

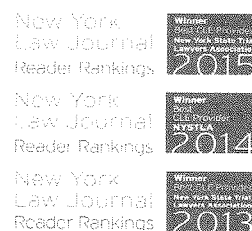
THE SPOILS OF FOIL

February 24, 2016

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with

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THE SPOILS OF FOIL

FEBRUARY 24, 2016

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A WORD OF THANKS

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The Committee on Open Government - Robert J. Freeman, Executive Director

- Freedom of Information Law
- Open Meetings Law
- Personal Privacy Protection Law

The Committee

The Committee on Open Government is responsible for overseeing implementation of the Freedom of Information Law (Public Officers Law sections 84-90) and the Open Meetings Law (Public Officers Law sections 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The Committee also oversees the Personal Privacy Protection Law.

The Committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law ("FOIL") directs the Committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the Committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information or the Open Meetings Law, the Committee staff can provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, more than 24,000 written advisory opinions have been prepared by the Committee at the request of government, the public and the news media. In addition, hundreds of thousands of verbal opinions have been provided by telephone. Staff also provides training and educational programs for government, public interest and news media organizations, as well as students on campus.

Opinions prepared since early 1993 that have educational or precedential value are maintained online, identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law.

The indexes can be accessed at the following links:

[FOIL Advisory Opinions](#)

[OML Advisory Opinions](#)

Each index to advisory opinions is updated periodically to ensure that interested persons and government agencies have the ability to obtain opinions recently rendered.

The website also includes the following:

[The text of the Freedom of Information Law;](#)

[Rules and Regulations of the Committee on Open Government \(21 NYCRR Part 1401\);](#)

[Model Rules for Agencies;](#)

[Sample Request for Records;](#)

[Sample Request for Records via Email;](#)

[Sample Appeal;](#)

[Sample Appeal When Agency Fails to Respond in a Timely Manner;](#)

[FOIL Case Law Summary;](#)

[Frequently Asked Questions regarding FOIL;](#)

[The text of the Open Meetings Law;](#)

[Model Rules for Public Bodies;](#)

[An Article on Boards of Ethics;](#)

OML Case Law Summary;

Frequently Asked Questions regarding OML;

The text of the Personal Privacy Protection Law (only applies to State Agencies);

You Should Know, regarding the Personal Privacy Protection Law.

If you are unable to locate information on the website and need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to contact:

Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave
Albany, NY 12231
(518) 474-2518 Tel
(518) 474-1927 Fax
coog@dos.state.ny.us

Freedom of Information

FOIL affirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law continues the existence of the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law

All agencies are subject to the Freedom of Information Law, and FOIL defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of

local government in the state (§86(3)).

The term "agency" does not include the State Legislature or the courts. For purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, which will be discussed later.

What is a record?

All records are subject to the FOIL, and the law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency or the State Legislature, in any physical form whatsoever. . ." (§86(4)). It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of "record." An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible records

FOIL is based on a presumption of access, stating that all records are accessible, except records or portions of records that fall within one of eleven categories of deniable records (§87(2)).

Deniable records include records or portions thereof that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) would if disclosed result in an unwarranted invasion of personal privacy;
- (c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;
- (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
- (e) are compiled for law enforcement purposes and which if disclosed would:
 - i. interfere with law enforcement investigations or judicial proceedings;
 - ii. deprive a person of a right to a fair trial or impartial adjudication;
 - iii. identify a confidential source or disclose confidential information relative to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

- (f) could if disclosed endanger the life or safety of any person;
- (g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:
 - i. statistical or factual tabulations or data;
 - ii. instructions to staff that affect the public;
 - iii. final agency policy or determinations; or
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government;
- (h) are examination questions or answers that are requested prior to the final administration of such questions; or
- (i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
- * (j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.
- * NB Repealed December 1, 2014
- * (k) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.
- * NB Repealed December 1, 2014
- * (l) are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.
- * NB Repealed September 20, 2015

The categories of deniable records generally involve potentially harmful effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Written communications transmitted from an

official of one agency to an official of another or between officials within an agency may be denied insofar as they consist of advice, opinions or recommendations. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. Statistical or factual information, on the other hand, as well as the policies and determinations upon which an agency relies in carrying out its duties are available, unless a different exception applies.

There are also special provisions in the law regarding the protection of trade secrets and critical infrastructure information. Those provisions pertain only to state agencies and enable a business entity submitting records to state agencies to request that records be kept separate and apart from all other agency records. When a request is made for records falling within these special provisions, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to the competitive position of commercial enterprise. A member of the public requesting records may challenge such a claim.

Generally, the law applies to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must maintain the following records:

- (a) a record of the final vote of each member in every agency proceeding in which the member votes;

- (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

- (c) reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible. (§87(3))

Protection of privacy

One of the exceptions to rights of access referenced earlier states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (§87(2)(b)).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself.

When a request is made for records that constitute a list of names and home addresses or its equivalent, the agency is permitted to require that the applicant certify that such list will not be used for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such list for solicitation or fund-raising purposes (§89(3)(a)).

Since 2010, agencies have been prohibited from intentionally releasing social security numbers to the public (§96-a).

How to Obtain Records

Subject matter list

As noted earlier, each agency must maintain a "subject matter list" (§87(3)(c)). The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought, and it must be updated annually. Each state agency is required to post its subject matter list online. An alternative to and often a substitute for a subject matter list is a records retention schedule. Schedules regarding state and local government outside of New York City are prepared by the State Archives; those applicable in New York City are prepared by the NYC Department of Records and Information Services

Regulations

Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee's regulations and a model designed to enable agencies to easily comply are available on the Committee's website. See Regulations of the Committee on Open Government and Model Rules for Agencies.

Designation of records access officer

Under the Committee's regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. See *Sample Request for Records*. The law requires you to "reasonably describe" the record in which you are interested (section 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency's filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (*i.e.*, alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. See *Sample Request for Records via Email*.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which

must be reasonable in consideration of attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If it is determined that more than 20 business days will be needed to grant a request in whole or in part, the agency's acknowledgment must explain the reason and provide a specific date within which it will grant a request in whole or in part. When a response is delayed beyond five business days, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial. For more information, see *Explanation of Time Limits for Responding to Requests*.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data. For more information see *2008 News/Fees for Electronic Information*

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the

appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based on an exception to rights of access, the agency has the burden of proving that the record sought falls within the exception (§89(4)(b)).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees to a person denied access to records. To do so, a court must find that the person denied access "substantially prevailed", and either that the agency had no reasonable basis for denying access or that it failed to comply with the time limits for responding to a request or an appeal.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

- (a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;
- (b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;
- (c) legislative notification of the proposed adoption of rules by an agency;
- (d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;
- (e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;
- (f) administrative staff manuals and instructions to staff that affect the public;
- (g) final reports and formal opinions submitted to the Legislature;
- (h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature; and
- (i) any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

- (a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;

(b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records (Sample)

Records Access Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Request

Records Access Officer:

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____.

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of \$_____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

Signature

Name

Address

City, State, ZIP code

Requesting Records via Email (Sample)

(It has been suggested that agencies create an email address dedicated to the receipt of requests. It is recommended that you review the website of the agency maintaining the records that you seek in order to locate its email address and its records access officer.)

(The subject line of your request should be "FOIL Request".)

Dear Records Access Officer:

Please email the following records if possible (include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.):

OR

Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.):

OR

Please inform me of the cost of providing paper copies of the following records (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.).

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested (\$0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a CD or floppy disk.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

(Name)

(Address, if records are to be mailed).

Appeal A Written Denial (Sample)

Name of Agency Official

Appeals Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include: _____ (describe the records that were denied to the extent possible and, if possible, offer reasons for disagreeing with the denial, i.e., by attaching an opinion of the Committee on Open Government acquired for its website).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,

Signature

Name

Address

City, State, ZIP code

Appeal A Denial due to an Agency's Failure to Respond in a Timely Manner
(Sample)

*FOIL Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP Code*

RE: Freedom of Information Law Appeal

Dear _____:

I requested (describe the records) by written request made on _____ (date). More than five business days have passed since the receipt of the request without having received a response... or... Although the receipt of the request was acknowledged and I was informed that a response would be given by _____ (date), no response has been given. Consequently, I consider the request to have been denied, and I am appealing on that basis.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

*Sincerely,
Signature
Name
Address
City, State, ZIP code*

Open Meetings

The Open Meetings Law, often known as the "Sunshine Law", went into effect in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective in 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decision making process in action. It requires public bodies to provide notice of the times and places of meetings, and keep minutes of all action taken.

As stated in the legislative declaration in the Open Meetings Law (§100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a meeting?

"Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business" (§102(1)), and has been expansively interpreted by the courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference. A meeting cannot validly be held by telephone or through the use of email.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit the public to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the state, for an agency of the state, or for public

corporations, including cities, counties, towns, villages and school districts (§102(2)). In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law. Citizens advisory bodies and similar advisory groups that are not created by law are not required to comply with the Open Meetings Law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting (§104).

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations and, when possible, online.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting in designated locations and online.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

When can a meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded (§105).

To hold an executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

A public body cannot close its doors to the public to discuss the subject of its choice,

for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight areas that may be discussed behind closed doors include:

- (a) matters which will imperil the public safety if disclosed;
- (b) any matter which may disclose the identity of a law enforcement agency or informer;
- (c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- (d) discussions regarding proposed, pending or current litigation;
- (e) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);
- (f) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
- (g) the preparation, grading or administration of examinations; and
- (h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

Note that item (f) is often referenced as “personnel,” even though that term does not appear in the grounds for holding executive sessions. Only when the discussion focuses on “a particular person or corporation” in relation to one or more of the topics listed in that provision is an executive session permitted.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and

executive sessions must be compiled and made available (§106).

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled; however, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against. The law does not require the approval of minutes, but directs that minutes of open meetings be prepared and disclosed within two weeks.

Enforcement of the law

What can be done if a public body holds a secret meeting? What if a public body makes a decision in private that should have been made in public?

Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, a person may be aggrieved if improperly excluded from a meeting or if an executive session was improperly held.

Upon a judicial challenge, a court has the power to declare either that the public body violated the Open Meetings Law and/or declare the action taken void (§107). If the court determines that a public body has violated the law, it has the authority to require the members of the public body to receive training given by staff of the Committee. A court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees. If, on the other hand, the court found that a public body voted in private "in material violation" of the law "or that substantial deliberations occurred in private" that should have occurred in public, the court would be required to award costs and attorney's fees to the successful party. A mandatory award of attorney's fees would apply only when secrecy is the issue.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. The law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier-free physical access" to physically handicapped persons, and that meetings are held in rooms that can "adequately accommodate" the volume of members of the public who wish to attend (§103).

Exemptions from the law

The Open Meetings Law does not apply to:

- (1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
- (2) deliberations of political committees, conferences and caucuses; or
- (3) matters made confidential by federal or state law (§108).

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board identifiable to a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Public Participation and recording meetings

The Open Meetings Law provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, it has been advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

Public bodies are required to allow meetings to be photographed, broadcast, webcast or otherwise recorded as long as the equipment used to do so is not disruptive or obtrusive. If the public body adopts rules regarding such activities, they must be reasonable and conspicuously posted, and provided to those in attendance upon request (§103(d)).

Revised, September 2011

FOIL Officer Contact Information
February 2015

Agency	RA Officer First Name	RA Officer Last Name	RA Officer Email	RA Officer Phone Number	RA Officer Job Title
Commission on Human Rights	Raymond	Karin	rkarin@cchr.nyc.gov	212-416-0145	Supervising Attorney
Department for the Aging	Jack	Kupferman	jkupferman@daging.nyc.gov	212-602-4140	Attorney
Department of Buildings	Angela	White	awhite@buildings.nyc.gov	212-393-2086	Records Access Officer
Department of Citywide Administrative Services	Alan	Deutsch	adeutsch@dcaas.nyc.gov	212-386-6226	Senior Counsel
Department of Consumer Affairs	Brenda	Greene	bgreene@dca.nyc.gov	212-436-0285	Freedom of Information Officer
Department of Correction	Laura	Meliu	laura.meliu@dcor.nyc.gov	718-516-0952	Senior Counsel / FOIL Officer
Department of Cultural Affairs	Omaya	Nunes	onunes@culture.nyc.gov	212-613-9313	Assistant Director of Grants and Special Initiatives
Department of Education	Joseph	Baranolo	jbaranolo3@schools.nyc.gov	212-374-3437	Central Records Access Officer
Department of Environmental Protection	Brenda	Farzen	brendaf@dep.nyc.gov	212-595-3448	PAA
Department of Finance	Gerold	Koszer	koszerG@finance.nyc.gov	718-403-3625	Associate Staff Analyst
Department of Health & Mental Hygiene	Chari	Anhouse	canhouse@health.nyc.gov	347-398-6419	Associate General Counsel-RAO
Department of Homeless Services	Cynthia	Stalard	cstalard@dhs.nyc.gov	212-607-6155	Attorney II
Department of Housing Preservation and Development	Donald	Appel	appel@hpd.nyc.gov	212-693-8347	Records Access Officer/City Planner
Department of Information Technology & Telecommunications	Jennifer	Baek	jbaek@dot.ny.gov	646-769-2013	Records Access Counsel
Department of Investigation	Elyse	Hirschorn	ehirschorn@doi.nyc.gov	212-826-5937	Sr. Investigative Attorney
Department of Parks & Recreation	Christina	Dunkwa	christina.dunkwa@parks.nyc.gov	212-360-1331	Records Access Officer
Department of Probation	David	Yin	dying@probation.nyc.gov	212-337-0710	Assistant General Counsel
Department of Records and Information Services	Kenneth	Cobb	kcobb@records.nyc.gov	212-185-8604	Assistant Commissioner
Department of Sanitation	Ellen	Cooper	ecooper@dsny.nyc.gov	646-885-4989	Associate Counsel
Department of Small Business Services	Michael	Rodriguez	mrodriguez@sbs.nyc.gov	212-613-6477	Agency Attorney
Department of Transportation	Judith	Park	park@dot.ny.gov	212-839-6836	Associate Counsel
Department of Youth and Community Development	Nichelle	DeSouza	FOIL@oycd.nyc.gov	646-343-6203	Executive Assistant Administrative Manager
Economic Development Corporation	Vacant	Vacant	FOIL@edc.nyc	Vacant	Records Access Officer
Environmental Control Board	James	Marion	jmarion@ecb.nyc.gov	212-436-0602	Counsel to the ECB
Financial Information Services Agency	Marcie	Serber	mserber@fisa.nyc.gov	212-857-1251	Agency Counsel
Fire Department	Maura	Kugelman	kugelman@fdny.nyc.gov	718-899-1666	Records Access Officer
Housing Authority	Alexandra	De Fresco	Alexandra.Defresco@nycha.nyc.gov	212-776-6026	Records Access Officer
Hudson Yards Development Corporation	Lincoln	Patel	lpatel@hydc.org	212-312-4267	Vice President and Counsel
Landmarks Preservation Commission	Matt	Fujitayashi	mfujitayashi@lpc.nyc.gov	212-606-2491	Records Access
Law Department	Andrea	Fasterberg	afasterberg@law.nyc.gov	212-358-2486	Senior Counsel
Mayor's Office for People with Disabilities	Kilee	Kling	kkling@cityhall.nyc.gov	212-768-0771	General Counsel
Mayor's Office of Contract Services	Vickie	Ordo	vordo@cityhall.nyc.gov	212-768-6625	Associate General Counsel
Mayor's Office of Immigrant Affairs	Sonia	Lin	slin@cityhall.nyc.gov	212-768-2831	General Counsel
Mayor's Office of Media and Entertainment	Marybeth	Ing	mhu@moen.nyc.gov	212-189-6710 ext 248	Press Secretary
New York City Department of Education	Joseph	Baranolo	jbaranolo3@schools.nyc.gov	212-374-3437	Central Records Access Officer and Executive Agency Counsel
Office of Administrative Trials and Hearings	Frank	Kog	fkog@oath.nyc.gov	212-633-3004	Assistant General Counsel
Office of Collective Bargaining	Karina	Spencer	kspencer@ocb.nyc.gov	212-306-7178	Deputy General Counsel
Office of Emergency Management	Robert	Wilson	rwilson@oem.nyc.gov	718-422-4836	Attorney
Office of Management & Budget	Deborah	Cohan	dcohan@omb.nyc.gov	212-786-6680	Deputy Counsel
Office of Payroll Administration	-	-	choffera@payroll.nyc.gov	-	Agency Attorney
Office of the Chief Medical Examiner	Glenn	Marrs	gmarrs@ocme.nyc.gov	212-323-1903	Special Counsel
Office of the Mayor	Karen	Guala	kguala@cityhall.nyc.gov	212-341-5395	Records Access Officer
Police Department	Richard	Martinez	richard.martinez@nypd.org	646-612-6266	Adjutant
Tax Appeals Tribunal	Judith	Feldor	jfeldor@ata.nyc.gov	212-662-4501	Administrative Manager
Taxi & Limousine Commission	Christina	Conner	conner@tlc.nyc.gov	212-675-1177	Assistant General Counsel

MTA

Main Site <http://www.mta.info/>
FOIL Site <http://web.mta.info/mta/foil.htm>
Transparency Info <http://web.mta.info/accountability/>
Subsidiary Information, Addresses with Certificates of Incorporation
http://web.mta.info/mta/compliance/pdf/2014_annual/2014%20Subsidiary%20Corporation%20Report.pdf
MTA & MTA agency By Laws
http://web.mta.info/mta/compliance/pdf/2014_annual/MTA%20and%20Agency%20By-Laws.pdf
MTA & MTA agency code of ethics
http://web.mta.info/mta/compliance/pdf/2014_annual/All%20Agency%20Code%20of%20Ethics%20and%20Board%20Member%20Code%20of%20Ethics.pdf
MTA & MTA Agencies Network Info <http://web.mta.info/mta/network.htm>

NEW YORK CITY

NYC Main <http://www.nyc.gov/>
NYC Agency List <http://www1.nyc.gov/nyc-resources/agencies.page>
NYC Open Data <https://nycopendata.socrata.com/>

NYC DOT <http://www.nyc.gov/html/dot/html/home/home.shtml>
NYC Community Boards <http://www.nyc.gov/html/cau/html/cb/cb.shtml>

NYC Foil Sites

Transportation DOT Records <http://www.nyc.gov/html/dot/html/about/foil.shtml>
Taxi TLC <http://www.nyc.gov/html/tlc/html/passenger/records.shtml>
Design & Construction <http://www1.nyc.gov/site/ddc/about/foil-requests.page>
NYPD http://www.nyc.gov/html/nypd/html/legal_matters/dclm_doc_production_foil.shtml
Police Misconduct CCRB <http://www.nyc.gov/html/ccrb/html/contact/contact.shtml>
Dept Corrections <http://www.nyc.gov/html/doc/html/contact/foil.shtml>
Board of Corrections (main not foil stie) <http://www.nyc.gov/html/boc/html/rules/rules.shtml>
FDNY http://www.nyc.gov/html/fdny/html/after_fire/fire_records.shtml
Buildings <http://www1.nyc.gov/site/buildings/about/foil-requests.page>
Housing http://www.nyc.gov/html/nycha/html/contact/foil_request.shtml
Economic Development Corp <https://www.nycfedc.com/about-nycfedc/contact-us>
Dept of Records Main <http://www.nyc.gov/html/records/html/home/home.shtml>
Dept of Records FOil info (see bottom) <http://www.nyc.gov/html/records/html/faq/faq.shtml#foil>
Chief Medical Examiner <http://www.nyc.gov/html/ocme/html/foil/foil.shtml>
Health DOH/Mental Health & Dog Bite Records <http://www.nyc.gov/html/doh/html/contact/ogc-foil.shtml>
Health & Hospitals (Main not
FOIL) <http://schools.nyc.gov/Offices/GeneralCounsel/Legal/FILU/default.htm>
Health & Hospital Transparency with bylaws (not
foil) <http://www.nychealthandhospitals.org/hhc/html/about/About-PublicInfo-Compliance.shtml>
Environment DEP http://www.nyc.gov/html/dep/html/contact_us/foil.shtml
Children ACS <http://www1.nyc.gov/site/acs/about/contact-acs.page>
Education <http://schools.nyc.gov/Offices/GeneralCounsel/Legal/FILU/default.htm>
Comptroller <http://comptroller.nyc.gov/forms-n-rfps/freedom-of-information-law-foil-requests/>
Planning <http://www.nyc.gov/html/dcp/html/about/foil.shtml>
Mayor <https://a002-oom03.nyc.gov/IRM/Handlers/Html/WelcomePage.ashx?eventGuid=082b7148-1812-4c92-b281-78883ad42d64>
Finance DOF <http://www.nyc.gov/html/doh/html/contact/ogc-foil.shtml>

NEW YORK STATE

New York State Department of Transportation
Main Site <https://www.dot.ny.gov/index>

FOIL Site <https://www.dot.ny.gov/main/foil-form-challenge>

NYS DOT - Public Transportation Safety Board
Main Site <https://www.dot.ny.gov/divisions/operating/osss/ptsb>

NYS DOT - Office of Safety and Security Services <https://www.dot.ny.gov/divisions/operating/osss>

NYS DOT - Public Transportation Safety Board
Main Site <https://www.dot.ny.gov/divisions/operating/osss/ptsb>

NYS DOT PTSB Accident Reporting with Forms
- <https://www.dot.ny.gov/divisions/operating/osss/ptsb/bus/accident-reports>

NYS DOT PTSB System Safety Program -
Plans <https://www.dot.ny.gov/divisions/operating/osss/ptsb/bus/program-guidelines>

Office of the MTA Inspector General
Main Site <http://mtaig.state.ny.us/>
FOIL Site http://mtaig.state.ny.us/foil_request.htm

NYS Comptroller Public Authorities
<https://www.osc.state.ny.us/pubauth/index.htm>

NYS Comptroller - More Info on Public Authorities
<http://www.openbooknewyork.com/>

NYS Comptroller - State agency FOIL contact List
<http://www.osc.state.ny.us/foilofficers.htm>

NYS Authorities Budget Office
<http://www.abo.ny.gov/>

NYS ABO Public Authorities directory
http://www.abo.ny.gov/paw/paw_weblistingST.html

NYS Dept of Budget Public Authorities Control Board- only controls 11 entities
<http://www.budget.ny.gov/agencyGuide/pacb/index.html>

New York State Department of State - List of Public Corporations that filed a certificate of designation for service of a notice of claim
https://appext20.dos.ny.gov/noc_public/corp_claim_app.noc_web_reports/public_corp_name_list

New York State Dept of State - Search Corporations
http://www.dos.ny.gov/corps/bus_entity_search.html

Other NYS Foil Sites
Courts records <https://www.nycourts.gov/foil/>
Corrections records <http://www.doccs.ny.gov/DOCCSwebfoilform.aspx>
Police https://www.troopers.ny.gov/Request_Government_Records/
Health <https://www.health.ny.gov/regulations/foil/>
Education <http://www.nysed.gov/foil>
MTA <http://web.mta.info/mta/foil.htm>

FEDERAL

US Dept of Transportation
Main Site <https://www.transportation.gov/>
FOIA Site <https://www.transportation.gov/foia>

US Dept of Transportation - Federal Transit Administration (FTA)
Main Site <http://www.fta.dot.gov/>
FOIA Site <http://www.fta.dot.gov/newsroom/12814.html>

US Dept of Transportation - Federal Railroad Administration (FRA)
Main Site <https://www.fra.dot.gov/Page/P0386>
FOIA Site <https://www.fra.dot.gov/Page/P0387>

Federal Motor Carrier Safety Administration (FMCSA)
Main Site <https://www.fmcsa.dot.gov/>
FOIA Site <https://www.fmcsa.dot.gov/foia>

National Highway Traffic Safety Administration (NHTSA)
Main Site <http://www.nhtsa.gov/>
FOIA Site <http://www.nhtsa.gov/FOIA>

National Transportation Safety Board (NTSB)
Main Site <http://www.nts.gov>
FOIA Site <http://www.nts.gov/about/foia/Pages/default.aspx>

OTHER TRANSIT SITES

TWU Union Rules that apply to bus operation and operators <http://transportworkersunited.org/wp-content/uploads/2012/09/rulesbook-TA-OA.pdf>

Radio system - NYCTA trunked radio system <http://www.n2nov.net/transit2.html>

National Transit Safety Research & Assistance Center
Home Site <http://www.transitsafetycenter.org/>
New York page with links to laws and rules http://www.transitsafetycenter.org/?page_id=1257

American Public Transit Association
Main Site <http://www.apta.com/Pages/default.aspx>
NY Transit links <http://www.apta.com/resources/links/unitedstates/Pages/NewYorkTransitLinks.aspx>

FOIL/FOIA article with links
<http://guides.nyu.edu/c.php?g=276693&p=1645569>

Kelly A. Stokes, Esq.
159-16 Union Turnpike - Suite 200
Fresh Meadows, New York 11366
[\(347\) 960-5277](tel:(347)960-5277)

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

July 7, 2015

Hand Delivered

New York City Transit Authority
130 Livingston Street
Brooklyn, NY 11201
Attn: Foil Request Unit

2015 JUL -7 PM 8:51
RECEIVED
@ 416 738 2810

Re.: FOIL Request - all Video Gary Merinstein fall into gap incident
D/A: July 1, 2015 at 8:30 am
L/A: Downtown 1 Train at the West 79th Street Station, New York, NY
File No.: 6096

Dear Sir/Madam:

Roth & Roth, LLP requests under the Freedom of Information Law that the New York City Transit Authority provide information in the form of the video recordings of the above incident, and track area in which Gary Merinstein was injured at approximately 8:30 am on July 1, 2015 when his leg became trapped in the gap between the subway car and platform in the 79th Street Station, on the upper west side of Manhattan, at the downtown 1 train. This incident was responded to by Transit personnel and Police and EMTs. We are requesting production or that you make available to us all video of the track area for one hour before and one hour after the aforementioned accident along with all footage showing all parts of the incident for all of the numerous cameras in that station whether they are hidden cameras, surveillance cameras, cctv or other video recording devices in that station.

If the recordings are downloaded and require software to view please inform us of the name of the software which can view the different recordings produced.

Additionally provide the name of any outside vendors that maintain and service the cameras at that station as well as the contract for that service.

Your prompt attention to this matter will be greatly appreciated.

Very truly yours,



Aracelis Velazquez
Paralegal

6096



New York City Transit

July 18, 2015

Roth & Roth, LLP.
192 Lexington Ave – Suite 802
New York, NY 10016

Re: ~~Foil Request~~ #19542 (Video Surveillance)

Dear Sir/Madam:

Please be advised that New York City Transit is in receipt of your video request regarding the above mentioned. Please note that you must serve a subpoena for the release of any audio/video requested from the New York City Transit Authority.

We are returning a copy of the correspondence and advising you to kindly forward a Subpoena to receive the requested preserved video.

If you have any additional questions, please contact me at (718) 694-3952

Yours Truly,

A handwritten signature in black ink, appearing to read "William Robinson".

William Robinson
Admin Assistant, Subpoena Unit
130 Livingston Street – Room 1221-I
Brooklyn, NY 11201

130 Livingston Street 12th Floor
Brooklyn, NY 11201



July 10, 2015

6096

Aracelis Velazquez
Roth & Roth, LLP.
192 Lexington Ave./ Ste. 802

NEW YORK, NY 10016

Re: Freedom of Information Law
Request No. 19542

Dear Ms. Velazquez :

This is to acknowledge receipt of your Freedom of Information Law request, wherein you request all documents, and video preservation regarding the fall and injury of Gary Merinstein when he fell into the gap of the downtown No. 1 train at the West 79th St. Station. on July 1, 2015

Your request has been forwarded to the appropriate department(s) for research.

Please be advised that the NYCT FOIL Unit receives a high volume of requests ranging from a simple request for one document that can be readily located to complex requests for multiple documents, such as records relating to a construction project. Typically, the FOIL Unit requests documents from other departments, which then must locate the documents and forward them for review by the FOIL Unit to determine if they are disclosable under the law. As a result, the time and effort required to complete a response can vary significantly. NYCT endeavors to complete each request in a time period that is reasonable under the circumstances. A few examples of the types of requests and estimated times for responses are:

- A.) Requests for accident reports, Payment and/or Performance Bonds for a particular contract, Board Minutes or other records that can be identified and located by going to one source - one to three months.
- B.) Requests requiring research to determine the type of records that may be responsive - six to eight months.
- C.) Multiple or voluminous requests seeking to obtain records pertaining to contracts - six

months to one year.

We believe that your request falls into the category that usually takes 2 Months to complete. We would expect that our response should be completed by 09/10/2015.

We will notify you if we cannot provide you with responsive records within the aforementioned time.

If you are able to narrow or further specify the records you seek, it may permit the FOIL Unit to complete the process in a shorter time period. Please use the above number when corresponding to advise us of this more narrow request.

The fee for this service is \$.25 per page of material provided. NYCT will advise you of the cost as soon as responsive documents are made available to us. Upon receipt of a check or money order to cover the costs of the documents, we will forward those records that are disclosable.

Should it become necessary to inquire further regarding this request, please refer to the above Freedom of Information request number in your correspondence.

Sincerely,

A handwritten signature in dark ink, appearing to read "Prudence", enclosed within a large, loopy, handwritten flourish or bracket.

Prudence Jacobs

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

August 13, 2015

Via Certified Mail

RRR#: 7010 1870 0000 1451 0353

Chairman and CEO of MTA Headquarters
347 Madison Avenue
New York, NY 10017

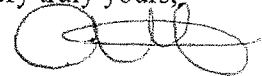
Re.: Gary Merinstein
D/A: July 1, 2015
File No.: 6096
Foil No.: 19542

Dear Sir/Madam:

This letter is an appeal of your constructive denial of our Freedom of information Law Request dated July 7, 2015, a copy is enclosed. The law permits 20 days to provide the records in response to our FOIL request. You wrote us on July 10, 2015, and claimed that to respond to our request would typically take 2 months and would be completed by September 10, 2015. Your letter is a form letter and you have arbitrarily assigned 2 months as your allotted window to provide the requested records. Nor does your letter deny with specificity the categories of documents for which you are refusing to provide. This is in violation of Public Officer's Law. Your refusal to provide records for an arbitrary period of time of 2 months which exceed the 20 days permissible under FOIL constitutes to a denial. Please provide all the documents/information that was requested on our Foil request.

Your prompt attention to this matter will be appreciated.

Very truly yours,



Aracelis Velazquez
Paralegal

Enclosure

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

July 7, 2015

Hand Delivered

New York City Transit Authority
130 Livingston Street
Brooklyn, NY 11201
Attn: Foil Request Unit

2015 JUL -7 PM 3:51
RECEIVED
@LAWFIRM

Re.: FOIL Request - all Video Gary Merinstein fall into gap
incident
D/A: July 1, 2015 at 8:30 am
L/A: Downtown 1 Train at the West 79th Street Station, New
New York, NY
File No.: 6096

Dear Sir/Madam:

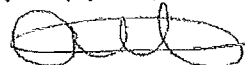
Roth & Roth, LLP requests under the Freedom of Information Law that the New York City Transit Authority provide information in the form of the video recordings of the above incident, and track area in which Gary Merinstein was injured at approximately 8:30 am on July 1, 2015 when his leg became trapped in the gap between the subway car and platform in the 79th Street Station, on the upper west side of Manhattan, at the downtown 1 train. This incident was responded to by Transit personnel and Police and EMTs. We are requesting production or that you make available to us all video of the track area for one hour before and one hour after the aforementioned accident along with all footage showing all parts of the incident for all of the numerous cameras in that station whether they are hidden cameras, surveillance cameras, octv or other video recording devices in that station.

If the recordings are downloaded and require software to view please inform us of the name of the software which can view the different recordings produced.

Additionally provide the name of any outside vendors that maintain and service the cameras at that station as well as the contract for that service.

Your prompt attention to this matter will be greatly appreciated.

Very truly yours,



Aracelis Velazquez
Paralegal

6096



New York City Transit

July 18, 2015

Roth & Roth, LLP.
192 Lexington Ave – Suite 802
New York, NY 10016

Re: **Foil Request** #19542 (Video Surveillance)

Dear Sir/Madam:

Please be advised that New York City Transit is in receipt of your video request regarding the above mentioned. Please note that you must serve a subpoena for the release of any audio/video requested from the New York City Transit Authority.

We are returning a copy of the correspondence and advising you to kindly forward a Subpoena to receive the requested preserved video.

If you have any additional questions, please contact me at (718) 694-3952

Yours Truly,

A handwritten signature in black ink, appearing to read "William Robinson".

William Robinson
Admin Assistant, Subpoena Unit
130 Livingston Street – Room 1221-I
Brooklyn, NY 11201

2 Broadway
New York, NY 10004

Carmen Bianco
President

6096



New York City Transit

(718) 694-4875

August 25, 2014

Roth & Roth, LLP.
192 Lexington Avenue / Suite 802
New York, N.Y. 10016
Attn: Aracelis Velazquez
Paralegal

Re: FOIL Request No. 19542- Gary Merinstein

Dear Ms. Velazquez:

This letter responds to your Freedom of Information Request for various documents regarding the above matter.

Please find enclosed a partial response of the above incident report. Due to the fact that the documents do not exceed four pages, the Transit Authority has waived the copying cost which is \$0.25 a page.

Sincerely,

A handwritten signature in black ink, appearing to read "Prudence Jacobs".

Prudence Jacobs
Deputy FOIL Officer

Encl.



New York City Transit

Department of Subways Train Incident Report

Incident Date: Wednesday, July 01, 2015
Sub-Division: A-033
Direction and Line: SB 1
Time of Incident: 0904 (09:04 AM)
Interval: 0829 242/SFT
Location: In 79 St (IRT Broadway)
Reported By: Robert Falcone
Train Operator: [REDACTED] Regina DeJesus
Train Conductor: [REDACTED] Robert Falcone
Charged Department: POL

DRAFT

Train Consist: 2470 2469 2468 2467 2466 2431 2432 2433 2434 2435
Cars Involved: 2469

Initial Delay: 004 Maximum Delay: N/A Duration Delay: 0019
Terminal Cancel: 003 Enroute Cancel: 002 Late Train: 024

Trouble Cause:

- 4017 - *INJURED CUSTOMER(S)

Comments:

MEDICAL ASSISTANCE RESPONDED TO A CUSTOMER WHOSE RIGHT LEG SLIPPED BETWEEN THE CAR BODY AND EDGE OF THE PLATFORM WHILE THE TRAIN WAS STOPPED IN THE STATION WITH THE DOORS OPENED.

SERVICE RESUMED AT 0914 HOURS.

0904 hours, Conductor R. Falcone [REDACTED], operating the 0829 1 242/SFY reported his train is in the 79th Street station and requested medical assistance to aid a customer whose leg slipped between the car body and edge of the station platform while his train was stopped in the station with the doors open. This happened while the customer was attempting to board the second south car. The customer is now seated on a platform bench seat and has complained of pain to his right leg muscle.

Train Operator R. DeJesus [REDACTED] operating the 0829 1 242/SFY reported the operating car is #2470.

Rail Control Center instructed Conductor Falcone and Train Operator DeJesus to discharged their customers and Conductor Falcone will remain with the customer.

Conductor Falcone and Train Operator DeJesus acknowledged.

#19542

ATS-A Rail Control Center adjusted the 1 line service as necessary.

0906 hours, Rail Control Center notified the Divisions of Car Equipment, Maintenance of Way, Station, Police and the Communications' Desk Control personnel via 6-wire.

0911 hours, Train Service Supervisor Pimental, [REDACTED] on duty at the Times Square station was notified of this incident and directed to respond to the injured customer.

Train Service Supervisor Pimental acknowledged.

Train Operator DeJesus reported all customers have detrained, the train doors are closed and he is ready to proceed.

0913 hours, Train Service Supervisor T. Williams, [REDACTED] reported he is entering the 79th Street station, northbound, and he will respond to the injured customer and update Rail Control Center.

DRAFT

Rail Control Center acknowledged and released Train Service Supervisor Pimental to his former duties.

Conductor Falcone reported he is on the platform with the customer, a bald Caucasian male wearing glasses, a white shirt and black pants.

Rail Control Center informed Conductor Falcone that Train Service Supervisor T. Williams, entering the 79th Street station northbound, would respond to the injured customer and instructed Conductor Falcone to return to his operating position and notify Rail Control Center.

Conductor Falcone and Train Operator DeJesus acknowledged.

0914 hours, Conductor Falcone reported he is in his operating position.

Rail Control Center instructed Conductor Falcone and Train Operator DeJesus to proceed on signals and return to customer service at the 72nd street station.

0914 hours, Service resumed.

0915 hours, Train Service Supervisor T. Williams reported he is with the injured customer.

0916 hours, Train Service Supervisor T. Williams reported the emergency medical services respondents are on the scene.

0917 hours, Rail Control Center notified the Divisions of Car Equipment, Maintenance of Way, Station, Police and the Communications' Desk Control personnel via 6-wire.

0922 hours, Train Service Supervisor T. Williams reported that the customer stated he was attempting to board the second south car when his right leg slipped between the train and the edge of the platform. The train did not move before the customer freed his leg, and the customer has a bruise on his right calf.

0933 hours, Train Service Supervisor T. Williams reported EDNY respondents are on the scene. The emergency medical services technicians are moving the customer, via train, to the 72nd Street station in order to use the elevator

#19542

to transport the customer to the street level.

Rail Control Center acknowledged.

1017 hours, Train Service Supervisor T. Williams reported that he estimated that there is about a four inch gap between the platform and train where the customer injury occurred.

Police Officer [REDACTED] responded. Emergency Medical Services Technician #7438 reported the customer will be transported to [REDACTED].

Customer: Gary M. Merinstein
310 West 80th Street, 1C
NY, NY 10024
Date Of Birth: 01/16/1955

1100 hours, Train Dispatcher Ferguson, [REDACTED] on duty at the 242nd Street terminal was notified of this incident and instructed to send to this train to the 240th Street Yard, after scheduled service, for the necessary car equipment follow up inspections. **DRAFT**

1101 hours, Yard Dispatcher Cherry, [REDACTED] on duty at the 240th Street Yard was notified of this incident and this train will be sent to the 240th Street Yard, after scheduled service, for the necessary car equipment follow up inspections.

1358 hours, Superintendent Cepeda has been notified.

Appropriate service delay announcements were made.

All concerned were notified that the following CANCELS, REROUTES OR EXTRA service (listed) were caused by the above incident.

CODE	LINE	INTERVAL	CANCELS	CAUSE	RPT#	ADJ	TERM	ENRT
POL	SB 1	0829 242/SFT [DISCHARGED]	79S/SFT	*INJURED CUSTOMER(S)	033	0	0	1
POL	SB 1	EXTRA	72S/SFT	*INJURED CUSTOMER(S)	033	1	0	0
POL	NB 1	0927 SFT/242	SFT/242	*INJURED CUSTOMER(S)	033	0	1	0
POL	NB 1	0931 SFT/242 [BATTERY RUN]	96S/242	*INJURED CUSTOMER(S)	033	0	0	1
POL	NB 1	EXTRA	137/242	*INJURED CUSTOMER(S)	033	1	0	0
POL	NB 1	0935 SFT/242	SFT/242	*INJURED CUSTOMER(S)	033	0	1	0
POL	NB 1	0943 SFT/242	SFT/242	*INJURED CUSTOMER(S)	033	0	1	0
POL	NB 1	EXTRA	SFT/242	*INJURED CUSTOMER(S)	033	3	0	0

Total

5 3 2

Total of 10 Service Changes.

All concerned were notified that the following LATE TRAINS (listed) were caused by the above incident.

LINE	CHARGED TERMINAL	LATE TRAINS
NB 1	Van Cortlandt Park-242 St	4
SB 1	South Ferry Terminal	7

LINE	CHARGED TERMINAL	LATE TRAINS
NB 2	Wakefield-241 St	1
SB 2	Flatbush Av Brooklyn College	5
SB 3	New Lots Av (IRT Livonia Av)	7
Total		24

Desk Superintendent - Joseph FlucusDispatcher - Geneva PattonTypist - Nivea Luke

This report is generated on 08/20/2015 01:41 PM

DRAFT

Signature: _____

#19542

130 Livingston Street
Brooklyn, NY 11201

Carmen Blanco
President



New York City Transit

6096

(718) 694-4875

August 21, 2015

Roth & Roth, LLP.
192 Lexington Avenue / Suite 802
New York, N.Y. 10016
Attn: Aracelis Velazquez, Paralegal

Re: Freedom of Information Law ("FOIL") 19542

Dear Ms. Velazquez:

This is a partial response to your FOIL request for various records arising from an incident involving your client, Gary Merinstein, on July 1, 2015.

Please be advised that by letter dated July 18, 2015, the New York City Transit Authority advised you that it had located and preserved video footage relating to the above incident. We consider videos to be safety sensitive records, which, if disclosed, could cause risk to public safety; however, as stated in the letter from Mr. Robinson, if you provide a so-ordered subpoena – we will forward a copy of the video to your office.

We also received a copy of your constructive denial letter. Since you received a response from our office regarding the existence of the video, your claim of constructive denial is without merit. Please contact the MTA to withdraw your claim of constructive denial.

Further, please note that the Transit Authority receives numerous requests on a daily basis. We review each FOIL request and decide, based on the nature and complexity of the request and many years of experience, how long we believe it will take to respond to each request in a time period that is reasonable under the circumstances, which is permitted by the Public Officer's Law.

1600519

In this case, the accident only occurred in July of this year and the records are not readily available. The FOIL unit is in the process of requesting the various items sought in your request, but we know that many of these records will take significant effort to collect and to review. When we have "public" records that respond to your request, we will make a "rolling production" providing them as they become available.

Sincerely,

A handwritten signature in black ink, appearing to read "Prudence Jacobs", written over a horizontal line.

Prudence Jacobs
Deputy FOIL Officer



Metropolitan Transportation Authority

State of New York

6096
Merinstein

September 2, 2015

Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Attn: Aracelis Velazquez, Paralegal

Re: Freedom of Information ("FOIL") Appeal
NYCT FOIL Request #19542

Dear Ms. Velazquez:

I am writing in response to your August 13, 2015 letter to Chairman & CEO, Thomas Prendergast, pertaining to your FOIL request submitted to New York City Transit ("NYCT").

NYCT has advised me that it receives numerous requests on a daily basis. Each request is carefully reviewed by a FOIL Officer who then makes a determination as to the time frame it will take to respond to the request. The acknowledgment letter you received sets forth an estimate of the time it will take to gather and review documents which are sought by your request, and is based on the parameters of your request.

I understand that NYCT has provided you with a partial response. Your appeal is therefore premature at this time. NYCT will provide documents responsive to your request on a rolling basis as they become available.

This completes the MTA's response to your FOIL appeal.

Very truly yours,

Roberta Bender
Deputy General Counsel

cc: Committee on Open Government

The agencies of the MTA

MTA New York City Transit
MTA Long Island Rail Road

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Capital Construction
MTA Bus Company

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

October 6, 2015

Via Certified Mail

RRR#:7010 1870 0000 1451 0445

Chairman and CEO of MTA Headquarters
2 Broadway
New York, NY 10004
Attn: Thomas Prendergast

Re.: Gary Merinstein
D/A: July 1, 2015
File No.: 6096
Foil No.: 19542 (Video Surveillance)

Dear Mr. Robinson:

This letter is our appeal of your improper denial in violation of FOIL dated July 18, 2015. We appreciate your creative attempt to get attorneys to stop requesting videos. Your claim that we must serve a subpoena for videos is a direct violation of FOIL.

We are requesting that you provide us with the video immediately and additionally request that you stop sending denials in response to FOIL requests for videos of areas that are clearly in public places. You are intentionally interfering with Public Access to records, which is a violation of Public Officer's Law Section 89.8. There are numerous Opinions by the Committee for Open Government which contain the following quote:

That statute indicates that unlawful prevention of public access to records is a violation. The term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed." Additionally, §80.05(4) of the Penal Law states that: "A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred fifty dollars." Based on the foregoing, it appears that a person found guilty of a violation may serve up to fifteen days in jail and/or be fined up to \$250.

By continuing to author letters claiming a subpoena is required and that one must be a litigant to obtain videos is in direct violation of the Public Officer's Law. The videos are either accessible or they are not under one of the enumerated sections of 87. I am aware of other cases where you make the same claim, yet as soon as an Article 78 is filed you turn over the videos.

If you do not provide us with the video and agree to stop sending letters claiming a requirement of a subpoena we will take the appropriate legal action to obtain both results.

Very truly yours,

A handwritten signature in black ink, appearing to be 'DR' with a stylized flourish.

David Roth

Enclosure

cc:

Robert Freeman

Commission for Open Government

6096



New York City Transit

July 18, 2015

Roth & Roth, LLP.
192 Lexington Ave – Suite 802
New York, NY 10016

Re: **Foil Request #19542 (Video Surveillance)**

Dear Sir/Madam:

Please be advised that New York City Transit is in receipt of your video request regarding the above mentioned. Please note that you must serve a subpoena for the release of any audio/video requested from the New York City Transit Authority.

We are returning a copy of the correspondence and advising you to kindly forward a Subpoena to receive the requested preserved video.

If you have any additional questions, please contact me at (718) 694-3952

Yours Truly,

A handwritten signature in black ink, appearing to read "William Robinson".

William Robinson
Admin Assistant, Subpoena Unit
130 Livingston Street – Room 1221-I
Brooklyn, NY 11201

At an IAS Part __ of the Supreme Court of the State of New York, County of New York, at the Courthouse located at 60 Center Street, New York, New York on this ____ day of _____, 2016

PRESENT:

Justice

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

-----X
ROTH & ROTH, LLP,

Petitioners,

Index #:

ORDER TO SHOW CAUSE

-against-

THOMAS PRENDERGAST, NEW YORK CITY TRANSIT
AUTHORITY and METROPOLITAN TRANSPORTATION
AUTHORITY,

Respondents.

