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

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In the matter of the application of
KEEGAN STEPHAN,

Petitioner-Plaintiff,

For Judgment and Order Pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules

- against -

The NEW YORK CITY POLICE DEPARTMENT, and WILLIAM BRATTON, NYPD COMMISSIONER, in his official capacity,

Respondents-Defendants.

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BRIEF IN SUPPORT OF VERIFIED PETITION AND COMPLAINT

Index Number: 101285-2016

RJI No.:

BRIEF IN SUPPORT OF VERIFIED PETITION AND COMPLAINT

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PRELIMINARY STATEMENT

Petitioner's December 12, 2014 FOIL Request (Exh. E[1], the "Request"), which was delivered to the New York City Police Department ("NYPD") by hand and by email to its Records Access Officer ("RAO"), sought records related to the NYPD's uses of a Long Range Acoustic Device ("LRAD") on December 5, 2014 that injured him and others, as well as records related to the NYPD's uses of LRADs between 2011 and 2014, and records reflecting NYPD policies and training related to LRADs. In this combined action for relief under CPLR Article 78 and for declaratory relief under CPLR Section 3001, Petitioner challenges Respondents' Final Determination to withhold documents allegedly discovered by Respondents responsive to the FOIL, and seeks to compel Respondents to comply with the letter and spirit of the FOIL by releasing the records Petitioner seeks and by accepting to and responding to FOIL requests electronically in the future.

STATEMENT OF FACTS

Since 2006, §§ 89(3)(b)[2] and 87(5)(a)[3] of the FOIL have required agencies such as the New York City Police Department ("NYPD") that have "reasonable means

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[1] All references to "Petitioner" are to "Petitioner-Plaintiff" and all references to "Respondents" are to "Respondents-Defendants." Unless otherwise specified, all references to "Exh." documents are to the corresponding exhibits to the Verified Petition and Complaint.

[2] Under § 89(3)(b) of the FOIL,

> 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.

See FOIL § 89(3)(b).

available" to accept and respond to FOIL requests by e-mail and to provide electronic versions of responsive records by e-mail "if the agency can reasonably make such copy."

Petitioner in this case made a December 2014 FOIL request to the NYPD through counsel, transmitted by e-mail, seeking response by e-mail and electronic versions of responsive records. *See* Exh. E. After Respondents refused to address the e-mail version of the Request and refused to respond to the Request by e-mail in this case, reflecting NYPD policy not to accept FOIL requests by e-mail*, see, e.g.,* Exh. F, Petitioner requested an advisory opinion from the New York State Committee on Open Government ("COOG") about whether the FOIL required the NYPD to accept and respond to FOIL requests by e-mail, and the COOG responded by providing a copy of its January 21, 2010 Advisory Opinion FOIL-AO-107965 (opining that "if an agency…has the ability to receive and respond to requests via email, it is required to do so.") *See* Exhs. N and O.

The NYPD at least arguably timely acknowledged receipt of the version of the hard copy version of the December 12, 2014 Request sent by mail on December 15, 2014 or December 19, 2014. *See* Exhs. G and H. The NYPD then estimated it would take twenty days to "assess the potential applicability of the FOIL exemptions set forth in the FOIL, and whether the records can be located".[4]

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[3] Under FOIL § 87(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."

[4] As seen below, that estimation was unreasonable, including because, as explained in the Fourth Administrative Appeal (discussed below) and elsewhere, that the records sought were reasonably described in clear terms, including seven requests that were substantially similar to the requests in the NYCLU FOIL,

As of around January 12, 2015, more than twenty business days had come and gone after the NYPD acknowledged receiving the Request, and by March 2, 2015, there had still been no word from Respondents in response to the Request.

Petitioner filed the First Administrative Appeal dated March 2, 2015 (Exh. I), challenging the constructive denial of the Request and the NYPD's refusals to accept and respond to the Request by electronic means. More than ten business days passed and there was no response to the First Administrative Appeal. Then, in a letter dated April 27, 2015, Respondents claimed it would take until, they estimated, "June 22, 2015" – nearly two more months - to comply with the Request because responsive records were "located in several locations and … difficult to search or locate", because "numerous records must be reviewed in order to determine whether disclosure is required", and because "records [had] not yet been received from other NYPD units". Exh. J.

And in a letter dated May 18, 2015 from the Records Access Appeals Officer ("RAAO"), the RAAO took the position that the Request was "not denied", noting the estimated June 22, 2015 date given in the April 27, 2015 letter, and that it therefore was "premature." Exh. K.

