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"FOIL"ed Again: The Article 78 and Attorney's Fees

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Program Coordinator: Cory H. Morris, Esq.

April 11, 2018
Suffolk County Bar Center, NY

FOILed Again
Wednesday, April 11, 2018

Agenda

5:45 – 6:35 p.m. - Introduction to NY FOIL and FOIL basics

6:35 – 6:45 p.m. – Break

6:45 – 7:10 p.m. - FOIL Request and response

7:10-8:00 p.m. - Article 78; Filing of Appeal; Q & A

Anthony J. Fasano

Associate at Guercio & Guercio, LLP

Mr. Fasano graduated *cum laude* from Adelphi University where he majored in Finance, and is a graduate of Touro College, Jacob D. Fuchsberg Law Center, where he also graduated *cum laude*. During law school, he served as a Research Editor on the *Touro Law Review*. His case note, *The Decline of the Confrontation Clause in New York – People v. Encarnacion*, 28 Touro L. Rev. 929 (2012), was published and subsequently cited by a New York Supreme Court in *People v. Umpierre*, 951 N.Y.S.2d 382 (Sup. Ct. Bronx County 2012). Before joining the firm in 2013, Mr. Fasano interned with the Honorable Joseph F. Bianco of the Eastern District of New York, the United States Attorney's Office of the Eastern District of New York, and Guercio & Guercio, LLP.

In addition to his academic career, Mr. Fasano received his commission as a second lieutenant in the New York Army National Guard in May of 2009 as a graduate of the Hofstra University Reserve Officers' Training Corps, where he earned the George C. Marshall Award for overall outstanding student in military studies and leadership. He is a graduate of the U.S. Army Field Artillery Basic Officer Leader Course.

Honors and Awards:

Super Lawyers – "Rising Stars" (2018)

Super Lawyers – "Rising Stars" (2017)

American Institute of Personal Injury Attorneys – 10 Best Attorneys (2017)

Super Lawyers – "Rising Stars" (2016)

Nassau County Bar Association – Young Lawyer of the Month (Jan 2015)

Continuing Legal Education

Fun with F.O.I.L., Suffolk County Bar Association, Suffolk Academy of Law (Oct. 2017)

FERPA and Family Court, Nassau County Bar Association (Oct. 2016)

Publications

Recent Trends in Attorney's Fees under FOIL, Nassau County Bar Association, *Nassau Lawyer* (Oct. 2017)

Common Pitfalls in Appeals to the Commissioner of Education, Nassau County Bar Association, *Nassau Lawyer*(Aug. 2017)

Navigating the Doctrine of Primary Jurisdiction, Nassau County Bar Association, *Nassau Lawyer* (Aug. 2016)

Contributing Editor, *Now That You've Turned 18* Pamphlet Series, NYSBA (2016)

FOIL 2015: A Year in Review, NYSBA, *Electronically In Touch* (Feb. 2016)

Ringing the Bell for Tinker, Nassau County Bar Association, *Nassau Lawyer* (Oct. 2015)

FOIL 101: An Inside Route to Better Discovery, NYSBA, *Perspective* (Apr. 2015)

A Primer on Student Suspension Hearings in New York Public Schools, NYSBA, *Electronically in Touch* (Oct. 2014)

The Decline of the Confrontation Clause in New York, 28 Touro L. Rev. 929 (2012)

Cory H. Morris, Attorney and Counselor at Law

Named a Superlawyer, Cory Morris is admitted to practice in New York State, the Eastern District of New York and the Southern District of New York. He is also admitted to practice law in Florida State. He was named top 40 under 40 by the Long Island Business News and named top 30 under 30 by the Huntington Chamber of Commerce. Mr. Morris is an advocate for equality, civil rights and social justice within the legal community. In recognition of this, Mr. Morris is the recipient of an Equality Award at the Suffolk County New York Civil Liberties Union 50th Anniversary Gala and the New York State Bar Empire Justice Award for Pro Bono work. He is focused on helping people charged with a crime, regardless of the allegations, and helping people vindicate their rights to be free from unreasonable government intrusion and excessive force. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

Mr. Morris is familiar with the issues surrounding Long Island and has an advanced background in psychology, serving as an Adjunct at Adelphi University. He attended college on Long Island, starting at Nassau Community College, obtaining his Bachelor's Degree in Criminal Justice from Adelphi University in 2008 and his Master's Degree from Adelphi's Derner Institute of Advanced Psychological Studies in 2010. During his graduate degree, his concentration was on forensic psychology, substance abuse, and impulsive disorders. He obtained an assistantship with Dr. Larry Josephs, was published in the Encyclopedia of the History of Psychological Theories and contributed to Adelphi's scholarship, working with a doctoral student and post-doctoral professor in developing his thesis titled "Impulsivity in the form of Suicidality in Borderline Personality Disorder."

Mr. Morris graduated Touro College at the top of his class, was a Dean's List recipient and received both the David A. Berg Public Interest Fellowship and the Howard Glickstein Public Interest Fellowship. He served as President of the American Civil Liberties Union student group, vice president of the criminal justice society at Touro College and was a member of Touro's International Law Review. He also participated in the Center for Restorative Practices, the Unemployment Action Center, and other student groups and public interest organizations. During his tenure at Touro College, he volunteered with both the Mississippi Center for Justice and with Malik Rahim's Common Ground organization in Louisiana. He successfully helped nearly a dozen unemployment claimants at administrative hearings, receiving an award for outstanding advocate, helped high school students facing school suspension hearings, and worked as a live chat operator to help low-income New Yorkers obtain free legal services and representation from pro bono attorneys. He is also the recipient of several awards for pro bono legal services as well as the Brian Lord Memorial Award for his demonstrated commitment to public interest.

A recent notable victory was In the Matter of Law Offices of Cory H. Morris, appellant, v County of Nassau, et al., respondents, a decision which held, inter alia, "to the extent that a TPVA record concerns the nonadjudicatory responsibilities of the TPVA, it is not exempt from disclosure under the definition of "agency" in Public Officers Law § 86(3)." The office also successfully opposed a School District's motion to hide surveillance footage capturing a school-incident, the choking of a student by a security guard, vis-a-vis a protective Order in Edmond v. Longwood CSD et al, 2:16-cv-02871-JFB-AYS, Document 55 (EDNY 04/17/17), a case where the Court found that "The District Defendants have provided this Court with no independent factual basis, nor case law, to issue a protective order other than the spectre that Plaintiffs may release the footage to the public."

CLE OUTLINE

By: Anthony J. Fasano, Esq. and Cory H. Morris, Esq.

FOIL HISTORY

The Freedom of Information Law ("FOIL"), codified in Article 6 of the Public Officers Law ("POL"), establishes a mechanism for the public to hold the government accountable (POL § 84). The Committee on Open Government ("COOG" or "Committee") is responsible for overseeing implementation of FOIL and the Open Meetings Law ("OML"). The Committee's website provides most of the information one needs to understand FOIL and how to make and respond to a FOIL request. The Committee prepares advisory opinions at the request of any person or agency; advisory opinions are frequently used in judicial proceedings as exhibits, and many judicial decisions have cited opinions rendered by the Committee.

New York's Freedom of Information Law, or FOIL, declares that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government." Whether it be records relating to police body cameras, government audits, wrongful convictions, traffic cameras or statements made to the police, any member of the public has standing to request such agency records and the attorney(s) who represents a spurned FOIL Petitioner in an article 78 proceeding is allowed to request reasonable attorney's fees.

The New York legislature first enacted FOIL in 1974 and amended the law in 1977. "The enactment of New York's Freedom of Information Law (Public Officers Law art 6) in 1974 was the result of a legislative effort to increase the accountability of the government to its citizens by recognizing the public's 'right to know' more about the operation of the government" (Matter of Weston v. Sloan, 84 N.Y.2d 462, 466 [1994]) (citing Public Officers Law § 84). Still keeping with its goals of government accountability, "[t]he 1977 legislation changed the format of the statute, however; while it expanded agency disclosure it excepted the Legislature and the judiciary from the definition of agencies" *Id.* (citing Letter of Senator Ralph J. Marino, Bill Jacket, L 1977, ch 933; POL § 86 [3]). Section 86 of the Public Officers Law in definition of agency excludes "the Judiciary". A definition of "Judiciary" is given in subdivision 1 of section 86 of the Public Officers Law: "'Judiciary' means the courts of the state, including any municipal or district court, whether or not of record."

> The reason for the exclusion of the courts from the Freedom of Information Law is based upon the notion that there are numerous statutes in the Judiciary Law and court acts which specifically direct that records be available or confidential. Consequently, neither the original Freedom of Information

> Law nor the Law as amended would affect rights of access to court records, even if the courts were included in the Law. Moreover, during the discussion, it was agreed that the administrative branches of the court system, such as the Office of Court Administration, are not themselves courts and therefore are not subject to the access provisions contained within the Judiciary Law, for example. It was further agreed that for the purpose of the Freedom of Information Law, the Office of Court Administration should not be considered a court within the definition of 'judiciary,' but rather an agency subject to the broad access provisions applicable to government generally.

Babigian v. Evans, 104 Misc 2d 140, 141-142, n * (Sup Ct, NY County 1980) (external quotation marks omitted). Indeed, "[i]n view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law." *Id.* at 141. In doing so, "[t]he Legislature did not include the administrative arm of the court," (*id.* at 142) including an agency has certain "nonadjudicatory responsibilities" albeit it handles judicial functions. Matter of Law Offs. of Cory H. Morris v. County of Nassau, 2018 N.Y. Slip Op 835 (2d Dep't. (2018). Additionally, "the Legislature added a new section 88 which provided for access under FOIL to certain specified State legislative records — the same types of records all agencies were required to provide under the more limited 1974 version of the statute. The effect of this was to make agency records more available to FOIL applicants but to retain the limitations on disclosure of legislative records unless disclosure was specifically authorized under the statute." (Matter of Weston v. Sloan, 84 N.Y.2d 462, 466 [1994]).

The Legislature unequivocally set forth its policy regarding the purpose of the Freedom of Information Law. The Legislative Declaration (Public Officers Law § 84) states, in part, "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." In Governor Wilson's Approval Memorandum to the FOIL bills, he stressed the view that open and accessible government is a hallmark of a free society, engendering public understanding and participation. He further noted, "The bills that I am today approving expressly affirm these principles and the beliefs which I have long held—that government is the people's business and that the people have a right to know the processes by which government decisions are made" (Russo v Nassau County Community Coll., 81 NY2d 690, 697 [1993]).

FOIL is based on the principle that "[o]pen and accessible government is a hall-mark of a free society, engendering public understanding and participation" (Russo, 81 N.Y.2d at 697). The courts have consistently recognized that" 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government,' "(Capital Newspapers v. Whalen, 69 N.Y.2d 246, 252 [1987])(quoting Fink v. Lefkowitz, 47 N.Y.2d 567, 571 [1979]), and that the Legislature enacted FOIL to: "achieve[ ] a more informed electorate and a more responsible and responsive [government]" (Westchester

Rockland Newspapers, Inc. v. Kimball, 50 N.Y.2d 575, 579 [1980])(in accord Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp., 84 N.Y.2d 488, 492 (1994) ("to assure accountability and to thwart secrecy").

Records

The legislative purpose in the Freedom of Information Law is mainly accomplished through the definitions of "Agency" and "Record." Pursuant to POL § 86(4), the term "record" is defined "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes." This is list is not exhaustive, as indicated by the phrase "but not limited to." "[A]ll records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (i) of the Law." Committee on Open Government FOIL Advisory Opinion 12579 (Mar. 16, 2001). An agency, however, is not required to create a record in response to a FOIL request. POL § 89(3)(a)).

There is no requirement that a "record" "evince some governmental purpose" (Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 NY2d 246 [1987]). It is the nature of the public information that should determine whether or the extent to which it must be disclosed, not the ease or difficulty of obtaining the information (FOIL-AO-11176).

An agency has no obligation to create records in response to a records request. NYCLU v. Nassau County Sheriff's Dep't, Index No. 7763/2015 (Sup. Ct., Nassau County 2015); see also FOIL-AO-18795 ("FOIL pertains to existing records and states, in general, that an agency need not create a record in response to a request for information; it may choose to do so, but is not required to do so. Similarly, nothing in FOIL requires and agency to supply information in response to questions.").

As agencies progressively moved to maintain more and more information in electronic formats, however, the line between locating and retrieving an electronic record and creating an entirely new record comprising information maintained by the agency became increasingly blurred. The Court of Appeals addressed this issue in its 2007 decision in Matter of Data Tree, LLC v Romaine (9 NY3d 454 [2007]). In that case, the Court stated that "if [agency] records are maintained electronically . . . and are retrievable with reasonable effort, that agency is required to disclose the information." The Court reasoned that, "[i]n such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium." Id. "A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document." Id.

In the year after Matter of Data Tree was decided, the Legislature amended Public Officers Law (see L 2008, ch 223, § 6). The Legislature added provisions which stated that

"[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so." "Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record" (Weslowski v. Vanderhoef, 98 A.D.3d 1123, 1126 [2d Dept 2012]).

A computer software application is not a record (Miller v. New York State Div. of Human Rights, 122 AD3d 431 [1st Dept 2014]).

Filmstrips used by a professor in a course given in a public college constitute records subject to FOIL (Russo v. Nassau County Comm. College, 81 NY2d 690 [1993]).

Videotaped news broadcasts retained by the District Attorney's office constituted a record under FOIL (Pennington v. Clark, 16 AD3d 1049 [4th Dept 2005]).

Personal or unofficial documents which are intermingled with official government files and are being "kept" or "held" by a governmental entity are "records" subject to possible disclosure (Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 NY2d 246 [1987]).

Physical evidence, namely "articles of clothing and alleged weapons", does not fall within the statutory definition of a "record" that may be disclosed under the Freedom of Information Law (Sideri v Off. of Dist. Atty., New York County, 243 AD2d 423, 423 [1st Dept 1997]).

Agencies Subject to FOIL

Under POL § 86(3), an "agency" is defined as: any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The courts are outside its coverage but often must disclose records under other provisions of law. The State Legislature is covered by the Freedom of Information Law, but is treated differently from agencies generally. Private corporations or companies are not subject to the Freedom of Information Law.

Where an entity "has simply contracted with [a governmental body] on a fee-for-service basis, much as any other independent business entity might," it does not constitute an agency that is "subject to the mandates of FOIL" (Justice v King, 60 AD3d 1452, 1453 [4th Dept 2009]). In determining whether a nongovernmental entity is such an agency pursuant to FOIL, a court may consider whether the entity is required to disclose its annual budget, maintains offices in a public building, is subject to a governmental entity's authority over hiring or firing personnel, has a board comprised

primarily of governmental officials, was created exclusively by a governmental entity, or describes itself as an agent of a governmental entity. Id.

The Port Authority is subject to neither FOIL nor FOIA (Ryan v. Port Authority of New York, Index No. 1354/2015 [Sup Ct, New York County 2015]). It does, however, have its own policies with respect to accessing records.

The Nassau County Traffic and Parking Violations Agency, at least in part, is subject to FOIL (Law Offices of Cory H. Morris v. County of Nassau, 158 AD3d 630 [2d Dept 2018]). The Second Department, in its decision, held that "to the extent that a TPVA record concerns the nonadjudicatory responsibilities of the TPVA, it is not exempt from disclosure under the definition of "agency" in Public Officers Law § 86(3)." This decision overrules prior caselaw to the contrary.

Private investigator hired by an 18-B attorney in a criminal matter is not an agency subject to FOIL (McBride v. Franklin, 288 AD2d 130 [1st Dept 2001]).

SUNY's Health Science Center is subject to FOIL (Citizens for Alternatives to Animal Labs, Inc. v Bd. of Trustees of State Univ. of New York, 92 NY2d 357, 359 [1998]).

"Records prepared by outside consultants retained by agencies may fall within the exemption. Records are not divested of their exempt status because the agency does not actually take, or contemplate taking, action based upon the information contained therein" (Miller v New York State Dept. of Transp., 58 AD3d 981, 984 [3d Dep't. 2009]). One should review the *Encore* decision, however, that notes

> Because ASC receives a copy of the booklist compiled by its subcontractor, Barnes & Noble, to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a government agency. In other words, the booklist information is "kept" or "held" by ASC "for an agency" (Public Officers Law § 86 [4]). Thus, the information falls within the unambiguous definition of the term "records" under FOIL. SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining "records" as information kept or held "by, with or for an agency."

Encore Coll. Bookstores, Inc. v Auxiliary Serv. Corp. of State Univ. of New York at Farmingdale, 87 NY2d 410, 417 (1995) (external quotation marks omitted and internal citation preserved).

Southern Tier Economic Development, Inc. ("STEAD") is not an agency subject to FOIL (Ervin v. Southern Tier Economic Development, Inc., 5 Misc3d 632 (Sup Ct, Chemung County 2004), aff'd 26 AD3d 633 [3d Dept 2006]). In affirming the lower court, the Third Department found:

> respondent here was created by private business persons, has a nine-member board which is comprised of six private individuals and three ex officio government officials, none of whom exercise any financial control over respondent, the City does not control or oversee the management of First Arena and respondent does not hold itself out as an agent of the City or administer loan programs or disburse funds on behalf of the City. Lastly, EDA is a private company and the audit of its financial records was retained by respondent and has not been made a part of any public record. Thus, although respondent is performing a governmental function by fostering the economic development of the City, it is not an agency of the City for purposes of FOIL.

Id. (external quotation marks omitted).

Requests for Records

Three key points to remember when you are requesting records under FOIL:

1. Must be in writing;
2. The request must "reasonably describe" the records you;
3. Directed to the "Records Access Officer".

1. Written Requests

If an agency so chooses, "it may require that requests for records be made in writing, addressed to the records access officer" (FOIL-AO-19174, citing POL § 89[3][a]). Nevertheless, and as does occur, agencies may accept verbal FOIL requests, although this is not recommended for either the requestor the agency. If the request is not in writing, a dispute may arise with respect to receipt of the request, what was requested in the request, etc. The recommended method is to keep a paper trail of your request, sending your request by certified mail/return receipt requested, facsimile, electronically, or otherwise, including whether the request was received/reviewed.

There is no specific format for making written requests, nor may agencies require one (FOIL-AO-16607). The use of an agency's form, however, may be beneficial for the requestor because it may be easier for the agency to process, may provide a set of directions for the request (e.g., where and how to send the request to the agency), and may allow you to get a faster response. For instance, New York City has a website that allows you to send FOIL requests to most of its agencies.

2. Reasonably Describe

The requirement of Public Officers Law § 89(3)(a) that requested documents be "reasonably described" serves to enable an agency to locate and identify the records in question (Pflaum v. Grattan, 116 AD3d 1103, 1104 [3d Dept 2014]). Whether a request reasonably describes the records sought may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system (FOIL-AO-18863- provides a good discussion of several types of requests).

Public Officers Law § 89(3) states in part that: "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..." Although the Freedom of Information Law as initially enacted required that an applicant must seek "identifiable" records, since 1978 it has merely required that an applicant "reasonably describe" the records sought.

An agency has the burden to establish that "the descriptions were insufficient for purposes of locating and identifying the document sought." (Konigsberg v. Coughlin, 68 NY2d 245,249 [1986]). "If the agency is able to locate the requested records with reasonable effort, it is required to do so" (FOIL-AO-18949).

The request does not need to be as detailed as a discovery demand pursuant to CPLR 3120 (Farbman & Sons v. New York City Health & Hosps. Corp, 62 NY2d 75, 82-83 [1984]). The CPLR objections of overbroad, unduly burdensome, use of any and all, etc., are not appropriate or are subject to different standards.

Records were properly denied where "petitioner failed to provide dates of birth, addresses, or other identifiable information for these persons to distinguish their records from the records of other people" (Roque v. Kings Cty. Dist. Attorney's Office, 12 AD3d 374, 375 [2d Dept 2004]).

The failure by a requestor to reasonably describe the sought-after records is grounds for denial of the request (Kongsberg v. Coughlin, 68 NY2d 245, 251 [1986]).

"The petitioner failed to provide dates of birth, addresses, or other identifiable information for these persons to distinguish their records from the records of other people. Further, transcripts of court proceedings are not agency records, and are not subject to FOIL disclosure" (Roque v Kings County Dist. Attorney's Off., 12 AD3d 374, 375 [2d Dept 2004]).

Requests for "unusual occurrence addendums" and "scratch sheets" do not reasonably describe the records sought (Brown v. DiFiore, 139 AD3d 1048, 1050 [2d Dept 2016]).

A request for information (e.g., asking a question) does not reasonably describe a record (Newman v. Dinallo, 69 AD3d 636 [2d Dept 2010]).

The First Department recently upheld the denial of a FOIL request for "reasons of overbreadth." The decisions states:

> Petitioners failed to meet their "burden . . . to reasonably describe the documents requested so that they can be located." Parts of the request sought documents relating to NYPD intelligence operations concerning unreasonably broad categories, such as any New York City businesses "frequented" by Middle Eastern, South Asian, or Muslim persons. Respondents also submitted an affidavit of an NYPD intelligence expert noting that a complete response to the request would entail searching more than 500,000 documents which, though mostly electronic, are not necessarily searchable by ethnicity, race, or religion. Thus, NYPD met its burden to establish that some of the descriptions in the FOIL request "were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request for reasons of overbreadth"

(Asian Am. Legal Defense and Educ. Fund v New York City Police Dept., 125 AD3d 531 [1st Dept 2015])(external quotation marks omitted).

3. Directed to Records Access Officer

Although public employees are required to forward FOIL requests to the Records Access Officer (see, e.g., FOIL-AO-18332), requests should always be addressed to the Records Access Officer. Commonly, laypersons will submit FOIL requests to individuals at agencies that they are accustomed to dealing with (e.g., a secretary). This may cause a delay in the production of records, and courts would likely excuse the delay if you addressed the request to the wrong person.

Responding to Records Requests

Initial Response

The timelines and obligations concerning the initial response from an agency are found in POL § 89(3)(a), and states:

> Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable

> under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.
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> ***
>
> If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

Id. (external quotation marks omitted).

Thus, the first statutory requirement for the response is to set forth a response within five business days of the receipt of the written request. See POL § 89 (3)(a). The four types of responses are:

1. Grant the request and provide the records request (should be done in writing);

2. Deny the request in writing (this one must be done in writing)

3. If more than five business days is needed, which is typically the case, acknowledge receipt of the request in writing within five business days and provide an approximate date within 20 business days of when the request will be granted or denied.

4. If more than five business days is needed and the agency cannot provide the records within 20 business days, the agency must acknowledge receipt of the request in writing and inform the applicant of the reason for the delay beyond 20 business days and provide a "date certain," a self-imposed deadline, indicating a promised date by which access will be granted in whole or in part. This date must be reasonable based on attendant facts and circumstances.

Oftentimes, the initial response will be a combination of these types. For example, you can grant in part and deny in part a request within the first five business days. Also, you can grant a portion of the request within five business days, and provide a further response within 20 business days. As FOIL Advisory Opinion 19372 states, however, "there is no provision in the statute for repeated extensions. The agency must, however, indicate the date by which it will respond, based on what is reasonable in consideration of attendant circumstances."

Extending Time to Respond

An agency must have a reasonable basis for not granting or denying access to a record within 20 business days of the date of acknowledgement of receipt. The Committee has provided factors to be used by agencies to assist in determining a reasonable time to provide access. As stated by the Committee in 21 NYCRR 1401.5(d):

> In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

Id (external quotation marks omitted).

These factors, if applicable, must be provided in the agency's response extending its time to respond. For larger agencies, "the number of requests received by the agency" reason is often provided. For smaller agencies, finding and reviewing the requested records is typically the issue because of a limited staff. Do not be surprised, however, when an agency, regardless of its size, provides all of the above factors in its reasons for not being able to provide a response within 20 business days.

An important factor to consider when drafting your request is the "complexity of the request." If you need one record in particular by a set date, you may want to consider having that request separated from a request in which you are requesting multiple documents. Alternatively, you may wish to indicate that records be provided on a "rolling" basis and make clear that each request, for the purposes of the response, should be considered an insular request. Although this should spare the confusion of whether an agency must respond to each request within a specific time, you should anticipate receiving an automatic template response asking for additional time.

Agencies, however, may not continue to extend their time to respond indefinitely. Rather, their requests for extensions must also be "reasonable." Determining what is reasonable is always a case-by-case basis. The below caselaw outlines some differing views on this issue:

Seven months of extensions was found not to be constructively denied (Huseman v. NYC Dep't of Educ., Index No. 15109/2016, 2016 NY Slip Op 30959(U) [Sup Ct, NY County 2016])

"In the rare situation in which it is found that more than twenty additional business days are needed, the agency may do so, with an explanation of the reason for the delay

and an indication of a 'date certain,' a self-imposed deadline by which it will grant access to the records in whole or in part" (FOIL-AO-18,008 [2010], citing 21 NYCRR § 1401.5). Notably, "[t]here is no provision that permits agencies to indicate extension after extension" (id. [emphasis added]). Such conduct is considered a constructive denial of access and may appropriately be appealed. Id.

Appealing the Records Access Officer's Response

An applicant may appeal an agency's denial within 30 days of denial (POL § 89[4][a]). In turn, the agency has ten business days of the receipt of the appeal to "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought" (*id.*).

The denial letter from the agency should contain the contact information for the FOIL Appeals Officer and directions on how one can appeal the determination (see, e.g., Barrett v. Morgenthau, 74 NY2d 907, 909 [1989] ["Inasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office and failed to demonstrate in this proceeding that procedures for such an appeal had, in fact, even been established, he cannot be heard to complain that petitioner failed to exhaust his administrative remedies."]; but see Matter of Advocates for Children of N.Y. v. New York City Dept. of Educ., 101 AD3d 445 [1st Dept 2012] ["Petitioners failed to exhaust their administrative remedies with respect to FOIL request No. 6762. Petitioners' administrative appeal was filed more than 30 days after respondents' letter denying the request. Petitioners' argument that this letter did not constitute a denial of their request because it lacked a notice of the right to appeal, is unavailing since the letter clearly stated that it was the "final response" to the request."]).

Use your appeal as a chance to highlight the reasons why the underlying denial was improper. If possible, utilize caselaw or advisory opinions from the Committee. As discussed later, attorney's fees shall be granted where the agency "had no reasonable basis for denying access." You want a record created at this point as to why the agency has not been reasonable.

The 30-day deadline is an important deadline to calendar. The failure to properly appeal may prevent you from submitting a duplicate FOIL request later on (see, e.g., Matter of Kelly v. New York City Police Dept., 286 AD2d 581 [1st Dept 2001]).

For an agency, it is important to pick up on any possible issues from the underlying denial. This means, for example, adding additional reasons why the request was denied (e.g., add additional statutory exemptions), overturning part of the decision if records should have been disclosed, and ensuring that there is a reasonable basis for the denial of the records.

Courts should not consider additional exemptions not raised in the administrative level (Madeiros v New York State Educ. Dept., 30 NY3d 67, 74 [2017]["Initially, we reject the Department's reliance on Public Officers Law § 87(2)(e)(iv)—pertaining to non-routine criminal investigative techniques—because the Department failed to invoke that

particular exemption in its denial of petitioner's FOIL request."]; but see, Williamson v. Fischer, 116 A.D.3d 1169, 1171 [3d Dept. 2014], leave to appeal denied, 24 N.Y.3d 904 [2014] [allowing the additional exemption when it was for the protection of a non-party]).

It is settled law that "judicial review of an administrative determination is limited to the grounds invoked by the agency" and "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. Matter of Scherbyn v. Wayne–Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 758 (1991) (internal quotation marks and citations omitted); see Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y., 16 N.Y.3d 360, 368 (2011); Matter of Scanlan v. Buffalo Pub. School Sys., 90 N.Y.2d 662, 678 (1997).

Redactions / Exemptions

Where a statute expressly requires, an agency may withhold a document in its entirety and is not required to redact portions of the document (see, e.g., MacKenzie v Seiden, 128 AD3d 1291, 1292 [3d Dept 2015] ["Even if it were possible to redact the identifying information, this course of action is not appropriate given that such documents are categorically excluded from disclosure...."]).

Interestingly, courts have begun expanding this precedent to cases where agencies had previously been required to redact: "For had it been considered an educational record [i.e. protected by FERPA], it would have been entirely exempt from disclosure under FOIL" (Jacobson v. Ithaca City Sch. Dist., 2016 WL 5719710 [Sup Ct, Tompkins County 2016]).

The general rule, however, is that agencies are required to redact portions of a record to remove those portions of the record that are properly withheld. The Committee summarizes the requirement aptly:

> It cannot be overemphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

(FOIL-AO-16663). Thus, for example, if a portion of a record is properly exempted under one of the possible exemptions, then that portion should be redacted and the remainder of the record disclosed.

One case found that redactions were required to be done in a method that allowed the applicant to know what was actually being redacted: "Additionally, any material that needs to be redacted shall be done in the manner requested by petitioner, 'utilizing black marks, or other similar type of marking that is customarily used and can be seen on documents' " (Guercio & Guercio, LLP Index No. 9251/2015 [Sup Ct, Nassau County 2015]).

No Records Exist

An agency is not required to create a record in response to a FOIL request (see, e.g., Weslowski v. Vanderhoef, 98 AD3d 1123, 1126 [2d Dept 2012]). Although this may seem clear, agencies often inadvertently create a record in response to a FOIL request and do not realize it. Additionally, savvy Records Access Officers may respond to a request stating that such a record does not exist as identified – by providing the improper name for a record, a Records Access Officer may properly deny the production of that record by stating that such a record does not exist. Furthermore, with respect to electronic records, what constitutes a record is becoming more complex.

This is a common situation that frequently occurs in agencies: Applicant seeks a record in response to an issue. The Records Access Officer then sends several e-mails to individuals within the agency to see if there is a record that is responsive to the request. In the subsequent back-and-forth e-mails, a record (the e-mail response) is now created that is responsive to the FOIL request. That request must be disclosed (absent an exemption).

Preventing Abuse

Agencies are not without protection from those that file inappropriate requests pursuant to FOIL. Individuals need to ensure that their FOIL requests are not done to "harass, annoy or embarrass another." This is especially so for attorneys making FOIL requests, as they can and should be held to a higher standard.

The Second Department has upheld the injunction against a pro se applicant with respect to litigation relating to FOIL requests. In Robert v O'Meara, 28 AD3d 567, 568 (2d Dept 2006), the court held:

> Further, although public policy generally mandates free access to the courts (see Matter of Shreve v. Shreve, 229 A.D.2d 1005, 645 N.Y.S.2d 198; Sassower v. Signorelli, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702), courts have imposed injunctions barring parties from commencing any further litigation where those parties have engaged in continuous and vexatious litigation (see Melnitzky v. Apple Bank for Sav., 19 A.D.3d 252, 797 N.Y.S.2d 470; Miller v. Lanzisera, 273 A.D.2d 866, 868, 709 N.Y.S.2d 286). Given the petitioner's past litigation history with the DOH, as well as with other State

> agencies, and given his stated intention to continue filing FOIL requests, the Supreme Court properly issued such an injunction (see Harbas v. Gilmore, 244 A.D.2d 218, 219, 664 N.Y.S.2d 921).

Id. (external quotation marks omitted and internal citations preserved).