-----X

UPON the annexed Petition of David A. Roth, an attorney duly admitted to practice law in the State of New York, on Roth & Roth, LLP ("Petitioners"), verified on the 12th day of January 2016, and upon all the papers and proceedings in this matter,

LET, THOMAS PRENDERGAST, NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY ("Respondents") show cause at a Term of this Court to be held at the New York Supreme Courthouse thereof located at 60 Center Street, New York, New York on the ____ day of _____, 2016, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard,

WHY an Order should not be entered herein:

1. Ordering Respondents to provide Petitioners with records responsive to requests in Petitioners' FOIL requests as follows;

A complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.;

2. Declaring that the Respondents decision to deny access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled;
3. Awarding attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
4. Granting Petitioners such other and further relief as this Court may deem just and proper.

Sufficient reason appearing therefore, let personal service of a copy of this order, together with the papers upon which it was granted, upon THOMAS PRENDERGAST at C/O MTA at 2 Broadway, New York, NY, NEW YORK CITY TRANSIT AUTHORITY at 130 Livingston Street Brooklyn, New York and METROPOLITAN TRANSPORTATION AUTHORITY at 2 Broadway, New York, NY on or before the ____ day of _____ 2016, be deemed good and sufficient service.

Dated: _____, 2016

Enter,

J.S.C.

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

-----X
ROTH & ROTH, LLP,

Petitioners,

Index #:

VERIFIED PETITION

-against-

THOMAS PRENDERGAST, NEW YORK CITY TRANSIT
AUTHORITY and METROPOLITAN TRANSPORTATION
AUTHORITY,

Respondents.
-----X

PRELIMINARY STATEMENT

1. This proceeding is brought under Article 78 of the New York Civil Practice Law and Rules ("CPLR") and seeks to vindicate the right of the public and of the Petitioners in both obtaining information that should be freely accessible to the public and to require the Respondents to comply with Public Officers Law § 87.

2. The Petitioners served a Freedom of Information Law (hereinafter FOIL) request for "A complete and final copy of the 2012 study of the New York City Subway System done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report (hereinafter "Survey" and Underlying Data") on the Respondents, NEW YORK CITY TRANSIT AUTHORITY (hereinafter NYCTA) and the METROPOLITAN TRANSPORTATION AUTHORITY (hereinafter MTA). The Respondents subsequently failed to comply with this FOIL request and the within Petition request the Court to Order the compliance with said FOIL request, for legal fees and such other relief as the court deems just and proper.

3. The Respondents herein are extremely sophisticated in the requirements of the Freedom of Information law. They have employees that are assigned to specifically handle FOIL requests. They

have litigated FOIL issues many times over the years and regularly cite to different sections of Public Officers law when denying access to information based on various exemptions contained therein. Respondents are very aware of the applicable time limits in which responses are required under the Freedom of Information Law.

4. On or about 2012 surveys were conducted of all NYC subway stations for the condition of the subway stations. See **Exhibit "A"**.

5. On or about 2012 the NYCTA and MTA were in possession of the underlying data that formed the basis of the survey reflected in **Exhibit "A"** as well as the 2012 NYC final survey for subway station conditions.

6. The Respondents have completely failed to comply in whole or in part with this very simple FOIL request. The Petitioners herein have been forced to bring this Article 78 and will be seeking attorney's fees in conjunction with said petition.

EXHIBITS

7. The following are the exhibits attached to this Petition:

- A. New York State Comptroller Report 8-2015 Metropolitan Transportation Authority Subway Station Conditions
- B. October 3, 2014 FOIL request for the 2012 Study of the NYC Subway System
- C. December 31, 2014 FOIL appeal sent to THOMAS PRENDERGAST on behalf of all respondents along with the certified mail receipt and green card
- D. January 12, 2015 letter from MTA stating that the NYCTA has no record of receiving underlying FOIL request dated October 3, 2014
- E. January 13, 2015 acknowledgement letter from the NYCTA
- F. FOIL response dated July 20, 2015 denying request
- G. August 18, 2015 appeal to the July 20, 2015 denial
- H. August 26, 2015 acknowledgement to our appeal
- I. September 9, 2015 denial to our appeal along with envelope postmarked September 12, 2015.
- J. MTA Twenty-Year Capital Needs Assessment 2015-2034/ Table of Contents
- K. NYCTA 2Q 2014 Elevator and Escalator Report in Sept 2014
- L. 146 Manhattan Stations Ranked by % of Structural Components in SGR
- M. Raw Structural and Architectural Data from NYCTA

RELIEF SOUGHT

8. Petitioners bring this proceeding pursuant to Article 78 of the CPLR requesting that the

Court direct the NYCTA and the MTA to provide Petitioners with information responsive to their FOIL request dated October 3, 2014 for:

A complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

9. Pursuant to Article 78 attorney's fees and costs incidental to this Petition are being requested.

PARTIES

10. Petitioners are attorneys who as members of the public have requested public information.

11. Respondent THOMAS PRENDERGAST is a public officer who is named in his official capacity as New York State Comptroller.

12. NYCTA and MTA are authorities subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

JURISDICTION

13. This Court has jurisdiction under Section 7801 *et seq.* of the CPLR to review administrative decisions made by the NYCTA and MTA under C.P.L.R. § 7803(1), a mandamus proceeding properly lies when a public administrative agency has failed to perform a duty which is in its sole discretion.

14. The NYCTA and the MTA have sole control over their own records and are in possession of the information to which Petitioner seeks access.

15. This action has been brought within four months of exhausting Petitioner's administrative remedies.

VENUE

16. Venue lies in New York County pursuant to CPLR §§ 506(b) and 7804(b) because this

proceeding is brought within the judicial district where the Respondents made the determinations complained of and where the principal office of 2 Broadway, New York, NY.

PROCEDURAL HISTORY

17. The Petitioners herein made a FOIL request dated October 3, 2014 requesting the 2012 Study of the New York City Subway system done in 2012. See **Exhibit "B"**.

18. The Petitioners did not receive an acknowledgement to our request.

19. As there was no response at all by the Respondents, this constituted a constructive denial. An Appeal was filed on December 31, 2014. See **Exhibit "C"**.

20. On January 12, 2015, Petitioners received a letter from MTA stating that the NYCTA has no record of receiving the underlying FOIL request dated October 3, 2014 and the MTA will now send the request to the NYCTA Foil officer. See **Exhibit "D"**.

21. On January 13, 2015, Petitioners received an acknowledgment letter from NYCTA informing Petitioner that the response would take approximately 3 month. See **Exhibit "E"**.

22. On July 20, 2015, Petitioners finally received a denial stating "the release of the entire report could create a risk to public safety". See Exhibit "F".

23. On August 18, 2015, Petitioners sent an appeal of the denial dated July 20, 2015 to the MTA chairman Thomas Prendergast. See "Exhibit "G".

24. On August 26, 2015, Petitioners received an acknowledgement to our appeal from the MTA. See Exhibit "H".

25. On September 15, 2015, Petitioners received a denial of our FOIL appeal response dated September 9, 2015 and postmarked September 12, 2015 stating "if disclosed could endanger the life and safety of any person" the letter and envelope are attached. See Exhibit "I".

26. The Petitioners have exhausted their administrative remedies and bring the within Article 78.

STATEMENT OF FACTS

27. The facts in this section or all based upon information and belief based upon the aforementioned Comptroller's report attached hereto as **Exhibit "A"**.

28. The New York City subway system includes 468 passenger stations, which are used by 5.5 million riders each weekday. The system is operated by New York City Transit Authority (NYCTA), the largest subsidiary of the Metropolitan Transportation Authority and was the subject of a survey that was completed in 2012.

29. NYCTA reports that it is making progress addressing structural defects, but as noted in this report, much more remains to be done. NYCTA estimates that it will need to invest more than \$5 billion over the next 20 years for subway station repairs.

30. Every five years, NYCTA examines the structural and architectural condition of all of the City's subway stations. The survey, which takes more than a year to complete, rates components on a scale of 1.0 to 5.0. Those rated less than 3.0 are considered by NYCTA to be free of defects and in a "state of good repair." Components rated 3.0 or higher are worn or damaged.

31. The 2012 survey represents NYCTA's latest data on subway station conditions. Using NYCTA's standards, the survey found that only 51 subway stations (11 percent) were free of both structural and architectural defects, and only 67 more had most (at least 90 percent) of their components in good repair.

32. The survey found 4,172 structural defects system wide (27 percent) and 411 stations (88 percent) with at least one structural defect. Only 57 stations (12 percent) were free of structural defects, but another 70 stations had most of their components in good repair. The survey also found that 94 stations had at least half of their components in disrepair, with an average of 16 defective components per station.

33. Among the four boroughs served by NYCTA, the stations in Brooklyn and Queens had the largest share of structural components with defects (one-third). Only 1 of the 81 stations in Queens was free of defects, although 13 others had most of their components in good repair. In Brooklyn, 28 percent of the stations had at least 90 percent of their components in good repair.

34. The survey shows that platform edges, which are important to rider safety because they close the gap between the platform and the train, had the largest percentage of defects (43 percent) of any structural component. While 33 percent of platform edges showed a moderate level of deterioration, 10 percent exhibited serious defects.

35. One-third of other platform components (such as ceilings, floors and columns) were structurally deficient, while similar components at the mezzanine level (i.e., the area between the platform and the street level) were in better condition.

36. The State Comptroller's office provided the Petitioners with hundreds of records in response to the same FOIL request including the results and analysis of the investigation and survey conducted, but none of the actual data photos or notes etc. as it was not in possession of those records.

37. The above information is in no way related to security or safety and any such issues would be ancillary to the type of information requested herein as it was gathered for the purpose of assessing the needs and costs of repairing the NYC subway station system not for security or safety.

38. On or about 2012 there existed a 2012 Subway System Survey.

39. Petitioner served a FOIL request on October 3, 2014 for:

a complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

40. Finally, after a long delay, on July 12, 2015 we received a denial from NYCTA denying our request because the report in its entirety would create a risk to the public.

41. We were informed the underlying documentation is being held by the NYCTA and MTA.

42. Based on the statements contained in the Comptrollers reports there are investigations of all the individual stations.

43. Based on the statements contained in the Comptrollers reports there are investigations of all the individual stations and including hundreds if not thousands of photographs of areas open to the public which are generally not exempted form FOIL. See **Exhibit "A"**.

44. Clearly these surveys and investigations are not about security of the system, they are about maintenance of the subway system. It is possible there maybe some security risk of certain documents which would fall under an exemptions but this would require individual or categorical denials to avoid the blanket denial herein.

45. The blanket herein denial is inimical to the spirit of FOIL.

LEGAL ARGUMENT

46. The Petitioners are entitled to the requested FOIL information: "2012 Survey and Underlying Data" based on the FOIL law.

47. The NYCTA and MTA have failed to comply or partially comply as required under FOIL with the Petitioner's FOIL request dated October 3, 2014 and therefore are in violation of the spirit of the Freedom of Information Law.

48. The benchmark case regarding FOIL is the Court of Appeals case *Gould v City of New York*, 89 NY2d 267 (1996) this contains the oft cited language regarding providing police records under the Freedom of Information Law as follows:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]).

49. There is a presumption that all governmental records are available to the public. As stated by Justice Karen Murphy in *Rebello v Thomas C. Dale, Nassau County Police Department, et al.* Index No. 11906/2013 (Sup Ct. Nassau County, March 2014)¹ *inter alia*:

An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government'" (*Matter of Buffalo News, Inc. v Buffalo Enterprise Development Corporation*, 84 NY2d 488, 492[1994][citations omitted]).

50. In this case these records were created for the purpose of allocating public funds to repair the subway system and make capital improvements. Although it is the Respondents burden to show that ALL of the records would pose a hazard to public safety, it is important to point out that the spirit of FOIL is the public's right to know what records indicate where public monies are being spent and on what it is being spent to preserve governmental transparency. This is why the State Comptroller's office gave us whatever records were sent to them by the Respondents herein. These records that were sent to us by the Comptroller are overlapping records from what the NYCTA and MTA have to be in possession of.²

51. FOIL advisory Opinions are created by the Committee for Open Government, are issued by this government sanctioned agency and are regularly cited by the Respondents herein.

52. The burden is on the Respondents to show that the ALL the records requested fall under the enumerated exemptions of § 87 of the public officer's law. Although Advisory Opinions are not required to be followed they are often cited precedent. One such Opinion is AO-F12748 which states in pertinent part:

...Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for

² The fact that hundreds of pages exchanged by the State Comptroller office does not excuse the Respondents herein from exchanging the same and where the results of the investigation were provided the data and the photographs etc that were compiled to be analyzed were not. Presumably this would be thousands documents and records. **Exhibits J-M** are attached hereto as examples of records that have been withheld and the subject matter of the documents requested herein.

denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences recognition on the part of the Legislature that a single record, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

This is exactly as the case herein, on the remote chance that there are records which go to safety then they need to be categorized and rest should have been turned over.

The AO goes on to state:

... Just as significant, the Court in *Gould* repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that:

"Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz*, supra, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Department has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate.

Third, the Freedom of Information Law pertains to all records maintained by or for an agency, and §86(4) defines the term "record" to mean: "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs,

drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

A clear reading of the above along with the case law supports the Petitioners request herein as it in this matter is would be beyond improbable that at least some of the records would not endanger the safety of the public and therefore the denial improper. In fact almost all records would not but since the Respondents issued a blanket denial they must turn over all records.

53. It is the Respondents' burden to provide the "particularized and specific justification" for not disclosing requested documents. The Respondents have simply failed to do so.

54. The complete failure to set forth and apply the FOIL exemptions to the request made herein is clearly in violation of all applicable case law. Therefore, the Court should order the Respondents to provide the information forthwith.

55. There is a valid public interest in the disclosure of the data of the maintenance of the subways systems. The release of the information requested serves the public interest by providing transparency and accountability for agency action. *Associated Press v. US Dep't of Defense* 554 F.3d 273, 285 (2d Cir. 2009).

ATTORNEY'S FEES

56. While the trial court enjoys discretion to award fees, Appellate Courts have provided no direct guidance about how this discretion is to be used. Lower courts are thus in need of guidance from the Appellate Courts about the parameters of FOIL fee-shifting.

57. However, New York Courts have held that where the discretion lies in lower court, said discretion cannot be exercised in a matter that contravenes direct legislative intent.

58. The Freedom of information Law was enacted in 1977, in an effort to "extend public accountability wherever and whenever feasible" by granting Citizens the "right to know the process of governmental decision-making and to review the documents and statistics leading to determinations" made by government agencies. N.Y. Public Officers Law§ 84.

59. The original version of the Foil Law did not provide the Court with discretion to award attorney's fees and costs for successful Foil litigants/requestors. However, the law was amended in 1982 to include a provision in the Foil Law to award fees to a prevailing Foil litigant which has met all statutory criteria.

60. The Memorandum in Support of Legislation explained the animating force behind the fee provision as follows:

First, if a person is denied access, challenges the denial in court and prevails, all he or she obtains are the records that should have been provided in the first place. Since litigation is costly and time consuming, relatively few judicial proceedings are initiated. Second, this amendment will discourage public bodies from denying access to records as a matter of course. Certain agencies have adopted a "sue us" attitude in relation to providing access to public records. This is a clear violation of the intent of the Legislature in enacting open government laws.

Add.,p.5.

The history of agency attempts to evade FOIL's mandate thus had a clear effect on the construction of the fee provision. At its core, the fee provision was designed to incentivize agencies to use the administrative mechanism of FOIL whenever possible in order to avoid costly, unnecessary litigation. This was a particularly important goal because, as noted below, litigation costs, let alone attorneys' fees, are enough to deter many New Yorkers from seeking redress in the courts.

61. Clearly the goal was to avoid unnecessary litigation and expense while promoting public accountability. It has been held that the Court must exercise its discretion in concert with the expressed legislative intent. *Continental Bldg. Co. v. Town of N Salem*, 625 N.Y.S.2d 700 (3d Dep't 1995), *app. denied* 86 N.Y.2d 818.

62. This principle is not limited to fee requests. *Application of Fischer*, 128 N.Y.S.2d 886, 887-888 (3d Dep't 1954); *Johnson v. Martins*, 2010 NY Slip Op 9195, *4 (2d Dep't Dec. 15, 2010)

63. Thus the trial court does have the discretion to award legal fees pursuant to the FOIL Statutes but said discretion must be exercised with the legislative intent in mind. Clearly the FOIL fee provisions were intended to avoid unnecessary litigation where documents were properly requested.

64. It is even more egregious when an experienced agency such as the Respondents, one of the largest transportation systems in the world, with their own FOIL department, is certainly familiar with the law and the constant thwarting of valid requests.

65. Attorney's fees in Article 78 proceedings may be recoverable by the Petitioners if they prevail. The Petitioners herein are making an application for attorneys fees associated with the Article 78 Petition and will submit an affirmation regarding the attorney's hourly rates and amount of hours spent if the Petitioners prevail.

66. There is absolutely no valid reason that the Respondents did not issue provide some information in response to the October 3, 2014 FOIL request. The Petitioner's were forced to bring the within application as there is no other remedy and at this point no excuse. Accordingly the request for attorney's fees is reasonable under the circumstances.

67. Thus this Court should exercise its discretion and award legal fees and costs after holding a hearing to determine the appropriate amount.

PRIOR APPLICATION

68. There has been no prior application for the 2012 Subway System Survey requested in the October 3, 2014 FOIL request.

WHEREFORE, Petitioners respectfully request this Court issue a Judgment:

1. Ordering Respondents to provide Petitioners with "a complete and final copy of the 2012 study of the New York City Subway System done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report" requested in Petitioners' FOIL request dated October 3, 2014;

2. Declaring that the NYCTA and MTA's decision to deny access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled;
3. Awarding attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
4. Granting Petitioners such other and further relief as this Court may deem just and proper.

Dated: New York, New York
January 12, 2016



DAVID A. ROTH

ATTORNEY'S VERIFICATION

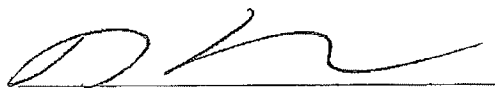
DAVID A. ROTH, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under the penalties of perjury:

I am a Partner of ROTH & ROTH, LLP, one of the Petitioners. I have read the annexed

VERIFIED PETITION

and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon interviews, facts, records, and other pertinent information contained in my files.

DATED: New York, New York
 January 12, 2016

A handwritten signature in black ink, appearing to read 'D. Roth', is written over a horizontal line.

DAVID A. ROTH

Exhibit A



Metropolitan Transportation Authority: Subway Station Conditions

Thomas P. DiNapoli
New York State Comptroller

Kenneth B. Bleiwas
Deputy Comptroller

Report 8-2015

October 2014

Highlights

- Nearly all of the New York City subway system's 468 stations were built before 1940. Nearly two-thirds are at least 90 years old.
- In 1999, New York City Transit (NYCT) had planned to fully renovate all 468 subway stations by 2022, but that goal will not be achieved.
- A 2012 survey by NYCT found that only 118 of New York City's subway stations (25 percent) had at least 90 percent of both their structural and architectural components in good repair.
- The survey found a total of 4,172 structural defects, or 27 percent of all structural components (4 percent of components displayed serious defects).
- NYCT reported that in 94 stations at least half of the structural components were in need of repair.
- The stations in Brooklyn and Queens had the largest share of structural components with defects (one-third).
- Platform edges, which are important to rider safety, had the largest percentage of defects (43 percent) of any structural component.
- The survey also found that 83 stations, including some high-profile stations, had at least 25 percent of their architectural components in disrepair.
- The tile or other finishing on more than one-third of all subway station platform walls and floors was in need of repair.
- More than one-quarter of station components needed to be painted.
- Of the almost 400 elevators and escalators maintained by NYCT, nearly one in five is beyond its useful life.
- More than half of the elevators operating beyond their useful lives are located at six deep stations in Upper Manhattan.

The New York City subway system includes 468 passenger stations, which are used by 5.5 million riders each weekday. The system is operated by New York City Transit (NYCT), the largest subsidiary of the Metropolitan Transportation Authority.

Over the past 32 years, NYCT has renovated 241 subway stations at a cost of \$4.5 billion as part of its station rehabilitation programs. Under these programs, each station was fully renovated to a state of good repair, including structural and architectural components. Once the work was completed, however, NYCT moved on to the next station for rehabilitation without committing the resources to maintain the renovated stations.

NYCT changed its approach to station renovation beginning with the 2010-2014 capital program. Rather than fully renovating stations, it is now focused on repairing the most deteriorated structural components. NYCT believes that this approach is a more effective use of its limited resources.

NYCT reports that it is making progress addressing structural defects, but as noted in this report, much more remains to be done. NYCT estimates that it will need to invest more than \$5 billion over the next 20 years for subway station repairs.

Every five years, NYCT examines the structural and architectural condition of all of the City's subway stations. The survey, which takes more than a year to complete, rates components on a scale of 1.0 to 5.0. Those rated less than 3.0 are considered by NYCT to be free of defects and in a "state of good repair." Components rated 3.0 or higher are worn or damaged.

The 2012 survey represents NYCT's latest data on subway station conditions. Using NYCT's standards, the survey found that only 51 subway stations (11 percent) were free of both structural and architectural defects, and only 67 more had most (at least 90 percent) of their components in good repair.

The survey found 4,172 structural defects system-wide (27 percent) and 411 stations (88 percent) with at least one structural defect. Only 57 stations (12 percent) were free of structural defects, but another 70 stations had most of their components in good repair. The survey also found that 94 stations had at least half of their components in disrepair, with an average of 16 defective components per station.

NYCT reports that the percentage of structural components with defects declined from 32 percent in 2007 to 27 percent in 2012, and that the percentage of serious defects (those rated 4.0 or worse) declined from 5 percent to 4 percent. NYCT estimates that the percentage of components with defects will decline to 21 percent after the completion of work planned during the current capital program. This forecast, however, does not account for any new deterioration since 2012, which will not be identified until the next survey is completed in 2017.

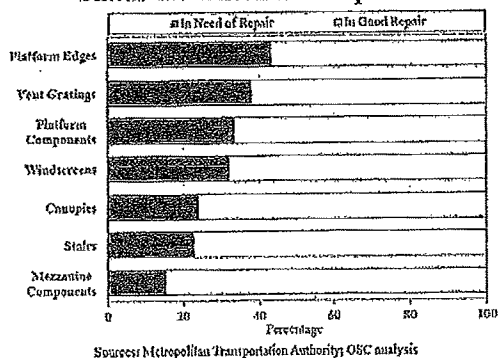
Among the four boroughs served by NYCT, the stations in Brooklyn and Queens had the largest share of structural components with defects (one-third). Only 1 of the 81 stations in Queens was free of defects, although 13 others had most of their components in good repair. In Brooklyn, 28 percent of the stations had at least 90 percent of their components in good repair.

In the Bronx, 26 of 70 stations (37 percent) had at least 90 percent of their structural components in good repair. Manhattan had the lowest percentage of components with defects (22 percent), but only 40 of the borough's 146 stations (27 percent) had at least 90 percent of their components in good repair.

The figure below shows that platform edges, which are important to rider safety because they close the gap between the platform and the train, had the largest percentage of defects (43 percent) of any structural component. While 33 percent of platform edges showed a moderate level of deterioration, 10 percent exhibited serious defects.

One-third of other platform components (such as ceilings, floors and columns) were structurally deficient, while similar components at the mezzanine level (i.e., the area between the platform and the street level) were in better condition.

Status of Structural Components

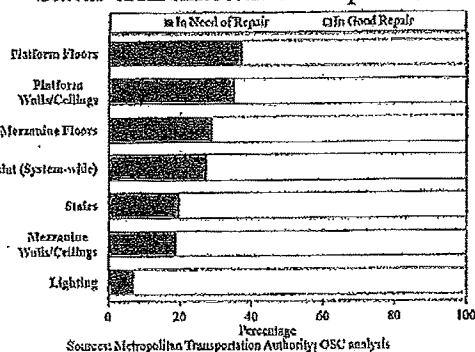


While the condition of structural components is important to rider safety, the condition of architectural components (e.g., tiles) affects how passengers perceive the overall condition of the transit system.

The 2012 survey found that 2,722 architectural components (13 percent) were in need of repair and 2,031 components (27 percent) needed to be painted.

In 2012, the architectural components at 141 stations met NYCT's standards for good repair. However, 83 other stations had at least 25 percent of their architectural components in disrepair, including Rockefeller Center in Manhattan and Borough Hall in Brooklyn. As shown in the figure below, the tile or other finishing on more than one-third of the walls and floors on station platforms did not meet the agency's standards. (The survey did not consider routine maintenance or cleanliness.)

Status of Architectural Components



Elevators and escalators help make the system accessible to passengers with impaired mobility. (Currently, only 82 subway stations comply with the federal Americans with Disabilities Act.) Escalators and elevators are not part of the station conditions report, but NYCT tracks service outages and the overall condition of escalators and elevators.

NYCT operates and maintains 176 escalators and 217 passenger elevators throughout the subway system. NYCT reported 2,646 elevator outages (an average of more than 12 per elevator) and 6,354 escalator outages (more than 30 per escalator) during the second quarter of 2014. NYCT reports that elevators were available 96 percent of the time and escalators 95 percent of the time, but an average elevator outage lasted seven hours and the average escalator outage was three hours. (These estimates exclude five escalators and two elevators that were closed for long-term capital repairs.)

In 1999, NYCT had planned to replace all outdated elevators and escalators by 2001, but that target date has been pushed back to 2019 for elevators and 2024 for escalators. Currently, 38 elevators (18 percent) and 34 escalators (19 percent) are beyond their useful lives and are in need of replacement. More than half of the elevators that need replacement serve deep underground stations in Upper Manhattan that are as much as 180 feet below street level.

For additional copies of this report, please visit our website at www.osc.state.ny.us or contact us at: (212) 383-1388

Exhibit B

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

October 3, 2014

New York City Transit Authority
130 Livingston Street
Brooklyn, NY 11201
Attn: Foil Department

Dear Sir or Madam:

Pursuant to the Freedom of Information Law, kindly provide this office with a complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

Thank you for your anticipated cooperation in this matter.

Very truly yours,



Aracelis Velazquez
Paralegal

Exhibit C

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

December 31, 2014

Via Certified Mail

RRR#: 7012 3050 0001 1486 3782

Chairman and CEO of MTA Headquarters
347 Madison Avenue
New York, NY 10017

Dear Sir/Madam:

I hereby appeal the constructive denial to my October 3, 2014 FOIL request letter which was received by your office and which has not been acknowledged, complied with or denied. As more than 5 days have passed since the attached October 3, 2014 letter was received by your office, said FOIL request has been constructively denied.

As you are aware to §89(3)(a) of the Freedom of Information Law requires:

Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied...

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the


record the reasons for further denial, or provide access to the record sought.

Since you have not complied with the above, the matter has become ripe for appeal. The records that were denied include the following:

A complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Aracelis Velazquez', written over a horizontal line.

Aracelis Velazquez
Paralegal

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
 (Domestic Mail Only, No Insurance Coverage Provided)
 For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$
 Certified Fee \$
 Return Receipt Fee (Endorsement Required)
 Restricted Delivery Fee (Endorsement Required)
 Total Postage & Fees \$

Sent To: Chairman & CEO of NTA
 Street, Apt. No. or PO Box No. 347 Madison Ave
 City, State, ZIP+4 NY, NY 10017

PS Form 3800, August 2008 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to: Chairman & CEO of NTA Headquarters 347 Madison Ave New York, NY 10017</p>		<p>A. Signature X <i>L. Staley</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>Lionel Staley</i></p> <p>C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>	
<p>2. Article Number (Transfer from service label) 7012 3050 0001 1486 3782</p>		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail[®] <input type="checkbox"/> Priority Mail Express[™] <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p>	
<p>PS Form 3811, July 2013</p>		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p> <p>Domestic Return Receipt</p>	

Exhibit D

347 Madison Avenue
New York, NY 10017-3739
212 878-7000 Tel



Metropolitan Transportation Authority
State of New York

January 12, 2015

Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Attn: Aracelis Velazquez, Paralegal

Re: Freedom of Information ("FOIL") Request

Dear Ms. Velazquez:

The MTA is in receipt of your December 31, 2014 letter regarding your October 3, 2014 FOIL request.

Please be advised that New York City Transit ("NYCT") has no record of receiving that request. I will therefore now send the request to the NYCT FOIL Officer. You should receive an acknowledgment of receipt within five (5) business days from the day it is received by NYCT.

If you do not receive an acknowledgement, please contact Beverley Jackson of NYCT at (718) 694-4898.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ann Cutler".

Ann Cutler
Paralegal

Tel: (212) 878-7315

The agencies of the MTA

MTA New York City Transit
MTA Long Island Rail Road

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Capital Construction
MTA Bus Company

Exhibit E

130 Livingston Street 12th Floor
Brooklyn, NY 11201



New York City Transit

January 13, 2015

Aracelis Velazquez
Roth & Roth, LLP
Attorneys at Law
192 Lexington Avenue
NEW YORK, NY 10016

Re: Freedom of Information Law
Request No. 19026

Dear Ms. Velazquez :

This is to acknowledge receipt of your Freedom of Information Law request, wherein you request a complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

Your request has been forwarded to the appropriate department(s) for research.

Please be advised that the NYCT FOIL Unit receives a high volume of requests ranging from a simple request for one document that can be readily located to complex requests for multiple documents, such as records relating to a construction project. Typically, the FOIL Unit requests documents from other departments, which then must locate the documents and forward them for review by the FOIL Unit to determine if they are disclosable under the law. As a result, the time and effort required to complete a response can vary significantly. NYCT endeavors to complete each request in a time period that is reasonable under the circumstances. A few examples of the types of requests and estimated times for responses are:

A.) Requests for accident reports, Payment and/or Performance Bonds for a particular contract, Board Minutes or other records that can be identified and located by going to one source - one to three months.

B.) Requests requiring research to determine the type of records that may be responsive - six to eight months.

MTA New York City Transit is an agency of the Metropolitan Transportation Authority, State of New York

C.) Multiple or voluminous requests seeking to obtain records pertaining to contracts - six months to one year.

We believe that your request falls into the category that usually takes 3 Months to complete. We would expect that our response should be completed by 04/12/2015.

We will notify you if we cannot provide you with responsive records within the aforementioned time.

If you are able to narrow or further specify the records you seek, it may permit the FOIL Unit to complete the process in a shorter time period. Please use the above number when corresponding to advise us of this more narrow request.

The fee for this service is \$.25 per page of material provided. NYCT will advise you of the cost as soon as responsive documents are made available to us. Upon receipt of a check or money order to cover the costs of the documents, we will forward those records that are disclosable.

Should it become necessary to inquire further regarding this request, please refer to the above Freedom of Information request number in your correspondence.

Sincerely,

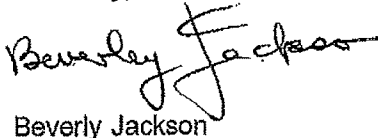

Beverly Jackson

Exhibit F

130 Livingston Street
Brooklyn, NY 11201

Carmen Blanco
President

(718) 694-4898



New York City Transit

July 20, 2015

Aracelis Velazquez
Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, N. Y. 10016

Re: Freedom of Information Law
Request No. 19026

Dear Ms. Velazquez,

This is in response to your Freedom of Information Law request, wherein you requested a complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

Please be advised that under the Public Officer's Law, the report in its entirety is a safety sensitive record, since it records structural defects for the entire subway system infrastructure and is exempt from disclosure. Release of the entire report could create a risk to public safety. Please see Public Officer's Law Section 87 (f).

However, if you require records regarding a specific incident and location, we would review and may be able to provide the record for a specific incident.

If you wish to appeal from this denial please submit your appeal in writing within 30 days to: MTA Chairman, Thomas Prendergast, 2 Broadway, New York NY 10004,

Sincerely,

A handwritten signature in dark ink, appearing to read "Beverley Jackson".

Beverley Jackson
Restitution Manager

Exhibit G

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

August 18, 2015

Via Certified Mail
RRR#: 7010 1870 0000 1451 0315
Chairman and CEO of MTA Headquarters
2 Broadway
New York, NY 10004
Attn: Thomas Prendergast

Foil No.: 19026

Dear Mr. Prendergast:

This letter is our appeal of NYCTA's improper denial dated July 20, 2015. A copy of the July 20, 2015 denial and our October 3, 2014 FOIL request are enclosed. Pursuant to *Gould v City of New York*, 89 NY2d 267 (1996) you have to deny with particularity and provide categories of information and records for which you are denying (not there may be some safety sensitive record). Additionally, embodied in this request, whether we agree with your assessment or not, there are certainly records that are covered by our request that do not fall under any FOIL exemptions. In this situation the municipality must provide all records that do not fall under the FOIL exemptions and provide categories of the different types of information that you claim fall under FOIL exemptions.

The burden is upon the municipality to search their own records and information to make said determination. Case law and FOIL opinions have held that information of inspections, complaints, records, defects, photographs and videos of areas that are accessible on a daily basis to the public are not safety sensitive records. The bulk of the records that are covered under this FOIL request, as per previous paragraph, do not fall under any FOIL exemptions. Please immediately provide said information.

Very truly yours,



David Roth

Enclosure

130 Livingston Street
Brooklyn, NY 11201

Carmen Blanco
President



(718) 694-4898

New York City Transit

July 20, 2015

Aracelis Velazquez
Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, N. Y. 10016

Re: Freedom of Information Law
Request No. 19026

Dear Ms. Velazquez,

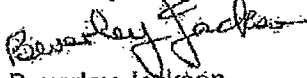
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Sincerely,


Beverley Jackson
Restitution Manager



Metropolitan Transportation Authority: Subway Station Conditions

Thomas P. DiNapoli
New York State Comptroller

Kenneth B. Beltracchi
Deputy Comptroller

Report 8-2015

October 2014

Highlights

- Nearly all of the New York City subway system's 468 stations were built before 1940. Nearly two-thirds are at least 90 years old.
- In 1999, New York City Transit (NYCT) had planned to fully renovate all 468 subway stations by 2022, but that goal will not be achieved.
- A 2012 survey by NYCT found that only 118 of New York City's subway stations (25 percent) had at least 90 percent of both their structural and architectural components in good repair.
- The survey found a total of 4,172 structural defects, or 27 percent of all structural components. 61 percent of components displayed serious defects.
- NYCT reported that in 94 stations at least half of the structural components were in need of repair.
- The stations in Brooklyn and Queens had the largest share of structural components with defects (one-third).
- Platform edges, which are important to rider safety, had the largest percentage of defects, 43 percent of any structural component.
- The survey also found that 83 stations, including some high-profile stations, had at least 25 percent of their architectural components in disrepair.
- The tile or other finishing on more than one-third of all subway station platform walls and floors was in need of repair.
- More than one-quarter of station components needed to be painted.
- Of the almost 300 elevators and escalators maintained by NYCT, nearly one in five is beyond its useful life.
- More than half of the elevators operating beyond their useful lives are located at six deep stations in Upper Manhattan.

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NYCT changed its approach to station renovation beginning with the 2010-2014 capital program. Rather than fully renovating stations, it is now focused on repairing the most deteriorated structural components. NYCT believes that this approach is a more effective use of its limited resources.

NYCT reports that it is making progress addressing structural defects, but as noted in this report, much more remains to be done. NYCT estimates that it will need to invest more than \$5 billion over the next 20 years for subway station repairs.

Every five years, NYCT examines the structural and architectural condition of all of the City's subway stations. The survey, which takes more than a year to complete, rates components on a scale of 1.0 to 5.0. Those rated less than 3.0 are considered by NYCT to be free of defects and in a "state of good repair." Components rated 3.0 or higher are worn or damaged.

The 2012 survey represents NYCT's latest data on subway station conditions. Using NYCT's standards, the survey found that only 51 subway stations (11 percent) were free of both structural and architectural defects, and only 67 more had most (at least 90 percent) of their components in good repair.

The survey found 4,172 structural defects system-wide (27 percent) and 411 stations (88 percent) with at least one structural defect. Only 37 stations (12 percent) were free of structural defects, but another 70 stations had most of their components in good repair. The survey also found that 94 stations had at least half of their components in disrepair, with an average of 16 defective components per station.

Office of the State Comptroller

NYCT reports that the percentage of structural components with defects declined from 32 percent in 2007 to 27 percent in 2012, and that the percentage of serious defects (those rated 4.0 or worse) declined from 5 percent to 4 percent. NYCT estimates that the percentage of components with defects will decline to 21 percent after the completion of work planned during the current capital program. This forecast, however, does not account for any new deterioration since 2012, which will not be identified until the next survey is completed in 2017.

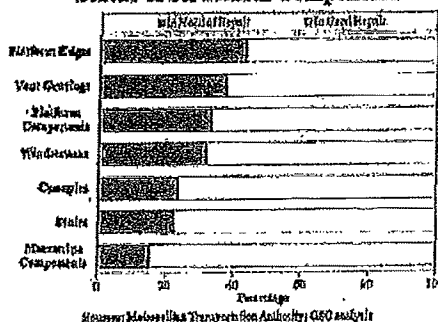
Among the four boroughs served by NYCT, the stations in Brooklyn and Queens had the largest share of structural components with defects (one-third). Only 1 of the 81 stations in Queens was free of defects, although 13 others had most of their components in good repair. In Brooklyn, 28 percent of the stations had at least 90 percent of their components in good repair.

In the Bronx, 26 of 70 stations (37 percent) had at least 90 percent of their structural components in good repair. Manhattan had the lowest percentage of components with defects (22 percent), but only 40 of the borough's 146 stations (27 percent) had at least 90 percent of their components in good repair.

The figure below shows that platform edges, which are important to rider safety because they close the gap between the platform and the train, had the largest percentage of defects (43 percent) of any structural component. While 33 percent of platform edges showed a moderate level of deterioration, 10 percent exhibited serious defects.

One-third of other platform components (such as ceilings, floors and columns) were structurally deficient, while similar components at the mezzanine level (i.e., the area between the platform and the street level) were in better condition.

Status of Structural Components

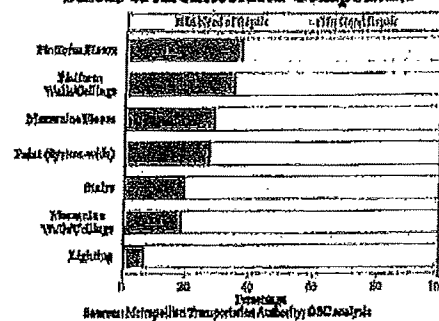


While the condition of structural components is important to rider safety, the condition of architectural components (e.g., tiles) affects how passengers perceive the overall condition of the transit system.

The 2012 survey found that 2,722 architectural components (13 percent) were in need of repair and 2,031 components (27 percent) needed to be painted.

In 2012, the architectural components at 141 stations met NYCT's standards for good repair. However, 83 other stations had at least 25 percent of their architectural components in disrepair, including Rockefeller Center in Manhattan and Borough Hall in Brooklyn. As shown in the figure below, the tile or other finishing on more than one-third of the walls and floors on station platforms did not meet the agency's standards. (The survey did not consider routine maintenance or cleanliness.)

Status of Architectural Components



Elevators and escalators help make the system accessible to passengers with impaired mobility. (Currently, only 82 subway stations comply with the federal Americans with Disabilities Act.) Escalators and elevators are not part of the station conditions report, but NYCT tracks service outages and the overall condition of escalators and elevators.

NYCT operates and maintains 176 escalators and 217 passenger elevators throughout the subway system. NYCT reported 2,646 elevator outages (an average of more than 12 per elevator) and 6,354 escalator outages (more than 30 per escalator) during the second quarter of 2014. NYCT reports that elevators were available 96 percent of the time and escalators 95 percent of the time, but an average elevator outage lasted seven hours and the average escalator outage was three hours. (These estimates exclude five escalators and two elevators that were closed for long-term capital repairs.)

In 1999, NYCT had planned to replace all outdated elevators and escalators by 2001, but that target date has been pushed back to 2019 for elevators and 2024 for escalators. Currently, 38 elevators (18 percent) and 34 escalators (19 percent) are beyond their useful lives and are in need of replacement. More than half of the elevators that need replacement serve deep underground stations in Upper Manhattan that are as much as 180 feet below street level.

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

October 3, 2014

New York City Transit Authority
130 Livingston Street
Brooklyn, NY 11201
Attn: Foll Department

Dear Sir or Madam:

Pursuant to the Freedom of Information Law, kindly provide this office with a complete and final copy of the 2012 study of the New York City subway system done in 2012 including a copy of any and all reports, investigative reports regarding the individual components, data, underlying data, notes, video tapes and all photographs taken whether or not used on the final report.

Thank you for your anticipated cooperation in this matter.

Very truly yours,



Aracelis Velazquez
Paralegal

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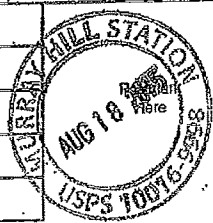


Exhibit H

2 Broadway
New York, NY 10004
212 878-7000 Tel

2012
5/1/15



Metropolitan Transportation Authority

State of New York

August 26, 2015

Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Attn: David Roth, Esq.

Re: Freedom of Information ("FOIL") Appeal

Dear Mr. Roth:

The MTA is in receipt of your August 18, 2015 letter to MTA Chairman & CEO Thomas Prendergast appealing the New York City Transit ("NYCT") response to your FOIL request.

I will contact NYCT regarding the records you requested and anticipate being able to respond within approximately three (3) weeks.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Roberta Bender".

Roberta Bender
Deputy General Counsel

The agencies of the MTA

MTA New York City Transit
MTA Long Island Rail Road

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Capital Construction
MTA Bus Company

Exhibit I

2 Broadway
New York, NY 10004
212 878-7000 Tel

2012
Survey



Metropolitan Transportation Authority

State of New York

September 9, 2015

Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Attn: David Roth, Esq.

Re: Freedom of Information ("FOIL") Appeal

Dear Mr. Roth:

This letter is in response to your August 18, 2015 correspondence to MTA Chairman & CEO Thomas Prendergast appealing the New York City Transit ("NYCT") response to your FOIL request.

The MTA contacted the NYCT Department of Security regarding your request for a complete and final copy of the 2012 Subway System Survey ("Survey"), as well as other documents associated with that Survey.

We have reviewed the Survey and found it to be security sensitive, due to the fact that it provides non-public information regarding subway infrastructure and possible vulnerabilities. Pursuant to New York Public Officers Law §87(2)(f), an agency may withhold records that "if disclosed could endanger the life or safety of any person". In accordance with this provision, the MTA has decided to deny your appeal.

This completes the MTA's response to your FOIL appeal.

Very truly yours,

Roberta Bender
Deputy General Counsel

cc: Committee on Open Government

The agencies of the MTA

MTA New York City Transit
MTA Long Island Rail Road

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Capital Construction
MTA Bus Company

2 Broadway
New York, NY 10004



Metropolitan Transportation Authority

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PM 7:1



U.S. POSTAGE & METS



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0001396007 SEP: 11, 2015

Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Attn: David Roth, Esq.

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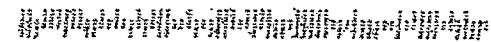


Exhibit J

MTA Twenty-Year Capital Needs Assessment 2015-2034



October 2013



**CAPITAL
PROGRAM**



Metropolitan Transportation Authority

**New York City Transit
Long Island Rail Road
Metro-North Railroad
Bridges and Tunnels
Capital Construction
Bus Company**

October 2013

On the cover:

An F train approaches New York City Transit's Smith-9th Sts. station in Brooklyn. These R-160 cars were part of an order for over 1,600 cars that was completed in 2010. Located on the Culver Line Viaduct, the station is the highest elevated station in NYCT's system. Originally opened in 1933, the station and viaduct have recently undergone a comprehensive rehabilitation to make structural repairs and modernize signals and other critical systems.