When the June 22, 2015 estimated response date came and went, counsel for Petitioner called the Department to complain on August 15, 2015, and in an August 17,

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responsive records are stored in ways that make them easy to search, and given the few locations within the NYPD in which it would have been necessary to search for records responsive to the Request (principally, the Disorder Control Unit/Strategic Response Group, the Communications Division, the Police Academy's Training Division, and the Manhattan Borough Command).

2015 letter, Respondents provided a second estimated revised response date of September 11, 2015. Exh. L.

On October 14, 2015, well after that second estimated revised response date had come and gone, Petitioner made a Second Administrative Appeal. Exh. M. The Second Administrative Appeal informed Respondents of the March 3, 2015 request from the COOG for an advisory opinion, and the COOG's response. In an October 28, 2015 letter, the RAAO responded, adhering to its May 18, 2015 letter and noting that the RAO would "issue a determination on or before November 13, 2015." Exh. P; *see also* Exhs. N and O.

November 13, 2015 came and went with no response from the NYPD. On December 1, 2015, Petitioner made a Third Administrative Appeal. Exh. Q.

Then, on December 3, 2015 – nearly a year after the Request had initially been sent – Respondents released the Decision and produced 23 pages of NYPD Patrol Guide provisions partially responsive to sections (i) and (j) of the Request and denying the remainder of the Request, citing FOIL § 87(2)(e)(iv) and claiming that disclosure of responsive documents "would reveal non-routine techniques and procedures" and citing § 87(2)(e)(i) based on the claim disclosing them would "interfere with law enforcement investigations or judicial proceedings." Exh. R. Upon information and belief, the RAO at One Police Plaza had access to both hard and electronic copies of the NYPD's Patrol Guide at all times relevant to the Request. Typically, the hard copy versions of the Patrol

Guide is searchable by Table of Contents and index, and the electronic versions can be searched by words (for example, "LRAD" or "use of force").

On January 2, 2016, Petitioner sent their Fourth Administrative Appeal to Respondents, including by hand, by mail, and by email. Exh. S. In addition to incorporating by reference and/or reiterating the grounds set forth in the prior appeals, the Fourth Administrative Appeal specifically challenged Respondents' invocations of FOIL §§ 87(2)(e)(i) and 87(2)(e)(iv) to justify withholding undescribed documents withheld in a blanket denial, and included copies of the NYCLU Request, the NYPD's response letter and attachments, the NYCLU Administrative Appeal Letter, and the NYCLU Response.

In a January 11, 2016 letter, the RAAO granted the Fourth Administrative Appeal to the extent that it directed that a further search be conducted and promised that a response would be made by February 27, 2016. Exh. T.

February 27, 2016 came and went.

On March 11, 2016, Respondents filed a Fifth Administrative Appeal by e-mail, by hand, and by mail. Exh. U.

By letter dated April 13, 2016, the RAAO communicated the NYPD's Final Determination. Exh. V. In the Final Determination, Respondents granted the Fifth Administrative Appeal to the extent that they re-disclosed the same documents that had been disclosed to the NYCLU, which Petitioner provided to them along with the Fourth Administrative Appeal, and otherwise denied the Fourth Administrative Appeal "[w]ith regard to other located records pursuant to ….87(2)(e)(iv) because disclosure of the

requested records would reveal non-routine criminal investigative techniques or procedures" as well as "pursuant to …87(2)(e)(i), in that the requested records, if disclosed, would interfere with ongoing judicial proceedings, including *Anika Edrei et al. v. City of New York* , Index Number 16CV01652, in United States District Court." Exh. W.

ARGUMENT

FOIL PRINCIPLES

The FOIL provides for reasonably prompt, presumptive access to agency records unless they fall within statutory exceptions enumerated in FOIL 87(2), which are to be narrowly construed to maximize public access to such records. *See* FOIL 84, 87(2), 89(3)(a); *Matter of Gould v. NYPD*, 89 NY2d 267, 275 (1996).

