

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

In the Matter of the Application of
THE BRONX DEFENDERS

Index No.:

Petitioner,
– against –

The NEW YORK CITY POLICE DEPARTMENT,
and WILLIAM BRATTON, in his official capacity as
Comissioner of the New York City Police Department,

Respondents.

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

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
APPLICATION FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES**

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PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of The Bronx Defenders and the public to have access to records held by the New York City Police Department (“NYPD”) concerning the policies and procedures, and accounting of money and property seized by the NYPD each year. Currently, the NYPD does not publicly account for how much money and property it seizes incident to arrest, or how such resources are spent or allocated.

After news reports based on government documents showed that the NYPD keeps millions of dollars in cash and property each year—including money and property seized from The Bronx Defenders’ clients—The Bronx Defenders submitted a request under the Freedom of Information Law, Pub. Officers L. §§ 84-90 (“FOIL”), on July 29, 2014 (the “Request”). The Request sought forty (40) different individual categories of records, which can roughly be divided into two broad categories: (a) documents pertaining to NYPD policies and procedures, and (b) documents pertaining to the value and accounting of money and property seized by the NYPD and whether such property was returned or kept, and for what purpose.

For over one year and seven months, the NYPD did not provide a single record in response to the Request. Finally, on March 18, 2016, after numerous extension requests, missed deadlines and boilerplate responses, the NYPD issued a response producing only an electronic copy of the NYPD Patrol Guide and three documents: (1) an 11-page document titled “NYPD Property Clerk Division 2013 Accounting Summary”; (2) a three-page document titled “NYPD Revenue Generated for July 1, 2012 to June 30, 2013;” and (3) an electronic copy of the NYPD Patrol Guide.

The NYPD did not produce any additional documents responsive to Petitioner’s numerous requests, nor did the NYPD even identify the categories of the Request to which the NYPD believed the documents it produced were responsive. Instead, the NYPD stated

cryptically that it was “unable to locate [additional] records responsive to [the R]equest based on the information ... provided” in the Request. (Verified Petition (“Pet.”). ¶ 4 & Ex. 10 (the “Denial”).) At no time did the NYPD seek clarification or otherwise seek to assist Petitioner to identify the records sought with greater specificity, nor did the NYPD certify that it does not possess the records or that it performed a diligent search to locate additional records, as required by Section 89(3) of the Public Officers Law. In any event, an assertion that the NYPD could not locate any further responsive documents would not be credible given the paltry amount of detail contained in the documents the NYPD did produce (which, as the documents’ names suggest were “summaries” and “reports” of information contained in other records).

The Bronx Defenders timely filed an administrative appeal of the constructive denial of the bulk of the Request on April 13, 2016. The NYPD did not respond to this appeal.

Having exhausted its administrative remedies, The Bronx Defenders now seeks judicial relief to compel the NYPD to comply with its legal obligation to conduct a diligent search of its records and produce all records responsive to the Petitioner’s request.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Dearth of Information Concerning NYPD Seizure of Millions in Property and Money

In January 2014, the website *Gothamist* reported that each year the NYPD retains millions of dollars and property through civil forfeiture and millions more in unclaimed sums. (Pet. ¶ 14, Ex. 1.) The figures were derived from documents obtained from the New York City Office of Management and Budget. The NYPD, however, does not publicly account for how much money and property it receives, or how it is spent or allocated. (*See* Pet. ¶¶ 14-15.)

These sums are derived from the more than three hundred thousand people arrested by the NYPD each year. In the vast majority of those cases, the arresting officers seize some form

of personal property from the person arrested. All of the property is inventoried in the NYPD's online Property and Evidence Tracking System. While much of the seized property is ultimately returned to the arrested individual, large amounts are permanently retained by the NYPD. For instance, some portion of the retained property is converted to NYPD ownership through the civil forfeiture process, and some portion is converted to NYPD ownership because the arrested person is unable to retrieve the property. (*See* Pet. ¶ 16.)

