

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

In re Application for a Judgment Pursuant to
Article 78 of the Civil Practice Law and Rules by

NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC., and CENTER FOR
CONSTITUTIONAL RIGHTS,

Petitioners,

Index No. _____

-against-

NEW YORK CITY POLICE DEPARTMENT, and
JAMES P. O'NEILL, in his official capacity as
Commissioner of the New York City Police
Department,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	4
ARGUMENT	12
I. THE NYPD’S DENIAL OF THE REQUESTS MERITS ARTICLE 78 REVIEW.	12
II. THE NYPD’S RESPONSE TO THE REQUESTS VIOLATES THE FREEDOM OF INFORMATION LAW.	13
A. The NYPD Did Not Conduct a Diligent Search for Requested Records.....	13
B. The NYPD Did Not Properly Certify Its Search for Record.	20
C. The NYPD Failed to Provide a Particularized and Specific Justification for Withholding Certain Records.	21
III. PETITIONERS ARE ENTITLED TO LEGAL COSTS, INCLUDING ATTORNEY’S FEES.	25
CONCLUSION.....	28

TABLE OF AUTHORITIES**PAGE(S)****CASES:**

<i>Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals</i> , 995 N.Y.S.2d 659 (Sup. Ct. 2013), <i>aff'd</i> , 992 N.Y.S.2d 667 (Mem.) (App. Div. 2014)	13
<i>City of Newark v. Law Dep't of N.Y.</i> , 760 N.Y.S.2d 431 (App. Div. 2003).....	24
<i>Church of Scientology of N.Y. v. State</i> , 46 N.Y.2d 906 (1979).....	24, 25
<i>Data Tree, LLC v. Romaine</i> , 9 N.Y.3d 454 (2007)	22
<i>Daum v. Tessler</i> , 804 N.Y.S.2d 920 (App. Div. 2005).....	13, 20
<i>DJL Rest. Corp. v. Dep't of Bldgs. of N.Y.</i> , 710 N.Y.S.2d 564 (App. Div. 2000).....	24
<i>Fink v. Lefkowitz</i> , 47 N.Y.2d 567 (1979).....	21, 26
<i>Friedman v. Rice</i> , 30 N.Y.3d 461 (2017).....	21
<i>Gould v. NYPD</i> , 89 N.Y.2d 267 (1996).....	14, 22
<i>Hanig v. N.Y. Dep't of Motor Vehicles</i> , 79 N.Y.2d 106 (1992).....	22
<i>Johnson v. NYPD</i> , 694 N.Y.S.2d 14 (App. Div. 1999).....	24
<i>Law Offices of Perlmutter, P.C. v. NYPD</i> , 999 N.Y.S.2d 26 (App. Div. 2014).....	22
<i>Madeiros v. N.Y.S. Educ. Dep't.</i> , 30 N.Y.3d 67 (2017).....	22, 23

PAGE(S)CASES:

<i>Mulgrew v. Bd. of Educ. of N.Y.</i> , 928 N.Y.S.2d 701 (App. Div. 2011).....	13
<i>Murphy v. N.Y. State Educ. Dep't, Office of Prof'l Discipline</i> , 543 N.Y.S.2d 70 (App. Div. 1989).....	12
<i>N.Y.S. Defs. Ass'n v. N.Y.S. Police</i> , 927 N.Y.S.2d 423 (App. Div. 2011).....	25, 26
<i>Oddone v. Suffolk Cty. Dist. Att'y's Office</i> , No. 14955/11, 2013 WL 2256301 (N.Y. Sup. Ct. 2013).....	20
<i>Oddone v. Suffolk Cty. Dist. Att'y's Office</i> , No. 0149552011, 2014 WL 10321399 (N.Y. Sup. Ct. 2014).....	20
<i>Oddone v. Suffolk Cty. Police Dep't</i> , 946 N.Y.S.2d 580 (App. Div. 2012).....	14, 17, 18, 19
<i>Rattley v. NYPD</i> , 96 N.Y.2d 873 (2001).....	20
<i>Rauh v. de Blasio</i> , 75 N.Y.S.3d 15 (App. Div. 2018).....	25
<i>Riley-James v. Vance</i> , 971 N.Y.S.2d 74 (Table) (Sup. Ct. 2013).....	20
<i>Schenectady Cty. Soc'y for the Prevention of Cruelty to Animals, Inc. v. Mills</i> , 18 N.Y.3d 42 (2011).....	27
<i>Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.</i> , 77 N.Y.2d 753 (1991).....	23
<i>Tarantino v. NYPD</i> , 25 N.Y.S.3d 601 (Mem.) (App. Div. 2016).....	20
<i>Thomas v. Condon</i> , 9 N.Y.S.3d 257 (App. Div. 2015).....	13
<i>W. Harlem Bus. Group v. Empire State Dev. Corp.</i> , 13 N.Y.3d 882 (2009).....	24, 26
<i>Whitfield v. Moriello</i> , 895 N.Y.S.2d 405 (2010).....	21

PAGE(S)

CASES:

Wright v. Woodard,
68 N.Y.S.3d 778 (Mem) (App. Div. 2018)..... 14

PAGE(S)

STATUTES & RULES

N.Y. PUB. OFF. LAW

§ 89(3)(a) (McKinney 2017)..... 13
 § 84 (McKinney 1977), *et seq.* 1
 § 89(4)(a) (McKinney 2017)..... 22, 25
 § 89(4)(b) (McKinney 2017) 12
 § 89(4)(c) (McKinney 2006)..... 25
 § 89(4)(c)(i) (McKinney 2017)..... 25
 § 89(4)(c)(ii) (McKinney 2017)..... 25

N.Y. C.P.L.R.

217(1) (McKinney 1990) 12
 7803(3) (McKinney 2003) 13

PAGE(S)

OTHER AUTHORITIES

Assembly Mem. in Support, at 1 Bill Jack, L. 1982..... 25

Chicagoans for an End to the Gang Database v. City of Chicago,
No. 18 Civ. 4242 (N.D. Ill. Filed June 19, 2018) 2

Mick Dumke, *Chicago’s Gang Database Is Full of Errors—And Records We Have Prove It*,
PROPUBLICA ILL. (Apr. 19, 2018, 4:00 AM),
<https://www.propublica.org/article/politic-il-insider-chicago-gang-database> 2

Sean Garcia-Leys, Meigan Thompson & Christyn Richardson, *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences*, UCI SCH. OF L. IMMIGR. RTS. CLINIC
(Apr. 2016), <http://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf> 2

Joseph Goldstein and J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*,
N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/nyregion/frisking-tactic-yields-to-a-focus-on-youth-gangs.html>..... 1

PAGE(S)

OTHER AUTHORITIES

K. Babe Howell, *Gang Policing: The Post-Stop-and Frisk Justification for Profile-Based Policing*,
 5 UNIV. DENVER CRIM. L. REV. 1 (2015)..... 1, 5

Nereida Moreno, *Chicago Settles Suit with Immigrant Falsely Accused of Gang Ties*,
 CHI. TRIB. (Dec. 7, 2017, 7:35 AM), <http://www.chicagotribune.com/news/immigration/ct-met-immigration-lawsuit-settled-1206-story.html>..... 2

Off. of Bill de Blasio, Pub. Advoc. for the City of New York, *Breaking Through Bureaucracy: Evaluating Government Responsiveness to Information Requests in New York City* (April 2013)..... 3

Patrol Guide 202-30, Youth Officer, N.Y.C. POLICE DEP’T (June 26, 2018),
https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf..... 5

Patrol Guide 212-13, Reporting Gang-Related Criminal Activity, N.Y.C. POLICE DEP’T
 (Dec. 31, 2015), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide2.pdf..... 5