The usual Article 78 standard, in which an agency's determination cannot be set aside unless it was reached without rational basis or unless it was arbitrary and capricious, does not apply to Article 78 review of an agency's final FOIL determination under the FOIL. *See* FOIL 89(4)(b)*; New York Committee for Occupational Safety and Health v. Bloomberg*, 72 AD3d 153 (1st Dept. 2010).[5]

Rather, it is the withholding agency's burden to set forth appropriately particularized and specific justifications for denying access to specific responsive records, showing its entitlement to withhold disclosure of documents, or of information

[5] Of course, the familiar Article 78 standards of review may be applied in this case to the extent that this Court may need to determine whether Respondents violated the FOIL's implementing regulations or the Uniform FOIL Rules.

withheld by means of redaction, establishing that one of the statutory exceptions justifies withholding the documents or information from disclosure, despite the strong statutory presumptions in favor of such disclosure. *See, e.g, Gould*, 89 NY2d at 275; *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *New York State Rifle & Pistol Assn, Inc. v. Kelly*, 55 AD3d 222 (1st Dept. 2008); *DJL Rest. Corp. v. Dept. of Buildings of the City of New York*, 273 A.D.2d 167 (1st Dept. 2000); *Laureano v. Grimes*, 179 AD2d 602, 603-4 (1st Dept. 1992); *Matter of Johnson v. New York City Police Department*, 257 A.D.2d 343, 349 (1st Dept. 1999), quoting *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns.,* 67 N.Y.2d 562, 566 (1986).

An agency must explain and justify its reliance on an exemption "in more than just a 'plausible fashion.'" *Data Tree, LLC v. Romaine*, 9 NY3d 454, 462 (2007). That includes setting for a "factual basis" for claiming exemption from the duty to disclose. *See, e.g., Church of Scientology of N.Y. v. State of New York,* 46 N.Y.2d 906, 908 (1979).

"Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Mater of Baez v. Brown*, 124 A.D.3d 881, 83 (2nd Dept. 2015) (quoting *Matter of Dilworth v. Westchester County Dep't of Correction*, 93 A.D.3d 722, 724 (2nd Dept. 2012); *see also Capital Newspapers Division of the Hearst Corp.* v. *City of Albany,* 15 N.Y.3d 759 (2010) ("conclusory affidavit" from agency insufficient to meet burden of invoking exemption); *Washington Post Co. v. New York State Insurance Dep't*, 61 N.Y.2d 557, 567 (1984) (rejecting reliance on "conclusory pleading allegations and affidavits"); *Matter of Washington Post Co. v. New*

York State Ins. Dep't., 61 N.Y.2d 557, 567 (1984) ("conclusory pleading allegations and affidavits" could not establish exceptions); *Villalobos v. New York City Fire Dep't*, 130 A.D.2d 935, 937 (2nd Dept. 2015) (conclusory statements insufficient to justify redactions); *Matter of Madera v. Elmont Public Library,* 101 AD3d 726 (2d Dept.2012); *Matter of Porco v. Fleischer,* 100 AD3d 639 (2d Dept.2012); *Matter of Buffalo Broadcasting Co., Inc. v. New York State Dep't. of Correctional Servs.,* 155 A.D.2d 106, 110 (3rd Dep't 1990); *Newsday LLC v. Nassau Cty. Police Dep't*, 42 Misc. 3d 1215(A), 984 N.Y.S.2d 633 (Sup. Ct. 2014); *Loevy & Loevy v. New York City Police Dep't*, 38 Misc. 3d 950, 953 (Sup. Ct. 2013) ("A conclusory contention that an entire category of documents is exempt will not suffice").

"A '[f]ailure to establish the factual existence of [a] claimed exemption ... renders [the] claim for exemption unavailing.' *Matter of New York Assn. of Homes and Servs. for the Aging, Inc. v. Novello,* 13 A.D.3d 958, 960–61, 786 N.Y.S.2d 827 (3d Dep't 2004) (internal citations omitted)."*Loevy & Loevy v. New York City Police Dep't,* 38 Misc. 3d 950, 954-55 (Sup. Ct. 2013).

Mere "references to sections, subdivisions and subparagraphs of the applicable statute and characterizations of the records sought to be withheld" – such as those at issue here – simply will not suffice. *Church of Scientology of N.Y*, 46 N.Y.2d at 908.

