

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

In the Matter of the Application of
THE BRONX DEFENDERS,

Petitioner,

– against –

The NEW YORK CITY ADMINISTRATION FOR
CHILDREN’S SERVICES, and JESS
DANNHAUSER, in his official capacity as
Commissioner of the Administration for Children’s
Services,

Respondents.

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

Index No.:

**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 petition seeks to vindicate the public's statutory right to access records regarding an audit that showed New York City's Administration for Children's Services ("ACS" or "Agency") was biased against, and more punitive to, Black families.

After the ACS Commissioner publicly touted an ongoing agency-wide racial equity audit in 2020, advocates sought information about its results. ACS failed to share the audit report, until Petitioner The Bronx Defenders served a request pursuant to New York's Freedom of Information Law ("FOIL") seeking the audit report, as well as information that ACS provided to the auditor, communications between ACS and the auditor, and ACS leadership's response. After months, the Agency produced the audit report, and it became clear why the Agency had attempted to bury it: the damning results concluded that ACS is a predatory system targeting Black parents, holds pervasive anti-Black stereotypes about the ability of Black parents to provide for their children, and presumes Black parents to be a risk to their children.

After producing the audit report, the Agency unilaterally concluded that it need not meaningfully respond to the remainder of Petitioner's FOIL request. Following negotiations and Petitioner's internal appeal, the Agency has produced an incomplete set of documents with overbroad redactions and boilerplate claims of statutory exemptions that fall far short of its burden "to justify any denial of access to requested records." *N.Y. State Rifle & Pistol Assn., Inc. v. Kelly*, 55 A.D.3d 222, 224 (1st Dep't 2008). ACS thus continues to hide its leadership's response to the audit report's grave findings. This petition challenges ACS's violation of FOIL and demands government transparency on this issue of vital importance to the public.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Background

On October 28, 2020, in testimony before the New York City Council, then-ACS Commissioner David Hansell touted that ACS was partnering with an organization called National Innovation Service (“NIS”) “to conduct an evaluation of [their] systems and activities as they relate to the racial equity experiences, needs, and priorities of frontline staff, families, and communities, and to identify key areas of intervention to drive system-level change.”¹ The racial equity audit (“Racial Equity Audit” or “Audit”) was necessary, according to Commissioner Hansell, because “Black/African American and Latinx/Hispanic families experience the child welfare system in NYC differently at every key decision point, as compared with White and Asian families,” meaning there was “essential work to do to address racial inequities within ACS.”²

In the following months, ACS continued, publicly, to attach importance to the Racial Equity Audit, lauding it as a mechanism to spur system-level change in January and July 2021 reports. *See* Pet. ¶ 11.

B. Procedural History

Considering the stark disparities in ACS’s treatment of Black and white families, advocates requested that the Agency disclose the audit report (“Report”). ACS did not. On December 8, 2021, Petitioner submitted a FOIL request seeking 13 categories of documents regarding the Audit, including as relevant here, the Report; communications and information exchanged between ACS

¹ *Oversight—Racial Disparities in the Child Welfare System*, N.Y. City Council Comm. on Gen. Welfare, at 19 (Oct. 28, 2020) (testimony of David Hansell), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9027169&GUID=F8F2C79D-9641-475C-8942-C994578F11A1>.

² *Id.* at 3.

and NIS; communications to ACS staff; and responses by ACS leadership. *See* Pet. ¶ 14; Exhibit (“Ex.”) A.³

Following more than four months of arbitrary timelines, missed deadlines, and extensive advocacy by Petitioner, *see* Pet. ¶¶ 15-16, ACS produced the Report and two accompanying presentations on April 27, 2022. *Id.* ¶ 16. The Report was alarming: it found that ACS is “a predatory system that specifically targets Black and brown parents”; ACS is more likely to give white parents “leniency with respect to removals and reunifications” of children; and ACS employees hold “pervasive anti-Black stereotypes about the abilities of Black and Brown parents to provide for their children.” Ex. B, Report, at ACS_001893-94. The Audit also found that the management culture at ACS involves “fear and intimidation,” incentivizing ACS staff to remove children from their home to protect staff from criticism and retribution from ACS leadership. *Id.* at ACS_001900.

ACS thus complied with Request 2 but not the remaining requests, stating it would produce remaining documents on a rolling basis. Pet. ¶ 16. At no time did ACS agree to speak with Petitioner about the requests or production. *Id.* ¶ 15.

On June 8, 2022, ACS extended its deadline to September 28, 2022. *Id.* ¶ 17. ACS failed to meet that deadline and again extended to December 19, 2022—more than a year after the FOIL request was first served. *Id.* With ACS constructively denying the remaining requests, Petitioner appealed to ACS’s FOIL Appeals Officer, who denied the appeal but imposed a December 15, 2022 deadline on the FOIL officer. *Id.* ¶ 18. The Appeals Officer further stated that “in our judgment the main gravamen of your request – the final NIS report and power-point slide deck – were produced in their entirety some months ago.” *Id.* In other words, ACS took it upon itself to

³ All exhibits are attached to the Petition. *See* Pet. ¶¶ 57-66.

determine that Petitioner was uninterested in 12 of the 13 FOIL requests. Petitioner never indicated any intention to limit the scope of its FOIL requests. To the contrary, Petitioner persistently asked ACS to comply with all 13 requests. *See id.* ¶¶ 15-18.