As a result of these NYPD practices, The Bronx Defenders' attempt to acquire information about the seizure of property and money is critical to the organization's understanding of a police procedure affecting many of its clients. It is also critical to helping clients of The Bronx Defenders regain their rightful property and to work with lawmakers to ensure due process and fairness in NYPD property seizure policy and practices. The paramount need for transparency from the NYPD has been recognized by New York City Council members Ritchie J. Torres and Daniel R. Garodnick who recently introduced a bill that would require the NYPD to report seized property data on an annual basis. (*See* Pet. ¶ 18 & Ex. 3.) No action has been taken yet on the bill since its introduction in November 2015.

B. The Bronx Defenders' FOIL Request and the NYPD's Delays

Several months after the *Gothamist* article, The Bronx Defenders sent the Request for information under FOIL on July 29, 2014. (Pet. ¶ 19 & Ex. 4.) The Request sought a variety of records pertaining to NYPD policies and procedures regarding, and accounting for, money and property seized by the NYPD during arrests, including information about property held for safekeeping during the arrest and booking process, property held as potential evidence in a criminal proceeding, and property subject to civil or criminal forfeiture. For example, the Request sought "[t]he total value of money invoiced by the NYPD pursuant to investigations not leading to arrests for the last fiscal year"; "[t]he total value of money invoiced by the NYPD

pursuant to arrests for the last fiscal year, broken down by precinct”; and “[t]he total value of money invoiced by the NYPD pursuant to investigations not leading to arrests for the last fiscal year, broken down by precinct” (*Id.* ¶¶ 5-7). The Request also sought, *inter alia*, “[a] complete accounting record for the last fiscal year detailing the distribution of forfeiture monies retained by the NYPD pursuant to arrests and investigations, [including] the total value of monies distributed to the NYPD Pension Fund, to the annual budget, etc.” (*Id.* ¶ 13.)

The NYPD acknowledged the request in a boilerplate form letter and extended its time to respond beyond the statutory 20 days to February 9, 2015. (Pet. ¶ 22 & Ex. 5.) Checkmarks were placed in predetermined boxes indicating that the time frame was based on three factors and not others:

- Records are located in several locations and are difficult to search or locate.
- Records are archived and are difficult to locate and retrieve.
- Numerous records must be reviewed in order to determine whether disclosure is required.
- Record(s) have not yet been received from other NYPD unit(s).
- Request is extremely voluminous and/or complex.
- Other:

(*Id.*) The letter further indicated:

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 of the name and address of the Records Access Appeals Officer.

(*Id.*) When no records (or further response) were received by the end of July 2015, The Bronx Defenders contacted the NYPD again by letter. (Pet. ¶ 23 & Ex. 6.) The NYPD responded with a substantially identical boilerplate form letter, except that it now indicated the request would be completed by September 11, 2015, and removed the check from the box next to “Record(s) have not yet been received from other NYPD unit(s). (Pet. ¶ 23 & Ex. 7.)

Having still not received any responsive documents, The Bronx Defenders submitted an administrative appeal of the constructive denial of its request on December 2, 2015. (Pet. ¶ 24 & Ex. 8.) In response, the NYPD issued a letter denying the appeal as “premature” and stating:

Contrary to your assertion, your request was not denied. In fact, the RAO complied with the provisions of [FOIL] in that he acknowledged receipt of your request in a timely manner, provided you with an approximate date when a determination of time required to process your request has exceeded the initial time estimate due to the extensive nature of your request, the search for and review [sic] potentially responsive records, the review of related legal issues, the large volume of requests processed by the NYPD’s FOIL unit, and the availability of staff members to process requests.

(Pet. ¶ 24 & Ex. 9.) The letter further represented that The Bronx Defendants would receive a determination by February 26, 2016—more than one and a half years after the Request was submitted. The NYPD did not issue a determination or produce any responsive documents on that date.

C. The NYPD’s Belated and Inadequate Determination

Finally, on March 18, 2016—one year and seven months after Petitioner initially filed its Request—the NYPD issued a half-page written response (the “Denial”), stating that it was providing an electronic copy of the NYPD Patrol Guide and two additional documents “[r]esponsive to [the] request”: (1) the NYPD Property Clerk Division 2013 Accounting Summary and (2) the NYPD Revenue Generated for July 1, 2012 to June 30, 2013. (See Pet. ¶ 25 & Ex. 10.) The Denial then stated, “In regard to the remaining records which you requested, this unit is unable to locate records responsive to your request based on the information you provided.” (*Id.*)

The Accounting Summary comprised a set of spreadsheets for each month of the calendar year 2013 (except, for some reason, for February 2013), including a “Currency Summary,” “Currency Balances,” and “Currency Invoice Balances,” and a chart breaking down “disposals”

of the property, whether by returning it to the owner or “destruction.” (Pet. Ex. 11.)¹ The Revenue Report is a three-page spreadsheet that appears to show “Revenue Generated” for fiscal year 2013 (July 2012 to June 30, 2013). (See Pet. Ex. 12.)