When some parts of a document may be withheld, but other parts are subject to disclosure, the agency must disclose those non-exempt portions, if they can reasonably be segregated. *See, e.g., Gould,* 89 N.Y.2d at 275 (ordering production of NYPD complaint

follow-up reports with redactions to exclude intra-agency opinions and analysis); *Fink,* 47 N.Y.2d at 572-73 (ordering production of investigators' manual redacting certain specialized techniques pursuant to the law enforcement exemption); *see also, Matter of Schenectady County Society for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011) (agency "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure"); *Data Tree, LLC,* 9 N.Y.3d at 464; *New York Times Co.* v. *City of New York Fire Dep 't,* 4 N.Y.3d 477, 486 (2005) (directing disclosure of recordings of 911 calls from September 11, 2001 with redactions to avoid privacy violations); *Daily Gazette Co.* v. *City of Schenectady,* 93 N.Y.2d 145, 159 (1999) (ordering disclosure of redacted officer disciplinary reports); *Matter of Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984); *Whitfield v. Bailey*, 80 A.D.3d 417, 418-9 (1st Dept. 2011); *Matter of Rodriguez v. Johnson,* 66 A.D.3d 536 (1st Dept. 2009); *Capital Newspapers Div. of Hearst Corp.* v. *Albany,* 63 A.D.3d 1336, 1339 (3d Dep't 2009) (although gun tags were exempt personnel records, ordering their disclosure with officers' names redacted), *aff'd on other grounds,* 15 N.Y.2d 759 (2010)*; Johnson* v. *New York City Police Dep 't,* 257 A.D.2d 343, 349 (1st Dep't 1999) (rejecting blanked withholding and ordering disclosure of records with names and identifying information redacted); *Polansky v. Regan*, 81 A.D.2d 102, 104 (3rd Dept. 1981); *Gallogly v. City of New York*, 21 N.Y.S.3d 867, 872 (N.Y. Sup. Ct. 2016) (citing, *inter alia, Matter of Exoneration Initiative v. New York Police Dept.,* 114 A.D.3d 436, 439–440 (1st Dept.2014); *Loevy & Loevy v. New York City Police Dep't,* 46 Misc. 3d 1214(A) (N.Y.

Sup. Ct. 2015) (FOIL "'does not [however] create a blanket exemption' to the production of documents (*Matter of Thomas v. New York City Dept. of Educ.,* 103 AD3d 495, 497 [1st Dept 2013]), and allows for production of documents 'when identifying details are deleted.' *Id.*"); and *Newsday LLC v. Nassau Cty. Police Dep't*, 42 Misc. 3d 1215(A) (Sup. Ct. 2014).

POINT I

RESPONDENTS' BLANKET DENIALS OF ACCESS TO UNDESCRIBED "OTHER LOCATED RECORDS", INVOKING FOIL §§ 87(2)(e)(i) and 87(2)(e)(iv), WERE IMPROPER

A. RESPONDENTS' BLANKET DENIALS WERE IMPROPER

Respondents' blanket denials of the Request with respect to the unspecified "other located records" referred to in the Final Determination were improper. "[B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government." *Gould*, 89 NY2d at 275; *see also Assn. v New York State Police*, 87 AD3d 193, 193 (3ed Dept. 2011) (such blanket denials are unreasonable). An agency's "blanket invocation of . .. statutory exemptions, without enumerating or describing any of the documents withheld and without offering a specific basis for any of the claims of exemption" does not pass muster. *City of Newark v. Law Dep 't of City of New York,* 305 A.D.2d 28, 34 (1st Dep't 2003) (emphasis added); *see also, e.g. ,Johnson v. NYPD,* 257 A.D.2d 343, 349 (1st Dep't 1999) (rejecting blanket claim to exemptions); *Loevy & Loevy,* 38 Misc. 3d 950, 954 (Sup. Ct., N.Y. County, 2014) (same); *New York Civil Liberties*

Union v. NYPD, 20 Misc. 3d 1108(A) (Slip Op.), at *3 (Sup. Ct., N.Y. County, May 7, 2008) (same).

"Instead, to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents". *Gould*, 89 NY2d at 275, *quoting Matter of Fink,* 47 N.Y.2d at 571.

As stated in the Fourth Administrative Appeal, although the Request specifically demands that the Department provide an appropriately detailed written denial so that judicial review can be meaningful, the Decision is not particular enough in its descriptions of the documents located to do that. For example, although the Decision determines to withhold documents, it does not say how many. Nor does the Decision break down how many of the total number of documents found were responsive to each of sections (a), (c) through (h), and (k) of the Request – just that the Department is withholding whatever documents, aside from Patrol Guide provisions, it did find. Additionally, because there is no reasonably particularized description of the documents withheld, it is also impossible to determine which documents Respondents withheld on the basis of FOIL § 87(2)(e)(iv) and which documents the Department withheld on the basis of FOIL § 87(2)(e). *See* Exh. S.