Although not a FOIL case, a Queens County Supreme Court recently made a similar analysis in prohibiting further litigation. In Avezbakiyev v. Moulana, P.E., 2017 WL 2265451 (Sup Ct, Queens County Apr. 18, 2017), the court stated:

> Courts in this state have barred or restricted pro se litigants from further litigation where that party has engaged in continuous and vexatious litigation motivated by ill will or spite, and intended to harass, annoy or embarrass another. (see Scholar v Timinsky, 87 AD3d 577 [2d Dept 2011][affirming order enjoining pro se litigant from bringing further motions in the action without permission of the court]; Vogelgesang v Vogelgesang, 71 AD3d 1132, 1134 [2d Dept 2010][affirming order enjoining pro se litigant from filing further actions or motions without prior written approval]; Matter of Robert v O'Meara, 28 AD3d 567, 568 [2d Dept 2006][affirming order enjoining petitioner from commencing further actions or proceedings under Freedom of Information Law].

Id. (external quotation marks omitted and internal citations preserved).

These cases are especially important for attorneys who are submitting FOIL requests. One should be guided (see *infra*) by experienced counsel in situations where litigation is pending or imminent.

Commencing an Article 78

An applicant may commence a proceeding to review an appeal officer's denial of a records request through an Article 78 proceeding (POL § 89[5][d]). There is a four-month statute of limitations to commence the action (CPLR 217[1]).

"It is well settled that the Statute of Limitations period does not begin to run until a petitioner receives notice of the final administrative determination, and not upon the issuance thereof. The burden of proving the applicability of the affirmative defense of statute of limitations rest upon the party asserting it, here the respondents. In the case at bar respondents make no effort to demonstrate when petitioner received the August 15, 2013, FOIL appeal determination" (Yuson v. Boll, Index No. 337/2014 [Sup Ct, Franklin County 2015]).

Venue is proper in the county where the agency is located (CPLR 506[b] ["A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located . . . ."]).

Service

Service Upon the State CPLR 307

1. Personal service upon the state shall be made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state.

2. Personal service on a state officer sued solely in an official capacity or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency, shall be made by (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section. Service by certified mail shall not be complete until the summons is received in a principal office of the agency and until personal service upon the state in the manner provided by subdivision one of this section is completed. For purposes of this subdivision, the term "principal office of the agency" shall mean the location at which the office of the chief executive officer of the agency is generally located. Service by certified mail shall not be effective unless the front of the envelope bears the legend "URGENT LEGAL MAIL" in capital letters. The chief executive officer of every such agency shall designate at least one person, in addition to himself or herself, to accept personal service on behalf of the agency. For purposes of this subdivision the term state agency shall be deemed to refer to any agency, board, bureau, commission, division, tribunal or other entity which constitutes the state for purposes of service under subdivision one of this section.

Personal Service upon a Corporation or Governmental Subdivision CPLR 311

(a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served

pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law;

2. upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county;

3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;

4. upon a county, to the chair or clerk of the board of supervisors, clerk, attorney or treasurer;

5. upon a town, to the supervisor or the clerk;

6. upon a village, to the mayor, clerk, or any trustee;

7. upon a school district, to a school officer, as defined in the education law; and

8. upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

(b) If service upon a domestic or foreign corporation within the one hundred twenty days allowed by section three hundred six-b of this article is impracticable under paragraph one of subdivision (a) of this section or any other law, service upon the corporation may be made in such manner, and proof of service may take such form, as the court, upon motion without notice, directs.

CPLR 306-b requirements:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Make sure to properly serve the Attorney General's office if the action is against a state agency: "In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this

section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county" (CPLR 7804[c]).

Burden

An Article 78 proceeding brought to compel the production of records is not subject to the standard "arbitrary and capricious" review (see, e.g., Prall v. New York City Dept. of Corrections, 129 AD3d 734, 735 [2d Dept 2015] ["Thus, in this proceeding, the Supreme Court erred in applying the "arbitrary and capricious" standard."]). Instead, the standard language utilized to discuss the burden and standard of review is as follows:

> In a proceeding pursuant to CPLR article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption, which exemptions are to be narrowly construed (see Public Officers Law § 89 [5] [e], [f]; Matter of West Harlem Bus. Group v Empire State Dev. Corp., 13 NY3d 882, 885 [2009]; Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462-463 [2007]). This showing requires the entity resisting disclosure to "articulate a 'particularized and specific justification for denying access' " (Matter of Dilworth v Westchester County Dept. of Correction, 93 AD3d 722, 724 [2d Dept 2012], quoting Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]). "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" (Matter of Dilworth, 93 AD3d at 724). Because FOIL is "based on a presumption of access to the records" (Matter of Data Tree, LLC v Romaine, 9 NY3d at 462), "FOIL 'compels disclosure, not concealment' " wherever the agency fails to demonstrate that a statutory exemption applies (id. at 463, quoting Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 580 [1980]; see Matter of Buffalo News v Buffalo Enter. Dev. Corp., 84 NY2d 488, 492 [1994]).

The Third Department, in Aurigemma v New York State Dept. of Taxation and Fin., 128 AD3d 1235, 1238–39 (3d Dept 2015), provided an often-overlooked aspect of an agency's burden:

> Respondents bore two separate burdens in this matter: first, to articulate "a particularized and specific justification for denying access" to the requested documents at the

> administrative level (Matter of MacKenzie v. Seiden, 106 A.D.3d at 1141, 964 N.Y.S.2d 702 [internal quotation marks and citations omitted]) and, second, in the context of the ensuing CPLR article 78 proceeding, to serve an answer containing "pertinent and material facts showing the grounds of [their] action[s]" (CPLR 7804[d]). In our view, merely attaching the privilege log to the records appeal officer's affidavit—without any corresponding reference to the cited exemptions or any explanation as to the manner in which such exemptions apply to the documents at issue—does not satisfy either of those burdens. As a result, neither of the alternative grounds relied upon by respondents will be considered by this Court. Respondents' remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Id. (external quotation marks omitted and internal citations preserved).

The Third Department, however, is not always consistent with this notion, as noted in Mazzone v New York State Dept. of Transp., 95 AD3d 1423, 1425 (3d Dept 2012):

> Next, petitioner claims that it was respondent's burden to establish that these documents were exempt from disclosure, and that this burden was not satisfied by simply submitting these materials to Supreme Court for an in camera inspection. When an agency claims that a record is exempt from disclosure, it must establish "that the material requested falls squarely within the ambit of one of these statutory exemptions." An agency is required to provide " 'a full written explanation of the reasons for denying access to a record,' " and may satisfy its burden by submitting " 'the records in question for in camera inspection by the court.' "

Id. (external quotation marks omitted).

Agencies must support their reasons for denials with first-hand information (not just attorney affirmations in opposition). However, an agency is not required to discuss and go into detail over every document withheld. Instead, discussing the generic kinds of documents withheld will usually be sufficient (Matter of Lesher v. Hynes, 19 NY3d 57, 67 [2012] ["The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of

documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89 (4) (b) to articulate a factual basis for the exemption."]). Nevertheless, this is a fine line to walk, and agencies run into problems when they do not provide sufficient details about the withheld records and simply rely on conclusory allegations (Dekom v. Waag, Index No. 14484/2012 [Sup Ct, Nassau County Feb. 19, 2013] ["The respondents' broad and unsubstantiated conclusion that most of the emails found in its search are exempt fails to satisfy the burden required to be met for nondisclosure under FOIL, thus necessitating an in camera inspection by this court."]).

Legislative Intent of FOIL (Useful for Introductory Paragraph in MOL)

> The legislative declaration section of FOIL announces New York's public policy that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions ... [T]he public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of [FOIL]." Public Officers Law § 84. 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." *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 (1979). This Court must bear in mind that "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932 (1987).

New York Times Co. v New York State Exec. Chamber, 56 NYS3d 821, 825–26 (Sup Ct 2017) (external quotation marks omitted and internal citations preserved).

Attorney's Fees

With the December 13, 2017, amendment to Public Officers Law § 89, attorney's fees under FOIL have become markedly easier to obtain. The amended statute states, in pertinent part:

The court in such a proceeding:

> (i) 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 this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time;
>
> and (ii) shall 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 this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

In the prior version, a court had discretion to award attorney's fees under both prongs. However, the most recent amendment now requires a court to award attorney's fees in the second prong. This is a prime example of why applicants need to outline in detail the reasons for their entitlement to records in the underlying FOIL appeal. It is harder for an agency to say that it had a "reasonable basis" to deny a FOIL request when it was presented with caselaw during the administrative appeal that plainly stated otherwise.

The award of attorney's fees is intended 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' " (S. Shore Press, Inc. v Havemeyer, 136 AD3d 929, 931 [2d Dept 2016])(internal citation omitted).

Moreover, an award of an attorney's fee and costs pursuant to FOIL is particularly appropriate to promote the purpose of and policy behind FOIL. Specifically, in enacting FOIL, the legislature declared that "government is the public's business" and expressly found that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions" (S. Shore Press, Inc. v Havemeyer, 136 AD3d 929, 931 [2d Dept 2016]).

In determining whether to exercise their discretionary authority to award attorney's fees, courts look to several factors. These factors primarily relate to the parties' conduct during the administrative process (see, e.g., Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017] [Instead, in the

Court's view, respondent stonewalled, and as noted in the November 2016 Decision and Order baldly "asserted that the records fell within 'one or more' of five possible exemptions ... (and completely failed) its obligation to 'fully explain in writing ... the reason for the denial of access' "]; Gonsalves v. Nassau County, Index No. 3442/2017 [Sup Ct, Nassau County 2017] [denying attorney's fees where the agency made a "good faith" effort]; Urac Corp. v Pub. Serv. Com'n of State of N.Y., 223 AD2d 906, 908 [3d Dept 1996] ["Nevertheless, even assuming that petitioner has satisfied all three of these criteria, we conclude that in light of evidence of confusion and possible misunderstanding involved in the Department's efforts to comply with petitioner's request, Supreme Court did not abuse its discretion in denying petitioner's request for counsel fees."]).

Additional factors courts look to prior to exercising discretion is the reasonableness of the agency in withholding the sought-after records, and the length of the delay in providing the appropriate statutory responses (see, e.g., Matter of Mineo v. New York State Police, 119 AD3d 1140, 1142 [3d Dept 2014]).

In determining whether attorney's fees are "reasonable," courts look to multiple factors, including:

1. the time, effort, and skill required;
2. the difficulty of the questions presented;
3. the responsibility involved;
4. counsel's experience, ability, and reputation;
5. the fee customarily charged in the locality; and
6. the contingency or certainty of compensation.

Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017], quoting Shrauger v. Shrauger, 146 AD2d 955, 956 [3d Dept 1989]). An additional factor to consider is the result obtained (Lee Enters., Inc. v. City of Glen Falls, 55 Misc3d 1207(A), *2 [Sup Ct, Warren County 2017]).

Courts will generally cap an attorney's hourly rate depending on the locality (Lee Enters., Inc. v. City of Glen Falls, 55 Misc3d 1207(A), *2 [Sup Ct, Warren County 2017] [finding the demanded hourly rate to be "excessive for this locality"]). However, courts have allowed attorneys to bill at their normal rates under particular circumstances (Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017] ["On this record, and particularly towards encouraging respondent to make a good faith effort in complying with FOIL, the court declines respondent's

request to reduce an already discounted hourly rate. Any less would be counterproductive and unreasonable under the circumstances."]).

These two cases provide a great discussion of what courts look to when deciding how much to award and what to award it for.

No Reasonable Basis

This is often a subjective analysis by the court. A review of the underlying record here is crucial in making a determination as to whether the agency's actions were reasonable. For FOIL applicants who intent to utilize this prong for attorney's fees, it is important to build the record that the agency is not being reasonable. This is oftentimes done by supplying the agency with caselaw that refutes their positions or by securing an advisory opinion by the Committee. It is hard for an agency to claim that it is being reasonable when the Committee provides an advisory opinion to the contrary.

It will also be interesting to see whether courts will exercise their former discretion in awarding attorney's fees under this prong by finding that the agency had a reasonable basis in denying the request.

> However, aside from those very limited exceptions, the Village Manager had no reasonable basis for denying access to any other materials "relating to depositions and supporting subpoena material from" (Rec. Ex. 1) litigations which were settled pursuant to the SCJ—including, but not limited to, the balance of the Rosenshein Deps which were submitted for in camera inspection and, to the extent they were in the Village's possession, the transcripts of the deposition of Bernard J. Rosenshein which was noticed by MBYC and any materials which were produced in response to the Taylor Point Subpoena.

McCrory v Vil. of Mamaroneck, 34 Misc 3d 603, 629–30 (Sup Ct 2011) (external quotation marks omitted and internal citations preserved).

Substantially Prevailed

There is no clear definition to the term "substantially prevailed" under FOIL. Clearly, a party has substantially prevailed when it receives all or most of the relief that it was seeking. However, when it does not receive all of the relief requested, what percentage of relief provided to relief sought qualifies as substantial?

The best way to examine this inquiry is through a review of caselaw. Saxton v New York State Dept. of Taxation and Fin., 107 AD3d 1104, 1105 (3d Dept 2013). "With respect to the request for counsel fees, we find no basis to disturb Supreme Court's conclusion that, having secured the disclosure of only three additional documents out of the 18 sought, petitioners did not substantially prevail" (Henry Schein, Inc. v Eristoff, 35 AD3d 1124, 1126 [3d Dept 2006]). "Further, the court's decision to order the release of 17 pages of the remaining 181 pages in dispute does not, in our view, necessarily indicate that petitioner 'substantially prevailed' in the dispute." (Grabell v New York City Police Dept., 47 Misc 3d 203, 216 (Sup Ct, New York County 2014), aff'd as modified 139 AD3d 477 (1st Dept 2016) – the First Department found the petitioner did not substantially prevail after it reduced the records that the petitioner was entitled to).

> Here, the NYPD denied petitioner's request in toto, and inasmuch as the court is ordering the NYPD to provide petitioner with at least redacted versions of documents responsive to four of the five requests in connection with which the NYPD acknowledges that it has documents, petitioner has "substantially prevailed." While the NYPD may have had a reasonable basis for withholding some of the documents that are responsive to petitioner's first five requests, it had no reasonable basis for withholding them all, or for failing to provide some of them in redacted form.

(Madeiros v New York State Educ. Dept., 30 NY3d 67, 79 [2017]) (external quotation marks omitted).

Here, the Appellate Division concluded that the statutory requirement that petitioner "substantially prevail" was not met because the "majority of the [Department's] challenged redactions were appropriate." However, this analysis fails to take into account that the Department made no disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding. Although the Department's redactions in the eventually-released records have been upheld, petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request—including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order.

Under these circumstances, petitioner substantially prevailed within the meaning of Public Officers Law § 89 (4) (c) and the Appellate Division erred in determining that

petitioner failed to meet the statutory prerequisites for an award of attorneys' fees. Indeed, to conclude otherwise would be to permit agencies to circumvent section 89 (4) (c) because "only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter—however dilatorily." See Kalish v. City of New York, 2009 WL 2844530 (Sup Ct, Queens County 2009).

A party has "substantially prevailed" in a FOIL proceeding where the initiation of the proceeding brought about the release of the requested documents. Bottom v Fischer, 129 AD3d 1604, 1605 (4th Dept 2015)("Inasmuch as respondent ultimately provided all but one of the documents in the FOIL request, petitioner "substantially prevailed" within the meaning of the statute"). Cook v Nassau County Police Dept., 140 AD3d 1059, 1060 (2d Dept 2016)("Here, the record does not support the Supreme Court's finding that the petitioner "substantially prevailed" in this proceeding. Although the NCPD was eventually ordered to disclose certain records, its claims of exemptions were largely sustained"). William J. Kline and Son, Inc. v Fallows, 124 Misc 2d 701, 705 [Sup Ct, Montgomery County 1984]

The case of Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision, 105 A.D.3d 1120, 1121-22 (3d Dept 2013), illustrates why it is important to always request a certification if no records exist. In that case, the petitioner was found to substantially prevail where the only relief it was provided was a certification after the commencement of litigation.

SAMPLE FOIL REQUEST

[This template is from the Committee on Open Government]

Dear Records Access Officer:
Please email the following records if possible [include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.]:
OR
Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies [include as much detail about the records as possible, including relevant dates, names, descriptions, etc.]:
OR

Please inform me of the cost of providing paper copies of the following records [include as much detail about the records as possible, including relevant dates, names, descriptions, etc.].

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested ($0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a CD or floppy disk.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.
If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

[Name]
[Address, if records are to be mailed].

SAMPLE FOIL REQUEST

[Insert on firm letterhead]

Re: Freedom of Information Law Request

Records Access Officer:

Pursuant to the Freedom of Information Law ("FOIL"), I hereby request the following records [on behalf of my client / law firm]:

1. Insert detailed description of records;
2. Insert detailed description of records.

I am requesting that these records be produced on a rolling basis. As such, as these records become available, I ask that they be produced. If no records exist responsive to the above request(s), I hereby request a certification to that effect. For records produced in response to the above request(s), I hereby request a certification that the record(s) produced are correct.

I am requesting that these records be produced in electronic format and e-mailed to me. If certain records cannot be produced through e-mail, please describe the reason why and advise me of the cost for reproducing those records. If records are too voluminous to transmit through e-mail, I will consent to the transmission of those records on a storage device (e.g., CD-ROM, flash drive, etc) and will pay the cost of such storage device.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

Pursuant to Public Officers Law § 89 (3), within five business days of the receipt of this request, you must grant the request, deny the request in writing, providing a response for the reasoning of its denial, or provide a date certain when such a response will be provided. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and e-mail address of the person or body to whom an appeal should be directed.

Please feel free to contact the undersigned with any inquiries you may have.

SAMPLE FOIL INITIAL RESPONSE (Granting or Extending Time)

[date]

[Name/Address]

Re: Response to FOIL Request

Dear [name]:

On [date], the [name of agency] received your Freedom of Information Law ("FOIL") request (enclosed herewith).

Sample Responses: (A) Your request is granted. Responsive records are enclosed herewith / Responsive records are available for inspection at [location and time] (B) A search for records will be conducted. We anticipate providing you with a further response, granting or denying your request, in whole or in part, on or before [date within 20 business days]

The [agency] charges the statutorily permitted fee of $.25 per page for duplication of records requested under FOIL (Public Officers Law §87[1][b][iii]). Further, if electronic records are sought, the [agency] may charge an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record(s) if at least two hours of employee time is needed to prepare the records (Public Officers Law §87[1][b],[c]). There is no provision in law or regulation requiring the waiver of this fee. Payment must be made to the [agency] by check or money order. Do not send any payment until you are notified that your request is granted and informed of the charge for your request. If your request is for electronic records in their electronic format and your request is granted, the records will be provided to you in that format.

Any person denied access to a record may appeal the decision in writing within thirty (30) days. Please state a specific ground for appeal and include copies of the initial request and the denial. Appeals should be sent to: [insert].

[Signature Line]
Records Access Officer

SAMPLE FOIL INITIAL RESPONSE (Denial)

[date]

[Name/Address]

Re: Response to FOIL Request

Dear [name]:

On [date], the [name of agency] received your Freedom of Information Law ("FOIL") request (enclosed herewith).

Please be advised that the [agency] denies your first FOIL request. Your request is denied because the [agency] is not in possession of such a document and an agency need not create a record in response for information.

OR

Please be advised that the [agency] denies your first FOIL request. Your request is denied because such records are education records and contain "personally identifiable information," as that term is defined by the Family Educational Rights and Privacy Act ("FERPA"). I find that no sufficient amount of redaction would justify disclosure of the records in this instance. Due to the limited number of students and uniqueness of the records, student identities would still be "easily traceable" even after redaction. As such, the records must be withheld in their entirety. Your request is further denied as it constitutes an unwarranted invasion of privacy.

Any person denied access to a record may appeal the decision in writing within thirty (30) days. Please state a specific ground for appeal and include copies of the initial request and the denial. Appeals should be sent to: [insert].

[Signature Line]
Records Access Officer

[See 21 NYCRR 1401.7 for a discussion on requirements for a proper denial]

SAMPLE FOIL APPEAL

[date]

[Name/Address]

Re: FOIL Appeal

Dear Mr/Mrs. [Name]

Please allow this to serve as an appeal from the [date] FOIL response by [name of Records Access Officer].

I hereby appeal the response received to item #1 of my FOIL request:

[insert the request]
[insert the response received]

Your denial of my request for videotapes of the incident outlined in this request is improper. Videotapes are considered "records" under FOIL (*see e.g.*, *Buffalo Broadcasting v. N.Y.S. Dept. of Correctional Servs.*, 155 AD2d 106 [3d Dept 1990]; FOIL-AO-18991 [2012]). As such, whether a videotape may be disclosed is analyzed under the same standards as any other record (*id.*). As with any record, blanket denials of videotapes are improper where the video may be properly redacted (*id.*). Therefore, to the extent that you are in possession of videotape footage containing the incident outlined in the request, such records must be disclosed pursuant to FOIL. If no videotape of the incident exists, I hereby request a certificate to that effect (FOIL-AO-17434).

I hereby appeal the response received to item #2 of my FOIL request:

[insert the request]
[insert the response received]
[Reasons why denial was wrong]

Your response to my appeal is due within 10 business days of this date. As a reminder, I note that you must transmit your decision to the Committee on Open

Government (21 NYCRR § 1401.7 [g]). Please note that nothing herein constitutes a waiver of my right to proceed with an Article 78 due to your agency's failure to properly respond to my initial FOIL appeal.

Please contact the undersigned with any further inquiries.

Enclosures:
FOIL Request
FOIL Denial

SAMPLE FOIL APPEAL

[date]

[Name/Address]

Re: FOIL Appeal

Dear Mr/Mrs. [Name]

Please allow this to serve as an appeal from my FOIL request dated [date], a copy of which is enclosed herewith for your convenience. As you are aware, an agency is required to furnish a response to a FOIL request within 5 business days of its receipt (POL § 89[3][a]). As such, a response regarding my FOIL request was due on or before [date]. However, to date, no response has been provided.

Therefore, I hereby appeal the constructive denial of my request (21 NYCRR 1401.5[e][1]; FOIL-AO-11865). I remind you of your obligation to provide me with a response within 10 business days and to transmit a copy of your response to my appeal to the Committee on Open Government.

Please contact the undersigned with any further inquiries.

SAMPLE FOIL APPEAL DENIAL

[date]

[Name]
[Address]

Re: Response to FOIL Appeal

Dear [Name]:

I am in receipt of your Freedom of Information Law ("FOIL") appeal dated [date], and received by the [agency] on [date] (enclosed herewith). Please be advised that, after careful review of your request, your appeal is denied.

With respect to your appeal of the first request, [insert request], your appeal is denied as the agency is not in possession of such a document and an agency need not create a record in response for information (*see e.g.*, FOIL-AO-19175 ["While New York's highest court has consistently interpreted the Freedom of Information Law in a manner that fosters maximum access, it does not require that an agency create records in response to a request."]).

With respect to your appeal of the second request, [insert request], your appeal is denied. After a review of the requested records, I agree with the Records Access Officer's determination that such records are education records and contain "personally identifiable information." Further, no sufficient amount of redaction would justify disclosure of the records in this instance. As stated by the Records Access Officer: "Due to the limited number of students and uniqueness of the records, student identities would still be 'easily traceable' even after redaction. As such, the records must be withheld in their entirety." In addition, the request was properly denied as it constituted an unwarranted invasion of privacy.

[If necessary—To further expand upon the Records Access Officer's denial ...]

I respectfully refer you to 21 NYCRR § 1401.7 for a complete recitation of your rights on appeal.

c: [Attorney for agency]

Committee on Open Government
Department of State
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, NY 12231

SAMPLE PETITION

Note – this Petition is taken from a simple case wherein the agency failed to respond to the initial FOIL request within the statutory timeline and then failed to respond to the appeal of the constructive denial. Much more detail may need to be provided in more advanced cases.

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

----------X

Law Offices of [Insert],

Petitioner,

Index No. _____

-against-

Verified Petition

[Insert],

Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

----------X

TO THE ABOVE-NAMED RESPONDENT:

Petitioner, [insert], as and for its Verified Petition alleges as follows:

PRELIMINARY STATEMENT

1. That, this Article 78 proceeding pursuant to the Freedom of Information Law ("FOIL"), Article 6 of the Public Officers Law, seeks to vindicate the rights of Petitioner, [insert], and of the public to access records regarding Respondent, [insert].

2. That, Respondent has refused to produce public records in response to a FOIL request dated [insert].

3. That, Respondent has failed to respond within the timelines mandated by the Freedom of Information Law.

4. That, having exhausted its administrative remedies, Petitioner now asks the Court to order the production of requested documents within 30 days of this Court's order; awarding Petitioner its costs and attorney's fees in this proceeding; and granting such other and further relief as this Court deems just and proper.

VENUE

5. That, pursuant to CPLR 7804(b) and 506(b), venue in this proceeding lies in New York County, in the judicial district in which Respondent took the action challenged here and where the offices of Respondent are located.

PARTIES

6. That, Petitioner, [insert], is a limited liability partnership duly located in the County of [insert], State of New York (hereinafter "Petitioner").

7. That, [insert], is an attorney with the Law Offices of [insert].

8. That, upon information and belief, Respondent, [insert], was and still is a Municipal Corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its offices located at [insert].

9. That, upon information and belief, at all times relevant hereto, Respondent was and still is a public body duly authorized and existing under and by virtue of the laws of the State of New York.

FACTS

10. On [date], the Petitioner served the following FOIL request on Respondent (Exhibits "1"). The request sought the following records:

[cut and paste applicable paragraphs from FOIL request]

11. That, the request sought the aforementioned records in "electronic format" to be provided to the e-mail address indicated in the request (Exhibit "1").

12. On [date], Respondent acknowledged receipt of the FOIL request (Exhibit "2"). Respondent assigned FOIL reference number [insert] to the request. In the response, Respondent stated that it anticipated providing a response by [insert].

13. By [date], however, no response had been provided to the request.

14. Consequently, on [date], Petitioner appealed the constructive denial of the request (Exhibit "3").

15. The statutory 10 business day timeframe to respond to an appeal ended on [date]. Respondent has failed to respond to the appeal within the statutory time. Further, Respondent has failed to produce the requested records. As such, Petitioner has exhausted its administrative remedies.

AS FOR THE FIRST CAUSE OF ACTION

16. Petitioner repeats, reiterates, and realleges each and every allegation set forth in the proceeding paragraphs of this Verified Petition with the same force and effect as if same were more fully set forth at length herein.

17. Respondent has engaged in a pattern and practice of failing to comply with its obligations under New York Public Officers Law section 84 *et seq.*, Section 1401.5 of the Rules and Regulations of the State of New York, and Respondent's [insert citation to

Respondent's internal regulations if applicable] by routinely ignoring statutory deadlines, constructively and improperly denying requests and appeals, and ultimately failing to disclose to Petitioner the requested documents to which it is entitled.

18. To date, Respondent has not produced the requested records under Petitioner's FOIL request dated [insert], nor has it responded to the [date] appeal.

19. Petitioner exhausted its administrative remedies when it appealed Respondent's constructive denial of the FOIL request, and Respondent failed to furnish a response within 10 business days.

WHEREFORE, Petitioner prays for an order:

1. Compelling Respondent to perform the duties required by New York Public Officers Law section 84 *et seq*, 21 NYCRR 1401.5, and Regulation [insert citation to Respondent's regulation if applicable] by, *inter alia*, producing the documents requested in Petitioner's FOIL request within 30 days of this Court's order;

2. Awarding Petitioner its costs and attorney's fees in this proceeding;

3. Granting such other and further relief as this Court deems just and proper.

[signature]

[Verification]

New York Law Journal

Outside Counsel

Public Agency Privileges, FOIL, and the CPLR

Matthew T. McLaughlin, New York Law Journal

September 29, 2017

Parties involved in disputes with public agencies generally know that those entities are subject to requests under the New York Freedom of Information Act (FOIL). It is also settled that public agencies involved in civil litigation likewise remain subject to CPLR requests. Litigants thus have an opportunity to bring a two-front attack when obtaining documents from a public agency. The CPLR and the FOIL statutes operate in tandem, and choosing one route to obtain documents from a public agency does not preclude use of the other. The tandem operation of these two statutes brings, however, an often unappreciated twist. Under FOIL, public agencies enjoy certain exceptions to the obligation to produce documents. Several courts, including three of the Appellate Division departments, hold that the exceptions to production found in the FOIL statute may be used defensively in civil litigation, thereby permitting a public agency to withhold documents for FOIL-based reasons.

Recent jurisprudence from the Appellate Division, Fourth Department has opened a chasm in the intersection between the CPLR discovery devices and the operation of FOIL. While the other Appellate Division departments hold that exceptions to production found in FOIL may be used in standard civil litigation, the Fourth Department disagrees. This tension in the departments is ripe for a Court of Appeals resolution. This article will discuss the conflict and suggest a resolution based on existing Court of Appeals authority.

FOIL and the CPLR

It all begins with the seminal decision *Farbman & Sons v. New York City Health and Hospitals*, 62 N.Y.2d 75 (1984). There, the Court of Appeals held that the production obligations of FOIL operate in tandem with the obligations of Article 31 of the CPLR. In *Farbman*, a construction contractor for the New York City Health and Hospitals Corporation (HHC) served a FOIL request on HHC for documents related to services rendered. While the FOIL request was pending, the contractor commenced litigation. Reviewing the policy underlying the FOIL statute beside that of the CPLR, the Court of Appeals held that the statutes operate jointly in that a party may pursue a FOIL request while a litigation progresses. Reasoning to this conclusion, the Court of Appeals noted that "[i]f the Legislature had intended to exempt agencies involved in litigation from FOIL, it certainly could have so provided." *Farbman*, 62 N.Y.2d at 81.

Against the backdrop of *Farbman*, Appellate Division authority has developed, establishing that public agencies involved in litigation are also entitled to the protections afforded by agency privileges, such as the deliberative process privilege protecting inter-/intra-agency communications from disclosure. The inter-/intra-agency deliberative process privilege is commonly applied in response to a FOIL request, and this exception to a FOIL production is codified in the FOIL statute. Public Officers Law §87(2)(g). Relying on *Farbman*, Appellate Division departments have reasoned that the protective

privileges embodied in FOIL should be available to a party in a civil litigation. Without this protection, the FOIL statute could be eviscerated by a FOIL requester simply filing a lawsuit and seeking disclosure under the CPLR.

The Second Department has been the most fertile ground for the flourishing of the deliberative process privilege in civil suits. In *Mecca v. Shang*, 55 A.D.3d 570 (2d Dept. 2008), plaintiff brought a legal malpractice action and sought discovery of documents from the Department of Health (DOH). The DOH withheld selected documents, claiming that they were exempt from discovery under agency privilege. The Second Department agreed that the documents were exempt from disclosure for various reasons, including the "deliberative process privilege." *Mecca*, 55 A.D.3d at 571. Significantly, *Mecca* was decided in the context of a litigation and did not involve a FOIL request.

Similarly, in *New York Telephone v. Nassau County*, 54 A.D.3d 368 (2d Dept. 2008), water and telephone utilities brought suit relating to property assessment values. In the dispute, a non-FOIL proceeding, the utilities sought disclosure of communications between Nassau County officials regarding the review of Nassau County's finances. The Second Department held that the communications sought were insulated because "[t]he communications at issue are protected from disclosure by the deliberative process privilege." *New York Telephone*, 54 A.D.3d at 370.