Based on the Accounting Summary and Revenue Report, it appears that the Property Clerk held tens of millions of dollars (usually around \$68 million) during every month in 2013, and the NYPD generated over \$6 million in revenue for the City from seized currency and property sales during the 2013 fiscal year. (See Pet. Exs. 11-12.)

The NYPD also provided the NYPD Patrol Guide, in electronic form, in full. Sections 218-01 through 218-57 contain policies that guide patrol officers and their supervisors on what procedures to follow when property is seized from a person pursuant to an arrest. However, these policies do not address numbers 1, 2, 3, 9, 33 or 37 of the Petitioner’s Request, which demanded the following: policy documents about when money is distributed or transferred from the NYPD Property Clerk to other NYPD divisions (§ 1), when money is distributed external law enforcement agencies (§ 2), where money is held or deposited by the NYPD (§ 3), when and how the NYPD determines to pursue civil forfeiture of money or other property (§§ 9, 33) and as for when and how property is returned to its owner (§ 37). Although some provisions of the Patrol Guide pertain to the NYPD Property Clerk, the Property Clerk Division has a separate Property Guide that describes the NYPD’s property tracking system and also contains the Property Clerk’s policies and procedures for storing and tracking property. See *Newton v. City of New York*, 779 F.3d 140, 153 (2d Cir. 2015). The NYPD did not provide the Property Guide in the records it disclosed.

¹ For reasons that are not clear, the January and March spreadsheets do not include the fourth spreadsheet breaking down disposals. (See Pet. Ex. 11 at 10-11.)

Even though the Accounting Summary and Revenue Report were necessarily created by compiling information from other (presumably electronic) records, the NYPD produced no additional documents responsive to the Request. The NYPD also did not identify the specific categories of records in the Request to which it was responding, nor did it identify the categories for which it was not able to locate documents. The NYPD also failed to certify that it did not have possession of the additional requested records or that such records could not be found after diligent search, as required by the Public Officers Law. Although the Denial states that the NYPD was unable to locate records “based on the information you provided,” the NYPD did not seek clarification or any additional information to enable it to respond fully to the Request. (*See* Pet. Ex. 10.)

On April 13, 2016, Petitioner timely appealed the constructive denial of the Request. Pursuant to Public Officers Law Section 89(4)(a), the NYPD was required to respond within “ten business days of the receipt of such appeal”—or by April 27, 2016—“in writing,” to explain “the reasons for further denial, or [to] provide access to the record sought.” To date, The Bronx Defenders has received no written determination of its Appeal.

The Bronx Defenders initiated this Article 78 proceeding because the NYPD’s ongoing failure to either provide records, to adequately respond to the Request (apart from the minimal production of documents to date), or to respond in any way to the Appeal amounts to a constructive denial.

ARGUMENT

The Court should order the NYPD to produce the records sought in The Bronx Defenders’ Request forthwith. The Request provided more than sufficient information to locate responsive records, and the nature of the documents the NYPD did produce demonstrates that additional responsive records must exist. Because the NYPD failed to certify that it does not

possess further responsive records or that it was not able to locate such records after a “diligent search,” it has not met its burden to justify nondisclosure.

I. THE FOIL STATUTE ESTABLISHES A BROAD RIGHT OF PUBLIC ACCESS TO GOVERNMENT RECORDS AND PLACES THE BURDEN ON THE AGENCY TO JUSTIFY FAILURE TO DISCLOSE

A. FOIL Is to Be Liberally Construed In Favor of Disclosure

The Freedom of Information Law, codified at sections 84 to 90 of the New York Public Officers Law, establishes New York State’s strong commitment to open government and public accountability. *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565, 505 N.Y.S.2d 576, 578 (1986). As noted in the statute’s 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.

