

# Gideon Orion Oliver

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## **BY HAND AND BY FIRST CLASS MAIL**

Mr. Jonathan David  
Records Access Appeals Officer  
New York City Police Department  
One Police Plaza – Room 1406  
New York, New York 10038

Re: Administrative Appeal – Constructive Denial  
12/12/14 FOIL Request – NYPD Long Range Acoustic Devices (LRADs)

Mr. David:

I represent clients seeking access to information from the New York City Police Department (“NYPD”). At just before 2:15PM on December 12, 2014, I emailed a request pursuant to the New York State Freedom of Information Law (“FOIL”), §§ 84-90 of the Public Officers Law, and its implementing regulations seeking documents regarding NYPD uses of LRADs (the “Request”) to Records Access Officer Lt. Richard Mantellino.<sup>1</sup>

A copy of the Request is attached as Appendix A to this letter. As set forth more fully below, this is to appeal (1) the NYPD’s constructive denial of the Request and (2) the NYPD’s refusals to accept and respond to the Request electronically.

In anticipation of litigation, please preserve and be prepared to produce any and all records regarding the RAO’s efforts to identify and produce records responsive to the Request, and any and all records regarding the Request, including, but not limited to, electronic and other communications and other records referring to the Request or containing or referring to information about or relating to the Request.

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<sup>1</sup> The Request specifically cites 21 NYCRR Part 1401, as well as the Uniform Rules and Regulations for All City Agencies Pertaining to the Administration of the Freedom of Information Law, Title 43, Rules of the City of New York Chapter 11

## BACKGROUND

Lt. Mantellino received the Request dated December 12, 2014 on December 12, 2014.

In addition to describing the documents related to LRADs requested with reasonable particularity, the Request states: “[p]lease respond to this request by e-mail in the first instance” and “[p]lease provide electronic versions of responsive documents/records where possible.”

At around 2:15PM on December 12, 2014, I received an email response from Lt. Mantellino, styled as an “Automatic reply.” A true copy of that email response is attached as Appendix B to this letter. In pertinent part, it states:

Please be advised that this email cannot accept FOIL requests and/or respond to inquiries or matters related to such. If you have a question regarding any NYPD FOIL related issue, please call (646) 610-6445. If you wish to make a FOIL request, please submit your request in writing to[ . . . the NYPD FOIL Unit at One Police Plaza].”

*See Appendix B.*

During around the week of December 15, 2014, Lt. Mantellino sent the letter dated December 15, 2014, to “Mr. Gordon Oliver” regarding FOIL Req. # 2014-PL-10945. A copy of that letter (the “Gordon Letter”) is attached as Appendix C. The Gordon Letter acknowledges receipt of the Request on December 15, 2014, states that its processing had been assigned to “Police Officer Halk” and that:

Before a determination can be rendered, further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located. I estimate that this review will be completed, and a determination issued, within twenty business days of this letter.

This is not a denial of the records you requested. Should your request be denied in whole or in part, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

*See Appendix C.* Also during around or after the week of December 15, 2014, Lt. Mantellino sent a letter with almost identical wording dated December 19, 2014 addressed to me regarding FOIL Req. # 2014-PL-10989, a copy of which is attached as Appendix D. That letter acknowledges receipt of the Request on December 12, 2014, gives the same information about the processing officer, and then goes on to repeat the same language quoted above.

I have not received any further response from the NYPD to the Request.

### **SECTION 1. APPEAL OF THE CONSTRUCTIVE DENIAL**

As seen above, the NYD first responded to the request it received on December 12, 2014 on December 12, 2014 itself, in the form of Lt. Mantellino's "Automatic reply" email. *See* Appendix B. That email response did not constitute the response required within five days under the FOIL or its implementing regulations. Additionally, as discussed in Section 2 below, that response, and all other subsequent refusals to provide responses by e-mail, violated § 89(3)(b) of the FOIL.

The NYPD next responded to the Request in letters dated December 15 and 19, 2014, variously acknowledging receipt of the Request on December 12 and December 15, 2014. Both letters estimated that a determination would be issued within twenty business days. Both letters explicitly stated that I would receive written notice of any denial, in whole or in part, of my request, along with the name and address of the Records Access Appeals Officer.

Twenty business days came and went as of around January 12, 2015, and there has been no other communication from the NYPD aside from what is attached hereto.

To the extent the NYPD may claim that some communication, not accounted for herein, was sent to me or "Gordon Oliver," please provide specific information regarding any proof that any such communication was sent, and please state specifically why any such communication was not sent by e-mail as requested. This information will be necessary for effective judicial review.

In response to the Request, the Records Access Officer (the "RAO") failed to assist me or my clients "to identify the records sought" or otherwise, in violation of 21 NYCRR § 1401.2(b)(2) and 43 RCNY § 1-03(b) (requiring that the RAO "shall assist members of the public in identifying requested records"). Upon information and belief, the RAO did not conduct a diligent search for responsive records. If the RAO located any records, the RAO failed to comply with the requirements of 21 NYCRR § 1401.2(b)(4) (requiring that, upon locating the records, the RAO make them available promptly or "deny access to the records in whole or in part and explain in writing the reasons therefor) and 43 RCNY § 1-03(c) (same). If the RAO conducted a diligent search and did not locate any records, the RAO failed to comply with the requirements that the RAO "certify that "(i) the agency is not the custodian for such records; or (ii) the records of which the agency is a custodian cannot be found after diligent search" in compliance with 21 NYCRR § 1401.2(b)(7) and 43 RCNY § 1-03(f) (same).