R.C. v. City of New York, No. 153739/2018 (N.Y. Sup. Ct. filed Apr. 24, 2018) 19

Josh Saul, *In a First for the Nation, Portland Police End Gang List to Improve Relations with Blacks and Latinos*, NEWSWEEK (Sept. 15, 2017, 6:40 AM),
<http://www.newsweek.com/2017/10/06/gang-violence-portland-police-tear-gang-member-list-effort-rebuild-community-665374.html> 2

Transcript: Oversight—NYPD’s Gang Takedown Efforts, N.Y.C. COUNCIL COMM.
 ON PUB. SAFETY
 (June 13, 2018, 10:17 AM), <https://on.nyc.gov/2vdi681> 3

Ali Winston, *NYPD Attempts to Block Surveillance Transparency Law with Misinformation*,
 THE INTERCEPT (July 7, 2017, 10:59 AM), <https://theintercept.com/2017/07/07/nypd-surveillance-post-act-lies-misinformation-transparency/> 3

Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM),
<http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html> 1

PRELIMINARY STATEMENT

Petitioners, the NAACP Legal Defense & Educational Fund, Inc. (“LDF”) and the Center for Constitutional Rights (“CCR”), respectfully submit this memorandum of law in support of review under Article 78 of the New York Civil Practice Law and Rules. This petition contests the New York City Police Department’s (“NYPD” or “the Department”) denial of LDF and CCR’s Requests for records under the Freedom of Information Law (“FOIL”) regarding the NYPD’s classification of individuals as members of local street gangs or crews.¹

Over the past decade, the NYPD has targeted local street gangs/crews—“informal groups of teenagers and young men who are organized geographically, around a housing project, a block or single building”—under the guise of precision policing.² Accordingly, the Department maintains a Criminal Group Database that indiscriminately designates thousands of New Yorkers as members of local street gangs or crews. These designations are overinclusive, racially discriminatory, and likely error-ridden.³

Nationwide, gang databases like the Criminal Group Database have widespread inaccuracies and lack due process protections. In California, an audit revealed that its statewide gang database erroneously included the names of forty-two toddlers one year of age or younger; twenty-eight of these babies allegedly admitted gang membership.⁴

¹ See generally N.Y. PUB. OFF. LAW § 84 (McKinney 1977) *et seq.*

² Joseph Goldstein and J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*, N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/nyregion/frisking-tactic-yields-to-a-focus-on-youth-gangs.html>.

³ K. Babe Howell, *Gang Policing: The Post-Stop-and Frisk Justification for Profile-Based Policing*, 5 UNIV. DENVER CRIM. L. REV. 1, 15-16 (2015).

⁴ Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html>.

The Chicago Police Department's gang database is similarly error-ridden. A Freedom of Information Act request revealed that Chicago's gang repository included more than 160 people in their 70s or 80s, along with two people who were allegedly 132 years old.⁵ Chicago now faces a federal lawsuit challenging the lack of due process afforded to individuals included in its gang database.⁶ In Portland, the response to a Freedom of Information Act request suggested that the Portland Police Department's gang database merely served as a tool for racial profiling. As a result, the City voluntarily dismantled its gang database.⁷

Individuals entered in these gang databases face extraordinary consequences. These boys and young men of color are subject to heightened police surveillance; elevated aggression during police encounters; enhanced bail recommendations; elevated charges; enhanced sentencing recommendations; and, for some, the loss of housing and threat of deportation.⁸

These concerns led LDF and CCR to submit two FOIL Requests to the NYPD seeking information about how the Department identifies an individual as a member of a gang or crew and what procedures, if any, exist to safeguard their due process rights. Petitioners also sought a list of other agencies with whom the NYPD shares information about individuals it has identified as members of a gang.

⁵ Mick Dumke, *Chicago's Gang Database Is Full of Errors—And Records We Have Prove It*, PROPUBLICA ILL. (Apr. 19, 2018, 4:00 AM), <https://www.propublica.org/article/politic-il-insider-chicago-gang-database>.

⁶ *Chicagoans for an End to the Gang Database v. City of Chicago*, No. 18 Civ. 4242 (N.D. Ill. Filed June 19, 2018).

⁷ Josh Saul, *In a First for the Nation, Portland Police End Gang List to Improve Relations with Blacks and Latinos*, NEWSWEEK (Sept. 15, 2017, 6:40 AM), <http://www.newsweek.com/2017/10/06/gang-violence-portland-police-tear-gang-member-list-effort-rebuild-community-665374.html>.

⁸ See Nereida Moreno, *Chicago Settles Suit with Immigrant Falsely Accused of Gang Ties*, CHI. TRIB. (Dec. 7, 2017, 7:35 AM), <http://www.chicagotribune.com/news/immigration/ct-met-immigration-lawsuit-settled-1206-story.html>; Sean Garcia-Leys, Meigan Thompson & Christyn Richardson, *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences*, UCI SCH. OF L. IMMIGR. RTS. CLINIC (Apr. 2016), <http://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf>.

Since serving the Requests, Petitioners have gained limited insight into the Department's Criminal Group Database. First, entry in the database is racially disproportionate. Ninety-nine percent of individuals in the database are people of color. Second, the database operates with limited due process protections. The NYPD has admitted to sharing information about individuals' gang affiliation with local District Attorneys' Offices and the New York City Department of Correction, but it does not notify individuals of their inclusion in the database.⁹ Nor does the Department provide a mechanism to challenge gang designations.¹⁰ While the NYPD has publicly claimed to review its database for errors and purge outdated entries,¹¹ the Department maintains a list of "inactive" members of gangs/crews.¹²

"The NYPD is notorious for flouting the New York State Freedom of Information Law for even the most routine requests about police activity, contracts, and policies."¹³ The Department failed to provide a particularized and specific justification for withholding certain records, as required by law. Further, the NYPD now claims that after conducting a "diligent search," it could not locate most of the requested records. This includes policies and procedures memorializing the criteria used to enter individuals in its gang database and the process by which

⁹ *Transcript: Oversight—NYPD's Gang Takedown Efforts*, N.Y.C. COUNCIL COMM. ON PUB. SAFETY (June 13, 2018, 10:17 AM), <https://on.nyc.gov/2vdi681>.

¹⁰ See Statement of Chief Dermot Shea, Chief of Detectives, New York City Police Department, Before the New York City Council Committee on Public Safety, Committee Room, City Hall at 4 (June 13, 2018), attached hereto as Ex. A.

¹¹ *Id.* at 3, 4.

¹² See NYPD Excel Spreadsheet of Inactive Criminal Group Members, attached hereto as Ex. B.

¹³ Ali Winston, *NYPD Attempts to Block Surveillance Transparency Law with Misinformation*, THE INTERCEPT (July 7, 2017, 10:59 AM), <https://theintercept.com/2017/07/07/nypd-surveillance-post-act-lies-misinformation-transparency/>. As Public Advocate, now-Mayor Bill de Blasio issued a scathing report criticizing, in part, the NYPD's lack of transparency and responsiveness under FOIL. The report gave the NYPD an overall grade of "F" for its responsiveness to FOIL Requests. According to the report, nearly one-third of all requests never received a response while 28% of answered requests took more than 60 days to process. Off. of Bill de Blasio, Pub. Advoc. for the City of New York, *Breaking Through Bureaucracy: Evaluating Government Responsiveness to Information Requests in New York City* 14, 26 (April 2013) (available via download through the N.Y.C. Pub. Advocate archive, <http://archive.advocate.nyc.gov//foil/report>).

the Department reviews and modifies its database for accuracy. Yet in June 2018, just days prior to the Department's final administrative decision on Petitioners' FOIL Requests, the Chief of Detectives testified publicly that, four years ago, the NYPD established policies and procedures on the criteria for entry and removal of individuals in its gang database.