C. ACS's Final Response and Petitioner's Appeal

On December 14, 2022, ACS partially granted and partially denied the Request. *See id.* ¶ 19; Ex. C. ACS responded in three ways: it produced documents, many of which were heavily redacted; stated it could not locate documents; and withheld documents. *See Pet.* ¶ 19.

The produced documents included communications between ACS and NIS, ACS policy documents, and internal data reports. *Pet.* ¶¶ 27, 30. Despite extensive redactions, *see id.* ¶ 28, the documents provided some insight, including that ACS internally touted the Audit: Commissioner Hansell sent a staff-wide email on October 26, 2020, lauding the Audit as part of “efforts to make ACS an antiracist organization.” *See Ex. J*, at ACS_000216-17. They also demonstrated ACS leadership’s heavy involvement in designing the Audit, *see, e.g., id.* at ACS_001521 (Commissioner Hansell’s redacted comments on the research plan); leadership’s scrutiny of the Report, *see, e.g., id.* at ACS_001830-31 (ACS leadership meeting about the Report); and leadership’s efforts to assure themselves that the Report would be confidential, *see id.* at ACS_001744.

Significantly, the documents included contracts and memoranda of understanding between ACS, NIS, and a third party, Casey Family Programs (“CFP”), which revealed that CFP secured NIS’s services, defined the services to meet CFP’s objectives, and compensated NIS. On September 30, 2020, CFP and NIS executed a “Services Agreement” (“CFP-NIS Agreement”). *Ex. G*, at ACS_001483-94. Under the CFP-NIS Agreement, NIS was to perform the Racial Equity Audit and draft the Audit Report from September to December 2020, and CFP would pay NIS

\$163,000. *Id.* at ACS_001490-93. On November 25, 2020, months after the Audit was underway, NIS and ACS entered a Memorandum of Understanding (the “NIS-ACS MOU”) under which NIS would perform a “Participatory System Audit” and “Collaborative Implementation Design.” Ex. H, at ACS_001541-43. The parties agreed that ACS would not fund NIS and that NIS could secure outside funding—which it already had, through CFP. *Id.* at ACS_001542.

On January 12, 2023, The Bronx Defenders timely filed an appeal (“Appeal”) of the Agency’s December 14, 2022 production, noting that it was incomplete and that the redactions were insufficiently justified and overbroad, including because NIS was a CFP contractor. Pet. ¶ 20; Ex. D. On January 27, 2023, ACS produced three additional documents, including agreements between CFP and ACS from 2018 and 2020 (the “CFP-ACS Agreement” and “CFP-ACS Amendment”). Pet. ¶ 21; Ex. E. The CFP-ACS Agreement, still in force at the time of the Audit, specified that CFP would provide expertise, resources, and consulting to ACS “at no cost to ACS.” Ex. F, at ACS_001965. ACS otherwise denied the appeal, repeating the earlier justifications for its FOIL denial. Pet. ¶ 21; Ex. E.

Petitioner now initiates this Article 78 proceeding because ACS’s production and its cursory response to the Appeal violate its weighty obligations under FOIL.

ARGUMENT

“FOIL imposes a broad duty of disclosure on government agencies.” *Hanig v. State Dep’t of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992) (citing Pub. Off. Law § 84). “All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions.” *Id.* “Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.” *Id.* Redacted disclosure is required when only portions of records are exempted. *See Wash. Post*

Co. v. N.Y. State Ins. Dep't, 61 N.Y.2d 557, 567 (1984) (citation omitted); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985). For documents the agency redacts or withholds, it must “articulate particularized and specific justification” for such denials. *Madeiras v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 74 (2017) (quoting *W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 885 (2009)).

ACS’s response violated FOIL’s broad duty of disclosure. ACS’s heavily redacted production revealed that ACS leadership, including the Commissioner, were closely involved in the Audit from inception to conclusion. But the production does not answer a central question: given this involvement, why did ACS bury the Audit and Report? Although ACS’s own production reveals categories of documents that likely exist and would answer this question, some documents were entirely omitted from ACS’s production, while others were redacted. These omissions and redactions violate FOIL: ACS improperly relied on the exemption for intra-agency materials, particularly in shielding communications exchanged with NIS; failed to offer particularized justifications for its redactions and denials as required by statute; and performed an inadequate search for responsive records. This Court must order the Agency to comply with its obligations under FOIL and produce all responsive documents without redactions.