Pub. Officers L. § 84. In amending the statute to increase public access to government records in 2008, the Legislature re-emphasized the breadth of the statute’s intended reach:

The legislation supports the position that has been taken in numerous court decisions that government records in all forms, including non-paper records, are preemptively open for public inspection and copying unless those records fall within a specific statutory exemption. The courts also have repeatedly ruled that these exemptions are to be narrowly construed.

See Legislative Memo, Justification for A.809-C, 231st Sess., Reg. Sess. (2008). Accordingly, courts have long held under the statute that “all records of governmental agencies are presumptively available for public inspection and copying, without regard to the status, need, good faith or purpose of the applicant requesting access.” *Scott, Sardano & Pomeranz v.*

Records Access Officer of City of Syracuse, 65 N.Y.2d 294, 296-97, 491 N.Y.S.2d 289, 291 (1985).²

The scheme of FOIL is straightforward. Section 87 provides that government agencies “shall ... make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that fall within certain exemptions specified in the statute.” Pub. Officers L. § 87(2). Failure to provide either written explanation of the reason(s) for a denial, to respond within the statutory timeframe, or to provide access to the requested materials as required by Section 89, constitutes a “constructive denial” of the FOIL request and entitles the person who made the request to seek relief pursuant to Article 78.

The New York Court of Appeals has repeatedly held that FOIL is to be liberally construed to ensure maximum access to government records. *Scott, Sardano & Pomeranz*, 65 N.Y.2d at 296-97, 491 N.Y.S.2d at 291 (citing cases). It is well settled that “the burden of proof rests solely with the [agency] to justify” a denial of a FOIL request. *Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 463, 849 N.Y.S.2d 489, 494 (2007) (citations omitted); *see also New York State Rifle & Pistol Assn, Inc. v. Kelly*, 55 A.D.3d 222, 224, 863 N.Y.S.2d 439, 441 (1st Dep’t 2008) (“[T]he burden at all times rests with the agency to justify any denial of access to requested records.”). Satisfying this burden of proof requires an agency seeking to prevent disclosure to “articulate[] particularized and specific justification” for denying access. *See Data Tree LLC*, 9 N.Y.3d at 462-63, 849 N.Y.S.2d at 494 (and cases cited therein). If the agency cannot meet that burden, “full disclosure is compelled.” *Scott, Sardano & Pomeranz*, 65 N.Y.2d at 297, 491 N.Y.S.2d at 291; *see also Data Tree*, 9 N.Y. 3d at 463, 849 N.Y.S.2d at 494 (“If the Clerk fails

² *See also Matter of Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492, 619 N.Y.S.2d 695, 697 (1994); *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 71 (1984).

to prove that a statutory exemption applies, FOIL ‘compels disclosure, not concealment.’”) (citation omitted).

B. The Agency Must Disclose Responsive, Non-Exempt Records, or Certify that it Could Not Locate Such Records

A basic requirement of FOIL is that, “[w]hen faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclose, or certify that it does not possess the requested document and that it could not be located after a diligent search.” *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440-41, 808 N.Y.S.2d 568, 571 (2005); *see also* Pub. Officers L. § 89(3). Although the statute does not specify the manner in which an agency must make this certification, failure to make any certification of non-possession and/or a “diligent search” is, on its face, insufficient to satisfy the agency’s burdens under the statute. *Cf. De Fabritis v. McMahon*, 301 A.D.2d 892, 893-94, 754 N.Y.S.2d 117, 118-19 (3d Dep’t 2003) (remanding to Supreme Court because court was “unable to determine if respondent fulfilled its obligation [under the statute] because the record lack[ed] any evidence of a statement or certification by [the agency] that all records had been provided or that a diligent search had been conducted”).