Without robust procedural safeguards, the NYPD's Criminal Group Database places innocent New Yorkers, mainly people of color, at substantial risk of harm. The public thus has a strong interest in knowing the precise policies and procedures the NYPD uses to designate individuals as gang or crew members, audits its database for accuracy, and removes an erroneously designated individual from its database. Without transparency, innocent New Yorkers—especially Black and Latino youth—will continue to suffer the consequences of the NYPD's imprecise policing practices.

For these reasons, LDF and CCR request that this Court grant the Verified Petition and require the NYPD to disclose the requested information about its gang policing tactics.

STATEMENT OF FACTS

LDF is the nation's first civil rights law organization. Through litigation, advocacy, public education, organizing and outreach, LDF strives to secure equal justice under the law for all Americans, and to eliminate barriers that prevent African Americans and other people of color from realizing their full civil and human rights. Since its inception, LDF has sought to eliminate the arbitrary role of race on the administration of the criminal justice system by challenging laws, policies and practices that disproportionately affect African Americans and other communities of color.

CCR is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution, federal civil rights law, and

the Universal Declaration of Human Rights. Since its founding in 1966, CCR has engaged in litigation, advocacy and public education campaigns challenging racially discriminatory and unconstitutional policies and practices within the American criminal justice system.

Access to public information, specifically, records generated and maintained by law enforcement agencies, enables LDF and CCR to advance their missions.

To hold the NYPD accountable for its gang policing practices, LDF and CCR together submitted two separate FOIL Requests (“the Requests” or “Petitioners’ Requests”) to the Department seeking information about the NYPD’s gang-related policies and practices, and in particular, its gang database.

At the time of the Requests, academic research suggested that the NYPD used a centralized repository to surveil and collect data on alleged members of local street gangs and crews.¹⁴ In addition, the NYPD’s publicly available Patrol Guide confirmed the existence of a gang database. According to the Patrol Guide, Youth Officers and Field Intelligence Officers must “identify youth gangs and maintain [a] youth gang file, including the names of known members, locations, colors, rivals, etc.”¹⁵ Similarly, Gang Division Supervisors or Members must enter relevant information into “pertinent Gang Division databases (ECMS).”¹⁶

Based in part on this information, Petitioners served their initial FOIL Request on December 20, 2017, seeking public records for five separate categories of information: (1) criteria used to designate individuals as gang/crew members; (2) criteria used to identify groups of people

¹⁴ See, e.g., Howell, *supra* note 3, at 15-16.

¹⁵ *Patrol Guide 202-30, Youth Officer*, N.Y.C. POLICE DEP’T (June 26, 2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf (pp. 77-78 of electronic document).

¹⁶ *Patrol Guide 212-13, Reporting Gang-Related Criminal Activity*, N.Y.C. POLICE DEP’T (Dec. 31, 2015), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide2.pdf (pp. 458-461 of electronic document).

as gangs/crews; (3) de-identified demographic information for individuals labeled as gang/crew members; (4) a copy of the NYPD's Gang/Group Incident Report (PD377-158); and (5) the use of the NYPD's Domain Awareness System to monitor and identify individuals as members of gangs or crews.¹⁷

On February 22, 2018, Petitioners served a second Request seeking additional public records about (1) the NYPD's definition of the terms "crew" and "gang"; (2) how, if at all, the NYPD notifies individuals it has entered into its gang database; (3) how, if at all, individuals in the database may challenge their designation as a gang/crew member; (4) information about individuals' challenges to their designation as gang/crew members; (5) how the NYPD reviews, audits, or modifies its gang database; and (6) a list of companies/agencies with which the NYPD has shared its gang database.¹⁸

The NYPD timely responded to each Request. Acknowledging receipt of the Requests, the Department wrote, "further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located."¹⁹ The Department agreed to issue a final determination on the requested documents within ninety business days of each acknowledgement letter.

On February 12, 2018, after submitting the first Request, the undersigned LDF counsel spoke by phone with Detective Steven Halk, the NYPD Detective assigned to the Request. Detective Halk conveyed that he had contacted "a couple different units" to gather the records requested.²⁰ He did not provide details about the information sought or collected. Detective Halk

¹⁷ December 20, 2017 FOIL Request, attached hereto as Ex. C.

¹⁸ February 22, 2018 FOIL Request, attached hereto as Ex. D.

¹⁹ December 28, 2017 and March 1, 2018 NYPD Acknowledgement Letters, attached hereto collectively as Ex. E.

²⁰ Conversations with Detective Halk spanned several months, from February 2018 through April 2018. In total, LDF counsel spoke with the Detective on five separate occasions about the FOIL Requests.

anticipated having the Request “wrapped up in the next couple weeks,” though he provided no date certain by which Petitioners could expect a determination from the NYPD. When asked, Detective Halk assured LDF that the NYPD would respond to the Request “well before” the Department’s ninety-day deadline.

On March 15, 2018, one month after the initial call with Detective Halk, LDF counsel again contacted him by telephone. The Detective confirmed that he had been assigned to both of Petitioners’ Requests. He assured counsel that he was “actively looking into” each Request and said he was “hoping” but “cannot guarantee” that he would have a response to the Requests “within the next week or two.”

Three weeks later, Petitioners again spoke with Detective Halk, who revealed that he received responses from “several” units concerning the Requests but was still waiting to hear back from the School Safety Division. In a fourth conversation on April 23, 2018, Detective Halk told LDF counsel that he should be able to provide some Patrol Guide Procedures “this week” but said the remainder of the responsive records collected were under review.

Nearly five months after Petitioners served the initial FOIL Request and more than two months after submitting the second FOIL request to the NYPD, the NYPD sent a determination letter for each request (“Determination Letters”).²¹ The Determination Letters were identical. Enclosed with each letter were eight NYPD Patrol Guide Procedures and two PowerPoint presentations that the Department redacted or withheld portions of, citing, without explanation, four distinct FOIL exemptions to justify the redactions and withholdings. The NYPD withheld the remainder of the requested records, broadly citing without explanation six distinct exemptions to disclosure in New York Public Officers Law.

²¹ See May 1, 2018 NYPD Determination Letters to Dec. 20, 2017 & Feb. 22, 2018 FOIL Requests, attached hereto collectively as Ex. F.

Petitioners administratively appealed each of the NYPD's Determination Letters ("the Appeals" or "Petitioners' Appeals").²² The Appeals contended that the Department's recitation of the FOIL subsections was inadequate to meet its burden of providing a "particularized and specific" justification for both the redacted/partially withheld documents provided and the nondisclosure of the remainder of the requested records. Petitioners argued that the NYPD improperly invoked or incorrectly applied several FOIL exemptions to deny records.

Before responding to Petitioners' Appeals, NYPD officials gave public, sworn testimony about the records that the Department claimed were subject to FOIL exemptions. On June 13, 2018, NYPD Chief of Detectives Dermot Shea appeared at a New York City Council Committee on Public Safety hearing entitled, "NYPD Gang Takedown Efforts." The Chief testified about the criteria the Department uses to designate individuals as members of gangs and provided statistics revealing that ninety-nine percent of the individuals in its Criminal Group Database are people of color. The Department also testified that it does not notify individuals of their entry in the database, nor is there a process for individuals to challenge their inclusion in the database.