I. ACS CANNOT INVOKE THE INTER- OR INTRA-AGENCY EXEMPTION TO HIDE MATERIALS EXCHANGED WITH NIS.

ACS’s broad invocation of the exemption for inter- and intra-agency materials distorted the exemption beyond its statutory text and purpose. The purpose of this exemption, codified at Pub. Off. Law § 87(2)(g), is to “to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers.” *Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 276 (1996) (citing *Xerox*, 65 N.Y.2d at 132). The exemption protects “opinions, ideas, or advice exchanged as part of the consultative or

deliberative process of government decision making.” *Id.* at 277. Exempted materials must still be disclosed if they fall under one of four exceptions: statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; or external audits. *See* Pub. Off. Law § 87(2)(g)(i)-(iv). ACS improperly invoked the exemption to withhold and redact materials that were exchanged with external, non-governmental organizations or that fell within one of the four exceptions. As such, the Court should set aside these claims and require unredacted disclosure of all documents and communications exchanged with NIS and CFP.

A. The Intra-Agency FOIL Exemption Does Not Apply Because Neither NIS nor CFP Was a Paid Contractor for ACS or Working Solely to Advance ACS’s Interests.

ACS broadly invoked the intra-agency exemption to shield communications and documents it exchanged with NIS, asserting that NIS was a contractor working for ACS. This is factually incorrect: NIS was a paid contractor for CFP, which had an unpaid partnership with ACS. The intra-agency exemption does not extend to an agency’s communications with an external organization advancing non-agency interests. Because ACS’s invocation of the exemption is improper, ACS must produce all documents exchanged with NIS.

The Court of Appeals has held that “intra-agency materials” include those “prepared by an outside consultant *at the behest of* an agency as part of the agency’s deliberative process.” *Xerox*, 65 N.Y.2d at 133 (emphasis added). The Court of Appeals clarified that, for a consultant’s materials to qualify as “intra-agency,” the consultant must “not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it.” *Town of Waterford v. N.Y. State Dep’t of Env’t Conservation*, 18 N.Y.3d 652, 658 (2012) (quoting *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10-11 (2001)). “It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency

exemption, the outside consultant must be retained by the governmental agency,” rather than by a “private organization.” *Rauh v. de Blasio*, 161 A.D.3d 120, 125-26 (1st Dep’t 2018) (citing *Xerox*, 65 N.Y.2d at 133); see *Reiburn v. N.Y.C. Dep’t of Parks & Recreation*, 171 A.D.3d 670, 670 (1st Dep’t 2019) (“[R]espondent failed to establish that it retained Owens Studio for purposes of preparing the report, a necessary prerequisite for invocation of the intra-agency materials exemption for documents prepared by an outside consultant.”).

The CFP-ACS Agreement and Amendment, the CFP-NIS Agreement, and the NIS-ACS MOU establish atypical relationships that go well “beyond the average agency-consultant relationship that the FOIL exemptions are designed to foster and protect.” *Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp.*, 54 A.D.3d 154, 166 (1st Dep’t 2008), *aff’d sub nom. W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882 (2009). Neither CFP nor NIS were “retained” by or working “at the behest of” ACS in performing the Audit or drafting the Report for purposes of FOIL exemptions.

CFP’s provision of services at no cost to ACS demonstrates pursuit of its own organizational interests. The CFP-ACS Agreement notes that work performed under the Agreement would “*inform and advance CFP’s 2020 Goals*, which involve collaboration with public, business, nonprofit, philanthropic, and community sectors to create supportive communities that keep children safe and help families thrive.” Ex. F, at ACS_001965 (emphasis added). CFP provided its services at no cost to ACS; indeed, the agreement allowed CFP to provide funds to ACS. *Id.* at ACS_001965-67. The 2018 Agreement and 2020 Amendment each included a quarterly schedule of reports due to CFP from ACS. *Id.* at ACS_001973-80 (2018); *id.* at ACS_001986-90 (2020). These provisions, among others in the Agreement and Amendment, did not delineate a relationship in which CFP was “retained” by ACS, worked at the “behest” of ACS,

and had no independent interests, as would be the case in a typical agency-consultant relationship. *See Waterford*, 18 N.Y.3d at 658 (declining to shield communications between state agency and federal EPA in part because “unlike typical consultants, [the two agencies] represent different constituencies and their interests may diverge”).

NIS’s work on the Audit served CFP’s interests and goals. In September 2020, CFP and NIS executed the CFP-NIS Agreement, where, for a \$163,000 payment from CFP, NIS would “provide services in furtherance of CFP’s 2020 goals, strategies, and initiatives,” and these services included performing the ACS Audit and drafting the Report. Ex. G, at ACS_001483-94 (emphasis added). The CFP-NIS Agreement specified that, by December 31, 2020, NIS would provide a “draft of the final report to CFP.” *Id.* at ACS_001490-93. This agreement, specifying work to begin in September 2020, delineates a contractual relationship whereby NIS derived its funding from, supported the organizational goals of, and owed its work product to CFP. Agencies cannot deploy the intra-agency exemption to protect communications with external organizations whose interests, like NIS here, are on behalf of another client. *Tuck-It-Away*, 54 A.D.3d at 163 (rejecting the exemption “if there is reason to believe that the consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant”).