The First Department also holds that a "public interest privilege" protects certain government documents from public disclosure. In *One Beekman Place v. City of New York*, 169 A.D.2d 492 (1st Dept. 1991), Manhattan property owners challenged a re-zoning plan and sought in litigation production of documents prepared by the Department of City Planning. These documents contained staff members' analyses, opinions, and recommendations. The First Department began its analysis by noting that "[i]t has long been recognized that the public interest is served by keeping certain government documents privileged from disclosure." Id. at 170. Surveying the law in the area, the First Department referenced the FOIL statute as protecting government interests and then noted that "[i]t is, for example, in the public interest to encourage candid discussion and representation of views among government employees involved in the development of policy." *One Beekman Place*, 169 A.D.2d at 493.

Providing guidance in assessing whether the public interest privilege is applicable, the First Department cautioned: "a court must weigh the encouragement of candor in the development of policy against the degree to which the public interest may be served by disclosing information which elucidates the governmental action taken." *One Beekman Place*, 169 A.D.2d at 493. Conducting that analysis on the City Planning documents, the First Department concluded that they fell within the privilege afforded to confidential communications among public officers and held that the documents should have been withheld.

Other Appellate Division decisions also apply agency privileges in non-FOIL, standard litigation, contexts. For example, in *Flores v. City of New York*, 207 A.D.2d 302 (1st Dept. 1994) the court denied a request for production of documents in a civil rights lawsuit on the grounds that the requested documents were pre-decisional intra-agency materials. In the last two years, the Third Department likewise held that documents should be withheld from a litigation production because of the deliberative process privilege. *Entergy Nuclear Indian Point 2 v. NYS Dept. of State*, 130 A.D.3d 1190 (3rd Dept. 2015).

Fourth Department Differs

Two recent Fourth Department decisions break from the interpretation of *Farbman* adopted by the other departments. In *Abate v. County of Erie*, 152 A.D.3d 177 (4th Dept. 2017) the Fourth Department rejected the notion that privileges afforded by FOIL would apply in a CPLR document production. Citing *Farbman*, the Fourth Department opined that the "discovery provisions of CPLR article 31 operate independently of the Freedom of Information Law and a litigant's entitlement to any

particular evidentiary item under article 31 is not affected by the disclosability of that item under FOIL." *Abate*, 152 A.D.3d at 181.

Likewise, the Fourth Department, in *Mosey v. County of Erie*, 148 A.D.3d 1572 (4th Dept. 2017), also held that documents protected by inter-/intra-agency deliberative process privilege must be produced in civil litigation. Critical of decisions that "all too casually" mention the deliberative process privilege and "purport to apply it outside the context of a FOIL proceeding," *Mosey*, 148 A.D.3d at 1575, the Fourth Department held that the Court of Appeals case law should not be construed as having created a distinct "deliberate process privilege" that should apply outside the context of a FOIL proceeding. The court therefore ordered the production of documents that would have otherwise been protected under the deliberative process privilege.

Conclusion, Recommendation

The Appellate Division disagreement regarding the overlap between FOIL and the CPLR began with *Farbman*. The tension will be resolved with a revisitation of that decision by the Court of Appeals. *Farbman* made explicit that FOIL and the CPLR can be used offensively in tandem: a civil litigant may still serve a valid FOIL request. The decision neglected to explicitly address the converse question of whether FOIL defenses may be used by a public agency to withhold a document in civil litigation.

In the search for a solution, it bears noting that the lower courts interpreting *Farbman* have each missed an implicit point in the decision. *Farbman* concluded with a direction that the lower court conduct an in camera inspection of the documents considered for production. The Court of Appeals, having decided that a litigant is entitled to make a FOIL request, nevertheless held that the documents need to be reviewed by a judge to discern whether they contain intra-/inter-agency deliberative materials. In the thicket of proceedings involving a FOIL request and CPLR document demands, *Farbman* noted that the agency privileges needed guarding. This significant coda to *Farbman* has gone unrecognized, particularly by the Fourth Department and other courts that have concluded that FOIL protections should not be afforded in civil litigation. While *Farbman* could have been more explicit, it remains clear enough that the Court of Appeals has already held that the agency privileges found in FOIL should operate to allow parties in civil litigation to withhold documents containing information protected by public agency privileges.

Matthew T. McLaughlin is the partner-in-charge of the New York office of Venable.

MATTER OF MADEIROS v. New York State Educ. Dept., 2017 NY Slip Op 7209 - NY: Court of Appeals 2017

2017 NY Slip Op 07209

IN THE MATTER OF PAMELA A. MADEIROS, Appellant,
v.
NEW YORK STATE EDUCATION DEPARTMENT ET AL., Respondents.

No. 90
Court of Appeals of New York.

Decided October 17, 2017.
Cynthia E. Neidl, for appellant.

Jeffrey W. Lang, for respondents.

Opinion by Judge Stein. Chief Judge DiFiore and Judges Rivera, Fahey, Garcia, Wilson and Feinman concur.

STEIN, J.

The question before us is whether the Freedom of Information Law exempts from disclosure certain records compiled by respondent New York State Education Department relating to municipalities' plans for auditing special education preschool provider costs. We hold that the materials at issue, as redacted, are exempt from disclosure under Public Officers Law § 87 (2) (e) (i).

I.

The board of every school district is responsible for providing special education services and programs to preschool-age children with disabilities (*see* Education Law §§ 4410 [2]; *see generally* Education Law § 4401). Such programs are often furnished by private providers approved by respondent New York State Education Department (hereinafter, the Department) (*see* Education Law §§ 4401 [2]; 4410 [9]; 8 NYCRR 200.20). Each county and New York City (for the counties contained therein) is charged with the costs of sending resident children to these special education preschool programs (*see* Education Law § 4410 [1] [g]; [11] [a]). The tuition rates charged by such programs are set by the Department — based on financial statements submitted by the provider, as well as State and municipal audits, which establish, among other things, the costs of administering such programs — and municipalities are reimbursed by the State for a statutory percentage of the costs paid out to providers (*see id.* § 4410 [10], [11] [b] [i]; 8 NYCRR 200.9).

The Office of the State Comptroller conducted a series of audits of approved preschool special education programs. These audits revealed widespread fraud and abuse in the reporting of allowed costs, and ultimately prompted several criminal prosecutions and professional disciplinary investigations. As a result, in 2013, the legislature amended Education Law § 4410 in an attempt to increase fiscal oversight and, specifically, to incentivize municipal audits of such programs. Although municipalities were already authorized to perform audits of programs for which they bore fiscal responsibility, the 2013 amendments further permitted municipalities to recover overpayments and retain all disallowed costs discovered (L 2013, ch 57, § 24 [ii]; *see* Education Law § 4410 [11] [c] [i], [ii]; 8 NYCRR 200.18). The amendments to section 4410 also required the Department to "provide guidelines on standards and procedures to municipalities and boards, for fiscal audits of [preschool] services or programs" (L 2013, ch 57, § 24 [i]; *see* Education Law § 4410 [11] [c] [1]). In addition to complying with that statutory mandate, the Department amended its regulations to require municipalities to submit, for approval by the Department, new "detailed audit plan[s] and audit program[s]" consistent with the Department's guidelines prior to undertaking any audits after a specific date (8 NYCRR 200.18 [b] [2], [3]). Once approved, a municipality's audit plan is valid for five years (*see id.*).

Shortly after the enactment of the statutory and regulatory amendments relating to Education Law § 4410, petitioner Pamela Madeiros submitted a request to the Department pursuant to the Freedom of Information Law (*see generally* Public Officers Law art 6 [FOIL]), seeking disclosure, as relevant here, of

> "any and all [Education Law § 4410 (11) (c) and 8 NYCRR 200.18] audit standards in [the Department's] possession, including any audit program and audit plan submitted by a municipality or school district . . ., whether approved, not approved, disapproved, pending or such other status."

The Department denied petitioner's request in its entirety, asserting that the records were exempt from disclosure pursuant to Public Officers Law § 87 (2) (e) because disclosure "would interfere with investigations of compliance with the provisions of the reimbursable cost manual and the preschool special education rate setting system." Petitioner administratively appealed, and the Department failed to respond within the statutory time frame, thereby constructively denying her appeal (*see* Public Officers Law § 89 [4] [a]).

Petitioner subsequently commenced the instant CPLR article 78 proceeding, seeking a judgment vacating the denial of her FOIL request and directing the Department to provide her with the records sought. Petitioner also requested attorneys' fees pursuant to Public Officers Law § 89 (4) (c).

Before answering the petition, the Department released to petitioner 55 pages of documents responsive to her FOIL inquiry. The documents consisted of the New York City and Onondaga County Audit Plans, the contents of which were partially redacted, certain unredacted Department records relating to the regulatory amendments, and the guidelines promulgated by the Department for fiscal audits of preschool providers undertaken by municipalities. After disclosing these documents, the Department answered the petition and sought dismissal of the

proceeding, arguing that: petitioner's claim was moot in light of its disclosures; the redactions were permitted under both sections 87 (2) (e) and (g) of the Public Officers Law; and petitioner had failed to demonstrate her entitlement to attorneys' fees. The Department submitted unredacted copies of the documents to the trial court for in camera review.

Supreme Court granted the petition only to the limited extent of requiring the Department to disclose two previously redacted pages due to the Department's failure to invoke Public Officers Law § 87 (g) as a basis for its administrative denial, upheld the remainder of the redactions, and otherwise dismissed the proceeding. Supreme Court reasoned that the majority of the Department's redactions were appropriate under Public Officers Law § 87 (2) (e) because the audit plans contained non-routine audit techniques and procedures compiled for law enforcement purposes, and disclosure would interfere with law enforcement investigations (*see* Public Officers Law § 87 [2] [e] [i], [iv]). Supreme Court did not award petitioner attorneys' fees. On petitioner's appeal, the Appellate Division affirmed (133 AD3d 962 [3d Dept 2015]),[1] and we granted petitioner leave to appeal (27 NY3d 903 [2016]).

II.

FOIL generally "requires government agencies to 'make available for public inspection and copying all records' subject to a number of exemptions" (*Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 379 [2012]; quoting Public Officers Law § 87 [2]). FOIL is based on a presumption of access in accordance with the underlying "premise 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 NY2d 567, 571 [1979]; *see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). The exemptions set forth in the statute are interpreted narrowly in order to effect the purpose of the statutory scheme (*see Matter of Data Tree*, 9 NY3d at 462).

This appeal centers on the meaning and interpretation of the exemption embodied in Public Officers Law § 87 (2) (e). Pursuant to this provision, an agency may deny public access to records or portions thereof that, as relevant here, "are compiled for law enforcement purposes and which, if disclosed, would" either "interfere with law enforcement investigations or judicial proceedings" (subdivision [i]) or "reveal criminal investigative techniques or procedures, except routine techniques and procedures" (subdivision [iv]). Petitioner argues that the courts below erred in concluding that the Department's redactions of the documents responsive to her FOIL request are exempt pursuant to either of these provisions. More specifically, petitioner asserts that any records relating to municipal audit plans were not compiled for law enforcement purposes, do not relate to and would not interfere with a law enforcement investigation or judicial proceeding, and are not criminal investigative techniques. Petitioner further contends that she is entitled to attorneys' fees because she has substantially prevailed in this proceeding given the Department's belated disclosures following its commencement. In response, the Department urges us to affirm the Appellate Division order under either subdivision (i) or (iv) of section 87 (2) (e), and disputes petitioner's claim that she is entitled to attorneys' fees.

III.

Initially, we reject the Department's reliance on Public Officers Law § 87 (2) (e) (iv) — pertaining to non-routine criminal investigative techniques — because the Department failed to invoke that particular exemption in its denial of petitioner's FOIL request. "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency" and "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991] [internal quotation marks and citations omitted]; *see Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]; *Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d 662, 678 [1997]). It is also settled that the "agency relying on the applicability of [a FOIL] exemption[], . . . ha[s] the burden of establishing that the . . . documents qualif[y]" for the exemption and, to meet that burden, the agency must "`articulate particularized and specific justification'" for denying disclosure (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 885 [2009], quoting *Matter of Fink*, 47 NY2d at 571; *see* Public Officers Law § 89 [4] [b]).

Here, the Department's administrative denial cited to Public Officers Law § 87 (2) (e), without referencing a specific subdivision. However, the justification offered — namely, that disclosure would "interfere with investigations of compliance" — plainly tracks the language of subdivision (i), not subdivision (iv). The Department did not make any contemporaneous claim that the requested materials constituted non-routine "criminal investigative techniques" (Public Officers Law § 87 [2] [e] [iv]). Because the Department did not rely on subdivision (iv) in its administrative denial, to allow it do so now would be contrary to our precedent, as well as to the spirit and purpose of FOIL.

IV.

The propriety of the Department's redactions of the disclosed records, therefore, turns on whether the redacted portions qualify for exemption under Public Officers Law § 87 (2) (e) (i). This requires us to address both prongs of the exemption: (1) whether the records were compiled for law enforcement purposes; and (2) whether disclosure of the records would interfere with law enforcement investigations or judicial proceedings. We conclude that, under the circumstances presented here, both of these prongs are satisfied and the records were properly redacted.

As to the first prong, we are persuaded that the records at issue were compiled for law enforcement purposes. The phrase "law enforcement purposes" is not defined in the FOIL statutes (*see* Public Officers Law § 86 [definitions]). "In the absence of a statutory definition, `we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase'" (*Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016], quoting *Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001]). To that end, "law enforcement" is generally defined by Black's Law Dictionary as "[t]he detection and

punishment of violations of the law" (Black's Law Dictionary [10th ed 2014], law enforcement). It is undisputed that the Department lacks jurisdiction to punish criminal violations of the law. However, as the dictionary further provides, the term "law enforcement" is "not limited to the enforcement of criminal laws" (Black's Law Dictionary [10th ed 2014], law enforcement).

Consistent with this definition, we conclude that the exemption set forth in Public Officers Law § 87 (2) (e) does not apply solely to records compiled for law enforcement purposes in connection with criminal investigations and punishment of violations of the criminal law. Notably, the exemptions provided in two of the subdivisions under section 87 (2) (e) expressly apply only to "criminal" matters, a limitation that would be superfluous if the term "law enforcement" was confined to criminal matters at the outset (Public Officers Law § 87 [2] [e] [iii], [iv]).

In addition, we have recognized that "`[f]ederal case law and legislative history . . . are instructive'" when interpreting Public Officers Law § 87 (2) (e) because the FOIL law enforcement exemption is modeled on the federal counterpart found in the Freedom of Information Act (*Matter of Lesher v Hynes*, 19 NY3d 57, 64, quoting *Matter of Fink*, 47 NY2d at 572 n; *see generally* 5 USC § 552 [FOIA]). Significantly in that regard, the federal analogue exempting certain materials compiled for law enforcement purposes has been held to encompass both civil and criminal law enforcement matters (*see e.g. Sack v U.S. Dept. of Defense*, 823 F3d 687, 694 [DC Cir 2016]; *Cooper Cameron Corp. v U.S. Dept. of Labor, Occupational Safety and Health Admin.*, 280 F3d 539, 545 [5th Cir 2002]; *Tax Analysts v I.R.S.*, 294 F3d 71, 77 [DC Cir 2002]; *Rugiero v U.S. Dept. of Justice*, 257 F3d 534, 550 [6th Cir 2001]; *see also Milner v Department of Navy*, 562 US 562, 582 [2011] [Alito, J. concurring] ["The ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity"]). The Committee on Open Government — which issues advisory opinions relating to FOIL obligations — has also recognized that "entities other than criminal law enforcement agencies may in certain circumstances cite [Public Officers Law] § 87 (2) (e) as a basis for denial," providing, as an example, an agency audit that uncovers possible illegality (Comm on Open Govt FOIL-AO-7332 [1992]).

Our decision should not be read to hold that every audit necessarily serves "law enforcement purposes" (Public Officers Law § [2] [e]). The audits at issue here, however, are not simply routine fiscal audits. The statutory scheme of Education Law § 4410, as amended in 2013, and the Department's regulations pertaining to municipal audit plans and audit programs, indicate that these audits are specifically targeted at ferreting out the improper and potentially illegal or fraudulent reporting of costs by preschool special education providers. The goal of the statutory and regulatory scheme and, in particular the 2013 amendments, is not only to ensure the establishment of an accurate tuition rate, but also to encourage compliance with the applicable reporting rules and curb existing fraud and abuse (*see generally* Senate Introducer's Mem in Support, Bill Jacket, L 2013, ch 545 at 9). Thus, the obvious inference arising from the statutory requirement that the Department issue guidelines for municipalities in conducting

these audits, is that the legislature sought to increase the efficacy of audit procedures in an effort to strengthen enforcement measures. Under these circumstances, we conclude that the records sought by petitioner were compiled for law enforcement purposes.

Turning to the second inquiry, we agree with the courts below that the redactions made by the Department were necessary to prevent interference with a law enforcement investigation (*see* Public Officers Law § 87 [2] [e] [i]). We have cautioned that "the purpose of [FOIL] is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution" (*Matter of Fink*, 47 NY2d at 572). Here, the Executive Coordinator for Special Education explained that the Department's redactions were imperative because releasing specific methods and procedures used by auditors in particular counties would supply providers subject to audit with "a roadmap to avoid disclosure of inappropriate costs" and would enable such providers to more effectively conceal fraudulent and criminal activities, thereby undermining the audit process. In other words, "disclosure of th[e redacted] procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel" (*Matter of Fink*, 47 NY2d at 572).

To the extent petitioner claims that Public Officers Law § 87 (2) (e) (i) is inapplicable because there were no ongoing audits at the time that she submitted her FOIL request, her argument is unpersuasive. While an agency may not rely on section 87 (2) (e) (i) to refuse disclosure of records upon a wholly speculative claim of potential interference with an unspecified future investigation to which the documents may or may not be relevant (*see Church of Scientology of N.Y. v State of New York*, 61 AD2d 942, 943 [1st Dept 1978], *affd on other grounds* 46 NY2d 906, 907 [1979]), that is not the case here. Rather, the municipal audits of special education preschool providers were expressly encouraged by statute and were plainly contemplated in the near future.

A municipality must submit an audit plan for approval as the necessary first step to conducting an audit (*see* 8 NYCRR 200.18). That is, the very purpose of a municipality's submission of an audit plan to the Department for approval is to obtain authorization to conduct such investigations. We have previously recognized that section 87 (2) (e) (i) applies to prospective investigations (*see Matter of Lesher*, 19 NY3d at 68 [observing that disclosure may be required where there was "no longer any pending or *potential* law enforcement investigation" (emphasis added)]; *see also Sussman v U.S. Marshals Serv.*, 494 F3d 1106, 1114 [DC Cir 2007] [under FOIA, the interference need not be with an ongoing investigation, as disclosure may be refused if it would interfere with a reasonably anticipated proceeding]; *Lynch v Dept. of Treasury*, 210 F3d 384 [9th Cir 2000] [FOIA exemption applied where legal action was "'contemplated' or 'in prospect'"], *cert denied* 530 US 1215 [2000]; *Manna v U.S. Dept. of Justice*, 51 F3d 1158, 1164 [3d Cir 1995] [under FOIA, the agency must show that an enforcement proceeding is "pending or prospective"], *cert denied* 516 US 975 [1995]; *Miller v U.S. Dept. of Agric.*, 13 F3d 260, 263 [8th Cir 1993] [same]).

Here, considering the municipalities' submissions of audit plans in the context of the statutory and regulatory amendments aiming to uncover and curtail fraudulent and criminal reporting,

the existence of reasonably anticipated investigations at the time of petitioner's FOIL request is clear. The municipalities in question, by virtue of having submitted plans pursuant to which audits could be conducted, were plainly contemplating impending audits of preschool program providers for which they bore financial responsibility. Thus, the redactions at issue fit squarely within the exemption permitting an agency to deny access to records compiled for law enforcement purposes where their disclosure would interfere with an investigation.

V.

As a final matter, we agree with petitioner that, even accepting the Department's redactions as proper, she "substantially prevailed" in this litigation (Public Officers Law § 89 [4] [c]). The Public Officers Law authorizes an award of attorneys' fees where the petitioner "has substantially prevailed" in the FOIL proceeding and the agency either lacked a reasonable basis for denying access to the requested records or "failed to respond to a request or appeal within the statutory time" (Public Officers Law § 89 [4] [c] [i], [ii]). "Where . . . a court determines that one of the requirements has not been met, we review whether the court erred as a matter of law in reaching that conclusion" (*Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 441 [2005]; *see Matter of Niagara Envtl. Action v City of Niagara Falls*, 63 NY2d 651, 652 [1984]). If the statutory requirements have been satisfied, the determination of whether to award fees rests within the court's discretion, subject to review only for an abuse of that discretion (*see Matter of Capital Newspapers Div. of the Hearst Corp. v City of Albany*, 15 NY3d 759, 761 [2010]; *Matter of Beechwood Restorative Care Ctr.*, 5 NY3d at 441; Governor's Approval Mem, Bill Jacket, L 1982, ch 73 at 8).

Here, the Appellate Division concluded that the statutory requirement that petitioner "substantially prevail" was not met because the "majority of the [Department's] challenged redactions were appropriate" (133 AD3d at 965). However, this analysis fails to take into account that the Department made *no* disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding. Although the Department's redactions in the eventually-released records have been upheld, petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request — including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order.

Under these circumstances, petitioner substantially prevailed within the meaning of Public Officers Law § 89 (4) (c) and the Appellate Division erred in determining that petitioner failed to meet the statutory prerequisites for an award of attorneys' fees. Indeed, to conclude otherwise would be to permit agencies to circumvent section 89 (4) (c) because "only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter — however dilatorily" (*Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 339-340 [3d Dept 2011]; *see Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437, 438 [1st Dept 2015]; *Matter of Jaronczyk v Mangano*, 121 AD3d 995, 997 [2d Dept 2014];

Matter of Purcell v Jefferson County Dist. Attorney, 77 AD3d 1328, 1329 [4th Dept 2010]; *Matter of* Powhida v City of Albany, 147 AD2d 236, 239 [3d Dept 1989]). We, therefore, must remit for Supreme Court to exercise its discretion in relation to petitioner's fee request.

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting the matter to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Order modified, without costs, by remitting to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

[1] During the pendency of petitioner's appeal, New York City released to petitioner an unredacted copy of its audit plan and program. Thus, insofar as petitioner sought disclosure of that plan, her request for that specific relief with regard to those particular documents is rendered academic (*see Matter of* Fappiano v New York City Police Dept., 95 NY2d 738, 749 [2001]).

New York Law Journal

Cuomo Signs Attorney Fee FOIL Bill

New York Gov. Andrew Cuomo on Wednesday signed a bill into law requiring state agencies to pay attorney's fee if a court finds that the agency had...

By Josefa Velasquez | December 13, 2017

Gov. Andrew Cuomo (Shutterstock)

New York Gov. Andrew Cuomo on Wednesday signed a bill into law requiring state agencies to pay attorney's fee if a court finds that the agency had no "reasonable basis" for denying a Freedom of Information Law request.

The bill, (http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02750&term=&Summary=Y&Memo=Y&Text=Y) sponsored by Democratic Assemblywoman Amy Paulin and Republican state Sen. Patrick Gallivan, would encourage state agencies to comply with FOIL and "minimize the burden of cost and time from bringing a judicial proceeding," the legislation says.

In his approval message, Cuomo says the bill "continues to perpetuate a fractured and inequitable system of transparency by only applying to the Executive, and intentionally excluding other branches of government."

"Specifically, this bill would remove judicial discretion and mandate the award of attorney's fees against the state. Notably, current law already provides courts with discretion to award attorney's fees in such situation, but they are not required to do so," Cuomo wrote.

The Democratic governor vetoed similar legislation in 2015, arguing that the previous bill was "unworkable, inequitable and a piecemeal approach to FOIL reform." Cuomo has repeatedly criticized the Legislature FOIL exemption and said in his approval message that he would advance reforms to FOIL in this upcoming legislative session—scheduled to begin Jan. 3— "because transparency should be embraced by all."

The bill signed by the governor remedies what he calls "technical concerns" he had about the previous iteration of the legislation.

"Thus while I continue to harbor concerns about diminishing the court's discretion in these cases, it is outweighed by the greater principle of increasing transparency," Cuomo said.

CIVIL RIGHTS

Focus on FOIL: Attorney's Fees Award No Longer Discret

By Cory Morris

Next time you are asked about New York's Freedom of Information Law, remember that attorneys can receive an award of reasonable attorney's fees for representation in an Article 78 proceeding. Adopting previous Committee on Open Government recommendations, Governor Cuomo[1] recently signed a bill that removes the discretion of trial court judges in awarding reasonable attorney's fees against governmental agencies that fail to comply with FOIL in certain circumstances.

New York's Freedom of Information Law

FOIL mandates that within five business days of receiving a request for records, an agency shall either make the record(s) available to the requestor; deny the request in writing; or furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied.[2] Public Officers Law Section 89(4)(c) allows for an award of reasonable attorney's fees and other litigation costs when the moving party has substantially prevailed[3] in its Article 78 petition. This fee shifting provision (see, e.g., 42 U.S.C. § 1988) should, at its best, serve as a strong disincentive for agencies to deny access to such records and, at its worst, become a new way for legal professionals to obtain awards of reasonable attorney's fees in testing agencies that routinely fail to follow the Public Officers Law.

Cory Morris

FOIL is a statutory civil right. "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy."[4] An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant." When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.

The award of attorney's fees in a FOIL litigation became necessary decades ago. The provision for attorney's fees was added to FOIL in 1982, based upon the Legislature shortly thereafter to add that the failure to respond within the statutory time would become an alternative basis for an award of counsel fees[6] "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."[7]

Prior to the New York Court of Appeals decision in the *Beechwood* case, FOIL's fee-shifting provision provided that "a court may award reasonable counsel fees and litigation that 'substantially pre ceeding if the court f record involved was, significant interest to

(Co

Focus on FOIL: Attorney's Fees Award No Longer Discretionary *(Continued from page 15)*

lic,' and (2) 'the agency lacked a reasonable basis in law for withholding the record.'" (citing Public Officers Law § 89(4)(c)). The legislative history to the 2006 amendment of Section 89(4)(c) states that "[t]his bill strengthens the enforcement of such a right by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to respond in a timely fashion or deny access without any real justification."[8] Now, the only showing that must be made for an award of reasonable attorney's fees under FOIL (Public Officers Law § 89(4)(c)) is that the petitioner substantially prevailed and that "i. the agency had no reasonable basis for denying access; or ii. the agency failed to respond to a request or appeal within the statutory time." Twelve years after *Beechwood*, FOIL's fee-shifting provision now removes the discretion of the trial judge, mandating an award of fees against governmental agencies, when the required showing is made. Paragraph (c) of subdivision 4 of section 89 of the Public Officers Law, as amended by chapter 492 of the laws of 2006, now reads as follows:

The court in such a proceeding: (i) 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 this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall 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 this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.[10]

Attorney's fees – a new incentive

This Public Officers Law amendment should encourage attorneys to utilize FOIL requests regularly in their practice, perhaps on behalf of the law firm itself. An agency may not shield itself from liability after the initiation of an Article 78 proceeding by releasing the documents sought. Although the request for documents itself will become moot in such a circumstance, the request for attorney's fees (which must be made part of the prayer for relief) must still be determined by the court.

Attorneys commencing FOIL proceedings will usually find themselves in one of two scenarios for billing purposes: (1) an action is commenced under FOIL in aid of an existing client, in which the only compensation for the separate action under FOIL will come in the event you receive attorney's fees (e.g., a plaintiff's attorney utilizes FOIL against a defendant municipality to seek documents that may not be forthcoming in discovery, and then is required to commence an Article 78 to compel disclosure of those documents); and (2) the attorney is retained specifically to commence litigation under FOIL against a government agency. In both situations, it is important for attorneys to keep detailed billing. Rates must be consistent with the locality and not all work on the proceeding is compensable. Either an attorney or litigant would be best served by utilizing experienced counsel in commencing an Article 78 litigation as the award of fees requires a FOIL violation.

This change in the law solidifies and safeguards this well recognized statutory civil right and encoura itant attorneys who worry about testing t Supreme Court judge s ent itself. Thank you,

Note: Cory Morris torney, holding a M General Psychology Principal Attorney at Cory H. Morris. He c http://www.coryhmor

[1] New York DOS, Committee o *nual Report to the Governor an* 2014), *available at* http pdfs/2014AnnualReport.pdf
[2] Josefa Velasquez, *Cuomo Sign* NYLJ (December 13, 2017), newyorklawjournal/site nal/2017/12/13/cuomo-signs-at
[3] Public Officers Law § 89 (3)
[4] *Legal Aid Soc. v. New York S and Community Supervision*, N.Y.S.2d 773 (3d Dep't. 2013
[5] *Matter of Alderson v. New Y & Life Sciences at Cornell U* 792 N.Y.S.2d 370, 825 N.E. quotation marks and citation o
[6] Assembly Mem. in Suppo 1982, ch. 73.
[7] *See* L. 2006, ch. 492, § 1; Public
[8] Senate Introducer's Mem. in 2006, ch. 492, at 5
[9] 2005 Legis. Bill Hist. NY S
[10] NY Legis. 453 (2017), 2017 Ch. 453 (A. 2750-A) (external

Prejudgment Interest Conundrum *(Continued from page 16)*

interest and the rate and date from which it shall be computed shall be in the court's discretion.[1]

CPLR §5001(b) reads in pertinent part:

> Interest shall be computed from the earliest ascertainable date the cause of action existed.

CPLR §5001(a) also clearly reads that it is within a court's discretion to award interest where a party has defaulted on payments pursuant to a settlement that interferes with the non-defaulting party's"title to, or possession or enjoyment of, property." CPLR §5001(a). See also, *Febus v. Guardian First Funding Group, LLC*, 90 F.Supp.3d 240 (S.D.N.Y. 2015) (where the District Court, in applying CPLR §5001, held that it was appropriate to award prejudgment interest to make the plaintiff whole based upon the fact that if the payments due plaintiff had been timely received, the money would have been able to earn interest), *Gober v. Gober*, 4 A.D.3d 175, 772 N.Y.S.2d 32 (1st Dept. 2004) (where the court held that until the defendant made his full payment of equitable distribution, the plaintiff was entitled to interest on said award because the defendant was "availing himself of plaintiff's money").

However, that slight guidance was upended recently in *O'Donnell v. O'Donnell*, 153 A.D.3d 1357, 61 N.Y.S.3d 321(2nd Dept. 2017) where the Appellate Division determined that a non-titled spouse that was owed $1,000,000 in a lump sum payment pursuant to the parties' agreement was not entitled to pre-judgment interest. Mr. O'Donnell took over one year to pay the $1,000,000 and only did so after the non-titled spouse filed a motion before the trial court. The Appellate Division held that "[i]n this case, where there was no finding of a willful default, and the amount was not reduced to a judgment, the denial of pre-judgment interest was a provident exercise of discretion." Such a holding seems contrary to CPLR§5001(a) and further muddies the waters as to when prejudgment interest is appropriate.

Perhaps one way to avoid the onerous consequences of an award of prejudgment interest is to seek a declaratory judgment at the trial level as to whether managing the parties' marital investments would potentially constitute 'a deprivation' that would trigger such an award. Otherwise, dep your appeal is decide panel as opposed to will be dispositive of th for post-judgment app son learned from the law is for the responsi negotiate an interest c ing a default in the ment to avoid this thorn

Note: Michael F. Lol ner at Barnes, Catters Barnes, LLP with offic Melville and Manhattan rimonial and family law at MFL@BCLBLAW (516) 222-6500.

[1] CPLR §5004 provides that the "nine per centum per annum."