The statute requires that records be “reasonably described” by the requester, Pub. Officers L. § 89(3), but the Court of Appeals has squarely placed the burden on the agency-respondent to “establish that [a] demand [i]s insufficient for purposes of enabling the[agency] to locate and identify the documents sought.” *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 247, 508 N.Y.S.2d 393, 393-4 (1986). Accordingly, regulations promulgated pursuant to FOIL require agencies to designate a records officer to “assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records.” 21 N.Y.C.R.R. §

1401.2(b)(2). In other words, it is the agency's obligation to seek clarification or request additional information as necessary in order to enable a complete response to the request. *See id.*; *see also* N.Y. Dep't of State, Comm. Open Gov't, Advisory Opinion FOIL-AO-16340 (Dec. 14, 2006), available at <http://docs.dos.ny.gov/coog/ftext/f16340.htm>; N.Y. Dep't of State, Comm. Open Gov't, Advisory Opinion FOIL-AO-16077 (July 18, 2006), available at <http://docs.dos.ny.gov/coog/ftext/f16077.htm>.³

These obligations apply whether the requested records exist in paper form or in an electronic database. Indeed, although the statute expressly does not "require any entity to prepare any record not possessed or maintained by such entity" (with limited exceptions not relevant here), the law was amended in 2008 to make clear 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." Pub. Officers L. § 89(3). The statute further provides that "[a]ny 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." *Id.* (emphasis added).⁴ Under the amended statute, courts hold that where records are maintained electronically, and a respondent "offer[s] no evidence that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document from the virtual files through an electronic word search ... or other reasonable technological effort," the agency has

³ FOIL authorizes the Committee on Open Government to oversee and issue advisory opinions interpreting FOIL. Pub. Officers L. § 89(1)-(2). Because the Committee is the administrative agency charged with oversight of the Freedom of Information Law, its interpretation of the statute, "if not irrational or unreasonable, should be upheld." *Howard v. Wyman*, 28 N.Y.2d 434,438, 322 N.Y.S.2d 683, 686-7 (1971).

⁴ Those amendments followed a decision from the Court of Appeals in 2007 that reached largely the same conclusion. *See Data Tree*, 9 N.Y. 3d at 464, 849 N.Y.S.2d at 495. Reasoning that "FOIL does not differentiate between records stored in paper form or those stored in electronic format," the Court held that "[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" under the statute. *Id.* at 464-64, 849 N.Y.S.2d at 495-96.

not met its burden under the statute. *Pflaum v. Grattan*, 116 A.D.3d 1103, 1104-05, 983 N.Y.S.2d 351, 352-53 (3d Dep't 2014); *see also* N.Y. Dep't of State, Comm. Open Gov't, Advisory Opinion FOIL-AO-18863 (Apr. 5, 2012) (explaining that if the equivalent of a phone book were maintained electronically, a request for listings of all individuals named "John" (which would be burdensome to satisfy if the records existed only in paper form) would be reasonable where, "by entering queries on a keyboard or engaging in a similar exercise, an agency employee can quickly extract all of the listings").

II. THE NYPD HAS FAILED TO MEET ITS BURDEN TO JUSTIFY ITS FAILURE TO PRODUCE THE REQUESTED RECORDS

The NYPD's response to the Request does not meet the agency's burden under FOIL to justify nondisclosure. The bare statement that the "unit is unable to locate records responsive to your requested based on the information you provided" (Pet. Ex. 10), is not a certification that the records do not exist, and the Denial does not even state (let alone certify) that the NYPD undertook a "diligent search" and was unable to locate the records. In addition, at no point in the year and seven months that the NYPD spent processing the initial application did the agency state that the descriptions of the records sought were insufficient, nor did the agency seek any clarification of any portion of the Request.⁵ Because the NYPD has not met its burden under the statute to justify failure to disclose the requested records, "full disclosure is compelled." *Scott, Sardano & Pomerantz*, 65 N.Y.2d at 297, 491 N.Y.S.2d at 291; *see also Beechwood Restorative Care Ctr.*, 5 N.Y.3d at 440-41, 808 N.Y.S.2d at 571 (2005); *Konigsberg*, 68 N.Y.2d at 247, 508 N.Y.S.2d at 393-4 ; N.Y. Dep't of State, Comm. Open Gov't, Advisory Opinion FOIL-AO-16340 (Dec. 14, 2006), available at <http://docs.dos.ny.gov/coog/ftext/f16340.htm>.

⁵ In fact, the NYPD's form responses seeking extensions of time to respond to the requests were based only on the assertions that "numerous records must be reviewed in order to determine whether disclosure is required"; "records have not yet been received from other NYPD units"; and "Request is extremely voluminous and/or complex."