NIS did not enter an MOU with ACS regarding the Audit and Report until November 25, 2020—almost two months after NIS contracted with CFP and began work on the Audit. Ex. H, at ACS_001541-48. Under the NIS-ACS MOU, ACS agreed to “collaborate” with NIS on a “Participatory System Audit” and “Collaborative Implementation Design.” *Id.* at ACS_001542-43. The MOU granted NIS access to ACS data and staff for interviews, but it specified that New York City would provide no funding to NIS and that “NIS may secure outside funding through

third-party partners.” *Id.* ACS’s own MOU recognized that NIS worked with, and for, another organization.⁴

Given the timing, the NIS-ACS MOU did not involve ACS retaining NIS or place the two into a typical agency-consultant relationship. NIS’s work, as specified in the MOU, was already being performed for CFP, a third party, and Commissioner Hansell had publicly announced the work as ongoing one month earlier. Indeed, the MOU’s primary purpose was to grant NIS access to ACS materials for the project.

In denying the administrative appeal, ACS characterized the various contractual relationships as follows:

In other words, ACS retained CFP, an outside consultant, to work on the City Project, including the racial equity review, which is the gravamen of your FOIL request. NIS was working as a consultant for ACS and as an independent contractor/sub-contractor for CFP on the City Project. CFP was merely acting as a passthrough for funding between ACS and NIS.

Ex. E, Appeal Denial, at 3. This characterization is wrong. ACS did not retain CFP. CFP independently initiated a collaborative project with ACS that furthered CFP’s own organizational goals. NIS was not working as a consultant to ACS before being retained by CFP. CFP was not remotely a “passthrough for funding.” CFP provided its services to ACS for free, and the agreements rule out any funding flowing from ACS through CFP to NIS. If ACS contends that it paid the \$163,000 to NIS in 2020 and the \$88,000 to NIS in 2021, such a payment would contradict the plain language of the contracts, and ACS has produced no records to substantiate such a claim.⁵

The assertion itself requires further disclosure from ACS.

⁴ NIS and CFP signed a supplemental Services Agreement in February 2021, whereby CFP would pay NIS \$88,000 for work in 2021, specifically to support “continuous quality improvement for racial and other equity initiatives within the agency.” Ex. G, ACS_001435-1445.

⁵ Redacted emails indicate that CFP approved the invoice for the funds. *See* Ex. J, at ACS_001735.

In *Rauh*, the First Department rejected that a public relations firm, hired by a nonprofit organization created by the Mayor's campaign, was acting as an employee-consultant for the Mayor's office because the consultant was "retained by a private organization and not the agency." 161 A.D.3d at 122. To hold otherwise, the First Department ruled, "expands the agency exemption and closes the door on government transparency." *Id.* at 126. The same is true here. ACS provided extensive access to external organizations, who used that access to advance their own interests, not the public's or the government's. Since the relationship is free of charge, there is no budgetary check. Transparency through FOIL is the primary way that ACS accounts to the public for these arrangements. Since ACS is not in a typical agency-consultant relationship with either CFP or NIS, and NIS was retained by CFP, materials exchanged between ACS and CFP or between ACS and NIS are not exempt from production. Records withheld or redacted on the basis that such communications or materials are intra-agency materials must be produced in full and unredacted.

B. ACS Unlawfully Hid the Feedback It Exchanged with NIS Regarding the Report.

ACS likely invoked the intra-agency exemption to protect the feedback document that was its final policy response to the NIS report; this claim is improper because NIS cannot fall within the exemption and this document is statutorily excepted from the exemption.

When Commissioner Hansell received the Audit Report from NIS on December 28, 2020, ACS leadership convened multiple high-level meetings over the next four weeks to discuss what was certain to be a public-relations crisis. *See* Pet. ¶ 34. In the CFP-NIS Agreement, NIS agreed to produce a final report by January 2021. *See* Ex. G, at ACS_001491. ACS dragged its feet. Finally, on February 4, 2021, ACS Chief of Staff Jill Krauss shared a document with NIS that comprised ACS's feedback to the Report, a result of ACS leadership's deliberation. *See* Ex. J, at

ACS_001523-26. One week later, NIS shared a document that contained its response. *Id.* The final report requested by CFP was dropped as a deliverable altogether. *See* Ex. J, at ACS_001519.

Although the public has a right to know how ACS leadership—after detailed consideration—formally responded to the Report’s grave findings, neither the feedback nor response documents were produced. ACS also excluded materials about the contemporaneous decision to drop the final report as a deliverable; since the CFP-NIS Agreement had required this, documentation is likely. These materials are responsive to the Request, as ACS-NIS communications and as ACS leadership responses to the Audit.

These documents, furthermore, are not exempt despite ACS’s likely invocation of the intra-agency exemption. Per Section I.A, *supra*, ACS cannot deploy this exemption to protect materials exchanged with NIS. In addition, the responses constitute final agency policy, as they followed extensive deliberation by ACS leadership and explained ACS’s final response to the Report and its recommendations. *See Miracle Mile Assn. v. Yudelson*, 68 A.D.2d 176, 182-83 (4th Dep’t 1979) (refusing to exempt documents “setting forth reasons for agency decisions already made”); *cf. Brennan Ctr. for Justice v. U.S. Dep’t of Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (not protecting materials as intra-agency if “adopted, formally or informally, as the agency position on the issue”).⁶ Thus, ACS must produce its feedback regarding the report, NIS’s response, and documents related to the decision to abandon a final report.