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Exhibit K

**Elevator and Escalator
Quarterly Performance Summary
Second Quarter - 2014**

Elevator Performance

Borough	No. Units	Avg Age	2014 2nd Quarter Availability			Outages			Entrapments
			24 Hr	AM Peak	PM Peak	Total	Non Scheduled	Scheduled	
Bronx	26	9.8	98.3%	98.9%	99.0%	259	158	101	16
Brooklyn	54	8.5	94.7%	96.0%	95.2%	586	323	263	24
Manhattan	103	11.2	95.7%	96.6%	96.5%	1386	825	561	51
Queens	34	11.4	96.9%	97.9%	97.8%	415	240	175	14
System	217	10.2	96.0%	97.0%	96.7%	2646	1546	1100	105

Escalator Performance

Borough	No. Units	Avg Age	2014 2nd Quarter Availability			Outages			Entrapments
			24 Hr	AM Peak	PM Peak	Total	Non Scheduled	Scheduled	
Bronx	12	15.1	93.4%	95.3%	92.8%	458	366	92	0
Brooklyn	33	13.2	91.9%	93.9%	90.9%	1258	1041	217	0
Manhattan	87	13.0	95.5%	97.2%	96.0%	3616	1968	1648	0
Queens	44	13.0	96.9%	98.2%	97.5%	1022	779	243	0
System	176	13.6	95.0%	96.7%	95.2%	6354	4154	2200	0

Definitions: Availability measures the percent of time that a unit is running and available for customer service. All service outages, regardless of cause, count as downtime in the availability calculation. (Note: Units out of service for capital rehabilitation are excluded from the calculations)

AM Peak: 6 AM - 10 AM

PM Peak: 3 PM - 7 PM

Exhibit L

Sta	MRN	Station	Age	Line(s)	Type	Line Seg.	Boro	DEFFECTS				SGR				DEFFECTS				SGR				2000-2009
								# of Structural Comp.	# of Arch Comp.	# of Pile Comp.	% >=5.0	# of Structural Comp.	% >=5.0	# of Structural Comp.	% >=5.0	# of Structural Comp.	% >=5.0	# of Arch Comp.	% >=5.0	# of Arch Comp.	% >=5.0	# of Arch Comp.	% >=5.0	
106		Fulton St	81.5	J,Z	SUB	Nassau Loop	Manhattan	73	167	53	0.0%	100.0%	73	NO	0.0%	100.0%	167	NO	0.0%	100.0%	NO			
296		Marble Hill - 225 St	107.6	1	ELV	7th Ave-Bway	Manhattan	17	15	7	0.0%	100.0%	17	NO	0.0%	100.0%	15	NO	0.0%	100.0%	NO			
299		Dyckman St	108.5	1	ELV	7th Ave-Bway	Manhattan	17	23	9	0.0%	100.0%	17	NO	0.0%	100.0%	23	NO	0.0%	100.0%	NO			
307		116 St	109.9	1	SUB	7th Ave-Bway	Manhattan	24	28	13	0.0%	100.0%	24	NO	0.0%	100.0%	28	NO	0.0%	100.0%	NO			
306		Cathedral Pkwy - 110 St	109.9	1	SUB	7th Ave-Bway	Manhattan	24	30	10	0.0%	100.0%	24	NO	0.0%	100.0%	30	NO	0.0%	100.0%	NO			
309		108 St	109.9	1	SUB	7th Ave-Bway	Manhattan	28	44	15	0.0%	100.0%	28	NO	0.0%	100.0%	44	NO	0.0%	100.0%	NO			
314		66 St	109.9	1	SUB	7th Ave-Bway	Manhattan	35	60	18	0.0%	100.0%	35	NO	0.0%	100.0%	60	NO	0.0%	100.0%	NO			
332		Fulton St	96.1	2,3	SUB	Clerk Street	Manhattan	25	27	11	0.0%	100.0%	25	NO	0.0%	100.0%	27	NO	0.0%	100.0%	NO			
399		116 St	96.1	5	SUB	Lexington	Manhattan	49	40	12	0.0%	100.0%	49	NO	0.0%	100.0%	40	NO	0.0%	100.0%	NO			
397		86 St	96.1	4,5,6	SUB	Lexington	Manhattan	61	86	28	0.0%	100.0%	61	NO	0.0%	100.0%	86	NO	0.0%	100.0%	NO			
412		Fulton St	109.6	4,5	SUB	Lexington	Manhattan	91	178	54	0.0%	100.0%	91	NO	0.0%	100.0%	178	NO	0.0%	100.0%	NO			
599		77 St	95.1	5	SUB	Lexington	Manhattan	59	71	29	0.0%	100.0%	59	NO	0.0%	100.0%	71	NO	0.0%	100.0%	NO			
174		Fulton St	83.2	A,C	SUB	8th Ave	Manhattan	32	42	18	0.0%	100.0%	32	NO	0.0%	100.0%	42	NO	0.0%	100.0%	NO			
313		72 St	109.9	1,2,3	SUB	7th Ave-Bway	Manhattan	32	64	20	0.0%	100.0%	32	NO	0.0%	100.0%	64	NO	0.0%	100.0%	NO			
298		207 St	108.5	1	ELV	7th Ave-Bway	Manhattan	22	13	8	0.0%	100.0%	22	NO	0.0%	100.0%	13	NO	0.0%	100.0%	NO			
310		96 St	109.9	1,2,3	SUB	7th Ave-Bway	Manhattan	48	106	85	21.1%	1	37.9%	47	NO	3.0%	1	39.0%	106	NO	3.0%	1	106	NO
11		Times Sq - 42 St	96.4	N,Q,R	SUB	Broadway	Manhattan	42	68	23	2.4%	1	37.6%	41	NO	3.0%	1	100.0%	68	NO	3.0%	1	68	NO
394		110 St	96.1	6	SUB	Lexington	Manhattan	38	23	8	2.9%	1	37.1%	34	NO	3.6%	1	36.4%	23	NO	3.6%	1	23	NO
408		Bleecker St	109.9	6	SUB	Lexington	Manhattan	31	48	14	8.2%	1	35.2%	30	NO	3.1%	1	37.3%	48	NO	3.1%	1	48	NO
515		59 St	109.9	1	SUB	7th Ave-Bway	Manhattan	27	44	13	3.7%	1	39.3%	26	NO	2.3%	1	37.7%	44	NO	2.3%	1	44	NO
153		125 St	82.0	A,B,C,D	SUB	8th Ave	Manhattan	54	89	28	3.7%	2	36.3%	52	NO	15.7%	19	34.3%	89	NO	15.7%	19	89	NO
382		125 St	96.1	4,5,6	SUB	Lexington	Manhattan	50	64	21	4.0%	2	36.0%	48	NO	0.0%	1	35.0%	64	NO	0.0%	1	64	NO
327		Chambers St	96.2	1,2,3	SUB	7th Ave-Bway	Manhattan	48	68	26	4.2%	2	35.8%	46	NO	1.5%	1	33.5%	68	NO	1.5%	1	68	NO
161		57 St	82.0	A,B,C,D	SUB	8th Ave	Manhattan	61	105	35	4.9%	3	35.1%	58	NO	1.6%	2	33.2%	105	NO	1.6%	2	105	NO
396		96 St	96.1	6	SUB	Lexington	Manhattan	36	50	17	5.6%	3	34.4%	34	NO	0.0%	2	33.0%	50	NO	0.0%	2	50	NO
228		Lexington Av - 63 St	24.8	F	SUB	63rd Street	Manhattan	32	47	14	6.3%	2	33.3%	30	NO	21.3%	10	34.7%	47	NO	21.3%	10	47	NO
414		Bowling Green	109.2	4,5	SUB	Lexington	Manhattan	31	37	16	9.5%	2	33.5%	29	NO	13.4%	5	36.3%	37	NO	13.4%	5	37	NO
163		42 St	82.0	A,C,E	SUB	8th Ave	Manhattan	59	113	38	5.8%	14	39.2%	55	NO	8.0%	9	32.0%	113	NO	8.0%	9	113	NO
412		Wall St	109.2	4,5	SUB	Lexington	Manhattan	42	88	21	7.1%	3	32.4%	38	NO	1.5%	4	33.5%	88	NO	1.5%	4	88	NO
233		Delancey St	78.7	F	SUB	6th Ave	Manhattan	40	82	26	7.3%	1	30.5%	37	NO	7.2%	2	34.3%	82	NO	7.2%	2	82	NO
21		Canal St	96.4	R	SUB	Broadway	Manhattan	38	59	17	7.7%	3	32.3%	36	NO	9.1%	3	34.4%	59	NO	9.1%	3	59	NO
466		5 Av	88.4	7	SUB	Flushing	Manhattan	24	44	14	8.3%	2	31.7%	22	NO	16.1%	5	33.6%	44	NO	16.1%	5	44	NO
164		34 St	82.0	A,C,E	SUB	8th Ave	Manhattan	104	197	62	8.7%	9	31.3%	95	NO	1.3%	4	36.0%	197	NO	1.3%	4	197	NO
329		Rector St	96.2	1	SUB	7th Ave-Bway	Manhattan	46	55	19	8.7%	4	31.3%	42	NO	5.3%	3	34.5%	55	NO	5.3%	3	55	NO
490		59 St	96.1	4,5,6	SUB	Lexington	Manhattan	67	115	36	9.0%	6	31.0%	61	NO	0.9%	1	30.1%	115	NO	0.9%	1	115	NO
440		116 St	109.9	2,3	SUB	Lenox	Manhattan	33	93	10	9.1%	3	30.9%	30	NO	15.2%	5	34.8%	93	NO	15.2%	5	93	NO
306		125 St	109.9	1	ELV	7th Ave-Bway	Manhattan	21	33	13	9.5%	2	30.5%	19	NO	0.0%	2	30.0%	33	NO	0.0%	2	33	NO
467		Times Sq - 42 St	87.5	7	SUB	Flushing	Manhattan	21	42	13	9.5%	2	30.5%	19	NO	0.0%	2	30.0%	42	NO	0.0%	2	42	NO
143		207 St	82.0	A	SUB	8th Ave	Manhattan	31	35	17	9.7%	3	30.3%	28	NO	5.9%	7	34.3%	35	NO	5.9%	7	35	NO
16		8 St - NYU	97.2	N,R	SUB	Broadway	Manhattan	41	58	18	9.8%	4	30.2%	37	NO	10.3%	4	33.7%	58	NO	10.3%	4	58	NO
401		51 St	96.1	6	SUB	Lexington	Manhattan	59	98	32	10.2%	5	30.8%	53	NO	6.1%	6	33.9%	98	NO	6.1%	6	98	NO
469		Grand Central - 42 St	109.9	5	SUB	Shulds	Manhattan	38	58	18	10.5%	4	30.5%	34	NO	1.4%	2	36.6%	58	NO	1.4%	2	58	NO
390		South Ferry	5.0	1	SUB	7th Ave-Bway	Manhattan	56	90	38	10.7%	16	39.3%	50	NO	5.8%	5	34.3%	90	NO	5.8%	5	90	NO
230		Broadway - Lafayette St	78.7	B,D,F,M	SUB	8th Ave	Manhattan	46	82	27	10.9%	5	30.1%	41	NO	8.0%	3	32.2%	82	NO	8.0%	3	82	NO
301		181 St	109.9	1	SUB	7th Ave-Bway	Manhattan	46	68	27	10.9%	5	30.1%	41	NO	13.1%	5	30.5%	68	NO	13.1%	5	68	NO
441		110 St	109.9	2,3	SUB	Lenox	Manhattan	17	14	8	11.8%	2	30.1%	15	NO	11.4%	3	36.0%	14	NO	11.4%	3	14	NO
275		Lexington Av - 59 St	81.0	G,M	SUB	Queens	Manhattan	25	44	13	12.0%	3	30.0%	22	NO	14.5%	6	35.0%	44	NO	14.5%	6	44	NO
216		42 St - Bryant Park	73.7	B,D,F,M	SUB	6th Ave	Manhattan	57	99	33	12.3%	7	37.7%	50	NO	6.1%	4	31.3%	99	NO	6.1%	4	99	NO
222		Roosevelt Island	24.8	F	SUB	63rd Street	Manhattan	15	29	8	12.5%	2	37.5%	14	NO	17.4%	8	34.4%	29	YES	17.4%	8	29	YES
234		East Broadway	78.7	F	SUB	6th Ave	Manhattan	33	73	25	13.2%	5	38.8%	33	NO	5.5%	4	34.3%	73	NO	5.5%	4	73	NO
220		155 St	81.2	B,D	SUB	Concourse	Manhattan	30	58	19	13.3%	4	38.7%	26	NO	37.8%	12	33.1%	58	YES	37.8%	12	58	YES
318		34 St	97.3	1,2,3	SUB	7th Ave-Bway	Manhattan	73	119	36	13.7%	10	38.5%	63	NO	2.5%	3	37.5%	119	NO	2.5%	3	119	NO
15		14 St - Union Sq	96.4	N,Q,R	SUB	Broadway	Manhattan	36	50	18	13.9%	5	38.1%	31	NO	3.4%	2	36.8%	50	NO	3.4%	2	50	NO
28		Whitehall St	98.1	R	SUB	Broadway	Manhattan	43	71	22	14.0%	6	38.0%	37	NO	4.2%	1	36.8%	71	NO	4.2%	1	71	NO
117		14 St - Union Sq	89.9	L	SUB	Canal	Manhattan	95	51	17	14.2%	5	35.7%	30	NO	13.7%	7	36.3%	51	NO	13.7%	7	51	NO
107		Broad St	82.8	J,Z	SUB	Nassau Loop	Manhattan	41	68	21	14.6%	6	35.4%	35	NO	4.4%	1	39.8%	68	NO	4.4%	1	68	NO
12		34 St	96.4	N,Q,R	SUB	Broadway	Manhattan	40	80	26	15.0%	6	35.0%	34	NO	45.8%	16	36.2%	80	YES	45.8%	16	80	YES
303		Wall St	96.1	2,3	SUB	Clerk Street	Manhattan	33	59	18	15.2%	5	34.8%	28	NO	35.8%	11	34.4%	59	YES	35.8%	11	59	YES
115		8 Av	85.2	L	SUB	Canal	Manhattan	26	39	12	15.4%	4	34.8%	22	NO	3.6%	2	37.7%	39	NO	3.6%	2	39	NO
300		181 St	109.9	1	SUB	7th Ave-Bway	Manhattan	25	44	14	15.0%	4</												

Page 106 of 349

Exhibit M

	STRUCTURAL CONDITIONS									DRAFT
	2007 Survey Not Adjusted		2007 Survey Adjusted		2012 Survey, Not Adjusted		2012 Survey Adjusted			
	Represents a snapshot of conditions existing in 2007.		Adjusted to reflect the completion of all 2005-09 programmed work (old-style rehab projects). This served as a benchmark for planning the 2010-14 component program.		Represents a snapshot of conditions existing in 2012. This is NYCT's best available data on "current" conditions.		Adjusted to reflect the projected completion of all 2010-14 programmed work. This is the only data point that shows the impact of component-based investment.			
	% 3.0 or worse	% 4.0 or worse	% 3.0 or worse	% 4.0 or worse	% 3.0 or worse	% 4.0 or worse	% 3.0 or worse	% 4.0 or worse		
Components System-wide	32%	5%	28%	4%	27%	4%	21%	2%		
Components by Type										
Stairs	27%	4%	23%	2%	23%	3%	17%	1%		
Platform Edges	57%	13%	49%	9%	43%	10%	32%	6%		
Windscreens	42%	10%	32%	8%	32%	5%	15%	3%		
Canoplas	37%	19%	26%	13%	24%	9%	13%	3%		
Platform Components	38%	6%	33%	5%	33%	5%	25%	2%		
Mezzanine Components	21%	2%	18%	1%	15%	1%	12%	0%		
Ventilators	40%	5%	38%	5%	38%	5%	33%	3%		
Other	41%	12%	39%	12%	28%	7%	19%	5%		
Components by Borough										
Bronx	27%	5%	19%	3%	25%	3%	18%	2%		
Brooklyn	43%	8%	38%	6%	32%	5%	21%	1%		
Manhattan	18%	2%	18%	1%	22%	2%	20%	1%		
Queens	47%	9%	39%	5%	35%	8%	26%	4%		
Components by Station									MRN	Line
DRMans Boulevard	71%	14%	71%	14%	71%	24%	47%	12%	1	BMT-Astoria
140th Ave-Astoria Blvd	52%	0%	52%	0%	75%	22%	66%	13%	2	BMT-Astoria
Grand Ave-30 Ave	65%	0%	65%	0%	72%	0%	72%	0%	3	BMT-Astoria
Broadway	73%	9%	73%	9%	68%	14%	55%	14%	4	BMT-Astoria
Washington Ave-36 Ave	73%	0%	73%	0%	67%	13%	67%	13%	5	BMT-Astoria
Beebe Ave-39 Ave	67%	10%	67%	10%	73%	9%	64%	9%	6	BMT-Astoria
Lexington Avenue	12%	0%	12%	0%	23%	0%	23%	0%	7	BMT-Broadway
5th Avenue	3%	0%	3%	0%	23%	0%	23%	0%	8	BMT-Broadway
57th Street	17%	0%	17%	0%	42%	0%	33%	0%	9	BMT-Broadway
49th Street	14%	6%	14%	6%	26%	0%	17%	0%	10	BMT-Broadway
Times Square-42nd Street	5%	0%	5%	0%	2%	0%	2%	0%	11	BMT-Broadway
34th Street	15%	0%	15%	0%	15%	0%	15%	0%	12	BMT-Broadway
28th Street	18%	0%	18%	0%	25%	2%	25%	2%	13	BMT-Broadway
23rd Street	19%	0%	19%	0%	24%	3%	24%	3%	14	BMT-Broadway
Union Square	17%	0%	17%	0%	14%	0%	14%	0%	15	BMT-Broadway
8th Street	8%	0%	8%	0%	10%	0%	10%	0%	16	BMT-Broadway
Prince Street	9%	0%	9%	0%	26%	0%	26%	0%	17	BMT-Broadway
Canal Street (UL)	29%	2%	29%	2%	30%	0%	28%	0%	18	BMT-Broadway
Canal Street (LL)	30%	0%	30%	0%	30%	0%	30%	0%	19	BMT-Broadway
City Hall	34%	0%	34%	0%	33%	3%	18%	0%	20	BMT-Broadway
Corlandt Street	0%	0%	0%	0%	8%	0%	8%	0%	21	BMT-Broadway
Rector Street	50%	16%	50%	16%	49%	35%	5%	0%	22	BMT-Broadway
Whitehall Street	13%	3%	13%	3%	14%	0%	12%	0%	23	BMT-Broadway
Court Street	79%	9%	79%	9%	48%	3%	36%	0%	24	BMT-Broadway
Jay Street/MetroTech	64%	3%	64%	3%	32%	0%	30%	0%	25	BMT-Broadway
Dakala Avenue	5%	0%	5%	0%	0%	0%	0%	0%	26	BMT-4th Ave
Pacific Street	3%	0%	3%	0%	5%	0%	5%	0%	27	BMT-4th Ave
Union Street	10%	0%	10%	0%	25%	0%	25%	0%	28	BMT-4th Ave
9th Street	48%	8%	48%	8%	65%	15%	45%	0%	29	BMT-4th Ave
Prospect Avenue	40%	0%	40%	0%	53%	11%	53%	11%	30	BMT-4th Ave
25th Street	37%	0%	37%	0%	39%	11%	39%	11%	31	BMT-4th Ave
36th Street	10%	0%	10%	0%	18%	4%	18%	4%	32	BMT-4th Ave
45th Street	35%	0%	35%	0%	45%	3%	45%	3%	33	BMT-4th Ave
53rd Street	35%	0%	35%	0%	31%	0%	31%	0%	34	BMT-4th Ave
59th Street	37%	7%	37%	7%	59%	3%	54%	3%	35	BMT-4th Ave
Bay Ridge Avenue	27%	0%	27%	0%	48%	0%	48%	0%	36	BMT-4th Ave
77th Street	11%	0%	11%	0%	43%	0%	43%	0%	37	BMT-4th Ave
86th Street	69%	4%	27%	0%	21%	0%	21%	0%	38	BMT-4th Ave
95th Street	15%	0%	15%	0%	26%	0%	26%	0%	39	BMT-4th Ave
Atlantic Avenue	4%	0%	4%	0%	3%	0%	3%	0%	40	BMT-Brighton
7th Avenue	83%	13%	83%	13%	86%	14%	67%	5%	41	BMT-Brighton
Prospect Park	44%	11%	44%	11%	44%	0%	33%	0%	42	BMT-Brighton
Parkside Avenue	71%	5%	71%	5%	60%	5%	50%	5%	43	BMT-Brighton
Church Avenue	39%	0%	39%	0%	35%	0%	35%	0%	44	BMT-Brighton
Beverly Road	60%	10%	60%	10%	79%	21%	42%	16%	45	BMT-Brighton
Cortelyou Road	45%	5%	45%	5%	63%	0%	42%	0%	46	BMT-Brighton
Newkirk Avenue	0%	0%	0%	0%	0%	0%	0%	0%	47	BMT-Brighton
Avenue H	0%	0%	0%	0%	0%	0%	0%	0%	48	BMT-Brighton
Avenue J	0%	0%	0%	0%	0%	0%	0%	0%	49	BMT-Brighton
Avenue M	0%	0%	0%	0%	0%	0%	0%	0%	50	BMT-Brighton
Kings Highway	33%	6%	6%	5%	0%	0%	0%	0%	51	BMT-Brighton
Avenue U	0%	0%	0%	0%	0%	0%	0%	0%	52	BMT-Brighton
Neck Road	0%	0%	0%	0%	0%	0%	0%	0%	53	BMT-Brighton
Sheephead Bay	9%	0%	9%	0%	12%	0%	12%	0%	54	BMT-Brighton

	2007 Survey Not Adjusted		2007 Survey Adjusted		2012 Survey Not Adjusted		2012 Survey Adjusted			
	Represents a snapshot of conditions existing in 2007.		Adjusted to reflect the completion of all 2005-09 programmed work (old-style rehab projects). This served as a benchmark for planning the 2010-14 component program.		Represents a snapshot of conditions existing in 2012. This is NYCT's best available data on "current" conditions.		Adjusted to reflect the projected completion of all 2010-14 programmed work. This is the only data point that shows the impact of component-based investment.			
	% 3.0 or worse	% 4.0 or worse	% 3.0 or worse	% 4.0 or worse	% 3.0 or worse	% 4.0 or worse	% 3.0 or worse	% 4.0 or worse		
Brighton Beach	30%	0%	30%	0%	23%	0%	23%	0%	55	BMT-Brighton
Ocean Parkway	64%	0%	64%	0%	28%	0%	28%	0%	56	BMT-Brighton
West 8th Street	13%	0%	13%	0%	9%	2%	9%	2%	57	BMT-Coney Is
Stillwell Avenue	0%	0%	0%	0%	0%	0%	0%	0%	58	BMT-Coney Is
9th Avenue	94%	45%	26%	16%	42%	19%	22%	11%	59	BMT-West End
FL Hamilton Parkway	83%	30%	0%	0%	0%	0%	0%	0%	60	BMT-West End
50th Street	26%	0%	0%	0%	9%	0%	9%	0%	61	BMT-West End
55th Street	50%	5%	0%	0%	9%	0%	9%	0%	62	BMT-West End
62nd Street	63%	41%	0%	0%	0%	0%	0%	0%	63	BMT-West End
71st Street	89%	21%	0%	0%	4%	0%	4%	0%	64	BMT-West End
79th Street	73%	12%	4%	0%	0%	0%	0%	0%	65	BMT-West End
18th Avenue	73%	32%	0%	0%	0%	0%	0%	0%	66	BMT-West End
20th Avenue	74%	30%	0%	0%	0%	0%	0%	0%	67	BMT-West End
Bay Parkway	83%	22%	0%	0%	0%	0%	0%	0%	68	BMT-West End
25th Avenue	86%	14%	0%	0%	0%	0%	0%	0%	69	BMT-West End
Bay 50th Street	67%	0%	0%	0%	0%	0%	0%	0%	70	BMT-West End
8th Avenue	77%	27%	77%	27%	78%	44%	6%	0%	71	BMT-Sea Beach
FL Hamilton Parkway	82%	27%	82%	27%	70%	30%	5%	0%	72	BMT-Sea Beach
New Utrecht Avenue	89%	14%	89%	14%	74%	0%	4%	0%	73	BMT-Sea Beach
18th Avenue	100%	52%	100%	52%	64%	40%	4%	0%	74	BMT-Sea Beach
20th Avenue	100%	13%	100%	13%	32%	5%	5%	0%	75	BMT-Sea Beach
Bay Parkway	96%	37%	96%	37%	64%	12%	0%	0%	76	BMT-Sea Beach
Kings Highway	96%	32%	96%	32%	79%	42%	4%	0%	77	BMT-Sea Beach
Avenue U	100%	39%	100%	39%	69%	31%	0%	0%	78	BMT-Sea Beach
86th Street	88%	29%	88%	29%	67%	13%	4%	0%	79	BMT-Sea Beach
121st Street	63%	22%	56%	22%	42%	31%	4%	0%	80	BMT-Jamaica
112th Street	63%	8%	54%	8%	56%	25%	8%	0%	81	BMT-Jamaica
104th St. - 102nd St.	89%	42%	79%	32%	74%	37%	21%	0%	82	BMT-Jamaica
Woodhaven Blvd.	67%	8%	54%	4%	67%	22%	67%	22%	83	BMT-Jamaica
Forest Parkway - 85th St.	63%	0%	53%	0%	74%	42%	74%	42%	84	BMT-Jamaica
Elderts Lane - 75th St.	47%	0%	42%	0%	63%	47%	63%	47%	85	BMT-Jamaica
Cypress Hills	83%	26%	70%	17%	67%	8%	67%	8%	86	BMT-Jamaica
Crescent Street	0%	0%	0%	0%	0%	0%	0%	0%	87	BMT-Jamaica
Harwood Avenue	0%	0%	0%	0%	0%	0%	0%	0%	88	BMT-Jamaica
Cleveland Street	0%	0%	0%	0%	0%	0%	0%	0%	89	BMT-Jamaica
Van Siclen Ave	9%	0%	9%	0%	8%	0%	8%	0%	90	BMT-Jamaica
Alabama Avenue	10%	0%	10%	0%	8%	0%	8%	0%	91	BMT-Jamaica
Qwy/Eastern Pkwy.	19%	0%	19%	0%	4%	0%	4%	0%	92	BMT-Jamaica
Chauncey Street	42%	0%	42%	0%	19%	0%	19%	0%	93	BMT-Jamaica
Halsey Street	33%	0%	33%	0%	15%	0%	15%	0%	94	BMT-Jamaica
Gatos Avenue	33%	0%	33%	0%	11%	0%	11%	0%	95	BMT-Jamaica
Kosciusko Street	25%	0%	25%	0%	4%	0%	4%	0%	96	BMT-Jamaica
Myrtle Avenue	57%	10%	57%	10%	21%	0%	14%	0%	97	BMT-Jamaica
Flushing Avenue	25%	0%	25%	0%	4%	0%	4%	0%	98	BMT-Jamaica
Lorimer Street	21%	0%	21%	0%	22%	0%	22%	0%	99	BMT-Jamaica
Reyes Street	29%	0%	29%	0%	8%	0%	8%	0%	100	BMT-Jamaica
Marcy Avenue	45%	0%	45%	0%	10%	0%	10%	0%	101	BMT-Jamaica
Essex Street	31%	7%	31%	7%	30%	3%	24%	0%	102	BMT-Nassau Loop
Bowery	11%	2%	11%	2%	25%	5%	25%	5%	103	BMT-Nassau Loop
Canal Street	0%	0%	0%	0%	29%	4%	29%	4%	104	BMT-Nassau Loop
Chambers Street	14%	0%	14%	0%	36%	7%	36%	7%	105	BMT-Nassau Loop
Fulton Street	3%	0%	3%	0%	0%	0%	0%	0%	106	BMT-Nassau Loop
Broad Street	30%	0%	30%	0%	15%	0%	15%	0%	107	BMT-Nassau Loop
Metropolitan Avenue	33%	0%	17%	0%	25%	0%	25%	0%	108	BMT-Myrtle Ave.
Fresh Pond Road	90%	10%	81%	10%	71%	21%	0%	0%	109	BMT-Myrtle Ave.
Forest Avenue	93%	29%	93%	23%	69%	38%	0%	0%	110	BMT-Myrtle Ave.
Seneca Avenue	85%	46%	85%	46%	86%	57%	7%	0%	111	BMT-Myrtle Ave.
Wyckoff Avenue	17%	0%	17%	0%	0%	0%	0%	0%	112	BMT-Myrtle Ave.
Knickerbocker Avenue	70%	10%	50%	0%	58%	0%	16%	0%	113	BMT-Myrtle Ave.
Central Avenue	100%	47%	76%	24%	42%	0%	0%	0%	114	BMT-Myrtle Ave.
8th Avenue	19%	0%	19%	0%	15%	0%	15%	0%	115	BMT-Canarsie
6th Avenue	44%	12%	44%	12%	33%	8%	33%	8%	116	BMT-Canarsie
Union Square	28%	6%	28%	6%	14%	3%	11%	0%	117	BMT-Canarsie
3rd Avenue	50%	15%	50%	15%	39%	0%	35%	0%	118	BMT-Canarsie
1st Avenue	40%	0%	40%	0%	50%	3%	50%	3%	119	BMT-Canarsie
Bedford Avenue	55%	5%	55%	5%	48%	15%	48%	15%	120	BMT-Canarsie
Lorimer Street	34%	10%	34%	10%	7%	0%	7%	0%	121	BMT-Canarsie
Graham Avenue	61%	4%	61%	4%	64%	8%	60%	4%	122	BMT-Canarsie
Grand Street	55%	25%	55%	25%	45%	15%	10%	0%	123	BMT-Canarsie
Montrose Avenue	76%	19%	76%	19%	64%	23%	23%	0%	124	BMT-Canarsie
Morgan Avenue	47%	3%	47%	3%	52%	3%	48%	3%	125	BMT-Canarsie
Jefferson Street	52%	0%	52%	0%	15%	0%	15%	0%	126	BMT-Canarsie
Dakalb Avenue	50%	4%	50%	4%	35%	0%	31%	0%	127	BMT-Canarsie
Myrtle Avenue	6%	0%	6%	0%	0%	0%	0%	0%	128	BMT-Canarsie
Halsey Street	50%	3%	50%	3%	33%	0%	33%	0%	129	BMT-Canarsie
Wilson Avenue	67%	40%	67%	40%	50%	14%	7%	0%	130	BMT-Canarsie

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

-----X

ROTH & ROTH, LLP,

Index #:

Petitioner,

-against-

THOMAS PRENDERGAST, NEW YORK CITY TRANSIT
AUTHORITY and METROPOLITAN TRANSPORTATION
AUTHORITY,

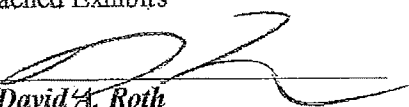
Respondents.

-----X

ORDER TO SHOW CAUSE, VERIFIED PETITION and ATTACHED EXHIBITS

The below signature attests to the following papers: Order to Show Cause, Verified Petition, and Attached Exhibits

By:


David A. Roth

ROTH & ROTH, LLP
Attorneys for Plaintiff
192 Lexington Avenue, Suite 802
New York, NY 10016
(212) 425-1020



NYSCEF - New York County Supreme Court Confirmation Notice



This is an automated response for Supreme Court / Court of Claims cases. The NYSCEF site has received your electronically filed document(s) for:

Roth & Roth, LLP - v. - Thomas Prendergast et al

Index Number NOT assigned

Documents Received on 01/12/2016 07:58 PM

Doc #	Document Type	Motion #
1	PETITION Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
2	ORDER TO SHOW CAUSE (PROPOSED) Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
3	EXHIBIT(S) A Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
4	EXHIBIT(S) B Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
5	EXHIBIT(S) C Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
6	EXHIBIT(S) D Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
7	EXHIBIT(S) E Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
8	EXHIBIT(S) F Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
9	EXHIBIT(S) G Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
10	EXHIBIT(S) H Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
11	EXHIBIT(S) I Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
12	EXHIBIT(S) J Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
13	EXHIBIT(S) K Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	
14	EXHIBIT(S) L Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	

Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court

Phone: 646-386-5956 Website: http://www.nycourts.gov/courts/1jd/supctmanh/county_clerk_operations.shtml

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Roth & Roth, LLP - v. - Thomas Prendergast et al

Index Number NOT assigned

- 15 EXHIBIT(S) M
Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)
- 16 STATEMENT OF AUTHORIZATION FOR ELECTRONIC FILING
Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)
- 17 RJl -RE: ORDER TO SHOW CAUSE
Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)

Filing User

Name: **DAVID A ROTH**
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Firm/Business Name: **Roth & Roth LLP**
Work Address: **192 Lexington Avenue
Suite 802
New York, NY 10016**

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on
01/12/2016 07:58 PM:

ROTH, DAVID A - david@rothandrothlaw.com

Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court

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Roth & Roth, LLP - v. - Thomas Prendergast et al

Index Number NOT assigned

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Phone: (646) 386-3033 Fax: (212) 401-9146 Website: www.nycourts.gov/efile



Metropolitan Transportation Authority

State of New York

January 27, 2016

David A. Roth
Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Re: Roth & Roth, LLP, v. Prendergast, et al., No. 150285/2016

Dear Mr. Roth:

I write in response to the attached notice from Michael Baccellieri of the New York County Supreme Court. I anticipate that you may be serving and filing a new petition with a new index number. However, I feel it is incumbent upon me to inform you that, in either case, the statute of limitations period under C.P.L.R. 217 has expired and your petition is time-barred. In light of this, you may wish to save the fees required to obtain a new index number.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jason Barnes", written over a horizontal line.

Jason Douglas Barnes
Excelsior Service Fellow

Counsel for Defendants

Enclosure

The agencies of the MTA

MTA New York City Transit
MTA Long Island Rail Road

MTA Metro-North Railroad
MTA Bridges and Tunnels

MTA Capital Construction
MTA Bus Company

Barnes, Jason

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Marc@rothandrothlaw.com; Barnes, Jason; audra@rothandrothlaw.com;
Audra@rothandrothlaw.com
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150285/2016 (Roth & Roth, LLP - v. - Thomas Prendergast et al)

**New York County Supreme Court**

DOCUMENT REMOVED FROM CASE/DOCKET ON
01/27/2016

Case Information

Index #: 150285/2016

Short Caption: **Roth & Roth, LLP - v. - Thomas Prendergast et al**

Assigned Case Judge: **Cynthia S Kern**

Remove Reason

Michael Baccellieri removed the following document(s) on 01/27/2016 02:06 PM:

Reason: A decision has been made on your Proposed Order to Show Cause. I see the Judge ordered you to bring by notice of motion instead. Unfortunately, if you intend to do that you'll need to commence a new special proceeding. This index number is technically disposed because there has been a determination. The only two documents that would be accepted under this index number would be a Notice of Appeal or a Motion to Reargue. If you'd like to speak to the Chief Clerk you can send me an e-mail to mbaccell@nycourts.gov and I will forward your information to her. Thank you.

Doc #	Document Type	Additional Doc Info	Special Instructions	Filed Date
19	NOTICE OF PETITION			01/22/2016

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Name	Email Address
------	---------------

5961 REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (7/2012)

Supreme COURT, COUNTY OF Nassau



Index No: 6590/14 Date Index Issued: 7/7/2014

CAPTION: Enter the complete case caption. Do not use et al or et ano. If more space is required, attach a caption rider sheet.

ROTH & ROTH, LLP,

Plaintiff(s)/Petitioner(s)

For Court Clerk Use Only:

IAS Entry Date

Judge Assigned

RJI Date

PAID
JUL 07 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE

-against-

THOMAS C. KRUMPTER, ACTING COMMISSIONER NASSAU COUNTY POLICE DEPARTMENT,
NASSAU COUNTY POLICE DEPARTMENT and COUNTY OF NASSAU

RECEIVED
NASSAU COUNTY
CLERK'S OFFICE
JUL 11 2014

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING:

Check ONE box only and specify where indicated.

MATRIMONIAL

☐ Contested

NOTE: For all Matrimonial actions where the parties have children under the age of 18, complete and attach the **MATRIMONIAL RJI Addendum**.
For Uncontested Matrimonial actions, use RJI form UD-13.

TORTS

☐ Asbestos

☐ Breast Implant

☐ Environmental: _____ (specify)

☐ Medical, Dental, or Podiatric Malpractice

☐ Motor Vehicle

☐ Products Liability: _____ (specify)

☐ Other Negligence: _____ (specify)

☐ Other Professional Malpractice: _____ (specify)

☐ Other Tort: _____ (specify)

OTHER MATTERS

☐ Certificate of Incorporation/Dissolution [see **NOTE** under Commercial]

☐ Emergency Medical Treatment

☐ Habeas Corpus

☐ Local Court Appeal

☐ Mechanic's Lien

☐ Name Change

☐ Pistol Permit Revocation Hearing

☐ Sale or Finance of Religious/Not-for-Profit Property

☐ Other: _____ (specify)

COMMERCIAL

☐ Business Entity (including corporations, partnerships, LLCs, etc.)

☐ Contract

☐ Insurance (where insurer is a party, except arbitration)

☐ UCC (including sales, negotiable instruments)

☐ Other Commercial: _____ (specify)

NOTE: For Commercial Division assignment requests [22 NYCRR § 202.70(d)], complete and attach the **COMMERCIAL DIV RJI Addendum**.

REAL PROPERTY: How many properties does the application include?

☐ Condemnation

☐ Mortgage Foreclosure (specify): _____

☐ Residential

☐ Commercial

Property Address: _____

Street Address

City

State

Zip

NOTE: For Mortgage Foreclosure actions involving a one- to four-family, owner-occupied, residential property, or an owner-occupied condominium, complete and attach the **FORECLOSURE RJI Addendum**.

☐ Tax Certiorari - Section: _____ Block: _____ Lot: _____

☐ Tax Foreclosure

☐ Other Real Property: _____ (specify)

SPECIAL PROCEEDINGS

☐ CPLR Article 75 (Arbitration) [see **NOTE** under Commercial]

☒ CPLR Article 78 (Body or Officer)

☐ Election Law

☐ MHL Article 9.60 (Kendra's Law)

☐ MHL Article 10 (Sex Offender Confinement-Initial)

☐ MHL Article 10 (Sex Offender Confinement-Review)

☐ MHL Article 81 (Guardianship)

☐ Other Mental Hygiene: _____ (specify)

☐ Other Special Proceeding: _____ (specify)

STATUS OF ACTION OR PROCEEDING:

Answer YES or NO for EVERY question AND enter additional information where indicated.

YES NO

Has a summons and complaint or summons w/notice been filed? ☐ YES ☒ NO

Has a summons and complaint or summons w/notice been served? ☐ YES ☒ NO

Is this action/proceeding being filed post-judgment? ☐ YES ☒ NO

If yes, date filed: _____

If yes, date served: _____

If yes, judgment date: _____

NATURE OF JUDICIAL INTERVENTION:

Check ONE box only AND enter additional information where indicated.

- ☐ Infant's Compromise
☐ Note of Issue and/or Certificate of Readiness
☐ Notice of Medical, Dental, or Podiatric Malpractice
☐ Notice of Motion
☐ Notice of Petition
☒ Order to Show Cause
☐ Other Ex Parte Application
☐ Poor Person Application
☐ Request for Preliminary Conference
☐ Residential Mortgage Foreclosure Settlement Conference
☐ Writ of Habeas Corpus
☐ Other (specify):

Date Issue Joined: _____

Relief Sought: _____

Return Date: _____

Relief Sought: _____

Return Date: _____

Relief Sought: Article 78 (against body or officer)



Return Date: _____

Relief Sought: _____

RELATED CASES:

List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases.

If additional space is required, complete and attach the RJJ Addendum. If none, leave blank.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case
Estate of Andrea Rebello by Nella rebello and Roth & Roth	11906/2013	Nassau Supreme	Karen Murphy	A Prior OSC was made for guidelines for Hostage/ Barricade protocols in effect on May 17, 2013. These protocols may be contained within the requested Department Manual, which is the subject of this Petition.

PARTIES:

For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in space provided.

If additional space is required, complete and attach the RJJ Addendum.

Un-Rep	Parties:	Attorneys and/or Unrepresented Litigants:	Issue Joined (Y/N):	Insurance Carrier(s):
<input type="checkbox"/>	Roth & Roth, LLP Last Name First Name Primary Role: Petitioner Secondary Role (if any):	Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address. Roth David A. Last Name First Name Roth & Roth, LLP Firm Name 192 Lexington Ave., Ste. 802 New York, NY 10016 Street Address City State Zip 212 425 1020 Phone Fax droth@rothandrothlaw.com e-mail	<input type="radio"/> YES <input type="radio"/> NO	
<input type="checkbox"/>	Krumpter Last Name First Name Primary Role: Respondent Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	<input type="radio"/> YES <input checked="" type="radio"/> NO	
<input type="checkbox"/>	Nassau County Police Dept. Last Name First Name Primary Role: Respondent Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	<input type="radio"/> YES <input checked="" type="radio"/> NO	
<input type="checkbox"/>	County of Nassau Last Name First Name Primary Role: Respondent Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	<input type="radio"/> YES <input checked="" type="radio"/> NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: July 7, 2014

245590

ATTORNEY REGISTRATION NUMBER

SIGNATURE

David A. Roth

PRINT OR TYPE NAME

Print Form

At an IAS Part 11 of the Supreme Court of the State of New York, County of Nassau, at the Courthouse located at 100 Supreme Court Drive, Mineola, New York on this 9 day of July, 2014

PRESENT:

Karen V. Murphy
Justice

NOTION SEQUENCE # 1

ORIGINAL RETURN DATE 08/11/14

RELIEF PART 78

SUBMISSION DEADLINE 08/11/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ROTH & ROTH, LLP,

Petitioners,

Index #: 6590/14

-against-

ORDER TO SHOW CAUSE

THOMAS C. KRUMPTER ACTING COMMISSIONER
NASSAU COUNTY POLICE DEPARTMENT,
NASSAU COUNTY POLICE DEPARTMENT,
and COUNTY OF NASSAU,

K. V. Murphy ✓

Respondents.

-----X
UPON the annexed Petition of David A. Roth, an attorney duly admitted to practice law in the State of New York, on behalf of the Roth & Roth, LLP ("Petitioners"), verified on the 7th day of July, 2014, and upon all the papers and proceedings in this matter,

LET, Thomas C. Krumpter Acting Commissioner Nassau County Police Department, Nassau County Police Department, and County of Nassau ("Respondents") show cause at a Term IAS Part 11 of this Court, to be held at the Nassau County Supreme Courthouse thereof located at 100 Supreme Court Drive, Mineola, New York on the 27 day of August, 2014, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard,

WHY an Order should not be entered herein:

1. Ordering Respondents to provide Petitioners with records responsive to requests in Petitioners' FOIL requests detailed herein;
2. Declaring that the Nassau County Police Department's decision to deny access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled;
3. Awarding attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
4. Granting Petitioners such other and further relief as this Court may deem just and proper.

and the Verified Petition with Index Number and Filing Date Endorsed Thereon
Sufficient reason appearing therefore, let personal service of a copy of this order, together with the papers upon which it was granted, upon Thomas C. Krumpter, Acting Commissioner Nassau County Police Department, Nassau County Police Department, and *and by delivering a copy to the Nassau County Attorney's Office* County of Nassau, on or before the 23 day of July 2014, be deemed good and sufficient service.

Dated: July 9, 2014

Enter,

Laura V. Murphy *turn*
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ROTH & ROTH, LLP,

Petitioners,

-against-

THOMAS C. KRUMPTER ACTING COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT,
and COUNTY OF NASSAU,

Respondents.
-----X

Index #: 6590/14

VERIFIED PETITION

RECEIVED

JUL 07 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE

PRELIMINARY STATEMENT

1. This proceeding is brought under Article 78 of the New York Civil Practice Law and Rules ("CPLR") and seeks to vindicate the right of the public and of the Petitioners in both obtaining information that should be freely accessible to the public and to require the Respondents to comply with Public Officers Law § 87.

2. The firms of Roth & Roth, LLP along with Co-Counsel, Law Office of Byron Lassin represent the Rebello family for the shooting death of Andrea Rebello. The Petitioners, Roth & Roth have brought and action on behalf of the Estate of Andrea Rebello and her family for wrongful death and other causes of action against the Respondents herein and other defendants.

3. Defenseless Andrea Rebello was shot and killed by Nikolas Budimlic, a Nassau County Police officer in her home on May 17, 2013.

4. The Petitioners served a Freedom of Information Law (hereinafter FOIL) request for the Nassau County Police Department Manual (hereinafter "Department Manual") on the Respondents. The Respondents subsequently failed to respond to either the FOIL request or the appeal.

5. The Respondents herein are extremely sophisticated in the requirements of the Freedom of Information law. They have police officers and employees that are assigned to specifically handle FOIL requests. They have litigated FOIL issues many times over the years and regularly cite to different sections of Public Officers law when denying access to information based on various exemptions contained therein. Respondents are very aware of the applicable time limits in which responses are required under the Freedom of Information Law.

6. On or about May 17, 2013 there existed a Department Manual for Nassau County Police Officers.

7. Nassau County Police Officers are mandated to follow the Department Manual in the performance of their duties as police officers.

8. The Department Manual applies to all Police Officers of all ranks within the department all the way up to and including the Commissioner.

9. In all situations where there is an applicable section of the Department Manual, the Nassau County Police Department (hereinafter "NCPD") officers must adhere to the rules, regulations, orders, and contents of the Department Manual.

10. The history given herein is solely to demonstrate that the request is not being done for any commercial purpose, as the reason behind the request and the standing of the Petitioner is

generally irrelevant to the request for access to information that should be available to the general public.

11. It is inexplicable that the Respondents herein would completely fail to respond to this very simple FOIL request. The request and appeal were both made via certified mail and properly signed for by the Police Department. The Petitioners herein have been forced to bring this Article 78 and will be seeking attorney's fees in conjunction with said petition.

12. The Respondents have a history of failing to comply with valid FOIL requests by the Rebello family. Now, in addition to failing to provide public access to the Department Manual, they are unnecessarily putting public monies at risk by failing to respond in any way to the within FOIL request and appeal, thereby causing a situation where the County may be subject to paying the attorney's fees for the within Article 78.

13. The underlying request – Department Manual – is a document that is routinely available to the public across the nation and in New York State. There are numerous police departments across the country whose entire department manuals, patrol guides and other Police Department directives are actually available online to be downloaded by the general public, not even needing a specific request. The New York City Patrol Guide is available to the general public online, and can be downloaded by anyone without the need for a FOIL request. The NYPD Patrol Guide is even available through an application on iTunes which your affirment has on his iPhone and iPad. It is clear that a Police Department Manual should be accessible to the public as well the Petitioners.

14. In a previous application the Police Department has used the excuse that there is an ongoing investigation to withhold information about the shooting death of Andrea Rebello and the pertinent documents related to the shooting.

15. Police officer Nikolas Budimlic is not the subject of any criminal investigation regarding the shooting deaths of Andrea Rebello or Dalton Smith.

16. No police officer is the subject of any criminal investigation regarding the shooting deaths of Andrea Rebello or Dalton Smith.

17. John Kourtessis is not the subject of any criminal investigation regarding the shooting deaths of Andrea Rebello or Dalton Smith.

EXHIBITS

18. The following are the exhibits attached to this Petition:

- A. May 28, 2014 FOIL request for the Department Manual and certified mail receipts and green cards.
- B. June 10, 2014 FOIL Appeal sent to Thomas Krumpster and the certified mail receipts and green cards .
- C. FOIL response dated Jan 2, 2014 – from a request made in June 2013

RELIEF SOUGHT

19. Petitioners bring this proceeding pursuant to Article 78 of the CPLR requesting that the Court direct the NCPD and the County of Nassau to provide Petitioners with information responsive to their FOIL requests dated May 28, 2014 for the Department Manual.

20. Pursuant to Article 78 attorney's fees and costs incidental to this Petition are being requested.

PARTIES

21. Petitioners are attorneys for the Estate of Andrea Rebello who as members of the public have requested public information.

22. Respondent Nassau County Police Department is a law-enforcement agency administered under New York Administrative Code, Title 14. The NCPD is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

23. Respondent Thomas C. Krumpster is a public officer who is named in his official capacity as Acting Commissioner of the NCPD.

24. County of Nassau is a government agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

JURISDICTION

25. This Court has jurisdiction under Section 7801 *et seq.* of the CPLR to review administrative decisions made by the NCPD and the County of Nassau under C.P.L.R. § 7803(1), a mandamus proceeding properly lies when a public administrative agency has failed to perform a duty which is in its sole discretion.

26. The NCPD has sole control over its own records and is in possession of the information to which Petitioners seek access.

27. This action has been brought within four months of exhausting Petitioner's administrative remedies.

VENUE

28. Venue lies in Nassau County pursuant to CPLR §§ 506(b) and 7804(b) because this proceeding is brought within the judicial district where the Respondents made the determinations complained of and where the principal office of the NCPD, Acting Commissioner Krumpert, and the County of Nassau lie.