A week after the hearing, the NYPD responded to Petitioners' Appeals ("Appeal Determination").²³ The Appeals were granted in part and denied in part. The NYPD claimed that "a diligent search was conducted" and "no records were located" on (1) the criteria for an individual's entry into the Criminal Group Database; (2) the criteria used to determine what groups

²² May 31, 2018 Petitioners' Appeals to Dec. 20, 2017 & Feb. 22, 2018 FOIL Requests, attached hereto collectively as Ex. G.

²³ June 20, 2018 NYPD Appeal Determination, attached hereto as Ex. H. The NYPD responded to Petitioners' Appeals six days late. New York Public Officers Law Section 89(4)(a) requires that an agency respond to an administrative appeal "within ten business days of the receipt of such appeal." Petitioners' sent the Appeals to the NYPD by email on May 31, 2018. By statute, therefore, the NYPD had until June 14, 2018 to respond to Petitioners' Appeals. On June 15, 2018, LDF counsel called the NYPD's FOIL Appeals Unit and spoke with Evelyn Cordero, who referred LDF counsel to Lisa Moore, Assistant Counsel at the NYPD Appeals Unit. Ms. Moore said the Records Appeals Access Officer was out of the office and would respond when he returned the next week.

of individuals constitute a gang or crew; (3) how the NYPD uses its Domain Awareness System to monitor or identify gang members; (4) the process for reviewing/auditing/modifying the database; (5) the process for notifying individuals about their inclusion in the database; (6) the process for individuals to challenge their inclusion in the database; (7) individual challenges to inclusion in the database; and (8) companies/agencies with which the NYPD shares its database.²⁴

The NYPD did produce some records in response to the Appeals. The Department provided three Microsoft Excel spreadsheets with “statistics that were previously disclosed pursuant to a separate FOIL request.”²⁵ The NYPD also disclosed a copy of the NYPD’s now-retired Gang/Group Incident Report (PD377-158), along with a copy of the Interim Order revoking the Incident Report. Finally, the Department provided an already public copy of the June 13, 2018 written testimony that Chief of Detectives Dermot Shea gave to the New York City Council Committee on Public Safety.²⁶

The lack of documentation provided by the NYPD in response to Petitioners’ FOIL Requests stands in sharp contrast to the Department’s public assurances of “robust safeguards” for its gang database. At a City Council hearing in June 2018, Chief Shea testified that in 2014, the NYPD “realized it needed to establish procedures to regulate the circumstances under which a person’s name would be entered into the database, as well as criteria for removal.”²⁷ The Department stated that the process for adding an individual to the database demands “a formal

²⁴ Ex. H at 1.

²⁵ Email from Sgt. Jordan Mazur, Records Access Appeals Officer, NYPD, to Matt Bailey, Paralegal, NAACP LDF (June 20, 2018, 1:26 P.M.) (on file with LDF counsel), attached hereto as Ex. I. A later email from Sergeant Mazur clarified that the spreadsheets were responsive to the third category of requests from the December 2017 Request seeking the demographic information of every individual in its gang database. See Email from Sgt. Jordan Mazur, Records Access Appeals Officer, NYPD, to Marne Lenox, Assistant Counsel, NAACP LDF (June 25, 2018, 9:17 AM) (on file with LDF counsel), attached hereto as Ex. J.

²⁶ See Ex. A.

²⁷ *Id.* at 3.

recommendation requiring a written narrative and supporting documentation that justify such individual's inclusion."²⁸

Chief Shea testified that the NYPD may include an individual in the gang database if he admits to gang membership or is identified by "two independent and reliable sources" as being gang affiliated.²⁹ Alternatively, the NYPD may enter an individual into its gang database if two of the following are true: 1) the person frequents a "known gang location;" 2) the person possesses "gang-related documents;" 3) the person associates with known gang members; 4) the person appears in social media posts possessing "known gang paraphernalia;" 5) the person has scars and tattoos associated with a particular gang; or 6) the person "frequent[ly]" wears colors and "frequent[ly]" uses hand signs associated with particular gangs.³⁰ According to Chief Shea, "These actions must be a consistent course of conduct."³¹

Despite this specific standard for entry in its Criminal Group Database, the NYPD's Appeal Determination claims the Department cannot locate a single record memorializing these criteria.³²

The City Council testimony also contends that "the Department has created three avenues to exit the database, reviewing each person every three years, and on their 23rd and 28th birthdays to determine if their actions and records still warrant their inclusion in the database. These safeguards are robust."³³ Like the criteria for entry in the database, the Appeal Determination asserts that the agency cannot locate any records reflecting these "avenues to exit the database."³⁴

²⁸ *Id.* at 4.

²⁹ *Id.*

³⁰ *Id.* at 4. One record turned over by the NYPD lists the colors associated with four different gangs as follows: 1) Bloods: Black, Red, Green, Brown, Khaki; 2) Crips: Black, Blue, Gray, Purple, Orange; 3) Latin Kings: Black, Gold/Yellow, Red, Purple, Green; 4) Dominican Gangs: Blue, Red, White, Black, Purple, Lime Green. PowerPoint Presentation, *Colors*, attached hereto as Ex. K.

³¹ *See* Ex. A at 4.

³² *See* Ex. H.

³³ *See* Ex. A.

³⁴ *See id.* at 4; *see also* Ex. H at 2.

After receiving the Appeal Determination, LDF counsel spoke with Sergeant Jordan Mazur, the Records Access Appeals Officer. While the exact parameters of the NYPD's search for requested records remain unclear, Sergeant Mazur confirmed that his search encompassed the search conducted at the pre-appeal level. The Sergeant noted that the search did not extend to the NYPD Detective Guide (which differs from the NYPD Patrol Guide) and that the search likewise did not encompass Youth Officer files.

LDF counsel also spoke with Sergeant Mazur about the December 2017 request for records on the relationship between the NYPD's Domain Awareness System and gang or crew identification.³⁵ The Appeal Determination denied this request "because your appeal does not reasonably describe a specific record in a manner that could lead to its retrieval" under Public Officers Law § 89(3).³⁶ Following discussion over the phone, Sergeant Mazur conceded that the written request did provide sufficient detail to allow the NYPD to search for the requested records. He stated, however, that such records do not exist.

Days later, Petitioners sought additional clarification from the NYPD about its Appeal Determination. The Determination failed to address the records that the Department originally disclosed but redacted and partially withheld, which Petitioners had raised on appeal. By email, Sergeant Mazur stated that the Department "maintains that any of that information redacted/withheld is exempt from disclosure under the same subsections of Public Officers Law cited by Lt. Mantellino" in the May 1, 2018 Determination Letters.³⁷

³⁵ See Ex. C at 2.

³⁶ Ex. H. at 1-2.

³⁷ See Ex. J, Email from Sgt. Jordan Mazur (June 25, 2018, 9:17 AM) (on file with LDF counsel).

ARGUMENT

I. THE NYPD'S DENIAL OF THE REQUESTS MERITS ARTICLE 78 REVIEW.

After exhausting administrative remedies, “a person denied access to a record in an appeal determination ... may bring a proceeding for review” of the agency’s determination under Article 78 of the New York Civil Practice Law and Rules.³⁸ This proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.”³⁹

Petitioners have met the threshold for filing an Article 78 petition in New York Supreme Court. To begin, Petitioners have exhausted the administrative review process. The NYPD issued a determination on Petitioners’ two FOIL Requests on May 1, 2018.⁴⁰ On May 31, 2018, Petitioners timely filed administrative appeals challenging the Department’s Determination Letters.⁴¹ In response, the NYPD sent Petitioners an Appeal Determination on June 20, 2018, exhausting the administrative review process.⁴² Petitioners then timely filed this petition on August 8, 2018, less than four months after the agency’s decision became “final and binding.”