C. ACS Improperly Withheld Communications and Documents That Reveal Why and How NIS Conducted the Audit.

ACS’s production revealed that the Audit had multiple phases but omitted information crucial to understanding why NIS engaged in the Audit, who it spoke to for the Audit, and what

⁶ Freedom of Information Act case law is instructive on FOIL’s scope. *Leshner v. Hynes*, 19 N.Y.3d 57, 64 (2012).

information it received. ACS cannot use the intra-agency exemption to hide these materials: it does not apply to NIS, and the documents must nevertheless be produced insofar as they contain factual or statistical material, final agency policy, or instructions to staff that affect the public. *See* Pub. Off. Law § 87(2)(g)(i)-(iii).

How ACS and NIS were introduced and began this project remains unknown. NIS reported that ACS began discussions with NIS in spring 2020 about performing the Audit, *see* Ex. B, Report, at ACS_001883. But the bulk of produced communications begin on September 15, 2020. *See* Pet. ¶ 27.⁷ Beyond those, ACS produced two meeting invitations from July 2020, between an ACS deputy commissioner and an NIS researcher, and no communications from spring 2020, *id.*, even though such ACS-NIS communications are responsive to the Request and constitute “factual data” unprotected by the intra-agency exemption. *See Gould*, 89 N.Y.2d at 277 (defining factual data as “objective information”); *Gartner v. N.Y. State Att’y General’s Office*, 160 A.D.3d 1087, 1090 (3d Dep’t 2018) (excluding information about meetings from the intra-agency exemption).

Once the Audit began, NIS stated that it conducted focus groups and interviews with 115 people and focused on two geographic divisions of ACS. *See* Ex. B, Report, at ACS_001892. ACS withheld notes from the focus groups and interviews, despite their responsiveness to Request 7, and the production lacked any communications about why NIS focused on the two divisions, how it selected people to interview, the extent of ACS’s involvement, or how ACS informed staff about the interviews. These notes and communications are factual data, *see Humane Soc’y of U.S. v. Brennan*, 53 A.D.3d 909, 911-12 (3d Dep’t 2008) (requiring the production of handwritten notes that underlay an investigation), and constitute instructions to staff that affect the public, *see Buffalo*

Broadcasting Co., Inc. v. City of Buffalo, 126 A.D.2d 983, 984 (4th Dep’t 1987) (holding that this exception includes agency requests to employees to say or do something).

ACS also provided materials to NIS for the Audit; while some may have been produced, ACS omitted certain provided documents. For example, NIS reported that it “was provided detailed analysis of current statistical operations.” *See* Ex. B, Report, at ACS_001889. This analysis was omitted without explanation, despite being responsive to Request 8 and being statistical material excepted from the intra-agency exemption. ACS also provided a 2016 internal report that included recommendations to address its racial inequities. Pet. ¶ 30. But ACS did not produce any documents regarding follow-up actions to the recommendations, suggesting that ACS omitted relevant documents, even though they would be responsive to Request 8 and excepted as final agency policy.⁸ *See Smith*, 116 A.D.3d at 1211.

Following the provision of the Report, ACS and NIS convened a “Racial Equity Workgroup” that met in summer 2021 and that informed NIS’s implementation plan for ACS to improve racial equity. *See* Ex. J, at ACS_000005. But the agendas and notes for this group’s meetings, communications between group members, and communications about who was chosen to be in the group were omitted: indeed, there is a gap in produced communications between May and September 2021, precisely when the group was meeting. These documents are responsive to Request 9 as ACS-NIS communications and are excepted from the intra-agency exemption as factual data that is not an expression of opinion. *See Gartner*, 160 A.D.3d at 1090.

⁸ These documents may not exist, but ACS has refused to certify that it conducted a fulsome search. As more fully explained in Section II.B, *infra*, ACS’s failure to certify means that Petitioner is unable to know whether omitted documents do not exist, whether ACS withheld them, or whether ACS did not conduct a proper search.

In sum, ACS offered NIS detailed access to its operations and staff for the Audit but shrouded how NIS became involved and how it conducted the Audit. ACS has no basis to exclude these responsive documents and must produce them in full.

D. ACS Redacted Documents Beyond the Reach of the Intra-Agency Exemption.

The Agency extensively redacted documents based on the intra-agency exemption. ACS cannot invoke this exemption to redact materials exchanged with NIS; even if it could, the Agency overreached in asserting the exemption, redacting materials that it was required to disclose.

For example, ACS redacted the titles of all attachments to the produced emails. Titles of attachments provide no opinions; they are objective information about an exchanged document. As such, this information is factual data subject to disclosure. *See Gould*, 89 N.Y.2d at 277. Furthermore, the fact that ACS produced identical emails but applied different redactions shows it over-redacted. For example:

- ACS produced an email from an NIS consultant to an ACS employee that said, “Here’s a pdf of the presentation,” *see* Ex. J, ACS_001549; another version redacted that statement, *see* Ex. J, ACS_001538.
- ACS produced an email from an ACS employee to another ACS employee that said, “I am on the phone and do not have access to the visuals referenced. Is it possible to share the PPT electronically?,” *see* Ex. J, ACS_001624; another version redacted that statement, *see* Ex. J, ACS_001660.
- ACS produced an email from an NIS consultant to an ACS employee where the NIS asked to “learn more about what you do,” *see* Ex. J, ACS_001628; another version redacted that statement, *see* Ex. J, ACS_001711.

