

# Gideon Orion Oliver

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\*Not for service

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## **BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

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

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

Mr. David:

I represent clients who have been seeking access to information from the New York City Police Department (“NYPD”) since their December 12, 2014 request pursuant to the New York State Freedom of Information Law (“FOIL”), §§ 84-90 of the Public Officers Law, 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, regarding NYPD uses of LRADs and other related matters (the “Request”).

Over a month has come and gone since September 11, 2015, the last estimated date for disclosure or other response from the NYPD, without disclosure or other required communication from the NYPD. Almost a year has passed since the Request was filed without any substantive response.

This is to appeal the NYPD’s constructive denials of the Request, as well as the NYPD’s failure to comply with the FOIL’s requirements to receive and respond to FOIL requests electronically.

Please provide your response to this appeal by e-mail promptly within the required time period.

I repeat and remind you of the litigation hold demand contained in the March 2, 2015 First Administrative Appeal directed to you: “In anticipation of litigation, please preserve and be prepared to 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.”

By way of relevant background between December 12, 2014 and the first administrative appeal of the NYPD’s constructive denials of the Request dated March 2, 2015, please find attached courtesy copies of the following documents related to the Request, all of which you have:

1. The March 2, 2015 First Administrative Appeal – Constructive Denial letter addressed to you delivered by hand on March 2, 2015 and by First Class Mail, including the demand for preservation and litigation hold, including the following Appendices attached thereto:
  - A. The December 12, 2014 Request;
  - B. The December 12, 2014 form email from NYPD Lt. Richard Mantellino to me;
  - C. The December 15, 2014 form letter from Lt. Mantellino to “Gordon Oliver” related to what NYPD designated as FOIL Req #: 2014-PL-10945 acknowledging receipt of the Request on December 15, 2014 and estimating that further review would be completed and a determination issued “within twenty business days” of December 15, 2014; and
  - D. The December 19, 2014 form letter from Lt. Mantellino me related to what NYPD designated as FOIL Req #: 2014-PL-10989 acknowledging receipt of the Request on December 15, 2014 and estimating that further review would be completed and a determination issued “within twenty business days” of December 19, 2014;
2. The April 27, 2015 form letter from Lt. Mantellino to me indicating that responsive records were “located in several locations and ... difficult to search or locate” that “numerous records must be reviewed in order to determine whether disclosure is required” and “records [had] not yet been received from other NYPD units” and estimating based on those factors that “the processing of [the Request would] be completed by June 22, 2015”;
3. The May 18, 2015 letter from you to me stating, *inter alia*, that “[i]nasmuch as [the] FOIL was not denied, the appeal lacks the predicate denial of access and is, therefore, premature” and noting that ; and

4. The August 17, 2015 letter from Lt. Mantellino to me indicating that “numerous records must be reviewed in order to determine whether disclosure is required” and estimating based on that factor that “the processing of [the Request would] be completed by September 11, 2015”.

Also attached please find:

5. March 3, 2015 letter-request for advisory opinion to Robert Freeman – New York State Committee on Open Government (“COOG”) requesting an advisory opinion in connection with Point 2 of the March 2, 2015 Second Administrative Appeal, specifically whether FOIL 89(3)(b) requires the NYPD to accept and respond to FOIL requests by electronic means; and
6. January 21, 2010 COOG Advisory Opinion FOIL-AO-107965 provided by COOG in response to the March 3, 2015 letter-request (opining “that if an agency ... has the ability to receive and respond to requests via email, it is required to do so”).

Additionally, please be advise that, on August 12, 2015, I spoke with Police Officer Halk to complain about the Department’s constructive denials of the Request. Officer Halk did not have any update about the request.

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

I repeat and reiterate all of the facts and arguments set forth in the corresponding section of the March 2, 2015 administrative appellate letter as if fully set forth herein.

In December of 2015, the NYPD initially responded to the FOIL and estimated a response would be completed by around January 12, 2015. Only after receiving the March 12, 2015 First Administrative Appeal did the NYPD communicate any further. An April 27, 2015 form letter estimated that a determination would be forthcoming by June 22, 2015.

You then sent a May 18, 2015 letter stating that the FOIL had not been denied and the appeal was therefore premature, citing the NYPD’s promise that a determination would be forthcoming by June 22, 2015.

That position flies in the face of the timing and other related requirements in the FOIL and related regulations cited in the First Administrative Appeal. The FOIL and related regulations require access to the records sought or a written denial containing required certifications - all within specific time periods. Failure to provide disclosure and/or an appropriate written denial, including – but not limited to - by providing approximate dates for determination that are unreasonable under the circumstances. *See,*

e.g., 21 NYCRR 1401.5(e); 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”); 43 RCNY 1-05(d) (“If the agency does not make a determination with respect to the request within ten business days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals”).

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 Section 8 of the New York State Constitution.

I look forward to your response, as required, within ten business days.

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

I repeat and reiterate all of the facts and arguments set forth in the corresponding section of the March 2, 2015 administrative appellate letter as if fully set forth herein.

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.

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.”

As stated in the attached January 21, 2010 COOG Advisory Opinion FOIL-AO-107965 provided by COOG in response to my March 3, 2015 letter-request seeking an advisory opinion related to Section 2 of the First Administrative Appeal, “if an agency ... has the ability to receive and respond to requests via email, it is required to do so”.

The NYPD has “reasonable means available” to accept and respond to requests

for records submitted in e-mail form such as the Request. The NYPD has the ability to receive and respond to requests via email.

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, including their rights under the First Amendment to the United States Constitution as well as Article I Section 8 of the New York State Constitution, and also including their rights to meaningful administrative and judicial review of any withholding or denial of such access, in a timely fashion.

### CONCLUSION

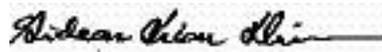
As set forth above, the NYPD's violations of the FOIL and its implementing regulations, including its constructive denial of the Request and other failures to grant access or to deny access in a writing with meaningful notice of appellate rights, along with its refusals to accept and respond to the Request 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.

Please provide the requested records in electronic format by e-mail.

Thank you for your attention to these matters.

Very truly yours,



Gideon Orion Oliver

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