STATEMENT OF FACTS

29. The facts herein are based upon affirrant's personal knowledge, and the files kept in Roth & Roth's offices.

30. The Petitioners have previously made various valid FOIL requests to the Nassau County Police Department. The Police Department failed to respond or only partially responded to most of the requests made until an Article 78 Petition was commenced. For example, in January of 2014 the Petitioners received a response from the NCPD to a FOIL request made two weeks, after the shooting in June of 2013. The FOIL response dated January 2, 2104 to the FOIL request dated June 4, 2013 is attached hereto as Exhibit "C". This information was provided 6 months later without any excuse for the delay and only came after the filing of a previous Article 78 but before any Order was issued.

31. The reason behind a FOIL request is generally irrelevant to the production of information. In this instance, it is important to understand the motivation behind the Respondents *withholding* this information. The Respondents were and are aware of the lawsuit regarding the actions of their police officers, police supervisors and/or agents and employees for the shooting death of Andrea Rebello. Additionally, they were and are aware of the claims of Jessica Rebello

for improper police conduct relating to the way they treated her after she was released as a hostage from the house.

PROCEDURAL HISTORY

32. The Petitioners herein made a FOIL request dated May 28, 2014 requesting one item – the Nassau County Police Department Manual. The Respondents did not respond in any way to said request. See Exhibit “A”.

33. As there was no response at all by the Respondents, this constituted a constructive denial. An Appeal was made on June 10, 2014. An appeal requires some response within ten days. See Exhibit “B”.

34. The Petitioners waited almost 30 days, and still no response to the Appeal or the initial FOIL request had been received and the within Petition has been filed to obtain the information requested.

35. The Petitioners have exhausted their administrative remedies and bring the within Article 78.

CAUSE OF ACTION: ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL REQUEST

36. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 35 as if fully set forth herein.

37. An Article 78 Petition is the appropriate method of review of agency determinations concerning FOIL requests as well as to require agencies to comply with Public Officers Law Section 87.

38. Petitioners have a clear right under Public Officers Law § 84 *et seq.* to the records requested.

39. Respondents have not produced the records sought by Petitioners.

40. Respondents have failed to respond to Petitioner's FOIL request and appeal or to properly invoke any of the exemptions under FOIL.

41. Respondents did not meet their burden to provide specific and particularized justification for withholding the requested records from disclosure under FOIL.

42. Petitioners have exhausted their administrative remedies and have no other remedy at law.

LEGAL ARGUMENT

43. The Petitioners are entitled to the Department Manual as the Respondents have improperly refused to deny or comply with Petitioner's May 28, 2014 FOIL request.

44. The Nassau County Police Department has failed to respond as required under the FOIL laws and to the Petitioner's FOIL request dated May 28, 2014 and therefore should be required to give Petitioners access to the Department Manual.

45. The benchmark case regarding FOIL issues as they relate to police records is the Court of Appeals case *Gould v City of New York*, 89 NY2d 267 (1996) contains the oft cited language regarding providing police records under the Freedom of Information Law as follows:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]).

46. There is a presumption that all governmental records are available to the public. The Respondents herein had the burden to respond to the May 28, 2014 FOIL request and the

June 10, 2014 FOIL appeal and to either give Petitioners access to the Department Manual or to claim some exemption as to why they could not give it. Justice Karen Murphy in *Rebello v Thomas C. Dale, Nassau County Police Department, et al.* Index No. 11906/2013 (Sup Ct. Nassau County, March 2014)¹ stated *inter alia*:

Accordingly, "[w]hen faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" (*Matter of Beechwood Restorative Care Center v Signor*, 5 NY3d 435, 440 [2005]; see also *Public Officers Law* §§ 87[2], 89[3]; *Matter of Leshner v Hynes*, 19 NY3d 57, 64 [2012]). "Put another way, in the absence of specific statutory protection for the requested material, the Freedom of Information Law compels disclosure, not concealment" (*Matter of Westchester Rockland Newspapers, v. Kimball*, 50 N12d 575, 580 [1980]).

47. It is the Respondents' burden to provide the "particularized and specific justification" for not disclosing requested documents. The Respondents have failed to do so.

48. The complete failure to set forth and apply the FOIL exemptions to the request made herein is clearly in violation of all applicable case law. Therefore, the Court should order the Respondents to provide the information forthwith.

49. There is a valid public interest in the disclosure of Nassau County Police Department practices and procedures. The release of the information requested serves the public interest by providing transparency and accountability for agency action. *Associated Press v. US Dep't of Defense* 554 F.3d 273, 285 (2d Cir. 2009). Additionally, if those procedures are cancelled or changed, the public has a right to know. This falls precisely into the purview of the request for information in question. "Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose." *U.S. Dep't of State*

¹ *Rebello v NCPD et al.* was another Article 78 proceeding brought by the Petitioners against the Nassau County Police Department and others, requesting an Order that the NCPD comply FOIL requests made in June and July of 2013.

v. *Ray*, 502 U.S 164, 177- 78 (1991).

ATTORNEY'S FEES

50. Attorney's fees in Article 78 proceedings may be recoverable by the Petitioners if they prevail. The Petitioners herein are making an application for attorneys fees associated with the Article 78 Petition and will submit an affirmation regarding the attorney's hourly rates and amount of hours spent if the Petitioners prevail.

51. There is absolutely no valid reason that the Respondents did not issue some response to the May 28, 2014 FOIL request. The Petitioner's were forced to bring the within application as there is no other remedy and at this point no excuse for the failure to provide access to said Department Manual. Accordingly the request for attorney's fees is reasonable under the circumstances.

PRIOR APPLICATION

52. There has been no prior application for the Department Manual requested in the May 28, 2014 FOIL request. A prior Petition was brought requesting the "pertinent orders or guidelines that were in effect on May 17, 2013 relating to Hostage/Barricade incidents." It is possible that there are some hostage protocols in the Departmental Manual. The aforementioned Petition is presently assigned to Justice Karen Murphy, a decision was rendered and a judgment is pending.

WHEREFORE, Petitioners respectfully request this Court issue a Judgment:

1. Ordering Respondents to provide Petitioners with access to Nassau County Police Department Manual as requested in Petitioners' FOIL request dated May 28, 2014;

2. Declaring that the Nassau County Police Department's decision to deny access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled;
3. Awarding attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
4. Granting Petitioners such other and further relief as this Court may deem just and proper.

Dated: New York, New York
July 7, 2014


DAVID A. ROTH

ATTORNEY'S VERIFICATION

DAVID A. ROTH, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under the penalties of perjury:

I am a Partner of ROTH & ROTH, LLP, one of the Petitioners. I have read the annexed

VERIFIED PETITION

and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon interviews, facts, records, and other pertinent information contained in my files.

DATED: New York, New York
July 7, 2014


DAVID A. ROTH

Exhibit A

ROTH & ROTH, LLP 5901
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

May 28, 2014

Via Certified Mail

RRR#: 7013 1090 0000 7736 7481

Nassau County Police Department
Legal Bureau
1490 Franklin Avenue
Mineola, New York 11501

Re.: Nassau County Department Manual

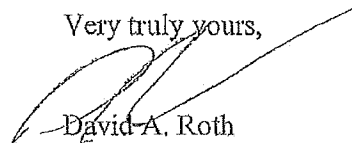
Dear Sir or Madam:

Pursuant to the Freedom of Information Law we are requesting the following:

1. A complete copy of the Nassau County Police Department Manual in effect on May 17, 2013;

Thank you for your cooperation to this matter.

Very truly yours,

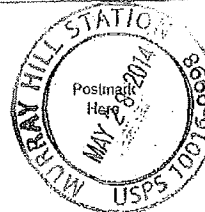


David A. Roth

DAR/drc

7013 1090 0000 7736 7481

U.S. Postal Service™ CERTIFIED MAIL™ RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ 6.48
Certified Fee	4.00
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 10.48



Sent To: Nissan County P.D.
 Street, Apt. No., or PO Box No.: 1490 Franklin Ave
 City, State, ZIP+4: Mineola, NY 11501

PS Form 3811, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<input checked="" type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input checked="" type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input checked="" type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.	A. Signature <input checked="" type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee <u>Karen McQuade</u>
1. Article Addressed to: <u>Nissan County Police Department</u> <u>Legal Bureau</u> <u>1490 Franklin Avenue</u> <u>Mineola, N.Y. 11501</u>	B. Received by (Printed Name) C. Date of Delivery <u>5/30/14</u>
2. Article Number (Transfer from service label) 7013 1090 0000 7736 7481	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No
3. Service Type <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes

PS Form 3811, July 2013

Domestic Return Receipt

Exhibit B

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

June 10, 2014

Via Certified Mail

RRR#: 7013 1090 0000 7736 5692

Nassau County Police Department
Legal Bureau
1490 Franklin Avenue
Mineola, New York 11501

Re: Freedom of Information Law Appeal

Dear Sir or Madam:

I hereby appeal the constructive denial to my May 28, 2014 FOIL request. The request letter was originally sent to the Nassau County Police Department Legal Bureau, 1490 Franklin Avenue, Mineola, New York 11501. The police department has not acknowledged receipt of this May 28th FOIL request in any manner.

The records requested in the May 28th FOIL were "[a] complete copy of the Nassau County Police Department Manual in effect on May 17, 2013." Attached please find a copy of the May 28th FOIL request.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

Sincerely



David Roth

CC: Byron Lassin, Esq.
Law Office of Byron Lassin
39-18 63rd Street
Woodside, NY 11377

ROTH & ROTH, LLP
ATTORNEYS AT LAW
192 Lexington Avenue, Suite 802
New York, NY 10016
Office (212) 425-1020 Fax (212) 532-3801

May 28, 2014

Via Certified Mail
RRR#: 7013 1090 0000 7736 7481
Nassau County Police Department
Legal Bureau
1490 Franklin Avenue
Mineola, New York 11501

Re.: Nassau County Department Manual

Dear Sir or Madam:

Pursuant to the Freedom of Information Law we are requesting the following:

1. A complete copy of the Nassau County Police Department Manual in effect on May 17, 2013;

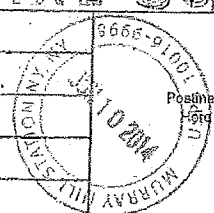
Thank you for your cooperation to this matter.

Very truly yours,


David A. Roth

DAR/drc

2695 9324 0000 0407 ETDL

U.S. Postal Service TM	
CERTIFIED MAILTM RECEIPT	
(Domestic Mail Only, No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
REGISTRATION \$8.40	
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Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Sent to: <u>Nassau County Police Department, Legal Bureau</u> Street, Apt. No.: <u>1990 Franklin Avenue</u> or PO Box No.: <u>1990</u> City, State, ZIP+4: <u>Mineola, New York 11501</u>	
PS Form 3800, August 2003 See Reverse for Instructions	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature <u>X Carol M. O'Leary</u> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee
	B. Received by (Printed Name) _____ C. Date of Delivery _____
1. Article Addressed to: <u>Nassau County Police Department</u> <u>Legal Bureau</u> <u>1990 Franklin Avenue</u> <u>Mineola, NY 11501</u>	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No
	3. Service Type <input checked="" type="checkbox"/> Certified Mail [®] <input type="checkbox"/> Priority Mail Express [™] <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes
2. Article Number (Transfer from service label)	7013 1090 0000 7736 5692
PS Form 3811, July 2013 Domestic Return Receipt	

Exhibit C

Nassau County



Police Department

EDWARD P. MANGANO
COUNTY EXECUTIVE

1490 Franklin Avenue
Mineola, New York 11501
(516) 573-8800

VICTOR F. POLITI
ACTING COMMISSIONER

January 2, 2014

David A. Roth
Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Re: Freedom of Information Law Request
Our File # LB 1210-2013/LB 1571-2013

Dear Mr. Roth:

The letter is in furtherance to your Freedom of Information Law request dated June 4, 2013, (as amended by your correspondence dated June 14, 2013) seeking various records regarding the May 17, 2013 incident. As you are aware, irrespective of the denial of this FOIL request and the objections stated therein, we have provided certain documents to your offices. Notwithstanding, your office commenced an Article 78 proceeding and such matter is currently before the Supreme County, County of Nassau Index No. 011906.

It was later determined that we were able to provide to your offices certain information (specifically requested in your June 14, 2014 correspondence) seeking, *inter alia*, the identity of NCPD personnel present at the scene. As the Article 78 proceeding had been commenced, we had provided this information to the County Attorney's office with the presumption that it would be forwarded to your offices. It has recently come to our attention that such information is not in your possession.

Accordingly, enclosed please find a *Serious Incident Time Log Worksheet* dated May 17, 2013 and the *First Precinct Roll Call*. These documents provide the identity of the NCPD personnel that were present at the scene and on duty that evening.

Sincerely,

A handwritten signature in black ink, appearing to read "Joanne L. Oweis".

Joanne L. Oweis
Attorney - Legal Bureau

cc: Brian Libert, Esq.
Byron Lassin, Esq.
Christopher D. Clarke, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Petitioners,

-against-

THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT,
EDWARD MANGANO and COUNTY OF NASSAU,

Respondents.

-----X

ORDER TO SHOW CAUSE

*The below signature attests to the following papers: ORDER TO SHOW CAUSE, VERIFIED
PETITION and ATTACHED EXHIBITS*

By: 
David A. Roth

ROTH & ROTH, LLP.
Attorneys for Petitioners
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020

RECEIVED BY
SUPREME COURT
NASSAU COUNTY
2014 JUL -7 AM 11:25

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ROTH & ROTH, LLP,

Index No.: 6590/14

Petitioner,

-against-

THOMAS C. KRUMPTER ACTING COMMISSIONER
NASSAU COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT and COUNTY OF
NASSAU,

**AFFIRMATION IN
OPPOSITION TO
PETITION**

Hon. Karen Murphy

Respondents.
-----X

CHRISTOPHER CLARKE, an attorney duly licensed to practice law before the Courts of the State of New York, and a member of the firm of LEAHEY & JOHNSON, P.C., attorneys for Defendants THOMAS C. KRUMPTER ACTING COMMISSIONER NASSAU COUNTY POLICE DEPARTMENT, NASSAU COUNTY POLICE DEPARTMENT (collectively “the NCPD”) and COUNTY OF NASSAU (“the County”) (collectively “Respondents”), affirms the following statements to be true under penalty of perjury pursuant to CPLR §2106; said statements being based on the underlying motion papers, and on the papers contained in the file maintained by the NCPD’s aforesaid attorneys and all the prior proceedings heretofore had herein.

1. The Article 78 Petition filed by Roth & Roth, LLP (“Petitioner”) pertains to a request made pursuant to the Freedom of Information Law (“FOIL”) on May 28, 2014 by Petitioner to the NCPD. For the reasons detailed below, this affirmation is respectfully submitted in opposition to Petitioner’s request for an Order of this Court:

- a. Ordering Respondents to provide Petitioners with records responsive to requests in Petitioner's FOIL request dated May 28, 2014;
- b. Declaring that the NCPD's response dated July 14, 2014 denying access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled; and
- c. Awarding attorney's fees in favor of Petitioner and against Respondents in an amount to be determined at the conclusion of this proceeding.

2. Here, Petitioner seeks the FOIL production of the entire Nassau County Police Department Manual ("the Manual"), as it was in effect on May 17, 2013. Petitioner seeks to obtain through FOIL a document that is exempt from production pursuant to New York State Public Officers Law ("POL") §§ 87(2)(e)(iv) and 87(2)(f), but which it could obtain through the usual discovery methods, subject to a strict confidentiality agreement, in the civil matter captioned Nella Rebello as Administrator of the Estate of Andrea Rebello, Nella Rebello, individually, Fernando Rebello and Jessica Rebello v. P.O. Nikolas Budimlic, P.O. Nicholas Zaharis, County of Nassau, Thomas Dale, Commissioner of Police, Det. Martin J. Helmke, John Doe Police Officers 1-10, and John Doe Police Supervisors 1-10, which is pending in this Court under Index No. 4911/2014 ("the Rebello matter").¹ However, as shown herein, granting Petitioner's FOIL request for the Manual "replete with sensitive information about the [NCPD]'s methods and operations, which could be publicly disseminated and potentially exploited by terrorists, would create 'a possibility of endangerment'" (Asian American Legal Defense & Education Fund v. New York City Police Department, ___ A.D.3d ___, ___ N.Y.S.2d ___ (1st

¹ The NCPD's untimely response to Petitioner's FOIL request, and its subsequent negotiations expressing a willingness to provide its Manual pursuant to a confidentiality agreement in the Rebello matter did not, and do not, constitute a waiver of its right to claim that the Manual is exempt from FOIL disclosure pursuant to POL §§ 87(2)(e)(iv) and 87(2)(f). See generally Miller v New York State DOT, 58 A.D.3d 981, 983, 871 N.Y.S.2d 489 (3d Dep't 2009; see also New York Times Co. v. City of New York Police Department, 103 A.D.3d 405, 959 N.Y.S.2d 171 (1st Dep't 2013).

Dep't February 24, 2015) found at 2015 N.Y. App. Div. LEXIS 1550, *3), warranting denial of Petitioner's Petition to compel and dismissal of this Article 78 proceeding.

3. The factual basis of the request and procedural history are discussed in greater detail below and in the Accompanying Affidavit of NCPD Detective Sergeant Israel Santiago, who have actual knowledge of the details precipitating this Article 78 proceeding. The FOIL demand at issue in this proceeding represents a very small percentage of the total amount of FOIL requests received by the NCPD. Although the cornerstone of FOIL is "open government" and "transparency" there are legitimate exemptions where records cannot be released because doing so would compromise the police department's primary function of law enforcement and, in many cases, would cause true and serious risks to the health and safety of Nassau County Police Officers and Nassau County civilians.

4. There is one FOIL dispute at issue in this proceeding. The NCPD has properly denied the request for the entire Manual because to release it would create a safety risk to the lives of its officers and the County's citizens (POL § 87(2)(f)) and would compromise non-routine investigative techniques of the NCPD (POL § 87(e)(iv)). As articulated in the Accompanying Affidavit NCPD Detective Sergeant Israel Santiago, the NCPD cannot disclose the Manual because the sensitive information within, if released to the public, would put the lives and safety of NCPD officers and the public at large in danger, as well as jeopardize the integrity of any future police work. See Accompanying Affidavit of NCPD Detective Sergeant Israel Santiago dated March 9, 2015 ("Santiago Aff.").

5. Thus, as demonstrated below and in the Accompanying Affidavits, the Petition lacks merit and should be dismissed in its entirety.

PRELIMINARY STATEMENT

6. On May 17, 2013, New York State Parolee, Dalton Smith, was in the process of committing an armed robbery inside Andrea Lynn Rebello's house in Nassau County. Nassau County Police were called and arrived at the scene. Thereafter NCPD Officer Nicholas Budlimlic entered the house and encountered Smith, holding a gun to Ms. Rebello's head, threatening to kill both Ms. Rebello and the officer. Officer Budlimlic fired his service weapon in the line of duty killing Smith and tragically striking and killing Ms. Rebello.

7. As a result of the tragic May 17, 2013 incident, a lengthy and thorough investigation was conducted by the NCPD. The investigation resulted in the production of considerable amounts of documentation; much of which has been requested by Petitioner's client pursuant to FOIL and subsequent to those requests, disclosed by Respondents.² However, the Manual, which is the subject of this proceeding, contrary to Petitioner's contention, falls within the statutory FOIL exemptions to be addressed below and therefore must remain confidential.

8. The County and the NCPD remain committed to upholding the policies of transparency and open government, the foundation principles of FOIL. Such commitment to FOIL is only surpassed by their commitment to ensuring the safety of the citizens of Nassau

² Defendants respectfully request that the Court take judicial notice of the Article 78 proceeding commenced in this Court under Index No. 11906/2013, captioned: Estate of Andrea Rebello by Administrator Nella Rebello and Roth & Roth, LLP v. Thomas Dale, Commissioner Nassau County Police Department, Nassau County Police Department, Edward Mangano and County of Nassau ("the First Art. 78 Proceeding").

County and the safety of the Nassau County Police Department Officers who protect and serve them. Thus, the NCPD is in the unique position of having to balance its statutory obligations under FOIL with its obligation to perform its law enforcement assignments faithfully, dutifully, and with diligence.

9. Although the NCPD treats its obligation to comply with the statutory mandates imposed by FOIL with the seriousness demanded by the legislature and the public, there are times where the NCPD's limited resources hamper its ability to comply strictly with the deadlines imposed by POL §§ 89(3)(a) and 89(4)(a). In light of the thousands of FOIL requests received, NCPD makes best efforts to meet the rigid response deadlines set in place by the FOIL statute, while managing numerous equally important, administrative duties.

10. The effects of these constraints on Respondents' day-to-day operations are reflected in the good faith, but unfortunately untimely, responses to Petitioner's numerous FOIL requests. See Santiago Aff. at Exs. D-E. Despite Petitioner's contentions to the contrary, Respondents' efforts to comply with the mandates of FOIL have been carried out to the greatest extent feasible under the circumstances.

11. This proceeding arises from Petitioner's erroneous contention that Respondents are mandated to disclose the *entire* confidential Manual in response to Petitioner's FOIL request served on May 28, 2014. Petitioner's FOIL request seeks disclosure of a complete copy of the Manual in effect on May 17, 2013. See Exhibit "A" to Petitioner's Order to Show Cause. Although relevant sections of this document have, at times, been disclosed in the course of litigation and arbitration subject to a strict confidentiality and non-dissemination agreement, it

has never been disclosed in its entirety pursuant to a FOIL request as to do so would put lives at risk and would reveal NCPD's non-routine investigative techniques and procedures to the detriment of the NCPD and the boon of prospective criminals.

12. Your affiant, with the consent and cooperation of Respondents, attempted to accommodate Petitioner's request for the entire Manual by making it available through the typical course of discovery in the Rebello matter subject to a confidentiality and non-dissemination agreement. Disclosure pursuant to a confidentiality and non-dissemination agreement will serve the combined goal of ensuring the safety and lives of NCPD officers as well as ensuring the preservation of its non-routine investigative techniques, while recognizing the Rebellos' valid need for the document for the prosecution of their civil claim. However, although Petitioner agreed to the majority of the terms in the proposed confidentiality agreement, Petitioner would not agree to return or destroy the Manual at the close of the Rebello matter, insisting instead to pursue disclosure through FOIL.

13. Respondents remain willing and ready to disclose the Manual pursuant to a confidentiality and non-dissemination agreement that requires Petitioner to return the Manual to Respondents' possession at the end of the Rebello matter. Petitioner has balked to the proposed confidentiality conditions and has taken the misinformed political position that the Manual should be available for public consumption.

14. Petitioner law firm, which represents the plaintiffs in the Rebello matter, seeks to set a foolhardy precedent to allow the public at large access to the confidential Manual. Petitioner stands behind the political position that the Manual should be a public document rather

than a confidential NCPD record to be used only in the prosecution of the Rebello matter.

However, disclosure of the Manual through FOIL serves no legitimate public purpose, would put lives of NCPD officers and Nassau County residents at risk, would reveal non-routine NCPD investigative techniques and procedures, and, therefore, must remain confidential.

15. Thus, as demonstrated below and in the Accompanying Affidavits annexed hereto, the meritless Petition should be dismissed with prejudice because the Manual falls within the purview of the statutory exemptions covered by POL §§ 87(2) (e)(iv) and 87(2)(f).

PETITIONERS' FOIL REQUEST HISTORY

16. In the last eighteen months Petitioner, in its own name and as counsel to the plaintiffs in the Rebello matter, has served the County and the NCPD with a nearly relentless series of FOIL requests as well as an Order to Show Cause seeking pre-action discovery. This current Petition represents yet another attempt to secure litigation discovery under the guise of FOIL. Below is a full chronological recitation of the FOIL requests submitted by Petitioner and Respondents' responses:

A. Petitioner's FOIL Request dated June 4, 2013 to the County and the NCPD

17. On June 4, 2013, Petitioner made a FOIL request upon the Nassau County Attorney's Office for documents related to the May 2013 incident. See FOIL Request annexed hereto as **Exhibit "A."** In response, Nassau County Attorney Brian Libert informed Petitioner, in writing on June 13, 2013, that the request would be forwarded to the NCPD, as that entity was

the repository of records responsive to the request. See FOIL Response annexed hereto as **Exhibit “B.”**³

18. On June 7, 2013, Petitioner made a FOIL request upon the NCPD Legal Bureau for additional documents related to the May 2013 incident. See FOIL Request annexed hereto as **Exhibit “C.”** NCPD Legal Bureau Detective Sergeant Israel Santiago acknowledged receipt of the June 7, 2013 FOIL request on July 1, 2013.⁴ See FOIL Response annexed hereto as **Exhibit “D.”** Shortly thereafter, on July 9, 2013, NCPD Legal Bureau attorney Joanne Oweis issued a denial of Petitioner’s June 7, 2013 FOIL request, citing exemptions pursuant to POL §§ 87(2)(e)(i) and 87(2)(e)(iv). See FOIL Response annexed hereto as **Exhibit “E.”**

19. On July 24, 2013, Petitioner appealed the denial of the June FOIL requests to then NCPD Commissioner Thomas Dale. See FOIL Appeal annexed hereto as **Exhibit “F.”** Commissioner Dale issued a denial to the appeal on August 12, 2013, citing exemptions to disclosure pursuant to POL §§ 87(2)(e)(i), 87(2)(e)(iv), and 87(2)(g). See FOIL Appeal Response annexed hereto as **Exhibit “G.”**

B. Petitioner’s “Request for Information” dated June 14, 2013 to the County and the NCPD

20. On June 14, 2013, Petitioner made a “request for information” upon the Nassau County Executive, Nassau County Attorney, Nassau County Police Commissioner, and Nassau County Medical Examiner (identical requests were directed at each entity). See Request

³ Where relevant, Respondents will annex hereto their FOIL response cover letters only without enclosures to avoid burdening the record before this Court with documents unrelated to the pending Article 78 proceeding.

⁴ In his acknowledgment, Det. Sgt. Santiago also acknowledged receipt of Petitioner’s “request for information” dated June 14, 2013. See Ex. “D.”

annexed hereto as **Exhibit “H.”** On June 17, 2013, Deputy County Attorney Gerald Podlesak informed Petitioner that the “requests for information” would be treated as a FOIL request and would be forwarded to the appropriate agencies. See Response annexed hereto as **Exhibit “I.”**

21. Petitioner, on July 1, 2013, filed four appeals of the purported denial of the June 17, 2013 request. See FOIL Appeal annexed hereto as **Exhibit “J.”** In response, on July 3, 2013, Mr. Libert responded to Petitioner’s appeal in writing stating that the June 17, 2013, correspondence was not a denial of Petitioner’s June 14, 2013, “request for information.” See Response annexed hereto as **Exhibit “K.”** On January 2, 2014, Joanne Oweis informed Petitioner that due to Petitioner’s commencement of an Article 78 proceeding, it had come to the attention of the NCPD Legal Bureau that records authorized for disclosure had not in fact been disclosed to Petitioner after having been forwarded to the Nassau County Attorney’s Office. See FOIL Response annexed hereto as **Exhibit “L.”** In acknowledgment of the administrative oversight, Joanne Oweis disclosed the Serious Incident Time Log Worksheet and the First Precinct Roll Call. See **Ex “L.”**

22. Thus, Petitioner’s allegation in ¶ 30 of the Petition that Respondents “took 6 months” to respond to the June 14, 2013 request is a mischaracterization of the actual events that occurred. Petitioner’s June 14, 2013 request sought disclosure of the identities of the officers who responded to the May 17, 2013 incident. See **Ex. “H.”** That request was acknowledged in the June 17, 2013 response by DCA Podlesak, who informed Petitioner the request had been forwarded to the appropriate agencies for review. See **Ex. I.**

23. Then, upon the conclusion of the investigation, the NCPD determined that disclosure of the responding officers' identities was authorized. The NCPD forwarded the requested records to the County Attorney's Office under the belief that they would then be provided to Petitioner, as explained in the January 2, 2014 letter from the NCPD Legal Bureau to Petitioner. See Exhibit "C" to Petitioner's Order to Show Cause. However, due to administrative oversight, the County Attorney's Office did not provide Petitioner with the responsive records. When the administrative oversight came to the NCPD's Legal Bureau's attention, the responsive records were immediately disclosed to Petitioner. See Ex "L."

C. Petitioner's FOIL Request dated July 26, 2013 to the NCPD

24. On July 26, 2013, Petitioner made yet another FOIL request to the NCPD for additional records related to the June 4, 2013, and June 7, 2013, FOIL requests. See FOIL Request annexed hereto as **Exhibit "M."** Petitioner appealed the alleged constructive denial on August 13, 2013. See FOIL Appeal annexed hereto as **Exhibit "N."** On August 20, 2013, Commissioner Dale disclosed records responsive to the July 26, 2013, request and cited POL § 87 exemptions for withholding the remaining records requested. See FOIL Appeal Response annexed hereto as **Exhibit "O."**

25. On December 4, 2013, as certain aspects of the NCPD investigation into the May 2013 incident concluded, Commissioner Dale disclosed additional records responsive to Petitioner's July 26, 2013, FOIL request. See FOIL Response annexed hereto as **Exhibit "P."**

D. Petitioner's FOIL Request dated January 30, 2014 to the NCPD

26. Petitioner, on January 30, 2014, made a FOIL request to the NCPD for GPS records pertaining to the NCPD patrol cars that responded to the May 17, 2013, incident. See FOIL Request annexed hereto as **Exhibit "Q."** In response, on May 1, 2014, Ms. Oweis disclosed GPS records responsive to Petitioner's request. See FOIL Response annexed hereto as **Exhibit "R."**

E. Petitioner's FOIL Request dated March 27, 2014 to the NCPD

27. On March 27, 2014, Petitioner made a FOIL request to the NCPD seeking a "Department Patrol Guide" as well as NCPD hostage protocols and training. See Santiago Aff. at **Ex. "A."** The NCPD Legal Bureau acknowledged Petitioner's request on April 11, 2014. See Santiago Aff. at **Ex. "B."** On April 21, 2014, Petitioner appealed the alleged constructive denial of the March 27, 2014 request. See Santiago Aff. at **Ex. "C."**

28. On May 19, 2014, Acting NCPD Commissioner Krumpert denied Petitioner's March 27, 2014, request and informed Petitioner that the NCPD does not possess a document named "Department Patrol Guide." See Santiago Aff. at **Ex. "D."** Acting in good faith and in an effort to assist the more specific or particularized formulation of any future requests, Acting Commissioner Krumpert informed Petitioner that the NCPD utilizes a document entitled "Nassau County Police Department Manual" ("the Manual") and provided Petitioner with a copy of the Table of Contents to the Manual. See Santiago Aff. at **Ex. "D."**

F. Petitioner's FOIL Request dated May 28, 2014 to the NCPD

29. Petitioner, in choosing to ignore use of the Table of Contents, made the most recent FOIL request for the entire Manual on May 28, 2014. See FOIL Request annexed hereto as **Exhibit "S."** On June 10, 2014, Petitioner filed an appeal of the alleged constructive denial of the subject request. See FOIL Appeal annexed hereto as **Exhibit "T."** On July 9, 2014, Petitioner commenced the instant Article 78 proceeding by Order to Show Cause.

30. On July 14, 2014, Joanne Oweis denied the FOIL request for the entire Manual pursuant to Public Officers Law §§ 87(2)(e)(iv) and 87(2)(f). See Santiago Aff. at Ex. "E." Petitioner was again informed that a particularized request for a section of the Manual could be made through use of the Table of Contents. See Santiago Aff. at Ex. "E." Petitioner also was informed of its ability to appeal the denial. See Santiago Aff. at Ex. "E." Petitioner did not take an administrative appeal of the July 14, 2014 denial.

G. The County and the NCPD have Responded to All of Petitioner's FOIL Requests in Good Faith and within the Precepts of POL § 87, et seq., to the Best of This Cash Strapped Municipality's Ability

31. Petitioner's selective summary of the salient procedural steps that have transpired leading up to their most recent Petition is misleading and bordering on disingenuous. As shown, Respondents worked diligently to respond to Petitioner's many FOIL requests. Indeed, as demonstrated, Acting Commissioner Krumpter provided Petitioner, in its capacity as attorneys for the plaintiffs in the Rebello matter, with a copy of the Table of Contents for the Manual in response to the March 28th FOIL request, in an effort to aid Petitioner in making a future, more specified demand for an existing document. See Santiago Aff. at Ex. "E."

However, although it was furnished with the Table of Contents and advised by Acting Commissioner Krumpert to make a more specified FOIL request based on the items identified in that document, Petitioner has never served a request for any specific part of the Manual. Instead, as shown, Petitioner served the May 28, 2014, FOIL request seeking disclosure of the entire confidential Manual. See Ex. S.

32. Further, it is noted, of course, that Petitioner's FOIL requests, though numerous, represent only a fraction of all FOIL requests made on the NCPD. Petitioner's present Petition, seeking disclosure to the public of the entire Manual, calls for the release of confidential materials entirely unrelated and irrelevant to the Rebello matter, and for which Petitioner has shown no need, warranting dismissal of the Petition in its entirety.

ARGUMENT

POINT I

THE NCPD PROPERLY DENIED PETITIONER'S FOIL REQUEST FOR THE MANUAL BECAUSE IT IS EXEMPT FROM DISCLOSURE PURSUANT TO PUBLIC OFFICERS LAW §§ 87(2)(e)(iv) AND 87(2)(f)

33. The Nassau County Police Department Manual is exempt from FOIL pursuant to Public Officers Law §§ 87(2)(e)(iv) and 87(2)(f) as disclosure would reveal non-routine criminal investigative techniques and procedures utilized by the NCPD and would endanger the life or safety of NCPD officers and, by extension, the citizens of the County. Generally, "[t]o promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public." Gould v. New York City Police

Department, 89 N.Y.2d 267, 274, 653 N.Y.S.2d 54 (1996); Farbman & Sons, Inc. v. New York City Health & Hospitals Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69 (1984); Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 419 N.Y.S.2d 467 (1979); POL § 84. However, the presumptive availability of all records of an agency to the public for inspection and copying is tempered when, such as here, the subject records “fall within one of eight categories of exemptions.” Farbman & Sons, Inc., 62 N.Y.2d at 79; Capital Newspapers Division of Hearst Corp. v. Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576 (1986); POL § 87(2).

34. “[T]here is a clear distinction between rights of access conferred upon the public under the Freedom of Information Law and rights conferred upon a litigant via the use of discovery, and the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings and in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the discovery provisions of the CPLR or the CPL are separate vehicles that may require or authorize disclosure of records due to one’s status as a litigant or defendant.” See Committee on Open Government FOIL-AO-F14095.

35. “It is emphasized that the introductory language of § 87(2) refers to the authority to withhold ‘records or portions thereof’ that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld.” See Committee on Open Government FOIL-AO-F12748.

36. “To ensure maximum access to government records, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption’.” Gould, 87 N.Y.2d at 275, citing Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715; Capital Newspapers Division of Hearst Corp. v. Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576 (1986); see also POL § 89(4)(b). “To invoke one of the exemptions of section 87(2), the agency must articulate ‘particularized and specific justification’ for not disclosing requested documents.” Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467 (1979).

37. POL “Section 87(2)(e) states in relevant part that an agency may deny access to records or portions of records which ‘are compiled for law enforcements purposes and which, if disclosed, would ... reveal criminal investigative techniques or procedures, except routine techniques and procedures’.” See Committee on Open Government FOIL-AO-F4655. “The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the non-routine procedures by which an agency obtains its information.” Fink, 47 N.Y.2d at 572, citing Frankel v Securities & Exch. Comm., 460 F.2d 813, 817 (2d Cir. 1972), cert. denied 409 U.S. 889 (1972). “Indicative, but not necessarily dispositive of whether investigative techniques are non-routine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.” Fink, 47 N.Y.2d at 572. “It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could ‘allow miscreants to tailor their

activities to evade detection.’ De Zimm v. Connolie, 64 N.Y.2d 860 (1985).” See Committee on Open Government FOIL-AO-F6468. “Manuals prepared or used by law enforcement agencies may be accessible or deniable, depending upon the effects of disclosure.” See Committee on Open Government FOIL-AO-F4661.

38. The above rationale has been applied to a FOIL request for the Buffalo Police Officer Personnel Policy and Procedures Manual when the Committee on Open Government opined that “it is likely that various aspects of the manual are reflective of ‘routine criminal investigative techniques and procedures.’ To that extent, I do not believe that §87(2)(e) could be cited as a basis for withholding. Nevertheless, other aspects of the manual might indicate non-routine criminal investigative techniques or procedures, and, to that extent, the manual could in my view be denied.” See Committee on Open Government FOIL-AO-F3657.

39. Similarly, in response to a request for guidance regarding a FOIL request for memorandum and policy as promulgated by the Yonkers Police Department in relation to correct procedures and actions to be used during a high speed car chase, the Committee on Open Government opined that the “request for memoranda and policy relating to correct procedures to be used during high speed car chase might reveal non-routine criminal investigative techniques or procedures. To the extent that disclosure of the Department’s high speed car chase procedures would allow ‘miscreants to tailor their activities to evade detection,’ I believe that records related to the procedures may be withheld.” See Committee on Open Government FOIL-AO-F3890.

40. The Committee on Open Government distinguished routine procedures from confidential techniques in its July 2, 1987, advisory opinion in response to a FOIL request

on the Suffolk County District Attorney's Office for the "Pre-trial Identification Manual." "In [the Committee's] opinion, the investigative techniques discussed in the 'Pre-trial Identification Manual' are more akin to 'procedures (which) are 'routine' in the sense of fingerprinting or ballistic tests' than to the confidential techniques used in investigating the activities of nursing homes or eavesdropping techniques. It appears that the latter two techniques are used to detect criminality in a discreet manner, such that disclosure of the techniques would allow the individuals under investigation to evade detection or to avoid successful prosecution." See Committee on Open Government FOIL-AO-F4655.

41. If the court is unable to determine whether a withheld document falls wholly within the scope of the asserted FOIL exemption, an *in camera* inspection should be conducted and disclosure of any non-exempt records could be ordered. Xerox Corp. v. Webster, 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488 (1985). However, an agency is permitted to generically identify the kinds of documents sought and the risks of disclosing the documents. Whitley v. New York County Dist. Attorney's Office, 101 A.D.3d 455, 955 N.Y.S.2d 42 (1st Dep't 2012); see also Leshner v. Hynes, 19 N.Y.3d 57, 67, 945 N.Y.S.2d 214 (2012) (holding that "agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents.").

42. As demonstrated in the Accompanying Affidavit of Det. Sgt. Santiago, disclosure of the Manual pursuant to FOIL without the disclosure being subject to a confidentially agreement will expose non-routine investigative techniques and procedures used by the NCPD to the public and will expose to unjustifiable risk the lives and safety of the NCPD

officers and the public at large. More specifically, Det. Sgt. Santiago averred, in pertinent part, as follows:

10. The statutory framework of FOIL supports the NCPD Legal Bureau's denial of the subject FOIL request as the statute provides exemptions from disclosure of records which if provided, would reveal certain investigative techniques or non-routine procedures and further, would endanger the life or safety of any person. See New York State Public Officers Law §§ 87(2)(e)(iv) and 87(2)(f). It is the responsibility of the NCPD to ensure the continued safety of its officers, and to do so it is imperative that the NCPD keep tactical procedures from public disclosure. The current climate of rising hostility directed at police departments, both locally and nationally, makes preserving the confidentiality of the Manual a top priority. Releasing the Manual to the public would reveal intimate tactical information that, in the hands of prospective criminals, would be used not only to evade detection by the NCPD, but also would unnecessarily increase and exacerbate the risks faced by NCPD officers in performing their jobs and protecting the public.
11. The NCPD's primary concern for the lives and safety of its officers and the public at large should the Manual become subject to a FOIL request cannot be understated. The undeniable adverse effect of public disclosure of the Manual on the safety of NCPD officers, including those who work undercover, as well as civilian and confidential informants, cannot be ignored. Revealing the confidential information within the Manual would undoubtedly expose the NCPD officers as well as civilians who already face great risk serving and protecting the County of Nassau to an unjustifiable level of danger.
12. I have no doubt that permitting disclosure of the Manual through FOIL here would create a landscape allowing any member of the public to obtain the Manual, including members of the public who intend to engage in criminal activity. Disclosure of the Manual in its entirety here, will create an imminent risk of future disclosure to criminals and terrorists who will use this information to evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by NCPD officers. Disclosure of confidential NCPD investigative techniques, which have lead to numerous successful prosecutions, will have a devastating

impact on NCPD law enforcement investigations by alerting prospective criminals to the course those investigations will take. These potential criminals, armed with the information within the Manual, will be in a position to tailor their behavior to evade detection, apprehension, and prosecution.

...

15. Public disclosure of the information sought by Roth & Roth, LLP would expose and destroy the effectiveness of the methods used to safely and swiftly carry out the NCPD's law enforcement operations. When balancing the effects of disclosure against non-disclosure it is clear that the risk of harm to the NCPD officers and the public at large would increase upon disclosure because the effectiveness of the tactics addressed above depend on their confidential status. As I stated above, and cannot emphasize enough, should the specialized tactics covered in the Manual become publically known, any prospective criminal will possess critical information as to threat response procedures employed by the NCPD. Such knowledge would undoubtedly put said criminal in position to inflict maximum damage upon both the public and the NCPD officers responding to the threat.
16. NCPD's ability to successfully and safely respond to and control various types of crime scenes depends on the confidential status of the NCPD's tactical and investigative procedures. Individuals engaged in criminal activity with knowledge of the confidential tactics and procedures would be in position to impede an investigation and possibly evade detection entirely by tailoring their efforts specifically to avoid apprehension. Criminal activity, by its nature, is secretive and presents obvious risks to the officers working towards apprehending the individuals committing crimes. Public disclosure of the Manual would exacerbate the risks faced by the officers and thereby would endanger the life or safety of any member of the NCPD.

See Santiago Aff. at ¶¶ 10-12, 15-16.

43. Accordingly, as demonstrated, Respondents properly denied Petitioner's FOIL request for the Manual pursuant to POL §§ 87(2)(3(iv) and 87(2)(f) warranting dismissal of this Article 78 proceeding in its entirety.

A. The Manual is Exempt from FOIL because it Contains Non-Routine Criminal Investigative Techniques and Procedures the Disclosure of which Would Give Rise to a Substantial Likelihood that Potential Criminals Could Evade Detection by Deliberately Tailoring Their Conduct in Anticipation of Avenues of Inquiry to be Pursued by the NCPD

44. In interpreting the scope of § 87(2)(e)(iv) the Court of Appeals ruled that “while the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential.” Fink, 47 N.Y.2d at 571. A government agency is exempt from disclosing any record which, upon disclosure, would reveal criminal investigative techniques or procedures that are not routine. See POL § 87(2)(e)(iv). “The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information.” Fink, 47 N.Y.2d at 572. “[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.” Id.

45. The proper application of the § 87(2)(e)(iv) exemption necessarily turns on whether the information being sought is comprised of non-routine techniques. “Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.” Id. Here, the subject of Petitioner’s FOIL request, the Manual, unquestionably provides information that, if possessed by the general public, would allow

potential criminals to adjust their behavior in response to the information within the Manual created solely for use by the members of the Nassau County Police Department. See Santiago Aff. at ¶¶ 12-16.

46. As articulated in the Accompanying Affidavit Det. Sgt. Santiago, the Manual contains numerous sections that squarely fall within FOIL exemptions, thus it is imperative that Petitioner make use of the Table of Contents to furnish a FOIL request for a particular section of the Manual so that the NCPD may determine whether that section may be disclosed or must be withheld pursuant to a FOIL exemption. See Santiago Aff. at ¶ 13.

47. As demonstrated, the sensitive and confidential nature of the information within the Manual pertaining to the execution of specialized law enforcement tactics places the Manual squarely within the purview of the § 87(2)(e)(iv) exemption. “The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe.” Fink, 47 N.Y.2d at 573. The reach of a FOIL request which releases confidential documents to the general public violates the legislative intent of the Freedom of Information Law and the type of information it is designed to protect. As it is clear that Petitioner’s subject FOIL request for the Manual has been made in relation to the Rebello matter currently pending in this Court, it is important to be mindful of the consequences of public release.

48. Authorizing disclosure of the Manual to the general public effectively apprises any would-be criminal with information highly useful in evading detection as the NCPD’s tactical advantages would be compromised. Disclosing the Manual to the general public would place an additional and significant burden on a police force already strained by

fiscal limitations on manpower. It is imperative, in the interests of both effective policing and ensuring the safety of the officers, that the Manual remain confidential. See Santiago Aff. at ¶¶ 6-7, 10-11, 14-16.

49. Petitioner speciously contends that because the New York City Police Department (“NYPD”) makes an unofficial version of its Patrol Guide available to purchase on the internet that the NCPD should follow suit and publicly release the Manual. See Petition ¶13. However, as demonstrated, the nature of the material NYPD Patrol Guide is different from the Manual in that it appears that the NYPD Patrol Guide contains general guidelines whereas, as averred to by Det. Sgt. Santiago, the NCPD Manual contains sensitive, non-routine and protected tactical and investigative procedures. The NYPD’s choice to make an unofficial version of their patrol guide available for purchase is hardly a convincing argument in favor of disclosing the NCPD Manual as the two police departments have drastically differing resources and capabilities.

50. The NYPD, with a prowess akin to that of a small army, is uniquely capable of monitoring and handling the risks inherent with disclosure of their department’s internal guidelines; a luxury not afforded to the NCPD. In addition to being irrelevant to this matter, the NYPD’s decision to sell an unofficial version of their internal guidelines to the public cannot be legitimately compared to the NCPD’s decision to ensure the safety of its officers by maintaining a confidential Manual.

51. The Rebello matter is currently pending in the Supreme Court. In the event that the case is not dismissed, it is likely that the Manual will be made available, subject to

a confidentiality agreement, through the discovery process, as your affiant has offered to do to resolve this proceeding. As discussed above and in the Accompanying Affidavit of Det. Sgt. Santiago, the Manual, where relevant, has routinely been made available in this manner in the past. However, Petitioner has chosen to use FOIL, rather than the typical discovery process, to seek disclosure in furtherance of the Rebello matter. Petitioner, as counsel to the plaintiffs in the Rebello matter, is urged to withdraw the FOIL request for the Manual and seek disclosure through the standard course of discovery set to occur, should the pending motion seeking dismissal of the lawsuit be denied.

