

May 24, 2018

VIA E-MAIL AND FEDEX

Records Access Officer
Special Litigation Bureau
New York County District Attorney's Office
One Hogan Place
New York, NY 10013

Re: Freedom of Information Law (FOIL) Request

To Whom It May Concern:

We write to appeal the New York County District Attorney's Office's ("NYDA") failure to respond to our May 9, 2018 Freedom of Information Law ("FOIL") request ("Request") seeking nine enumerated categories of records, pursuant to New York Public Officers Law § 89(4)(a). *See* N.Y. Comm. Open Gov. A.O. No. 19305 (noting a party may appeal "a constructive denial of access as a result of the agency's failure to comply with the time limits for response required by § 89(3)(a)"). Attached please find a copy of the Request as Exhibit A.

The Freedom of Information Law mandates that an agency must respond to a records request "within five business days of the receipt of a written request for a record reasonably described." N.Y. Pub. Off. Law § 89(3)(a). Accordingly, the NYDA was required to respond to the Request by the end of the day on Wednesday, May 16. However, to date, the NYDA has not provided any acknowledgment of its receipt of the Request, which is now six business days past the statutory timeframe. The NYDA's failure to comply with the statutorily-imposed five-day requirement constitutes a constructive denial of the Request. *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 460 (2007) ("The Clerk failed to respond to the request within the five-day period required by Public Officers Law § 89(3), thereby constructively denying the request."); *see also Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1121 (3d Dep't 2013) (explaining that when the agency failed to respond to a FOIL request within the statutory timeframe, "the court may award counsel fees and other litigation costs to a litigant who 'substantially prevail[s]' in a CPLR article 78 proceeding brought to review the constructive denial of the request") (internal citations omitted).

Similarly, under 21 NYCRR § 1401.5(e)(1), an agency's failure to comply within five business days of the receipt of a FOIL request "shall constitute a denial of a request that may be appealed." *See also Kohler-Hausmann v. New York City Police Dep't*, 133 A.D.3d 437 (1st



Dep't 2015) (“By failing to respond for months after that deadline, NYPD constructively denied the FOIL request) (internal citations omitted). Relying on this law, the New York Committee on Open Government has found that “[i]f neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may . . . be considered to have been constructively denied.” N.Y. Comm. Open Gov. A.O. No. 8366. *See also* N.Y. Comm. Open Gov. A.O. No. 8092 (same); N.Y. Comm. Open Gov. A.O. No. 9413 (same); N.Y. Comm. Open Gov. A.O. No. 0083 (same); N.Y. Comm. Open Gov. A.O. No. 9646 (same); N.Y. Comm. Open Gov. A.O. No. 9644 (same).

Please respond within ten business days of receiving this appeal to the constructive denial of the Request by stating whether the Request is granted or denied in full or in part. *See* Pub. Off. Law § 89(4)(a). If the appeal is granted, please state a specific date by which the requested records will be produced. As described in the Request, please produce electronic records in their unlocked native format with all original metadata and original file names. Paper documents should be scanned and produced as Adobe PDF files or TIF files. Emails produced should be grouped together with any attachments. Please do not redact any non-responsive information from any records; we request the complete copies of any records with any responsive information. Please send the documents to: Marne Lenox, NAACP Legal Defense & Educational Fund, Inc., 40 Rector Street, 5th Floor, New York, NY 10006 or mlexox@naacpldf.org.

If the FOIL appeal is denied in whole or in part, please identify the appropriate specific authority and justify all specific deletions by reference to exemptions in the statute. Additionally, please inform us of the reason(s) for such denial in writing, and provide the name, mailing address, and email address of the person or body to whom an appeal should be directed. Please note that FOIL directs all appeals and the determinations that follow to be sent to the Committee on Open Government, Department of State, 41 State Street, Albany, New York 12231.

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



Please direct correspondence related to this request to the undersigned via telephone at (212) 965-2256, email at mlenox@naacpldf.org, or by mail at 40 Rector Street, 5th Floor, New York, NY 10006.

Thank you for your attention to this matter.

Yours truly,

/s/ Marne Lenox

Marne Lenox, Assistant Counsel

John S. Cusick, Equal Justice Works Fellow

NAACP Legal Defense & Educational Fund, Inc.

EXHIBIT A

May 9, 2018

VIA EMAIL AND FEDEX

Records Access Officer
Special Litigation Bureau
New York County District Attorney's Office
One Hogan Place
New York, NY 10013

Re: Freedom of Information Law (FOIL) Request

Dear Freedom of Information Officer:

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") makes this request for records, regardless of format, medium, or physical characteristics, and including electronic records and information, pursuant to New York Public Officers Law §§ 84-90. We respectfully request that you provide us with the following information within five business days of your receipt of this letter:

- (1) All documents, including without limitation instructions to staff, training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the New York County District Attorney's Office ("NYDA") from January 1, 2010, to the present, regarding the criteria for identifying an individual as a suspected, confirmed, former, or possible member, associate, and/or affiliate of any gang and/or crew in any database, log, list, and/or electronic system, including but not limited to the Arrest Alert System, Crime Prevention Database, the Crime Strategies Unit ("CSU") Database, and the CSU Gang Database.
- (2) All documents, including without limitation instructions to staff, training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYDA from January 1, 2010, to the present, regarding the process by which any database, log, list, and/or electronic system that identifies an individual as a suspected, confirmed, former, or possible member, associate, and/or affiliate of any gang and/or crew, including but not limited to the Crime Prevention Database, the CSU Database, and the CSU Gang Database, is reviewed, audited, and/or modified for accuracy.



