

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE**

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In the matter of	:	Index No. _____
INVESTIGATIVE POST, INC.,		
Petitioner,	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	
-against-	:	VERIFIED PETITION
COUNTY OF ERIE,	:	
Respondent.	:	

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Petitioner Investigative Post, Inc. (“iPost”), by and through its undersigned counsel, respectfully alleges as follows:

PRELIMINARY STATEMENT

1. This Article 78 proceeding challenges respondent County of Erie’s (“County”) partial denial of a records request that petitioner iPost, a nonprofit investigative reporting center, submitted under the Freedom of Information Law, N.Y. Pub. Off. Law §§ 84, *et seq.* (“FOIL”) on September 27, 2021.
2. iPost seeks a 2021 engineering study assessing the condition of Highmark Stadium, the current home of the Buffalo Bills (“Condition Study”). The Condition Study contains information critical to the debate around the future of where the Buffalo Bills will play, and who will pay for it.
3. iPost and other news organizations have reported extensively in recent months on the future of where the Bills will play. Central to this issue is the estimated financial burden of

renovating the Bills' current home, Highmark Stadium,, versus building a new stadium. *See, e.g.,* Tim O'Shei, Jason Wolf, *Pegula executives: Renovating Highmark Stadium for Bills is "just not realistic,"* Dothan Eagle, <https://perma.cc/7QDB-HQQS> (Feb. 3, 2022); Zachary Phillips, *AECOM report urges Buffalo Bills to build new \$1.4B stadium, not renovate.* Construction Dive (Nov. 12, 2021), <https://perma.cc/33HV-KRJS>; Mark Scheer, *A record subsidy for Bills stadium?* Investigative Post (Nov. 16, 2021), <https://perma.cc/S5P8-8CSD>.

4. This issue is of particular importance to the public because New York State and Erie County taxpayers are expected to shoulder much of the cost of a \$1.4 billion new stadium. *See* Tim O'Shei, *With time ticking on Bills stadium talks, what leverage does each side have?* The Buffalo News (Nov. 29, 2021), <https://perma.cc/T9Q2-4LAD>; Mark Scheer, *A record subsidy for Bills stadium?* Investigative Post (Nov. 16, 2021), <https://perma.cc/S5P8-8CSD>.

5. In connection with ongoing negotiations regarding the Bills stadium, the State of New York and Erie County have commissioned several studies, including the Condition Study at issue in these proceedings. These studies address issues such as the current condition of Highmark Stadium, estimated costs of renovating Highmark Stadium, potential locations for a new stadium and associated costs, and other financial and practical considerations. *See, e.g.,* New Era Field Facility Condition Assessment (Feb. 8, 2019), <https://perma.cc/QS9D-LVH8> (PDF pages 28-194); Pegula Sports and Entertainment Economic and Fiscal Impact Analysis (Jan. 15, 2021), <https://perma.cc/AJJ8-M43R>; AECOM Preliminary Buffalo Bills Stadium Analysis (Nov. 1, 2021), <https://perma.cc/FP77-GTQQ>.

6. The State released two of these studies and related materials late last year after iPost brought an Article 78 proceeding against Empire State Development Corp. *See* Jim Heaney, *iPost sues to obtain Bills stadium studies*, Investigative Post (Dec. 1, 2021),

<https://perma.cc/2WQQ-BKDF>; Jim Heaney, *iPost* suit prompts release of stadium reports, Investigative Post (Dec. 23, 2021), <https://perma.cc/M8YM-3DEG>.

7. iPost seeks to further its ongoing investigative reporting with findings from the Condition Study it seeks in this suit, including the renovations that would need to be made to Highmark Stadium, the costs involved, and whether renovation of the stadium is cost-effective versus building a new stadium.

8. The County's refusal to release an unredacted version of the Condition Study has hampered iPost's ability to continue its investigation.

9. The County made sweeping redactions to the Condition Study, citing FOIL's life and safety exemption.

10. The County has not, and cannot, make the particularized showing required to justify its redactions under this exemption. The County cannot demonstrate any non-speculative causal connection between disclosing the still-redacted information and the possibility of danger to life or safety. *See* N.Y. Pub. Off. Law § 87(2)(f).

11. Further highlighting the County's flawed position, a dramatic mismatch exists between what the County claims must be redacted and the type of information about Highmark Stadium that is already available to the public. For example, the State recently released a 2019 "Facility Condition Assessment" concerning Highmark Stadium which appears to mirror the Condition Study in substance, methodology, scope, and level of detail ("2019 Study").¹ The 2019 Study is

¹ New Era Field Facility Condition Assessment, (Feb. 8, 2019), <https://perma.cc/QS9D-LVH8> (PDF pages 28-194).

available in full to the public, yet the County claims that its 2021 Condition Study must remain redacted.

12. The County's continued delay in producing the full, unredacted Condition Study violates both the letter and the spirit of FOIL.