The redacted communications, which are responsive to Request 8, contain no opinions or advice; they are formulaic exchanges about schedules and attached documents. *See Gartner*, 160 A.D.3d at 1090 (“Certain other documents ... are not exempt because they deal with the scheduling of meetings, rather than any deliberative process.”).

These comparisons, while seemingly minor, are the only visible checks on ACS's redaction claims and call into question the validity of ACS's extensive redactions.⁹ Many produced communications are entirely or largely redacted, even though they may contain material unprotected by the intra-agency exemption. For example, an email thread between ACS leadership dated January 27, 2021 is entirely redacted. *See* Ex. J, at ACS_001454-57. Given the Agency's overbroad application of the exemption, Petitioner cannot know whether the thread contains factual or statistical material. ACS thus overreached in invoking the intra-agency exemption, particularly regarding documents exchanged with NIS, and this Court must require unredacted disclosure of these records.

II. ACS'S HAPHAZARD RESPONSE FAILED TO COMPLY WITH THE RIGOROUS DEMANDS OF FOIL.

In addition to the crude application of the intra-agency exemption, the Agency's response violated two foundational requirements of FOIL. Under FOIL's broad duty of disclosure, the Agency must provide a particularized and specific justification for any exemption claims and must conduct a thorough search for all responsive documents. ACS failed to comply with both basic obligations. Each failure constitutes an independent basis to grant this petition and requires ACS to produce all unredacted versions of all responsive documents, together with a certification that the Agency has conducted a fulsome search.

A. ACS Did Not Adequately Justify Its Broad Redactions and Denials.

ACS both withheld and extensively redacted documents without providing particularized and specific justifications. Instead, ACS merely quoted the language of the statutory exemption.

⁹ As detailed in Section II.A, *infra*, ACS did not provide a specific justification for these redactions and thus did not satisfy its burden under FOIL, requiring disclosure.

Because ACS failed to prove that an exemption applied to the withheld and redacted documents, FOIL compels full disclosure.

When invoking a statutory exemption to withhold or redact documents, “[t]he burden rests on the agency to demonstrate the applicability of an exemption, which requires a particularized and specific justification for denying access to demanded documents that is more than a ‘blanket’ exemption.” *DJL Rest. Corp. v. Dep’t of Bldgs.*, 273 A.D.2d 167, 168 (1st Dep’t 2000) (citations omitted). A particularized justification allows meaningful scrutiny of exemption claims and thus fulfills FOIL’s goal of promoting “open government and public accountability.” *Tuck-It-Away*, 54 A.D.3d at 162 (citing *Gould*, 89 N.Y.2d at 274).

ACS failed to provide particularized justifications for redactions and instead recited statutory exemptions. For example, in response to Request 11 seeking materials by ACS leadership responding to the Audit or Report, ACS said, “Your request under FOIL has been reviewed and is granted except for portions that are redacted or withheld in its entirety pursuant to Public Officer’s Law § 87(2)(g) inter-agency materials which does not fall within the enumerated exceptions.” Ex. C, ACS Response, at 5. Each exemption claim was written this way. An agency’s attempt to meet its burden by “merely repeating the statutory phrasing of an exemption” is “insufficient to establish the requirement of particularity.” *City of Newark v. Law Dep’t of N.Y.*, 305 A.D.2d 28, 34 (1st Dep’t 2003) (quoting *DJL*, 273 A.D.2d at 168-69). Such “conclusory characterizations” provide no opportunity for meaningful scrutiny. *W. Harlem Bus. Grp.*, 13 N.Y.3d at 885.

Likewise, ACS’s appeal denial letter does not satisfy its burden, as it did not provide a factual basis for the exemption; instead, ACS just stated that the exemption claim was proper and repeated the statutory language. *See* Ex. E, at 2. The “blanket invocation” of a statutory exemption, “without enumerating or describing any of the documents withheld and without offering a specific

basis for any of the claims of exemption,” does not meet ACS’s weighty burden under FOIL. *Newark*, 305 A.D.2d at 34.