- (3) All documents, including without limitation instructions to staff, training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYDA from January 1, 2010, to the present, regarding the purpose and/or use of the information contained in any database, log, list, and/or electronic system that identifies an individual as a suspected, confirmed, former, or possible member, associate, and/or affiliate of any gang and/or crew, including but not limited to the Crime Prevention Database, the CSU Database, and the CSU Gang Database, including but not limited to the information's purpose and/use for bail applications, plea offers, sentencing recommendations, charge elevations, etc.
- (4) All NYDA internal correspondence sent to or from members of the NYDA Executive Team, including but not limited to electronic correspondence, from January 1, 2010, to the present, concerning: (1) the existence of a database, log, list, and/or electronic system, including but not limited to the Crime Prevention Database, the CSU Database, and the CSU Gang Database identifying individuals as suspected, confirmed, former, or possible members, associates, and/or affiliates of any gang and/or crew; (2) the criteria for identifying an individual as a suspected, confirmed, former, or possible member, associate, and/or affiliate of any gang and/or crew in any database, log, list, and/or electronic system, including but not limited to the Crime Prevention Database, the CSU Database, and the CSU Gang Database; and (3) statistical and factual tabulations or data about demographic information of individuals suspected, confirmed, former, or possible members, associates, and/or affiliates of any gang and/or crew.
- (5) Without revealing personally identifying information, all demographic information—including without limitation race, sex, age, and residence—of every individual currently included in any database, log, list, and/or electronic system for suspected, confirmed, former, or possible membership, association, and/or affiliation with any gang and/or crew, including but not limited to the Crime Prevention Database, the CSU Database, and the CSU Gang Database.
- (6) A list of all New York City agencies and/or organizations, including but not limited to the New York City Police Department, the Bronx District Attorney's Office, the Richmond (Staten Island) County District Attorney's Office, the Queens District Attorney's Office, the Kings County (Brooklyn) District Attorney's Office, the New York City Department of Corrections, and the New York City Housing Authority, with whom the NYDA has shared any database, log, list, and/or electronic system that identifies an individual as a suspected, confirmed, former, or possible member, associate, and/or affiliate of any gang and/or crew from January 1, 2010, to the present.



- (7) A list of all federal agencies and/or organizations, including but not limited to the U.S. Attorney's Office for the Southern District of New York, the U.S. Attorney's Office for the Eastern District of New York, and the U.S. Immigrations and Customs Enforcement, with whom the NYDA has shared any database, log, list, and/or electronic system that identifies an individual as a suspected, confirmed, former, or possible member, associate, and/or affiliate of any gang and/or crew from January 1, 2010, to the present.
- (8) A copy of every press release that the NYDA has issued from January 1, 2010, to the present, concerning individuals associated/affiliated with any gang and/or crew.
- (9) All documents, including without limitation instructions to staff, training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYDA, regarding the NYDA's retention and/or destruction of documents.

Format

Electronic records should be produced in their unlocked native format with all original metadata and original filenames. Paper documents should be scanned and produced as Adobe PDF files or TIF files. Emails produced should be grouped together with any attachments. When searching emails, please search all folders, including inbox, subject matter folders, sent items, archived items, and deleted items. Please produce all metadata fields for emails, including BCC.

Fee Waiver and Expedited Processing

The above requests are a matter of public interest. Accordingly, we request a fee waiver and expedited processing. The disclosure of the information sought is not for commercial purposes; instead, it will contribute to the public's understanding of government operations.¹

LDF is a non-profit organization dedicated to civil and human rights, with a proven track-record of compiling and disseminating information and reports to the public about government functions and activities. We have undertaken this work in the public interest and not for any private commercial interest. Similarly, the primary purpose of this Request is to obtain information to further the public's understanding of important government functions and

¹ Letter of Robert Freeman, Executive Director, NYS Committee on Open Government, Opinion No. 11745, <http://docs.dos.ny.gov/coog/ftext/f11745.htm> (last visited Sept. 6, 2017) (“[T]here is nothing in the Freedom of Information Law that prohibits an agency from waiving the fee for copies.”).



activities. Access to this information is crucial for LDF and the communities we serve to evaluate such policies and their effects.

Conclusion

As indicated above, the Freedom of Information Law (“FOIL”) requires that an agency respond within five business days of receipt of a FOIL request. If you are unable to comply with our Request within five business days, please provide us with a copy of the internal report explaining the delay in accordance with New York Public Officers Law §89(3)(a) and let us know when we may expect the requested records.

If this request is denied in whole or in part, please identify the appropriate specific authority and justify all specific deletions by reference to exemptions in the statute. Please do not redact any non-responsive information from any records; we request the complete copies of any records with any responsive information. Additionally, please inform us of the reason(s) for such denial in writing, and provide the name, mailing address, and email address of the person or body to whom an appeal should be directed.

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

Please direct correspondence related to this Request to the undersigned via telephone at (212) 965-2256, email at mlex@naacpldf.org, or by mail at 40 Rector Street, 5th Floor, New York, NY 10006.

Thank you for considering our Request.

Sincerely,

\s\ Marne Lenox

Marne Lenox, Assistant Counsel

John S. Cusick, Equal Justice Works Fellow

NAACP Legal Defense and Educational Fund, Inc.