Respondents know better than to employ blanket denials of this nature and their use of them in this case, as well as the history of delays lacking in justification or based on questionable justification, should raise questions about their good faith. For example, the blanket denials in the Final Determination rely on the very same grounds invoked by

Respondents in the first instance in this case in their initial December 3, 2015 Decision to withhold even the documents they had previously disclosed in response to the 2011 NYCLU FOIL, which Respondents re-re-disclosed to Petitioner in this case only after Petitioner re-disclosed those same documents to Respondents as part of the Fourth Administrative Appeal.

Respondents' blanket denials not only prevent Petitioner from obtaining documents he is presumptively entitled to without offering the necessary particularized justifications for withholding them, they also prevent Petitioner from making more specific arguments to this Court about why their purported justifications for withholding responsive documents are improper.

B. RESPONDENTS' RELIANCE ON FOIL § 87(2)(e)(iv) TO JUSTIFY WITHHOLDING UNDESCRIBED RESPONSIVE RECORDS WAS IMPROPER

FOIL § 87(2)(e)(iv) provides for withholding of records "compiled for law enforcement purposes and which, if disclosed, would… iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures". This exemption means to shield police from being required to "furnish the safecracker with the combination to the safe." *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 573 (1979). "The purpose of the exemption…is to prevent violators of the law from being apprised of non-routine procedures by which law enforcement officials gather information." *Id.* at 572. This exemption may only be invoked when disclosure would result in the frustration of "pending or threatened investigations" or if the disclosure could be used "to construct a

defense to impede a prosecution." *Id.* The exemption can protect certain records from disclosure where their release would create "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." *Id*. The key question is whether disclosure of the documents requested would create a substantial likelihood that a criminal could evade detection as a result of the disclosure. *See, e.g., Fink*, 47 N.Y.2d at 572.

Respondents have not met their burden to establish that disclosing the requested records would reveal *"investigative techniques or procedures*" at all. The requested records do not seek records regarding "investigative techniques or procedures" at all. Upon information and belief, there is no investigative use of the LRAD and no investigative procedures the LRAD is utilized in connection with.

Respondents have not met their burden to establish that disclosing the requested records would reveal *criminal* investigative techniques or procedures. The exemption only applies to *criminal* investigative techniques or procedures. *See, e.g., Gallogly v. City of New York*, 21 N.Y.S.3d 867, 870-71 (N.Y. Sup. Ct. 2016) (rejecting claim of exemption where Affidavit from NYPD Lieutenant "did not establish that there was any *criminal* investigation … or that *criminal* non-routine investigative techniques and procedures were employed"); *see also Aurigemma v. New York State Dep't of Taxation & Fin*., 128 A.D.3d 1235, 1237 (3rd Dept. 2015) ("The statute—on its face—references *criminal* investigative techniques or procedures, and prevailing case law suggests that this

exemption applies only to a FOIL request that, at the very least, has its genesis in an underlying criminal investigation or prosecution") (citing cases).

Even assuming, *arguendo*, that Respondents had met such burden, the requested records would only potentially disclose *routine techniques and procedures*. *See, e.g., Aurigemma,* 128 A.D.3d at 1237-38 (declining to extend exemption to justify withholding documents that would reveal law enforcement questions that "were routine in nature—the disclosure of which would not reveal detailed or specialized investigative techniques or procedures"); *Laborers' Int'l Union of N. Am. Local Union No. 17 v N.Y. State Dept. of Transp.*, 280 AD2d 66, 70 (3rd Dept. 2001) (where records reveal information already known, invocation of exemption is improper); *N.Y. Civil Liberties Union v City of N.Y. Police Dept.*, 20 Misc 3d 1108, *2-3 (Sup Ct NY County 2008) (exemption improperly invoked to withhold from disclosure information that had already been provided to researchers); *Gray v Faculty-Student Ass'n of Hudson Valley Community Coll.*, 717 NYS2d 507, 510 (Sup. Ct., Rensselaer County 2000) (exemption improperly invoked to withhold "information which is already available to any member of the public simply by walking into the bookstore"); *Matter of Muniz v Roth*, 163 Misc. 2d 293, 297 (Sup Ct, Tomkins County 1994]) (denying exemption to justify withholding information about a technique that "was the subject of testimony in open court")).