While insufficient justification invalidates the Agency’s invocation of the exemptions, it is particularly concerning here for two reasons. First, the Agency’s redaction claims appear overbroad. *See supra* Section I.D. Second, ACS failed to provide a privilege log or otherwise catalog each responsive document that it claimed was exempted. *See W. Harlem Bus. Grp.*, 13 N.Y.3d at 884 (government’s privilege log was insufficient to meet its obligations under FOIL when the log did not address all documents); *Kirsch v. Bd. of Educ.*, 152 A.D.3d 1218, 1219-20 (4th Dep’t 2017) (citing *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 251 (1986)). Even if ACS was not obligated to provide a specific privilege log, it must provide evidentiary support for its claims that a document is exempted. *See Weisshaus v. Port Authority of N.Y. & N.J.*, 49 Misc. 3d 550, 558 (Sup. Ct., Kings Cty. 2015). Without a particularized justification for claimed exemptions, a privilege log listing exempted documents, or another form of evidentiary support for ACS’s position, Petitioner cannot determine whether the withheld and redacted documents were properly exempted. *See Xerox*, 65 N.Y.2d 131, 133 (1985) (“While the reports in principle may be exempt from disclosure, on this record—which contains only the barest description of them—we cannot determine whether the documents in fact fall wholly within the scope of FOIL’s exemption for ‘intra-agency materials,’ as claimed by respondents.”).

By simply repeating the language of the statutory exemptions, ACS failed to meet its burden to justify its withholdings and redactions. If the agency cannot meet that burden, “full disclosure is compelled.” *Scott, Sardano & Pomerantz v. Records Access Officer*, 65 N.Y.2d 294, 297 (1985); *see Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007). ACS may not offer additional reasons to explain its denial, as such justification is not in the administrative record and

would be an impermissible post hoc rationalization. *See Tessler v. City of New York*, 38 Misc. 3d 215, 228 (Sup. Ct., N.Y. Cty. 2012) (collecting cases).¹⁰ ACS must produce unredacted versions of all withheld documents.

B. Documents Were Missing from ACS's Production, and ACS Must Produce These Materials or Certify It Has Performed a Thorough Search.

The Agency's production raises concerns about as-yet-unidentified responsive documents. As such, the Court should order ACS to conduct a fulsome search, certify the thoroughness of this search, identify which documents are responsive to which requests, and provide a privilege log of any withheld documents.

Petitioner notified ACS in its Appeal of nine specific deficiencies, articulating factual bases for why the documents existed and were within the Agency's control. *See Ex. D, Appeal*, at 2-3; *Gould*, 89 N.Y.2d at 279.¹¹ One such deficiency was ACS's failure to produce any information about policy changes in response to the Audit. ACS's production suggests that this material should exist, as ACS received multiple recommendations from the Audit: for example, in October 2021, NIS provided an additional 91-page document described as a continuous quality improvement toolkit, effectively an implementation plan for ACS to improve its racial-equity practices. *Ex. I*.

But the production withheld information about ACS's response to the Audit, particularly the Report and toolkit. There are no messages to staff about the Audit besides the Commissioner's October 2020 email, even when NIS delivered the Report or concluded its engagement with ACS. Further, in the toolkit, NIS designed a five-step process, with the first requiring ACS to solicit input from staff, via a quantitative and qualitative survey, about existing practices contributing to

¹⁰ The Court may require an *in camera* review of the redacted documents to assess the correctness of any redactions. *See W. Harlem Bus. Grp.*, 13 N.Y.3d at 884.

¹¹ In response, ACS did not produce additional documents or further explain its non-disclosure; indeed, it did not even acknowledge this portion of the Appeal. *See Ex. E, Appeal Denial*, at 3-4.

racial disparities. *See* Ex. I, ACS_000568. Had ACS followed this directive, the survey and its results are responsive to Requests 10 and 11 and should have been produced. They were not. The production also contains no policy changes prompted by the Audit, despite calls for such changes through the Report and toolkit. For example, the toolkit instructs the Department of Child Protection to “implement[] a pilot version” of the continuous quality improvement process, but ACS provided no documents instructing staff on this pilot or outlining policy changes. *See* Ex. I, ACS_000566; Pet. ¶ 37.¹²

This highly visible deficiency and the eight other identified deficiencies indicate gaps in the production still unknown to Petitioner for three reasons. First, ACS refused to affirm that it completed a thorough search for all documents. *See* Pet. ¶ 21; Ex. D. ACS never agreed to meet with Petitioner about the Request, despite multiple attempts by Petitioner. Instead, ACS unilaterally limited the scope of the FOIL request. *See* Pet. ¶¶ 15-18.

Second, as described in Section II.A, *supra*, ACS did not indicate which documents were withheld, instead broadly asserting that certain requests were “denied in part” and that documents were being withheld. This inhibits Petitioner’s ability to account for the fulsomeness of ACS’s response.

Third, ACS did not identify which produced documents were responsive to each enumerated request. As a result, an assortment of various produced documents could be responsive to many requests—or none. For example, the production included internal data reports and mayoral executive orders. *See* Pet. ¶ 30. These may have been produced in response to Request 8, as ACS may have provided these documents to NIS for the Audit. However, ACS has provided no

¹² ACS has no basis to withhold these documents, as the inter- or intra-agency materials exemption statutorily does not reach instructions to staff that affect the public or final agency policy. *See* Pub. Off. Law § 87(2)(g)(ii)-(iii).

documents to support that inference. Such an inference would raise more questions: other documents referenced in the Report were not produced, including the 2017 and 2018 Path Through the Child Welfare System reports and the 2020 ACS Budget Overview. *Id.* In sum, ACS's fragmented production has made it impossible for Petitioner to fully account for deficiencies.