Diversity in ADR *(Continued from page 6)*

unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding"

Section 10 of the Statement of Client's Rights issued by the New York

on an attorney's conduct in selecting a mediator or arbitrator, one could argue that selecting a neutral based on merit is more in keeping with an attorney's obligations to refrain from discriminatory conduct in other areas. Perhaps ADR providers could support more merit-based neutral selection by asking

vided to parties w providers in the n process.

Note: Lisa Renee Po ness and employment County, New York. She arbitrator on the AAA

Post settles lawsuit with city over DOE delays on Freedom of Information requests

NEW YORK POST

By Anna Sanders

April 8, 2018 | 6:13am

The New York Post has settled a landmark lawsuit charging that the city Department of Education routinely violated the state Freedom of Information Law.

Under the settlement, the DOE not only turned over public records it had withheld for up to 20 months, but agreed to reform what The Post called a "pattern and practice" of endless delays and stonewalling.

After lengthy negotiations with Post lawyers, the DOE agreed to revise its FOIL rules to halt the indefinite postponements — and stick to reasonable deadlines. New guidelines were approved in November.

"We are very pleased that the DOE has acknowledged The Post's significant contribution to

amending the Chancellor's Regulations, and more importantly that DOE has taken corrective action that we hope will improve its response to freedom of information requests," said Post lawyer Jeremy Chase, who led the talks.

The Post, which may now seek reimbursement of attorney fees, sued in August 2016, challenging the DOE's claim that it could sit on public records as long as it sent a monthly letter extending its own deadlines.

trending now

Committee on Open Government, Freedom of Information Law

PUBLIC OFFICERS LAW, ARTICLE 6

SECTIONS 84-90
FREEDOM OF INFORMATION LAW

§84. Legislative declaration.
The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

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. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

§85. Short title. This article shall be known and may be cited as the "Freedom of Information Law."

§86. Definitions. As used in this article, unless the context requires otherwise.

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.
2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.
3. "Agency" means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.
4. "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency or the state

legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.
5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

§87. Access to agency records.
1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.
(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:
i. the times and places such records are available;
ii. the persons from whom such records may be obtained; and
iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

c. In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency`s information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee`s time is needed, or if an outside professional service would be retained to prepare a copy of the record.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;
(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;
ii. deprive a person of a right to a fair trial or impartial adjudication;
iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;
(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public;
iii. final agency policy or determinations; or
iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions; (i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
(j) [Deemed repealed Dec. 1, 2019, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.
(k) [Expires and deemed repealed Dec. 1, 2019, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 21, § 22; L.2009, c. 22, § 22; L.2009, c. 23, § 9; L.2009, c. 383, § 24.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.
(l) [Expires and deemed repealed Sept. 20, 2020, pursuant to L.2010, c. 59, pt. II, § 14.] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.
(m) [Expires and deemed repealed Aug. 30, 2018, pursuant to L.2013, c. 189, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.
(n) [Expires and deemed repealed July 25, 2018, pursuant to L.2014, c. 43, § 12. See, also, par. below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-c of the vehicle and traffic law.
(n) [Expires and deemed repealed Aug. 21, 2019, pursuant to L.2014, c. 99, § 15; L.2014, c. 101, § 15; L.2014, c. 123, §15. See, also, par. (n) above.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.
(o) [Expires and deemed repealed Sept. 12, 2020, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

3. Each agency shall maintain:
(a) a record of the final vote of each member in every agency proceeding in which the member votes;
(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and
(c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied

pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;
(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;
(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and, if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

5.(a) An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service. Records provided in a computer format shall not be encrypted.

(b) No agency shall enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency`s records.

§88. Access to state legislative records.
1. The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:

(a) the times and places such records are available;
(b) the persons from whom such records may be obtained;
(c) the fees for copies of such records, which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law.

2. The state legislature shall, in accordance with its published rules, make available for public inspection and copying:

(a) bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records;
(b) messages received from the governor or the other house of the legislature, and home rule messages;
(c) legislative notification of the proposed adoption of rules by an agency;
(d) transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken;
(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;
(f) administrative staff manuals and instructions to staff that affect members of the public;
(g) final reports and formal opinions submitted to the legislature;
(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;

(i) any other files, records, papers or documents required by law to be made available for public inspection and copying.

3. Each house shall maintain and make available for public inspection and copying:

(a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;
(b) a record setting forth the name, public office address, title, and salary of every officer or employee; and
(c) a current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying pursuant to this section.

§89. General provisions relating to access to records; certain cases. The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the government for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;
ii. furnish to any person advisory opinions or other appropriate information regarding this article;
iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;
iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and
v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and
vi. report on its activities and findings regarding articles six and seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on open government may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.
(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising

purposes;
iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or
vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.
(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;
ii. when the person to whom a record pertains consents in writing to disclosure;
iii. when upon presenting reasonable proof of identity' a person seeks access to records pertaining to him or her; or
iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law".

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or

data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding 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 this section in which such person has substantially prevailed, when:

i. the agency had no reasonable basis for denying access; or
ii. the agency failed to respond to a request or appeal within the statutory time.
*(d)(i) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.
*(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:
*(A) shall be given preference;
*(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application of any party to the proceeding; and
*(C) shall be deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal, unless consent to further extension is given by all parties, or
unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

*Effective May 27, 2017

5. (a) (1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-

seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.
(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.
(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;
(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;
(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on open government.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision.

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.
(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

(d) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision.
(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.
(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.
(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.
(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.

§90. Severability.
If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

For further information, contact: Committee on Open Government, New York Department of State, One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231

Recent Trends in Attorney's Fees under FOIL

Cory H. Morris

Anthony J. Fasano

The frequency in which courts award attorney's fees under the Freedom of Information Law (FOIL), codified in New York's Public Officer's Law, has continued to grow. Although there are likely numerous reasons for this trend, this progression modifies the FOIL landscape. Practitioners in this field, and those who utilize FOIL as an ancillary to their practice, need to be mindful of the increased awards of attorney's fees, as there is now more of an incentive for compelling FOIL compliance via the commencement of an Article 78 proceeding, thereby increasing the likelihood of such litigation in the immediate future.

"The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy."[1] An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant."[2] When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.

The provision for attorney's fees was "added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that '[c]ertain agencies have adopted a 'sue us' attitude in relation to providing access to public records,' thereby violating the Legislature's intent in enacting FOIL to foster open government."[3] The provision was amended shortly thereafter to add that the failure to respond within the statutory time would become an alternative basis for an award of counsel fees "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."[4] The statute has been followed by some courts.[10]

As of now, it appears that requests for attorney's fees should continue to be made through the law firm rather than through the individual attorney

under the Freedom of Information Act (FOIA), which allows for attorney's fees in this scenario.[6]

The seminal case in this recent trend is In re *The Law Offices of Adam D. Perlmutter v. N.Y.C. Police Dept.*,[7] issued by Judge Ling-Cohan in New York County Supreme Court. In that case, the same attorney who made the FOIL request also represented the law firm in the subsequent Article 78. After granting the petition, the court awarded the law firm reasonable attorney's fees. The court specifically noted that, the "respondents failed to supply case law in support of their argument that legal fees should be denied because petitioner law firm appeared in this proceeding pro se." The First Department subsequently affirmed the decision.

The First Department then expanded In re *The Law Offices of Adam D. Perlmutter* when it issued *Kohler-Hausmann v. N.Y.C.* Police Dep't.[8] *In Kohler-Hausmann*, the First Department held that the "attorney petitioner's self-representation does not preclude an award of attorney's fees." Interestingly, this case represents a buck against New York courts following federal courts' interpretation of FOIA because FOIA does not permit self-represented attorneys to recoup attorney's fees.[9] Practitioners should be mindful, however, that this decision has not compel disclosure of those documents); and (2) the attorney is retained specifically to commence litigation under FOIL against a government agency.

In both situations, it is important for attorneys to keep detailed billing. If attorney's fees are granted, courts will have no trouble cutting billing for hours that are not properly supported. Furthermore, rates must be consistent with the locality and not all work on the proceeding is compensable.

The recent case of *Lee Enters., Inc. v. City of Gelenn Falls*[12] provides an illustration of these issues. In Lee Enters., the attorneys for the petitioner sought reimbursement of $25,000 in fees (although it was claimed that over $45,000 in fees were incurred). To support that request, the attorneys submitted billing entries for three attorneys: one partner and two associates. The two associates billed approximately $39,000 at a rate of $275.00 per hour, and the partner billed approximately $4,000 at a rate of $450.00 per hour. They also sought reimbursement for administrative fees, which included "Lexis Advance Fees." The respondent opposed the imposition of fees above the $6,000 flat fee charged by petitioner's attorneys.

The *Lee Enters.* court began its analysis by outlining what constitutes reasonable compensation by noting: "the [C]ourt should consider 'the time commitment involved, the relative difficulty of the matter, the nature of the services provided, counsel's experience and the results obtained.' " The court then proceeded to reduce billing entries. Specifically, the court struck billing entries of the associates who repeatedly conferred with one another and the partner. The court found that "awarding fees for the identical services provided by [the associates] would be inequitable, as would awarding fees for the time spent by [the associates] in learning about FOIL. Indeed, any such award would constitute a windfall for petitioners."

The *Lee Enters.* court then went on to strike all billing entries for one

Perhaps the most notable development concerning awards of attorney's fees under FOIL has do with courts awarding attorney's fees to law firms that appear pro se.

Supporting the Demand for Attorney's Fees

The demand for attorney's fees is supported in one of three ways: (1) an affirmation and reply affirmation in support of attorney's fees submitted with the petition and reply; (2) an inquest; (3) an affirmation submitted in support of attorney's fees to the court after the court grants attorney's fees. Courts, even ones in the same county, will differ on which procedure they use. The standard practice is the latter two options.

There is no prohibition as to setting oneself up for reasonable attorney's fees under all three scenarios, which would require an attorney to include relevant billing information with the petition and reply. However, this procedure will oftentimes detract from the main issue of whether to grant disclosure and attorney's fees in the first place, because a dispute will then likely arise as to the amount of the fees and whether fees for certain work is even permissible.

Practitioners need to be mindful of the potential for attorney's fees at the very outset of any litigation. Oftentimes, strategy and case management for a matter will need to be altered depending on whether an award of reasonable attorney's fees is possible. As such, understanding when an award of attorney's fees is permitted and how such claims are made and appropriately supported are crucial elements to be made aware of at the outset of representation.

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Anthony J. Fasano is an attorney with Guercio & Guercio, LLP, where he practices Education Law and Personal Injury Litigation. Mr. Fasano is also a co-chair of the Publications Committee of the Nassau County Bar Association.

1 *Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230 (2006).
2 *Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994).
3 *New York State Defenders Ass'n v. New York State Police*, 87 A.D.3d 193, 195 n.2 (3d Dept. 2011) (quoting Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73).

MATTER OF FRIEDMAN v. Rice, 2017 NY Slip Op 8167 - NY: Court of Appeals 2017

2017 NY Slip Op 08167

IN THE MATTER OF JESSE FRIEDMAN, Appellant,
v.
KATHLEEN M. RICE, & C., Respondent.

No. 56.
Court of Appeals of New York.

Decided November 21, 2017.
Ronald L. Kuby, for appellant.

Judith R. Sternberg, for respondent.

Reporters Committee for Freedom of the Press, et al.; National Association of Criminal Defense Lawyers et al.; District Attorneys Association of the State of New York, amici curiae.

Opinion by Judge Rivera. Judges Stein, Fahey, Feinman and Peters concur. Judge Whalen dissents in part in an opinion, in which Judge Garcia concurs. Chief Judge DiFiore and Judge Wilson took no part.

RIVERA, J.

On this appeal we clarify the proper interpretation of section 87 (2) (e) (iii) of our State's Freedom of Information Law (Public Officers Law art 6 [FOIL]), under which a government agency may seek to exempt from public inspection those records, or a portion thereof, "compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation" (Public Officers Law § 87 [2] [e] [iii]). We hold that a government agency may rely on this exemption only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred.

Here, the Second Department applied the wrong standard when it held that the District Attorney of Nassau County properly denied petitioner Jesse Friedman's FOIL request for records relating to his conviction. The court relied on its precedent that identifying information and statements gathered in the course of a police investigation from witnesses who do not testify at trial are presumptively confidential and, as such, are exempt from disclosure under FOIL. No other Appellate Division Department has adopted this interpretation of section 87 (2) (e) (iii). Rather, the other Departments have properly required some express or implied

assurance of confidentiality to justify withholding information, including the names or identities of sources. The federal courts have required a similar showing under the federal Freedom of Information Act (FOIA).

We conclude that the Second Department misinterpreted section 87 (2) (e) (iii), and respondent's denial of petitioner's FOIL request must be analyzed under the proper standard as set forth in this opinion. Therefore, we now reverse the Appellate Division order and remit the matter to Supreme Court.

I.

This appeal is the latest in petitioner's efforts to overturn his decades-old child sex crime convictions. In this litigation, petitioner seeks information in the control of the Nassau County District Attorney's Office, including the victim statements and other information gathered during police interviews of child witnesses. Petitioner argues that this material is necessary to establish his claim of actual innocence. Before turning to the legal issues, we briefly summarize the events that led to petitioner's conviction and the procedural history of the matter before us.

A.

In 1987, then 18-year-old petitioner and his father were arrested on multiple counts of sexual abuse of several children between the ages of 8 and 12. According to the charges contained in the three indictments filed against petitioner, the abuse occurred over five years while the children attended an after-school computer class taught by petitioner's father at their family home. There was no forensic evidence of physical abuse and the prosecution relied heavily on the children's allegations made after questioning by the police, who employed tactics and interview techniques that the District Attorney concedes were "not ideal" and are no longer in use.

Petitioner's father pleaded guilty to numerous sex crimes in 1988 and died in prison in 1995. A few months after his father's plea, petitioner also pleaded guilty to various sex crimes, and was sentenced to multiple concurrent terms with a maximum range of 6 to 18 years of incarceration. Petitioner did not appeal, and, after serving 13 years of his sentence, was paroled in December 2001.

B.

Approximately one year after petitioner was paroled, the film "Capturing the Friedmans" was released. The movie suggested that the police had elicited witness statements using investigatory techniques that were unreliable or known to produce false testimony — including, in the case of one witness, hypnosis — and that petitioner was wrongfully convicted and actually innocent. The filmmaker had interviewed many of those involved in the original investigation, including detectives, attorneys, family members, and victims.

Based on new information petitioner learned from the film, he commenced the first of several state and federal court proceedings. In 2004, petitioner moved unsuccessfully in state court to vacate his conviction. The Appellate Division denied him leave to appeal, and a Judge of this Court dismissed his application for leave to appeal (6 NY3d 894 [2006]). Petitioner subsequently petitioned for a writ of habeas corpus in federal court, claiming, among other things, that he would not have pleaded guilty if he had known the details of the flawed investigatory procedures used to build the case against him. Petitioner asserted that he only learned about these methods from the filmmaker, who provided access to his materials including unredacted tapes and complete transcripts of witness interviews.

The federal district court dismissed the habeas petition as untimely, and the Second Circuit affirmed, also concluding that the proceeding was time-barred (*see Friedman v Rehal*, 618 F3d 142, 152 [2d Cir 2010]). The court's opinion, however, included an extensive discussion highlighting the judges' concerns with the process leading to petitioner's conviction. The court noted that "[t]he magnitude of the allegations against petitioner must be viewed in the context of the late 1980s and early-1990s, a period in which allegations of outrageously bizarre and often ritualistic child abuse spread like wildfire across the country" (618 F3d at 155). This "[v]ast moral panic fueled a series of highly-questionable child sex abuse prosecutions," based largely "on memories that alleged victims `recovered' through suggestive memory recovery tactics" and investigatory techniques that, "[t]he prevailing view" now holds, "are [in the vast majority of cases] false" (*id.* at 155-156). The court observed that between 1984 and 1995 "seventy-two individuals were convicted in nearly a dozen major child sex abuse and satanic ritual prosecutions," but "almost all th[ose] convictions have since been reversed" (*id.* at 156). The instant case was "merely one example" of that "significant national trend," as it featured many of the same allegations, investigatory techniques, and developmental patterns seen across the country (*id.* at 158). The court intended that its "lengthy discussion of the facts and circumstances that Friedman asserts led to his conviction" would "make the case that a further inquiry by a responsible prosecutor's office is justified despite a guilty plea entered under circumstances which clearly suggest that it was not voluntary" (*id.* at 161). The court ultimately concluded that "[t]he record here suggests a reasonable likelihood that Jesse Friedman was wrongfully convicted" (*id.* at 159-160 [internal quotation marks omitted]).[1]

C.

After the Second Circuit issued its decision, then-Nassau County District Attorney Kathleen M. Rice announced she would reopen the case and convene a "Friedman Case Review Panel" to oversee the reinvestigation. Senior prosecutors in the Nassau County District Attorney's Office, who were not involved in the original case nor part of the prior administration that prosecuted petitioner, worked alongside an "Advisory Panel" of criminal justice and wrongful conviction experts. The reinvestigation was conducted by the "Review Team" of prosecutors, which had access to the District Attorney's entire case file as well as the grand jury minutes. The "Advisory Panel" advised the Review Team on "process issues," counseling the prosecutors on how best to conduct a reinvestigation and generally auditing whether the Review Team was operating in good faith. The Advisory Panel did not itself conduct the reinvestigation or weigh

the credibility of witnesses, and it had access only to those documents, some redacted, provided to it by the District Attorney's office.

In the Review Team's final report, it concluded that petitioner "was not wrongfully convicted" and that none of the Second Circuit's principal concerns were substantiated by the evidence. It distinguished the case from the moral panic cases of the 1980s and 1990s on the grounds that the allegations in the Friedman prosecution were plausible, the children involved were older, and petitioner had pleaded guilty. The Advisory Panel prefaced the report with its own statement that "the conclusions expressed in the Review Team's Report are reasonable and supported by the evidence it cites."

In 2012, before completion of the report but after the District Attorney announced the appointment of the Advisory Panel, petitioner filed a FOIL request for all documents provided by the Nassau County District Attorney to the "Friedman Case Review Panel" and for all records concerning whether Advisory Panel members were "members of the general public for purposes of [FOIL] and Civil Rights Law § 50-b." By letter, the Nassau County District Attorney's Office denied the request based on multiple grounds: (1) Public Officers Law § 87 (2) (e) (iii), which, the letter claimed, exempted all "statements of witnesses compiled for law enforcement purposes, unless the witnesses have testified at trial"; (2) Civil Rights Law § 50-b (1) (as applied to FOIL through Public Officers Law § 87 [2] [a]), which exempts from disclosure any document which "tends to identify" the victim of a sex crime; (3) Public Officers Law § 87 (2) (e) (i), which the District Attorney claimed exempted from disclosure information that would interfere with an ongoing criminal investigation;[2] and (4) Public Officers Law § 87 (2) (g), which exempted most inter- and intra-agency materials[3]. The letter also informed petitioner that the District Attorney did not believe a compelling and particularized basis existed for disclosing the grand jury transcripts, but that petitioner could move for their release on those grounds in state court.

On his administrative appeal from the denial of his FOIL request, petitioner argued that courts had rejected the type of blanket exemptions claimed by the District Attorney. The FOIL Appeal Officer nevertheless upheld the asserted exemptions as sufficiently particular.

D.

Petitioner subsequently commenced this proceeding pursuant to CPLR article 78 against respondent, Kathleen M. Rice, in her official capacity as the Nassau County District Attorney,[4] seeking disclosure of his entire case file and the grand jury minutes[5] . The District Attorney responded that the court lacked jurisdiction and sought dismissal of the petition, asserting that petitioner had not yet exhausted his administrative remedies since he had only requested documents shared with the Advisory Panel rather than his entire case file. As to what had been shared with the Advisory Panel, the District Attorney reasserted that the material was exempt from disclosure under FOIL and Civil Rights Law § 50-b (1).

By this time, the reinvestigation was complete and the Review Team had elected to disclose inter- and intra-agency communications, rendering moot two of the prior four FOIL grounds for

withholding disclosure. The District Attorney nevertheless maintained that the remaining documents were exempt, relying on Civil Rights Law § 50-b (1) and the confidentiality exemption contained in Public Officers Law § 87 (2) (e) (iii)[6] . As for the grand jury minutes, the District Attorney argued that petitioner had failed to demonstrate a particularized and compelling need for their release, as required under Criminal Procedure Law § 190.25 (4) (a).

Supreme Court granted the petition and directed the District Attorney to provide petitioner with all documents and records in his case file, as well as the grand jury minutes, with the names of three witnesses redacted[7]. Pursuant to CPLR 5519 (a), Supreme Court's judgment was stayed pending respondent's appeal.

Thereafter, the Appellate Division reversed, denied the petition, and dismissed the proceeding, with one Justice dissenting (134 AD3d 826 [2d Dept 2015]). The court held that petitioner did not need to exhaust his administrative remedies, since it was clear from the District Attorney's response to the initial FOIL request that further administrative proceedings would have been futile. On the merits, the court concluded that the case file was appropriately withheld under section 87 (2) (e) (iii), which, according to Second Department precedent, exempted from FOIL disclosure the statements of nontestifying witnesses as presumptively confidential. The court further held that petitioner did not demonstrate a compelling and particularized need for the grand jury minutes.[8]

As discussed in her thoroughly-written opinion, the dissenting Justice would have modified the judgment to direct the specific disclosure of the redacted materials provided to the Advisory Panel, as well as the case file, investigatory notes, and grand jury minutes, subject to the redaction of the names of the witnesses who had objected to the disclosure of their identities (134 AD3d at 831-832 [Barros, J, dissenting]). According to the dissent, the District Attorney failed to support the withholding of the documents under section 87 (2) (e) (iii). The dissent identified a split between the Second Department's interpretation, which applies this exemption to all witness statements obtained in the course of preparing for trial unless used in open court, and decisions of the First, Third, and Fourth Departments, as well as the federal courts, which only recognize the exemption where the government can show an express promise of confidentiality or circumstances from which confidentiality can be inferred (*see id.* at 832-836). We granted petitioner leave to appeal (27 NY3d 903 [2016]).

II.

Petitioner argues that the Second Department's interpretation of FOIL impermissibly creates a blanket exemption for all nontestifying witnesses and thus misinterprets the statute and undermines its purpose. He claims that the Second Department deviates from the interpretation of this provision adopted by every other Department and the federal courts. Petitioner also asserts that he established a compelling and particularized need for the grand jury minutes and that he should be permitted access to the witness statements in his case file in accordance with Civil Rights Law § 50-b (2) (b).

We conclude that the Second Department applied an incorrect standard in determining the

applicability of FOIL's confidentiality exemption to petitioner's request. Under section 87 (2) (e) (iii), sources and information may be withheld only upon a specific showing of an express promise of confidentiality to the source, or a finding that, under the circumstances of the particular case, the confidentiality of the source or information can be reasonably inferred.

A. *Exhaustion*

As a threshold matter, we reject respondent's argument that petitioner's claim for his entire case file is unreviewable because he did not include that specific demand in his FOIL request. Petitioner's FOIL request sought "the documents provided by the Nassau County District Attorney to the entity known as the `Friedman Case Review Panel.'" That language tracks the District Attorney's earlier press release that four experts had been appointed to a "Friedman Case Review Panel" who would "join prosecutors in review of" petitioner's case, to "work alongside" her office and "oversee the investigation." Here, taken in context and under the circumstances, petitioner's request reasonably described, and therefore clearly sought, all documents that would be part of the reinvestigation process called for by the District Attorney (*see* Public Officers Law § 89 [3]).

Even if that were not the case, under the particular circumstances presented here, petitioner does not have to restart the FOIL process anew. The general rule requiring a party to exhaust administrative remedies before seeking judicial review of an agency's determination "need not be followed . . . when resort to an administrative remedy would be futile" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). As every judge who has considered the matter properly concluded, the District Attorney's letter denying petitioner's FOIL request clearly established that respondent's office would not release any documents to petitioner from the Friedman case file absent a court order, rendering futile any further attempts at administrative review. The letter informed petitioner that the information he requested was only being shared with the Advisory Panel because its members had sworn an oath of confidentiality and were operating "as an extension of [the prosecutor's] office." As a general matter, the letter went on, the documents he sought were "not available to the general public," were "confidential under Civil Rights Law § 50-b," and so were "not available to you or others who seek them under FOIL." As a member of the general public — which is, as we have long maintained, the status of anyone seeking documents under FOIL (*see Matter of John P. v Whalen*, 54 NY2d 89, 99 ["(O)ne who seeks access to records under the Freedom of Information Law (does so) as a member of the public(.)"]) — petitioner was never going to receive access to any of the documents he wanted from the District Attorney's office. In other words, since the District Attorney did not grant the Advisory Panel access to the entire unredacted case file, it follows that she similarly would have denied access to petitioner. Indeed, the District Attorney's unwavering position throughout this litigation has been that all information sought by petitioner should be subject to a blanket exemption from disclosure. Thus, even assuming any ambiguity in petitioner's FOIL request, an additional request for information provided specifically to the Review Team that was not disclosed to the Advisory Panel would have been futile.[9]

"The exhaustion rule . . . is not an inflexible one," and should be applied where it "furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference [with the work of the agency], and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its `expertise and judgment'" (*Watergate II Apts.*, 46 NY2d at 57 [internal citations omitted]). Those goals would not be served by mechanical application of the rule to petitioner's case. Under the facts presented here, it would be an exercise in futility and a waste of administrative and judicial resources to require petitioner to request documents merely for respondent to restate the same bases for denial.

B. *FOIL Exemption Section 87 (2) (e) (iii)*

The purpose of FOIL is "[t]o promote open government and public accountability" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]). The law's "premise [is] 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 NY2d 567, 571 [1979]). One of FOIL's salient features is its capacity to expose "abuses on the part of government; in short, `to hold the governors accountable to the governed'" (*id.*, quoting *NLRB v Robbins Tire & Rubber Co.*, 437 US 214, 242 [1978]). In furtherance of the legislature's policy of disclosure, "FOIL provides the public with broad `access to the records of government' [and] [a]n agency must `make available for public inspection and copying all records' unless it can claim a specific exemption to disclosure" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007], quoting Public Officers Law §§ 84, 87 [2], 89 [3]). These "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government" (*id.* at 462). "Thus the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification . . . to exempt its records from disclosure. Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (*Matter of Fink*, 47 NY2d at 571 [internal citation omitted]).

As relevant to this appeal, an agency may withhold documents "compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation" (Public Officers Law § 87 [2] [e] [iii]). The Second Department categorically held below that "witness statements and other documents containing information provided to law enforcement officials during [a] criminal investigation by witnesses who did not testify at trial [are] exempt from disclosure under [section] 87 (2) (e) (iii)" (134 AD3d at 828). In so holding, the Second Department purported to follow its prior departmental case law that "the statements of nontestifying witnesses are confidential, and that [this] `cloak of confidentiality' is removed `once the statements have been used in open court'" (*id.*, quoting *Matter of Moore v Santucci*, 151 AD2d 677, 679 [2d Dept 1989]).

This precedent refers back to Second Department decisions that were decided under a former and no longer valid FOIL provision. *Matter of Knight v Gold* (53 AD2d 694 [2d Dept 1976]), the foundation for *Matter of Moore v Santucci* (151 AD2d 677 [2d Dept 1989]), relied on below, was based on a prior version of FOIL which broadly exempted all information that was "part of investigatory files compiled for law enforcement purposes" (former Public Officers Law § 88 [7] [d] [L 1974, ch 579 § 3]). Of particular note, this prior version of FOIL made no reference to confidential sources or confidential information. That is to say, under the plain language of that statute, "investigatory files compiled for law enforcement purposes," including witness statements, could be withheld from disclosure irrespective of the confidential nature of the information or its source. That section of the statute was amended in 1977, and replaced with the enumerated categories set forth today in Public Officers Law §§ 87 (2) (e) (i)-(iv), including the exemption at issue here. The legislature thus discarded the broad protections from disclosure found in the previous version of FOIL and adopted discrete, limited exemptions, reaffirming the law's general policy of public access to government documents (*cf. Matter of Lesher v Hynes*, 19 NY3d 57, 64-65 [2012] [describing Congress' 1974 amendments to FOIA, which replaced a generic exemption from disclosure for information compiled for law enforcement purposes with six specific exemptions, and noting that the New York legislature's 1977 amendments to FOIA "followed suit"]).

The amendments were widely understood at the time to "reverse[] the presumption" of the old law, according to which "records [were] deniable unless they f[ell] within one of nine limited categories of records" that could be disclosed. Instead, the amendments "state[d] that all records . . . are accessible unless specifically listed as deniable" (Mario M. Cuomo, Secretary of State, News Release, July 27, 1977, at 5, Bill Jacket, L 1977, ch 933 [internal quotation marks omitted]). Members of law enforcement objected to the bill for this very reason, observing that it replaced a presumption of nondisclosure and broad protections for all materials gathered in the course of law enforcement investigations with a presumption of disclosure and a narrow set of exemptions for only certain kinds of law enforcement materials, which could be invoked at only certain times (*see e.g.* William G. Connelie, Superintendent, New York State Police, Mem re: Senate 16-A, July 29, 1977, at 5-6, Bill Jacket, L 1977, ch 933). The Second Department's jurisprudence thus lacks historical and textual foundation.[10]

Nevertheless, respondent advocates for a blanket rule that categorically permits the withholding of statements of nontestifying witnesses without regard to the specific facts and circumstances of the subject case[11] . In so doing, respondent misconstrues section 87 (2) (e) (iii) and FOIL's purpose by applying the exemption expansively rather than narrowly. Respondent's proposed rule thus constricts the broad access to which the public is entitled under the law. As our Court has stated, FOIL "established a general policy [in favor of] disclosure" (*Matter of Fink*, 47 NY2d at 571) and so "exemptions [to FOIL] are to be narrowly interpreted so that the public is granted maximum access to the records of government" (*Data Tree*, 9 NY3d at 462, citing *Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen*, 69 NY2d 246, 252 [1987]). The rule advocated by respondent would essentially reinstate the previously discarded non-disclosure presumption, clearly in contravention of the statute's purpose and settled case law.

In addition, such an interpretation of section 87 (2) (e) (iii) cannot be reconciled with the statutory language, as it effectively excises the word "confidential" from the statutory exemption. This we cannot do, because "[i]n the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give each a distinct and separate meaning" (McKinney's Cons Laws of NY Book 1, Statutes § 231; *see also* McKinney's Cons Laws of NY Book 1, Statutes § 98 [" (E)ffect and meaning must, if possible, be given to the entire statute and every part and word thereof."]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587 [1998]). If the legislature intended for the exemption to apply to the statements of all witnesses, or even just those who do not testify at trial, it would simply have stated as much. It did not, and instead used the word "confidential" to delineate the type of statements and sources not subject to FOIL disclosure. Given that "the Legislature established a general policy of disclosure by enacting the Freedom of Information Law" (*Matter of Fink*, 47 NY2d at 571), we cannot undermine that policy by exempting a large category of information from FOIL in a manner inconsistent with the plain language of the statute.

Were we to construe the law otherwise, we would be creating an unjustified and impermissible precondition on disclosure. Under respondent's proposed rule, the only witness statements accessible under FOIL are statements that have already been made public in open court. In practice, this restricts access to witness statements under FOIL to statements that have already been disclosed at a trial. Nowhere does section 87 (2) (e) (iii), however, so much as mention the need for prior public disclosure, whether at a trial or any other judicial proceeding, as a disclosure precondition. The legislature did not limit disclosure under FOIL to information released through post-hoc publication, and we decline to impose such a limitation ourselves.