There is a great deal of information publicly available about LRADs, including technical information about the LRADs' capacities from the manufacturer, the LRAD Corporation. The NYPD's deployment and uses of LRADs at demonstrations are now

routine, publicly visible, widely known, and detailed through social networking posts online, as well as online and otherwise in the media.

Therefore, Respondents' reliance on FOIL § 87(2)(e)(iv) to justify withholding undescribed records responsive to the FOIL was improper.

C. RESPONDENTS' RELIANCE ON FOIL § 87(2)(e)(i) TO JUSTIFY WITHHOLDING UNDESCRIBED RESPONSIVE RECORDS WAS IMPROPER

FOIL § 87(2)(e)(i) provides for withholding documents when their disclosure would "interfere with law enforcement investigations or judicial proceedings."

> Records compiled for law enforcement purposes may be withheld if "disclosure while a case is pending would generally interfere with enforcement proceedings." *Lesher v. Hynes,* 19 N.Y.3d 57, 67, 945 N.Y.S.2d 214, 968 N.E.2d 451 (2012). It is the agency's burden to "articulate a factual basis for the exemption" by identifying "generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of the categories of documents." *Id.; see* Public Officers Law § 89(4). 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.

Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't, 41 Misc. 3d 471, 476 (Sup. Ct. 2013), *aff'd*, 125 A.D.3d 531 (1st Dept. 2015), *leave den'd*, 26 NY3d 919 (2016).

When a specific criminal investigation or prosecution is ongoing, an agency need not always articulate a factual basis for invoking the exemption to withhold each and every document sought from the related investigation file, but it must always at least "articulate a factual basis for the exemption" by identifying "generic kinds of documents

for which the exemption is claimed, and the generic risks posed by disclosure of the categories of documents." *Lesher,* 19 N.Y.3d at 67. In *Lesher*, passing on *Pittari v. Pirro*, 258 A.D.2d 202, 206 (2nd Dept. 1999), *lv. denied* 94 N.Y.2d 755 (1999) (which limits its holding to "*where there are pending criminal investigations*" (*id.* at 204, emphasis added)), the Court of Appeals emphasized that its decision in *Pittari* "does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosures imply because [it is] kept there" and that, post-*Pittari*, agencies must still "identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosures of these categories of documents"); *Matter of Whitley v. New York County Dist. Attorney's Off.,* 101 A.D.3d 455 (1st Dept. 2012) (respondents need not necessarily set forth particularized findings with respect to each responsive document in cases involving criminal prosecutions where they had identified the generic documents for which the exemption was claimed and the generic risks posed by the disclosure).

When a criminal investigation, prosecution, or related judicial proceeding is over, the exemption ceases to apply:

> Of course, Public Officers Law § 87(2)(e)(i) ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course. Thus, the exemption does not bar disclosure of records compiled for law enforcement purposes in a criminal matter where the prosecution has been completed, absent some unusual circumstance such as the prospect that disclosure might compromise a related case.

Lesher, 19 N.Y.3d at 68. And the exemption does not apply where criminal investigations have been completed and no further action is contemplated. *See, e.g., Council of Regulated Adult Liquor Licensees v. NYPD*, 300 A.D.2d 17, 18 (N.Y. App. Div. 2002); *Church of Scientology*, 403 N.Y.S.2d at 226 (finding that disclosure of the requested records would not interfere with criminal investigations where it was "apparent from the facts submitted that the letters of complaint had already been responded to, have been the subject of inquiry, have resulted in no further action, and there presently exists no intention to commence any further action with regard to them").

"[A]ccess to government records in aid of litigation, both against the government and against other individuals, frequently has been directed by the courts." *Journal Pub. Co. v. Office of Special Prosecutor*, 131 Misc. 2d 417, 420 (Sup. Ct. 1986) (ordering disclosure of tape recordings that had been sealed pursuant to NY CPL 160.50 to litigant in libel action) (citing, *inter alia*, Siegel, Practice Commentaries, McKinney's Cons. Laws, Book 7B, CPLR C 3101.25, Supp. (1986 p. 28)). And of course,

> [a]n agency may not deny a FOIL request based either on the reason for the request or the status of the individual making the request (i.e. that the requestor is a litigant or suspect) (*see generally, M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437 [1984]).

Lynch v. City of Troy, 33 Misc. 3d 174, 177 (Sup. Ct. 2011).