When reviewing an Article 78 petition challenging a FOIL determination, courts apply the “affected by an error of law” standard of review.⁴³ Generally, this “involves an allegation that the agency improperly interpreted or applied a statute or regulation.”⁴⁴ Here, the NYPD’s Appeal

³⁸ N.Y. PUB. OFF. LAW § 89(4)(b) (McKinney 2017); *see also* *Murphy v. N.Y. State Educ. Dep’t, Office of Prof’l Discipline*, 543 N.Y.S.2d 70, 73 (App. Div. 1989) (noting that a petitioner must exhaust administrative remedies before seeking judicial relief for a FOIL Request).

³⁹ N.Y. C.P.L.R. 217(1) (McKinney 1990).

⁴⁰ *See* Ex. F.

⁴¹ *See* Ex. G; *see also* N.Y. PUB. OFF. LAW § 89(4)(a) (noting that “any person denied access to a record may within thirty days appeal in writing such denial”).

⁴² The NYPD issued its June 20, 2018 Appeal Determination six days after the statutory deadline. *See id.*

⁴³ *Mulgrew v. Bd. of Educ. of N.Y.*, 928 N.Y.S.2d 701, 702 (App. Div. 2011) (citing N.Y. C.P.L.R. 7803(3) (McKinney 2003)); *Thomas v. Condon*, 9 N.Y.S.3d 257, 258 (App. Div. 2015) (finding the application of “abuse of discretion” and “arbitrary and capricious” legal standards of review to be reversible error).

⁴⁴ *Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals*, 995 N.Y.S.2d 659, 666 (Sup. Ct. 2013), *aff’d*, 992 N.Y.S.2d 667 (Mem.) (App. Div. 2014).

Determination violates the Freedom of Information Law in three distinct ways. First, the Department flouted FOIL by failing to conduct a diligent search for the records Petitioners requested. Second, the NYPD violated FOIL by neglecting to certify properly its search for records. Third, the NYPD failed to provide a particularized and specific justification for withholding records.

For these reasons, judicial review of the NYPD's Appeal Determination is warranted.

II. THE NYPD'S RESPONSE TO THE REQUESTS VIOLATES THE FREEDOM OF INFORMATION LAW.

A. The NYPD Did Not Conduct a Diligent Search for Requested Records.

The NYPD claims that for most records sought in Petitioners' FOIL Requests, "a diligent search was conducted" and "no records were located."⁴⁵ Yet Petitioners have reason to believe that the NYPD maintains records that it claims could not be located. Petitioners therefore contest the thoroughness of the NYPD's search for records.

Under FOIL, an agency claiming not to have records must "certify that it does not have possession of such record or that such record cannot be found after diligent search."⁴⁶ Generally, proper certification of such a search ends the inquiry for public records.⁴⁷ But a petitioner is entitled to a hearing on the agency's possession of requested documents when the petitioner "articulate[s] a demonstrable factual basis to support his contention that the requested documents existed and were within [the agency's] control."⁴⁸

⁴⁵ Ex. H at 1.

⁴⁶ N.Y. PUB. OFF. LAW § 89(3)(a).

⁴⁷ See, e.g., *Daum v. Tessler*, 804 N.Y.S.2d 920, 921 (App. Div. 2005). See *infra* Section II.B for discussion about the NYPD's certification of its search for records.

⁴⁸ *Gould v. NYPD*, 89 N.Y.2d 267, 279 (1996); see also *Oddone v. Suffolk Cty. Police Dep't*, 946 N.Y.S.2d 580, 584 (App. Div. 2012) ("[E]ven where an entity properly certifies that it was unable to locate requested documents after performing a diligent search, the person requesting the documents may nevertheless be entitled to a hearing on the issue where he or she can 'articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [entity's] control.'" (internal citations omitted); cf. *Wright v. Woodard*, 68 N.Y.S.3d 778 (Mem), 778 (App. Div.

As explained in detail below, there is a “factual basis” to believe that the NYPD maintains records that it claims cannot be located. First, the NYPD’s original response to Petitioners’ Requests signaled that the Department possessed responsive records that it withheld under FOIL exemptions. It is records of this type that Petitioners now seek. Second, the NYPD’s June 13, 2018 City Council hearing testimony avers that in 2014, the Department “established procedures” to regulate the criteria for inclusion in its Criminal Group Database and “instituted oversight mechanisms” to ensure the accuracy of its database. This public declaration undermines the claim that no such records could be located, providing Petitioners the basis to believe requested records exist.

We first turn to the NYPD’s direct response to Petitioners’ FOIL Requests. On May 1, 2018, the NYPD issued two identical Determination Letters granting Petitioners’ FOIL Requests in part and denying the Requests in part. Along with the Determination Letters, the Department disclosed eight NYPD Patrol Guide procedures and two PowerPoint presentations, noting that the Department made “[r]edaction[s] and withholdings” to these records under FOIL exemptions. The NYPD denied the remainder of the requests, citing six different FOIL exemptions to withhold the requested records.⁴⁹ The NYPD’s Determination Letters contained no indication that the requested records could not be located. Instead, the Letters suggested that the Department possessed responsive records but believed the records were exempt from disclosure under FOIL.

Conversations with the NYPD about the Requests also evidence the existence of requested records. Between February and April 2018, LDF counsel spoke with the Detective assigned to the

2018) (holding FOIL certification requirements satisfied and petition properly dismissed when there is no reason to disbelieve an affidavit from the agency’s custodian of records averring that the records sought do not exist).

⁴⁹ Ex. F.

FOIL Requests, Detective Steven Halk, four times.⁵⁰ Each time, the Detective suggested he was collecting responsive records from a wide array of units within the Department. These records, according to Detective Halk, required review and vetting by his superiors before disclosure.

Nearly two months after sending the Determination Letters, however, the NYPD responded to Petitioners' administrative appeal without citing a single FOIL exemption as justification for withholding records. Instead, the Records Access Appeals Officer stated that after conducting a "diligent search"—including review of the pre-appeal search—he could not locate most of the records Petitioners requested.⁵¹ The records he purportedly could not locate include (1) the criteria for an individual's entry into its Criminal Group Database; (2) the criteria used to determine what groups of individuals constitute a gang or crew; (3) documents about how the NYPD uses its Domain Awareness System to monitor or identify gang members; and (4) the process to review, audit, or modify the database.⁵² In other words, on May 1, 2018, the NYPD asserted multiple statutory exemptions to withhold records that on June 20, 2018 it claimed not to have been able to locate.

The records that the NYPD did disclose further undermine the Department's position that it could not locate additional responsive records. In particular, the written copy of Chief of Detectives Dermot Shea's June 13, 2018 sworn testimony before the New York City Council Committee for Public Safety belies the NYPD's contention that it could not locate certain requested records.

⁵⁰ Telephone interviews occurred on the following dates: Feb. 12, 2018; Mar. 15, 2018; Apr. 6, 2018; and Apr. 23, 2018.

⁵¹ Telephone Interview with Sgt. Jordan Mazur, Records Access Appeals Officer, NYPD (June 21, 2018).

⁵² Sgt. Jordan Mazur claimed not to have found records for more categories than this, but these are the only categories LDF counsel contests. Telephone Interview with Sgt. Jordan Mazur, *supra* note 51.