Respondent alleges that its proposed categorical exemption is essential to encourage the cooperation of individuals who might otherwise refrain from disclosing confidential information if they knew that they could be identified as the source. This circular reasoning is unpersuasive since the law by its terms protects confidential sources (*see* Public Officers Law § 87 [2] [e] [iii] [exempting "confidential source(s)" from disclosure under FOIL]).

Moreover, a blanket exemption for any statement made to law enforcement on the ground that it is inherently confidential admits of absurd results. There is no basis to assume that every person who communicates with law enforcement in the course of a criminal investigation expects that their name and each and every statement they make will be held in confidence. So interpreted, the exemption would cover even an innocuous statement to a police officer or a comment that "relates," but is obviously insignificant, to a criminal investigation. Consider, for example, a nontestifying witness who avers merely that "I did not see anything," or a witness who merely corroborates undisputed and uncontroversial facts. Respondent concedes that statements of such nature are not "confidential" under any accepted understanding of the term, yet, the rule for which respondent advocates would seem to place those statements under a "cloak of confidentiality."

Unsurprisingly, respondent's interpretation of section 87 (2) (e) (iii) is an outlier. Every other Appellate Division Department, in reliance on the current version of FOIL, has concluded that

"defendants are not entitled to a blanket exemption from disclosure" (*Brown v Town of Amherst*, 195 AD2d 979, 979 [4th Dept 1993]). The majority rule for New York Courts has been that "[s]tatements by a witness must be disclosed absent a showing that [the witness] was a confidential informant or was promised anonymity" (*Matter of Gomez v Fisher*, 74 AD3d 1399, 1401 [3d Dept 2010] [internal citations omitted]; *see also Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 440 [1st Dept 2014]). Indeed, in *Matter of Exoneration Initiative,* the First Department stated explicitly that information about an unnamed informant does not fall within section 87 (2) (e) (iii) "in the absence of any evidence that th[e] person received an express or implied promise of confidentiality" (114 AD3d at 440; *see also Matter of John H. v Goord*, 27 AD3d 798, 800 [3rd Dept 2006] [overruling a claimed FOIL confidentiality exemption where an in camera review persuaded the court that "the records at issue . . . (did not) contain any suggestion that the participating witnesses qualif(ied) as confidential sources, and . . . d(id) not reveal any source or disclose any information which would be deemed confidential," while withholding disclosure under a separate FOIL exemption "inasmuch as disclosure could endanger the life or safety of a person"] [internal quotation marks and citations omitted]).[12]

A blanket exemption for witness identifications and statements would also be contrary to the interpretation of 5 USC § 552 (b) (7) (D), the FOIA counterpart to section 87 (2) (e) (iii)[13]. As we have observed, "[f]ederal case law and legislative history . . . are instructive" when interpreting a FOIL provision "patterned after the Federal analogue" (*Matter of Lesher v Hynes*, 19 NY3d at 64, quoting *Matter of Fink*, 47 NY2d at 572 n).

The United States Supreme Court has explained that the FOIA confidentiality exemption (5 USC § 552 [b] [7] [D]) applies only where there is "an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred" (*U.S. Dept. of Justice v Landano*, 508 US 165, 172 [1993] [internal quotation marks omitted]; *see also Church of Scientology Intern. v U.S. Dept. of Justice*, 30 F3d 224, 238 [1st Cir 1994] [applying *Landano* and rejecting several alleged FOIA confidentiality exemptions on the grounds that the government failed to establish that the documents withheld came from a source that had received an express promise of confidentiality, or that the circumstances warranted implying confidentiality]; *Davin v U.S. Dept. of Justice*, 60 F3d 1043 [3rd Cir 1995] [same]; *Halpern v FBI*, 181 F3d 279, 298-300 [2d Cir 1999] [applying *Landano* and finding no express promise of confidentiality, but finding that the circumstances supported some implicit confidentiality with respect to some of the requested information]). The Supreme Court has also precisely rejected respondent's argument here — that all law enforcement sources are inherently confidential. Instead, the Court has held that whether a source is confidential should be determined under a "particularized approach", which may include consideration of "the character of the crime" and "the source's relation to the crime" (508 US at 180,179). This reasoning applies with equal force to FOIL. Ultimately, a determination of confidentiality should turn on an evaluation of the facts and circumstances surrounding the particular source or requested information.

III.

The legislature's policy of broad public access, as expressed in FOIL, dictates that the exemption for confidential sources and information be narrowly circumscribed. Therefore disclosure under FOIL can only be refused pursuant to section 87 (2) (e) (iii) if the agency presents a "particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]), based on an express promise of confidentiality to the source, or by establishing that, under the circumstances of the particular case, the confidentiality of the source or information can be reasonably inferred.

Application of this rule is case and information specific, and depends on the particular facts and circumstances. In determining whether information obtained in the course of a criminal investigation should be treated as confidential or whether a source spoke on the assumption that the source's identity or statements would remain confidential, courts may consider, as they deem relevant, such factors as the nature of the crime, the source of the information in relation to the crime, and the content of the statements or information. Where the content of a statement or information and the circumstances surrounding its compilation by law enforcement convince a court that its confidentiality can be reasonably inferred, it may be withheld or released with appropriate redactions pursuant to section 87 (2) (e) (iii). Otherwise, absent an explicit assurance of confidentiality, it may not be withheld or redacted under that FOIL exemption.[14]

Here, because the Second Department majority misconstrued the FOIL exemption asserted by respondent, the order below must be reversed and the matter remitted for consideration under the correct standard. The People remain free, on remittal, to present evidence that the documents previously withheld are exempt under section 87 (2) (e) (iii) in accordance with the standard articulated in this opinion. Since the Appellate Division did not reach petitioner's Civil Rights Law argument and Supreme Court did not review the grand jury minutes in determining whether petitioner met his burden to justify access to the minutes, we decline to reach those questions. Instead, we consider it prudent under the unique circumstances of this case to remit them, along with the FOIL matter, to Supreme Court for its consideration of all these claims.

IV.

We recognize that petitioner seeks these documents to support his claim of actual innocence and that our decision does not answer whether respondent may deny disclosure. We are also acutely aware that petitioner filed his FOIL request years ago and it remains unresolved, despite the legislature's intention to provide public access to government documents within a reasonable time frame. It is our intention that enunciation of the proper standard and our remittal to Supreme Court should facilitate the timely adjudication of petitioner's claims.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

WHALEN, J. (dissenting in part).

I agree with the majority opinion insofar as it holds that the Appellate Division read the confidentiality exemption of FOIL (Public Officers Law § 87 [2] [e] [iii]) too broadly; that witness statements should be protected from disclosure pursuant to that exemption only where a witness was promised confidentiality or the circumstances were such that the confidentiality of the information provided could reasonably be inferred; and that this proceeding should be remitted for Supreme Court to determine the applicability of the confidentiality exemption to the material sought in petitioner's initial FOIL request under the proper standard. I further agree with the majority that upon remittal, the Civil Rights Law § 50-b issues raised by the parties may be considered, and petitioner's request for disclosure of the grand jury minutes should likewise be determined following an in camera review of the minutes. I respectfully dissent, however, from the majority's conclusion that petitioner was not required to exhaust his administrative remedies with respect to his request for his "entire case file," i.e., documents outside the scope of his initial FOIL request. I also write separately because I do not fully agree with the majority's discussion of how an agency can meet its burden of establishing that information was intended to be confidential for purposes of the FOIL confidentiality exemption in a case like this one that involves allegations of sexual offenses committed against children.

I.

Beginning with the exhaustion issue, I cannot agree with the majority that this record reflects that it would have been futile for petitioner to seek his entire case file from the District Attorney through the FOIL process (*see* *Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038-1039 [2012], *cert denied* 568 US 1213 [2013]; *cf.* *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978])[15] . It is not a fair interpretation of the District Attorney's FOIL denial letter to say that it "clearly established that [the District Attorney] would not release any documents absent a court order" (majority op at 14). Petitioner asserts that his failure to request the "entire case file" originally resulted from a lack of information regarding the distinction between the Review Team and the Advisory Panel, and that is the only explanation given for the request's expansion from the original FOIL request to the article 78 petition. Even accepting, for the sake of argument, the premise that petitioner may have been unaware (through no fault of his own) of the difference between the Review Team and the Advisory Panel (*cf.* *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 196 [2007] ["hindsight cannot be used to determine whether administrative steps were futile"]), it is evident that the District Attorney did not view petitioner's FOIL request as one for "all documents that would be part of the reinvestigation process" (majority op at 13) or "the entire case file" as stated in petitioner's article 78 petition, and did not respond as though all such documents had been requested[16]. Indeed, as the District Attorney points out in her brief, some items that are presumably in the case file[17] are plainly not within the FOIL exemptions she invoked in the denial letter, and have since been made public with the final Conviction Integrity Review report[18]. It is likely that there may be documents in petitioner's case file that are subject to as-yet-uninvoked FOIL exemptions, and the District Attorney has not yet been afforded the requisite opportunity to make a record with respect to any such documents (*see Matter of* *Carty v New York City Police Dept.*, 41 AD3d 150, 150 [1st Dept 2007]; *see generally Matter of* *Yarbrough v Franco*,

95 NY2d 342, 347 [2000]; *Watergate II Apts.*, 46 NY2d at 57). The majority faults the District Attorney because she has never "indicated what additional case file material might be protected, what additional FOIL grounds respondents would have invoked to prevent their release, or even that respondents would have invoked other FOIL exemptions at all" (majority op at 15 n 9). This is precisely because the request for the "entire case file" was unexhausted, and as a result the District Attorney was never given the opportunity to do so. Accordingly, I would affirm the Appellate Division order to the extent that it denied so much of the petition as sought disclosure under FOIL of documents other than those provided by the District Attorney to the Advisory Panel (*see* 134 AD3d at 831; *see generally Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 749 [2001]).

II.

Turning to the confidentiality exemption, I agree with the majority that the Appellate Division's analysis — which held the exemption applicable to any statement made by a witness who did not testify at a trial (*see* 134 AD3d at 828-829) — had its roots in a materially different version of FOIL (*see Matter of Moore v Santucci*, 151 AD2d 677, 679 [2d Dept 1989], citing *Matter of Knight v Gold*, 53 AD2d 694, 694 [2d Dept 1976], *lv dismissed* 43 NY2d 841 [1978]; *see generally Matter of Lesher v Hynes*, 19 NY3d 57, 64-66 [2012]), and is irreconcilable with the principle that FOIL exemptions must be narrowly construed (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-463 [2007]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). I also agree that the exemption should apply to witness statements only where a witness is promised confidentiality or the confidentiality of the information provided by the witness can be reasonably inferred, consistent with federal case law[19] and with Appellate Division cases from outside the Second Department (*see e.g. U.S. Dept. of Justice v Landano*, 508 US 165, 172 [1993]; *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 440 [1st Dept 2014]; *Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1292 [3d Dept 2009]).

While I generally agree with the majority's identification of factors to consider in evaluating whether confidentiality should be inferred (majority op at 27-28), I would place additional weight on the nature of the crime in proceedings involving sensitive matters such as alleged sexual offenses committed against children. The United States Supreme Court noted in *Landano* that the character of the crime being investigated may constitute a "generic circumstance[]" from which "an implied assurance of confidentiality [to witnesses] fairly can be inferred" (508 US at 179). As a matter of common sense, a witness who provides a statement alleging that he or she saw a sexual offense committed against a child does so with the reasonable expectation that the statement will be kept confidential "except to the extent . . . necessary for law enforcement purposes" (*Landano*, 508 US at 174). The inference of confidentiality is even stronger when the statement is given by a child, and stronger still when the child witness is also the victim of the alleged sexual offense. Where an agency establishes that material requested under FOIL consists of statements made by children concerning the investigation of a claim of sexual abuse, the confidentiality exemption should apply in the absence of circumstances that demonstrate that confidentiality was not intended. Notably,

child sex offense prosecutions often end in plea bargains for the very purpose of protecting victims from having to testify publicly. That purpose would be subverted if witness statements made in connection with those prosecutions were routinely discoverable under FOIL and thus available not only to former defendants like petitioner seeking to establish their actual innocence but equally to any member of the public regardless of the purpose for which the statements are sought (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]; *Matter of John P. v Whalen*, 54 NY2d 89, 99 [1981]; *Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353, 355 [1st Dept 2009]). Nonetheless, because there has not yet been an analysis of the confidentiality of the witness statements here under the proper standard, I agree with the majority that a remittal for that purpose is in order. I would therefore modify the Appellate Division order by reinstating so much of the petition as sought disclosure of the materials provided to the Advisory Panel and the grand jury minutes, and I would remit the matter to Supreme Court for further proceedings in accordance with this opinion.

Order reversed, with costs, and matter remitted to Supreme Court, Nassau County, for further proceedings in accordance with the opinion herein.

[1] Judge Raggi concurred in the judgment and joined all but the part of the court's opinion that recounted petitioner's assertions of the circumstances that led to his conviction and the conclusion the court drew as to his innocence. However, she agreed that "the facts alleged are disturbing and may well warrant further inquiry by a responsible prosecutor's office" (618 F3d at 161 [Raggi, J., concurring in part]).

[2] The "ongoing investigation" in this case was the District Attorney's reinvestigation.

[3] Notably, the District Attorney did not invoke Public Officers Law § 87 (2) (b), which exempts "records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy" within the meaning of Public Officers Law § 89 (2).

[4] Rice stepped down as District Attorney in 2015 and was succeeded by Madeline Singas as acting District Attorney. Singas was elected Nassau County District Attorney in 2016.

[5] Additionally, in June 2014, petitioner commenced a defamation action against the District Attorney and two Information Officers employed by her office, which Supreme Court dismissed in 2015. Also in June 2014, petitioner filed a motion, pursuant to Criminal Procedure Law § 440, to vacate his judgment of conviction and dismiss the underlying indictments. Supreme Court denied the motion to overturn the conviction but granted, on consent, his request for a hearing on actual innocence. That hearing has been stayed pending the resolution of this appeal.

[6] The District Attorney further claimed that all four FOIL exemptions had been properly invoked at the time of petitioner's request.

[7] Those witnesses had contacted the court in response to petitioner's notice of his request for access to his case file, as required by Civil Rights Law § 50-b (2) (b). That provision states that petitioners seeking the disclosure of documents tending to identify the victim of a sex offense should "appl[y] to a court having jurisdiction over the alleged offense, demonstrate[] to the satisfaction of the court that good cause exists for disclosure to that person[,]" and make "[s]uch application . . . upon notice to the victim or other person legally responsible for the care of the victim [as well as] the public officer or employee charged with the duty of prosecuting the offense[.]" Petitioner did not complain about the redaction of the names of witnesses who, in response to the notice, objected to the disclosure of their identities, but he reserved the right to do so. Supreme Court thus clarified that its redaction order was given on consent of the parties.

[8] The parties agree that no court reviewed the grand jury minutes.

[9] The dissent and respondent imply that the original case file may contain material that was not shared with the Advisory Panel and does not fit within a FOIL exemption invoked by the District Attorney in her original denial (dissenting op at 3-4). However, by the District Attorney's own admission, the Advisory Panel only had access to certain materials in the case file because of its special status. It stands to reason that any documents that would have been reachable under FOIL — that is, that the public, with its less privileged status, might have been able to request — would also have been available to the Advisory Panel.

Moreover, at no point in this litigation has respondent ever indicated what additional case file material might be protected, what additional FOIL grounds respondent would have invoked to prevent their release, or even *that* respondent would have invoked other FOIL exemptions at all. In fact, contrary to the dissent's assertion, all the material disclosed as part of the Conviction Integrity Review had initially been withheld under a FOIL exemption invoked in the District Attorney's first denial letter.

[10] The court's interpretation here is also inconsistent with the Second Department's reading of Public Officers Law § 89 (2) (b) (v), another FOIL confidentiality exemption, which generally protects the "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such an agency." There, that court construed confidentiality to attach only to information gathered from "individuals [who] received an express or implied promise of confidentiality" (*Matter of Prall v New York City Dept. of Corrections*, 129 AD3d 734, 736 [2d Dept 2015]).

[11] To the extent respondent's argument may be interpreted as limited solely to witness statements, we note that section 87 (2) (e) (iii) also applies to "confidential information" without regard to source. In accordance with the statute's plain text, the rule we elaborate here applies to sources and information alike.

[12] *Hakwins v Kurlander* (98 AD2d 14 [4th Dept 1983]),relied on by the Second Department for the proposition that " [t]he rule holding that . . . statements [of nontestifying witnesses] are inherently confidential is sound as it encourages private citizens to furnish controversial information to law enforcement officials" (*Matter of Friedman*, 134 AD3d at 829 [internal quotation marks omitted]), is not to the contrary. In that case the witnesses had been given explicit assurances of confidentiality (*see Hawkins*, 98 Ad2d at 17 ["For a court to hold that a promise of confidentiality can be breached merely because the investigation did not lead to criminal charges would raise a red flag for future witnesses who might well decline to reveal confidences to the District Attorney because of the risk of public disclosure."]). The federal case cited in *Hawkins*, and on which the Second Department majority also relied, supports the rule we adopt here (*see Pope v United States*, 599 F2d 1383, 1387 [5th Cir 1979] [upholding a decision to withhold witness statements from disclosure under FOIA's confidentiality exemption not because the witnesses did not testify but because "(t)he substance of the three documents and the circumstances under which the information was given (to the agency) convince us that there was an implied assurance of confidentiality associated with these communications"]).

[13] The federal statute exempts from disclosure information from confidential sources, while the New York law protects confidential sources and information (*compare* 5 USC § 552 [b] [7] [D] [exempting from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source"] *and U.S. Dept of Justice v Landano*,508 US 165, 172 [1993] ["Under Exemption 7(D), the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."] *with* Public Officers Law § 87 [2] [e] [iii] [exempting from disclosure "records . . . compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation"]). The difference in language between the FOIA and FOIL provisions does not diminish the usefulness of comparison with the federal analogue. Even though the federal statute does not by its terms apply to "confidential information," federal courts have sometimes interpreted the statute to cover the same kind of "confidential information" protected in New York on a similar theory (*see e.g. Pope*, 599 F2d at 1386-87 [withholding witness

statements alleging attorney misconduct as confidential because "disclosure of the (documents') contents would inevitably reveal their source" and "from the content and other circumstances" surrounding the documents, the court concluded the information was provided on an inferred assurance of confidentiality"] [internal quotation marks omitted]).

[14] Of course other statutory exemptions may apply. The legislature has enacted specific provisions to protect witnesses and the accused from "unwarranted invasion[s] of [their] personal privacy" (Public Officers Law § 87 [2] [b]) and, in some circumstances, the disclosure of their identity (*see e.g.* Civil Rights Law § 50-b). The FOIL provision at issue here, though, was not primarily designed to protect victims, witnesses, or accused persons. As its text and legislative history make clear, this exemption is designed to balance the public's right to information with the need to maintain the integrity of police investigations involving confidential information and sources.

Contrary to the dissent's contention, our rule does not lead to the conclusion that "witness statements made in connection with [child sex offense prosecutions will be] routinely discoverable under FOIL" (dissenting op at 7). As we have explained, each FOIL request must be analyzed on its own terms, based on the specific facts and circumstances it presents. For the same reason, a court analyzing whether an agency's invocation of section 87 (2) (e) (iii) is justified should not place "additional weight on the nature of the crime" as a categorical rule (dissenting op at 6), but must consider the specific facts and circumstances of each particular case.

[15] Because the District Attorney preserved her exhaustion argument below, it is properly before us as an alternative ground for an affirmance of the Appellate Division's order in part (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]).

[16] The majority presumes that the Advisory Panel had access to documents from the case file otherwise reachable under FOIL (majority op at 15 n 9). But it does not follow from the fact that "the Advisory Panel only had access to certain materials in the case file because of its special status" that it necessarily received and considered every remaining piece of disclosable material in the entire case file. In any event, we need not speculate, as the sole issue is what material the Advisory Panel actually received, and whether that material is disclosable under FOIL. Any remaining items not disclosed to that panel are not the proper subject of this proceeding.

[17] The entire case file is not part of the record before us, and there is no basis to question the District Attorney's assertion that it was not before Supreme Court either.

[18] The majority's claim that the District Attorney *withheld* those items under FOIL (majority op at 15 n 9) presupposes that she viewed them as within the scope of petitioner's request.

[19] Federal cases interpreting the Freedom of Information Act are instructive when interpreting section 87 (2) (e) of FOIL, which was patterned after its federal counterpart (*see Matter of Madeiros v New York State Educ. Dept.*, ___ NY3d ___, 2017 NY Slip Op 07209 at *6 [Oct. 17, 2017]; *Lesher*, 19 NY3d at 64).

MATTER OF ABDUR-RASHID v. NEW YORK CITY POLICE DEPT., 2018 NY Slip Op 2206 - NY: Court of Appeals 2018

2018 NY Slip Op 02206

IN THE MATTER OF TALIB W. ABDUR-RASHID, Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, ET AL., Respondents.
IN THE MATTER OF SAMIR HASHMI, Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, ET AL., Respondents.

No. 19.
Court of Appeals of New York.

Decided March 29, 2018.
Omar T. Mohammedi, for appellants.

Devin Slack, for respondents.

Reporters Committee for Freedom of the Press, et al.; New York Civil Liberties Union; District Attorneys Association of the State of New York; New York City Council's Black, Latino and Asian Caucus, amici curiae.

Opinion by Chief Judge DiFiore. Judges Fahey, Garcia and Feinman concur. Judge Wilson dissents in part in an opinion. Judge Stein dissents in an opinion in which Judge Rivera concurs.

DiFIORE, Chief Judge.

The issue presented is whether an agency may decline to acknowledge that requested records exist in response to a Freedom of Information Law request (Public Officers Law § 84 *et seq.* [FOIL]) when necessary to safeguard statutorily exempted information. Under these circumstances, we hold that it may and therefore affirm the Appellate Division order, which reached the same conclusion.

The federal courts have long permitted federal agencies responding to Freedom of Information Act (FOIA) requests to neither confirm nor deny the existence of responsive documents — a so-called Glomar response — when the agency's acknowledgement that it possesses responsive documents would itself reveal information protected from disclosure under a FOIA exemption. In the context presented here, where a law enforcement agency was asked to disclose records relating to a police investigation and surveillance activities involving two

specific individuals and associated organizations — information protected under the law enforcement and public safety exemptions of Public Officers Law § 87 — such a response is compatible with the FOIL statute and our precedent interpreting it.

In October 2012, petitioners Talib Abdur-Rashid and Samir Hashmi separately submitted targeted FOIL requests seeking any records possessed by the New York City Police Department (NYPD) related to any "surveillance" and "investigation" of them as individuals and of certain specified entities with which they were associated (including a mosque and a university student association, respectively) for the six-year period immediately preceding the request. The agency denied the requests, stating in each case that the information, "if possessed by the NYPD", would be protected from disclosure under various statutory exemptions, including the law enforcement, public safety and personal privacy provisions. After the NYPD adhered to those decisions on administrative appeal, petitioners commenced separate CPLR article 78 proceedings challenging the determinations. Petitioners asserted that the NYPD was engaged in an ongoing domestic surveillance program in which, as alleged in press articles, it had targeted Muslim individuals, places of worship, businesses, schools, student groups and the like. It was in this context that petitioners attempted to ascertain whether they were subjects of surveillance or investigation, noting that they had supplied certifications of identity waiving their personal privacy interests and authorizing the NYPD to release responsive records to their attorneys.[1]

The NYPD's response, although styled as a motion to dismiss the petition in each case, did not assert a procedural objection but defended the FOIL responses on the merits. The agency explained the basis for its denial of the FOIL requests and its refusal to disclose whether it possessed responsive documents in a 22-page affidavit of its Chief of Intelligence, Thomas Galati. Without offering any specific information relating to petitioners, Chief Galati described the NYPD's ongoing and wide-ranging counterterrorism efforts, acknowledging that the agency was actively engaged in covert surveillance and other intelligence gathering in its effort to preempt acts of terrorism in New York City, which remains a prime target in the wake of the World Trade Center attacks. The Galati affidavit averred that disclosure of whether the NYPD possesses records responsive to the FOIL requests would necessarily reveal whether petitioners had been the subjects of its investigation, information which — particularly if aggregated — would provide unprecedented and invaluable information concerning NYPD counterterrorism strategies, operations, tactics and techniques to those planning future terrorist attacks. The Galati affidavit also averred that the NYPD intelligence strategies are monitored by individuals and organizations with the goal of developing counterintelligence measures, and the greatest vulnerability to the NYPD Intelligence Bureau is the release of even "seemingly innocuous information" which would inexorably reveal sources from which information is gathered by the NYPD.

The proceedings were assigned to different justices for resolution. In *Abdur-Rashid,* Supreme Court granted the NYPD's motion to dismiss and denied the petition, reasoning that the NYPD demonstrated that its response — including its refusal to acknowledge whether responsive records existed — was not prohibited by FOIL as the records sought were exempt from

disclosure under the statute and the cases interpreting it. In *Hashmi,* although not disputing that the content of responsive records may be exempt, Supreme Court, among other things, denied the motion to dismiss on the rationale that the NYPD's failure to acknowledge whether or not responsive records existed was impermissible under FOIL. Hearing the cases together, the Appellate Division affirmed in *Abdur-Rashid* and, among other things, reversed the order denying the motion to dismiss in *Hashmi,* granting the motion and dismissing the petition (140 AD3d 419 [1st Dept 2016]). The Appellate Division reasoned that, through the affidavits of Chief Galati, the NYPD had "establish[ed] that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts" in contravention of the law enforcement and public safety exemptions (*see id.* at 421). Thus, the court held that NYPD's refusal to confirm or deny the existence of responsive records was consistent with FOIL and the cases construing it. We granted petitioners leave to appeal (28 NY3d 908 [2016]).

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 NY2d 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 NY3d 454, 462 [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 NY2d at 571). "While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.,* 79 NY2d 106, 110 [1992] [internal quotation marks and citation omitted]). Nor may the courts order disclosure of records deemed *confidential* by the Legislature: "[o]nce it is determined that the requested material falls within a FOIL exemption, no further [balancing of interests] or policy analysis is required" (*id.* at 112).[2]

From the outset of FOIL, the legislature expressly exempted certain agency records from public access, recognizing that there is sometimes "a legitimate need on the part of government to keep some matters confidential" (*Fink,* 47 NY2d at 571). For example, the law enforcement exemption and the public safety exemption, which the NYPD relied on here, protect records that, if disclosed, would interfere with law enforcement investigations or judicial proceedings, reveal nonroutine criminal investigative techniques or endanger the life or safety of any person (Public Officers Law § 87 [2][e][i], [e][iv], [f]). When interpreting these provisions, we have emphasized that "the purpose of [FOIL] is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution" (*Matter of Madeiros v New York State Educ. Dept.,* 30 NY3d 67, 77 [2017] [quotation marks and citation omitted]). FOIL was not designed to assist wrongdoers in evading detection or, put another way, "to furnish the safecracker with

the combination to the safe" (*Fink*, 47 NY2d at 573). As this Court has acknowledged, the disclosure of information acquired by the police during a criminal investigation "could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 278 [1996]).

In *Matter of Lesher v Hynes* (19 NY3d 57, 59 [2012]), an author sought "any and all" records from a District Attorney's office concerning its pending prosecution of a defendant charged with sexual abuse who fled the country "one step ahead of an arrest warrant." The District Attorney declined to turn over any records, broadly asserting that any records relevant to the pending prosecution — including correspondence with federal officials relating to extradition efforts — were protected from disclosure under the law enforcement exemption. Petitioner argued, among other things, that the District Attorney had not adequately explained how the release of records relating to a publicly acknowledged prosecution would interfere with law enforcement investigations or judicial proceedings. In rejecting that argument, we adopted the analysis in *NLRB v Robbins Tire & Rubber Co.* (437 US 214 [1978]) in which the United States Supreme Court held — interpreting its own analogous law enforcement exemption (5 USC § 552[b][7][A]) — that courts may determine that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings'" (*Robbins*, 437 US at 236, quoting 5 USC 552[b][7][A]). Thus, in the case of a pending criminal investigation or prosecution, a law enforcement agency is not required to make a specific evidentiary showing relating to the likelihood that disclosure of records would pose any unique or unusual danger of interference in the individual case that is the subject of the request (*Lesher*, 19 NY3d at 67). Rather, the agency may fulfill its burden to articulate a factual basis for the exemption under FOIL by "identify[ing] the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of [those] categories of documents" (*id.*). In *Lesher*, for example, the prosecutor's general explanation that the correspondence sought contained information concerning the particulars of the crime and the identities and statements of witnesses and that "its release posed an obvious risk of prematurely tipping the District Attorney's hand" was sufficient to support reliance on the exemption (*id.* at 67-68).

We recognized the need to protect investigative information in *Lesher* even though the existence of the criminal action was a matter of public record. Before criminal proceedings have commenced, the inherent dangers of premature disclosure are even greater. In fact, the need for government confidentiality may be at its zenith when a law enforcement agency is undertaking a covert investigation of individuals or organizations, where the lives of the public, cooperators and undercover officers may hang precariously in the balance and the reputation, livelihood or liberty of the subject may be at stake. This Court has never held that FOIL compels a law enforcement agency to reveal records relating to an ongoing criminal investigation of a particular individual or organization to the target, the press or anyone else — and the structure and purpose of the law enforcement and public safety exemptions in Public

Officers Law § 87 are rendered meaningless by a contrary conclusion. The dissent does not argue otherwise and petitioners in this case no longer challenge the applicability of the cited exemptions to the content of the investigation and surveillance records they requested.[3]

Rather, the thrust of petitioners' argument is that, when declining to disclose records which fall squarely within an exemption, the NYPD must specify whether or not it possesses materials responsive to the FOIL request even when doing so would reveal information safeguarded by that same FOIL exemption. Taken to its logical extreme, petitioners argue a Catch-22 paradigm where the NYPD would have to acknowledge the existence of an investigation involving a particular person notwithstanding that the contents of any responsive records would be exempt and revelation of their existence would result in the same harm justifying exemption of the contents — whether the FOIL request comes from the target, a newspaper or some other member of the public.

The NYPD counters that this Court should follow the commonsense doctrine employed by the federal courts, which have recognized that it is permissible under the federal statutory scheme of FOIA for a federal agency to decline to acknowledge possession of responsive records when the fact that responsive records exist would itself reveal information protected under a FOIA exemption. Federal recognition of this policy dates back to *Phillippi v Central Intelligence Agency* (546 F2d 1009 [DC Cir 1976]), in which a reporter sought records from the CIA concerning its relationship with a vessel known as the Hughes Glomar Explorer, purportedly owned by a private corporation but believed to have been used by the CIA to gather information concerning sunken Russian submarines. The District of Columbia Circuit credited the CIA's explanation that, to require it to reveal whether it possessed records relating to the vessel would be tantamount to requiring it to reveal its connection to the vessel — a fact exempt from disclosure under FOIA exemptions 1 (5 USC 552[b][1], protecting materials classified pursuant to Executive Order) and 3 (5 USC 552[b][3], protecting materials "specifically exempted from disclosure by statute"). Thus, in federal parlance, when an agency neither confirms nor denies that it possesses records in response to a FOIA request, it is known as a Glomar response (*see e.g. Wilner v Natl. Sec. Agency*, 592 F3d 60, 64 [2d Cir 2009], *cert denied* 562 US 828 [2010]).