13. Moreover, the County's refusal to produce the full, unredacted Condition Study was not reasonable under the circumstances because the requested record is readily retrievable and clearly public. Should iPost substantially prevail in its Article 78 petition, it is entitled to an award of attorney's fees and litigation costs pursuant to FOIL.

PARTIES

14. Petitioner iPost is a Buffalo-based nonprofit investigative reporting center. iPost is devoted to producing fact-based, nonpartisan investigative stories and analyses on issues that matter to the citizens and taxpayers of Buffalo and Western New York. Jim Heaney, iPost's editor and executive director, founded iPost in 2012.

15. Respondent County of Erie is a municipality organized and existing under the laws of New York State. The County was and is responsible for the policy, practice, supervision, and conduct of its officers and agencies at all relevant times hereto. The County is a body within the meaning of Article 78 of the CPLR. The County's principal office is located at 95 Franklin Street, Room 1634, Buffalo, New York, 14202.

JURISDICTION AND VENUE

16. iPost has exhausted its administrative remedies. This Court therefore has jurisdiction over this matter pursuant to FOIL § 89(4)(b), CPLR § 506(b), and CPLR § 7804(b).

17. Pursuant to CPLR §§ 506(b) and 7804(b), this proceeding is commenced in Erie County, where the County's principal offices are located, where its agent made the determinations petitioned against and complained of, and where it failed to perform the duties required of it by law.

STATEMENT OF FACTS

18. On September 27, 2021, iPost filed a FOIL request with the County seeking copies of "any and all engineering studies or assessments conducted in the last five years on the conditions at the professional football stadium in Orchard Park that is currently called Highmark Stadium." A true and correct copy of this request is attached as **Exhibit A**.

19. On October 12, 2021, the County responded to iPost's FOIL request. The County provided the cover page, table of contents, and a redacted version of the executive summary for a report titled "Highmark Stadium Condition Study 2020," and dated May 12, 2021 ("Condition Study"). The County withheld the remainder of the Condition Study. In this initial response, the County cited three FOIL exemptions: (1) that, "[a]s a critical piece of infrastructure, . . . releasing details about the structure could endanger the life or safety of any person who enters the stadium"; (2) "impair[ment of] an imminent contract award" due to "ongoing negotiations with New York State and the Buffalo Bills regarding the future of the football team in Erie County"; and (3) the "inter/intra-agency exception" given that "the study is a Draft and subject to change." A true and correct copy of the response letter and its attachment are attached as **Exhibit B**.

20. On October 13, 2021, iPost appealed the County's partial denial of iPost's September 27, 2021, request. iPost argued in its appeal that the County's denial did "not cite any applicable specific state statutes or exemptions provided under [FOIL]." iPost also challenged the County's

contention that the roughly 170 pages of the Condition Study it withheld entirely “contain absolutely no releasable information.” Finally, iPost “question[ed] how a report issued a year ago can be considered a draft,” and argued that “ongoing negotiations with The Buffalo Bills a[re] irrelevant.” A true and correct copy of this appeal is attached as **Exhibit C**.

21. On November 5, 2021, the County’s FOIL Appeals Officer Daniel Meyer responded to iPost’s appeal. The response does not address the arguments iPost raised in its appeal. Instead, the response stated that the County would “release photographs in the study that are labeled as ‘general’ that display public areas of Highmark Stadium[,]” as well as “charts that display expenses for particular projects to be done within Highmark Stadium.” The County attached a document reflecting a redacted copy of the Condition Study (excluding the cover page, table of contents, and redacted executive summary that were previously provided), which is nearly 250 pages long. Large portions of the Study are redacted. A true and correct copy of the County’s letter, dated November 5, 2021, and the redacted copy of the remainder of the Condition Study are attached as **Exhibit D**.

22. Later that same day, reporter Mark Scheer of iPost emailed County Press Secretary Peter Anderson to inquire to whom Scheer should direct his questions about the redacted Condition Study. A true and correct copy of this email is attached as **Exhibit E**.

23. On November 8, 2021, Daniel Meyer, the County FOIL Appeals Officer, responded to Scheer’s inquiry. Meyer stated that the reason for the County’s decision to continue redacting most of the study “is because the information that remains redacted has been defined as something that would publicly reveal structural elements currently unknown to the public[,]” the release of which “could create and invite an opportunity for a threat to public safety with privileged records and information that fall under FOIL’s public safety exemption.” Meyer also

wrote “that the information that has been redacted is being done so as part of Erie County’s continued efforts to observe and share any pre-operational planned activity by terrorist organizations or agents and to help deter terrorist attacks and detect any possible preparations for such attacks.” A true and correct copy of this email is attached as **Exhibit F**.