Chief Shea testified before the New York City Council that around 2014, the NYPD “*establish[ed] procedures* to regulate the circumstances under which a person’s name would be entered into the database, as well as criteria for removal.”⁵³ Describing the “two paths” for entry into the NYPD’s Criminal Group Database, the Chief testified:

The first path requires that one of the following occur: a self-admission of gang membership to a member of the Department; being identified as a gang member by two independent and reliable sources; or social media posts admitting to membership in a gang. The second path requires two of the following to be true: frequent presence at a known gang location; possession of gang-related documents; association with known gang members; social media posts with known gang members while possessing known gang paraphernalia; scars and tattoos associated with a particular gang, frequent wearing of the colors and frequent use of hand signs that are associated with particular gangs. It is not enough for a person to be in a gang location, or to flash hand signs, or to wear gang colors on a certain day. These actions must be a consistent course of conduct.⁵⁴

According to Chief Shea, these paths to entry in the database are closely guarded. Only a “limited number of people” may recommend a person for entry in the database, and the Department has “*instituted oversight mechanisms* to ensure the recommendation is backed up by evidence.”⁵⁵ Chief Shea swore, “This is a formal recommendation requiring a written narrative and supporting documentation that justify [an] individual’s inclusion [in the database].”⁵⁶ The Chief insisted that Gang Squad supervisors review the recommendations to ensure the accuracy of gang designations.

Despite Chief Shea’s testimony about the Department’s specific procedures for entering individuals in the database, the NYPD claims to have been unable to locate any records memorializing the criteria for entry in its gang database. In lieu of written policies and procedures, Sergeant Mazur claimed that NYPD personnel communicate this information verbally. Rookie officers, he said, sit down with seasoned detectives who communicate the criteria for entry in the

⁵³ See Ex. A at 3 (emphasis added).

⁵⁴ See *id.* at 4.

⁵⁵ See Ex. A at 4.

⁵⁶ *Id.*

database.⁵⁷ This cannot be true. It defies belief that for the past four years, detectives have been meeting with each other to assess and apply a set of criteria that exists nowhere in writing.

Chief Shea's testimony also casts doubt on the Department's assertion that it could not locate records on the process by which the NYPD reviews, audits, or modifies its Criminal Group Database. According to Chief Shea, "the Department has created three avenues to exit the database, reviewing each person every three years, and on their 23rd and 28th birthdays to determine if their actions and records still warrant their inclusion in the database." The Chief proclaimed, "These safeguards are robust."⁵⁸

Yet according to the Records Access Appeals Officer, the Department has no written policies, procedures, or training materials reflecting these "robust" safeguards. The NYPD would have us believe that the Department has implemented the safeguards outlined in Chief Shea's testimony absent a single enshrined departmental policy or procedure. If the NYPD has adopted the policies and procedures it touts in its City Council testimony, there must be internal records reflecting such.

The facts here mirror those in *Oddone v. Suffolk County Police Department*.⁵⁹ In *Oddone*, the petitioner filed a FOIL Request for records related to his own criminal case maintained by the Suffolk County Police Department.⁶⁰ In response, the police department disclosed some documents responsive to petitioner's FOIL Request and stated that no other responsive documents could be located.⁶¹ The petitioner then brought an Article 78 proceeding against the police department arguing that the police department neglected to search thoroughly for records related

⁵⁷ Telephone Interview with Sgt. Jordan Mazur, *supra* note 51.

⁵⁸ Ex. A at 4.

⁵⁹ 946 N.Y.S.2d 580.

⁶⁰ *Id.* at 582.

⁶¹ *Id.*

to his criminal case. The petitioner reasoned that the disparity between the volume of documents a Suffolk County Police Department officer brought to the petitioner's criminal trial "and the documents produced in response to the petitioner's request indicated the existence of additional responsive documents."⁶²

In response, the police department relied on its Appeals Officer's determination that "after a diligent search, no other responsive documents could be located."⁶³ Still, the court found that "the allegations contained in the petition, if proven, would provide a factual basis to support the petitioner's contention that additional documents relating to the criminal investigation of the petitioner's case exist and are within the Police Department's control."⁶⁴ Petitioners were therefore entitled to a hearing to determine whether additional responsive documents exist within respondent's control.

As in *Oddone*, LDF and CCR have documents that evidence the existence of records the NYPD claims to be unable to locate. The NYPD cannot reconcile its alleged lack of records with Chief Shea's assurances that the Department has implemented robust safeguards to protect individuals' constitutional rights.

As additional evidence of the NYPD's deficient search, Sergeant Mazur conceded that his search for records was not exhaustive. When LDF counsel spoke with him, the Sergeant stated that his search did not include the NYPD Detective Guide—which differs from the Patrol Guide—nor did he request to search Youth Officers' files.⁶⁵ Because Youth Officers must "identify youth

⁶² *Id.*

⁶³ *Id.* at 583.

⁶⁴ *Id.* at 584.

⁶⁵ Telephone Interview with Sgt. Jordan Mazur, *supra* note 51.

gangs and maintain [a] youth gang file, including the names of known members, locations, colors, rivals, etc.” the NYPD should have reviewed these officers’ files for responsive records.⁶⁶

These are just two instances of searches known to Petitioners that the Department should have conducted but did not. There are likely others. Rather than conduct a diligent search for records, it appears the Records Access Appeals Officer did little more than review and rubber stamp Detective Halk’s pre-appeal search for records. For these reasons, “the allegations in th[is] petition are sufficient to make out a claim that the determination of the Appeals Officer was ‘made in violation of lawful procedure.’”⁶⁷

Petitioners also have reason to doubt the NYPD’s claim that it could not locate records about the relationship between its Domain Awareness System and gang policing. In April 2018, the Bronx Defenders and the law firm Cleary Gottlieb Steen & Hamilton LLP filed a class action complaint on behalf of aggrieved New Yorkers challenging the NYPD’s use of sealed arrest information in violation of New York law.⁶⁸ Exhibit B of the complaint is a Domain Awareness System Snapshot, which contains information about an individual in the system, including a field labeled “Gang Affln.”⁶⁹ This Snapshot establishes that the Domain Awareness System in some way monitors or identifies individuals alleged to be members of a gang. Thus, there is reason to believe that records about the NYPD’s use of the Domain Awareness System to monitor or identify members of gangs exist despite the Department’s assertion to the contrary.

⁶⁶ *Patrol Guide 202-30, Youth Officer*, *supra* note 15.

⁶⁷ *Oddone*, 946 N.Y.S.2d at 584 (internal citations omitted).

⁶⁸ *R.C. v. City of New York*, No. 153739/2018 (N.Y. Sup. Ct. filed Apr. 24, 2018).

⁶⁹ Domain Awareness System Snapshot, attached hereto as Ex. L.

For the reasons stated above, at a minimum, the Court should grant a hearing to determine whether additional documents responsive to Petitioners' FOIL Requests exist and are within the NYPD's control.⁷⁰

B. The NYPD Did Not Properly Certify Its Search for Records.

When an agency cannot locate records requested under FOIL, New York Public Officers Law Section 89(3) requires the agency to certify that "such record cannot be found after diligent search." While "[t]he statute does not specify the manner in which an agency must certify that documents cannot be located,"⁷¹ certification demands "something more than a bare-faced allegation."⁷² To certify that records requested under FOIL do not exist, an agency must tender a sworn document submitted under penalty of perjury.⁷³

In contrast to this rule, the NYPD's response to Petitioners' FOIL Requests "lack[s] any supporting affidavits from respondent to certify that the [agency] performed a diligent search for the requested documents but could not find them."⁷⁴ Instead, the NYPD merely submitted a letter stating that, with respect to most of the records sought, "a diligent search was conducted" but "no

⁷⁰ See *Oddone v. Suffolk Cty. Dist. Att'y's Office*, No. 14955/11, 2013 WL 2256301, at *5 (N.Y. Sup. Ct. 2013) (ordering a hearing on the existence of documents respondent claimed not to exist in response to petitioner's FOIL Request); *Oddone v. Suffolk Cty. Dist. Att'y's Office*, No. 0149552011, 2014 WL 10321399, at *1 (N.Y. Sup. Ct. 2014) (granting petitioner's motion for issuing so-ordered subpoenas related to the subject of petitioner's FOIL Request); cf. *Daum*, 804 N.Y.S.2d at 921 ("Petitioner has offered no persuasive reason to reject respondents' statement of diligent efforts to locate the subject documents.").