The federal courts have recognized that "[FOIA's] exemptions cover not only the content of the protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption'" (*id.*, at 68, quoting *Larsen v Dept. of State*, 565 F3d 857, 861 [DC Cir 2009]). Thus, as the Second Circuit has explained, "[t]he *Glomar* doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records" (*Wilner*, 592 F3d at 68). The burden is on the agency to submit an affidavit explaining in as much detail as possible why the information protected by a Glomar response — i.e., whether the agency possesses responsive documents — logically falls within the claimed FOIA exemptions (*Phillippi*, 546 F2d at 1013).

Although pointed FOIA requests analogous to the inquiries here are rare, the dangers of

disclosure of the existence of an investigation of a particular person have been acknowledged under that statute. In *Vazquez v U.S. Dept. of Justice* (887 F Supp 2d 114, *motion for summary affirmance granted* 2013 WL 6818207 [DC Cir 2013]), plaintiff sought records about him maintained by the FBI's National Crime Information Center (NCIC), a compilation of 19 separate databases containing investigative material compiled for law enforcement purposes. In upholding the use of a Glomar response under FOIA law enforcement exemption 7(E), the court credited the FBI's assertion

> "that public confirmation of NCIC transactions would alert individuals that they are the subject of an investigation as well as reveal[] the identity of the investigative agency. With this information, individuals could modify their criminal behavior, thereby preventing detection by law enforcement agencies and risking circumvention of the law. . . . In other words, persons knowing that they are being investigated by a law enforcement entity, which the requested information would reveal, could reasonably be expected to use the information to circumvent the law. Conversely, . . . knowledge that there have been no NCIC checks run [would indicate the person] is not on law enforcement's radar [permitting them] to continue to engage in unlawful endeavors with renewed vigor" (887 F Supp 2d at 117-118).

FOIA cases involving counterintelligence records are also particularly instructive. In *Hunt v Central Intelligence Agency* (981 F2d 1116 [9th Cir 1992]), a defendant on trial for murder sought disclosure from the CIA of records regarding his victim, an Iranian national. The Ninth Circuit upheld the CIA's use of a Glomar response, crediting its explanation in supporting affidavits that:

> "the disclosure of the existence or non-existence of documents must not be viewed in isolation but rather as one tile in a mosaic of intelligence gathering. Through the CIA's disclosure of the existence or non-existence of records on particular individuals, a FOIA requester could make the information public or otherwise available to counter-intelligence operations from other nations. . . . [T]hose experts could then determine the contours and gaps of CIA intelligence operations and make informed judgments as to the identities of probable sources and targets [who] . . . could find themselves under suspicion and in grave danger. . . . [P]otential future sources would be reluctant to come forward; targets of intelligence scrutiny would be alerted and could take additional precautions; and foreign operatives could learn whether or not the CIA was aware of their activities"(981 F2d at 1119).

The same risk has been recognized when the subject of the request is not an individual but a specific organization or institution. For example, in *Gardels v Central Intelligence Agency* (689 F2d 1100 [DC Cir 1982]), the FOIA request sought records from the CIA relating to its past and present relationships with the University of California. The District of Columbia Circuit emphasized that the specific request could not be viewed in isolation, particularly there where the CIA had received 125 similar requests seeking information relating to about 100 American colleges and universities. Acknowledgment of the existence of records concerning any one institution, when aggregated, could reveal substantial information relating to the CIA's covert activities and assist foreign intelligence bodies in determining which institutions to avoid and where to concentrate their efforts. In *Gardels,* the court reasoned that the CIA could properly

treat all such requests uniformly by providing a Glomar response, neither revealing the existence or nonexistence of responsive records with respect to any one institution.

Given that our statute was modeled after FOIA, we have repeatedly looked to federal precedent when interpreting FOIL, particularly in relation to the law enforcement exemptions (*see Matter of Friedman v Rice*, 30 NY3d 461 [2017]; *Madeiros*, 30 NY3d 67; *Lesher*, 19 NY3d 57). And while it is not necessary for us to consider on this appeal whether there are other circumstances when a Glomar-type response might be permissible under FOIL, the analysis in the federal cases is instructive in the unique situation presented here where a targeted request seeks records concerning a specific individual's involvement in a pending NYPD investigation. As these cases demonstrate, there are indeed occasions when, due in large part to the precise manner in which the FOIL request is structured, an interpretation of the statute that compels a law enforcement agency to reveal that responsive records exist with respect to a specific individual or organization would, in effect, force the agency to disclose substantive information that is protected under FOIL's law enforcement and public safety exemptions. Just as requiring the CIA to state whether it possesses documents relating to the Hughes Glomar explorer would reveal whether or not it was connected to that vessel, compelling the NYPD to state whether or not it possesses "investigative or surveillance" records would reveal substantive information concerning an individual's involvement with the NYPD investigation. Put another way, when there is a FOIL request as to whether a specific individual or organization is being investigated or surveilled, the agency — in order to avoid "tipping its hand" — must be permitted to provide a Glomar-type response.[4]

We reject petitioners' argument that there is a textual basis in New York's FOIL statute foreclosing an agency from declining to reveal whether responsive documents exist when it is denying a FOIL request based on a statutory exemption. The general rule requiring an agency to acknowledge the existence of responsive records stems from the presumption of access — it is usually necessary for an agency to reveal that a particular record exists in order to demonstrate the applicability of an exemption[5]. But there is no specific statutory language requiring an agency to certify the existence of records wholly protected under an exemption. Petitioners rely on Public Officers Law § 89(3)(a), which states that an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." However, that provision is triggered when, in lieu of granting a FOIL request, the agency finds that it either does not possess the item requested or is unable to locate it after a diligent search (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 874-875 [2001]); it does not require certification of the existence of records for which the agency is claiming an exemption. Here, the NYPD based its denial on the applicability of various exemptions and not on an inability to locate responsive documents after a diligent search. Nor is the response inconsistent with the provisions in section 89(3)(a) identifying the three permissible final responses to a FOIL request: (1) grant the request and disclose documents, (2) certify that the record cannot be found after a diligent search, or (3) "deny such request," invoking one or more exemptions (*see Matter of Beechwood Restorative Care Ctr. v Signor*, 5

NY3d 435, 440-441 [2005]). The determinations under review, in which the NYPD refused to turn over any records relying on multiple exemptions, fell into the third category — a denial of the request for records.[6]

It is the rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, acknowledging that any responsive records exist would, itself, reveal information tethered to a narrow exemption under FOIL. But when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the NYPD Intelligence Bureau, such a response is entirely consistent with the purpose and structure of our statute. To recognize that those unusual circumstances coalesce here does not create a broad judicial exemption as the dissent erroneously claims. Rather, we are applying a commonsense interpretation of the relevant statutory language to give full effect to the law enforcement and public safety exemptions carefully crafted by the legislature, as interpreted for decades by this Court. A model of understatement, the dissent recognizes that requiring an agency to acknowledge the existence of records in these circumstances "may have concerning implications" (dissenting opn at 18-19) but protests that the Court is powerless to avoid such a result — that only the Legislature can intervene. We disagree. The Legislature has already acted by adopting the law enforcement and public safety exemptions — the task of interpreting them falls squarely within the province of the courts. At bottom, the legislative intent was not to provide public access to information, the secrecy of which is necessary to sustain the government's legitimate exercise of police powers to investigate criminal activity. We will not abdicate our fundamental role to interpret the statutory language to give full effect to the FOIL exemptions implicated in this case, just as the federal courts have done in the Glomar cases. While the dissent rightfully expresses concern about "blanket" or "carte blanche" exemptions, we endorse nothing of the sort here as our decision is premised on respondents' factual demonstration of the necessity for non-access, which is addressed below. Like the federal courts, our courts must scrutinize an agency's refusal to confirm or deny the existence of responsive documents on a case-by-case basis to ensure it is warranted under the particular circumstances presented.

Here, in assessing the propriety of the agency's refusal to reveal whether responsive records exist, we begin with the requests themselves, which were both extremely specific and quite unusual. Indeed, we know of no other FOIL case in which individuals who had never been arrested, involved in a police confrontation or formally charged have asked a police agency to acknowledge if they were under investigation. Abdur-Rashid requested records relating to any "investigation" or "surveillance" of himself, individually or in his capacity as leader of a religious institution. Hashmi similarly sought all records relating to "investigation" or "surveillance" of himself or a student group with which he is associated. In their petitions, both men referred to news articles describing the NYPD's ongoing counterterrorism investigation and surveillance program[7].

Petitioners seek to learn their connection, if any, to this endeavor — anyone who suspects, reasonably or otherwise, that they are the subject of or even a peripheral figure in a covert police investigation might understandably feel the same. However, FOIL was never designed

to compel a law enforcement agency to disclose inherently confidential, investigatory information of this nature. Petitioners' requests for information concerning a recent or ongoing investigation by a law enforcement agency implicate the core concerns underlying the law enforcement and public safety exemptions. Under *Lesher*, the agency could meet its obligation to provide a factual basis for the exemptions by identifying the generic kind of records for which the exemption was claimed and the generic risks posed by disclosure of those types of records. The Galati affidavits fulfilled that requirement. Without revealing any specific information about these petitioners (which it could not do without revealing the very information it claimed was exempt), the affidavit explained in extensive detail how disclosing the information sought — i.e., who has been the subject of investigation or surveillance — would imperil its ongoing counterterrorism efforts to protect New York City.

Chief Galati noted that, unlike other NYPD units that investigate crimes after they have occurred (essentially gathering evidence to reconstruct a past event), the intelligence unit of the NYPD is tasked with the objective to be preemptive — amassing information to deter, detect and thwart future terrorist activity. He described numerous, recent cases involving terrorist activity in New York City, demonstrating that the City remains a primary target for terrorist attacks and that, working jointly and sharing information with other state and federal law enforcement agencies, his unit plays a pivotal role in identifying terrorist plots and arresting those involved in order to prevent planned attacks designed to cause mass casualties. The unit gathers information from a myriad of sources, from undercover operations and confidential informants to open sources, as well as a well-publicized counterterrorism hotline, welcoming any and all leads from the public on a promise of confidentiality. Chief Galati averred that it was essential to the operational integrity of the intelligence program that it be able to keep confidential the information it gathers, the sources it uses and the methodologies and tactics it employs to defend against countermeasures used by individuals and organizations to expose the vulnerabilities in the NYPD program. The NYPD's role in preventing the next attack is dependent on its ability to collect information without publicizing its methods or sources to anyone who can use the information to counter its efforts, an assertion consistent with the basic realities of intelligence work.

Further, Chief Galati asserted that the FOIL requests under review here could not be viewed in isolation, noting that the NYPD was beginning to receive similar requests from others. In particular, Chief Galati highlighted the recent initiation of a mass FOIL campaign by a local organization, which encouraged and assisted constituents in submitting requests to the NYPD "FOILing" themselves. The affidavit explained that, if records from disparate requests were aggregated, this would place any individual response into a larger mosaic which could be used to analyze NYPD's counterterrorism operation and identify areas of focus and sources of information. Critically, Chief Galati contended that compelling the NYPD to acknowledge that it possesses records responsive to the request — even if it did not turn over documents — would reveal whether petitioners or the organizations with which they are affiliated were subjects of NYPD investigative interest, information that is itself exempt from disclosure.

The Appellate Division did not err in determining that the Galati affidavit established a factual basis for the exemptions claimed under the circumstances presented. This is true even though the NYPD does not claim (nor could it, consistent with its desire to maintain secrecy) that petitioners or their organizations are connected in any way with its pending counterterrorism investigation. As the federal courts have recognized (*see generally* Gardels, 689 F2d 1100), a Glomar-type response would be ineffective if it were permissible only when the agency possesses responsive records, even though that is the situation when it is most evident that revealing the existence of the records would damage a pending investigation. Such a myopic approach would prove unworkable because it would not be difficult to distinguish between individuals and organizations who are under investigation (who would receive a Glomar-type response) and those who are not (who would be told that responsive records do not exist). Thus, in the circumstances presented here, when confronted with a targeted FOIL request of this nature, a police agency must be permitted to give a uniform response — to decline to confirm or deny the existence of responsive material in either scenario — on the rationale that whether or not it is investigating a particular person or organization constitutes information that is itself statutorily exempt from disclosure.

Finally, petitioners argue that even if — as we have concluded — an agency can decline to acknowledge that responsive records exist in these unique circumstances, various safeguards recognized by the federal courts preclude the NYPD's use of such a response here. For example, petitioners contend that an agency cannot decline to reveal the existence of records when it has publicly revealed the information for which it is claiming an exemption. They further argue that the NYPD invoked Glomar in a bad faith effort to cover up embarrassing or unlawful acts, such as its use of racial or religious profiling. We caution that we have no occasion in this case to consider whether a Glomar-type response is available under FOIL in any circumstance other than that presented here where the request involves an ongoing criminal investigation, nor do we adopt wholesale the approach taken by the federal courts. That being said, we agree that a police agency that has already revealed the records sought and for which it claims an exemption cannot credibly support such a response. Here, petitioners have not come forward with any evidence that the NYPD publicly acknowledged that it investigated or surveilled petitioners or the organizations referenced in their specific FOIL requests.

As for bad faith, the strongest safeguard against misuse of a FOIL exemption is the factual showing requirement. An agency denying a FOIL request must establish a bona fide, factual basis for the exemptions claimed and any evidence that undermines that showing is material to the court's assessment of the adequacy of the agency's submission — including a claim of bad faith. Although there is no language in the statute authorizing the procedure, New York courts have interpreted FOIL to permit in camera review of sensitive or confidential materials when the court deems such a procedure appropriate or necessary in a particular case to test the legitimacy of a claim of confidentiality or to oversee the redaction process in cases where portions of a record are subject to disclosure (*see e.g. Matter of* New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477, 490 [2005])[8]. Given that the requests here sought "investigative" and "surveillance" records involving a specific person relating to a discrete time period

immediately preceding the request, and in light of the comprehensive affidavit supporting application of the claimed exemptions, there was certainly no abuse of discretion in declining to order in camera review in these cases.

Moreover, other than general allegations arising from news reports, petitioners offered no evidence that the NYPD's response to these particular requests is a function of bad faith, rather than the legitimate law enforcement concerns identified in the comprehensive Galati affidavit. Notably, the Galati affidavit set forth the types of investigative activities which the NYPD is authorized to conduct in furtherance of its goals of detecting or preventing terrorist activities, none of which hinted at an insidious type of surveillance (*see e.g.* *People v Capolongo*, 85 NY2d 151, 160 [1995]). Here, the Galati affidavit was properly deemed sufficient to meet the factual basis requirement for the invocation of the statutory exemption. However, there may well be instances when the FOIL request is more general, either in terms of its subject or the nature of the materials sought, where the propriety of a Glomar-type response is less clear from the law enforcement agency affidavit, or where indicia of improper motive significantly undermine the asserted basis for the exemption. In that event, some form of in camera review may be warranted, even if modifications to the typical procedure are necessary. Thus, our existing FOIL paradigm contains important safeguards against misuse of the exemptions that are no less available in the rare instance when a law enforcement agency denying a request neither confirms nor denies the existence of responsive records.

It bears emphasizing, as is also true under FOIA, that if an agency establishes that the records sought fall within a FOIL exemption adopted by the legislature, the courts cannot order disclosure based on some other public policy concern asserted by a party or the court (*see* *Hanig*, 79 NY2d at 112; *see* *Minier v Central Intelligence Agency*, 88 F3d 796, 802-803 [9th Cir 1996]). While FOIL is an important tool in ensuring government transparency and public accountability, it is not — and was never designed to be — the only check against government overreach. For example, post-use notice requirements are set by the legislature for intrusive police surveillance, taking into account the need to protect the secrecy of the pending investigation (*see* CPL 700.50[3]). Complaints of unconstitutional discriminatory actions have resulted in federal court actions and settlements (*see* *Handschu v Special Services Div.*, 605 F Supp 1384, 1416 [SD NY 1985]). Further, petitioners' claims that an NYPD investigative unit engaged in improper racial and religious profiling were the subject of numerous press articles. As averred in the Galati affidavit, the NYPD — while denying any wrongdoing — has nonetheless changed its policy.

For all of these reasons, under the circumstances presented here, where necessary to give full effect to the law enforcement and public safety statutory exemptions, the NYPD's response neither confirming nor denying the existence of the investigative or surveillance records sought is compatible with FOIL and the policy underlying those exemptions, which is to provide the public access to records without compromising a core function of government — the investigation, prevention and prosecution of crime.

Accordingly, in each case, the order of the Appellate Division should be affirmed, with costs.

WILSON, J. (concurring in part and dissenting in part):

We have not before been asked whether a governmental agency may, in response to a FOIL request, decline to confirm or deny the existence of documents. All of us agree that FOIL expresses New York's strong policy command that, subject to limited exceptions, government documents must be made available to the public; that FOIL differs from and is more powerful than FOIA, and that the public is not permitted to use FOIL to disrupt law enforcement operations. FOIL eschews a police state in which citizens are subject to the secret whims of government, yet recognizes the immense public interest in the effective and faithful enforcement of law. As the majority points out, the dissent's position is unsupportable, because FOIL does not require that an agency state whether documents exist if that disclosure itself would reveal information falling within an exemption. As the dissent explains, the majority's position, though repeatedly self-described as narrow and pertaining solely to the facts of this case, logically requires that the NYPD — or any other governmental agency charged with law enforcement — should respond to all FOIL requests seeking information about investigations by refusing to state whether any responsive documents exist.

I write separately to explain what the process compelled by FOIL and our prior decisions should be. In this case, that process would result in a partial remittal. I have organized my explanation as follows. *First,* neither FOIL nor our decisional law interpreting it requires an agency to confirm or deny the existence of protected documents if such confirmation or denial would itself be protected by an exemption. *Second,* conforming our FOIL doctrine to FOIA Glomar doctrine is inappropriate, because of the unique foreign policy concerns underlying the Glomar doctrine and the criticism of federal decisions expanding that doctrine into more mundane areas. *Third,* agencies must evaluate the specific terms of each FOIL request and, if appropriate, make partial responses differentiated by the scope of the request and the nature of documents the agency possesses. *Fourth,* the procedural safeguards proffered by the NYPD, along with some additional safeguards, should be part of the Article 78 process when a FOIL applicant seeks to challenge an agency's refusal to confirm or deny the existence of records on the ground that the act of doing so would itself disclose protected information. *Fifth,* the evidence tendered here by the NYPD is not sufficient to meet its prima facie burden to justify its wholesale nonresponse or to overcome the objections raised by the petitioners. Although that evidence is presently insufficient, I would remit to Supreme Court to give the parties the opportunity to present evidence in line with the process and guidelines I suggest.

I.

I begin with FOIL's language. Within five business days of receiving a written request for records, an agency "[i] shall make such record available to the person requesting it, [ii] deny such request in writing or [iii] furnish a written acknowledgement of the receipt of such request and a statement of the approximate date . . . when such request will be granted or denied." (*id.* § 89 [3] [a]). The statutory language authorizing denial of a request does not require the

agency to offer any reason for the denial at this stage. Thus, at this initial stage an agency is permitted merely to deny a request, without explanation — and certainly without any requirement to state whether such documents do or do not exist.

As a second step, any person whose request is denied may take an administrative appeal to the agency's director or her designee, who then has ten business days to provide the responsive records or "fully explain in writing to the person requesting the record the reasons for further denial" (*id.* § 89 [4] [a]). The statute does not state that the "full explanation" must identify any particular document's existence, or the existence of responsive documents at all. Thus, if the response to a request would itself reveal exempt information, the "full explanation" could state only that. For example, § 87(2)(h) exempts "examination questions or answers which are requested prior to the final administration of such questions." In anticipation of sitting for a police officer examination, I might lodge a FOIL request asking for all documents concerning any questions on the forthcoming test that relate to this court's *DeBour* factors. Confirming that such documents exist would tell me that I should study those factors; confirming that they do not exist would tell me not to bother. I might serve hundreds of similar requests which, if answered, would give me a very good idea of the test's composition. A satisfactory "full response in writing" to my request would be that the request seeks to compromise the test, and without confirming or denying whether any such documents exist, if they did they would be exempt from disclosure. But if I asked the same questions for a test given in the 1970s, that response would be patently unsatisfactory.

As a third step, a person displeased with the result of the second step (or whose administrative appeal is not timely resolved) may commence an Article 78 petition in Supreme Court (*id.* § 89 [4] [b]). In that proceeding, the agency "shall have the burden of proving that such record falls within the provisions of" one of the exceptions contained in § 87 (2) (*id.*). That, then, brings us to the question in this case: what does the agency's burden entail when the agency asserts that the acknowledgement of the existence or nonexistence of documents would itself fall within an exception?

The statute is silent as to any requirements specifically pertaining to such an Article 78 challenge. Although FOIL's process requires agencies to explain why any records they withhold are be exempt from disclosure, no provision in the statute requires those agencies in possession of responsive but exempt documents to disclose the existence of those documents in every case. Instead, the statute contemplates a spectrum of increasingly circumscribed, and increasingly difficult to justify, responses. To be sure, FOIL's goal of extending public accountability "wherever and whenever feasible" requires agencies to disclose as much information as is not protected by an exemption (*id.* § 84); exemptions are to be applied only to the relevant "records or portions thereof" and requests are to be "granted . . . in part" whenever possible. Thus, if an agency establishes a responsive document contains protected information, it will be "required to prepare a redacted version" (*Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]). If no sufficient redaction is possible, it will be permitted to instead provide a list "enumerating or describing . . . the documents withheld" (*Matter of Rose v Albany County Dist. Attorney's Off.*, 111 AD3d 1123, 1126 [3d Dept 2013]; *see West Harlem Bus. Grp.*

v Empire State Dev. Corp., 13 NY3d 882, 885 [2009] [calling "conclusory characterizations" "insufficient"]; *Ciracle v 80 Pine St. Corp.*, 35 NY2d 113, 119 [1974] [requiring agencies, in the context of the common-law privilege for official information but with an eye toward the recently passed FOIL, to provide a "description of the material sought, the purpose for which it was gathered and other similar considerations" when invoking an exception]). By extension, if an agency establishes that enumeration would divulge protected information, it may acknowledge the existence of, but choose not to in any way describe, the withheld documents (*see* *American Civil Liberties Union v C.I.A.*, 710 F3d 422, 433 [DC Cir 2013]). In the "rare case" (majority op. at 15) where an agency establishes that even acknowledging the existence of responsive documents would divulge information protected by any one of the FOIL exemptions, it may provide an evidentiary basis for its conclusion while refusing to admit or deny the existence of any requested documents.

II.

The majority's reliance on federal Glomar doctrine is misplaced. Yes, FOIL was structurally modeled on FOIA. However, as the dissent explains, the Glomar doctrine arises not from FOIA's law enforcement exemption, but from FOIA's exemption of documents "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," which has no analog in FOIL. The Constitution arrogates national defense and foreign policy to the federal government; the NYPD is not searching for a lost Soviet submarine or worried about the foreign policy consequences thereof. Both the majority and dissent tar their FOIL analysis by referring to the NYPD's response as a "Glomar" response.

Glomar's peculiar history has had a profound effect on its logic. FOIA Exemptions 1 and 3, together with certain national security-related statutes, create a "near-blanket . . . exemption" for properly classified materials and CIA records (*Minier v Cent. Intelligence Agency*, 88 F3d 796, 801 [9th Cir 1996]). The exemptions' near-blanket nature opens the door to the federal judiciary's hands-off approach. The national security-related content of FOIA exceptions 1 and 3, coupled with a sense of the uniquely executive purview of national security, pushes judges through it: federal courts consistently reaffirm their "deferential posture" in Glomar cases (*Larson v Dep't of State*, 565 F3d 857, 865 [DC Cir 2009]). By way of example, the U.S. Court of Appeals for the D.C. Circuit believes that it is "in an extremely poor position to second-guess the predictive judgments made by the government's intelligence agencies regarding questions such as whether a country's changed political climate has yet neutralized the risk of harm to national security posed by disclosing particular intelligence sources" (*id.*)

The federal courts' routine deference to Glomar responses "has been justified on both constitutional and prudential separation of powers grounds: Courts opine that protection of national security information is entrusted to the executive under Article II of the Constitution and that courts lack the competence to assess executive determinations to withhold national security information" (Nathan Freed Wessler, "[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the Glomar

Response Under FOIA, 85 NYU L Rev 1381, 1398 [2010]). It has also been criticized for resting on "concerns about comparative competence [that] are overblown and are outweighed by the institutional conflict of interest that arises when the executive branch makes essentially unreviewed decisions to withhold its own records from disclosure" (*id.*)

Those foreign-policy insecurities have no place in New York State's excellent unified court system. Our government features neither a unitary executive tasked with the national defense nor an elaborate system of classified information to which courts routinely defer. Most CIA endeavors will never see the light of day, let alone that of a courthouse; the destiny of every successful NYPD investigation is to appear before a judge. Regardless of federal courts' competence to evaluate foreign countries' changing political climates, we are not similarly handicapped in judging the soundness of FOIL exemptions based on police, privacy, or other justifications. Our courts are fully capable of scrutinizing an agency's "response on a case-by-case basis to ensure it is warranted under the particular circumstances presented" (majority op. at 16).

III.

Glomar aside, both the majority and the dissent come to what I view as unsound resolutions because they fail to consider two important propositions. First, the scope of a particular FOIL request affects the appropriateness of a response refusing to admit or deny the existence of documents. Second, an agency, in responding to a FOIL request, may not be able to make a single response that is appropriate for all the information sought by the request.

Consider two requests: (1) all documents the NYPD possesses concerning any investigation of me; (2) all documents the NYPD possesses concerning any female undercover officer present at the XYZ bar on the evening of February 27, 2018. FOIL requires a different agency response to these two requests, and the former requires far more proof than the latter to justify a refusal to admit or deny the existence of documents. In the case of the latter request, the request facially is to determine the identity of an undercover officer or the existence of an ongoing investigation, and no extrinsic proof should be required to justify the NYPD's refusal to admit or deny the existence of documents. The dissent's absolutist position would require the NYPD to respond that documents do (or do not), exist, which is neither required by FOIL nor responsible public policy.

On the other hand, the majority's treatment of Mr. Abdur-Rashid's request — which is very much like request (1) above — prompts the dissent's salvo at the expansive implications of the majority's writing, allowing the NYPD to "claim the right to refuse to confirm or deny the existence of any record that even tangentially relates to any past, present, or future investigation of crime,' thereby avoiding its FOIL obligations in innumerable cases" (dissenting op. at 12)[9]. If the NYPD has in its possession documents from its surveillance of Mr. Abdur-Rashid in 1993, when he attended the Parliament of World Religions in Chicago, the majority has exempted the NYPD from saying whether it has such documents.

Neither the majority nor the dissent acknowledges that, in the case of a broad request such as (1) above, the agency is not entitled to give a monolithic response, and cannot give any response without examining the documents in its possession, if any. That is, FOIL expressly states that agencies may grant or deny requests "in whole or in part", and a broad request likely calls for a differentiated response, based on the agency's examination of what, if anything, it possesses.

Here, as the dissent notes, the requests seek information about current investigations as well as past investigations. Those two differ in the proof required. As to pending investigations, an agency's refusal to admit or deny the existence of responsive records should require little, if any, proof, because the acknowledgement of the existence of an investigation while it is pending (or being contemplated) is clearly likely to "interfere with law enforcement investigations". However, absent some specific proof that would bring disclosure of the existence of a past investigation within a FOIL exception, documents related to closed matters do not presumptively interfere with law enforcement investigations. Although agnostic on the question, today's decision, if properly implemented, should allow the NYPD categorically to refuse to confirm or deny the existence of records only if those records "involve[] an ongoing criminal investigation" or were provided to it under an information-sharing agreement with federal agencies whose records are specifically exempted from disclosure (majority op. at 20). I discuss the application to the facts of this matter in part V.

IV.

I agree with the majority that "our existing FOIL paradigm contains important safeguards against misuse of the exemptions that are no less available in the rare instance when a Glomar-response is asserted" (majority op. at 22).

Chief among those safeguards is the parties', our lower courts', and the majority's recognition that an agency declining to confirm or deny the existence of responsive records must be held to the same standard expected of every agency that denies any part of a FOIL request[10]. To withhold responsive records, or any information about those records (including the fact of their existence or nonexistence), an agency must demonstrate that they, or the information, "fall[] squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). Those "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). For the same reason, those justifications must present "specific, persuasive evidence" and "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm" (*Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]). In other words, the NYPD must meet its burden "in more than just a plausible fashion'" (*Data Tree*, 9 NY3d at 462).

Another familiar safeguard is the expectation, shared by the majority, that courts unable to determine whether withheld documents fall entirely within the scope of the asserted exemption will "test the legitimacy of a claim of confidentiality" by ordering an "in camera review of

sensitive or confidential materials" (majority op. at 21; *see Matter of Gould v New York City Police Dep't*, 89 NY2d 267, 275 [1996])[11]. "Supreme Court should decide" whether in camera review is necessary on the basis of an agency's submission, regardless of whether the petitioner raises the issue (*New York Times Co. v City of New York Fire Dep't*, 4 NY3d 477, 491 [2005]; *see also Xerox Corp. v Town of Webster*, 65 NY2d 131, 133 [1985]; *Church of Scientology Int'l v US Dep't of Justice*, 30 F3d 224, 233 [1st Cir 1994] ["The fact that the Church did not request in camera review in no way lessens the government's burden to make an adequate showing . . . In other words, in camera review is a tool available to a court when the government's showing otherwise is inadequate to satisfy the burden of proving the exempt status of withheld documents. The Church had no obligation to request such a review"]). The more circumscribed the response, the more necessary the review: in the "rare case"—like this one—where no index of withheld documents can be provided, "it would seem proper that the material requested be examined by the court in camera" (*Ciracle*, 35 NY2d at 119).

A third and final familiar safeguard is the provision, recently augmented by the legislature, for attorney's fees to be awarded to petitioners who substantially prevail over an agency's effort to restrict the freedom of information (Public Officers Law § 89 [4] [c] [i]-[ii]). As I understand the majority's logic, agencies refusing to confirm or deny the existence of responsive records first establish an exemption applies to the contents of that record. Then, they rerun their analysis, under the same or another exemption, against the bare fact of the record's existence. Petitioners who prevail over that second iteration of the FOIL provision, even if they do not succeed in accessing the document itself, may be entitled to whatever attorney's fees are attributable to that portion of their effort.

In addition to those familiar safeguards, all parties in this case suggest—and the majority agrees—that further precautions should be adopted in FOIL cases where the agency neither confirms nor denies the existence of responsive records.

First, the "burden is on the agency to submit an affidavit explaining in as much detail as possible why the information protected by [the agency's response]—i.e., whether the agency possesses responsive documents—logically falls within the claimed [FOIL] exemptions" (majority op. at 10).

Second, as the NYPD proposes, a petitioner should have the opportunity to test the affidavit by (a) "argu[ing] that the agency's claims are insufficient to show that acknowledging the existence of records implicates an exemption to disclosure" and (b) "producing competent evidence" that rebuts the agency's proffered justification for using a circumscribed response (Resp. Brief at 43-44). To "create as complete as public record as is possible", the petitioner "should be allowed to seek appropriate discovery" (*Phillippi*, 546 F2d at 1013).

