; and it is further

ORDERED that this Court's Decision and Order dated February 18, 2022 is vacated as and upon reconsideration, petitioner's amended petition is granted to the extent that respondents violated FOIL with respect to petitioner's Second and Third FOIL requests; and it is further

ORDERED that respondents comply fully with petitioner's Second and Third FOIL requests; and it is further

ORDERED that respondents shall pay reasonable attorneys' fees and costs associated with this proceeding in an amount to be determined upon petitioner's submission of supporting documentation on or before September 12, 2022 and respondents shall have until September 26, 2022 to submit any opposition; and it is further

ORDERED that respondents' cross-motion is denied as untimely.

Dated: August 30th, 2022
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record Via NYSCEF