

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF LIVINGSTON

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**PLEASE DON'T DESTROY GENESEO,  
WILLIAM S. LOFQUIST and M. CORRIN STRONG,**

Petitioners,

**ORDER**

v.

**WESTON KENNISON, SUPERVISOR OF THE  
TOWN OF GENESEO and the TOWN OF GENESEO,**

Index No.448-2007

Respondents.

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1. Whereas, Petitioners have brought this Article 78 action seeking significant public documents required to be retained under the NYS Arts and Cultural Education Law and made available under the Freedom of Information Law which have not been delivered subject to a lawful FOIL request;
  2. And whereas this court has been satisfied by the evidence produced by the Petitioners that these documents may still be in the possession of Respondents, or can be retrieved by them either from electronic or other storage systems or from those who originally either sent or received the correspondence;
  3. And whereas, the billing records of Underberg & Kessler LLC, attorneys for the Respondents, indicate that attorneys Ronald Hull, James Coniglio, and Helen Zamboni were involved as attorneys for the Town of Geneseo in review of Newman Development Group's Planned Development District application and in certain correspondence generated in that matter which are the subject of Petitioners' request under this action;
  4. And whereas, the information submitted to the court by Underberg & Kessler in an affidavit by Attorney Ron Hull gives no background on the nature of the document retention policies or paper or electronic information systems maintained by the firm and only limited details about the e-mail system;
  5. And whereas, the information submitted to the court by Underberg & Kessler in an affidavit by Michael L. Klinkbeil, System Administrator, indicates that he only searched the electronic email of the office computer of James Coniglio and that Underberg & Kessler does not maintain a centralized archive of historical emails;
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6. And whereas, no affidavits have been offered based on the personal knowledge or search of the office, home computers or outside computer servers of any other UK attorneys or employees involved in the review or production of the documents in this matter. And no certification has been offered of any search of the firm's paper or electronic document retention systems for any form of document besides e-mails.
  
7. Now therefore, Respondents are directed to produce additional sworn affidavits by those in a position to know of their own personal knowledge the following information:
  - A. The electronic and paper document retention policies and practices of Underberg & Kessler, including whether and in what format electronic or paper copies of documents and communications are stored on-site or in remote locations, and provide a copy of any written policies on these matters if they exist and especially any policies with respect to records of municipal clients that are subject to the NYS Freedom of Information Law and the Arts and Cultural Affairs Law;
  - B. The identities of any attorneys, staff persons or contracted agents responsible for the computer and information technology and record management systems of the firm and the nature of their responsibility;
  - C. The meaning of the term "client's file" as used in Mr. Hull's affidavit, including how such files are created and the documents, both sent and received, that they customarily include, and to what extent such a file would include any electronic information associated with the client either in electronic form or routinely printed out;
  - D. The security procedures employed by Underberg & Kessler, if any, to guarantee the integrity and completeness of the "client's file" and to ensure that significant public records in such files do not become lost or inadvertently destroyed.
  - E. The policies and procedures of the firm that allow for the destruction of municipal client's records deemed not significant under the regulations of the Arts and Cultural Affairs Law and whether any documentation of such destruction is routinely kept or was kept in this matter;
  - F. A certification that all Underberg & Kessler individual, network and back-up information systems, both paper and electronic, have been searched for the documents sought in this case, to include specific certification of the search of the following:

1. Paper files, computers and other electronic devices on the premises of UK either under the control of or used by Ronald Hull, James Coniglio, and Helen Zamboni, as well as those of all administrative assistants or other office personnel who might receive or retain paper or electronic documents sent to or from the above named attorneys, (including all letters, faxes, word processing documents, e-mails, and attachments);
  2. Any portable or home computers, or any other electronic devices such as PDAs (portable digital assistants), smart phones or Blackberries, or digital printers or copiers, wherever located, used by any of the above individuals for work on behalf of the Town of Geneseo in this matter;
  3. Any e-mail servers used by UK and servers used for any private e-mail accounts used by individual staff members for UK business (e.g. RoadRunner, Microsoft Exchange, Lotus Notes) whether located within UK's control or elsewhere, including any backups or archives kept;
  4. Any UK document back up system, whether on site or remote; electronic or paper; CD, DVD, tape or any other media; internal or external hard drive, along with a description of how said back-up system works, how frequently electronic files are backed-up and how long said back-up copies are retained.
- G. A certification that all those parties who may have sent or received originals or copies of the subject records, including but not limited to officials of the Town of Geneseo, representatives of Newman Development Group, McCann Development, Ferrera/Jerum, APD Engineering, and Neal Madden, Esq., have been asked to provide copies of the missing records;
- H. To the extent that the documents sought by Petitioners are still not found after a complete search, provide an affidavit by the attorney associated with the review of each such correspondence as to the nature and content of the missing documents to the best of their recollection;
- I. To the extent that the documents sought by the Petitioners are still not found after a complete search, provide an affidavit from those persons involved in their destruction explaining the manner of their destruction and whether such destruction was consistent with UK document retention policies and practices as well as the requirements of the Arts and Cultural Affairs Law.

8. And is further ordered that these additional affidavits be delivered to the court with a copy to the Petitioners no later than 20 days from the date of this order.

So ordered this \_\_\_\_\_ day of June, 2007

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Ann Marie Taddeo, Justice  
New York State Supreme Court