52. In the event that the Court determines that the Manual does not fall within the §87(2)(f) or §87(2)(e)(iv) exemptions to disclosure, which we urge that it does, Respondents request that disclosure is made subject to the conditions of a confidentiality agreement limiting the extent of disclosure. The primary function of the confidentiality agreement will limit disclosure of the Manual only to Petitioner for use during the pendency of the Rebello matter. Respondents anticipate that a confidentiality agreement covering the terms of disclosure would be conducive to the interests of all parties in that Petitioner will have access to the information sought and Respondents' concerns about the continued safety and effectiveness of the members of the NCPD will be satisfied.

B. Moreover, Disclosure of the Manual, including Disclosure of Non-Routine Investigative Techniques and Procedures, Would Impair the Lives and Safety of the NCPD Law Enforcement Community, Undercover Officers, Confidential Informants, and Members of the Public at Large

53. Public Officers Law § 87 (2)(f) exempts from disclosure documents which, if disclosed would endanger the life or safety of any person. Notably, "the agency in

question need only demonstrate ‘a possibility of endanger[ment]’ in order to invoke this exemption.” Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police, 218 A.D.2d 494, 499, 641 N.Y.S.2d 411 (3d Dep’t 1996). The Appellate Division previously rejected the assertion “that respondents are required to prove that a danger to a person’s life or safety will occur if the information is made public.” Stronza v. Hoke, 148 A.D.2d 900, 901, 539 N.Y.S.2d 528 (3d Dep’t 1989) citing Matter of Nalo v. Sullivan, 125 A.D.2d 311, 312, 509 N.Y.S.2d 53 (2d Dep’t 1986) leave denied 69 N.Y.2d 612 (1987). “Rather, there need only be a possibility that such information would endanger the lives or safety of individuals.” Id.

54. As articulated by Det. Sgt. Santiago, in light of the current violence, hostility, and critical rhetoric directed at police officers locally and nationally, disclosure of the Manual to the general public would create an unjustifiable risk to the safety of all NCPD officers, as well as to the citizens of the County. Outsiders in possession of the confidential information within the Manual will have knowledge of numerous investigative and tactical techniques including, but not limited to, information regarding “plain clothes” operations and crime scene processing protocol. Any would-be violator of the law, armed with the Manual, would have ample opportunity to endanger the safety and lives of members of the NCPD carrying out their duties. The possibility of harm must be prevented for the good of both the NCPD and the citizens of the County of whom those officers have sworn to protect. See Santiago Aff. at ¶¶ 6, 14.

55. Should the confidential information within the Department Manual be made public, the officers who face the greatest risks to their well being will become significantly more vulnerable to the sinister acts of criminals. Of particular significance is the protection the

confidential information within the Manual affords to police officers engaged in coordinated undercover operations. Officers who engage and infiltrate criminal enterprises over extended time periods do so by relying on the confidential nature of their procedures and tactics.

56. On March 10, 2003, notorious Bloods gang member Ronnell Wilson murdered undercover NYPD Detectives Rodney J. Andrews and James Nemorin in a during sting operation aimed at removing illegal firearms from the streets of New York City. After an ongoing investigation, Detectives Andrews and Nemorin attempted to purchase a firearm from Wilson. However, Wilson shot each detective in the back of the head allegedly upon realizing that the two men were law enforcement officers. Wilson was convicted of capital murder in Federal Court and was sentenced to death. Although an uncommon occurrence, the orchestrated killing of police officers is a cognizable risk inherent in undercover operations. It bears repeating that certain police procedures and tactics must remain confidential to maintain the integrity of high risk operations and prevent heinous acts of violent criminals like Wilson. Public dissemination of the Manual will simply provide additional ammunition for prospective criminals like Wilson and his compatriots to carry out their sinister intentions.

57. As we all know, threats to the lives and safety of police officers is not limited to domestic criminals. Following the deadly terrorist attack in Paris, France in January 2015, the FBI and the Department of Homeland Security issued a joint bulletin to 18,000 domestic law enforcement departments highlighting the current need for awareness and vigilance with regard to the current threat level nationwide, as reported by multiple major news outlets. See e.g., <http://www.washingtontimes.com/news/2015/jan/9/fbi-state-department-issue-new-terror-warnings-aft/> (a copy of the bulletin is annexed hereto as **Exhibit "CC"**);

<http://www.cbsnews.com/news/fbi-issues-bulletin-to-remain-vigilant/> (a copy of the bulletin is annexed hereto as **Exhibit “DD”**). John Miller, the New York City Police Department Deputy Commissioner of Intelligence and Counter-Terrorism issued a related statement informing the public that “New York City remains on a situational heightened alert as we continue to follow the events in Paris.” See <http://www.foxnews.com/us/2015/01/12/nypd-fbi-issue-alerts-after-isis-puts-out-video-calling-for-attacks-on-law/> (a copy of the report is annexed hereto as **Exhibit “EE”**).

58. The credible recent concerns over potential threats to the New York metropolitan area appear to have reached heights not previously acknowledged. The well publicized threats of hostility towards law enforcement personnel and civilians from terrorist extremists have created an atmosphere where keeping specialized law enforcement investigative tactics confidential is of utmost importance. As local police departments prepare for the risks associated with both international terrorist organization and domestic “lone-wolf” insurgent attacks, the confidentiality of counter-measure tactics is critical to successfully protecting this region. At a time when technological advances allow for the instantaneous exchange of information worldwide, it is reasonable to believe that public dissemination of the Manual will place it in the hands of anyone who seeks it, including those individuals intent on causing destruction in the New York metropolitan area and harm to peace officers.

59. A Joint Intelligence Bulletin leaked by an anonymous federal agent and obtained by Breitbart Texas in October, 2014, titled “Islamic State of Iraq and the Levant and Its Supporters Encouraging Attacks Against Law Enforcement and Government Personnel,” sheds rarely seen insight into the magnitude of the stakes involved with large scale crime prevention.

Although no references are made to particular threats to the County, it remains highly plausible that violent extremists will attempt to obtain as many government and law enforcement documents as possible. See <http://www.breitbart.com/Texas/2014/10/23/FBI-Report-Warns-of-Potential-Homegrown-ISIS-Attacks-Against-Law-Enforcement-in-US/>. A copy of the bulletin is annexed hereto as **Exhibit “U”** for the Court’s convenience.

60. More specific to this proceeding, following the May 2013 incident giving rise to the related Rebello matter, multiple major news outlets reported that threats posted on Twitter.com under the username “@JohnnySmith2” were directed at NCPD Officer Nikolas Budimlic, the officer involved in the Rebello matter. Notably, one threat read “Hopefully, #NikolasBudimlic gets taken hostage and one of his fellow officers [sic] charges in and fires 8 shots killing Budimlic #justice.” The NCPD, noting the gravity of the situation, conducted an investigation to ensure the safety of their officers. A copy of the CBS article is annexed hereto as **Exhibit “V.”**

61. The threats directed at Officer Budimlic are representative of the broader issues of violent hostility and threats of violence local police departments are currently facing. In the days following the July 13, 2014 ambush murder of rookie Jersey City Police Officer Melvin Santiago, members of the notorious Bloods street gang issued a threat to the Jersey City Police Department vowing to “kill a Jersey City cop and not stop until the National Guard is called out,” as reported by multiple news outlets. See <http://nypost.com/2014/07/15/bloods-threaten-to-kill-a-cop-in-revenge-for-cop-killer-shot-dead/>; <http://www.dailymail.co.uk/news/article-2696475/Police-officers-armed-rifles-stand-watch-wake-fallen-Jersey-City-cop-23-amid-threats-gang-attack.html>. A copy of the New York Post

article is annexed hereto as **Exhibit “W.”** The Jersey City Police Department responded to the threat by having officers conduct their patrols in pairs, instead of having officers ride alone.

62. The Bloods gang made an even more specific threat to the Jersey City Police Department, by threatening to target officers stationed at the Pulaski Skyway because they are “sitting ducks” at a “fixed post.” The New York Post obtained an internal memo from the New Jersey State Police which stated that “[t]he Bloods [plan to] ... take retaliatory action against police officers who are working a traffic post on the Pulaski Skyway construction detail.” See <http://nypost.com/2014/07/17/bloods-threaten-to-kill-cops-guarding-the-pulaski-skyway/>; <http://www.nydailynews.com/news/crime/bloods-allegedly-threaten-gun-jersey-city-cops-assigned-pulaski-skyway-article-1.1870102>. A copy of the New York Post article is annexed hereto as **Exhibit “X.”** Such a threat makes it abundantly clear that criminals will act opportunistically and use available information regarding where police officers are located in planning their ambush attacks.

63. The current backlash directed at police officers appears to be a growing national trend, increasing in magnitude by the day. On December 29, 2014, two men armed with rifles in Los Angeles, California opened fire on LAPD Officers who were inside of their patrol car responding to an unrelated radio call. See <http://ktla.com/2014/12/29/manhunt-underway-after-2-lapd-officers-ambushed-shot-at-in-south-la/>. A copy of the KTLA article is annexed hereto as **Exhibit “Y.”** Though no injuries resulted, the threat to the Officers’ lives is readily apparent. While life threatening altercations are an inherent risk in police work, those risks must be mitigated whenever possible. The confidential nature of the Manual functions to mitigate the

life threatening risks NCPD Officers face on a daily basis and therefore must remain exempt from FOIL disclosure through § 87(2)(f).

64. Disclosure of the entire Manual will also create safety risks on a much larger scale in the form of a relatively modern crime known as “swatting.” “Swatting,” as described by the FBI, is an act by an individual who, through the use of phone-hacking technology, makes a call to a police department intending to elicit an emergency response from the local SWAT team for a fictitious threat. Typically this is done as either a prank or for revenge, but neither the responding SWAT team nor the victim being “swatted” is aware of the ruse. A copy of the FBI release “The Crime of Swatting” is annexed hereto as **Exhibit “Z.”** The danger arises in that the SWAT team rushes to a location mentally and physically prepared for a potentially violent encounter and the victim is taken by surprise at the presence of a SWAT team.

65. An individual with access to sections of the Manual covering emergency response and tactical methods is able to tailor the “swatting call” to generate the most vigorous response from the police department. An August 2014 instance of “swatting” in Oviedo, Florida resulted in twenty to thirty officers and deputies responding to what was believed to be the scene of a shooting and standoff inside someone’s home. A copy of the WESH.com article is annexed hereto as **Exhibit “AA.”** Diverting SWAT units to fabricated emergency situations effectively leaves the whole community vulnerable to legitimate threats, which clearly creates a possibility that lives will be endangered. Public release of the information within the Manual only exacerbates that risk.

66. In September 2014, an arrest was made in connection to a series of “swatting” incidents that occurred across multiple states. A bomb-threat directed towards the University of Connecticut Admissions Department lead to an hours-long campus-wide lockdown and the a response by UConn Police and the Connecticut’s State Police Bomb Squad, Emergency Services Unit, and SWAT team. A copy of the FBI Press Release is annexed hereto as **Exhibit “BB.”** By the plainness of its language, the FOIL exemption codified by § 87(2)(f) clearly serves to prevent disclosure of information that would assist someone in diverting law enforcement resources, thus exposing the public to legitimate criminal threats. In the context of “swatting,” a perpetrator with knowledge of the NCPD’s tactical response protocol can threaten both the lives of law enforcement officers directly and the citizens left vulnerable indirectly.

67. The FBI considers “swatting” a crime and public safety risk and that “[i]t’s only a matter of time before somebody gets seriously injured as a result of one of these incidents.” See Ex. “Z.” Reported injuries related to “swatting” include injury to a police officer who was in a car accident during an emergency response and victims suffering mild heart attacks from the shock of experiencing a SWAT team at their doorstep. See Ex. “Z.” As many instances of “swatting” involve threats of hostage execution and bomb detonation it does not require a great leap to envision the possibility that someone will be seriously injured during one of these incidents.

68. The relatively small number of officers employed by the NCPD puts the police force at great risk to the concerted efforts of criminals operating in Nassau County. In the wrong hands, such as those of the violent gang members terrorizing the County, the Manual will reveal information that leaves the NCPD vulnerable to legitimate and potentially deadly acts of

hostility. The officers' physical safety as well as preservation of their peace of mind while on the job must be maintained through the use of the § 87(2)(f) exemption in keeping the Manual confidential.

POINT II

A DISCRETIONARY AWARD OF ATTORNEY'S FEES IS UNREASONABLE UNDER THE CIRCUMSTANCES

69. POL § 89(4)(c) permits the assessment of reasonable attorney's fees, incurred in bringing an Article 78 proceeding, to a substantially prevailing party when (i) the agency had no reasonable basis for denying access or (ii) the agency failed to respond to a request or appeal within the statutory time. However, even if the criteria of § 89(4)(c) are met, the decision to award attorney's fees lies within the Court's discretion.

70. Given NCPD's legitimate concerns over preserving the integrity of their non-routine investigative techniques and procedures as well as concerns over the safety of the County's officers and citizens, it is clear that a reasonable basis for withholding the Manual exists. Here, where the NCPD had a reasonable basis in law to deny disclosure of the entire Manual, an award of attorney's fees would be inappropriate. See Capital Newspapers Div. of Hearst Corp. v. City of Albany, 63 A.D.3d 1336, 1339, 881 N.Y.S.2d 214 (3d Dep't 2009) leave to appeal granted 13 N.Y.3d 707, 890 N.Y.S.2d 444 (2009) affirmed as modified 15 N.Y.3d 759, 906 N.Y.S.2d 808 (2010).

CONCLUSION

71. For the foregoing reasons the Petition should be dismissed in its entirety with costs and disbursements. If the Court finds that some or part of the FOIL responses are inadequate or improper, Respondents respectfully request that the Court review those items *in camera* before any final determination is made.

WHEREFORE, it is respectfully requested that this Court: (1) deny Petitioner's request for the disclosure of the Nassau County Police Department Manual; (2) deny an award of attorney's fees against Respondents; and (3) grant such other and further relief as this Court deems just and proper.

ATTORNEY'S CERTIFICATION

The undersigned hereby certifies that, to the best of the undersigned's knowledge, information and belief, formed after a reasonable inquiry under the circumstances, the presentation of the within Answer or the contentions contained herein are not frivolous as defined in 22 NYCRR §130-1.1(c).

Dated: New York, NY
March 9, 2015

Yours, etc.,
LEAHEY & JOHNSON, P.C.
Attorneys for Respondents
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CHRISTOPHER CLARKE

TO:

ROTH & ROTH, LLP.

Petitioners

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ROTH & ROTH, LLP,

Petitioner,

Index No.: 6590/14

-against-

THOMAS C. KRUMPTER ACTING COMMISSIONER
NASSAU COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT and COUNTY OF
NASSAU,

VERIFIED ANSWER

Hon. Karen Murphy

Respondents.

-----X
Respondents, THOMAS C. KRUMPTER ACTING COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU COUNTY POLICE DEPARTMENT and
COUNTY OF NASSAU, by their attorneys, LEAHEY & JOHNSON, P.C., answering the
Petition of Petitioner herein, upon information and belief, respectfully allege:

PRELIMINARY STATEMENT

1. Denies the allegations made in paragraph 1, except admits this proceeding was commenced pursuant to CPLR Article 78, and begs leave to refer all questions of law to the Court at the time of trial.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 2, except admit there is a pending action captioned Nella Rebello as Administrator of the Estate of Andrea Rebello, Nella Rebello, individually, Fernando Rebello and Jessica Rebello v. P.O. Nikolas Budimlic, P.O. Nicholas Zaharis, County of Nassau, Thomas

Dale, Commissioner of Police, Det. Martin J. Helmke, John Doe Police Officers 1-10, and John Doe Police Supervisors 1-10, in Supreme Court, Nassau County under Index No. 4911/2014.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 3, and begs leave to refer all questions of law to the Court at the time of trial, except admits that Andrea Rebello died on May 17, 2013.

4. Denies all allegations made in paragraph 4, except that Petitioner served a FOIL request on Respondents for the Nassau County Police Department Manual.

5. Denies the allegations made in paragraph 5, and begs leave to refer all questions of law to the Court at the time of trial.

6. Admits the allegations made in paragraph 6.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 7.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 9.

10. Denies the allegations made in paragraph 10, and begs leave to refer all questions of law to the Court at the time of trial.

11. Denies the allegations made in paragraph 11, and begs leave to refer all questions of law to the Court at the time of trial.

12. Denies all allegations made in paragraph 12, and begs leave to refer all questions of law to the Court at the time of trial.

13. Denies the allegations made in paragraph 13, and begs leave to refer all questions of law to the Court at the time of trial.

14. Denies the allegations made in paragraph 14, except admits that Respondents properly relied on exemptions to the FOIL to deny improper requests for documents.

15. Admits the allegations made in paragraph 15.

16. Admits the allegations made in paragraph 16.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 17.

EXHIBITS

18. Admits the allegations made in paragraph 18.

RELIEF SOUGHT

19. Admits the allegations made in paragraph 19.

20. Denies the allegations made in paragraph 20, and begs leave to refer all questions of law to the Court at the time of trial.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 21, and begs leave to refer all questions of law to the Court at the time of trial.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 22, and begs leave to refer all questions of law to the Court at the time of trial.

23. Admits the allegations made in paragraph 23.

24. Admits the allegations made in paragraph 24.

JURISDICTION

25. Denies the allegations made in paragraph 25, and begs leave to refer all questions of law to the Court at the time of trial.

26. Admits the allegations made in paragraph 26.

27. Denies the allegations made in paragraph 27, and begs leave to refer all questions of law to the Court at the time of trial.

28. Admits the allegations made in paragraph 28.

STATEMENT OF FACTS

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 29.

30. Denies the allegations made in paragraph 30.

31. Denies knowledge or information sufficient to form a belief as to the truth of allegations made in paragraph 31.

PROCEDURAL HISTORY

32. Denies the allegations made in paragraph 32.

33. Denies the allegations made in paragraph 33.

34. Denies the allegations made in paragraph 34.

35. Denies the allegations made in paragraph 35.

CAUSE OF ACTION: ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL REQUEST

36. Respondents, THOMAS C. KRUMPTER ACTING COMMISSIONER NASSAU COUNTY POLICE DEPARTMENT, NASSAU COUNTY POLICE DEPARTMENT and

COUNTY OF NASSAU, by their attorneys, LEAHEY & JOHNSON, P.C., answering paragraph "36" repeat, reiterate and reallege each and every denial and admission concerning paragraphs "1" through "35", inclusive of the Petition in the answer thereto with the same force and effect as though fully set forth at length.

37. Denies the allegations made in paragraph 37, and begs leave to refer all questions of law to the Court at the time of trial.

38. Denies the allegations made in paragraph 38, and begs leave to refer all questions of law to the Court at the time of trial.

39. Admits the allegations made in paragraph 39.

40. Denies allegations made in paragraph 40.

41. Denies the allegations made in paragraph 41.

42. Denies the allegations made in paragraph 42, and begs leave to refer all questions of law to the Court at the time of trial.

LEGAL ARGUMENT

43. Denies the allegations made in paragraph 43.

44. Denies the allegations made in paragraph 44.

45. Denies the allegations made in paragraph 45, and begs leave to refer all questions of law to the Court at the time of trial.

46. Denies the allegations made in paragraph 46, and begs leave to refer all questions of law to the Court at the time of trial.

47. Denies the allegations made in paragraph 47, and begs leave to refer all questions of law to the Court at the time of trial.

48. Denies the allegations made in paragraph 48, and begs leave to refer all questions of law to the Court at the time of trial.

49. Denies the allegations made in paragraph 49, and begs leave to refer all questions of law to the Court at the time of trial.

ATTORNEY'S FEES

50. Denies the allegations made in paragraph 50, and begs leave to refer all questions of law to the Court at the time of trial.

51. Denies the allegations made in paragraph 51, and begs leave to refer all questions of law to the Court at the time of trial.

PRIOR APPLICATION

52. Denies the allegations made in paragraph 52, and begs leave to refer all questions of law to the Court at the time of trial.

FIRST AFFIRMATIVE DEFENSE

53. The Nassau County Police Department Manual is exempt from FOIL pursuant to POL §§ 87(2)(e)(iv) and 87(2)(f) as its release would reveal non-routine criminal investigative techniques and procedures, and would endanger the life and safety of Nassau County Police Officers and the citizens of Nassau County.

SECOND AFFIRMATIVE DEFENSE

54. Petitioner lacks standing to compel the County of Nassau to comply with Public Officer's Law § 87(3)(c).

THIRD AFFIRMATIVE DEFENSE

55. To the extent that there is a record that could be disclosed to Petitioner, but for the fact that it contains information subject to exemptions under FOIL, the Respondents should be permitted to submit such document for the Court's *in camera* inspection.

FOURTH AFFIRMATIVE DEFENSE

56. Petitioner failed to exhaust all administrative remedies available before commencing this Article 78 proceeding.

FIFTH AFFIRMATIVE DEFENSE

57. There is a substantial risk that disclosure of the information sought by Petitioner could endanger the lives of law enforcement personnel and impede future police operations.

SIXTH AFFIRMATIVE DEFENSE

58. To the extent that there are records that could be disclosed to Petitioner, but for the fact that they contain information otherwise subject to exceptions under FOIL, Respondents should be permitted to provide such documents for the Court's *in camera* review.

SEVENTH AFFIRMATIVE DEFENSE

59. Petitioner failed to meet its burden to reasonably describe and particularize the documents requested for the purposes of locating and determining whether the documents sought were subject to FOIL.

WHEREFORE, Respondents, THOMAS C. KRUMPTER ACTING
COMMISSIONER NASSAU COUNTY POLICE DEPARTMENT, NASSAU COUNTY

POLICE DEPARTMENT and COUNTY OF NASSAU, demand judgment dismissing
Petitioner's Petition against them with the costs and disbursements of this action and further
relief as this Court may deem just and proper.

ATTORNEY'S CERTIFICATION

*The undersigned hereby certifies that, to the best of the undersigned's knowledge,
information and belief, formed after a reasonable inquiry under the circumstances, the
presentation of the within Verified Answer or the contentions contained herein is/are not
frivolous as defined in 22 NYCRR §130-1.1(c).*

Dated: New York, New York
March 9, 2015

Yours, etc.,

LEAHEY & JOHNSON, P.C.

Attorneys for Respondents

THOMAS C. KRUMPTER ACTING COMMISSIONER
NASSAU COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT and COUNTY OF
NASSAU

120 Wall Street, Suite 2220

New York, New York 10005

(212) 269-7308

BY: 

CHRISTOPHER CLARKE

TO:

ROTH & ROTH, LLP

Attorneys for Petitioner

Lexington Avenue, suite 802

New York, New York 10016

ATTORNEY'S VERIFICATION

STATE OF NEW YORK)
 :SS
COUNTY OF NEW YORK)

The undersigned, an attorney admitted to practice in the Courts of the State of New York, affirms that the following statements are true under penalties of perjury:

That he is a member of the firm of LEAHEY & JOHNSON, P.C., attorneys for Respondents, THOMAS C. KRUMPTER ACTING COMMISSIONER NASSAU COUNTY POLICE DEPARTMENT, NASSAU COUNTY POLICE DEPARTMENT and COUNTY OF NASSAU in the action herein, and that he has read the foregoing Verified Answer and knows the contents thereof; that the same is true to his own knowledge except as those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; and the reason this verification is not made by Respondents and is made by affirmant is that Respondents do not reside in the county where the attorneys for said Respondents have their office.

Affirmant further says that the source of her information and the grounds of his belief as to all matters not stated upon his knowledge are from investigations made on behalf of the said Respondents.

Dated: New York, New York
March 9, 2015


CHRISTOPHER CLARKE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ROTH & ROTH, LLP,

Petitioners,

-against-

Index #:6590/2014

REPLY AFFIDAVIT AND
RESPONSE TO AFFIRMATIVE
DEFENSES

THOMAS C. KRUMPTER ACTING COMMISSIONER
NASSAU COUNTY POLICE DEPARTMENT,
NASSAU COUNTY POLICE DEPARTMENT,
and COUNTY OF NASSAU,

Respondents.

-----X
STATE OF NEW YORK

)

) ss:

COUNTY OF NASSAU

)

DAVID A. ROTH, an attorney duly admitted to practice law in the State of New York,
being duly sworn deposes and says:

I make this affidavit in support of the within Reply and swear to those things for which I
have personal knowledge.

PRELIMINARY STATEMENT IN REPLY

1. The subject of this Petition is the FOIL request dated May 28, 2014 for a
“complete copy of the Nassau County Police Department Manual in effect on May 17th, 2013.”
On June 10, 2014, after having received no response within the statutory time period allotted,
Petitioner appealed said constructive denial. Pursuant to Public Officers Law §89 4(a) and (b),
the failure to respond to a FOIL request and subsequent Appeal constitutes a denial and in such

event a person may bring a proceeding for review of such denial pursuant to Article 78 of the CPLR. On July 9, 2014 Petitioners filed a proceeding under Article 78 to review the denial of the May 28, 2014 FOIL request.

2. The Respondents answered the Petition and served Opposition papers consisting of an Affirmation by attorney, Christopher Clarke (Clarke Affirmation) along with numerous irrelevant exhibits attached thereto and an Affidavit of Detective Sergeant Israel Santiago, ("Santiago Affidavit") Commanding Officer of the Nassau County Police Department Legal Bureau, and exhibits attached thereto.

3. The Respondents have gone to great effort to mislead the Court that the Petition herein has a tortured history of many prior FOIL requests, negotiations over same, and that the Petitioners are counsel to the Rebello family, yet none of this has anything to do with the proceedings herein.

4. The only issue in front of this Court is the FOIL request of May 28, 2014 requesting a "complete copy of the Nassau County Police Department Manual in effect on May 17th, 2013" and the associated costs and attorneys' fees if Petitioners are substantially successful. There are no other issues to be determined by the Court other than whether the public is entitled to the NCPD Manual or sections thereof. It is well settled law that the status or need of the Petitioner is irrelevant to the access to information under FOIL.

5. The NCPD FOIL bureau is extremely sophisticated and has the responsibility to the Public to follow Public Officers Law §87 as interpreted by the Courts of New York State. The Courts have often cited to the Committee on Open Government that issues FOIL Advisory Opinions(AO) as a guide. The law is clear that if some portions of a document or record fall within an exemption and some do not, then the portions that do not fall under an exemption

must be disclosed. The Respondents incompletely cite to AO-F12748 in Clarke Affirmation

¶35:

"It is emphasized that the introductory language of§ 87(2) refers to the authority to withhold 'records or portions thereof that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld." See Committee on Open Government FOIL-AO-F12748.

6. The Clarke Affirmation selectively leaves out the most important point of the AO-12748 which contradicts the overall erroneous position taken by Respondents, herein. The Respondents improperly argue that the burden is on the Petitioner to identify the portions of the Manual they are seeking. The Respondents wish this Court to ignore that the FOIL request was for the entire manual and that it is the Respondents' obligation to review same and provide proof as to which sections fall under exemptions and to disclose remainder. Significantly the Respondents deleted the last sentence from ¶35 in 12748 which states:

That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

Attached to Petitioners papers herein to aid the Court in determining the Petition, Petitioner has attached the committee on open Government Advisory Opinions the Respondents cite to but fail to attach to their papers as **Exhibit "A"**.

7. The position that Respondents are taking herein, that if any part of a record is claimed to fall under an exemption as enumerated POL §87 it results in withholding the entire record and all sections or portions therein, is inimical to the FOIL law and extremely troubling. Assuming that the Petitioners herein are being treated the same as any other members of the

public when requesting information from the NCPD FOIL Legal Bureau, it is clear that the NCPD is not fulfilling its obligations to disclose those portions of the records or documents requested that do not fall within any exemption.

8. The law requires the municipality to give access to all records that do not fall under an exemption. In this matter there can be no question that the Respondents have only claimed exemptions for those sections listed in ¶13 of the Santiago Affidavit. Regardless if the Petitioners herein agree or disagree that those sections are being properly withheld, Respondents are required to disclose all other sections and the ongoing failure to disclose is inexcusable and a corruption of the manner in which the FOIL is meant to be interpreted.

9. Clarke Affirmation ¶46 demonstrates either a complete lack of comprehension of the FOIL law and/or an intention to refuse to comply with said FOIL law.

46. As articulated in the Accompanying Affidavit Det. Sgt. Santiago, the Manual contains numerous sections that squarely fall within FOIL exemptions, thus it is imperative that Petitioner make use of the Table of Contents to furnish a FOIL request for a particular section of the Manual so that the NCPD may determine whether that section may be disclosed or must be withheld pursuant to a FOIL exemption. See Santiago Aff. at, 13.

10. This is the exact opposite of the way the Courts have ruled. The above paragraph indicates that it is “imperative for the Petitioner” to serve an additional more limited FOIL request, which improperly shifts the burden to the Petitioner. All of the burden rests with the government; that is the burden to prove that the exemptions apply and the burden to review the information to determine which records must be disclosed.

11. Therefore with regard to the Department Manual the sections for which the Respondents are not asserting an exemption should and must be disclosed to the Petitioners and the Public. In the Santiago Affidavit ¶13 he lists 30 sections in which he believes exemptions

apply, of the approximate 257 sections listed in the Table of Contents of the Department Manual. This requires disclosure of every single section for which the Respondents have failed to claim an exemption, approximately 227 remaining sections. A copy of the Table of Contents of the Department Manual is attached to the Santiago Affidavit as Exhibit "D".

12. Clarke Affirmation ¶32 contains another impermissible basis for withholding the Department Manual:

Further, it is noted, of course, that Petitioner's FOIL requests, though numerous, represent only a fraction of all FOIL requests made on the NCPD. Petitioner's present Petition, seeking disclosure to the public of the entire Manual, calls for the release of confidential materials entirely unrelated and irrelevant to the Rebello matter, and for which Petitioner has shown no need, warranting dismissal of the Petition in its entirety.

This statement ignores Justice Murphy's prior ruling on in in *Rebello v Thomas C. Dale, Nassau County Police Department, et al.* Index No. 11906/2013 (Sup Ct. Nassau County, March 2014) wherein she noted:

An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government'" (*Matter of Buffalo News, Inc. v Buffalo Enterprise Development Corporation*, 84 NY2d 488, 492[1994][citations omitted]). A copy of Hon. Karen Murphy's Decision dated March 2014 is attached hereto as **Exhibit "B"**

The Respondents continuous insertion of the status of the Petitioners, the needs of the Petitioners or any other ancillary issue is irrelevant to the request herein.

13. It well settled law as stated by the Court of Appeals in *Gould v City of New York*, 89 NY2d 267 (1996) that the goal of the freedom of information law of this state is that the public is to be given maximum access to government records and all exemptions are to be

narrowly construed with the burden resting on the agency to demonstrate that the requested materials qualify under the exemptions.

14. The Santiago Affidavit fails to meet the requirements of an affidavit of someone with personal knowledge of the contents of the Department Manual and is simply impermissible, pure conclusory speculation regarding the alleged consequences of permitting access to the public of the Nassau County Department Manual. The Clarke Affirmation has no evidentiary value at all and all facts and allegations stated therein cannot be used as a basis for meeting the Respondents burden that the Department Manual falls within either of the exemptions Respondents rely upon in denying access to the Department Manual.

15. As to those sections and portions of the Department Manual which are listed in ¶13 of the Santiago Affidavit, it is clear that Officer Santiago based his affidavit upon only reviewing the “Table of Contents” and never alleges any familiarity with the contents of those sections or of the Department Manual nor does he state with any specificity what type of information is contained in those sections that would create a danger to the public or would reveal “criminal non-routine investigative techniques.” The Police manuals and guides are published so that all police officers in a department follow the same routines, and that the public can rely upon those routines in their contact with the police.

16. The Respondents’ papers are replete with misstatements of law, impermissible arguments, statements of case law and advisory opinions for the opposite proposition for which they actually stand, continuously taking quotes and portions of case law and advisory opinions out of context and failing to note for the Court that those opinions actually hold for the opposite point that Respondents’ are trying to make.

17. A brief summary of the Respondents erroneous contentions and improper arguments both legal and factual are as follows:

1. That the Petitioners are other litigation with the County, and this should have an effect or is significant in responding to the within FOIL request. The Court of Appeals in M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75, 476 NYS2d 69 (1984) to which Respondents cite, held that Petitioners status is irrelevant.

2. That prior FOIL requests that were made by the Petitioners (Respondents' Exhibits A – R in the Clarke affirmation) are germane to these proceedings. This is simply not relevant.¹

3. That there were discussions prior to the Respondents' submission of the opposition herein regarding the turning over of the manual and possibly settling this matter without the need for further litigation and that these discussions are relevant. This argument is directly prohibited by CPLR 4547 (all settlement discussions are confidential) and is irrelevant as to whether the Department Manual falls under a particular exemption.

4. That Petitioners relief requested according to Clarke Affirmation ¶ 1B is:

Declaring that the NCPD's response dated July 14, 2014 denying access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled; and

This is in fact not the relief stated and the July 14, 2014 letter was improperly inserted as it did not exist as of the filing of the within petition as the Petition was filed on July 7, 2014.

5. The Clarke Affirmation attaches numerous exhibits which include online Articles, twitter, bulletins and other news stories regarding various crimes across the country and the world. This is inflammatory and the Petitioners could just as easily attach 10 times the number of Articles about the need for transparency and greater police accountability.

6. The Clarke affirmation claims that the Nassau County Police Department has “a relatively small number of police officers” Clarke Affirmation ¶68, when in fact it is one of the largest in the Country.

¹ It should be noted that every one of those foil requests was either complied with or this court ordered respondents to produce said records and information, which the County is currently refusing to do and is appealing said decision order and judgment.

7. Clarke Affirmation makes numerous references to the County being “cash strapped” and overburdened. This is a completely unsubstantiated statement that is unfounded and not even Officer Santiago states that the County is “cash strapped” in their FOIL department.

The above arguments are simply erroneous as to whether the public is entitled to the Nassau County Police Department Manual or sections thereof.

18. The Respondent herein are corrupting the legislative intent as stated in the declaration contained in section §84 of the Public Officers law, which by case law applies to police departments. The declaration as stated below demonstrates the important public interest in having access to the governmental records:

McKinney's Public Officers Law § 84
§ 84. Legislative declaration

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this Article

ACCESSIBILITY TO GOVERNMENTAL RECORDS PURSUANT TO FOIL

19. As cited in the original Petition, the benchmark case regarding FOIL issues as they relate to police records is the Court of Appeals case *Gould v City of New York*, 89 NY2d 267 (1996) contains the oft cited language regarding providing police records under the Freedom

of Information Law as follows:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]).

20. Justice Karen Murphy in *Rebello v Thomas C. Dale, Nassau County Police Department, et al.* Index No. 11906/2013 (Sup Ct. Nassau County, March 2014)² stated *inter alia*:

Accordingly, "[w]hen faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" (*Matter of Beechwood Restorative Care Center v Signor*, 5 NY3d 435, 440 [2005]; *see also Public Officers Law* §§ 87[2], 89[3]; *Matter of Leshner v Hynes*, 19 NY3d 57, 64 [2012]). "Put another way, in the absence of specific statutory protection for the requested material, the Freedom of Information Law compels disclosure, not concealment" (*Matter of Westchester Rockland Newspapers, v. Kimball*, 50 N.Y.2d 575, 580 [1980]).

21. In this instance, although the Respondents make excuses for failing to respond to the initial FOIL request and Appeal as mandated by §89(3)(a), they have no excuse for failing to immediately turn over those portions or sections of the Department Manual for which they have not asserted an exemption.

22. The cases cited herein clearly state that the FOIL law compels disclosure not concealment. Nor is there a special exemption for "cash strapped" municipalities to ignore the law. The excuses Clarke proffers for not timely denying the FOIL requests ¶ 9 (limited resources) and ¶10 (constraints of day to day operations), are not one of the exemptions

² *Rebello v NCPD et al.* was another Article 78 proceeding brought by the Petitioners against the Nassau County Police Department and others, requesting an Order that the NCPD comply with FOIL requests made in June and July of 2013. The is relevant only for the point that the Respondents herein are fully familiar with the decision having been served and appealing it at this time.

contained in §87. Nor is there a shred of proof that this is the reason why the County failed to respond to the FOIL request herein. In fact just on March 19, 2015 the front cover of Newsday noted that the County paid over 67 million in overtime for police officers, clearly disputing that the Police Department is “cash-strapped.” A copy of the Newsday Article is attached hereto as **Exhibit “C.”**

23. There is a valid public interest in the disclosure of Nassau County Police Department practices and procedures. The release of the information requested serves the public interest by providing transparency and accountability for agency action. *Associated Press v. US Dep't of Defense* 554 F.3d 273, 285 (2d Cir. 2009). Additionally, if those procedures are cancelled or changed, the public has a right to know. This falls precisely into the purview of the request for information in question. "Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 177- 78 (1991).

PETITIONER'S STATUS

24. The Respondents, in an effort to mislead the Court, devote a substantial portion of their papers in both the Clarke Affirmation as well as the Santiago Affirmation alleging Petitioners are currently suing the County of Nassau in the Rebello case and are using FOIL requests for litigation in the Rebello matter. This argument is irrelevant and as this Court previously pointed out contradicted by all case law. Accordingly, and ignored by the Respondents in their papers Justice Murphy noted in her decision in *Rebello*, supra regarding the previous improper FOIL denial that :

An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this

Court has firmly held that 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government'" (*Matter of Buffalo News, Inc. v Buffalo Enterprise Development Corporation*, 84 NY2d 488, 492[1994][citations omitted]).

25. Respondents could not cite any relevant cases as precedent for the proposition that the status of the Petitioner as a litigant is relevant. The Respondents continuously take portions of Advisory Opinions and Case law out of context, arguing for contrary conclusions for which those cases actually stand.

26. Respondents often cite to the FOIL Advisory Opinions. A relevant Opinion AO–17938 says:

Lastly, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see *Burke v. Yudelson*, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (*Matter of Westchester Rockland Newspapers v. Kimball*, 50 NY2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [*Farbman v. New York City Health and Hospitals Corporation*, 62 NY 2d 75, 80 (1984)].

A complete copy of the Committee for Open Government Advisory Opinion 17938 is attached hereto in **Exhibit "A"**

27. There is not a single case that holds that the status or need of a petitioner is relevant to a FOIL request. The case law is clear either the public is entitled to a record or it is not. Every single case and advisory opinion cited by the defendants holds that not only is the status or need of the Petitioner irrelevant, if there is ongoing litigation records under FOIL may be available when they are not available through litigation.

28. The Respondents cite to advisory Opinion FOIL AO -14095 in Clarke Affirmation ¶35 but quote only a portion of the relevant text and take it out of context. This portion of the Opinion contained in the Clarke Affirmation is as follows:

“there is a clear distinction between rights of access conferred upon the public under the Freedom of Information Law and rights conferred upon a litigant via the use of discovery, and the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings and in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the discovery provisions of the CPLR or the CPL are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.”

Respondents not only fail to attach said Opinion which is required unless it is an official opinion, but did not include the next two paragraphs which hold opposite to the Respondents contentions. The next paragraphs in Advisory Opinion 14095 are:

As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [*Farbman v. NYC Health and Hospitals Corporation*, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [*Matter of John P. v. Whalen*, 54 NY 2d 89, 99 (1980)]. The Court in *Farbman*, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (*Matter of Westchester Rockland Newspapers v. Kimball*, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a

public right and in the public interest, irrespective of the status or need of the person making the request.

"CPLR Article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' Article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (*Allen v. Crowell-Collier Pub. Co.*, 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action' [see *Farbman*, supra, at 80].

What is particularly egregious about selectively quoting this Opinion is that the summary conclusion which was eliminated, holds that the records should be disclosed regardless of requesters status or interest:

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant, and the nature of the records or their materiality to a proceeding. The materials made available in discovery to a litigant through discovery may not be available to the public under the Freedom of Information Law. Conversely, there may be instances in which records are beyond the scope of discovery, but which may be available under the Freedom of Information Law.

A complete copy of the Committee for Open Government Advisory Opinion 14095 is attached hereto in **Exhibit "A"**

29. Reluctantly, we must address Clarke Affirmation ¶¶32 where the Respondents request dismissal of the entire Petition because it calls for the release of material unrelated to the Rebello matter for which the Petitioner has shown no need. This statement is directly contradicted by the case law and opinions contained in the Clarke Affirmation ¶¶ 33-37 and is a clear misinterpretation of the FOIL Law. The law is absolutely clear on this point as stated by Justice Karen Murphy Supra and by the Court of Appeals in *Farbman*, supra that state standing

is no issue and Respondents arguments to the contrary demonstrate a complete lack of comprehension of the FOIL law.

30. The Court of Appeals in *M. Farbman & Sons v. New York City Health and Hosps. Corp.*, 62 NY2d 75, 476 NYS2d 69 (1984), reversed the Appellate Division and held that "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, art 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency. Because the court below erroneously concluded that FOIL is unavailable to a litigant, and that CPLR Article 31 is a blanket exemption from FOIL, we reverse the dismissal of the petition." The Court went on to distinguish Freedom of Information Law from Article 31 of the CPLR, stating *inter alia*:

FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (*Matter of Westchester Rockland Newspapers v Kimball*, 50 NY2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

31. The Clark Affirmation as well as the Santiago Affidavit allege that the Respondents attempted to negotiate with the Petitioner a resolution to the FOIL request for the entire NCPD Manual. They further allege that Petitioner "balked" (Clark Affirmation ¶13)³ to the conditions that NCPD wanted to impose on the Petitioners in the proposed confidentiality agreement. The categorization of "balking" would fall in the lap of the Respondents had the full timing and the entire discussions been disclosed by Respondents. The Respondents know full well that pursuant CPLR 4527 all evidence of any conduct, statements or discussions of

³ The Petitioners recognizing their obligations under CPLR 4547 to keep settlement negotiations confidential will not include or address any discussions between counsel, but refute and object to the characterizations of the overall negotiations. Introduction of settlement negotiations generally, are considered so egregious that it can result in a mistrial.

proposed settlement agreements made during compromise negotiations are not admissible and inserting them into their papers was a violation of the CPLR:

§4547. Compromise and offers to compromise. Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

32. Nevertheless the Respondents attempt to make the Petitioners look unreasonable by referencing to the trier of fact a proposed settlement agreement that is clearly inadmissible and irrelevant as the fact that the NCPD Manual may be available to the Petitioner in another action does not affect the Petitioners right to obtain the record in this underlying FOIL request.

33. The purpose of the Freedom of Information Law is to provide Government accountability to the public. The Second Department in *Westchester Rockland Newspapers, Inc., v. Mosczydlowski*, 58 A.D.2d 234, 396 N.Y.S.2d 857, (2nd Dept. 1977) stated:

The legislative intent, as embodied in the Freedom of Information Law (Public Officers Law, s 85) was to increase the understanding and participation of the public in government and to extend public accountability by giving the public unimpaired access to the records of government and its process of decision making.

34. The case law cited throughout our papers herein states the purposes of FOIL as “public accountability,” “maximum access to records,” “records are presumptively available to

the public,” the goal is to achieve “maximum public access to government documents.” In this matter the Respondents have taken the opposite philosophy and approach to releasing records.

35. The Respondents denial of the entire manual and not detailing specifically which sections the release of the manual are impermissible “blanket” exemptions to restrict access which is “inimical to the principles of FOIL”. *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274, 653 N.Y.S.2d 54, 675 N.E.2d 808 (1996).

36. To those sections of the Department Manual that are not specifically addressed by the Respondents, they have failed to prove that these sections fall under any exemption. The Respondents are aware that they are continuing to violate Public Officers Law §87 by failing to turn the approximately 227⁴ sections of the Department Manual that they have failed to assert fall under any exemption.

Article 78 Proceedings Burden of Proof

37. An Article 78 proceeding is a special proceeding which has the same burden of proof requirement as a motion for summary judgment. The commentary to CPLR § 7804 subdivision states:

Subdivision (e) also obligates the respondent to submit affidavits or other written proof with the answer as evidentiary support for any contention that a triable issue of fact exists. In the absence of any such fact issue, the court can summarily dispose of the case in the manner of summary judgment. See N.Y.Jud. Council, Third Ann.Rep. 186 (1937).

⁴ The Table of Contents of the Department Manual, attached to the Santiago Affidavit Ex. D, contains 257 sections. The only sections of the Department Manual claimed by the Respondents to fall under any exemption are listed in Santiago ¶13, using the titles generally and the specific sections there are 30 total sections the Respondents are claiming fall under any exemption, the other 227 are being withheld without a claimed exemption violation of the FOIL law.

38. The obligation of the Respondents is to lay bare their proof with affidavits so the Court can make summary determinations on the papers and pleadings before it. See *Friends World College v. Nicklin*, 249 A.D.2d 393, 671 N.Y.S.2d 489 (2 Dept. 1998)

39. The same test that is applied to a motion for summary judgment is used to determine special proceedings, and thus, if papers and pleadings fail to raise material issues of fact, the Court is authorized to make summary determination. *Jones v. Marcy*, 135 A.D.2d 887, 522 N.Y.S.2d 285. (3 Dept. 1987); See, also, *Lefkowitz v. McMillen*, 57 A.D.2d 979, 394 N.Y.S.2d 107 (1977), appeal denied 42 N.Y.2d 807, 398 N.Y.S.2d 1029, 368 N.E.2d 45; *State by Lefkowitz v. Bel Fior Hotel*, 95 Misc.2d 901, 408 N.Y.S.2d 696(1978); *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936(1977).