Third, a petitioner should have the opportunity to challenge the asserted FOIL exemption by advancing "a claim of bad faith" (majority op. at 21). "[T]he mere allegation of bad faith should not undermine the sufficiency of agency submissions" (*Minier v Cent. Intelligence Agency*, 88

F3d 796, 803 [9th Cir 1996]). Should a court find that an agency's refusal to disclose information is motivated not by the spirit of the exemption but by some more invidious purpose, the primary remedy is "to review the agency affidavits with greater scrutiny" (*id.*).

Fourth, a petitioner should have the opportunity to establish an exemption to the exemption by demonstrating that the agency "has already revealed the records sought and for which it claims an exemption" (majority op. at 20). If so, that agency "cannot credibly support a Glomar-type response" and the court should "compel the disclosure of information over an agency's otherwise valid exemption claim" (*id.*; *Fitzgibbon v CIA*, 911 F2d 755, 765 [DC Cir 1990]). Although the longstanding test for whether information has been officially acknowledged by an agency appears quite narrow (*see id.*), more recent decisions have compelled disclosure when an agency, or another high-ranking public official, has revealed not the document itself but the information that would otherwise justify withholding the document (*New York Times Co. v US Dep't of Justice*, 756 F3d 100, 120-121 (2d Cir 2014); *Am. Civil Liberties Union*, 710 F3d 422, 241-245 [DC Cir 2013]). The world's few Glomar watchers would see the federal courts move still further in that direction (Michael D. Becker, Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check, 64 Admin L Rev 673, 698 [2012]; Wessler, 85 NYU L Rev at 1414).

Moreover, the federal official acknowledgement doctrine is instructive, but—even at its broadest—too narrow for FOIL. As with other concepts borrowed from Glomar cases, its birth "in the arena of intelligence and foreign relations" has stunted its growth (*Fitzgibbon*, 911 F2d at 765). In those arenas, "there can be a critical difference between official and unofficial disclosures" (*id.*; *see Wilson v CIA*, 586 F3d 171, 186 [2d Cir 2009] ["Foreign governments can often ignore unofficial disclosure of CIA activities that might be viewed as embarrassing or harmful to their interests, they cannot, however, so easily cast a blind eye on official disclosures made by the CIA itself"]; *Afshar v Dep't of State*, 702 F2d 1125, 1130-31 [DC Cir 1983] ["Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgment may force a government to retaliate"]). "In the world of international diplomacy, where face-saving may often be as important as substance, official confirmation . . . could have an adverse effect on our relations" with other countries (*Phillippi*, 655 F2d at 1333).

The NYPD, however, has no international diplomacy docket. Accordingly, the official acknowledgement doctrine should yield, here, to the broader public domain doctrine (*see Chesapeake Bay Found., Inc. v U.S. Army Corps of Engineers*, 722 FSupp2d 66, 72 n 3 [DDC 2010] [refusing to apply the open acknowledgement doctrine in a case involving law enforcement records]). "Under the public domain doctrine, FOIA-exempt information may not be withheld if it was previously disclosed and preserved in a permanent public record. The plaintiff bears the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." (*id.* at 72). If FOIL petitioners can establish that the existence of a document, or the information an agency seeks to protect by refusing to confirm the existence of a document, is already included in a public record, then agencies should have to disclose that information.

Together, these safeguards—as well as others that courts deem appropriate in discharging their obligations to adjudicate FOIL determinations challenged pursuant to Article 78—suffice to protect petitioners from overzealous assertions of an agencies' inability to confirm or deny the existence of response.[12]

V.

Here, the NYPD moved to dismiss petitioners' Article 78 proceeding because it alleged confirming or denying the existence of any records responsive to their requests would cause harms cognizable under FOIL's law enforcement and public safety exemptions (Public Officers Law § 87 [2] [e], [f]). In support of that contention, it offered a public affidavit from NYPD Chief of Intelligence Thomas Galati. Chief Galati's "22-page affidavit" consists of five pages describing his background and the organization of the NYPD's Intelligence Division, and another seven listing public accounts of apprehending and trying terrorists. The balance avers that "disclosure of whether responsive documents even exist necessarily would reveal whether Petitioner currently is or previously has been the subject of a counter-terrorism investigation." Chief Galati lists four consequences the NYPD seeks to avoid:

> (1) "The knowledge that a person or group is the subject of a NYPD counter-terrorism investigation would allow that person or group to alter their behavior so as to avoid detection"
>
> (2) "Conversely, the knowledge that a person or group is not a subject of investigation would allow such persons to more freely engage in illegal activity"
>
> (3) "A person who knows he or she is under investigation might scrutinize his or her contacts more carefully and, in doing so, could discern the identity of an undercover police officer or confidential informant working on the case. Not only would this compromise the integrity and value of any information to be learned from such sources, but it could endanger the lives and safety of such sources"
>
> (4) "Disclosure of whether a particular individual or group is the subject of investigation would allow those bent on unlawful activity to prepare a roadmap of investigatory operations, decisions, techniques and information that would enable every group to anticipate investigative tactics and activities, and undermine current and future investigations."

In opposing the motion to dismiss, the petitioners argued that Chief Galati's affidavit failed to establish a prima facie case for asserting such a severely circumscribed response. They also argued that, even had the case been established, it would have been defeated by the fact that the information the NYPD sought to protect was already a matter of public record, by the stricter scrutiny turned on agencies that assert FOIL exemptions in bad faith, and by in camera review.

A. The NYPD's Prima Facie Case

As discussed in part III, in response to a FOIL request seeking information about investigations, I would hold that the NYPD has the right to refuse to confirm or deny the existence of documents as to any pending investigation, because such a request facially interferes with a law enforcement investigation[13]. However, the requests here are not limited to present investigations, but include past ones as well. As to those, the NYPD has not carried its burden of articulating a particularized and specific justification for refusing to confirm or deny whether documents responsive to any of petitioners' 22 requests exist.

The first three harms it alleges are premised on the conjecture that individuals—presumably other than Mr. Hashmi and Mr. Abdur-Rashid, whom the record suggests are upstanding citizens—inclined to terrorism or organized crime will FOIL themselves, and then tailor the scope of their activities to either stymie investigators or exploit the discovery that they are not (or were not) under investigation. Chief Galati's affidavit, however, "does not state whether it is aware of any instance of this use of FOIL by terrorists" (*Hashmi v New York City Police Dep't*, 46 Misc 3d 712, 721 [Sup Ct, NY County 2014]), nor does it provide any factual basis to conclude that terrorists have used similar information to tailor their activities. Absent such a statement, let alone the evidence thereof that our probing standard would require, it strains belief that terrorists are self-identifying themselves to the NYPD by filing regular FOIL requests.

Those three harms fail to justify the NYPD's refusal to confirm or deny the existence of past investigations. Contrary to the majority's insistence that the requests were "extremely specific" and related to "a discrete time period immediately preceding the request", many of them were unbounded in time and in type (majority op. at 16, 21). Petitioners requested, for instance, "[a]ll records related to the surveillance of Imam Talib W. Abdur-Rashid by NYPD", "[a]ll records related to the Mosque of Islamic Brotherhood . . . relied upon by the NYPD that led to any report being filed", and "[a]ll records related to any investigation of Samir Hashmi, between 2006-2012". Chief Galati's affidavit does not suggest that law enforcement purposes or the public safety would be compromised if the agency revealed that it had records from the 1960s pertaining to Mr. Abdur-Rashid or the mosque with which he is now affiliated (*see Matter of Lesher v Hynes*, 19 NY3d 57 [2012]), or to an investigation into noise complaints against Mr. Hashmi's college parties. FOIL's demand that agencies provide in part what records or information they cannot provide in whole should have led the agency to disclose, or Supreme Court to require it to disclose, whether relevant records from a time or of a type that did not trigger the affidavit's concerns existed. The NYPD could readily have accompanied that admission with a statement that it would neither confirm nor deny the existence of any records related to ongoing terrorism investigations.

The fourth harm alleged in Chief Galati's affidavit is more substantial. Acknowledging the existence of records responsive to requests of the kind submitted by these petitioners could, in the aggregate, provide terrorists and other criminals or criminal organizations with a guide to the people and places, or the type of people and places, monitored by the NYPD.

That rationale, however, is subject to the same time and type restrictions as its companions. As to time, there is some point, which the NYPD should have specified or Supreme Court

should have determined, prior to which information about the NYPD's historical capabilities, strategies, and operating tactics will cease to provide today's threats with relevant information. A map of NYPD activities around Rutgers may continue to reveal important general practices, or may be considerably less germane to a world in which the NYPD has substantially curtailed or abandoned its out-of-state activities. Given the constant improvements to and alterations in NYPD capabilities and strategies, as well as the significant changes made to the Intelligence Division in the wake of the 2013 mayoral election that separated the initial request for records from the hearing on the motion to dismiss, Chief Galati's affidavit either failed to justify categorically refusing to acknowledge the existence of records pertaining to closed investigations or—equally fatally—must be taken to justify withholding such information permanently. As to type, whatever the counter-intelligence capacities of gangsters and terrorists, garden-variety criminals (and law-abiding citizens) are probably not piecing FOIL reports into a jigsaw puzzle depicting the anticipated movements of NYPD officers.

Put aside the deficiencies in Chief Galati's affidavit. Still, its purported justification goes to terrorism-related threats only, and the NYPD's FOIL response should at a minimum have read "We [have] [do not have] records of investigating or surveilling the petitioners on suspicions other than terrorism. As to whether terrorism-related records exist, we cannot say." Accordingly, I would reverse the Appellate Division's order granting the motion to dismiss and remand the case to Supreme Court, where the NYPD can augment Chief Galati's affidavit and the parties can hash out, on a request-by-request basis, to what extent an entirely circumscribed response is appropriate as to past investigations.

B. The Petitioners' Rebuttal Evidence

In addition to challenging the sufficiency of the NYPD's affidavit, petitioners invoked one other safeguard native to FOIL and two modeled on federal FOIA decisions.

As to the native safeguard, petitioners have steadfastly requested in camera review[14]. Here, although the NYPD could have refused to confirm or deny the existence of records relating to *ongoing* investigations on the strength of only a public affidavit, the doubts the petitioners raised about the propriety of withholding information about *prior* investigations should have required Supreme Court, absent a very different affidavit, to order in camera review of responsive documents, if any. In *Abdur-Rashid,* the court abused its discretion in impliedly deciding to forego that review. In *Hashmi,* uncontrovertibly, the court committed an error of law in concluding that in camera review, which it wished to undertake, was, by spurious analogy to the Glomar doctrine, unavailable.

In addition to requesting in camera review, petitioners alleged facts invoking two additional FOIL safeguards: the bad faith and official acknowledgment doctrines. The NYPD urges not only those safeguards' adoption but also their zealous enforcement; "Federal courts employing similar safeguards do not operate as a rubber stamp on agencies' use of the circumscribed response . . . [P]rocedural safeguards are far from a paper tiger and allow for meaningful judicial review" (NYPD AD Reply Brief, reprinted at A837). Because respondents are here on a

motion to dismiss, it is our responsibility to accept all the facts claimed in the petitions as true, accord petitioners the benefit of every possible favorable inference, and determine only whether the facts as alleged make out any cognizable legal theory for defeating the protections of the FOIL exemptions (*see* Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Under that standard, even had Chief Galati's affidavit made out a prima facie case for non-disclosure, the motion to dismiss should have been denied and the cases remitted to Supreme Court.

Turning first to the bad faith doctrine, petitioners allege several grounds for their assertion that the NYPD is refusing to confirm or deny the existence of responsive records not because that would cause a harm cognizable under a FOIL exemption, but because it wishes to conceal evidence of underlying illegality: an investigation and surveillance program premised on religious discrimination. The majority dismisses that argument by complaining that "other than general allegations arising from news reports, petitioners offered no evidence that the NYPD's response to these particular requests is a function of bad faith" (majority op. at 22). In so doing, it ignores the standard of review appropriate on a motion to dismiss. The AP's Pulitzer Prize-winning series of articles detailing the NYPD's questionable conduct and efforts to cover up that conduct satisfies the threshold showing required to allow petitioners to "seek appropriate discovery . . . to identify the procedures by which [the NYPD's] position was established" (*Phillippi*, 546 F2d at 1013). That showing is buttressed by the allegations that the NYPD, which took nearly eight months to respond substantively to the petitioners' requests, was "purposefully delaying the process" by supplying sequential notices of delay and by throwing up unusual objections to the form of the requests, including a particularly obstructionist cavil regarding a typographical error in Mr. Abdur-Rashid's name.

Second, the petitioners alleged the NYPD has already officially acknowledged the information it hopes to conceal by refusing to confirm or deny the existence of responsive records. In a June 2012 deposition in a different case, Chief Galati acknowledged that "none of the visits conducted by the Zone Assessment Unit resulted in an investigation." Although that statement is followed by some discussion of what constitutes an investigation and whether the ZAU was designed to pursue them, it seems in tension with the NYPD's claim that it had not already denied having, for example, "records related to any investigation of Talib W. Abdur-Rashid in relation to his activities as Imam as the Mosque of Islamic Brotherhood." In addition, in *Hashmi*, it is ambiguous whether Supreme Court found nothing in "Mayor [d]e Blasio's well-publicized decision to disband the NYPD unit that had conducted the surveillance" that undermined the agency's ability to deny the existence of records or erroneously concluded, as the prior sentence of its opinion suggests, that the mayor was not the kind of senior executive branch official whose statements are "sufficient to effect waiver of a Glomar response" (*Hashmi*, 46 Misc 3d at 723). It may be that "whatever protection" the records "might once have had has been lost by virtue of public statements at the highest levels" (*New York Times Co. v United States Dep't of Justice*, 756 F3d 100, 120-121).

Even if those disclosures do not satisfy the official acknowledgment doctrine, they, coupled with the information in the AP articles and in the leaked NYPD documents that accompanied those articles, may defeat the NYPD's refusal to confirm or deny the existence of certain

responsive documents. Rather than grapple with the full scope of the disclosures, the NYPD fixates on the fact that the they emanate from the AP, rather than from its own officials. That fixation "confuses the act of waiver . . . with an agency's independent obligation to carry its burden'" of showing the mere disclosure of a document's existence would be protected (*Florez v Cent. Intelligence Agency*, 829 F3d 178, 186 [2d Cir 2016] [rejecting a "per se rule barring consideration of third party disclosures" and instead remanding "to allow the district court to weigh the facts in the first instance"]). A third party's disclosures "cannot waive the asserting agency's right to a Glomar response, but such disclosures may well shift the factual groundwork upon which a district court assesses the merits of such a response" (*id.*).

Several references in the existing record suggest that has happened in this case. To give but one example, the petitioners requested "[a]ll directives and/or memoranda sent or received by the NYPD related to surveillance of the Rutgers Muslim Student Associations from 2006-2012." The AP published a copy of the NYPD's weekly Muslim student association report responsive to that request. It is untenable for the NYPD to neither confirm nor deny the existence of that responsive record. Once the existence of one record in a category must be disclosed, it may be that the existence of other records in the same category are not protected. "The Glomar doctrine is in large measure a judicial construct, an interpretation of . . . exemptions that flows from their purpose rather than their express language. In this case, the [agency] asked the courts to stretch that doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men' and women" (*American Civil Liberties Union*, 710 F3d at 431, quoting *Watts v Indiana*, 338 US 49, 52 [1949]). The cases should be remitted to Supreme Court so the petitioners can augment the record with additional documents disclosed by the AP and so the court can consider the implications of the disclosure of those documents.

The majority's insistence on resolving these cases on the scant record before us privileges the expectation that FOIL suits will be resolved on the law over the reality that these FOIL suits turn, in part, on contested facts. It is at odds with our standard of review for motions to dismiss and inconsistent with the federal practice in Glomar cases of "first determin[ing] whether the district court had an adequate factual basis upon which to base its decision" (*Minier*, 88 F3d at 800). Whatever the majority's confidence in its conclusions, "[p]laintiffs are entitled to an opportunity to conduct their own litigation" (*Phillippi*, 546 F2d at 1015).

Even were the record not riddled with opportunities for further development, the appropriate remedy after resolving the thorny theoretical issue in this case of first impression would be to remit the petitions to Supreme Court for consideration unclouded by the overarching and overwhelming question of whether an agency may *ever* refuse to confirm or deny the existence of responsive records. Simply put, "we lack the benefit of an evaluation of th[ese] issue[s] by the [lower] court[s]" (*Florez*, 429 F3d at 183-184, quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F3d 73, 79 [2d Cir 2006] [Sotomayor, J.]; *id.* at 189 [collecting cases]). Whereas the U.S. Court of Appeals for the Second Circuit was able when first addressing the Glomar doctrine to "adopt the District Court's careful and well-reasoned

analysis" as that court "in the interest of thoroughness . . . provided a detailed explanation and analysis of the affidavits submitted" (*Wilner*, 592 F3d 60, 71-73 [2009]), none of the three lower courts whose decisions are before us today reached the fact-specific issues the majority now decides.

* * *

For that and the foregoing reasons, I would remit these cases to Supreme Court to provide both parties with a fair opportunity to litigate their cases on the terms described herein.

STEIN, J. (dissenting).

Whether, and to what extent, law enforcement agencies should be permitted, under the Freedom of Information Law (FOIL), to issue "Glomar" responses (*see Phillippi v Central Intelligence Agency*, 546 F2d 1009, 1012 [DC Cir 1976]) that refuse to confirm or deny the existence of requested records is a thorny question with strong competing public policy concerns on each side of the debate. However, this Court must look to New York's FOIL statute, as it is written and has been interpreted by our prior case law, to answer the question of whether Glomar responses are permissible and, if so, under what circumstances. In my view, authorization for such responses cannot be found in, or reconciled with, the language of FOIL, and the majority's determination to the contrary sanctions a blanket exemption from disclosure for a vast amount of information and records. Granting such a broad judicial exemption is at odds with the express will of the legislature, as reflected in the statutory text.

It is beyond dispute that terrorism presents a significant threat that our law enforcement agencies must be equipped to combat. Undoubtedly, the concerns of respondent New York Police Department (NYPD) and various amici warrant legislative attention with regard to whether FOIL should be amended to allow agencies to refuse to acknowledge the existence of certain records when confronted with requests seeking targeted information regarding, among other things, "pending" or "ongoing" law enforcement investigations of particular persons or organizations (majority op, at 7, 8). Conversely, there are compelling policy arguments raised by petitioners and amici on the other side of the issue, pertaining to governmental transparency and accountability, and to a citizen's right to access information pursuant to FOIL. These concerns also merit legislative consideration. Because existing state law does not accommodate Glomar responses, weighing these competing interests is a matter for the legislature, not the Court. I, therefore, respectfully dissent.

I.

FOIL is founded upon the "premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government'" (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 73 [2017], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). As explained in the FOIL "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 more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> 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.
>
> The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article" (Public Officers Law § 84). Consistent with this legislative intent, we have recognized that "judicious use of the provisions of [FOIL] can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, to hold the governors accountable to the governed'" (*Matter of Fink*, 47 NY2d at 571, quoting *NLRB v Robbins Tire & Rubber Co.*, 437 US 214, 242 [1978]).

To effectuate these goals, FOIL incorporates a presumption of access to records (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). More specifically, Public Officers Law § 87 (2) states that an agency "shall make available for public inspection and copying *all* records" (emphasis added). This open access is qualified by the caveat that an agency "may deny access to records or portions thereof" which, "if disclosed," would cause certain specified harms (Public Officers Law § 87 [2]). The harms justifying an agency's denial of access include, as relevant here, disclosure of records and information that would constitute an unwarranted invasion of privacy or endanger the life or safety of any person, as well as disclosure of records compiled for law enforcement purposes, where such disclosure would interfere with law enforcement investigations or judicial proceedings, identify confidential sources or confidential information relating to a criminal investigation, or reveal criminal investigative techniques or procedures (*see* Public Officers Law § 87 [2] [b]; [2] [e] [i], [ii], [iv]; [2] [f]). The crux of the question before us on this appeal is whether FOIL authorizes a "Glomar" response — i.e., an agency response that neither confirms nor denies the existence of requested records but, rather, presupposes that, if the requested materials did exist, they would qualify for exemption under one of these provisions.

To that end, "our primary consideration is to ascertain and give effect to the intention of the Legislature'" as indicated through the statutory text (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006], quoting *Riley v County of Broome*, 95 NY2d 455, 463 [2000]). Further, we must "giv[e] effect to the plain meaning" of unambiguous language (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]), and "the failure of the Legislature to include a matter within the scope of an act may be construed as an indication

that its exclusion was intended" (Statutes Law § 74; *see Matter of Corrigan v New York State Off. of Children & Family Servs.*, 28 NY3d 636, 642 [2017]; *Commonwealth of N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 61 [2013]).

As written, FOIL permits an agency to "deny access" to records or information where the requested "disclosure" meets certain criteria (Public Officers Law § 87 [2]), and regulations governing the FOIL process require that any "[d]enial of access shall be in writing stating the reason therefor" (21 NYCRR 1401.7 [b]; *see* Public Officers Law §§ 86 [3]; 89 [b] [iii]; 21 NYCRR 1401.1 [b])[15]. The FOIL statutes and regulations do not expressly allow an agency to refuse to acknowledge the existence of the record or information that is responsive to the FOIL request (*see* Public Officers Law §§ 87, 89; 21 NYCRR 1401.5). Moreover, such a refusal would be inconsistent with Public Officers Law § 89 (3) (a), which sets forth the permissible responses to a FOIL request: grant the request and "make such record available to the person requesting it"; deny the request for access; acknowledge the request and specify the date on which it will be granted or denied; or certify that the record cannot be found or is not in the agency's possession (*see Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-441 [2005] ["When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search"]; Comm on Open Govt FOIL-AO-18946 [2012] ["interpret[ing] the certification requirement to be necessary if requested, after the agency has indicated that there are no records"])[16]. These permitted responses do not contemplate an agency's refusal to acknowledge the existence or non-existence of information or a record that the agency possesses. The majority's novel interpretation of the heretofore generally accepted responses available to agencies responding to FOIL requests introduces new uncertainty into the FOIL process.

Pursuant to Public Officers Law § 89 (4) (b), "[i]n the event that access to any record is denied pursuant to the provisions of section [87 (2)] of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision." We have long held that, to meet this burden, an agency must "articulate particularized and specific justification'" for denying disclosure (*Matter of Friedman v Rice*, 30 NY3d 461, 475 [2017], quoting *Matter of Fink*, 47 NY2d at 571; *see Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]), and we have made it clear that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]).

We also have emphasized that FOIL "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Data Tree, LLC*, 9 NY3d at 462; *see Matter of Madeiros*, 30 NY3d at 73). An agency "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm" (*Matter of Markowitz v Serio*, 11 NY3d 43, 51 [2008]). Rather, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (*Matter of Fink*, 47 NY2d at 571).

The NYPD attempts to circumvent the plain language of FOIL and these principles governing

the use of FOIL exemptions — and, ultimately to avoid their burden of proving the applicability of such an exemption — by arguing that a Glomar response must be permissible because, in some limited contexts, a FOIL request may be framed in such a way that disclosure of the existence of the record, alone, causes the same harm as disclosure of the actual record sought. To be sure, "the purpose of [FOIL] is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (*Matter of Madeiros,* 30 NY3d at 77, quoting *Matter of Fink,* 47 NY2d at 572). For that reason, and consistent with the statutory exemption for such disclosures, we have held that FOIL does not require the disclosure of records when it would interfere with a "pending" investigation or prosecution or one that is "plainly contemplated in the near future" (*Matter of Madeiros,* 30 NY3d at 77; *see* Public Officers Law § 87 [2] [e] [i]).

The flaw in the NYPD's position is that, in order for a Glomar response to be effective, it must be utilized whether or not the requested record exists and whether or not a FOIL exemption actually applies. In other words, to permit the Glomar response is to authorize the agency — here, the NYPD — to give the same response to individuals requesting information pertaining to its investigations regardless of whether the subject of the requested information is actively being investigated, was never investigated, or was investigated and cleared of any wrongdoing in the past. After all, the Glomar response would be the equivalent of an implicit concession that responsive records exist if invoked only when there is an ongoing investigation.

To illustrate how the Glomar response can protect information otherwise disclosable under FOIL, we need only point out that the Glomar response will inevitably cloak in secrecy records pertaining to *closed* investigations. Without additional factual explanation, the NYPD would lack a valid claim that revealing the nonexistence of records would cause any harm qualifying for FOIL exemption, such as interference with a law enforcement investigation, identification of a confidential source, or endangerment of life and safety (*see Matter of Lesher v Hynes,* 19 NY3d 57, 68 [2012]). In such instances, it is likely that a FOIL exemption would not apply and, typically, "[i]f the [agency] fails to prove that a statutory exemption applies, FOIL compels disclosure, not concealment'" (*Matter of Data Tree, LLC,* 9 NY3d at 463, quoting *Matter of Westchester Rockland Newspapers v Kimball,* 50 NY2d 575, 580 [1980]). The Glomar doctrine, however, permits concealment.

To adopt the Glomar doctrine is, therefore, to endorse an impermissible blanket exemption that is not set forth in the statute and which applies without regard to whether the harm protected by the relevant FOIL exemption is actually implicated or whether it is merely speculative. Contrary to the majority's suggestion, such a result is not sanctioned by our holding in *Matter of Lesher v Hynes* (19 NY3d 57). In *Lesher,* we held that law enforcement agencies may determine that disclosure of particular kinds of investigatory records would generally interfere with pending investigations or proceedings and that an agency need not, in responding to every specific request, always articulate facts demonstrating that the particular pending investigation in question would be jeopardized by disclosure (*see id.* at 67). However, we "emphasize[d] that this does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there" and that "

[t]he agency must identify the generic kinds of documents for which the exemption is claimed" (*id.* at 67). In that case, the District Attorney met this burden by identifying the responsive documents as "crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements" (*id.* at 63). Here, in stark contrast, the NYPD has not indicated whether any responsive documents even exist, let alone the nature of such documents, to support their claimed exemptions as required by *Lesher*. Further, we made clear in *Lesher* that disclosure may be mandated where there is "no longer any pending or potential law enforcement investigation" (*id.* at 68). The majority does not explain how the Glomar response can be applied in a manner consistent with this directive.

In view of our recognition that "the Legislature established a general policy of disclosure by enacting the Freedom of Information Law" (*Matter of Fink*, 47 NY2d at 571), this Court recently held that "we cannot undermine that policy by exempting a large category of information from FOIL in a manner inconsistent with the plain language of the statute" (*Matter of Friedman,* 30 NY3d at 478). Yet, the majority does just that by giving a law enforcement agency carte blanche to exempt, with precious little (if any) judicial oversight, a broad swathe of governmental records, without regard to whether the records requested — assuming they do exist — actually fall within the plain language of the exemption on which the Glomar response is purportedly based or whether the agency has made any factual showing to that effect.

Here, no "particularized and specific justification" was offered for the exemptions claimed (*Matter of Fink*, 47 NY2d at 571), as reflected by the fact that the NYPD submitted identical affidavits justifying use of the Glomar response to FOIL requests made by, and concerning investigations and surveillance of, two different individuals and the distinct organizations with which they are associated. In fact, while the majority repeatedly characterizes the requested records as relating to a "pending" or "ongoing" "covert" investigation (majority op, at 6, 8), those characterizations are based on both an unsupported assumption and an astonishingly expansive view of the relevant "investigation." To be clear, we do not know whether either of the petitioners here were ever investigated or whether they are currently implicated in any ongoing or pending investigations, warranted or otherwise. We do not know if any past or current investigations of petitioners actually related to counterterrorism or whether any such investigations involved some other matter where disclosure would not implicate the same concerns posited by the NYPD. Frankly, we know very little beyond the undeniable reality that terrorism and the NYPD's counterterrorism efforts are of significant importance. However, this does not obviate the requirement that the agency comply with the mandate of the FOIL statute, as enacted by the legislature.[17]

Moreover, despite our repeated direction that, "[i]f the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material" (*Matter of Gould*, 89 NY2d at 275; *see Matter of Fink*, 47 NY2d at 571), the majority abdicates this oversight in adopting the Glomar doctrine in this case, resulting in our inability to determine whether a FOIL exemption squarely applies. Rather, the majority accepts, without any scrutiny, the NYPD's claim that the scope of the

relevant "investigation" is "terrorism," and that revelation of any investigation — apparently of any person for any reason — could impede its counterterrorism efforts[18]. Viewed in this light, it follows that the NYPD could claim the right to refuse to confirm or deny the existence of any record that even tangentially relates to any past, present, or future investigation of "crime," thereby avoiding its FOIL obligations in innumerable cases. It is the legislature's prerogative to decide whether a blanket exemption of this type is consistent with the objectives of FOIL.

II.

To support its position before us, the NYPD relies heavily on federal case law interpreting the Freedom of Information Act (FOIA) and adopting the Glomar doctrine. This reliance is understandable considering that the doctrine originated in federal courts, FOIL is modeled on FOIA, and we have often found FOIA case law to be instructive (*see e.g. Matter of Lesher*, 19 NY3d at 64; *Matter of Madeiros*, 30 NY3d at 76). Nevertheless, we have never before endorsed a blind adoption of a federal judicial doctrine in analyzing a matter of state statutory construction and, in my view, it is inappropriate to follow federal case law here in light of material distinctions between the two statutory schemes.

The Glomar doctrine originated in 1976 when the Central Intelligence Agency (CIA) responded to a request for information regarding the Hughes Glomar Explorer — an oceanic research vessel that was allegedly owned by the United States government and used to retrieve a sunken Soviet Union submarine during the Cold War — by refusing to either confirm or deny the existence of relevant records (*see* Phillippi, 546 F2d at 1012). The CIA asserted that the existence or nonexistence of the requested records was, itself, a classified fact since admitting their existence would implicitly reveal that the CIA had some affiliation with the Explorer. Accordingly, the CIA argued that the existence or nonexistence of records was exempt from disclosure pursuant to FOIA Exemptions (1) and (3), which exempt "classified" information (*see* 5 USC § 552 [b] [1]) and certain additional information that is specifically exempted from disclosure by other statutes (*see* 5 USC § 552 [b] [3]), such as the National Security Act of 1947. As the majority recognizes, Glomar has since been adopted by other federal Circuits (*see e.g. Taylor v National Sec. Agency*, 618 Fed Appx 478, 482 [11th Cir 2015]; Wilner v National Sec. Agency, 592 F3d 60, 67-68 [2d Cir 2009], *cert denied* 562 US 828 [2010]; Bassiouni v Central Intelligence Agency, 392 F3d 244, 246 [7th Cir 2004], *cert denied* 545 US 1129 [2005]).

At its inception, the Glomar doctrine was not expressly authorized by the FOIA statute (*see e.g.* Shapiro v United States Dept. of Justice, 153 F Supp 3d 253, 275 [D DC 2016] [recognizing that the Glomar doctrine is a judicial "gloss" on FOIA's text]; American Civ. Liberties Union v Central Intelligence Agency, 710 F3d 422, 431 [DC Cir 2013] ["The Glomar doctrine is in large measure a judicial construct"]). Nevertheless, federal courts concluded that the doctrine did not directly conflict with the text of FOIA which, unlike FOIL, does not limit the agency's available responses but, rather, permits an agency to treat FOIA as "*not apply[ing]* to matters that are" delineated as exempt (5 USC § 552 [b] [emphasis added]). This language leaves substantially more room for judicial interpretation.