24. On February 9, 2022, iPost sent a letter to Mr. Meyer “request[ing] that the County release the [Condition Study] in full.” The letter explained that the County had not met – and cannot meet – its required burden under FOIL to justify the redactions to the Condition Study for two reasons. First, “[t]he County ha[d] not made a particularized showing of the danger to life and safety that would result from the report’s release.” Second, “the County [had not] explained why redactions are necessary to a study that reflects similar types of information as – and a similar level of detail as – a publicly available condition assessment of Highmark Stadium completed in 2019.”² A true and correct copy of this letter is attached as **Exhibit G**.

25. On February 15, 2022, the County mailed a letter to iPost’s undersigned counsel, which counsel received on March 2, 2022. The County’s letter stated that, “[i]n an effort to avoid litigation, [the County is] willing to allow you or your representative the opportunity to inspect an unredacted copy of the study.” The County asserts that such an inspection “would give you the opportunity to determine which information you believe should be released pursuant to [FOIL],” may provide “better insight into [the County’s] rationale for withholding the information,” and “will allow [iPost’s counsel] to more clearly articulate why we are wrong to

² New Era Field Facility Condition Assessment, (Feb. 8, 2019), <https://perma.cc/QS9D-LVH8> (PDF pages 28-194).

withhold the information from the public.” A true and correct copy of this letter is attached as **Exhibit H**.

26. iPost’s counsel spoke with the County on March 2 and March 3, 2022. In these conversations, iPost indicated to the County that iPost intended to file this petition on March 7, 2022, to preserve its rights as to this FOIL request. iPost’s counsel, in the meantime, would continue to discuss with iPost the County’s offer – that is, the offer that iPost could come inspect the unredacted study, but that the County would still refuse to release it to the public.

27. iPost has exhausted its administrative remedies. Accordingly, iPost has commenced this Article 78 proceeding to challenge the County’s partial denial of its request.

CLAIM FOR RELIEF

(Article 78 Review of Wrongful Denial of FOIL Request)

28. iPost hereby reasserts and realleges paragraphs 1 through 26 as if fully set forth herein.

29. iPost commences this proceeding, which is in the nature of a writ of prohibition and a writ of mandamus, pursuant to CPLR Article 78 and N.Y. Pub. Off. Law § 89(4)(b).

30. Under FOIL, all documents held by government entities like the County of Erie are presumed open for public inspection and copying. Documents may be withheld from public inspection only if expressly permitted by a specific statutory exemption and such exemptions are interpreted narrowly in order to effect the purpose of the statutory scheme.

31. The County has improperly withheld a significant portion of the document responsive to iPost’s FOIL request.

32. The County has failed to meet its burden to provide specific and particularized justifications for withholding the requested documents.

33. The County has no reasonable basis for denying access to the requested document.
34. The County's actions have caused and continue to cause irreparable harm to the rights guaranteed to iPost and to the public at large under FOIL.
35. The information requested by iPost is of significant interest and concern to the public.
36. iPost has exhausted its administrative remedies and has obtained only a portion of the requested record.
37. As a result of the foregoing, the County has violated FOIL.
38. iPost has no other adequate remedy at law.
39. No prior application for the relief requested herein has been made to the Court.

PRAYER FOR RELIEF

WHEREFORE, Petitioner iPost respectfully requests this Court to grant judgment:

- (a) Directing the County to comply with its duty under FOIL and to produce the requested records, unredacted, within five (5) days;
- (b) Awarding iPost its reasonable attorney's fees and litigation costs pursuant to N.Y. Pub. Off. Law § 89(4)(c); and
- (c) Awarding iPost such further relief as the Court deems just and proper.

Dated: March 4, 2022
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL

FIRST AMENDMENT CLINIC

by: /s/ Christina N. Neitzey

Christina N. Neitzey

Heather E. Murray

Myron Taylor Hall

Ithaca, New York 14853

Tel.: (607) 255-9182

cn266@cornell.edu

Counsel for Petitioner Investigative Post, Inc.

VERIFICATION

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

JAMES HEANEY, being duly sworn, deposes and says:

1. I am founder, editor, and executive director of Investigative Post, Inc.
2. I have read the foregoing petition. Based on my personal knowledge, and on information obtained in the ordinary course of business from records and from individuals with knowledge, the information contained herein is true to the best of my knowledge, information, and belief.

James Heaney

JAMES HEANEY

Sworn to before me this
4th day of March, 2022

Susan J. Tosto

Notary Public



Certification for Remote Notarization

This record was remotely acknowledged and executed before me through a Secure Communication Link on 4 March 2022 by JIM HEANEY (the "Signer").

I further certify that, at the time of acknowledgement:

Signer and Notary were both located in the State of New York.

1. I complied with the requirements of New York State for virtual notarization.
 - a. I confirmed the identity of the signer.
 - b. The quality of the interaction allowed clear visual observation of both the face of the Signer and the signing of the document(s).

Signature of notary public:



Printed name:

Susan J. Tosto

Commission number:

01TO6272075

Commission expiration date:

11/13/2024