40. The Court analyzed this issue in *McCrory v Village of Mamaroneck*, 34 Misc. 3d (Sup Ct. West. 2011) stating:

FOIL imposes a broad duty on government to make its records available to the public. *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274, 653 N.Y.S.2d 54, 675 N.E.2d 808 (1996). Thus, analysis of the propriety of an agency's denial of a FOIL application begins with the principle that “[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).” *Id.*, 89 N.Y.2d at 274–275, 653 N.Y.S.2d 54, 675 N.E.2d 808. “Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption” (*622 *Matter of Hanig v. State of New York Dept. Of Motor Vehs.*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 [1992]), and an application for the disclosure of materials in an agency's possession may be denied “[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions” (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 [1979]). If the agency “fails to prove that a statutory exemption applies, FOIL compels disclosure, not concealment” (source of internal quotation omitted).” *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463, 849 N.Y.S.2d 489, 880 N.E.2d 10 (2007)

41. The burden is then on the Respondents to lay bare their proof in admissible form.

The Court in *McCrory* goes onto state:

“It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' (CPLR 409 [b] [other internal citations omitted]) .” *Matter of Karr v. Black*, 55 A.D.3d 82, 86, 863 N.Y.S.2d 26 (1st Dep't 2008); *see also Matter of Bahar v. Schwartzreich*, 204 A.D.2d 441, 443, 611 N.Y.S.2d 619 (2nd Dep't 1994) (applying summary judgment standard in Article 78 proceeding). Applying in the instant proceeding the standards and rules of decision as apply on a motion for summary judgment (*see **867 Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980].)

RESPONDENTS HAVE NOT MET THEIR BURDEN OF PROOF TO DENY ACCESS TO THE DEPARTMENT MANUAL BASED UPON PUBLIC OFFICERS LAW § 87(2)(E)(IV) THAT SUCH ACCESS WOULD REVEAL CRIMINAL INVESTIGATIVE TECHNIQUES AND PROCEDURES EXCEPT ROUTINE TECHNIQUES AND PROCEDURES

42. The Respondents have failed to put forth affidavits sufficient to raise a question of fact in this matter. Only one insufficient affidavit was attached to the Respondents' Answer to the Petition and in support of the Respondents' Affirmative Defenses. The sole affidavit on behalf of the Respondent, Nassau County Police Department (NCPD), only identified certain sections of the Departmental Manual which they claim fall under § 87(2)(e)(iv) “criminal investigative techniques and procedures except routine techniques and procedures.” Those specific sections are listed in Santiago Affidavit ¶13.

43. The Santiago Affidavit only states he read the Table of Contents of the Department Manual and titles of sections of the Department Manual. He never refers to their contents in any way. He states in ¶13 “a review of the Table of Contents” shows that the

following sections of the Department Manual fall squarely within these (§ 87(2)(e)(iv) and § 87(2)f). He states that the below fall under both stated exemptions:

- Emergencies and Planned Events (see POL 4500-4505);
- Prisoner Handling (OPS 2210-2230);
- Tactical Methods and Special Events (OPS 12100-12400).

The below titles Santiago states are specifically non-routine⁵ procedures:

- Section POL 3305 addresses "Specialized Training."
- Section POL 4101 addresses police operations regarding "Foreign Nationals and Undocumented Persons."
- Section POL 4500 deals with Emergencies, including "Hazardous Material Incidents," and "Weapons of Mass Destruction Incidents."
- Section OPS 6411 covers "Off-Duty and On-Duty Plain Clothes Police Encounters!"
- Section OPS 12000, which pertains to "Tactical Methods and Special Events"
- OPS 12106 "Emergency Situations." Subsections regarding "Rapid Deployment for Active Shooter"
- OPS 12111 "Bomb and Bomb Threats"
- OPS 12113 "Hazardous Material Incidents",
- OPS 12114 "Weapons of Mass Destruction"
- OPS 12118 "Nassau County Correctional Center Emergency" in section,
- OPS 12118a Nassau County Correctional Center Access Routes and Posts,
- OPS 12160 "Emergency Access System" in section, and
- OPS 12160a "Emergency Access System Credential Samples"

44. As Santiago has failed to address any of the other sections in the Department Manual, the Respondents have failed to meet their burden of proof that any of the other 227 sections of the Department Manual fall under the two claimed exemptions or any other exemptions, therefore the Respondents failure to permit access to those other sections of the Department Manual listed in Santiago Affidavit Exhibit D and the continuing denial of Petitioners to access, is a violation of Public Officers Law §87.

⁵ Santiago does not state that any of these sections would “ reveal criminal investigative techniques or procedures” it is clear that the Respondents do not appreciate that this exception only applies to criminal investigative techniques not all operational techniques.

45. As to the sections of the Department Manual listed above and contained in the Santiago Affidavit ¶13, the hearsay ridden Clarke Affirmation and Santiago's Affidavit fail to state with any specificity that the substance of each section would fall within the exemptions claimed.

46. It should be noted that when Officer Santiago personally reviews something he notes same in his affidavit. See Santiago Affidavit ¶ 5:

I have reviewed the Petition in this matter as well as the communications referenced ¶¶ 2 and 3 above related to Petitioner's preceding FOIL requests to the NCPD. I note that because Petitioner commenced this proceeding on July 9, 2014, the Petition before this Court does not include the July 14, 2014 response from the NCPD Legal Bureau to the May 28th FOIL request. More specifically, based upon my review of the records related to this FOIL request, I understand that on July 14th NCPD Legal Bureau attorney Joanne Oweis denied the May 28, 2014 FOIL request seeking the entire Departmental Manual pursuant to the exemptions codified in Public Officers Law §§ 87(2)(e)(iv) and §87(2)(f). See Letter dated July 14, 2014 annexed hereto as Exhibit "E"

Santiago then goes on to discuss the contents of what he read. Similarly when referring to the Department Manual he states that "A review of the Table of Contents provided to Petitioners shows that the Department's Manual contains items which fall squarely within these exemptions." Santiago Affidavit ¶13. He never states anywhere that he actually read the contents of the sections he mentions. The Santiago Affidavit is devoid of any analysis of what is contained in each section. Thus he has not provided nor can he provide any analysis as required to meet the Respondents burden to show how the substance of each section falls within either the two exemptions claimed. He offers only conclusions that these sections fall into the exemptions claimed rather than a basis of why he reached those conclusions.

47. Santiago has not articulated his reliance on any of his own qualifications, experience or statistics in offering the opinion regarding the contents of the Department Manual

and the types of information contained therein. He makes no attempt to explain why the sections in ¶13 are “non-routine” “criminal investigative techniques” or how the release of said information “would endanger the life and safety of Nassau County Police Officers and the citizens of Nassau County.” Santiago only indicates experience in dealing with the FOIL law, but does not have any stated qualifications to rely upon in determining how the possible contents of the sections he mentions would “iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures”.

48. To meet its burden of proof the Respondents need to put forward some testimony or analysis of someone with expertise in the areas in which they are claiming apply to the exemptions.

49. The NCPD has chosen to submit an affidavit from a FOIL officer from their legal bureau, instead of obtaining an affidavit from someone with tactical experience, someone experienced in the operations contained within the sections of the manual listed above, someone from their academy or even an outside expert who had the qualifications to opine that giving the public access to the sections of the Department Manual stated above would “iv. reveal criminal investigative techniques or procedures except routine techniques and procedures.” The Santiago Affidavit fails to describe, even generally, the type of information contained within the manual. Santiago could have described the types of techniques or investigations that are contained within the sections of the manual stated in ¶13 without giving away the specifics. The sections of the Table of Contents that Santiago cites to are apparently operational techniques. On its face these sections in ¶13 such as “Emergencies and Planned events”, “Tactical methods and Special events” do not appear to be “criminal investigative techniques.” The sections for “specialized training”, “emergencies including hazardous material incidents”, “responding to active shooter”,

“Bomb and Bomb threats”, “Weapons of Mass destruction” and “Emergency access system” are by their titles clearly are not in any way criminal investigative techniques. The titles to these sections simply have nothing to do with criminal investigations. The manner in which officers respond to special situations is not a “criminal investigative technique.” Officer Santiago does not even describe the types of information that would constitute criminal techniques or procedures that are non-routine.

50. Santiago’s failure to describe the difference between criminal investigative techniques or procedures and those that are non-routine is fatal to their burden of proof that these sections fall under Public Officers Law §87(e) iv.

51. When determining the facts of a case, the trier of the fact (in this case the Court) chooses how much weight to give to each person’s testimony and other evidence. Santiago’s opinion is based upon a review of the current and prior FOIL requests and responses ¶¶2-5, a review of the petition herein, ¶5 a review of the table of contents of the Department Manual, ¶¶12-13 and nothing else. He fails to state his qualifications to render an opinion as to what would be a non-routine criminal investigative technique or procedure, other than that he is a “Detective Sergeant with the Nassau County Police Department (the NCPD,) and also the Commanding Officer of the Department's Legal Bureau. He gives no other information as to his background. He states ¶1 “In my capacity as Commanding Officer of the Legal Bureau, I oversee the processing of Freedom of Information Law ("FOIL") requests made to the NCPD”. He doesn’t state any experience with the contents of the manual he is commenting on, and it would be only speculation to consider what his expertise might be beyond what is in his affidavit. Santiago is being proffered to give an opinion about the two exemptions claimed by the Respondents. An

opinion whether by an expert or an employee of party must be based upon facts, experience, and not self-serving conclusions.

52. In *Romano v Stanley*, 90 N.Y.2d 444 , 684 N.E.2d 19, 661 N.Y.S.2d 589, (1997)

The Court of Appeals held:

an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor.

In some situations, the nature of the subject matter or the expert's area of special skill will suffice to support the inference that the opinion is based on knowledge acquired through personal professional experience. In other situations, an expert's affidavit may be deemed sufficiently probative to defeat summary judgment if it makes reference to outside material " 'of a kind accepted in the profession as reliable in forming a professional opinion' " and such reference is accompanied by evidence establishing the out-of-court material's reliability (*Hambach v New York City Tr. Auth.*, 63 NY2d 723, 726).

53. Here Santiago is giving opinions about the content of what he believes is in various sections of the NCPD Department Manual that he refers to in ¶13, but he cites no basis for that opinion. His opinion whether he is being called an "expert" or not, must be based upon qualifications and/or statistical data for said opinions. Santiago is an employee of the NCPD and his affidavit simply makes conclusory speculations regarding the content of said Department Manual.

54. In contrast Petitioners have submitted the affidavit of an experienced police practices and procedures expert, Hugh McGowan (McGowan). **Exhibit "D."** McGowan's qualifications, experience, and credentials are detailed in ¶¶1-11 in his attached Affidavit. He is currently employed as a hostage negotiation and crisis intervention instructor teaching best practices at the Public Agency Training Council (PATC). He served for 33 years in the NYPD,

the last 13 years being employed as the Commanding Officer and Chief Negotiator for the New York City Police Department's Hostage Negotiation Team (HNT). He also held positions with the Emergency Services Unit (NYPD SWAT) as a Citywide Patrol Operations Supervisor and later as the Planning and Training Coordinator. He was also a Detective Sergeant and Executive Officer of the Bomb Squad. He has opine that based upon his experience unless the NCPD Department Manual deviates materially from manuals nationwide, then the sections cited by Santiago ¶13 deal with operations and administration and do not involve criminal investigations techniques. Additionally, what is described albeit in very limited fashion would be routine police procedures. McGowan ¶15-16.

55. Freedom of Information laws abound across the country. The Federal Government (FOIA) and every state have laws giving the public access to governmental records including Police Records. The concept behind the laws is the need for governmental transparency. The public has a similar interest in police transparency regardless of the state or jurisdiction. Police Department Manuals are available to the public through local freedom of information laws and are even online in numerous states. Department Manuals and guides generally describe routine information that the public and police officers can rely upon.

McGowan ¶16-17. The Online Police manual of the City of North Las Vegas

(<https://www.cityofnorthlasvegas.com/Departments/Police/PDFs/Department-Policy-Manual.pdf>) states:

The integrity of the Department rests with the actions of its members. This manual is a guideline to assist with the regulation of conduct. Our community's perception of the Police Department is based on the competence and ethical deportment of our officers and staff. These policies will help to ensure that public trust is well placed.

56. Petitioners' moving papers noted that that the largest police force in the Country, NYPD, has its Patrol Guide available to the public and in fact downloadable on iTunes. Although the Clarke Affirmation speculates as to the differences between the NYPD patrol guide and the NCPD Department Manual, Santiago is silent on that issue and fails to note any differences between them. The Clarke Affirmation ¶49 makes the unsupported claim that the NYPD manual contains general guidelines and that the NCPD manual contains sensitive, non-routine and protected procedures⁶. This claim in the Clarke Affirmation is as baseless as any of the other unsupported claims made by the Respondents. Clarke is not an expert in police procedures and Santiago is silent as to any alleged differences. The Respondents attach no supporting documentation regarding the differences between the NYPD patrol guide and the NCPD manual. The burden on the Respondents is to supply proof to the Court that the NCPD manual contains "criminal investigative techniques and procedures" that are non-routine, which they quite simply have not done.

57. One of the numerous police departments that have their manuals online is the Cincinnati Police Department⁷. The online introduction states:

The Cincinnati Police Department Procedure Manual

The Cincinnati Police Department Procedure Manual is to provide an official guide outlining the way to do many of the routine operations which confront the Cincinnati Police Department. the Procedure Manual is provided here as a downloadable file, both as a Adobe Acrobat PDF portfolio and as a compressed (zip) file. A procedures contained in both formats are in PDF format. Use the below links to download the Procedure Manual in the venue of your choice.

⁶ Once again the Respondents are unaware that the routine procedures have to be criminal in nature and the operative word is criminal when claiming exemption under § 87(2)(e)(iv). The consistent failure to put the word criminal into the exemption stated emphasizes the failure of the Respondents to appreciate the Public Officers Law §87

⁷ The web address for this manual is <http://www.cincinnati-oh.gov/police/permits-auctions-references/police-department-procedure-manual/>

The Procedure Manual was last updated on 03/12/2015

- Procedure Manual as a PDF Portfolio
- Procedure Manual as a compressed zip file

10.000 PROCEDURE MANUAL AND OTHER BINDING WRITTEN DIRECTIVES Purpose: To provide an official guide outlining the way to do many of the routine operations which confront the Cincinnati Police Department. To provide efficient methods and high standards for procedures, rules, regulations, policies and directives recognized as official policy and applied on a department-wide basis.

This manual along with many others highlight the concept that manuals contain routine procedures for police officers. McGowan ¶15-18. The Respondents have the burden of proof to show that the exemptions apply. The manuals are generally not considered a secret as if so they would not be given out to thousands of officers. McGowan Affidavit ¶18

RESPONDENTS HAVE NOT MET THEIR BURDEN OF PROOF TO DENY ACCESS TO THE DEPARTMENT MANUAL BASED UPON PUBLIC OFFICERS LAW 87 (2)(F) THAT SUCH RELIEF WOULD ENDANGER THE LIFE AND SAFETY OF NASSAU COUNTY POLICE OFFICERS AND THE CITIZENS OF NASSAU COUNTY.

58. The Respondents rely upon officer Santiago's Affidavit to support the above exemption that the release of the manual and the sections articulated in ¶13 would be a danger to the public and Nassau County Police Officers. The factual argument can only be based upon Santiago's Affidavit and exhibits. The speculation, hearsay, conclusory statements and fear mongering contained in the Clarke Affirmation are statements made by counsel and are not evidence.

59. The only proof set forth by the Respondents is Santiago's conclusory Affidavit which makes a broad based claim in ¶12:

Disclosure of confidential NCPD investigative techniques, which have lead to numerous successful prosecutions, will have a devastating impact on NCPD law enforcement investigations by alerting prospective criminals to the course those

investigations will take. These potential criminals, armed with the information within the Manual will be in a position to tailor their behavior to evade detection, apprehension, and prosecution.”

This is pure speculation and has no merit whatsoever as Santiago cites no information that he could base this statement upon or which sections would “arm criminals” with the information to “evade detection, apprehension, and prosecution.” McGowan specifically addresses Santiago ¶12th and states in McGowan ¶26:

“This is pure speculation and has no merit whatsoever. Santiago cites no information as a source of this statement and he does not indicate which sections would “arm criminals” with the information to “evade detection, apprehension, and prosecution”. This entire paragraph is pure fiction with no support from the various professional police associations and their publications that set policy for good and accepted police practices.”

McGowan goes on to state in ¶25:

At lectures that I have given, panels I have sat on, conferences and lectures that I attended regarding the most current issues in police practices and procedures never once in the last 20 years has any concern come up with any dangers associated with the release of Department Manuals to the public.

60. The Articles and hearsay propaganda attached to the Clarke Affirmation are not admissible proof. Neither Clarke nor Santiago make a correlation between any possible dangers associated with release of the Department Manual or the sections cited in ¶13 and the Articles, webpages and twitter pages that he references.

61. It is absurd to say that the release of said manuals would endanger the officers or the public without some statistical evidence. Other departments have released their manuals to the public without any reported increase incidents against police or the public. McGowan¶24. The Santiago Affidavit makes no mention or reference to any of the materials that are attached to the Clarke Affirmation and therefore should be ignored by the Court

62. Hugh McGowan, a police procedures expert, ex ESU (SAT), the previous head of the hostage negotiation team for the City of New York, is familiar with the NYPD manual, and similar manuals across the country. He regularly lectures regarding police tactics along with the top police experts in the country and has stated that there is no fear within the police community that should their police manuals be accessible to the public it will create crime sprees, police shootings and executions or any other of the provocative allegations contained in the Respondents papers. McGowan ¶19-31. The Respondents put forth no evidentiary support for the statement in the Clarke Affirmation ¶54 that “in light of the current violence, hostility, and critical rhetoric directed at police officers locally and nationally” would be in anyway effected by the release of the NCOPD Department Manual . McGowan specifically disputes the statements contained in Clarke Affirmation ¶54 and Santiago ¶12 and states “ the allegations contained in 54 Clarke and Paragraph 12 of Santiago are pure fictional made from “whole cloth” without any factual or statistical basis to support them.” Additionally he states “the police in jurisdictions where the Department Manuals or patrol guides are available to the public are in no more danger than those jurisdictions where it is not publically available at this time. McGowan further states that are no publications, or lectures devoted to the dangers of releasing the Department Manuals to the public. However there is continuously a great deal of discussion and a nationwide concern that there is a need for greater transparency for police records and information to promote greater police community relations. McGowan ¶27-28

63. A large portion of the Clarke Affirmation is devoted to Swatting⁸ and his opinion about the dangers of releasing the Department Manual in relation to Swatting. This is a wholly made up argument by Clarke and neither Santiago nor the Articles attached to the Clarke

⁸ SWAT - Special Weapons and Tactics (team)

Affirmation support the position that if the manual is released the “Swatters(sp)” would be more effective. McGowan ¶31. According to McGowan “Swatting” is basically a crank phone call to police departments causing police to go a scene of an alleged call which draws a response from law enforcement, usually a swat team. The Articles and FBI bulletins and web pages attached to the Clarke Affirmation are simply fear mongering for the purpose of making a salacious argument that has no basis in fact. Santiago Affidavit ¶12 states with feigned Authority that “I have no doubt that permitting disclosure of the Manual through FOIL here would create a landscape allowing any member of the public to obtain the Manual, including members of the public who intend to engage in criminal activity.” This statement is pure speculation and the Respondents need to make some connection between the specific sections of the Department Manual and the contents thereof with the dangers claimed that would make them fall under the exemption.

64. None of the Articles or online materials, bulletins or any other exhibits submitted by the Respondents mention that the swatting, attacks on police officers or terror attacks abroad occurred because the Police Department Manuals for those jurisdictions were available to the public nor are any statistics cited support this erroneous contention. Clarke Affirmation ¶65 states “An individual with access to sections of the Manual covering emergency response and tactical methods is able to tailor the "swatting call" to generate the most vigorous response from the police department.” There is no allegation in the materials attached to the opposing papers that the aforementioned attacks or criminal incidents were related to access to departmental manuals in those jurisdictions. McGowan specifically refutes this as a risk at ¶31 and at ¶32 states:

In my opinion and based upon my experience there is no significant increase in danger to police or the public through more effective or increased

frequency of “swatting” or violence against police officers due to the public availability of a police Department Manual.

The Court requires some evidentiary submission without solely conclusory statements to support the Respondents claimed exemptions. See *Rebello v County* Supra, Justice Murphy states:

Here, the Respondents' principal evidentiary submission, the one-and-a half page affidavit supplied by Det. Sgt. Santiago, is conclusory and contains virtually no descriptive facts upon which the Court can meaningfully weigh the viability of the claimed exemption (*see, Newsday LLC v Nassau County Police Department, supra*, at 9; *Matter of Loevy & Loevy v New York City Police Department, supra*, at 954-955 *cf, Matter of Lesherv llyues, supra; Whitley v New York County District Attorney's Office, supra*).

Once again the Affidavit of Santiago does not meet the burden of proof required by this Court.

65. An attorney’s affirmation cannot satisfy the Respondents’ burden of proof. The only proof in this matter as to the reason for withholding records comes from the affidavit of Detective Sergeant Santiago. In *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455826 N.Y.S.2d 152,(2nd Dept. 2006) the Court stated:

The deposition testimony annexed to the motion papers did not address those issues, and thus failed to put forth sufficient evidentiary proof to support the attorneys affirmation (*cf. Olan v. Farrell Lines*, 64 N.Y.2d 1092, 1093, 489 N.Y.S.2d 884, 479 N.E.2d 229). An attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*see JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 384–385, 795 N.Y.S.2d 502, 828 N.E.2d 604; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Palo v. Principio*, 303 A.D.2d 478, 479, 756 N.Y.S.2d 623; *Hirsch v. Morgan Stanley & Co.*, 239 A.D.2d 466, 467, 657 N.Y.S.2d 448)

66. The Respondents have failed to submit any proof in any form that the release of a Department Manual in any jurisdiction anywhere was found to assist any criminal in any crime. As set forth Hugh McGowan's affidavit that there are no statistically significant incidents of Department Manuals being used by criminals to further criminal enterprise. McGowan ¶21

67. The last Federal Census taken for Police Departments was in 2008 and at that time it was noted that there were approximately 12,500 local police departments. ¶23 McGowan Ex.1 pg 4.⁹ The Census has the Nassau County Police Department ranked 12th largest in the total number of sworn police officers for local police agencies in the United States. The Clarke Affirmation contains numerous misstatements of fact and significantly notes in ¶68 that "The relatively small number of officers employed by the NCPD puts the police force at great risk to the concerted efforts of criminals operating in Nassau County." The premise of this argument is that the Nassau County Police Department is at greater risk than other police departments because of its relatively small size. In fact the opposite is actually true and the Nassau County Police Department is a "relatively" massive local police department. McGowan ¶23. Consequently, if the Respondents specious argument is taken to its logical conclusion then the NCPD is in actually less danger from the release of the Department Manual than almost all other jurisdictions.

68. The Clarke Affirmation in ¶11 states: "This proceeding arises from Petitioner's erroneous contention that Respondents are mandated to disclose the *entire* confidential Manual in response to Petitioner's FOIL request served on May 28, 2014." There is nothing to indicate the Manual is confidential manual, and once again Respondents make erroneous statements. The

⁹ The Petitioner asks the Court to take judicial notice of the Federal Census, a government created document taken off the Federal Census website at <http://www.bjs.gov/content/pub/pdf/cs1lea08.pdf>

idea that NCPD's manual is confidential is something that the Respondents simply made up. This was specifically addressed by the Court in *Daily News, L.P. v. New York City Office of Payroll Administration*, 9 AD3d 308, 781 NYS2d 3 (1st Dept 2003), appeal denied 3 NY3d 609, 786 NYS2d 812 (2004), holding that an attorney cannot simply make a claim that certain information is confidential. The Court in *Daily News, L.P. v. New York City Office of Payroll Administration, supra*, stated an "attorney's affirmation is insufficient to establish that the employees provided their ages or zip codes in confidence." Santiago doesn't ever support Clarke's claim that the entire manual is confidential, noting that in his opinion (with which we disagree) some portions are confidential, which means some portions are not.

69. As noted above there are many Department Manuals online and presumably many more available through FOIL. The Clarke Affirmation ¶50 alleges that due to the size of the NYPD it can have its Patrol Guide or Manual online as it has "a prowess akin to that of a small army, is uniquely capable of monitoring and handling the risks inherent with disclosure of their department's internal guidelines; a luxury not afforded to the NCPD". This contention again of the NCPD being small, while it is actually the 12th largest in the United States, is a gross misrepresentation and refuted by McGowan ¶25. It is however pertinent in expressing the general tenor that the Respondents will allege anything to avoid complying with the law.

70. Petitioners, without giving any countenance to this argument, requested that McGowan conduct a search for the police departments that had manuals available online relative to the size of the Nassau County Police Department. This survey was conducted due to the claim in the Clarke Affirmation ¶50 that the size of the police department was germane to said departments' "ability to handle the alleged risks inherent with disclosure of the manual."

71. McGowan's search revealed that there were manuals available online for 8 out of the 11 local police departments larger than NCPD¹⁰ as well as 7 manuals available online¹¹ out of the 11 next largest Police departments. 15 of the 23 largest Police Departments have their manuals are online. If this was a problem none of these department would be putting their officers at risk. McGowan ¶23-25 states:

23. The last published Federal Census (Ex. 1) notes, which corresponds with my general knowledge, that NCPD is the 12th largest local Police Department in the United States out of approximately 12,500 local departments. The top 23 largest police departments consisted of the 11 departments that were larger than the NCPD and the 11 Departments immediately smaller than the NCPD. Of the 11 larger departments larger than the NCPD 8 of them have their manuals accessible online¹² and of the Departments ranked 13-23 in size 7 of those departments' manuals were available online.¹³ If there was truly a danger to public having access to the Department Manuals, none of these departments of similar size would be putting their officers at risk by publishing their manuals online.
24. I have personally trained and certified officers from all 15 police departments referred to above as well as their commanders. I have spoken to them during training and they had no issues, complaints or concerns with regard to having their manuals available to the public.
25. At lectures that I have given, panels I have sat on, conferences and lectures that I attended regarding the most current issues in police practices and procedures never once in the last 20 years has any concern come up with any dangers associated with the release of Department Manuals to the public.

70. Generally as to the danger of releasing the Department Manuals Hugh McGowan¶ states:

¹⁰ NYPD, NY., LAPD, Ca., Houston, Tx., Washington DC., Dallas, Tx., Baltimore, Md., Las Vegas, NV. Chicago, Ill.

¹¹ Detroit, Mi., Boston, Ma., Milwaukee, Wi. , San Diego, Ca. , San Francisco, Ca. and Columbus, Ohio. Atlanta, PD

¹² NYPD, NY., LAPD, Ca., Houston, Tx., Washington DC., Dallas, Tx., Baltimore, Md., Las Vegas, NV. Chicago, Ill.

¹³ Detroit, Mi., Boston, Ma., Milwaukee, WI. , San Diego, Ca. , San Francisco, Ca. and Columbus, Ohio. Atlanta, PD

19. The release of the Department Manuals to the public nationwide over the last 20 years has not resulted in crime spree, successful gang attacks on police officers, reports that officers are more vulnerable to potentially deadly acts of hostility, or any of the other numerous claims in the Clarke Affirmation including that the release of the manuals puts officers at greater risk. I disagree with the claim that Officers' peace of mind could be affected by the release of the Department Manuals (Clarke Affirmation ¶68) and it is simply not supported by any literature, studies or statistics.
20. There are no publications, bulletins, periodicals or statistics indicating that jurisdictions with their manuals online or accessible to the public have officers that are in greater danger than any other jurisdiction where manuals are not publicly available. Nor is there any literature to substantiate that criminals are more successful and that they are committing more violence successfully against police officers if the manuals are available to the public.
21. There are no statistically significant incidents reported of Department Manuals being used by criminals to further criminal enterprise or evade criminal prosecution.

The Respondents Denial of the Entire Department Manual Amounts to an Impermissible Blanket Exemption

72. Officer Santiago's affidavit amounts to a generic "blanket exemption" which is impermissible to support a denial of all police records. In *Loevy & Loevy v. New York City Police Dept.*, 957 N.Y.S.2d 628 (Sup 2013) the Court held:

An agency that seeks to withhold documents, pursuant to one or another of the statutory exemptions, must make a particularized showing that each such document falls within that exemption. A conclusory contention that an entire category of documents is exempt will not suffice. *See Matter of Washington Post Co. v. New York State Ins. Dep't.*, 61 N.Y.2d 557, 567, 475 N.Y.S.2d 263, 463 N.E.2d 604 (1984); *Matter of Buffalo Broadcasting Co., Inc. v. New York State Dep't. of Correctional Servs.*, 155 A.D.2d 106, 110, 552 N.Y.S.2d 712 (3rd Dep't 1990). “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 an exemption Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld”. *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274–75, 653 N.Y.S.2d 54, 675 N.E.2d 808 (1996) (internal citations and quotations omitted).

73. In this matter the sole affidavit does not address or identify any sections other than the sections listed in ¶13. In *Windham v NYPD* 2013 WL 5636306, N.Y. Slip Op. 32418(U) (Trial Order) (N.Y.Sup. 2013), Judge Lobis held:

The New York Court of Appeals has held that “blanket exemptions for particular types of documents are inimical to FOIL's policy of open government.” *Gould*, 89 N.Y.2d at 275 (citing *Fink*, 47 N.Y.2d at 571). This burden requires identifying the types of documents, their general content, and the risk associated with that type of content. The Respondents have not identified the documents, content, or risks. They have not articulated a factual basis for the exemption.

74. The failure to provide the balance of the sections listed in the Table of Contents (other than those listed ¶13) by the Respondents herein fits squarely in the impermissible category of the “blanket exemption.”

75. Additionally the FOIL law requires the release of any information in the sections of the Department Manual not covered by an exemption. The Clarke Affirmation cites to advisory opinions and case law that hold for the proposition that if any section of the Department Manual does not fall under one of the articulated exemption in POL 87 then it must be disclosed. Clarke Affirmation ¶35

"It is emphasized that the introductory language of § 87(2) refers to the authority to withhold 'records or portions thereof that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld." See Committee on Open Government FOIL-AO-F12748.

76. The Respondents research supports giving Petitioner's access to those portions of the Department Manual that do not fall under either of the exemptions claimed. Clarke Affirmation ¶38

" it is likely that various aspects of the manual are reflective of 'routine criminal investigative techniques and procedures.' To that extent, I do not believe that §87(2)(e) could be cited as a basis for withholding. Nevertheless, other aspects of the manual might indicate non-routine criminal investigative techniques or procedures, and, to that extent, the manual could in my view be denied." See Committee on Open Government FOIL-AO-F3657

IN CAMERA INSPECTION

77. The Respondents have in the alternative to outright denying the Petitioners' request, asked the Court to conduct an in camera inspection of the Department Manual. The request for in camera inspection is so vague and only appears in one paragraph of the Respondents' Opposition. They request that the Court inspect the entire Department but have failed to give the Court any tools to determine which exemptions apply to which sections. It is respectfully submitted that a Court is not an expert in police routines, procedures and operations and nor is Santiago.

78. As to the above sections listed in ¶13 Respondents have failed to provide proof other than a conclusory affidavit that the Department Manual should be withheld or that an in camera inspection is required. The Respondents have additionally failed to provide the Court with information to do an in camera inspection of the above sections of the Department Manual.

79. Justice Murphy in her March 2014 decision *infra* stated *inter alia*:

The Court of Appeals has emphasized that "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capitol Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562,566 [1986]; see, *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462463 [2007]). Wholly "blanket"-type statements and/or "[c]onclusory assertions that certain records fall within a statutory exemption," are insufficient to sustain an agency's burden with respect to a FOIL exemption (*Matter of Dilworth v Westchester County Dept. of Correction*, 93 AD3d722,724 [2d Dept., 2012]; see, *Matter of Konigsberg v Coughlin*, 68 NY2d 245,250-251 [1986]; *Matter of Madera v Elmont Public Library*, 101 AD3d 726,727 [2d Dept 2012]).

See **Exhibit "B."**

80. The Respondents have charted their course and chosen not to give the Court the proper foundation to do an in camera inspection of the records. Had the Respondents complied with Public Officer's Law and issued proper denials and affidavits explaining why the different sections listed fall under the claimed exemptions. Then the Court would have the tools to properly evaluate the records in an in camera inspection. As the Court noted in *Windham v City of New York, supra*, the Respondents have the burden to support with evidentiary proof the reasons for withholding records. This burden requires identifying the types of documents, their general content, and the risk associated with releasing that type of content. *Windham v City of New York, supra*. The Respondents in this case had three opportunities to deny Petitioners' FOIL requests in a manner that complies with the Public Officer's Law. The Respondents' initial responses to Petitioners' FOIL requests, the responses to the Petitioner's FOIL appeal and then their response to the within Article 78 Petition. Each and every time they have failed to comply as required by law.

81. The Court of Appeals gives directions to the municipalities in these situations stating in *Gould v City of New York*:

The general philosophy underpinning the statute is full agency disclosure in order to “achieve maximum public access to government documents.” *Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 416, 639 N.Y.S.2d 990 (1995).

The Respondents are simply not adhering to this philosophy and will clearly do anything to avoid giving over any information regarding this incident.

ATTORNEY’S FEES

82. New York Jurisprudence, Second Edition, 92 N.Y. Jur. 2d Records and Recording § 74 Attorney's fees states the reasoning behind awarding attorney fees and litigation costs in Article 78 FOIL Proceedings:

The Freedom of Information Law (FOIL) provides that in an Article 78 proceeding to review an administrative determination denying access to a record, the court may assess, against the agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by a person in any case in which such person has substantially prevailed, when: (1) the agency had no reasonable basis for denying access; or (2) the agency failed to respond to the request or appeal within the statutory time.¹ This provision was added in recognition that persons seeking to force an agency to respond to a proper FOIL request must engage in costly litigation; the statute was enacted in order to create a clear deterrent to unreasonable delays and denial of access, and thereby encourage every unit of government to make a good-faith effort to comply with the requirements of FOIL

83. The Petitioners herein have put forth a herculean effort to obtain public information that should not have been withheld, caused in part because of the manner in which the Respondents opposed the Petition herein.

84. In this instance due to the unsubstantiated conclusory allegations by Officer Santiago and Clarke, Petitioners were required to spend an enormous amount of time replying to the Opposition herein and needed to hire an expert to challenge the unsubstantiated outrageous statements regarding the effect of the release of the Department Manual or any parts thereof to the public and/or police officers.

85. Recently *In the Matter of John JARONCZYK, v. MANGANO, etc.* 121 A.D.3d 995, (2nd Dept. 2014) the Court awarded legal fees to Petitioners when the County failed to provide police records in the form of Overtime records at the Sheriff's office. Police records of all types are considered to be of public interest. A copy of the decision *In the Matter of John JARONCZYK, v. MANGANO, etc.* 121 A.D.3d 995, (2nd Dept. 2014).

86. In the underlying decision *In the Matter of John JARONCZYK, v. MANGANO, etc* Index Number 2819/12 (Nas. Sup. Ct. 2012) Hon. Justice Sher stated:

Upon our review of the record, we cannot say that it was reasonable for Respondents to initially withhold the entirety of the records sought by petitioners and then release the overtime slips with the redaction of social security numbers only after petitioners retained and paid for counsel and filed an Article 78 proceeding. *See Matter of New York State Defenders Ass'n v. New York State Police, supra.*

87. In the present matter the NCPD has asserted only a very small portion of the Department Manual is subject to any exemption. Therefore Respondents have no reasonable basis to withhold access to 227 out of the 257 sections of the Department Manual. Additionally, the claims by the Respondents herein required Petitioners and their expert to go to great lengths to determine if any of their claims had a shred of factual support. As detailed herein, almost none of the Respondents claims have any evidentiary support and are simply speculation.

88. It has become clear from my research that many Petitioners give up on their FOIL requests against the NCPD because it is too difficult and onerous to proceed with a plenary action against such a powerful municipality. The Petitioners herein considered giving up some rights as to the FOIL information that they were duly entitled because of the enormity of the task that lay ahead in fighting the Respondents for fair access to the Department Manual.

89. The Respondents comments about any proposed confidentiality agreement for FOIL records is counter to the purpose of the Freedom of Information Law. The information should be available to everyone or no one. The Respondents' request for confidentiality in exchange for releasing records to the public shows how inapposite they treat the Freedom of Information Law. The Petitioners do not want anything that all members of the public are not entitled to.

90. The Petitioners herein not only had the skill to bring such an action but were willing to put in the effort and retain an expert to take on the Nassau County Police Department because of the importance of the issues that were involved.

91. The award of legal fees is crucial for counsel to be able to take on these types of proceedings.

92. The facts and legal issues in this case were made exceedingly more complex and required almost twice the effort by the continuous improper and inappropriate arguments by Respondents.

93. Respondents are choosing to withhold documents that should have been exchanged under FOIL and are subjecting the County to unnecessary legal fees. The goal of the Respondents is clearly to avoid public accountability and hide behind claimed exemptions rather

provide the requested information to the Petitioners. Petitioners should be awarded legal fees on this matter. See *Purcell v. Jefferson County District attorney* , 77 AD3d 1328, 909 NYS2d 238 (2010)

94. Police records are of substantial public interest and legal fees and costs are often awarded when Petitioners prevail in Article 78 proceedings against police departments. In *Castle House Development Corp. v City of New York Police Department*, Supreme Court, New York County, October 29, 2009 - -Request for records led to misleading responses, and the Court awarded petitioners more than \$8,000 "in full satisfaction of all claims that were or could have been raised in this action, including claims for costs, expenses and attorney fees."

95. In *New York State Defenders Assn. v. New York State Police*, 87 A.D.3d 193 (3rd Dept. 2011) the Court stated

Upon our review of this record, we cannot say that it was reasonable for respondents to issue a blanket denial of petitioner's document request. The argument that there was a reasonable basis to believe that the records were exempt from disclosure is belied by the virtually immediate release of the requested information upon commencement of this proceeding. Furthermore, our independent review of the records reveals that, at most, respondents could have reasonably believed that a small portion of the records were exempt. However, respondents have failed to articulate any persuasive reason why the records could not have been redacted and the portions that were not exempt from disclosure turned over (see Public Officers Law § 87 et seq.). Thus, we find that Supreme Court erred in determining that respondents had a reasonable basis for withholding the entirety of the records sought (compare *Matter of Miller v. New York State Dept. of Transp.*, 58 A.D.3d at 985, 871 N.Y.S.2d 489;

In *New York State Defenders Assn. v. New York State Police*, *supra* as here the Respondents have not alleged that more than a small portion of the manual falls under any exemption.

96. As to the general entitlement to fees The NY PUB. OFF. L. § 89(4)(c) states, in relevant part:

The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:... i. the agency had no reasonable basis for denying access; or ii. the agency failed to respond to a request or appeal within the statutory time.

97. In order to obtain attorneys' fees and costs under NY PUB. OFF L. § 89(4)(c) the Petitioners need to show that they have (1) "substantially prevailed", (2) "the record involved was, in fact, of clearly significant interest to the general public", and (3) "the agency lacked a reasonable basis in law for withholding the *25 record." *Beechwood Restorative Care Ctr. v. Signor*, 11 A.D3d 987,988 (4th Dept. 2004).

The Petitioners Should Substantially Prevail

98. If the Respondents are required only to turn over those sections of the Department Manual that were not listed in the Santiago Affidavit, Petitioners will substantially prevail and the Court would be within its discretion to it award attorneys' fees and costs.

99. In the event that the Respondents' eventually provide all or certain section portion of the Department Manual herein without an Order from this Court on a voluntary basis,the "voluntariness" of such disclosure is irrelevant to the issue of whether petitioner has substantially prevailed in this proceeding. Indeed to allow a res to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purposes of FOIL's fee-shifting provision. *see Powhida v. Albany*, 147 A.D.2d 236, 239 (3d Dept. 1989) (holding "... we first reject Respondents' contention that petitioner cannot be deemed to have substantially prevailed since the documents were released before any defense was asserted, Such a contention is irrational. It would allow a respondent to moot any proceeding and prevent an award of counsel fees by releasing the documents before asserting a defense."); *Matter of Mc Crory v Village of Mamaroneck*, 34 Misc. 3d 603, 629

(N.Y. Sup. Ct. 2011) (holding that attorneys' fees and costs may still be appropriate because the Village could have denied petitioner access to some portions under the Public Officers Law).

100. The rationale for the holdings in *Matter of New York State Defenders Assn, Powhida* and *Matter of McCrory* is that these decisions deter a municipality from initially denying FOIL requests, then after the requester retains and pays for an attorney, to pursue litigation, only then, does the municipality turn over the documents.

REPLY TO OBJECTIONS/AFFIRMATIVE DEFENSES

The Petitioners Reply to the Four affirmative defenses interposed by Respondents as Follows:

FIRST AFFIRMATIVE DEFENSE

The Nassau County Police Department Manual is exempt from FOIL pursuant to POL§§ 87(2)(e)(iv) and 87(2)(f) as its release would reveal non-routine criminal investigative techniques and procedures, and would endanger the life and safety of Nassau County Police Officers and the citizens of Nassau County.

REPLY TO FIRST AFFIRMATIVE DEFENSE

The Respondents have failed to meet their burden of proof as detailed above that the NCPD's Department Manual would reveal non-routine criminal investigative techniques and procedures, and would endanger the life and safety of Nassau County Police Officers and the citizens of Nassau County This response incorporates all arguments previously asserted herein.

SECOND AFFIRMATIVE DEFENSE

The Petitioners lack standing to compel the County to comply with Public Officer's Law §87(3)(c).

REPLY TO SECOND AFFIRMATIVE DEFENSE

Respondents failed in their burden of proof and in fact the legal arguments contained in their papers as well as all the cited case law and advisory opinions support the Petitioner standing to compel the County of Nassau to comply with Public Officer's Law§ 87(3)(c). All residents of the State of New York have the right to compel the County to comply with Public Officer's Law§ 87(3)(c) and the County's claim that the Petitioner's don't have standing to compel compliance with the law is representative of the County's continuous flagrant belief it is above the law.

THIRD AFFIRMATIVE DEFENSE

To the extent that there is a record that could be disclosed to Petitioner, but for the , fact that it contains information subject to exemptions under FOIL, the Respondents should be permitted to submit such document for the Court's *in camera* inspection.

REPLY TO THIRD AFFIRMATIVE DEFENSE

The Respondents have failed to provide any basis to conduct an in camera inspection of the entire Department Manual as the affidavit of FOIL officer Santiago is based upon pure speculation and conclusory opinions which are prohibited in denying FOIL requests.

The Respondents fails to submit an affidavit that addresses the entire Department Manual and although inadequate the only sections of the manuals addressed by the Respondent's FOIL Officer are as follows:

Emergencies and Planned Events (see POL 4500-4505);
Prisoner Handling (OPS 2210-2230);
Tactical Methods and Special Events (OPS 12100-12400).
Section POL 3305 addresses "Specialized Training."
Section POL 4101 addresses police operations regarding "Foreign Nationals and Undocumented Persons."
Section POL 4500 deals with Emergencies, including "Hazardous Material Incidents," and "Weapons of Mass Destruction Incidents."

Section OPS 6411 covers "Off-Duty and On-Duty Plain Clothes Police Encounters!"
Section OPS 12000, which pertains to "Tactical Methods and Special Events"
OPS 12106 "Emergency Situations." Subsections regarding "Rapid Deployment for Active Shooter"
OPS 12111 "Bomb and Bomb Threats"
OPS 12113 "Hazardous Material Incidents",
OPS 12114 "Weapons of Mass Destruction"
OPS 12118 "Nassau County Correctional Center Emergency" in section,
OPS 12118a Nassau County Correctional Center Access Routes and Posts,
OPS 12160 "Emergency Access System" in section, and
OPS 12160a "Emergency Access System Credential Samples"

As the Respondents have failed to address any other sections in the Department Manual, Respondents have failed to provide any basis for withholding any of the other sections, inadequate or otherwise, nor a need for in camera inspection of same.

As to the above sections Respondents mention, they have failed to provide proof other than a conclusory affidavit that the Department Manual should be withheld or that an in camera inspection is required. The Respondents have failed to provide the Court with the tools to do an in camera inspection of the above sections of the Department Manual.

FOURTH AFFIRMATIVE DEFENSE

Petitioner failed to exhaust all administrative remedies available before commencing this Article 78 proceeding.

REPLY TO FOURTH AFFIRMATIVE DEFENSE

The Respondents have failed to prove that Petitioner did not exhaust all administrative remedies available before commencing this Article 78 proceeding. The Respondents acknowledged that the County failed to respond timely to the Petitioners FOIL requests and appeals until after the within proceeding was commenced. See P 10 of the Clarke Affirmation. Respondents have admitted that they failed to timely respond to the FOIL response. If the agency does not respond timely to the FOIL request or the Appeal then by that constructive denial all administrative

remedies are exhausted and the matter is ripe for an Article 78 proceeding. Request made May 28, 2013, and appeal dated June 10, 2014.

§89(3)(a) states that:

“Each entity subject to the provisions of this Article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied...”

If requester is not given access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to Article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this Article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

Such appeal was made on June 10, 2014 and no response was forthcoming. Thus the Petitioner did exhaust all remedies. The belated denial dated July 19, 2014 was untimely and has no effect on the matter herein.

FIFTH AFFIRMATIVE DEFENSE

There is a substantial risk that disclosure of the information sought by Petitioner could endanger the lives of law enforcement personnel and impede future police operations.

REPLY TO FIFTH AFFIRMATIVE DEFENSE

The Respondents failed to offer any evidence other than mere speculation that the disclosure of the police Department Manual would endanger the lives of law enforcement personnel and impede future police operations. Officer Santiago's affidavit is inadequate to support the Respondents burden of proof to support this defense.

SIXTH AFFIRMATIVE DEFENSE

To the extent that there are records that could be disclosed to Petitioner, but for the fact that they contain information otherwise subject to exceptions under FOIL, Respondents should be permitted to provide such documents for the Court's *in camera* review.

REPLY TO SIXTH AFFIRMATIVE DEFENSE

The Respondents have simply not met their burden to require an in camera inspection of the entire Department Manual nor have they met their burden to require an in camera inspection of any section or part therein. Officer Santiago's affidavit only discusses the Table of contents and does not even indicate he ever read a single section cited in paragraph 13-16 of his Affidavit and offers no more explanation of why these sections fall into the exemption than any lay person could come up with from reading the same table of contents.

SEVENTH AFFIRMATIVE DEFENSE

Petitioner failed to meet its burden to reasonably describe and particularize the documents requested for the purposes of locating and determining whether the documents sought were subject to FOIL.

REPLY SEVENTH AFFIRMATIVE DEFENSE

Petitioner requested the Department Manual, the Respondents admit that they are in possession of said document Paragraph 26 of the Answer herein admits that NCPD has sole control over its own records and is in possession of the information to which Petitioners seek access. Clearly the Respondents have the manual know what it is and have failed to meet it burden as to this affirmative defense.