⁷¹ *Rattley v. NYPD*, 96 N.Y.2d 873, 875 (2001).

⁷² *Riley-James v. Vance*, 971 N.Y.S.2d 74 (Table) (Sup. Ct. 2013).

⁷³ See *Rattley*, 96 N.Y.2d at 875 (finding an affirmation that the agency could not locate records requested under FOIL satisfied the certification requirement); *Riley-James*, 971 N.Y.S.2d at 74 (noting that "sufficient certification is not provided by the allegations in the denial that [the agency] does not possess the requested documents" where the allegations are unsworn); *Tarantino v. NYPD*, 25 N.Y.S.3d 601 (Mem.), 601 (App. Div. 2016) (finding "respondents sufficiently established" that they did not possess materials sought in petitioner's FOIL request "by submitting their attorney's certification to that effect").

⁷⁴ See *Riley-James*, 971 N.Y.S.2d at 74.

records were located.”⁷⁵ This statement is insufficient to certify the Department’s search for records that were not located.⁷⁶

If the NYPD intends to maintain its untenable position that certain requested records cannot be located, the Department must provide a supporting affidavit or confirmation in its verified answer indicating such.

C. The NYPD Failed to Provide a Particularized and Specific Justification for Withholding Certain Records.

The NYPD neglected to provide sufficient justification for redacting and partially withholding portions of records that it disclosed to Petitioners. In its Determination Letters, the NYPD disclosed eight NYPD Patrol Guide Procedures and two PowerPoint presentations with the caveat that the Department redacted and withheld unspecified portions of the disclosed documents pursuant to four cited FOIL exemptions. After issuing the Appeal Determination, Sergeant Mazur cited these four exemptions, along with two additional exemptions, as justification for continuing to redact and withhold responsive documents. The email citing these six exemptions merely parroted the statutory language and failed to provide a particularized and specific justification for invoking each exemption, as required under FOIL.⁷⁷

The Freedom of Information Law “proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.”⁷⁸ “To promote open government and public accountability, the FOIL imposes a

⁷⁵ See Ex. H at 2.

⁷⁶ See *Whitfield v. Moriello*, 895 N.Y.S.2d 405, 406 (2010) (finding search for records properly certified when responded “provide[d] affidavits from two of its officers stating that they had diligently searched the two facilities where the records might be stored, and documents showing that, prior to petitioner’s FOIL request, 2050 boxes of inmate records stored in one of the facilities had been ruined in a flood and destroyed pursuant to administrative order”).

⁷⁷ Ex. J, Email from Sgt. Jordan Mazur, (June 25, 2018, 9:17 AM).

⁷⁸ *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); see also *Friedman v. Rice*, 30 N.Y.3d 461, 475 (2017).

broad duty on government to make its records available to the public.”⁷⁹ Therefore, “[a]ll government records are [] presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2). To ensure maximum access to government documents, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.’”⁸⁰

Here, the NYPD relies on several FOIL exemptions—§ 87(2)(b), 87(2)(g), 87(2)(i), 87(2)(e)(iii), 87(2)(e)(iv), 87(2)(f), and 87(2)(g)(iii)—to justify redacting or partially withholding some of the records disclosed to Petitioners. The NYPD’s reliance on these exemptions lacks merit because the NYPD failed to provide a “particularized and specific” justification for withholding and redacting the requested records.

When an agency denies access to records requested under FOIL, it must “fully explain in writing to the person requesting the record the reasons for [] denial.”⁸¹ The Court of Appeals has interpreted this to mean the agency shoulders the burden to “articulate particularized and specific justification . . . to exempt its records from disclosure.”⁸² “Only where the material requested falls squarely within the ambit of one of the [] statutory exemptions may disclosure be withheld.”⁸³

Equally important, “[j]udicial review of an administrative determination is limited to the grounds invoked by the agency” during the administrative process.⁸⁴ This procedural safeguard

⁷⁹ *Gould*, 89 N.Y.2d at 274.

⁸⁰ *Id.* at 274-75 (citing *Hanig v. N.Y. Dep’t of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992)).

⁸¹ N.Y. PUB. OFF. LAW § 89(4)(a).

⁸² *Fink*, 47 N.Y.2d at 571.

⁸³ *Id.* (noting that an “agency does not have carte blanche to withhold any information it pleases”); *see also Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-63 (2007) (noting that when an agency “fails to prove that a statutory exemption applies, FOIL compels disclosure, not concealment”) (quotations and citation omitted); *Condon*, 9 N.Y.S.3d at 258.

⁸⁴ *Madeiros v. N.Y.S. Educ. Dep’t.*, 30 N.Y.3d 67, 75 (2017) (rejecting agency’s reliance on an exemption that the agency failed to invoke in its denial of petitioners’ FOIL request); *see also Law Offices of Perlmutter, P.C. v. NYPD*, 999 N.Y.S.2d 26, 27 (App. Div. 2014) (rejecting the NYPD’s attempt to invoke an exemption during the Article 78 proceeding because it “was not cited by [the NYPD] at the administrative level”).

ensures that an agency does not invoke additional exemptions after the administrative proceeding, which would unfairly disadvantage a petitioner. Consequently, when determining whether to compel disclosure of the records sought, this Court must consider only the exemptions cited by NYPD in the administrative appeal record.⁸⁵

Here, the NYPD neglected to articulate a “particularized and specific justification” for withholding records in both its Determination Letters and Appeal Determination. In the Determination Letters, the Department disclosed eight NYPD Patrol Guide Procedures and two PowerPoint presentations, asserting:

Redaction and withholdings have been made to the documents on the basis of Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures; Public Officers Law Section 87(2)(e)(iii), in that the release of such information would identify a confidential source or disclose confidential information; Public Officers Law Section 87(2)(b) as such information, if disclosed, would constitute an unwarranted invasion of personal privacy; and Public Officers Law Section 87(2)(f) as such records/information would endanger the life or safety of any person.⁸⁶

In contravention of the Freedom of Information Law, the Department’s Determination Letters merely recited statutory language with no factual support for the assertion that these FOIL provisions exempted records from disclosure.

The Appeal Determination neglected to address the redactions and withholdings made to the eight Patrol Guide sections and two PowerPoint presentations. When asked about the redactions and withholdings to these materials, the Records Access Appeals Officer expanded on

⁸⁵ *Madeiras*, 30 N.Y.3d at 74 (noting that “the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis”), (citing *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991)) (“It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency.”).

⁸⁶ Ex. F.

the exemptions cited in the Determination Letters, invoking two additional exemptions without explanation. In the text of an email, Sergeant Mazur stated:

Where the appeal determination failed to address the exemptions/withholdings claimed by the RAO as it pertains to Patrol Guide procedures and Instructor's Guide/PowerPoint presentations, the NYPD maintains that any of that information redacted/withheld is exempt from disclosure under the same subsections of Public Officers Law cited by Lt. Mantellino [i.e., 87(2)(b); 87(2)(e)(iii); 87(2)(e)(iv); 87(2)(f); 87(2)(g); 87(2)(i)].⁸⁷

Again, the Sergeant Mazur simply listed statutory exemptions to FOIL without a shred of support to justify withholding responsive records.