Regardless of what the RAO did or did not do to locate responsive records, I did not hear from the RAO or anyone at the NYPD in response to my request after December 2014. Therefore, the NYPD has constructively denied the request. *See* FOIL § 89(3)(a) (requiring access or denial in writing within specific time periods); 21 NYCRR 1401.5(c) (same); 43 § RCNY 1-05(c) (same); 21 NYCRR § 1401.5(e)(4) ("A failure to comply

with the time limitations described herein shall constitute a denial of a request that may be appealed. Such failure shall include situations in which an agency: . . . (4) fails to respond to a request within a reasonable time after the approximate date given or within twenty business days after the date of its acknowledgment of the receipt of a request”); 21 NYCRR § 1401.7(c) (“If an agency fails to respond to a request as required in section 1401.5 of this Part, such failure shall be deemed a denial of access by the agency”).

The denial of access violated the provisions of the FOIL and implementing regulations guaranteeing access or an appropriate, appealable, written denial stating the reasons for withholding access, along with meaningful notice of appellate rights. *See, e.g.*, FOIL § 89(3)(a) (requiring access or denial in writing within specific time periods); 21 NYCRR § 1401.5(c) (same); 43 RCNY § 1-05(c) (same); FOIL § 89(4)(a) (“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, . . . 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); 21 NYCRR § 1401.7(b) (“Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body designated to determine appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer”); and 43 RCNY § 1-05(6) (“Each writing denying a request in whole or in part shall inform the requesting party of his right to appeal the determination of the agency within thirty days and shall state the name of the person or body designated in the agency to hear such appeals. Such person or body shall be identified by name, title, business address and telephone number”).

The lack of appropriate, appealable, written denial stating the reasons for withholding access, along with meaningful notice of appellate rights, has frustrated my clients’ appellate rights, as well as their rights to seek meaningful judicial review. *See, e.g.*, FOIL § 89(4)(a) (“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, . . . 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); 89(4)(b) (providing for Article 78 review of a final denial of access); 21 NYCRR § 1401.7(d) (“any person denied access to records may appeal within 30 days of a denial”); 21 NYCRR § 1401.7(f) (“A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal”); and 21 NYCRR § 1401.7(i) (“A final denial of access to a requested record, as provided for in subdivision (g) of this section, shall be subject to court review, as provided for in article 78 of the Civil Practice Laws and Rules); 43 RCNY § 1-06 (b) (“When a request for inspection has been denied in writing in whole, or in part by a records access officer, the requesting party shall have thirty days after receipt of the denial within which to appeal. An appeal shall be in writing, addressed to the denying agency’s appeals officer, and shall include the name of the records access officer who denied the request, the date of the request, the date of the denial, the records which were

the subject of the request and the name and address of the appellant”); 43 RCNY § 1-06 (d) (“Within ten business days from the date of actual receipt of an appeal, the appeals officer shall make a written determination either affirming or reversing the denial and shall transmit copies of his or its determination to the appellant, the Law Department and the Committee on Open Government. Determinations affirming denials shall state the grounds for withholding of the requested records and that judicial review of the denial may be obtained in a proceeding under Article 78 of the Civil Practice Law and Rules commenced within four months after determination of the appeal”).

Additionally, as set forth more fully below, the NYPD’s refusal to accept and respond to the Request by electronic means violates §§ 89(3)(b) and 87(5)(a) of the FOIL.

Finally, the NYPD’s refusals to comply with the FOIL and its implementing regulations by providing access to the requested records in whole or in part within the requisite time periods has violated my clients’ rights under the First Amendment to the United States Constitution as well as Article I, Sections 8 and 9 of the New York State Constitution.

I look forward to your response, required within ten (10) business days, or by March 17, 2015 at the latest.

Please provide your response to this appeal by e-mail.

## **SECTION 2. ELECTRONIC REQUESTS AND RESPONSES**

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). This requirement has been in place since 2006.

The NYPD has “reasonable means available” to accept requests for records submitted in e-mail form.

The NYPD’s refusal to accept and respond to the Request by electronic means violates §§ 89(3)(b) (quoted above) and 87(5)(a) of the FOIL (. It also violates the letter and spirit of the provisions of the FOIL and implementing regulations requiring the NYPD to grant public access to its records.

As applied in this case, the NYPD's refusal to accept and respond to the Request has frustrated my clients' rights to access to the documents and information sought, as well as meaningful administrative and judicial review of any withholding or denial of such access, in a timely fashion.

### CONCLUSION

As set forth above, the NYPD's violations of the FOIL and its implementing regulations, including its constructive denial of the Request and other failures to grant access or to deny access in a writing with meaningful notice of appellate rights, along with its refusals to accept and respond to the Request electronically, have violated and continued to violate my clients' rights to access the information and/or their related rights.

These violations of their rights are serious and ongoing and the lack of access to the documents and information sought has caused and continues to cause irreparable harm.

Based on the foregoing, I hope you will grant access to the requested records, and comply with the FOIL by accepting and responding to FOIL requests electronically, immediately.

Thank you for your prompt attention to these matters.

Very truly yours,

/S/

Gideon Orion Oliver

cc: Committee on Open Government  
New York State Department of State  
41 State Street  
Albany, New York 12231