WHEREFORE, Petitioners respectfully request this Court issue a Judgment:


1. Ordering Respondents to provide Petitioners with access to Nassau County Police Department Manual as requested in Petitioners' FOIL request dated May 28, 2014;
2. Declaring that the Nassau County Police Department's decision to deny access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled;
3. Awarding costs and attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
4. Granting Petitioners such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 23, 2015


DAVID A. ROTH

COUNTY OF NASSAU) ss.:
)

On March 23, 2015 before me personally came David A. Roth, to me known and known to me to be the individual described herein, and who was duly sworn, and who executed the foregoing Affidavit, and who acknowledged the execution thereof.


NOTARY PUBLIC

BLANCA PONCE
NOTARY PUBLIC, State of New York
No. 01905904468
Qualified in Queens County
Commission Expires February 06, 2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ROTH & ROTH, LLP,

Index #:6590/2014

Petitioners,

-against-

THOMAS C. KRUMPTER ACTING COMMISSIONER
NASSAU COUNTY POLICE DEPARTMENT,
NASSAU COUNTY POLICE DEPARTMENT,
and COUNTY OF NASSAU,

REPLY AFFIDAVIT AND RESPONSE TO AFFIRMATIVE DEFENSES

The below signature attests to the following papers: Reply Affidavit/ Response to Affirmative Defenses and attached Exhibits

By: 
David A. Roth

ROTH & ROTH, LLP.
Petitioners
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020

At an IAS Part __ of the Supreme
Court of the State of New York,
County of Nassau, at the Courthouse
located at 100 Supreme Court Drive,
Mineola, New York on this ____ day
of _____, 2013

PRESENT:

Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Petitioners,

Index #: 13-011906

-against-

ORDER TO SHOW CAUSE

THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT,
EDWARD MANGANO and COUNTY OF NASSAU,

Respondents.

-----X
UPON the annexed Petition of David A. Roth, an attorney duly admitted to practice law
in the State of New York, on behalf of the Estate of Andrea Rebello, by administrator Nella
Rebello and Roth & Roth, LLP (collectively "Petitioners"), verified on the 27th day of
September, 2013, and upon all the papers and proceedings in this matter,

LET, Thomas Dale Commissioner Nassau County Police Department, Nassau County
Police Department, Edward Mangano and County Of Nassau ("Respondents") show cause at a
Term of this Court to be held at the Nassau County Supreme Courthouse thereof located at 100
Supreme Court Drive, Mineola New York, New York on the ____ day of _____, 2013, at
9:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard,

WHY an Order should not be entered herein:

1. Ordering Respondents to provide Petitioners with records responsive to requests in Petitioners' FOIL requests detailed herein;
2. Ordering Respondents to provide complete information without redactions of the recordings of all of Nassau County Police Department's communications over all police radio frequencies and channels, including the code lists, as well as all emails, texts and other electronic communications generated as a result of the incident herein by any of the Respondents or their employees;
3. Ordering Respondents to comply with Public Officers Law § 87 3(c) which requires each of its agencies to maintain a detailed list by subject matter of all records in their possession and to post same on its' websites; to provide said lists to Petitioners; if none exist, then an Order directing Respondents to create and post same;
4. Declaring that the Nassau County Police Department's decision to deny access to the requested records was arbitrary, capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled;
5. Awarding attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
6. Granting Petitioners such other and further relief as this Court may deem just and proper.

Sufficient reason appearing therefore, let _____ service of a copy of this order, together with the papers upon which it was granted, upon Thomas Dale Commissioner Nassau, County Police Department, Nassau County Police Department, Edward Mangano and County Of Nassau, on or before the _____ day of _____ 2013, be deemed good and sufficient service.

Dated: _____, 2013

Enter,

J.S.C.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Petitioners,

Index #:

-against-

VERIFIED PETITION

THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT,
EDWARD MANGANO and COUNTY OF NASSAU,

Respondents.

-----X

RECEIVED

SEP 30 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE

PRELIMINARY STATEMENT

1. This proceeding is brought under Article 78 of the New York Civil Practice Law and Rules ("CPLR") and seeks to vindicate the right of the public and of the Petitioners in both obtaining information that should be freely accessible to the public and to require the Respondents to comply with Public Officers Law § 87 by maintaining reasonably detailed subject matter lists of all records in their possession that are available under Article 6 of the Public Officers Law on all their websites.

2. The Petitioners herein are the Estate of Andrea Rebello, by Administrator Nella Rebello, and her attorneys. Andrea Rebello was shot and killed by a Nassau County Police officer in her home on May 17, 2013. The Petitioners have duly requested information about the facts and circumstances surrounding that shooting. There were allegations in the press that the police officer who did the shooting went into the house and did not wait for supervisors or hostage negotiators to get to the scene. After entering the house, without any shots being fired at

the Police Officer, the officer shot defenseless hostage, Andrea Rebello, in the head. Shortly thereafter, a newspaper article stated that there was an issue as to whether the Police Communications Operator gave proper instructions to police officers about the hostage situation at the house. After the article was published, the Police Communications Operators (PCO) Union (CSEA) brought suit against the County of Nassau for improperly cancelling the training of the PCOs and PCO Supervisors .

3. The Petitioners made requests for records relating to the shooting of Andrea Rebello that should have been available to the public. Before making the requests under the Freedom of Information Law (hereafter "FOIL") a search was made on the County's website for a subject matter list of all documents and records in possession of the County. There were no subject matter lists on the County's website, www.nassaucountyny.gov/FOIL/index.php. Additionally a search was made on the Nassau County Police Department's website for a subject matter list. There were no subject matter lists on the Nassau County Police Department's website, www.police.nassaucountyny.gov/index.htm. Byron Lassin, one of the attorneys for the Estate of Andrea Rebello, herein contacted the Nassau County Police legal department and spoke with the police officer assigned to assist with the transfer of documents pursuant to outstanding FOIL requests. The police officer he spoke with had not heard of the subject matter lists, did not know of their existence, nor knew that such lists were required. The subject matter lists are important to the public so that the public knows what records exist and so they can be request the records with particularity. The failure to comply with the Public Officers Law making such subject matter lists available violates specific sections of the Public Officers Law but also violates the spirit of the FOIL laws making the within Petition necessary.

4. In addition to the records requested in relation to the facts and circumstances surrounding the shooting, there were two other requests for information that were denied without particularity or specific justification. These two requests were for the Police Communications Operators training materials, and operating protocols and the Hostage/Barricade Incident protocols in effect on May 17, 2013. Neither record was provided to the Petitioners nor was the existence of such records confirmed or denied¹. If there were subject matter lists, these documents would properly be on such lists. There is a vital public interest in knowing about how the Nassau County Police Department (NCPD) responds to emergency calls as well as the way they respond to hostage/barricade incidents.

5. The Petitioners duly appealed the denials by the Respondents. The Nassau County Police Department and the County of Nassau claimed several FOIL exemptions in an attempt to justify withholding nearly all of the requested records from the public. These exemptions do not support the NCPD's near blanket denial of the requests. Indeed, the Court of Appeals in *Gould v. New York City Police Department*, 89 NY2d 267 (1996) and its progeny has held that such blanket exemptions are inimical to FOIL's policy of open government. The NCPD's refusal to provide almost all information requested is unfair and unreasonable. The Respondents' blanket and non-particularized denials are inconsistent with the intended spirit of the Freedom of Information Law. Every relevant precedent makes it clear that if a requested record has information that is subject to disclosure it must be disclosed unless there is an exemption. If an agency is to deny the information based upon an exemption it must state and particularize the exemption with specific justification as to why it is exempt from disclosure. This was simply not done in this matter.

¹ The County's denial dated August 20, 2013 states that they will provide additional documents but as of the date of this petition no additional documents have been provided.

EXHIBITS

6. The following are the exhibits attached to this Petition:
- A. June 4, 2013 preservation letter sent to nine different County agencies.
 - B. June 4, 2013 FOIL request sent to John Ciampoli.
 - C. June 7, 2013 FOIL request sent to the Nassau County Police Department.
 - D. June 7, 2013 FOIL request sent to the County of Nassau.
 - E. June 13, 2013 letter from Brian Libert, FOIL Officer.
 - F. June 14, 2013 FOIL request sent to Edward P. Mangano, Nassau County Executive; John Ciampoli, Nassau County Attorney; Thomas V. Dale, Nassau County Police Commissioner and Tamara Bloom, M.D. Chief Medical Examiner.
 - G. June 14, 2013 denial from Sergio Blanco, Counsel to the Office of the Nassau County Comptroller.
 - H. June 17, 2013 FOIL denial from the County Attorney's Office.
 - I. July 1, 2013 email from Detective Sergeant Israel Santiago Commanding Officer Legal Bureau, Nassau County Police Department.
 - J. July 1, 2013 FOIL Appeal sent to County of Nassau appealing the denial dated June 17, 2013 which denied Petitioners' June 14, 2013 FOIL request.
 - K. July 1, 2013 FOIL Appeal sent to County of Nassau, Comptroller's Office appealing the denial dated June 14, 2013 which denied the June 7, 2013 FOIL request.
 - L. July 1, 2013 FOIL Appeal sent to Nassau County Attorney appealing the denial dated June 13, 2013 which denied the June 4, 2013 FOIL request.
 - M. July 1, 2013 FOIL Appeal sent to Nassau County Attorney appealing the denial letter dated June 17, 2013 which denied the June 14, 2013 FOIL request.
 - N. July 3, 2013 Appeal denial from Brian M. Libert.
 - O. July 9th and 10th, 2013 FOIL request denials from Joanne L. Oweis, Attorney at the Nassau County Legal Bureau on behalf of the NCPD.
 - P. July 17, 2013 letter from the County, containing partial exchange of information.
 - Q. July 24, 2013 FOIL Appeal sent to Thomas V. Dale, Commissioner of the Nassau County Police Department.
 - R. July 26, 2013 FOIL request sent to the Nassau County Police Department.
 - S. August 12, 2013 FOIL denial from Thomas V. Dale.
 - T. August 13, 2013 FOIL Appeal sent to Nassau County Police Department.
 - U. August 20, 2013 partial denial.
 - V. Appendix C of the Department Manual.
 - W. Department Procedure No. OPS 4217 and the worksheet checklist.
 - X. Web pages and the subject matter lists for the MTA/NYCTA.
 - Y. Commissioner's Procedural Order, order no. 7-95 titled "Procedure Relating to Hostage/Barricade Incidents."
 - Z. Truro, Massachusetts Police Department's Hostage Situation Procedures

- AA. Tigard Oregon Hostage policy manual.
- BB. Tuscon Use of Force manual addressing Hostage situations.
- CC. Model Policy for Hostage/Barricaded Subject Incidents sponsored by a Federal Grant and published by the IACP National Law Enforcement Policy Center.

RELIEF SOUGHT

7. Petitioners bring this proceeding pursuant to Article 78 of the CPLR requesting that the Court direct the NCPD and the County of Nassau to provide Petitioners with information responsive to their FOIL requests dated June 4, 2013, June 7, 2013, June 14, 2013, and July 26, 2013 pertaining to the shooting death of Andrea Rebello.

8. Below is a list of FOIL outstanding requests that Petitioners are seeking that were improperly denied by the Respondents:

- i. The June 4th FOIL request:

[t]he unredacted sprint reports for the incident

- ii. The June 7, 2013 FOIL request:

[t]he unredacted sprint reports for the incident,

All audio communications for all channels and all frequencies, both public and private, the original digital files/recordings, analog recordings, written transcripts of any recordings, between police officers, Command, and EMS workers as well as ESB (Emergency Service Bureau), BSO (Bureau Special Operations and Hostage Negotiation Unit), and Nikolas Budimlic, complete and without redactions which were recorded during any active police investigation of the May 17, 2013 shooting. This includes but is not limited to:

Sprint tapes
Sprint reports
All incoming and outgoing police radio communications
Command communications between all officers
Dispatch recordings
Police radio runs
Radio to radio communications

EMS transmissions
ESB transmissions
BSO transmissions

Furthermore, any and all reports, including but not limited to police reports, crime victim reports, aided reports and all other records and documents.

iii. The June 14, 2013 FOIL request:

All sprint reports for the incident including all channels.

All of the complete audio recordings, without redactions, for all channels, regarding this incident, all communications which were recorded of Police Department or County employees including officers, supervisors, Brass, Command, EMT, BSO, or any agents and/or employees of the County not identified herein, and any other such communications including the EMS calls with regard to this incident.

All photos and video of the crime scene, including those depicting Andrea Rebello and Dalton Smith.

All police reports, Aided reports, Unusual Incident/Occurrence reports, as well as any other reports that are completed at this time by the Nassau County Police Department or any other County department and/or agency regarding this incident.

Any and all photographs relating to the shooting deaths of Andrea Rebello and Dalton Smith, digital images and/or video taken by the Medical Examiner's office regarding this incident including but not limited to the autopsies of Andrea Rebello, Dalton Smith, as well as the crime scene.

The identity of the Police Department personnel and/or drivers that correspond to the radio motor patrol (RMP) car numbers/call signs that are on the audio recordings referred to above in paragraph 2, including but not limited to 101, 102, 104, 105, 107, 108., 110, 141, 144, 145, 306, 324, 344, 2351, 2361, BSO as well as any other of the police RMP car numbers/call signs for officers that were at the scene.

Information regarding the identity of the Police officer who shot and killed Andrea Rebello.

Information regarding the identity of the person who held Andrea Rebello hostage.

Information as to whether or not Commissioner's Procedural Order, order no. 7-95 titled "Procedure Relating To Hostage/Barricade Incidents" was in effect at the time of the incident. Additionally if the Commissioner's Procedural Order was changed, updated, or modified provide the pertinent orders or guidelines that were in effect on May 17, 2013 relating to Hostage/Barricade incidents. If there were no procedures in place then that information as well.

iv. The July 26, 2013 FOIL request:

All Nassau County 911 operator, Police Communications Operators (PCO) and PCO Supervisors training manuals, pamphlets, training materials, lesson plans and other manuals that contain codes and instructions that are relied upon in the performance of the PCO and PCOS job duties in effect for the years 2003 through 2013.

To the extent that the previous FOIL requests did not pertain to all of the following, we request the entire Investigative file from Homicide Squad regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

To the extent that the previous FOIL requests did not pertain to all of the following, we request the entire Investigative file from BSO regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

To the extent that the previous FOIL requests did not pertain to all of the following, we request the entire Investigative file from IAB regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

The entire list of records created by the Homicide Squad, BSO, IAB and any other department, section, squad or division of the Nassau County Police Department regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

The subject matter list for all records kept by the Police Department that are subject to FOIL pursuant to Public Officer's law.

9. Petitioners are requesting that Respondents comply with Public Officers Law §87 3(c) which requires each agency to maintain a detailed list by subject matter of all records in

possession of each agency and to post same on its' websites; to provide said lists to Petitioners; if none exist, then an Order directing Respondents to create and post same.

10. Petitioners also request that the Court award costs and attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding if the Petition is resolved in the Petitioners' favor.

PARTIES

11. Petitioners are the Estate of Andrea Rebello by her administrator Nella Rebello, and her attorneys Roth & Roth LLP.

12. Respondent Nassau County Police Department is a law-enforcement agency administered under New York Administrative Code, Title 14. The NCPD is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

13. Respondent Thomas Dale is a public officer who is named in his official capacity as Commissioner of the NCPD.

14. County of Nassau is a government agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

15. Respondent Edward Mangano is a public officer who is named in his official capacity as the Executive of the County of Nassau.

JURISDICTION

16. This Court has jurisdiction under Section 7801 *et seq.* of the CPLR to review

administrative decisions made by the NCPD and the County of Nassau under C.P.L.R. § 7803(1), a mandamus proceeding properly lies when a public administrative agency has failed to perform a duty which is in its sole discretion.

17. The NCPD has sole control over its own records and specifically the information which Petitioners seek. This action is being brought by the Petitioners within four months of exhausting their administrative remedies.

VENUE

18. Venue lies in Nassau County pursuant to CPLR §§ 506(b) and 7804(b) because this proceeding is brought within the judicial district where the Respondents made the determinations complained of and where the principal office of the NCPD, Commissioner Dale, the County of Nassau and the County Executive are maintained.

STATEMENT OF FACTS

19. The facts herein are based upon interviews with witnesses, news reports and limited information provided by the Nassau County Police Department. On May 17, 2013 between 2 a.m. and 3 a.m. Dalton Smith entered the home of Andrea and Jessica Rebello located at 213 California Avenue, Uniondale, New York and held the occupants Jessica Rebello, Andrea Rebello, John Kourtessis and Shannon, hostage. Smith directed them to gather valuables from around the house. Smith then permitted Shannon to leave the house to go to an ATM to bring back money. Upon leaving, Shannon called 911 and informed the Police that her friends were in the house and that there was a gunman holding them hostage. The recording of that conversation is in the sole possession of the NCPD. At some point the police came to the scene. After police

arrived, Jessica Rebello was allowed to leave the house as well. After Jessica left the house, a Nassau County Police officer, reported to be Nikolas Budimlic, entered the house alone, caused a confrontation with Smith and then shot eight (8) bullets at Andrea Rebello and Dalton Smith, killing both of them. No shots were ever fired by Dalton Smith.

20. Subsequently, Jessica, John and Shannon were interviewed by NCPD officers. At no time was Jessica or her family informed of the name of the shooter. No information was released to Petitioners about the facts and circumstances surrounding the shooting, nor was the family given any information about the event in which a Nassau County Police Officer shot and killed the unarmed and innocent Andrea Rebello. Jessica Rebello was not given a copy of her own statement that was taken by the NCPD.

21. Numerous statements were subscribed to the Respondents either officially or unofficially in news stories. One of the reports was that the PCOs, also known as 911 operators, did not give adequate information to the officers at the scene nor did they properly perform their job functions. Subsequently, the union on behalf of the 911 operators, sued the County of Nassau and the Nassau County Police Department for failing to train the operators and for making them sign false affidavits to submit to the Department of Homeland Security².

22. In an effort to understand what happened that night, Petitioners requested information relating to the facts and circumstances surrounding the shooting of Andrea Rebello pursuant to the FOIL. The requests and the denials are included in the exhibits herein. Requests were also made for PCOs training information and manuals, as well as any and all protocols and procedures applicable to Hostage/Barricade incidents in effect on the night of the shooting.

² Civil Service Employees Association, Inc., A.F.S.C.M.E., LOCAL 1000, A.F.L.-C.I.O., by its Local 830 v. The County Of Nassau, Index Number 13-007245.

23. Prior to serving the FOIL requests on the Respondents, the attorneys herein searched on the NCPD and County websites for subject matter lists and could not find them. Co-counsel, Byron Lassin, contacted the NCPD to inquire about the existence of subject matter lists. The police officer he spoke to in the legal department had never heard of a subject matter list or the law requiring its existence.

24. Petitioners also served preservation letters upon the Respondents and every department or agency of the County which thought to have relevant records on the within incident.

25. The reason behind a FOIL request is generally irrelevant to the production of information. In this instance, it is important to understand the motivation behind the Respondents in *withholding* this information. The Respondents were and are aware of a potential lawsuit regarding the actions of their police officers, police supervisors and/or agents and employees for the shooting death of Andrea Rebello. Additionally, they were and are aware of the claims of Jessica Rebello for improper police conduct relating to the way they treated her after she was released as a hostage from the house.

PROCEDURAL HISTORY

26. On June 4, 2013, Petitioners sent a preservation letter to nine (9) different departments/officials/agencies of the County of Nassau and its police department along with a cover letter to John Ciampoli, County Attorney for the County of Nassau requesting information as follows:

“[t]he unredacted sprint reports for the incident, as well as the twenty-five (25) minute 911 call of Shannon. If the 911 call is stored digitally, then we would like the audio file. Additionally, please inform us if Commissioner's Procedural Order, order no. 7-95 titled "Procedure

Relating To Hostage/Barricade Incidents" was in effect at the time of the incident. If the Commissioner's Procedural Order was changed updated, modified or replaced please forward us the orders or guidelines that were in effect on May 17, 2013 relating to hostage/barricade incidents."

Attached hereto as **Exhibit "A"** is a copy of the June 4, 2013 preservation letter and **Exhibit "B"** is the letter to John Ciampoli requesting information that was eventually determined by the Respondents to be a request for information under FOIL.

27. On June 7, 2013, Petitioners made a FOIL request to the Nassau County Police Department, via certified mail requesting the following items³:

1. All audio communications for all channels and all frequencies, both public and private, the original digital files/recordings, analog recordings, written transcripts of any recordings, between police officers, Command, and EMS workers as well as ESB (Emergency Service Bureau) and BSO (Bureau Special Operations and Hostage Negotiation Unit), Nikolas Budimlic, which are recorded during any active police investigation of the May 17, 2013 shooting. This includes but is not limited to:
 - i. 911 call tapes
 - ii. Sprint tapes
 - iii. Sprint reports
 - iv. All incoming and outgoing police radio communications
 - v. Command communications between all officers
 - vi. Dispatch recordings
 - vii. Police radio runs
 - viii. Radio to radio communications
 - ix. EMS transmissions
 - x. ESB transmissions
 - xi. BSO transmissions
2. All dash board cameras or video from cameras attached or mounted on police vehicles for all vehicles that were on the road between 2:30am and 6am. This request encompasses but not limited to every single police vehicle, Nassau County vehicle or any of their agents, contractors or employees that responded to the scene on May 17, 2013.

³ Petitioners had initially submitted an identical FOIL request to the Nassau County Police Department via their online submission form on June 6, 2013. Because the online submission site did not provide a confirmation, Petitioners sent the identical FOIL request via certified mail the next day.

3. Furthermore, any and all reports, including but not limited to police reports, crime victim reports, aided reports and all other records and documents.

Attached hereto as **Exhibit "C"**, is a copy of the June 7, 2013 FOIL request sent to the Nassau County Police Department.

28. An identical letter requesting the same items was also sent on June 7, 2013 via certified mail to County of Nassau, Nassau County Comptroller's Office. Attached hereto as **Exhibit "D"** is a copy of the June 7, 2013 FOIL request sent to the County of Nassau, Nassau County Comptroller's Office.

29. On June 13, 2013, Brian M. Libert, Deputy County Attorney and FOIL officer of the County of Nassau, denied Petitioners' June 7, 2013 FOIL request. The denial stated that "this office is not the repository of the records that you are seeking" and that he would be sending Petitioners request to the Nassau County Police Department. Attached hereto as **Exhibit "E"**, is a copy of the June 13, 2013 letter from Brian Libert.

30. On June 14, 2013, Petitioners sent a request for information to Edward P. Mangano, Nassau County Executive; John Ciampoli, Nassau County Attorney; Thomas V. Dale, Nassau County Police Commissioner, Tamara Bloom, M.D. Chief Medical Examiner⁴; requesting the following:

1. All sprint reports for the incident including all channels.
2. All of the audio recordings, for all channels, regarding this incident, including but not limited to all of the 911 calls, all communications which were recorded of Police Department or County employees including officers, supervisors, Brass, Command, EMT, BSO, or any agents and/or employees of the County not identified herein, and any other such communications including the EMS calls with regard to this incident. These are all in digital format

⁴ Due to the fact that there were no published subject matter lists, Petitioners were forced to FOIL all County agencies.

and should have already been preserved. As such it should take minimal effort to download to a disc or thumb drive.

3. All recordings from the dashboard cams of all police cars at the scene or any other video recording devices that were at the scene including recordings from dashboard cameras of police cars that simply drove past the scene. These are all in digital format and should have already been preserved. As such it should take minimal effort to download to a disc or thumb drive.

4. All photos and video of the crime scene, including those depicting Andrea Rebello and Dalton Smith. These are all in digital format and should have already been preserved. As such it should take minimal effort to download to a disc or thumb drive.

5. All police reports, Aided reports, Unusual Incident/Occurrence reports, as well as any other reports that are completed at this time by the Nassau County Police Department or any other County department and/or agency regarding this incident.

6. Our expert has informed us that at this point most of the autopsy examination and report is complete. The portions of the autopsy examination and report that should be currently available would be useful to help explain to the family what happened. Therefore, please provide us with the complete Medical Examiner's file regarding both Andrea Rebello and Dalton Smith, that currently exist, including the first dictation of the autopsy and all autopsy reports in whatever stage that they currently exist and x-rays reports, x-ray films of digital images, all testing reports, films and results. To the extent any reports are presently finalized we would like those as well. We also want the unredacted written notes, audio recording, in digital or tape format taken during the autopsy; and all scene visit reports. To the extent that there are slides, toxicology reports or other tests that are presently waiting results, we understand and they can be sent to us at a later date. As you know Nassau County Law Section 677(3)(b) provides that we are entitled to the Medical Examiner's file for Dalton Smith.

7. Any and all photographs relating to the shooting deaths of Andrea Rebello and Dalton Smith, digital images and/or video taken by the Medical Examiner's, office regarding this incident including but not limited to the autopsies of Andrea Rebello, Dalton Smith, as well as the crime scene. These are all in digital format and should have already been preserved. As such it should take minimal effort to download to a disc of thumb drive.

8. Additionally, please identify the Police Department personnel and/or

drivers that correspond to the radio motor patrol (RMP) ear numbers/call signs that are on the audio recordings referred to above in paragraph 2, including but not limited to 101, 102, 104, 105, 107, 108., 110, 141, 144, 145, 306, 324, 344, 2351, 2361, BSO as well as any other of the police RMP car numbers/call signs for officers that were at the scene.

9. Also please confirm the identity of the shooter, believed to be Nikolas Budilimic according to news reports. Please confirm the identity of Dalton Smith, as the correct name of the intruder in this incident who was shot and killed as well.

10. It would also be helpful to inform us if Commissioner's Procedural Order, order no. 7-95 titled "Procedure Relating To Hostage/Barricade Incidents" was in effect at the time of the incident. Additionally if the Commissioner's Procedural Order was changed, updated, or modified provide the pertinent orders or guidelines that were in effect on May 17, 2013 relating to Hostage/Barricade incidents. This will also help the family to comprehend what happened in this tragic event.

11. Lastly the police took Jessica Rebello and Andrea Rebello's iphones and laptops. The family is requesting their return. At this time you should be ready to turn over these items. The family wants these items back as well. as any other personal belongings of the Rebellos.

The June 14, 2013 letter attached hereto as **Exhibit "F"**.

31. Sergio A. Blanco, Counsel to the Office of the Nassau County Comptroller on the Nassau Comptroller letterhead issued a denial dated June 14, 2013. The denial stated that the request made to the office of the Comptroller dated June 7, 2013 was being denied on the basis that such information is not maintained by the Office of the Nassau County Comptroller. The denial dated June 14, 2013 is attached hereto as **Exhibit "G"**.

32. On June 17, 2013 the County Attorney's office denied Peitioners FOIL requests dated June 4, 2013 and June 14, 2013. This denial signed by Gerald R. Podlesak, Deputy County Attorney, on the letterhead of the County of Nassau Office of the County Attorney, stated that Petitioners' request has been forwarded to the appropriate agencies which is the repository of

records that you were seeking and that these agencies are reviewing your request which are subject to FOIL and will be responding once the review is complete. The denial dated June 17, 2013 is attached hereto as **Exhibit "H"**.

33. On July 1, 2013, Detective Sergeant Israel Santiago Commanding Officer Legal Bureau, Nassau County Police Department, sent Byron Lassin, co-counsel for Petitioners, an email where he acknowledged receipt of two (2) FOIL requests from Roth & Roth dated June 7, 2013 and June 14, 2013. The email further states that the June 14, 2013 letter is being considered an amendment to the June 7, 2013 request, that these requests are being reviewed and processed pursuant to Public Officers Law 87-89, and that his office will be contacting Mr. Lassin concerning the request. The email dated July 1, 2013 is attached hereto as **Exhibit "I"**.

34. Thereafter, Mr. Lassin was contacted by Christine McDonald from the Legal Bureau of the police department, who stated that she was the officer assigned to coordinate information to be turned over to Petitioners in response to their FOIL requests.

35. Thereafter, there were numerous telephone conversations between Byron Lassin and Christine McDonald as to the timing and extent of the information that would be turned over to Petitioners, pursuant to the FOIL requests.

36. Petitioners sent a FOIL Appeal dated July 1, 2013 to County of Nassau appealing the denial dated June 17, 2013 which denied Petitioners' June 14, 2013 FOIL request. The July 1, 2013 Appeal is attached hereto as **Exhibit "J"**.

37. Petitioners sent a FOIL Appeal dated July 1, 2013 to County of Nassau, Comptroller's Office appealing the denial dated June 14, 2013 which denied the June 7, 2013 FOIL request. The July 1, 2013 Appeal is attached hereto as **Exhibit "K"**.

38. Petitioners sent a FOIL Appeal dated July 1, 2013 to Nassau County Attorney appealing the denial dated June 13, 2013 which denied the June 4, 2013 FOIL request. The July 1, 2013 Appeal is attached hereto as **Exhibit “L”**.

39. Petitioners sent a FOIL Appeal dated July 1, 2013 to Nassau County Attorney appealing the denial letter dated June 17, 2013 which denied the June 14, 2013 FOIL request. The July 1, 2013 Appeal is attached hereto as **Exhibit “M”**.

40. On July 3, 2013, Brian M. Libert, on the stationary of the County of Nassau, Office of the County Attorney, issued a denial of Appeal of the four (4) FOIL Appeals dated July 1, 2013 for records requested from John Ciampoli, County Attorney, Nassau County Comptroller's Office, and Edward P. Mangano, Nassau County Executive. He further stated that to the extent records were available they will be located at the Nassau County Police Department and that our request has been forwarded to that agency who will respond pursuant to FOIL. Attached hereto as **Exhibit “N”** is the denial dated July 3, 2013. The denial states that “this constitutes the County’s final determination of your Appeals” and attached the prior FOIL requests and Appeals. This denial constituted an exhaustion of Petitioners’ administrative remedies for the requests covered by the July 1, 2013 appeals.

41. On July 10, 2013, Joanne L. Oweis, Attorney at the Nassau County Legal Bureau on behalf of the NCPD, denied Petitioners’ FOIL requests dated June 7, 2013 and the amended FOIL request of June 14, 2013⁵. The denials dated July 9th and July 10th 2013 are attached hereto as **Exhibit “M”**

⁵ In a prior denial the day before dated July 9, 2013, Joanne L. Oweis denied the June 4, 2013 and June 14th FOIL request. The July 10, 2013 denial corrected the mistake and denied the June 7, 2013 FOIL request as amended by the June 14, 2013 letter.

42. On July 17, 2013, the County provided the following limited redacted information in response to the June 7, 2013 FOIL⁶:

1. CD entitled 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21;
2. CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05 - 1741:37;
3. Event Search 5/17/13 2:28:33;
4. NCPD Background Event Chronology Event Number 130248000;
5. NCPD Unit Information;
6. Event Search 5/17/13 3:44:54;
7. NCPD Background Event Chronology Event Number 130248045.

The July 17 2013 letter is attached hereto as **Exhibit "P"**.

43. On July 24, 2013 Petitioners sent two FOIL Appeals to Thomas V. Dale, Commissioner of the Nassau County Police Department. The first letter appealed the constructive denial of our June 4, 2013 FOIL request and the second appealed the July 10, 2013 denial of our June 7, 2013 and June 14, 2013 FOIL requests. The July 24, 2013, appeals are attached hereto as **Exhibit "Q"**.

44. On July 26, 2013 Petitioners made another FOIL request to the Nassau County Police Department. This FOIL request was made in part to insure that the Petitioners had requested all of the information that was available under the Freedom of Information Law relating to the shooting death of Andrea Rebello. This FOIL request was made in part because there was no subject matter list to select records from and it was possible that phraseology or description that was used in Petitioners' prior requests might be denied on a technicality. The July 26, 2013 FOIL requested the following information:

- 1) All Nassau County 911 operator, Police Communications Operators (PCO) and PCO Supervisors training manuals, pamphlets, training materials, lesson plans and other manuals that contain codes and

⁶ The July 17, 2013 partial exchange of information is incomplete and improperly redacted.

instructions that are relied upon in the performance of the PCO and PCOS job duties in effect for the years 2003 through 2013.

2) To the extent that the previous FOIL requests did not pertain to all of the following, we request the entire Investigative file from Homicide Squad regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

3) To the extent that the previous FOIL requests did not pertain to all of the following, we request the entire Investigative file from BSO regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

4) To the extent that the previous FOIL requests did not pertain to all of the following, we request the entire Investigative file from IAB regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

5) The entire list of records created by the Homicide Squad, BSO, IAB and any other department, section, squad or division of the Nassau County Police Department regarding the shooting incident of May 17, 2013 at 213 California Uniondale.

6) The subject matter list for all records kept by the Police Department that are subject to FOIL pursuant to public officers law.

The July 26, 2013, FOIL request is attached hereto as **Exhibit "R"**.

45. A denial dated August 12, 2013 from Thomas V. Dale, Commissioner of Police, denied our two Appeals dated July 24, 2013. Commissioner Dale stated that after a review of the requests and our Appeal, he had determined that our request for these records was properly denied. The August 12, 2013 denial is attached hereto as **Exhibit "S"**. This denial constituted an exhaustion of Petitioners' administrative remedies for these FOIL requests

46. On August 13, 2013 Petitioners appealed the NCPD's constructive denial of the July 26, 2013 FOIL request which had not been responded to as of the date of the Appeal. The Appeal was sent to Thomas V. Dale, Commissioner of Police, requesting he reconsider the

constructive denial to Petitioners July 26, 2013 FOIL Request. The August 13, 2013 Appeal is attached hereto as **Exhibit “T”**.

47. The Nassau County Police Department issued a partial denial on August 20, 2013, of Petitioners’ Appeal dated August 13, 2013. The Thomas Dale denied almost the entire Appeal, but did attach several pages of information which were incomplete and non-responsive. The August 20, 2013 denial stated in pertinent part that attached were “Appendix C of the Department Manual with additional materials to follow⁷” and a copy of “Department Procedure No. OPS 4217 and a sample of the checklist worksheet utilized by our Legal Bureau.” Neither of which is responsive to our July 26, 2013 FOIL request. The August 20, 2013 denial is attached hereto as **Exhibit “U”**.

CAUSE OF ACTION: ARTICLE 78 REVIEW
OF WRONGFUL DENIAL OF FOIL REQUEST

48. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 47 as if fully set forth herein.

49. Article 78 is the appropriate method of review of agency determinations concerning FOIL requests as well as to require agencies to comply with Public Officers law section 87.

50. Petitioners have a clear right under Public Officers Law § 84 *et seq.* to the records requested.

51. Petitioners have a clear right under the Public Officers Law § 87 3 (c) to require the Respondents to create and put subject matter lists on their website for the names of records they maintain whether or not they are the available to the public via FOIL.

52. Respondents have not produced the records sought by Petitioners, have provided

⁷ To date, no additional materials have been provided.

improperly redacted information and have failed to properly invoke exemptions under FOIL.

53. Respondents did not meet their burden to provide specific and particularized justification for withholding the requested records from disclosure under FOIL nor for the redactions made to records that were provided.

54. Petitioners have exhausted their administrative remedies and have no other remedy at law.

LEGAL ARGUMENT

A. Police Records

55. The Respondents have improperly refused to comply with Petitioners' numerous FOIL requests.

56. As will be detailed further in this Petition, the Respondents' failure to maintain subject matter lists upon their websites required the Petitioners to serve multiple FOIL requests for similar information to the various agencies and departments of the County of Nassau including the Police Department. It is unclear which departments and which agencies of the County have which records because there are no subject matter lists. The Respondents have alleged all the documents (other than the autopsy records) are maintained by the Police Department.

57. The Nassau County Police Department issued a denial of the Appeals for all of the aforementioned FOIL requests in denials dated August 12 and August 20, 2013. See **Exhibits "S" and "U."** The language contained in the two denials is similar and the August 20, 2013 denial reads in part as follows:

As you are fully aware, there is an open investigation by the Department with respect to the May 17, 2013 incident. Accordingly, the denial of your request was appropriate as the disclosure of the certain records sought by your request would interfere with the Department's active and ongoing investigation of this matter. *See* New York State Public Officers Law ("POL") §87(2)(e)(i) (stating that access to certain records may be denied if such records are "compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations ... "). In addition, denial of your request was appropriate as the disclosure of such records would reveal certain investigative techniques or procedures. *See* POL §87(2)(e)(iv). Moreover, pursuant to POL § 87(2)(g), denial of the Requests was proper as they sought certain inter and/or intra agencies materials. Accordingly, your request seeking, *inter alia*, "investigative" files or the contents thereof was properly denied.

As for your request seeking "[a]ll Nassau County 911 operator, Police Communications Operators (PCO) and PCO Supervisor training manuals, pamphlet, training materials, lesson plans and other manuals ... for the years 2003 through 2013", the Department will provide any such materials that do not involve the disclosure of tactical operations. As such, enclosed please find Appendix C of the Department Manual with additional materials to follow. Moreover, with respect for your request seeking "[t]he subject matter list for all records ... that are subject to FOIL ... ", enclosed please find a copy of Department Procedure No. OPS 4217 and a sample of the checklist worksheet utilized by our Legal Bureau.

58. The Respondents are entitled to withhold certain information under FOIL exemptions of § 87(2), of the Public Officers Law, provided they do so with particularity and specific justification for each record denied. The Respondents have failed to state with any particularity or specific justification the reasons for their denials. They Respondents simply quote statutory language which fails under the relevant case law to justify the withholding of records subject to FOIL. Therefore, the Petitioners herein are entitled to all the records. The Respondents' blanket and improper denials have made it so Petitioners cannot guess or parse out which possible exemptions go to which record.

59. The Respondents are familiar with the Advisory Committee for Open Government and they cite to same as authoritative in their August 12, 2013 denial attached

hereto as **Exhibit “S”**. There are hundreds and hundreds of opinions and cases listed on the website for the Committee on Open Government addressing FOIL issues. The benchmark case regarding FOIL issues as they relate to police records is the Court of Appeals case *Gould v City of New York*, 89 NY2d 267 (1996)].

60. FOIL opinion FOIL-AO-17079 dated March 27, 2008 contains the oft cited language regarding providing police records under the Freedom of Information Law as follows:

The Court of Appeals, the state’s highest court, reiterated its general view of the intent of the Freedom of Information Law in *Gould v. New York City Police Department* [89 NY2d 267 (1996)], stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*id.*, 275).

Just as significant, the Court in *Gould* repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, a police department contended that certain reports, so-called “complaint follow up reports” that are similar in nature to incident reports, could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

61. The denials from the Respondents fail to comport with almost every element of the applicable case law. Significantly, the court in *Gould* stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government". The denials by the Respondents amount to nothing more than blanket denials reiterating the language contained in the statute with no particularized or specific justification for withholding the information. The Court in *Gould* also held:

...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

The Court in *Gould* also held:

To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]).

62. The Respondents have failed to meet their burden to withhold the information requested because they failed to state which exemption goes with which record requested. Additionally, the Respondents attempt to justify their denials, stating: "As you are fully aware, there is an open investigation by the Department with respect to the May 17, 2013 incident." We are, in fact, not "fully aware" of any investigation into the shooting death of Andrea Rebello. To our knowledge there is no open investigation of the police officer who shot and killed Andrea Rebello. There has been no indictment and no grand jury convened to our knowledge. The person who took her hostage, believed to be Dalton Smith, was shot and killed by Nassau County Police Officer, believed to be Nikolas Budimlic. The family, nor our office, has ever been told by Respondents the name of the police officer who shot and killed Andrea Rebello, despite a FOIL

request for that information. This highlights the absurdity of a blanket denial where the Respondents will not even confirm the most basic information as to the name of the police officer who did the shooting. The Petitioners are therefore forced to rely upon newspaper articles and televised news shows as to who committed the homicide of Andrea Rebello.

63. Since there is no investigation that we are aware of, this argument itself should fail. It is now over four (4) months since the shooting, and if the NCPD had any intention of arresting anyone or pursuing a criminal case it would have likely happened already. If not, they would still need to list each and every record that contains the information sought by Petitioners which clearly has not been done.

64. It is the Respondents' burden to go item by item and provide the "particularized and specific justification" for not disclosing requested documents. The Respondents have failed to do so.

65. The complete failure to set forth and apply the FOIL exemptions to each individual requested item of information in the Respondents possession is clearly in violation of all applicable case law. Therefore, the Court should order the Respondents to provide the information forthwith. As the Respondents failed to publish subject matter lists in violation of Public Officer's Law §87 3(c), the Petitioners have been unable to specifically identify each report, document or item by the name allocated to it by the Respondents. The Respondents' failure to provide subject matter lists or any itemized lists of the documents that are being withheld is shocking and should not be countenanced by the Court.

B. Subject Matter Lists

66. Petitioners respectfully request that the Court Order the Respondents to provide the subject matter lists as are required to be maintained pursuant to Public Officers Law §87 3(c).

If there are no subject matter lists then Respondents should be ordered to create the subject matter lists and place subject matter lists on their respective websites pursuant to Public Officers Law § 87 3(c). It clear from the County's responses and a review of their websites that there are no subject matter lists available to the public. Public Officers Law § 87 3(c) states:

3. Each agency shall maintain:

c) a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be *conspicuously* indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government. (emphasis added)

67. In the telephone conversations with the Respondents they did not provide definitive information as to the existence or location of subject matter lists. Petitioners sent an additional FOIL request for subject matter lists dated July 26, 2013 stating *inter alia* :

6) The subject matter list for all records kept by the Police Department that are subject to FOIL pursuant to public officer's law.

See **Exhibit "R"**. Although Petitioners initially requested lists that were subject to FOIL the statute clearly says all records, whether subject to FOIL or not should be on the subject matter lists.

68. As previously discussed, Petitioners did not receive a response to the July 26, 2013 FOIL request. On August 13, 2013 Petitioners sent an appeal to Thomas V. Dale, Commissioner of Police, for the constructive denial to Petitioners July 26, 2013 FOIL request. See **Exhibit "T"**.

69. On August 20, 2013 the Nassau County Police Department partially denied the August 13, 2013 Appeal. NCPD's denial dated August 20, 2013 enclosed documents entitled

"Appendix C of the Department Manual", "Department Procedure No. OPS 4217", and a sample of a worksheet checklist. None of these documents is responsive to Petitioners' July 26, 2013 request, nor remotely corresponds to a subject matter list required by the statute. Subject matter lists are lists by subject of all records in possession of the agency. The August 20, 2013 denial is attached hereto as **Exhibit "U."**

70. "Appendix C of the Department Manual" is a one page list of radio codes for the NCPD. Appendix C is attached hereto as **Exhibit "V"**. The other information attached to the August 20, 2013 denial consisted of "Department Procedure No. OPS 4217" and the worksheet checklist which are attached hereto as **Exhibit "W."**

71. The checklist and worksheets exchanged are not "a reasonably detailed current list by subject matter of all records in the possession of the agency" as defined by Public Officers Law § 87 3(c). It is simply a worksheet to be completed by a FOIL officer that indicates the reasons why a FOIL request would be denied and not a subject matter list of documents available via FOIL. An example of what subject matter lists are and the way they should be accessed can be clearly be seen on the Metropolitan Transportation Authority's (MTA) website. Attached are the web pages from the MTA's website showing how to access the subject matter lists of one of its sub-agencies, the New York City Transit Authority (NYCTA). The web pages and the subject matter lists for the MTA/NYCTA are attached as **Exhibit "X"**. The subject matters list for the New York City Transit Authority, are readily available on its website, <http://web.mta.info/mta/foil/>. As can be clearly seen, the Transit Authority keeps an updated list of all of the documents that are available through FOIL. The "sample checklist worksheet" provided is simply not a subject matter list and attempting to pass it off as one is inappropriate. The aforementioned subject matter list from the NYCTA is an example of the type of list that is

required under Public Officers Law § 87 3(c). The documents attached to the response by the County, confirms that the County and the Police Department do not keep such a list, in violation of Public Officer's Law.

72. There is a vital public interest in government agencies complying with the Public Officers Law § 87 3(c) which requires agencies to provide subject matter lists for their FOIL topics to the public so that proper and legally specific FOIL requests can be made. The Petitioners are aggrieved by the failure of the County and NCPD to maintain the subject matter lists on their websites.

73. The public is harmed by the Respondents' failure to provide the subject matter lists and the locations from which one could properly request such information.

74. Due to the failure of the County and all its agencies and departments, including the Nassau County Police Department, to provide subject matter lists to the Petitioners and place same on their websites, the Petitioners were forced to send out duplicative and all encompassing FOIL requests to numerous agencies.

75. Respondents' failure to provide the subject matter lists and the locations from which one could properly request such information. Petitioners request an order directing the Respondents to immediately begin to comply with the Public Officers Law § 87 3(c) requiring that the subject matter lists for FOIL requests be provided to the public, as well as ordering reimbursement of Petitioners' costs and ordering them to pay attorneys' fees associated with this Petition and the relief requested herein.

C. Hostage/Barricade Procedures

76. The Petitioners requested the applicable Hostage/Barricade Incident police

procedures that were in place on May 17, 2013 for NCPD Officers and Supervisors as detailed above. Petitioners received no direct response to this request.

77. The Respondents have failed to provide any information for procedures relating to hostage/barricade incidents or in the alternative, failed to even confirm that the Commissioner's Procedural Order, order no. 7-95 titled "Procedure Relating To Hostage/Barricade Incidents", issued in 1995 was or was not still in effect at the time of the incident.

78. A review of the Commissioner's Order 7-95 reveals that nothing contained therein amounts to an "investigative procedure". The exemption contained Section 87(2)(e)(iv), which applies to information that would "reveal criminal investigative techniques or procedures, except routine techniques or procedures," simply does not apply to the Commissioner's Procedural Order, order no. 7-95 titled "Procedure Relating To Hostage/Barricade Incidents". See **Exhibit "Y"**. As such, it is Petitioners' position that any procedures relating to hostage/barricade incidents are not exempt under the Freedom of Information Law.