ACS's response was to state that FOIL does not require it to Bates-stamp documents or provide a privilege log in responding to an internal appeal. See Ex. E, at 2. This hyper-literal response misses the mark. The Agency must provide a fulsome response and certify that it has conducted a thorough search. *See* Pub. Off. Law § 89(3); *Rattley v. N.Y.C. Police Dep't*, 96 N.Y.2d 873, 875 (2001). ACS must justify the completeness of its response when confronted with deficiencies. *See* Pub. Off. Law § 89(4)(a); *Wagstaffe v. David*, 26 Misc. 3d 1229(A), at *4-5 (Sup. Ct., N.Y. Cty. 2010) (quoting *Gould*, 89 N.Y.2d at 279) (requiring agency to state reasons for further denial when petitioner articulated a demonstrable factual basis that documents existed and were within agency's control); *Oddone v. Suffolk Cty. Police Dep't*, 96 A.D.3d 758, 761 (2d Dep't 2012) (requiring inquiry even after agency certification if petitioner articulates sufficient factual basis). Bates-stamping and providing a privilege log were two ways that it could have done so. Instead, the Agency has wholly refused to comply with its obligations under FOIL.

The deficiencies identified by Petitioner, the pointed failure of ACS to affirm that it conducted a thorough search, and ACS's fractured response indicate that ACS has not properly searched for missing documents. This Court should order ACS to search thoroughly for all responsive documents to Petitioner's requests, including but not limited to the nine deficiencies outlined in the Appeal; produce those documents; and identify which request(s) each document responds to.

III. PETITIONER IS ENTITLED TO REASONABLE ATTORNEYS' FEES

Petitioner requests reasonable attorneys' fees and other litigation costs. FOIL was amended in 2006 to make it easier to obtain attorneys' fees. *See, e.g., NYCLU v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011). This court has discretion to award fees and costs when the moving party has "substantially prevailed" in its petition and the government agency *either* "had 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); *Kohler-Hausmann v. N.Y.C. Police Dep't*, 133 A.D.3d 437, 438 (1st Dep't 2015).

Respondent failed to meaningfully respond to the Request or to the Appeal. ACS limited the scope of Petitioner's Request, ignoring 12 of its 13 requests while refusing to communicate with Petitioner. *See The Bronx Defenders v. N.Y.C. Police Dep't*, No. 156520/2016 (Sup. Ct., N.Y. Cty. May 19, 2017) (Bluth, J.) (Interim Order, NYSECF Doc. No. 60, at 5) (holding that agencies had an obligation to work with requesters to facilitate production under 21 N.Y.C.R.R. § 1401(b)(2)). After Petitioner's Appeal notified ACS that it had omitted responsive documents, ACS failed to respond to this portion of the Appeal, even though Public Officers Law § 89(4)(a) required it to explain its denial or provide access to the documents. *See Madeiros*, 30 N.Y.3d at 79; *Kohler-Hausmann*, 133 A.D.3d at 438 (holding that failure to respond within the statutory time warrants an award of attorneys' fees).

Moreover, ACS offered no reasonable basis for denying access to the records that it withheld. It offered conclusory statements to justify broad redactions and denials, rather than particularized justifications. *See Dioso Faustino Freedom of Information Law Request v. City of New York*, 191 A.D.3d 504, 506 (1st Dep't 2021) (holding that an exemption claim lacking "any factual showing" in support did not constitute a reasonable basis for denying disclosure); *South*

Shore Press, Inc. v. Havemeyer, 136 A.D.3d 929, 930-31 (2d Dep’t 2016) (same). Moreover, the Agency’s attempt to invoke the inter- and intra-agency exemption was improper. *See N.Y. Times Co. v. City of New York Office of Mayor*, 194 A.D.3d 157, 165-66 (1st Dep’t 2021) (affirming award of attorneys’ fees when the agency’s invoked exemption was inapplicable). ACS mischaracterized its relationship with CFP and NIS, calling CFP a “pass-through” and NIS a “consultant-employee,” despite plain contractual language. *See Rauh*, 161 A.D.3d at 125-27 (holding that such misapplication of the intra-agency exemption constituted an unreasonable basis for non-disclosure). It redacted communications under the intra-agency exemption that included factual data exempt from disclosure. *See Madeiros*, 30 N.Y.3d at 79 (holding that “substantial unredacted post-commencement disclosure” was sufficient for fees, even if some redactions are warranted). As such, Petitioner warrants an award of reasonable attorneys’ fees and costs.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Court order ACS to search for all responsive documents; certify the search’s thoroughness; produce all responsive, non-exempt documents; produce a privilege log detailing all exemption claims; provide a particularized justification for each exemption; and award Petitioner attorneys’ fees and costs.

Respectfully submitted,

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Uniform Civil Rules Word Limit Certification

I, Michael Schissel, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the Memorandum of Law in Support of Petitioner's Application for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules complies with the word count limit set forth in 22 N.Y.C.R.R. 202.8(b)(a)(i) of the Uniform Civil Rules for the Supreme Court & the County Court, as it contains 6,997 words excluding the caption and signature block. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: New York, NY
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