The NYPD's Determination Letters, its Appeal Determination, and Sergeant Mazur's email epitomize the "wholly insufficient" response to FOIL Requests that courts caution against.⁸⁸ The NYPD has "tendered only references to sections, subdivisions, and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld."⁸⁹ "This falls short of the showing FOIL requires to establish the applicability of an exemption."⁹⁰

New York State courts have continuously held that parroting the statutory language of FOIL exemptions cannot justify withholding records under FOIL.⁹¹ This Court should therefore

⁸⁷ Ex. J, Email from Sgt. Jordan Mazur, (June 25, 2018, 9:17 AM).

⁸⁸ See *Church of Scientology of N.Y. v. State*, 46 N.Y.2d 906, 907-08 (1979).

⁸⁹ See *id.*

⁹⁰ *City of Newark v. Law Dep't of N.Y.*, 760 N.Y.S.2d 431, 436-37 (App. Div. 2003) (noting that the agency "withheld all of the requested records on the basis of a blanket invocation of three statutory exemptions, without enumerating or describing any of the documents withheld and without offering a specific basis for any of the claims of exemption").

⁹¹ See, e.g., *W. Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884-85 (2009) (finding an agency's appeals officer's sole reliance on FOIL statutory exemptions to deny requested records without more constituted a failure to explain fully in writing the reasons for the denial as required by FOIL); *DJL Rest. Corp. v. Dep't of Bldgs. of N.Y.*, 710 N.Y.S.2d 564, 566 (App. Div. 2000) ("Affidavits merely repeating the statutory phrasing of an exemption are insufficient to establish the requirement of particularity."); *Johnson v. NYPD*, 694 N.Y.S.2d 14, 20 (App. Div. 1999) ("NYPD's failure to present a more expansive 'particularized and specific justification for denying access' and instead seeking a blanket exemption on privacy or safety grounds is unfortunate, and precludes a summary disposition of petitioner's FOIL request.") (internal citation omitted).

compel disclosure of the withheld/redacted records.⁹²

III. PETITIONERS ARE ENTITLED TO LEGAL COSTS, INCLUDING ATTORNEY'S FEES.

Petitioners request attorney's fees and litigation costs stemming from this Article 78 petition. Under FOIL's fee provision, a court must assess fees and costs against an agency in an Article 78 proceeding if petitioners: (1) "substantially prevailed" and (2) "the court finds that the agency had no reasonable basis for denying access."⁹³

This mandatory assessment is intended to encourage agencies to comply with FOIL and deter costly litigation.⁹⁴ Originally adopted in 1982, the New York State Legislature drafted Section 89(4) to discourage agencies from waiting until petitioners filed lawsuits before complying with FOIL.⁹⁵ In 2006, the Legislature amended the fee provision to expand access to attorney's fees in two ways. First, the amendment eliminated the statutory requirement that the records must be of clearly significant interest to the general public.⁹⁶ Second, the amendment authorized fee recovery when an agency fails to meet statutory timeframes.⁹⁷ These modifications sought to

⁹² See *Church of Scientology*, 46 N.Y.2d at 907-08 (holding petitioner is entitled to records when "[t]here is no tender of any factual basis on which to determine whether the materials sought either fell outside the scope of mandated disclosure ... or come within the exceptions specified [under FOIL]").

⁹³ N.Y. PUB. OFF. LAW § 89(4)(c)(ii). See also *Rauh v. de Blasio*, 75 N.Y.S.3d 15, 15 (App. Div. 2018) (noting that the statute "evinces an unmistakable legislative intent that attorney's fees are to be assessed against an agency when the other party has substantially prevailed and the agency had no reasonable basis for denying access").

⁹⁴ Petitioners could also be entitled to attorney's fees and litigation costs because the NYPD failed to provide an Appeal Determination letter within the ten-day statutory timeframe. N.Y. PUB. OFF. LAW § 89(4)(a). A court may assess costs against an agency in an Article 78 proceeding if petitioners: (1) "substantially prevailed" and (2) "when the agency failed to respond to a request or appeal within the statutory time." N.Y. PUB. OFF. LAW § 89(4)(c)(i) (emphasis added). Petitioners received the NYPD's Appeal Determination on June 20, 2018, three days after the statutory timeframe. Although the NYPD failed to meet this statutory obligation, Petitioners do not request attorney's fees and litigation costs under this subsection of the fee provision.

⁹⁵ *N.Y.S. Defs. Ass'n v. N.Y.S. Police*, 927 N.Y.S.2d 423, 423 n.2 (App. Div. 2011) (citing Assembly Mem. in Support, at 1 Bill Jack, L. 1982, ch. 73).

⁹⁶ *Id.*; for statutory history, see N.Y. PUB. OFF. LAW § 89(4)(c) (McKinney 2006).

⁹⁷ N.Y. PUB. OFF. LAW § 89(4)(c)(i).

“create a clear deterrent to unreasonable delays and denials [and thereby] encourage every unit of government to make good faith efforts to comply with the requirements of FOIL.”⁹⁸

The NYPD’s inadequate response to Petitioners’ FOIL Requests is the precise type of unreasonable agency action the fee provision aims to deter. The NYPD’s Determination Letters flouted the requirement under FOIL that agencies articulate a particularized and specific justification to redact or withhold responsive documents.⁹⁹ Petitioners appealed the agency’s determination, noting that failure to justify the redactions and withholdings to documents violates FOIL. In response, the NYPD at first failed to articulate any basis for the redactions and withholding. When pressed through email, the NYPD invoked six FOIL exemptions and again merely parroted statutory exemptions to withhold responsive records.¹⁰⁰ Thus, Petitioners were compelled to commence an Article 78 proceeding. Had the NYPD complied with FOIL, “this litigation could have been avoided, or significantly limited.”¹⁰¹

Equally important, Petitioners took significant steps to minimize the possibility of litigation. After serving the FOIL Requests, Petitioners called the NYPD Detective assigned to the Requests, Detective Halk, several times to follow up on the Requests. Then, in response to the Determination Letters, Petitioners filed two administrative appeals.¹⁰² The Records Access Appeals Officer did not timely respond to the administrative appeals, prompting Petitioners to follow up with a phone call and subsequent email.¹⁰³ After receiving the Appeal Determination,

⁹⁸ *N.Y.S. Defs. Ass’n*, 927 N.Y.S.2d at 423 n.2 .

⁹⁹ *See Fink*, 47 N.Y.2d at 571-72.

¹⁰⁰ *W. Harlem Bus. Group*, 13 N.Y.3d at 885-86 (finding the agency failed to meet its burden of “establishing that the documents [requested] are exempt from disclosure”).

¹⁰¹ *Id.* at 885.

¹⁰² Petitioners filed one administrative appeal for each of the two FOIL Requests.

¹⁰³ Response was received six days late (*see supra* note 23).

Petitioners followed up by phone and then email for clarification. Time and again, Petitioners sought to resolve this matter without resorting to litigation, to no avail.

Unreasonable responses and costly litigation are inconsistent with the letter and spirit of FOIL. Petitioners should not have to sue an agency to ensure its compliance with FOIL, especially when an agency has been put on notice of its legal duties during the administrative process. Had the NYPD been “sensitive to its FOIL obligations,” it could have complied with its “obligations in a more efficient way.”¹⁰⁴ But the Department flouted its obligations.

Accordingly, this Court should grant Petitioners’ request for attorney’s fees and litigation costs.

¹⁰⁴ *Schenectady Cty. Soc’y for the Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011).

CONCLUSION

For these reasons, LDF and CCR request that the Court grant the Verified Petition, enter a judgment directing the NYPD to undergo a more thorough search for records and disclose the documents requested in the Requests, award Petitioners litigation costs and reasonable attorney's fees, and any other relief the Court considers necessary and proper.

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Respectfully submitted,

s/ Marne L. Lenox

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