In those federal courts in which the Glomar doctrine has gained acceptance, it has been invoked almost exclusively in connection with FOIA Exemptions (1) and (3) (*see* 5 USC § 552 [b] [1]; [b] [3]) and, to a lesser extent, Exemption 7 (c) (*see* 5 USC § 552 [b] [7] [c] [pertaining to disclosures that would constitute an unwarranted invasion of personal privacy]; *see e.g.* *Cause of Action v Treasury Inspector Gen. for Tax Admin.*, 70 F Supp 3d 45, 55 [D DC 2014]). Notably, there is no counterpart in FOIL to the exemption for "classified" information under FOIA Exemptions (1) and (3), and the NYPD does not claim to have any state-authorized classification authority (*see* Public Officers Law § 87 [2]). Nor does the NYPD point to any other statutes through which the requested records "are specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87 [2] [a]). Inasmuch as the federal cases relied on by the majority primarily concern FOIA Exemptions (1) and (3), they are inapposite for the reasons explained in Judge Wilson's partial dissent (*see* *Hunt v Central Intelligence Agency*, 981 F2d 1116 [9th Cir 1992]; *Larson v Department of State*, 565 F3d 857 [DC Cir 2009]; *Gardels v Central Intelligence Agency*, 689 F2d 1100 [DC Cir 1982])[19]. It merits comment that, in *Hunt v Central Intelligence Agency,* quoted by the majority at length, the Ninth Circuit recognized that federal courts are, through the Glomar doctrine, "only a short step [from] exempting all CIA records from FOIA" and that this "result may well be contrary to what Congress intended" (981 F2d at 1120 [internal quotation marks omitted]). The majority overlooks this cautionary warning and ignores the reality that the Glomar response operates as a blanket exemption.

Cases applying the Glomar doctrine to the law enforcement exemptions in FOIA — the federal analogues to the exemptions on which the NYPD principally rely here — are scarce[20]. This is likely because, ten years after the judicial formulation of the Glomar doctrine, Congress enacted 5 USC § 552 (c) (*see* Pub L No. 99-570, §§ 1801-04, 100 Stat. 3207-48 to -50), which sets forth exclusions that specifically authorize agencies to "treat the records as not subject to the requirements of" FOIA. The section 552 (c) exclusions apply where a FOIA request involves access to records: (1) compiled for investigations of criminal violations of the law, where disclosure can reasonably be expected to interfere with enforcement proceedings and "there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency"; (2) "maintained by a criminal law enforcement agency under an informant's name or personal identifier [that] are requested by a third party according to the informant's name or personal identifier, unless the informant's status as an informant has been officially confirmed"; and (3) "maintained by the [FBI] pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information" (5 USC § 552 [c] [1]-[3]). Thus, in enacting subdivision 552 (c), Congress codified the use of a Glomar-type response for law enforcement investigations, including those that do not necessarily involve "classified" information (*see* *Benavides v Drug Enforcement Admin.*, 968 F2d 1243, 1246 [DC Cir 1992] [concluding "from the text and legislative history that Congress intended [§ 552 (c)] to provide express legislative authorization for a Glomar response"], *op mod on reh* 976 F2d 751 [DC Cir 1992]; *see* *Light v Department of Justice*, 968 F Supp 2d 11, 30 [D DC 2013]; *see e.g.* *Pickard v Department of Justice*, 653 F3d 782, 786 [9th Cir 2011] [analyzing Glomar response under 5 USC § 552 (c)]). Indeed, the enactment of section 552 (c) was largely prompted by the FBI's recognition that, while the CIA could utilize Exemptions (1) and (3) to issue a Glomar

response, "using such a response to protect sensitive, ongoing criminal investigations' would not be in full compliance with the letter and spirit of the FOIA'" (*American Civil Liberties Union of Mich. v Federal Bureau of Investigation*, 734 F3d 460, 469 [6th Cir 2013], quoting Hearings on the Freedom of Information Reform Act Before a Subcomm. of the H. Comm. On Gov't Operations, 98th Cong. 906-910 [Aug 9, 1984]).

Although years have passed since the proliferation of the Glomar doctrine under federal case law, and decades have gone by since congressional enactment of section 552 (c) to define the narrow circumstances in which the Glomar doctrine should be applied to law enforcement investigations, our state legislature has not authorized the Glomar response. This is so despite numerous other amendments to FOIL. Abiding by the principle that "courts are not to legislate under the guise of interpretation" or by reading into a statute an exception that does not exist," it is not our place to do so now (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]).

III.

The majority repeatedly asserts that permissible use of the Glomar doctrine will be "rare" and "unusual" (majority op, at 16). However, application of the doctrine under the circumstances presented here — despite the absence of in camera review to determine whether any of the exemptions set forth in FOIL actually apply and by defining the relevant investigation at the macro level of "terrorism" — casts doubt on whether that will, or indeed can ever be, the reality. While complete rejection of the doctrine may have concerning implications of its own, even federal courts have recognized that "[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods" (*American Civ. Liberties Union v Department of Defense*, 389 F Supp 2d 547, 561 [SD NY 2005]). Adoption of the Glomar doctrine without legislative guidance in the statutory text, and with insufficient procedural safeguards, is bound to unduly "constrict[] the broad access to which the public is entitled under the law" (*Matter of Friedman*, 30 NY3d at 477).

In my view, the analyses of the majority and the partial dissent tread too closely to a weighing of policy arguments relating to the wisdom of the respective parties' perspectives with regard to society's interests in government transparency during dangerous times. These difficult choices are for the legislature, not for this Court to make under the guise of statutory interpretation. Ultimately, our task is to read and give effect to the statute "as it is written by the [l]egislature, not as the court may think it should or would have been written if the [l]egislature had envisaged all the problems and complications which might arise" (*People v Tychanski*, 78 NY2d 909, 911 [1991] [internal quotation marks and citations omitted]).

Accordingly, I dissent.

Order affirmed, with costs.

[1] While petitioners waived their own privacy interests, they did not claim to have the authority to waive the privacy interests of other members of the associated entities with respect to which they also sought information.

[2] In New York, challenges to FOIL determinations are resolved in summary proceedings pursuant to CPLR article 78 (*see* Public Officer's Law § 89[4][b]). Where — as here — exemptions are relied upon, "the agency involved shall have the burden of proving that such record falls within" the claimed exemptions (*id.*). Beyond merely disposing of motions to dismiss, here the Appellate Division considered the petitions on the merits, concluding the NYPD met its burden of justifying its reliance on FOIL exemptions in each instance to shield the existence and contents of any responsive records. Whether the court erred in that regard presents an issue of law in this Court. We therefore disagree with the suggestion that the merits are not ripe for adjudication by virtue of a "scant record" or "contested facts" (Wilson, J., opn at 26). In each proceeding, the record here was fully developed; the NYPD supplied all of the documents comprising a return, supported by a detailed affidavit explaining the basis for the claimed exemptions, which submissions were addressed by petitioners.

[3] Nowhere in their briefs do petitioners analyze the propriety of the exemptions as applied to their requests. Petitioners cite with approval the Appellate Division decision in *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.* (125 AD3d 531 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016] ["AALDEF"]) in which an organization sought thirteen categories of documents generated by the NYPD Intelligence Division relating to investigation of Muslim persons, among others. There the Appellate Division indicated that these documents fell within the law enforcement exemption. Petitioners do not dispute that the "investigation" and "surveillance" records they seek here, if they exist, would be a subset of the documents they acknowledge were properly treated as exempt in AALDEF. While, as the dissent notes, petitioners have not been provided with the records requested, they could have argued that records of a recent or pending covert investigation of specific individuals are not exempt from disclosure — but it is telling that neither they nor the dissent make such a claim. Instead, the dissent essentially ignores the fact that petitioners specifically requested "investigation" and "surveillance" records — not some other class of documents without a clear connection to such activities.

[4] Although we find federal law persuasive, we reach this conclusion by interpreting FOIL's statutory exemptions and our cases construing them — there has been no "blind adoption of a federal judicial doctrine" (*see* dissenting opn at 13). That being said, we are unpersuaded that there are relevant textual distinctions between the provisions of FOIA and FOIL. The fact that FOIL requires that a request be "denied" whereas FOIA permits an agency to treat FOIA as "not apply[ing]" to exempt matters in no way impacts the Glomar issue, nor has any federal court relied on the dissent's novel textual analysis. The 1986 amendment adding 5 USC § 552(c) — discussed extensively by the dissent — likewise in no way undermined the commonsense analysis underlying the federal Glomar cases that precede or follow it, which do not restrict the doctrine to classified or national security materials under exemptions 1 and 3. The dissent's speculation that the analysis is unavailable or limited in cases involving FOIA's law enforcement exemptions is unsupported and inconsistent with cases indicating just the opposite (*see Vazquez*, 887 F Supp 2d 114; *see e.g. United States Dept. of Justice v Reporters Comm. for Freedom of Press*, 489 US 749 [1989] [upholding denial of request under law enforcement exemption 7(c) where agency neither confirmed nor denied possession of information on rap sheet involving specific individual]). Moreover, the dissent's analysis misses the mark for the more fundamental reason that it fails to focus on the facts of this case and the contours of New York's law enforcement and public safety exemptions — which are controlling here.

[5] In most instances, the fact that an agency possesses responsive records does not itself provide substantive information protected by an exemption. For example, in *Lesher*, the pending prosecution was a matter of public record and, as such, the fact that the District Attorney possessed responsive records did not reveal confidential information — only the contents of those records fell within an exemption. Thus, in cases like *Lesher* involving pending or completed prosecutions, a request for records related to a defendant in the possession of the pertinent police agency would be unlikely to engender a Glomar-type response because the fact that that defendant has been the subject of investigation is obvious from the prosecution itself. In that scenario, the contents of the records may or may not be exempt under FOIL, but the fact that responsive records exist would not be.

[6] The dissent's conclusion to the contrary is puzzling. FOIL provides a mechanism for public access to records and, here, the NYPD expressly and categorically denied petitioners' FOIL requests. In this case, if responsive records do

not exist, petitioners were not entitled to disclosure of anything. If responsive records do exist, the question is whether either their contents — or the fact that they exist, which itself may disclose confidential information — is protected under one or more FOIL exemptions. We believe this is the central issue in the case, which the dissent entirely fails to confront. If the existence of records is protected information under a statutory exemption, nothing in FOIL compels its disclosure. In this regard, it is the dissent that adopts a new requirement found nowhere in the text of the statute — a requirement that, in all instances, an agency expressly certify that responsive records exist, regardless of whether the existence of the records is protected under an exemption.

[7] The dissent faults the Galati affidavit for justifying the NYPD's response by referencing its counterterrorism investigation, lamenting that "we do not know if any past or current investigations of petitioners actually related to counterterrorism" (dissenting opn at 11). However, the NYPD response cannot be so easily dismissed. In the petitions, petitioners referenced news articles alleging that the NYPD was engaged in an ongoing domestic surveillance program involving Muslim individuals and institutions. The news articles reported that, in the wake of the September 11th attacks, the NYPD, with the assistance of the CIA, had undertaken a covert domestic counterterrorism operation in the tri-state area. The NYPD thus interpreted petitioners' request for "investigation" and "surveillance" records (for a discrete time period immediately preceding the request) as relating to that ongoing investigation, described in detail in the Galati affidavit; this was not the product of an "unsupported assumption" (*see* dissenting opn at 10). The NYPD could not have provided more specific information relating to these individuals without disclosing precisely the information claimed to be exempt — i.e., whether petitioners were subjects of the investigation they referenced — which is exactly the purpose of the refusal to confirm or deny the existence of the information sought.

[8] Despite its concern about judicial overreach, the dissent endorses the in camera review procedure, taking no issue with this exercise of judicial prerogative. While noting the absence of in camera review (*see* dissenting opn at 12), the dissent neither suggests that the nisi prius court abused its discretion by failing to invoke the procedure nor explains what types of materials could have been submitted that would have warranted a different outcome here where no one disputes that the requested "investigation" or "surveillance" records, if they exist, are exempt from disclosure.

[9] The majority, too, resorts to occasional hyperbole. It describes the logical conclusion of the petitioners' argument as the NYPD having to acknowledge the existence of an investigation involving a particular person "whether the FOIL request comes from the target, a newspaper, or some other member of the public" (majority op. at 8). The NYPD, however, demands a release before commencing a search for records that could implicate an individual's privacy and are being requested by the third party. The petitioners' requests are restricted to requests for information about themselves.

[10] That standard is stricter than federal courts' "deferential posture" toward agency affidavits attempting to justify Glomar responses under FOIA Exemptions 1 and 3 (*Larson*, 565 F3d at 865). Although courts in those cases "must accord substantial weight to an agency's affidavit", their relaxed scrutiny has nothing to do with the portable logic of a Glomar-like response (*Wolf v C.I.A.*, 473 F3d 370, 374 [DC Cir 2007]). Instead, it is the result of a Congressional dictate specific to affidavits "concerning the details of the classified status of the disputed record'" (*Ray v Turner*, 587 F2d 1187, 1194 [DC Cir 1978], quoting S Rep No 93-1200, 93d Cong., 2d Sess. 12 [1974], reprinted in 1974 USCCAN 6267, 6290). New York, as already noted, has no analog to the first FOIA exemption, no Congress, and no classification authority. In any case, the lower federal standard is simply incompatible with our precedents (*compare* *Larson*, 565 F3d at 862 ["Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical' or plausible'"] *with* *Data Tree*, 9 NY3d at 462 [an agency must meet its burden "in more than just a plausible fashion'"]; *compare also* *Gardels v CIA.*, 689 F2d 1100, 1105 [DC Cir 1982] ["The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility"] *with* *Markowitz*, 11 NY3d at 51 [the court must find the agency's evidence "persuasive"]). The lower courts properly rejected its application here (*see Matter of* *Abdur-Rashid v New York City Police Dep't, et al*, 140 AD3d 419, 420-21 [1st Dept 2016] [holding the NYPD to FOIL cases' usual "error of law" standard under Article 78]; *Matter of* *Abdur-Rashid v New York City Police Dep't*, 45 Misc 3d 888, 893 [Sup Ct, NY County 2014] [observing that the federal standard stems from a unique national security context and concluding that "(a)lthough federal cases note that a court must accord substantial weight' to the agency's affidavits, this court only looks to federal cases for guidance in interpreting the requirement and is not required to give the same substantial weight to the affidavits"]).

[11] I join the majority in rejecting our federal counterparts' reluctance to review in camera documents whose existence the agency wishes neither to confirm nor to deny (*see Phillippi,* 546 F2d at 1012 ["When the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits"]). That reluctance is not only at odds with our precedent, but also predicated on Glomar's unique context. Because federal courts have committed to policing, absent a showing of bad faith, only the formal logic of an agency's affidavit, they have less need to examine the documents, if any, underlying that affidavit. Furthermore, the blanket nature of the first and third FOIA exemptions makes in camera review both less relevant and considerably more time-consuming for the court. As most equally circumscribed responses under FOIL will be justified by the extremely specific way in which the requests are phrased, they are likely to involve more exercises of discretion and fewer responsive records through which the court, aided by a confidential index, can be expected to sift. This aspect of the Glomar doctrine has sustained particularly heavy criticism (Wessler, 85 NYU L Rev at 1409-1410 [calling "in camera review of any underlying records . . . an important first step toward reform of the Glomar response"]).

[12] Although I have discussed the safeguards in isolation in the interest of analytical clarity, there is interplay between them. For instance, "[w]here there is evidence of bad faith on the part of the agency, in camera inspection is plainly necessary" (*Carter v US Dep't of Commerce,* 830 F2d 388, 393 [DC Cir 1987][internal quotation marks omitted]).

[13] It is important to remember that the proper denial of a FOIL request, whether a refusal to state whether responsive documents exist or merely a refusal to furnish the documents, means only that the documents will not be *publicly* available to all — not that courts must refuse their disclosure if relevant to a civil lawsuit. Thus, the majority correctly identifies civil litigation as a further check on government overreach, independent of FOIL (majority op. at 19).

[14] Their Article 78 petitions, memoranda of law in opposition to the motion to dismiss, and their combined brief on appeal all request the court either direct the NYPD to release the records or order an in camera view. The NYPD understood petitioners to be asking the courts to base their decisions on the motions to dismiss on not only the public affidavit but also on an in camera review of responsive documents, if any, but argued that review was "inapposite and entirely premature" under the Glomar doctrine. In *Hashmi,* Supreme Court's decision and statements at oral argument on the motion for leave to appeal left little doubt that it would have evaluated the motion to dismiss in the light of an in camera review of the responsive documents, if any, had it not been already inclined to deny the petition on theoretical grounds and had it not thought in camera review precluded by analogy to the Glomar doctrine. Supreme Court in *Abdur-Rashid,* and the Appellative Division in the combined appeal, did not address the request.

[15] It is, therefore, inaccurate to state that, at the initial stage of a FOIL denial, an agency "is permitted merely to deny a request, without explanation" (partial dissenting op of Wilson, J., at 3).

[16] In analyzing the sufficiency of such a certification, this Court observed in *Matter of Rattley v New York City Police Dept.* that a certification is required "[w]hen an agency is unable to locate documents properly requested under FOIL" (96 NY2d 873, 875 [2001]). However, we have never held that a certification is required *only* when an agency grants a FOIL request and subsequently discovers that it has lost or does not possess the relevant records. Indeed, it would make little sense for the certification to apply only where a FOIL request has already been granted because an agency will not always be able to ascertain whether, and to what extent, a requested record is disclosable under FOIL without undertaking a review thereof.

[17] The majority asserts that petitioners do not "analyze the propriety of the exemptions as applied to their requests" (majority op, at 8 n 3). Considering that petitioners are unaware of what, if any, records exist and cannot discern when, if ever, they were investigated, it is unclear exactly what argument the petitioners could make, other than that which is currently presented, which is that the NYPD's Glomar response is an impermissible blanket exemption that has not been authorized by the legislature. Again, the majority's response to this is to assume, without foundation, that the only records that exist, if any, relate to a "pending covert investigation" (majority op, at 9 n 3) and are, therefore, "protected under one or more FOIL exemptions" (majority op, at 15 n 6).

Further, the majority completely fails to address the implications of Glomar responses in cases where records exist that are not protected by a statutory exemption but which, nevertheless, will be shielded from disclosure and judicial review by such a response. Instead, the majority avoids this problematic aspect of its position by suggesting that

petitioners limited the dispute to records concerning terrorism-related investigations. This is inaccurate. Petitioners' FOIL requests are devoid of any reference to terrorism investigations or to news articles relating to the NYPD's covert domestic counterterrorism operations. Petitioners requested, among other things, "[a]ll records related to *any* investigation of [petitioners] between 2006-2012," "[a]ll records related to [the petitioners] relied upon by the NYPD that led to any report being filed," and "[a]ll records related to the surveillance of [the petitioners] by [the] NYPD" (emphasis added). Indeed, the majority's apparent claim that the Glomar response was given only because the investigations at issue related to terrorism is untenable considering that the NYPD denied petitioners' administrative appeals, in part, on the ground that petitioners failed to specifically identify the nature of the investigations to which the FOIL requests pertained. Moreover, while it is true that petitioners referenced a series of news articles concerning NYPD surveillance of Muslim communities in their CPLR article 78 petitions — filed after the Glomar responses had been conveyed — at no point did they disavow or narrow their earlier requests for records pertaining to "any investigation." In addition, they maintained that the NYPD's response was an impermissible blanket exemption and that the NYPD should instead redact any records containing protected information. Despite the majority's repeated attempts to shift the blame to petitioners for the agency's noncompliant response here, it is unquestionably the NYPD's burden to demonstrate the applicability of an exemption to any records withheld — a showing that is woefully lacking.

[18] The majority's failure to require any in camera review also increases the likelihood that a Glomar response will violate the precept that an agency "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure" and, instead, should make every effort to redact protected information while disclosing exempt information (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*,18 NY3d 42, 46 [2011]). Further, contrary to the majority's likening of its creation of a blanket exemption to this Court's prior approval of in camera review, unlike the Glomar response, FOIL expressly authorizes judicial review of an agency's response to a FOIL request (*see* Public Officers Law § 89 [4] [b]), and our precedent clearly establishes the propriety of in camera review.

[19] To the extent the NYPD also relies on *New Jersey Media Group Inc. v Bergen County Prosecutor's Office*(447 NJ Super 182, 188, 146 A3d 656, 660 [NJ Super Ct App Div 2016]), such reliance is misplaced. In that case, a New Jersey appellate court interpreted the New Jersey Open Public Records Act (OPRA), to permit an agency to neither confirm nor deny the existence of records when the agency "(1) relies upon an exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) presents a sufficient basis for the court to determine that the claimed exemption applies" (*New Jersey Media Group*, 447 NJ Super at 189). That court held that a Glomar-type response was authorized in limited circumstances by language in OPRA providing that the statute "shall not abrogate [a] grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record" (NJ Stat Ann 47:1A-9). Under New Jersey law, "before OPRA was enacted, judicial decisions recognized the need to maintain a high degree of confidentiality' for records regarding a person who has not been arrested or charged" (*New Jersey Media Group*, 447 NJ Super at 203-204). Accordingly, the New Jersey court held that the mere existence of records pertaining to someone who had been investigated, but not charged or arrested, was exempt under the statutory provision exempting materials that were confidential under prior case law. FOIL, however, does not contain a similar provision.

[20] The majority concedes this point, but claims — without any basis in record or fact — that FOIA requests analogous to those presented here are "rare" (majority op, at 11). Moreover, while there certainly exists a federal case or two applying the Glomar doctrine to the FOIA law enforcement exemption (*see Vazquez v United States Dept of Justice* (887 F Supp 2d 114 [DC Cir 2013]),we note that the United States Supreme Court has never addressed the propriety of the Glomar doctrine, despite the majority's suggestion otherwise (*see States Dept of Justice v Reporters Committee for Freedom of Press*, 489 US 749 [1989] [addressing only whether the actual contents of a rap sheet are exempt under FOIA exemption 7 (c)]).

"Your Right to Know" / Your Right to Know

The Committee

The Committee on Open Government is responsible for overseeing implementation of the Freedom of Information Law (Public Officers Law §§ 84-90) and the Open Meetings Law (Public Officers Law §§ 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The Committee also oversees the Personal Privacy Protection Law.

The Committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law ("FOIL") directs the Committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the Committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information or the Open Meetings Law, the Committee staff can provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, more than 24,000 written advisory opinions have been prepared by the Committee at the request of government, the public and the news media. In addition, hundreds of thousands of verbal opinions have been provided by telephone. Staff also provides training and educational programs for government, public interest and news media organizations, as well as students on campus.

Opinions prepared since early 1993 that have educational or precedential value are maintained online, identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law.

FOIL Advisory Opinions OML Advisory Opinions

Each index to advisory opinions is updated periodically to ensure that interested persons and government agencies have the ability to obtain opinions recently rendered.

The website also includes the following:
The text of the Freedom of Information Law;
Rules and Regulations of the Committee on Open Government (21 NYCRR Part 1401);
Model Rules for Agencies;
Sample Request for Records;
Sample Request for Records via Email;
Sample Appeal;

Sample Appeal When Agency Fails to Respond in a Timely Manner;
FOIL Case Law Summary;
Frequently Asked Questions regarding FOIL;
The text of the Open Meetings Law;
Model Rules for Public Bodies;
An Article on Boards of Ethics;
OML Case Law Summary;
Frequently Asked Questions regarding OML;
The text of the Personal Privacy Protection Law (only applies to State Agencies);
You Should Know, regarding the Personal Privacy Protection Law.

If you are unable to locate information on the website and need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to contact:

Committee on Open Government
NYS Department of State
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Freedom of Information

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law
All agencies are subject to the Freedom of Information Law, and FOIL defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (§86(3)).

The term "agency" does not include the State Legislature or the courts. For purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, which will be discussed later.

What is a record?
All records are subject to the FOIL, and the law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency... in any physical form whatsoever. . ." (§86(4)). It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of "record." An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so.
For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible records

FOIL is based on a presumption of access, stating that all records are accessible, except records or portions of records that fall within one of eleven categories of deniable records (§87(2)).

Deniable records include records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;
(b) would if disclosed result in an unwarranted invasion of personal privacy;
(c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;
(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
(e) are compiled for law enforcement purposes and which if disclosed would:
    i. interfere with law enforcement investigations or judicial proceedings;
    ii. deprive a person of a right to a fair trial or impartial adjudication;
    iii. identify a confi dential source or disclose confi dential information relative to a criminal investigation; or
    iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
(f) could if disclosed endanger the life or safety of any person;
(g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:
    i. statistical or factual tabulations or data;
    ii. instructions to staff that affect the public;
    iii. fi nal agency policy or determinations; or
    iv. external audits, including but not limited to audits performed by the comptroller and the federal government;
(h) are examination questions or answers that are requested prior to the fi nal administration of such questions; or
(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
* (j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffi c law.
* NB Repealed December 1, 2014
* (k) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffi c law.
* NB Repealed December 1, 2014
* (l) are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffi c law.
* NB Repealed September 20, 2015

Protection of privacy

One of the exceptions to rights of access referenced earlier states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (§87(2)(b)). Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself.

When a request is made for records that constitute a list of names and home addresses or its equivalent, the agency is permitted to require that the applicant certify that such list will not be used for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such list for solicitation or fund-raising purposes (§89(3)(a)).

Since 2010, agencies have been prohibited from intentionally releasing social security numbers to the public (§96-

a).

How to Obtain Records

Subject matter list
As noted earlier, each agency must maintain a "subject matter list" (§87(3)(c)). The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought, and it must be updated annually. Each state agency is required to post its subject matter list online. An alternative to and often a substitute for a subject matter list is a records retention schedule. Schedules regarding state and local government outside of New York City are prepared by the State Archives; those applicable in New York City are prepared by the NYC Department of Records and Information Services.

Regulations
Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee's regulations and a model designed to enable agencies to easily comply are available on the Committee's website. See Regulations of the Committee on Open Government and Model Rules for Agencies.

Designation of records access officer
Under the Committee's regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot
be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records
An agency may ask you to make your request in writing. See Sample Request for Records. The law requires you to "reasonably describe" the record in which you are interested (§ 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency's fi ling or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, fi le designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to fi nd out how an agency keeps the records of your interest (i.e., alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. See Sample Request for Records via Email. Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which must be reasonable in consideration of

attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If it is determined that more than 20 business days will be needed to grant a request in whole or in part, the agency's acknowledgment must explain the reason and provide a specifi c date within which it will grant a request in whole or in part. When a response is delayed beyond 20 business days, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial. For more information, see Explanation of Time Limits for Responding to Requests.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data.

For more information see 2008 News/Fees for Electronic Information.

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based on an exception to rights of access, the agency has the burden of proving that the record sought falls within the exception (§89(4)(b)).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees to a person denied access to records. To do so, a court must find that the person denied access "substantially prevailed", and either that the agency had no reasonable basis for denying access or that it failed to comply with the time limits for responding to a request or an appeal.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

(a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;

(b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;

(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

(f) administrative staff manuals and instructions to staff that affect the public;

(g) final reports and formal opinions submitted to the Legislature;

(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature; and

(i) any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

(a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;

(b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records (Sample)

Records Access Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information Law Request
Records Access Officer:

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____ .

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of $____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,
Signature
Name
Address

City, State, ZIP code

***Requesting Records via Email** (Sample)*

(It has been suggested that agencies create an email address dedicated to the receipt of requests. It is recommended that you review the website of the agency maintaining the records that you seek in order to locate its email address and its records access officer.)
(The subject line of your request should be "FOIL Request".)

Dear Records Access Officer:

Please email the following records if possible (include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.):

OR

Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.):

OR

Please inform me of the cost of providing paper copies of the following records (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.).

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested ($0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a CD or floppy disk.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

(Name)
(Address, if records are to be mailed).

***Appeal A Written Denial** (Sample)*

Name of Agency Official
Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP code
Re: Freedom of Information
Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include:_____ (describe the records that were denied to the extent possible and, if possible, offer reasons for disagreeing with the denial, i.e., by attaching an opinion of the Committee on Open Government acquired for its website).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,
Signature
Name
Address
City, State, ZIP code

***Appeal A Denial due to an Agency's Failure to Respond in a Timely Manner** (Sample)*

FOIL Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information
Law Appeal

Dear _____:

I requested (describe the records) by written request made on _____ (date). More than five business days have passed since the receipt of the request without having received a response… or… Although the receipt of the request was acknowledged and I was informed that a response would be given by _____ (date), no response has been given. Consequently, I consider the request to have been denied, and I am appealing on that basis.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,
Signature
Name
Address
City, State, ZIP code

The Open Meetings Law, often known as the "Sunshine Law", went into effect in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective in 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decision making process in action. It requires public bodies to provide notice of the times and places of meetings, and keep minutes of all action taken.

As stated in the legislative declaration in the Open Meetings Law (§100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a meeting?

"Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business" (§102(1)), and has been expansively interpreted by the courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference. A meeting cannot validly be held by telephone or through the use of email.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit the public to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the state, for an agency of the state, or for public corporations, including cities, counties, towns, villages and school districts (§102(2)). In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law. Citizens advisory bodies and similar advisory groups that are not created by law are not required to comply with the Open Meetings Law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting (§104).

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations and, when possible, online.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting in designated locations and online.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

Records to be discussed

If records that are scheduled to be discussed during an open meeting are available under FOIL or consist of a proposed resolution, law, rule, regulation, policy or any amendment thereto, the record is required to be made

available "to the extent practicable" online and in response to a request to inspect or copy prior to or during the meeting.

When can a meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded (§105).

To hold an executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

A public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight areas that may be discussed behind closed doors include:

(a) matters which will imperil the public safety if disclosed;
(b) any matter which may disclose the identity of a law enforcement agency or informer;
(c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
(d) discussions regarding proposed, pending or current litigation;
(e) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);
(f) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
(g) the preparation, grading or administration of examinations; and
(h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

Note that item (f) is often referenced as "personnel," even though that term does not appear in the grounds for holding executive sessions. Only when the discussion focuses on "a particular person or corporation" in relation to one or more of the topics listed in that provision is an executive session permitted.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and executive sessions must be compiled and made available (§106).

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled; however, if action is taken, minutes of the action taken must be compiled

and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against. The law does not require the approval of minutes, but directs that minutes of open meetings be prepared and disclosed within two weeks.

Enforcement of the law

What can be done if a public body holds a secret meeting? What if a public body makes a decision in private that should have been made in public? Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, a person may be aggrieved if improperly excluded from a meeting or if an executive session was improperly held.

Upon a judicial challenge, a court has the power to declare either that the public body violated the Open Meetings Law and/or declare the action taken void (§107). If the court determines that a public body has violated the law, it has the authority to require the members of the public body to receive training given by staff of the Committee. A court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees. If, on the other hand, the court found that a public body voted in private "in material violation" of the law "or that substantial deliberations occurred in private" that should have occurred in public, the court would be required to award costs and attorney's fees to the successful party. A mandatory award of attorney's fees would apply only when secrecy is the issue.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. The law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier-free physical access" to physically handicapped persons, and that meetings are held in rooms that can "adequately accommodate" the volume of members of the public who wish to attend (§103).

Exemptions from the law

The Open Meetings Law does not apply to:

(1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
(2) deliberations of political committees, conferences and caucuses; or
(3) matters made confidential by federal or state law (§108).

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board identifiable to a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Public Participation and recording meetings

The Open Meetings Law provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, it has been advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

Public bodies are required to allow meetings to be photographed, broadcast, webcast or otherwise recorded as long as the equipment used to do so is not disruptive or obtrusive. If the public body adopts rules regarding such activities, they must be reasonable and conspicuously posted, and provided to those in attendance upon request

(§103(d)).

Revised, April 2014