In this case, there is no claim that the disclosure of documents responsive to the Request would interfere with any law enforcement investigation. Nor is there any claim

that the disclosure of responsive documents would interfere with any law enforcement proceedings, such as a criminal prosecution.

It is true that Petitioner is among the Plaintiffs in a lawsuit, in which there will, they hope, be discovery related to the NYPD's LRAD uses and related training and policies. However, the mere fact that a civil proceeding now exists, in which some of the documents sought in the Request may become relevant and subject to disclosure, does not mean that there is a sufficient factual basis for withholding any documents from disclosure in this case. Defendants in that case have represented to counsel in that case that they will move to dismiss the First Amended Complaint pursuant to Fed.R.Civ.P. 12. If the civil case is dismissed pursuant to the threatened rule 12 motion, then the disclosure of documents pursuant to the Request will have no bearing on the litigation whatsoever. Nor is it likely that such disclosure interfere with the proceedings if the case is not dismissed and it proceeds to discovery.

Thus, Respondents' reliance on FOIL § 87(2)(e)(i) to justify withholding undescribed records responsive to the FOIL was improper.

C. THE COURT SHOLD REVIEW THE DOCUMENTS *IN CAMERA*

If Respondents do not disclose the documents responsive to the Request as a result of this litigation without court intervention, the Court should, at a bare minimum, review the documents *in camera* in order to assist the Court in determining whether Respondents' withholding of the records was justified. "If a court is unable to determine from the parties' papers whether withheld documents fall within the claimed exemptions,

it must conduct its own inspection of the withheld documents *in camera* and order disclosure of any non exempt, appropriately redacted material." *Gould*, 89 NY2d at 275, citing *Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 133 (1985) and *Matter of Farbman & Sons v. New York City Health & Hospitals Corp*., 62 NY2d 75, 83 (1984). "Moreover, where the breadth or good faith of the invocation of the statute is called into doubt, the court should make an in camera inspection of the requested documents (*see Matter of City of Newark v. Law Dept. of the City of N.Y.,* 305 A.D.2d 28, 34, 760 N.Y.S.2d 431 [2003])." *Molloy v. New York City Police Dep't,* 50 A.D.3d 98, 100 (1st Dept. 2008).

POINT II

RESPONDENTS' REFUSALS TO ACCEPT AND RESPOND TO FOIL REQUESTS ELECTRONICALLY VIOLATE FOIL §§ 89(3)(b) AND 87(5)(a), AND THIS COURT SHOULD GRANT PETITIONER THE ORDER PETITIONER SEEKS PURSUANT TO CPLR 7803(1) AND THE DECLARATION PETITIONER SEEKS PURSUANT TO CPLR 3001 COMPELLING RESPONDENTS TO DO SO

The NYPD is an "entity that has reasonable means available" to "accept requests for records submitted in the form of electronic mail" and to "respond to such requests by electronic mail." *See* FOIL § 89(3)(b).

The NYPD can also "reasonably make" digital copies of responsive records itself or "by engaging an outside professional service." *See* FOIL § 87(5)(a).

Yet the NYPD did not accept or respond to the Request in this case electronically, and does not accept or respond to FOIL requests electronically as a matter of policy.

To the extent there may be any questions of fact necessary to determine whether the NYPD is an "entity that has reasonable means available" to accept and respond to FOIL requests by email, including any such questions the Court may deem raised based on representations made by Respondents in their opposition, Petitioner respectfully requests the opportunity to address such questions of fact in Petitioner's reply papers, and, if necessary, to seek limited discovery to contest any factual representations Respondents may make.

In this connection, Petitioner requested and received a response from the COOG indicating that the NYPD must accept and respond to requests by e-mail. The FOIL authorizes the COOG – the administrative agency charged with overseeing the implementation of the FOIL - to issue such opinions. *See* FOIL Section 89(1).

> As the body charged with furnishing advisory guidelines and opinions to agencies and individuals concerning FOIL (*see* Public Officers Law § 89[1][b]), the interpretation of the Committee on Open Government should be given deference by the court. *Kwasnik v. City of New York,* 262 A.D.2d 171, 691 N.Y.S.2d 525 (1st Dept 1999), citing *Matter of Miracle Mile Assocs. v. Yudelson,* 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dept 1979).