It is not surprising that the NYPD could not certify that it was unable to locate additional records after a diligent search, since additional responsive records plainly do exist. The NYPD's assertion that it was "unable to locate records responsive to [the] request based on the information provided" is simply not credible. *Cf. Data Tree*, 9 N.Y.3d at 462, 849 N.Y.S.2d at 494 (agency must meet its burden "in more than just a plausible fashion"). The Accounting Summary and Revenue Report are by their nature "*summaries*" of data that exist elsewhere in the NYPD's files. For example, a chart listing the number of "RTOS" and "Destructions" in a given month, on a per-borough basis, must be drawn from data from the precincts within each borough. Presumably, the totals from each precinct are not merely numbers scribbled on a post-it note. Rather, the disposals were surely documented with details about the nature of the property and the circumstances of how such property was obtained and disposed of. And insofar as the NYPD is accounting for revenue generated on a weekly, borough-by-borough basis, it is simply not plausible that a major city agency has no records that account for where that revenue ends up.

In fact, the NYPD computerized property tracking system, which inventories all property and cash that is seized incident to an arrest, was designed specifically to allow automation and streamlining of information regarding property held by the NYPD and large-scale "data mining throughout department units." *See* New York City Police Department, "Capgemini and NYPD Property and Evidence Tracking System (PETS) Case Study," (application from the designers of the NYPD's property management system to become a Computerworld Honors Program laureate) available at http://www.cwhonors.org/case_studies/2012finalists/innovation/3000.pdf. Through use of this system, it should be a fairly straightforward process to obtain the records delineated in the Request.

In sum, the Request sets forth detailed categories of information in a straightforward manner. Even if Respondents do not maintain records sought by Petitioner in the precise form set forth in the paragraphs of the Request, the NYPD is obligated to produce responsive records if they can be generated by pulling the relevant information from the agency's electronic databases. *See* Pub. Officers L. § 89(3); *Data Tree*, 9 N.Y.3d at 464-64, 849 N.Y.S.2d at 495-96.

The NYPD's apparent failure to perform the required diligent search for responsive records constitutes an unlawful constructive denial of the Request. The Court should instruct the Respondent to undertake a diligent search for responsive records and produce them within 30 days.

III. PETITIONER IS ENTITLED TO REASONABLE ATTORNEYS' FEES

The Bronx Defenders and Davis Wright Tremaine LLP request reasonable attorneys' fees and other litigation costs under FOIL. This court has the discretion to award fees and costs when the moving party has "substantially prevailed" in its Article 78 petition and the government agency "has no reasonable basis for denying access" to the records sought or "the agency failed to respond to a request or appeal within the statutory time." Pub. Off. Law § 89(4)(c).

FOIL was amended by the legislature in 2006 to make it easier to obtain attorneys' fees. *See, e.g., New York Civ. Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338, 926 N.Y.S.3d 732, 734 (3d Dep't 2011) (examining purposes of counsel fee award and legislative history). According to the legislative history, the bill "strengthen[ed] New York State's Freedom of Information Law by making it easier for citizens to recover attorneys' fees from government agencies that fail to promptly respond to reasonable FOIL requests." N.Y. Bill Jacket, 2006 S.B. 7011, Ch. 492. This was in order 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.” *City of Saratoga Springs*, 87 A.D.3d at 338, 926 N.Y.S.3d at 734.

Under this standard, the Petitioner need only establish that it has substantially prevailed in this Article 78 and that Respondent *either* had “no reasonable basis for denying access” to the records sought by The Bronx Defenders *or* “failed to respond to a request or an appeal within the statutory time.” Pub. Off. Law § 89(4)(c); *Kohler-Hausmann v. New York City Police Dep’t*, 133 A.D.3d 437, 438, 18 N.Y.S.3d 848, 849 (1st Dep’t 2015) (remanding for attorney fees on constructive denial).

For all of the reasons discussed above, the NYPD constructively denied the Request after failing to issue a written determination within the 10-business-day statutory period, or by April 27, 2016. The Bronx Defenders and Davis Wright Tremaine LLP are therefore entitled to attorneys’ fees for bringing this Article 78 to enforce FOIL.

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CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Court order the New York City Police Department to perform an adequate search for the records requested in the Petitioner's July 29, 2014 FOIL request and disclose all portions of the responsive records that are not subject to any exemption or other privilege, and to award the Petitioner its attorneys' fees and litigation costs.

Respectfully Submitted,



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