Pride Int'l Realty, LLC. v. Daniels, 4 Misc. 3d 1005(A), 791 N.Y.S.2d 873 (Sup. Ct. 2004). The COOG's interpretation of the statute should be upheld unless it is irrational or unreasonable. *See, e.g., Howard v. Wyman*, 228 N.Y.2d 434, 438 (1971).

Therefore, in making determinations about whether Respondents must receive and respond to FOIL requests electronically, this Court should accord the COOG's opinion heavy weight.

B. THE COURT SHOULD GRANT PETITIONER THE REQUESTED ORDER PURSUANT TO CPLR 7803(1) DIRECTING RESPONDENTS TO ACCEPT AND RESPOND TO FOIL REQUESTS ELECTRONICALLY

Petitioner seeks relief under CPLR 7803(1) in the nature of mandamus to compel Respondents to accept and respond to FOIL requests electronically – specific ministerial acts that are required by law to be performed. Article 78 retained the substantive law of the common-law writs of mandamus. *See, e.g.,* Alexander, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C7801:1, at 29–30.

Under the substantive law of a writ of mandamus to compel, a party seeking such relief must have "a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief." *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753, 757 (1991); *see also Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 388 (2006).

> A discretionary act "involve [s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v. Tulevech,* 61 N.Y.2d 34, 41, 471 N.Y.S.2d 73, 459 N.E.2d 182 [1983]).

New York Civil Liberties Union v. State, 4 N.Y.3d 175, 184 (2005).

As seen above, Petitioner has a "clear legal right" to the requested relief. And Petitioner made previous written demands in the form of five administrative appeals and language in the Fourth Administrative Appeal specifically stated that Petitioner would seek an order requiring Respondents to accept and respond to FOIL requests

electronically unless Respondents did so voluntarily, all of which Respondents ignored. The Court should therefore grant Petitioner the requested order sounding in mandamus to compel Respondents to accept and respond to FOIL requests electronically.

C. THE COURT SHOULD GRANT PETITIONER THE REQUESTED DECLARATORY JUDGMENT THAT RESPONDENTS' REFUSALS TO ACCEPT AND RESPOND TO FOIL REQUESTS ELECTRONICALLY VIOLATED, AND VIOLATE, THE FOIL

Petitioner also seeks a declaratory judgment that Respondents' refusals to accept and respond to FOIL requests electronically violated, and violate, the FOIL. Declaratory relief is appropriate in this case to determine the parties' rights and responsibilities related to accepting and responding to FOIL requests electronically. The controversy is likely to repeat and likely to evade judicial review. The Court should therefore grant Petitioner the requested declaratory judgment.

POINT III

PETITIONER IS ENTITLED TO ATTORNEY'S FEES UNDER THE FOIL

Section 89(4)(c) of the FOIL grant this Court discretion to award reasonable attorney's fees and costs if Petitioner substantially prevails and show that Respondents had "no reasonable basis for denying access" or that they "failed to respond to a request or appeal within the statutory time."

As seen in the Petition, Respondents had no reasonable basis for denying access to the records requested and failed to respond to the Request and five administrative appeals in a timely and appropriate manner.

To the extent the matter of fees may depend on Respondents' opposition, Petitioner respectfully reserves the right to respond in reply papers.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant a final judgment and order pursuant to CPLR Article 78 and CPLR § 3001 containing the following relief:

(a) Pursuant to CPLR 7806, annulling Respondents' Final Determination and ordering Respondents to comply with their duties under the FOIL, implementing regulations, and related rules, by conducting a meaningful search for the records sought in the Request and granting Petitioner access to non-exempt responsive documents, or appropriate certifications as to the disposition of the requested records or Respondents' inability to locate them, along with the required appropriately particularized written explanations justifying any documents or information redacted or withheld, within a prompt date certain;

(b) Pursuant to CPLR 7803(1), issuing an Order in the nature of mandamus requiring Respondents to accept and respond to FOIL requests by e-mail and to produce documents in electronic format in compliance with §§ 89(3)(b) and 87(5)(a) of the FOIL;

(c) Pursuant to CPLR § 3001, issuing a declaratory judgment that Respondents' refusals to accept and respond to FOIL requests by e-mail and by producing documents in electronic format where available violated and violate those provisions of the FOIL;

(d) Pursuant to Public Officers Law Article 6 § 89(4)(c), ordering the Respondents to pay the reasonable litigation costs and attorney's fees; and

(e) For such other and further relief as to the Court may seem just and proper.

Dated: August 11, 2016
New York, New York

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