79. There is a valid public interest in the disclosure of Nassau County Police Department practices and procedures in responding to hostage/barricade incidents. The release of the information requested serves the public interest by providing transparency and accountability for agency action. *Associated Press v. US Dep 't of Defense* 554 F.3d 273, 285 (2d Cir. 2009). Additionally, if those procedures are cancelled or changed, the public has a right to know. This falls precisely into the purview of the request for information in question. "Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose." *U.S Dep 't of State v. Ray* 502 U.S 164, 177- 78 (1991). Where, if at all, the NCPD identifies a protected privacy interest, it should be weighed against the substantial public interest in these matters.

80. Furthermore, the Respondents' decision to withhold the hostage procedures pursuant to Petitioners' FOIL requests is especially troubling in light of the fact that other precincts and jurisdictions around the country provide this information to the public. Samples of hostage/barricade procedures and protocols are found on many police and law enforcement websites. Some examples of hostage/barricade policies, procedures and protocols that are published on other police department websites are: Truro, Massachusetts Police Department's Hostage Situation Procedures, **Exhibit "Z"**; Tigard Oregon Hostage policy manual **Exhibit "AA"**; the Tuscon Use of Force manual addressing Hostage situations; **Exhibit "BB"**; and finally a Model Policy for Hostage/Barricaded Subject Incidents sponsored by a Federal Grant and published by the IACP National Law Enforcement Policy Center. **Exhibit "CC"**. A review of these policies and procedures regarding hostage/barricade incidents shows that these policy, protocols and procedures have nothing to do with investigative techniques, but are focused on routine procedures for hostage situations.

81. To the extent that there were no procedures, protocols or orders that were in place at the time of the shooting, the public has a right to know this as well. Regardless of what the document itself is called, the public has a right to see any policies, procedures and protocols relating to hostage/barricade incidents. Again as there is no subject matter list posted for the NCPD, therefore, the Petitioners can only guess at the names of the documents containing information about the NCPD's hostage/barricade policies and procedures.

D. Police Communication/911 Operator Training materials

82. Petitioners made a FOIL request for the Nassau County Police Communications Operators (911) training manuals, pamphlets, training materials, for a period ten years prior to

May 17, 2013. Specifically, in our July 26, 2013 FOIL request, Petitioners requested the following information from the Nassau County Police Department:

1) All Nassau County 911 operator, Police Communications Operators (PCO) and PCO Supervisors training manuals, pamphlets, training materials, lesson plans and other manuals that contain codes and instructions that are relied upon in the performance of the PCO and PCOS job duties in effect for the years 2003 through 2013.

Petitioners did not receive a response to our July 26, 2013 FOIL request, and as such was constructively denied.

83. Petitioners appealed as set forth above. Thomas Dale issued a denial dated August 20, 2013, **Exhibit "T"**. The denial of Appeal attached some materials described therein as “[a]ppendix C of the Department Manual with additional materials to follow” **Exhibit "V"** and a copy of “Department Procedure No. OPS 4217 **Exhibit "W"** and a sample of the checklist worksheet utilized by our Legal Bureau.”

84. “Appendix C of the Department Manual” is not responsive to the demands for PCO training materials etc. as demanded in Petitioners July 26, 2013 FOIL request. The title of said document is “Appendix C – Radio Codes” and is simply a list of “ten-code signals [that] are used to facilitate the prompt transmission of radio messages”. No training manuals, pamphlets, training materials, lesson plans or other materials were included.

85. The public has a vital interest in the disclosure of the aforesaid training manuals and other training materials by the Nassau County Police. The release of these records serves the public interest by providing transparency and accountability for agency action. *Associated Press v. US Dep 't of Defense* 554 F.3d 273, 285 (2d Cir. 2009).

86. Additionally, the public relies on the proper training and execution of the PCO(S)/911 operators for their safety. As such, the public has a right to know that these

operators are properly trained and prepared to handle emergency situations. Again, the Respondents have failed to particularize the reasons as to why this request was denied.

87. The Petitioners are aggrieved by the failure of the NCPD to turn over the requested information. Petitioners request an order directing the Respondents to provide those records requested in the Petitioners FOIL request detailed supra as well as costs and attorneys' fees associated with this Petition and the relief requested herein.

E. Improperly Redacted Material

88. The Respondents provided certain information to Petitioners as detailed below:

1. CD entitled 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21;
2. CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05 - 1741:37;
3. Event Search 5/17/13 2:28:33;
4. NCPD Background Event Chronology Event Number 130248000;
5. NCPD Unit Information;
6. Event Search 5/17/13 3:44:54; and
7. NCPD Background Event Chronology Event Number 130248045.

89. This information provided was incomplete and improperly redacted without particularization or specific justification. Additionally this information as it relates to communications does not include any electronic communications between officers, nor does it include texts or emails. Specifically, the Nassau County Police Department Unit Information, Event Searches, and NCPD Background Event Chronology Event Number that were exchanged contain numerous and significant unexplained redactions.

90. The Nassau County Police Department seems to have redacted the information that would identify the Police Officers. The Respondents do not give any basis for their

numerous redactions. It is submitted that the redactions contained in the information exchanged is improper as the Petitioners are entitled to know which officers were present at the scene of the shooting and what their roles were. There is no right of privacy for the identity of anyone who is present at the scene of an incident and certainly not for the officers involved.

ATTORNEY'S FEES

93. Attorney's fees in Article 78 proceedings may be recoverable by the Petitioners if they prevail. The Petitioners herein will make an application to the Court at the resolution of this matter if appropriate. The Petitioners are putting the Respondents on notice that they will be seeking costs and attorneys fees if the matter is resolved in the Petitioners' favor.

PRIOR APPLICATION

94. Petitioners have not made a prior similar application for the relief requested herein.

WHEREFORE, Petitioners respectfully request this Court issue a Judgment:

1. Ordering Respondents to provide Petitioners with records responsive to requests in Petitioners' FOIL requests detailed herein;
2. Ordering Respondents to provide complete information without redactions of the recordings of all of Nassau County Police Department's communications over all police radio frequencies and channels, including the code lists, as well as all emails, texts and other electronic communications generated as a result of the incident herein by any of the Respondents or their employees herein;
3. Ordering Respondents to comply with Public Officers Law § 87 3(c) which requires each of its agencies to maintain a detailed list by subject matter of all records in their possession and to post same on its' websites; to provide said lists to Petitioners; if none exist, then an Order directing Respondents to create and post same;
4. Declaring that the Nassau County Police Department's decision to deny access to the requested records was arbitrary, capricious, an abuse of

discretion and erroneous as a matter of law, and should be annulled;

5. Awarding attorneys' fees in favor of Petitioners and against Respondents in an amount to be determined at the conclusion of this proceeding; and
6. Granting Petitioners such other and further relief as this Court may deem just and proper.

Dated: New York, New York
September 27, 2013



DAVID A. ROTH

ATTORNEY'S VERIFICATION

DAVID A. ROTH, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under the penalties of perjury:

I am a Partner of ROTH & ROTH, LLP, one of the Petitioners. I have read the annexed

VERIFIED PETITION

and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon interviews, facts, records, and other pertinent information contained in my files.

DATED: New York, New York
 September 27, 2013



DAVID A. ROTH

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO,

Index No. 011906/2013

Petitioner,

-against-

**VERIFIED ANSWER AND
OBJECTIONS IN POINT
OF LAW**

Hon. Karen Murphy

THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU COUNTY
POLICE DEPARTMENT, EDWARD MANGANO and
COUNTY OF NASSAU

Respondent.

-----X

The respondents, by CARNELL T. FOSKEY, acting Nassau County Attorney,
answering the petition, alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraphs (1), (9), (13), (14), (15), (16), (17), (18), (19), (22), (23), (24), (31), (34), (35), (40), (43), (45), (47), (49), (54), (71), (76), (84), (93), and (94) of the Petition.
2. Denies all allegations made in paragraphs (2), (4), (7), (10), (20), (21), (25), (32), (44), (48), (50), (51), (52), (53), (55), (56), (58), (59), (60), (61), (62), (63), (64), (65), (66), (72), (73), (74), (75), (77), (78), (79), (80), (81), (85), (86), (87), (89) and (90) of the Petition except the identities of the parties.
3. Admits all allegations made in paragraph (6), (11), (12), (26), (27), (28), (30), (33), (36), (37), (38), (39), (41), (42), (46), (60), (70), (83), and (88) of the Petition.

4. Denies all allegations made in paragraph (3) of the petition except that Petitioners submitted FOIL requests to Respondents starting on June 4, 2013 and ending on July 26, 2013.

5. Denies all allegations made in paragraph (5) of the petition except to admit that Petitioners submitted FOIL appeals.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph (8) of the petition but admits that Petitioners submitted FOIL requests to Respondents dated June 4, 7, 11, and 26, 2013.

7. Denies the allegations made in paragraph (29) of the petition, but admits that on June 13, 2013 a letter was sent to petitioners in response to their June 7, 2013 FOIL and an accurate copy of that letter is attached to petition as exhibit E.

8. Denies the allegations made in paragraph (57) of the petition but admits that the NCPD issued letters to Petitioners dated August 12 and August 20 2013 but leaves content and meaning to the resolution of this litigation. True and accurate copies of these letters are included in petition as exhibits S and U.

9. Denies the allegations made in paragraph (67) of the petition but admits that Petitioners sent a FOIL request dated July 26, 2013.

10. Denies the allegations made in paragraph (68) of the petition but admits that Petitioners sent Commissioner Dale a letter dated August 13, 2013 but leave content and meaning to the resolution of this litigation.

11. Denies the allegations made in paragraph (69) of the petition but admits that the NCPD sent petitioners a letter dated August 20, 2013 but leave content and meaning to the resolution of this litigation.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph (82) of the petition except to admit that Petitioners' submitted a FOIL request dated July 26, 2013.

FIRST AFFIRMATIVE DEFENSE

13. The NCPD's Investigative Files into the May 17, 2013 incident are exempt from disclosure as their release would interfere with the open investigation into the incident.

SECOND AFFIRMATIVE DEFENSE

14. The Petitioners lack standing to compel the County to comply with Public Officer's Law §87(3)(c).

THIRD AFFIRMATIVE DEFENSE

15. County Executive Mangano's inclusion as a co-respondent is redundant and he should be dismissed from this action.

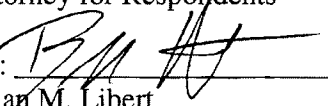
FOURTH AFFIRMATIVE DEFENSE

16. To the extent that there are records that could be disclosed to the petitioner, but for the fact that they contain information otherwise subject to exceptions under FOIL, the respondent should be permitted to provide such documents for the Court's *in camera* inspection.

WHEREFORE the respondent, Nassau County Police Department requests order and judgment dismissing the petition, together with costs and disbursements, and such other relief that the Court may deem proper.

Dated: Mineola, New York
December 5, 2013

HON. CARNELL T. FOSKEY
Acting Nassau County Attorney
Attorney for Respondents

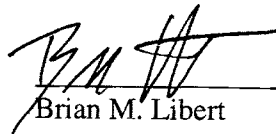
By: 
Brian M. Libert
Deputy County Attorney
1 West Street
Mineola, New York 11501
(516) 571-3015

VERIFICATION

Brian Libert, an attorney duly admitted to practice in the Courts of this State,
affirms under the penalties of perjury:

I am a Deputy County Attorney in the office of HON. CARNELL T. FOSKEY,
Acting County Attorney of the County of Nassau. I have read the foregoing Answer and
know the contents thereof to be true based on my knowledge and belief and review of the
records maintained and provided to me by the Nassau County Police Department, except
as to matters alleged to be upon information and belief and, as to those matters, I believe
them to be true. The reason that this verification is made by me and not by the
defendants is that defendants are a governmental subdivisions, boards, commissions,
agencies or public officers on whose behalf a verification can be made pursuant to CPLR
3020(d)(2) by any person acquainted with the facts.

Dated: Mineola, New York
December 5, 2013



Brian M. Libert

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Petitioner,

* against *

THOMAS DALE, COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT, EDWARD
MANGANO, and COUNTY OF NASSAU

Respondent.

Index No. 011906/2013

AFFIRMATION

Hon. Karen Murphy

-----X
Brian M. Libert, an attorney admitted to practice law before the Courts of the State of New
York, affirms the following to be true under the penalties of perjury.

1. I am a Deputy County Attorney in the office of Hon. Carnell T. Foskey, Acting Nassau
County Attorney, attorney for the Respondents THOMAS DALE, NASSAU COUNTY POLICE
DEPARTMENT ("NCPD"), EDWARD MANGANO and COUNTY OF NASSAU
("Respondents"). I am familiar with this case by virtue of a file maintained in the Office of the
County Attorney and my conversations with the NCPD and other agencies in the County.

2. This affirmation is respectfully submitted in opposition to ESTATE OF ANDREA
REBELLO by ADMINSTRATOR NELLA REBELLO and ROTH & ROTH LPP's
("Petitioners") Article 78 petition, among other things, to compel the NCPD to disclose certain
documents under the Freedom of Information Law ("FOIL") among other remedies. This
Petition, pertains to several FOIL requests made by Petitioners to Nassau County and the
NCPD.

3. This is an Article 78 under NY Public Officers Law §89 (“FOIL”). Petitioners seek records pursuant to FOIL related to the death of Petitioner Nella Rebello’s daughter, Andrea Lynn Rebello. On May 17, 2013, New York State Parolee, Dalton Smith, was in the process of committing an armed robbery at the apartment of Andrea Lynn Rebello. Police were called and arrived to the scene. During the ensuing period, shots were fired and both Andrea Lynn Rebello and Dalton Smith were killed. This incident was the subject of significant news coverage.

Procedural History

4. Beginning on June 4, 2013 Petitioners filed a series of FOIL requests to several different Nassau County agencies requesting records related to the NCPD’s investigation into the May 17, 2013 incident. Over the course of the following two months Petitioners and Respondent Nassau County agencies exchanged several correspondences regarding Petitioners’ FOIL requests and then FOIL appeals. Some requests were unclear.

June 4, 2013 “Preservation Letter”

5. On June 4, 2013, Petitioners, by counsel David A. Roth sent letters to the NCPD and the Nassau County Attorney . The letter to NCPD requested that the NCPD preserve evidence regarding the May 17, 2013 incident (Petition Exhibit A p. 39). The letter to the Nassau County Attorney requested that “sprint reports” and a 911 recording made on May 17, 2013 be released and inquired whether Commissioner’s Procedural Order 7-95 (entitled “Procedure Relating To Hostage/Barricade Incidents”) was in effect on May 17, 2013. (Petition Exhibit B p. 51); (Petition Exhibit Y p. 187).

6. In response to the June 4 letter sent to the County Attorney, on June 13, 2013, Deputy County Attorney Brian Libert sent a letter explaining that the June 4 letter was being treated as a FOIL request, articulating that the County Attorney’s Office was not the repository

of the records requested and indicated that the request had been forwarded to the appropriate agency, the NCPD. (Petition Exhibit E p. 64).

June 7, 2013 Nassau County Comptroller FOIL Request

7. On June 7, 2013 Petitioners, by counsel, Stephen F. Doddato, sent a FOIL request to the Nassau County Comptroller's Office requesting records regarding the investigation of the May 17, 2013 incident. (Petition Exhibit C p. 54)

8. On June 14, 2013 the Nassau County Comptroller's office sent a letter responding to Petitioners' June 7, 2013 FOIL request. The Comptroller's Office denied the request on the ground that the Nassau County Comptroller's office was not the repository for the records. (Petition Exhibit G p. 72).

June 7, 2013 NCPD FOIL Request

9. On June 7, 2013 Petitioners, by counsel, Stephen F. Doddato, sent a request, to the Legal Bureau of the Nassau County Police Department which was identical to the June 7, 2013 request to the Nassau County Comptroller's office for records. (Petition Exhibit C p. 54).

10. On June 14, 2013, before the NCPD could respond to Petitioners' June 7, 2013 FOIL request, the Petitioners by counsel, David A. Roth, sent four copies of a letter to the offices of the Nassau County Executive, Nassau County Attorney, Nassau County Police Commissioner and the Nassau County Medical Examiner requesting voluntary cooperation in providing records. (Petition Exhibit F p. 66)

11. On July 1, 2013, by email, Detective Sergeant Israel Santiago of the NCPD Legal Bureau acknowledged receipt of Petitioners' June 7, 2013 FOIL request and Petitioners' June 14, 2013 letter. Detective Sergeant Santiago informed Petitioners that the June 14, 2013 letter was

being considered as an amendment to the earlier FOIL request and that the NCPD was processing both requests. (Petition Exhibit I p. 78).

12. On July 9, 2013 the NCPD, by its counsel, Joanne L. Oweis, denied Petitioners' June 7, 2013, FOIL request to the NCPD (as amended by the June 14, 2013 letter) citing exemptions pursuant to the provisions of the Public Officer's Law §§ 87(2)(e)(i), 87(2)(e)(iv), and County Law §308(4). The letter also explained that the investigation into Andrea Rebello's death was still ongoing, as discussed in further detail below. (Petition Exhibit O, p. 121).

13. On July 17, 2013 Respondents by Police Officer Christine McDonald released to Petitioners two CD's containing audio files of radio transmission recorded on May 17, 2013 and five documents related to NCPD activity on May 17, 2013. (Petition Exhibit P p. 125).

June 14, 2013 "Requests for Information"

14. As described above, on June 14, 2013 Petitioners, by counsel, David A. Roth, sent four copies of a letter to several County agencies requesting voluntary cooperation in providing records to the Petitioners regarding the May 17, 2013 incident. (Petition Exhibit F p. 66).

Petitioners argued that due to a Newsday quote by the County Executive calling for an investigation of the incident that the Nassau County agencies should turn over the information without a FOIL request. (Petition Exhibit F p. 66). In fact, Petitioners characterized the County's responses to the June 4, 2013 letter pursuant to FOIL as "ancillary".

15. On June 17, 2013, Deputy County Attorney Gerald Podlesak responded, to Petitioners' June 14, 2013 letters explaining that Nassau County could only provide records to the Petitioners pursuant to FOIL and that Petitioners' FOIL requests had all been forwarded to the NCPD, the repository of the records requested. The letter indicated that NCPD would turn over any responsive records after the request had been reviewed, and any records were identified

and then appropriately redacted pursuant to FOIL. (Petition Exhibit H p. 75). In addition, Mr. Podlesak explained that the Medical Examiner's file was unavailable to Petitioners pursuant to County Charter §906(4)(a) & County Law §677(3)(b) absent a court order and that any 911 recordings were also exempt from disclosure pursuant to County Law §308(4).

Petitioners' July 1, 2013 FOIL Appeals

16. On July 1, 2013, despite both telephone and written communications with Brian Libert explaining that Respondents' June 17 letter was not a denial, Petitioners submitted four appeals in response to the June 17, 2013 letter by Gerald R. Podlesak: 1) An appeal for Petitioners' June 4 request to the Nassau County Attorney (Petition exhibit N p. 106); 2) An appeal for Petitioners' June 7 request to the Nassau County Comptroller (Petition exhibit N p. 102); 3) An appeal Petitioners' June 14 request to the Nassau Attorney (Petition Exhibit N p. 109); and 4) An appeal Petitioners' June 14 request to the Nassau County Executive (Petition Exhibit N p. 114). .

17. On July 3, 2013 Brian Libert sent a letter to Petitioner's Counsel David A. Roth in response to Petitioners' four July 1, 2013 FOIL appeals. The letter advised Petitioners that its FOIL requests had not been denied but, rather had been forwarded to the appropriate Nassau County agencies that were in possession of responsive records so that the requests could be reviewed and processed. (Petition Exhibit N p. 102).

Petitioners' July 24, 2013 NCPD FOIL Appeal

18. On July 24, 2013 Petitioners, by counsel, David A. Roth, submitted a FOIL appeal to Nassau County Police Commissioner Thomas Dale regarding Petitioners' June 4 and June 7, 2013 FOIL requests to the NCPD. Petitioners characterized the NCPD's response to Petitioners' June 4, 2013, FOIL request as a constructive denial of their entire request.

Petitioners appealed the NCPD's denial of their June 7, 2013 request and appealed the redaction of records that the NCPD did release. (Petition exhibit Q p. 127, 137).

19. On August 12, 2013 Commissioner Dale, the appeal NCPD's FOIL officer, answered Petitioners' July 24, 2013, FOIL Appeal by letter. Dale's answer responded to Petitioners' June 4, June 7, and June 14 FOIL requests and the subsequent FOIL determinations made by the NCPD Legal Bureau. Commissioner Dale upheld the denials of all three requests explaining that Petitioners' FOIL requests were properly denied because 1) pursuant to Public Officer's Law §87(2)(e)(i) the request would interfere with the NCPD's open investigation; 2) pursuant to Public Officer's Law §87(2)(e)(iv) as responsive records would reveal investigative techniques or procedures; and 3) pursuant to Public Officer's Law §87(2)(g) any responsive record contains inter/intra agency materials. Furthermore, Commissioner Dale articulated that pursuant to County Law §308(4), any records of calls to the 911 system of Nassau County were exempt from disclosure under FOIL. (Petition Exhibit S p. 153).

Petitioners' July 26, 2013 FOIL Request to NCPD

20. On July 26, 2013 Petitioners, by their counsel, David A. Roth, submitted another FOIL request to the NCPD Legal Bureau. This FOIL request was characterized by Petitioners as being for records not previously covered by Petitioners' June 4, and June 7, 2013, FOIL requests. The request sought 911 operator training and educational materials from 2003-2013, complete investigation files from the Homicide, BSO and IAB divisions of the NCPD, and a subject matter list of all files maintained by the NCPD. (Petition Exhibit R p. 149).

21. On August 13, 2013 Petitioners, by counsel, David A. Roth, submitted a FOIL appeal to Commissioner Dale regarding Petitioners' July 26, 2013 FOIL request. Petitioner appealed from a purported constructive denial by NCPD. (Petition Exhibit T p. 156).

22. On August 20, 2013 Commissioner Dale answered Petitioners' August 13, 2013 FOIL appeal. Commissioner Dale concluded that while most of the responsive records were exempt from disclosure, certain responsive records were responsive and those records were enclosed with his appeal determination. (Petition Exhibit U p. 160)

23. Petitioners' requests were numerous, frequently overlapped and caused confusion with the County agencies. Petitioners sent, at least, seven different letters to various County agencies many of which were differing somewhat but also often times overlapped. This made it extremely difficult for Respondents to determine if requests had been acknowledged properly and if the records had already been requested.

24. Certainly, the fact that Petitioners sent so many requests and that they were so expansive and voluminous that it belies the point that any County agency could have constructively denied any requests. To the contrary, as Respondent's became aware of the various requests, they were acknowledged forthwith. The County also took efforts on several occasions to speak to Petitioners by phone and attempt to understand the records requested in each request. To suggest that any County agency constructively denied the requests is simply inaccurate.

25. Respondents have, responded have legally and properly complied with all legitimate Freedom of Information Law ("FOIL") requests. The records withheld by Respondents are appropriately withheld pursuant to FOIL because the NCPD investigation into the underlying incident is still on-going. NY Public Officers Law §87(2)(3)(i). As further articulated in the accompanying affidavit of Detective Sargent Israel Santiago, the NCPD cannot release those records at this time because it would jeopardize the investigation. Release of these

records before the investigation is concluded could cause prejudice to the investigation or hamper the ability of the NCPD to investigate completely all aspects of the incident.

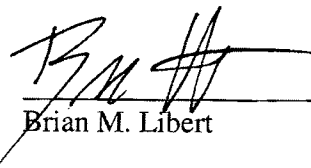
26. On December 4, 2013, in compliance with FOIL and in the spirit of cooperation the NCPD sent an expansive set documents related to 911 Operator Training to Petitioners' Counsel, David A. Roth, by overnight mail. At this time, NCPD has complied fully with the request related to training and education for 911 operators. A detailed description of those items is in the cover letter sent by NCPD and annexed hereto as Exhibit "A". Therefore, that issue is moot before this court and should be dismissed.

27. For reasons explained in the accompanying Answer and Memorandum of Law, the NCPD had appropriate justification for withholding the records at issue in this case. The Petition lacks merit.

28. To the extent that there are records that could be disclosed to the petitioner, but for the fact that they contain information otherwise subject to exceptions under FOIL, the respondent should be permitted to provide such documents for the Court's *in camera* inspection.

WHEREFORE the Respondents, requests order and judgment dismissing the petition, together with such other relief that the Court may deem proper.

Dated: Mineola, NY
December 5, 2013


Brian M. Libert

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Index No.: 13-011906

Petitioners,

AFFIDAVIT

-against-

THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT,
EDWARD MANGANO and COUNTY OF NASSAU,

Respondents.

-----X

ISRAEL SANTIAGO, being duly sworn, deposes and says:

1. I am a Detective Sergeant with the Nassau County Police Department ("NCPD").

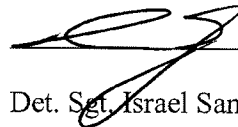
I have been employed by the NCPD for twenty-one (21) years. I am the Commanding Officer of the NCPD's Legal Bureau.

2. Based upon my training and experience, and as a result of my employment with the NCPD, I am familiar with the manner in which investigations are conducted by various bureaus and squads within the NCPD, including the Homicide Squad.

3. As a result of my assignment as Commanding Officer of the Legal Bureau of the NCPD, I am familiar with the Order to Show Cause submitted in relation to the above-captioned matter. Further, I have spoken with members of the NCPD concerning the underlying investigation being conducted by the Homicide Squad. Based upon those conversations, I know that the investigation being conducted by the Homicide Squad is an active investigation and is not complete.

4. Disclosure at this time of several documents requested by the petitioners would interfere with the open and ongoing police investigation and would impede the ability of the NCPD to complete the homicide investigation. The Homicide Squad needs to take further action in relation to the evidence in order to close its investigation. It should be noted that the NCPD has clearly, properly and specifically identified these documents requested by petitioners to the County Attorney's Office.

5. To the extent that certain documents requested by the petitioners will not prejudice the Homicide Squad's open and ongoing investigation, said documents have been heretofore provided to the County Attorney's Office for disclosure to petitioners.



Det. Sgt. Israel Santiago

Sworn to before me this
4th day of December, 2013



NOTARY PUBLIC

CHRISTOPHER F. BELLISTRI
Notary Public, State of New York
No. 02BE6130622
Qualified in Queens County
Commission Expires July 18, 2017

Exhibit A

Nassau County



Police Department

EDWARD P. MANGANO
COUNTY EXECUTIVE

1490 Franklin Avenue
Mineola, New York 11501
(516) 573-8800

THOMAS V. DALE
COMMISSIONER

December 4, 2013

David A. Roth
Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, New York 10016

Re: Freedom of Information Law Request
Our File # LB 1210-2013/LB 1571-2013

Dear Mr. Roth:

As per our August 20, 2013 correspondence enclosed please find documents in response to your July 26, 2013 Freedom of Information (FOIL) request. Specifically, your FOIL request sought "[a]ll Nassau County 911 operator, Police Communications Operators (PCO) and PCO Supervisor training manuals, pamphlet, training materials, lesson plans and other manuals . . . for the years 2003 through 2013".

As such, enclosed please find the following:

- Nassau County Communications Bureau Lesson Plans (Police Communications/ 911 Operator Course)
 - o Daily Personnel Operations
 - o Military Time
 - o Phonetic Alphabet – 10 Codes – Police Terminology
 - o Ambulance and Aided
 - o Managing Suicidal Callers
 - o Telephone Referrals
 - o Alarm Entry Position
 - o Classifying Calls For Delay
 - o Language Link
 - o VESTA Workstation
 - o E-911 Equipment Overview
 - o Geography- Precincts

- Call Entry Screen
 - CAD Call Entry (2)
 - Phone Skills
 - Professional Conduct
 - Telephonic Device For The Deaf (TDD)
 - TDD – When VESTA Is Not Working
 - Managing Stress
- Testing Materials (Quizzes)
- CAD I
 - CAD II
 - CAD III
 - Classifying Calls I
 - Classifying Calls II
 - Final Examination – 911 Police Communication Operators
 - Geography 1 & 7
 - Geography 2 & 8
 - Geography 3 & 6
 - Geography 4 & 5
 - Geography Quiz II
 - Geography Quiz III
 - Law Quiz I
 - Law Quiz II
 - Phonetic Alphabet Quiz I & II
 - CAD City Codes
 - CAD Event Types
- Handouts
- Phonetic Alphabet
 - Commonly Used Abbreviations
 - 911 Question Guide
 - CAD 911 Call Types
 - Firecom
 - Facilities Covered By Nassau County
 - Fire Departments With Dispatchers Separate From Firecom
 - Police Terminology List
 - Radio Signals
 - Call Types
 - North Shore/ LIJ EMS
 - Non-Emergency Complaints
 - Standard Operating Procedure
 - Violent Domestic Disturbance
 - LIE Auto Accidents
 - Unknown Weapons

- Searching Calls
 - Westbury Plaza
 - Callers
 - Greetings
 - Call Entry
 - Trunk Number
 - Verification
 - Medical Control
 - Law
- I/CAD Workbook: 911 & Radio Dispatch
 - I/CAD Lesson Plans & Quizzes
 - Outline For Radio Training
 - 911 Module 1 – Day 1
 - 911 Module 2 – Day 2
 - 911 Module 3 – Day 3
 - CAD Commands
 - Radio Terminology – 10 Codes
 - Most Important 10 Codes
 - Duties of the radio Dispatcher/Dispatching Procedures/ Incident Cards
 - Motorola Centracom CRT Console Guide
 - Radio Equipment/Frequencies/Telephone Referrals
 - Priority Calls/Number of Units To Dispatch/Delay Response Calls
 - Ambulance & Aided
 - Park, Walk & Talk/Directed Patrol Assignment/Directed Training Assignment/Radio Training Assignment/Caper Alarms/Lojack/ Nassau Alarms
 - Highway Console
 - Shot Spotter
 - 10 Codes
 - 10 Codes I
 - 10 Codes II
 - CAD Commands
 - Radio – Quiz I
 - Radio – Quiz II
 - Radio – Quiz III
 - Radio – Quiz IV
 - Radio – Quiz V
 - Radio – Quiz VI
 - Radio – Quiz VII
 - CAD Commands – Radio Quiz I
 - CAD Commands – Radio Quiz II
 - CAD Commands – Radio Quiz III
 - CAD Commands – Radio Quiz IV

- o CAD Commands – Radio Quiz V
- o Disposition Codes
- o Radio Final

- I/CAD Workbook: Supervisor

Sincerely,



Joanne L. Oweis
Attorney- Legal Bureau

Enclosures

cc: Byron Lassin, Esq. (w/o enclosures)
Brian Libert Esq., Nassau County Attorney's Office (w/o enclosures)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 011906/2013

ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP

Petitioners,

-against-

THOMAS DALE, COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT, EDWARD
MANGANO, and COUNTY OF NASSAU,

Respondents.

VERIFIED ANSWER, AFFIRMATION
& AFFIDAVIT OF ISRAEL SANTIAGO

HON. CARNELL T. FOSKEY

Acting Nassau County Attorney
Attorney for Respondents

By: Brian M. Libert
Deputy County Attorney
One West Street
Mineola, New York 11501
(516) 571-3015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Index No. 011906/2013

Petitioner,

* against *

Hon. Karen Murphy

THOMAS DALE, COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT, EDWARD
MANGANO, and COUNTY OF NASSAU

Respondents.

-----X

RESPONDENT'S MEMORANDUM OF LAW

HON. CARNELL T. FOSKEY
Acting Nassau County Attorney
Attorney for Respondent
1 West Street
Mineola, New York 11501
(516) 571-3056

Of Counsel:
Brian Libert,
Deputy County Attorney
(516) 571-3015

Preliminary Statement

Nassau County ("County") and the Nassau County Police Department (the "NCPD") are committed to the policies of transparency and open government which underlie the Freedom of Information Law ("FOIL"). NCPD, however, is always in the unique situation of having to balance its statutory obligations under FOIL with its everyday obligations to perform its tasks dutifully, completely and with all due diligence.

This is an Article 78 under NY Public Officers Law §89 ("FOIL"). Petitioners seek records pursuant to FOIL related to the death of Petitioner Nella Rebello's daughter, Andrea Lynn Rebello. On May 17, 2013, a New York State Parolee, Dalton Smith, was in the process of committing an armed robbery at the apartment of Andrea Lynn Rebello. Police were called and arrived to the scene. During the ensuing period, shots were fired and both Andrea Lynn Rebello and Dalton Smith were killed.

Given the serious nature of this particular incident, the NCPD is making every effort to investigate fully and without undue delay or interference. It is an intensive and ongoing investigation. Until all elements of the investigation are complete the NCPD cannot release those records which could prejudice the investigation or cause any impediment to the investigation. Further, as a police agency the NCPD must protect certain records in order to maintain the confidentiality of investigations, and its high standards of safety for officers and ordinary citizens.

Furthermore, Petitioners are not prejudiced by the NCPD's appropriate denials under FOIL. Petitioners filed a notice of claim with the County on August 9, 2013, and, with the most conservative estimate, the statute of limitations for such actions is one year, however in many

cases would be as much as three years. In the ensuing period the NCPD may conclude its investigation and additional records may become available to petitioners.

Keeping in mind the principles of FOIL and its statutory requirements, the NCPD cannot disclose records where it would affect ongoing investigations, expose non-routine police procedures or investigative techniques, or risk the safety of any person. The documents in question are exempt under FOIL. NCPD has supplied all records required under FOIL and therefore the petition is without merit.

Petitioners' FOIL Requests

Over the course of Petitioner's correspondence with the County, Petitioners have requested numerous records with multiple and sometimes confusing requests. The County has made the following determinations and released records, accordingly:

June 4, 2013 Letter to the Nassau County Attorney (Petition Exhibit B p. 51)

1. Un-redacted sprint reports for the May 17, 2013 incident.
 - NCPD is not in possession of these records.
2. A twenty-five minute 911 call of Shannon [redacted]
 - This record is exempt from FOIL disclosure pursuant to New York State County Law §308(4).
3. Petitioners ask to be informed if Commissioners' Procedural Order, order no. 7-95 was in effect on May 17, 2013.
 - FOIL pertains only to records "...kept, held, filed...in any physical form whatsoever..." therefore, questions, rather than a records request are inappropriate and must be denied.

June 7, 2013 FOIL request to the NCPD Legal Bureau (Petition Exhibit C p. 54). A duplicate request was sent to the Nassau County Comptroller.

1. 911 call tapes
 - As discussed above, this record is exempt from FOIL disclosure pursuant to New York State County Law §308(4).
2. Sprint tapes
 - NCPD is not in possession of these records.
3. Sprint reports
 - NCPD is not in possession of these records.

4. All incoming and outgoing police radio communications
 - This record has been released to the Petitioners on CD, 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21; CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05-1741:37 (Petition Exhibit P p. 125).
5. Command communications
 - NCPD is not in possession of these records.
6. Dispatch recordings.
 - This record has been released to the Petitioners on CD, 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21; CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05-1741:37 (Petition Exhibit P p. 125).
7. Police Radio runs
 - This record has been released to the Petitioners on CD, 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21; CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05-1741:37 (Petition Exhibit P p. 125).
8. Radio to Radio communications
 - This record has been released to the Petitioners on CD, 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21; CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05-1741:37 (Petition Exhibit P p. 125).
9. EMS Transmissions
 - NCPD is not in possession of these records.
10. ESB Transmissions
 - NCPD is not in possession of these records.
11. BSO Transmissions
 - This record has been released to the Petitioners on CD, 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21; CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05-1741:37 (Petition Exhibit P p. 125).
12. Dashboard camera footage.
 - NCPD is not in possession of these records.
13. Any and all reports, including but not limited to police reports, crime victim reports, aided reports and all other records and documents
 - The NCPD's investigative files into the May 17, 2013 incident are exempt from disclosure under FOIL pursuant to Public Officers Law §87(2)(3)(i).

June 14, 2013 amended FOIL request. (Petition Exhibit F p. 66) Requests duplicative from the June 7, 2013 request are omitted.

1. Crime scene photographs, digital images, and or video.
 - The NCPD's investigative files into the May 17, 2013 incident, which include all crime scene photographs, are exempt from disclosure under FOIL pursuant to Public Officers Law §87(2)(3)(i).
2. Medical Examiner's file

- The Medical Examiner's file has been the subject of a different Article 78 petition in Supreme Court, Nassau County before Hon. Norman Janowitz and has been released pursuant to that court's order.
- 3. A record identifying Police on scene.
 - The NCPD released this record, consisting of a document entitled NCPD time log. (Petition Exhibit P p. 125)
- 4. Petitioners requested that the NCPD confirm the identities of the hostage taker and the Police officer who shot and killed Andrea Rebello.

FOIL pertains only to records "...kept, held, filed...in any physical form whatsoever..." therefore, questions, rather than a records request are inappropriate and must be denied.
- 5. Jessica and Andrea Rebello's iPhones and Laptops.
 - These items have been returned to Petitioners.

June 26, 2013 FOIL request (Petition Exhibit R p. 148) Requests duplicative from June 7 and June 4, 2013 requests omitted.

1. All 911 operator, Police Communications operators, and Police Communications operator Supervisors training manuals from 2003-2013.

ARGUMENT

Legal Standard

Public Officers Law §87 "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." *Fink v Lefkowitz*, 47 NY2d 567, 571 (1979). The statute provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted. Public Officers Law § 87(2); *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 79 (1984). Exemptions, pursuant to FOIL, are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access. *Capital Newspapers Div. of Hearst Corp. v Burns*, 67 N.Y.2d 562, 566 (1986). Because FOIL has made disclosure by public agencies a public right, the status or need of the person seeking access is generally of no

consequence in construing FOIL and its exemptions. *Id.* The burden of proof rests solely with the agency to justify the denial of access to the requested records. *Porco v Fleischer*, 953 N.Y.S.2d 282, 283-84 (2d Dept. 2012).

The burden of demonstrating that a particular document qualifies for exemption rests on the agency. *Hanig v State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992). Where the material requested falls squarely within the ambit of one of these statutory exemptions disclosure may be withheld. *Matter of Fink v Lefkowitz*, 47 N.Y.2d, 567, 571 (1979). To invoke one of the exemptions of section 87(2), the agency must articulate particularized and specific justification for not disclosing requested documents. *Fink v Lefkowitz, supra*, 47 N.Y.2d, at 571.

If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material. *Xerox Corp. v Town of Webster*, 65 N.Y.2d 131, 133 (1985); *Farbman & Sons v New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83. However, an agency is permitted to generically identify the kinds of documents sought and the risks of disclosing the documents. *Whitley v New York County Dist. Atty.'s Off.*, 101 A.D.3d 455 (1st Dept. 2012). *See also Leshner v Hynes*, 19 NY3d 57, 67 (2012) (Holding that an agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents).

With these principals in mind, this memo will discuss all outstanding items pursuant to these FOIL requests.

Ongoing Investigation

Petitioners have requested any and all records related to the NCPD's investigation of this incident, including police reports, witness reports, photographs, digital images or videos. At this time, the NCPD is still investigating the incident. The investigation is not yet completed. This is confirmed by the affidavit of a member of the NCPD annexed hereto. (Affidavit of Detective Sargent Israel Santiago). These records must be withheld until the investigation is concluded because premature release could cause prejudice to the investigation or hamper the ability of the NCPD to investigate completely all aspects of the incident. (Affidavit of Detective Sargent Israel Santiago). FOIL has a specific and explicit exemption for matters which may still be under investigation. NY Public Officers Law §87(2)(3)(i).

The purpose of this exemption is that police departments, and other investigative agencies, must be able to properly conduct an ongoing investigation without concern that records may be released and compromise the investigation. "However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records *to frustrate pending or threatened investigations* nor to use that information to construct a defense to impede a prosecution." *Fink v. Lefkowitz*, 47 N.Y.2d 567 (1979), *emphasis added*. Courts have repeatedly upheld this exemption where it would interfere with an ongoing investigation or potential prosecution. *Pittari v. Pirro* (2 Dept. 1999) 258 A.D.2d 202, *leave to appeal denied* 94 N.Y.2d 755; *see also* Legal Aid Society 274 A.D.2d 207 (1st Dept. 2000).

In addition to these general principles being consistently upheld, this case is analogous to *DeLuca v. New York City Police Department*, 261 A.D.2d 140 (1st Dept. 1999), where the court held that records were appropriately exempt where they regarded an on-going investigation into

the shooting of an off-duty police officer when the request was made by the officer's surviving parents.

Since this investigation is only in its infancy, the police may further interview other individuals, including the decedent's sister. Therefore, future issues and information could arise which "may provide a basis for further investigation along lines of inquiry not heretofore pursued." *Id.* Even if that never takes place, the NCPD must remain free to pursue all avenues of this investigation without any of the risks of disclosure. Further, Petitioners suffer no prejudice by any delay in releasing these records. Petitioners have already filed a notice of claim and even with *the most conservative interpretation* their statute of limitations will not run until May 17, 2014, one year from the incident. The NCPD may conclude its investigation during that ensuing period, at which time, additional records may become available.

Similarly, Petitioners' claim that redactions on the records as released are improper is without merit. These redactions are also necessary to protect the ongoing investigation. The records released are NCPD's attempt to comply with Petitioners' request as much as possible without compromising the investigation and the redactions are necessary and appropriate under FOIL.

For these reasons, and as fully articulated in the Affidavit of Detective Sargent Santiago, the NCPD has properly withheld documents which are the subject of the ongoing investigation and cannot release any records until the investigation is fully complete.

Subject Matter Lists

Petitioners also request that this Court order the County to comply with Public Officers Law §87(3)(c) which states that each agency shall maintain "a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available under this

article” and that “each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list.”

Courts have routinely held that “[t]o establish standing to challenge an administrative action, a petitioner must show an injury in fact—*an actual legal stake in the matter being adjudicated...*” *Matter of Lasalle Ambulance v. New York State Dept. of Health*, 245 A.D.2d 724, 724 (3d Dept. 1997) *emphasis added*; *See also, Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991). “Such injury, in turn, must be different in kind or degree from that suffered by the public at large” *Parkland Ambulance Serv., Inc. v. New York State Dep’t of Health*, 261 A.D.2d 770, 771-72, 689 N.Y.S.2d 769, 771 (1999).

Here, Petitioners have clearly not been prejudiced or injured by any alleged failure to obtain a subject matter lists. The various FOIL requests sent by Petitioners make this fact obvious. The purpose of the subject matter lists is that ordinary citizens might know, in general, what documents are available at a specific agency. However, it is abundantly clear from the Petitioners’ requests that Petitioners are fully aware of documents available at the NCPD because the requests names certain specific things which would not be known to an ordinary citizen such as “EMS Transmissions,” “BSO Transmissions,” and “Radio to Radio Communications.” Petitioners are not the ordinary citizen who is uninformed and may be prejudiced by failure to know what is available. To the contrary, it appears that Petitioners are fully aware and informed about what types of documents the NCPD possesses. And, further, having asked for such an exhaustive series of documents, Petitioners’ numerous requests seek the proverbial “kitchen sink.” Any record the NCPD might have has already been requested.

The Appellate Division held that it is not necessary for respondents to produce a list where it is obvious that the petitioner’s request allowed the agency to locate the records

requested. *Allen v. Strojnowski*, 129 A.D.2d 700, 701, 514 N.Y.S.2d 463 (2d. Dept. 1987) citing *Matter of Capital Newspapers v. Whalen*, 113 AD2d 217, 219, *appeal dismissed* 67 NY2d 917, *revd on other grounds* 69 N.Y.2d 246 (3d. Dept. 1987) (“...nor is there any indication that review of such a list was necessary before the petitioner could formulate his requests for records, since the petitioner’s requests were sufficiently described to permit the agency to locate the subject records.”)

Petitioners have failed to allege any specific injury with regard to this claim thus rendering it completely academic before this Court. In fact, the Petition explicitly states that “[t]he public is harmed by the Respondent’s failure to provide the subject matter lists and locations from which one could properly request such information,” (Petition, p. 27 ¶ 72) and states in its first paragraph that the Petition “...seeks to vindicate the right of the public...” However, an injury to the general public is not sufficient to claim an injury in fact in an Article 78 proceeding. *Clark v. Board of Town of Clarkstown*, 28 A.D.3d 553 (2d Dept. 2006). The injury must be a specific injury which is different from that suffered by other County taxpayers. *Id. see also Nager v. Goodman*, 70 A.D.3d 951 (2d Dept. 2010). Petitioner has not suffered any injury in regard to this claim and cannot allege injury in fact based on any purported injury to the general public. This portion of the claim is entirely academic, nonjusticiable before this Court and, therefore, must be dismissed in its entirety.

County Executive Mangano

Nassau County Executive Edward Mangano’s inclusion in this matter in his official capacity is redundant to Petitioners’ claim against the County of Nassau and serves no legitimate purpose. Accordingly, County Executive Mangano should be dismissed as a Respondent. *See e.g. Orange v. County of Suffolk*, F. Supp. 701, 707 (E.D.N.Y. 1993); *Dudek v. Nassau County*

Sheriff's Dept., 6092855 WL 2013 (E.D.N.Y. 2013); *Kaczmarek v. Conroy*, 218 A.D.2d 976 (3d Dept. 1995).

The “official-capacity” cause of action is a means to bring a suit against an entity through their agents. *See. Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72-73 (2d Cir. 1992). In an official-capacity suit, the agent of a municipal entity stands in as a proxy to the municipality itself, requiring that the official be treated as the municipality rather than an individual. *See. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, (1997) (Doctrine of absolute legislative immunity not available as a defense to legislator sued in official capacity as legislative immunity did not apply to the entity the legislator represented). In instances where the agent and the municipality are separately named respondents in an action, the agent’s inclusion in their official capacity is redundant as the claims against the agent are functionally equivalent to the claims against the entity. *Kaczmarek v. Conroy*, 218 A.D.2d 976 (3d Dept. 1995). Separate claims against an agent and the municipality should only be sustained in instances where the agent is included in the action in their individual capacity. *Dudek v. Nassau County Sheriff's Dept.*, 6092855 WL 2013 (E.D.N.Y. 2013)

In the instant action, Petitioners’ include County Executive Mangano only in his official capacity as the County Executive. (Petition, p. 8 ¶ 15) As Petitioners’ do not name County Executive Mangano as a co-respondent in his individual capacity and maintain the County of Nassau as a separate co-respondent, County Executive Mangano’s inclusion in this action is as an agent of Nassau County. Furthermore, the Petitioner alleges no facts or circumstances that implicate a cognizable cause of action against County Executive Mangano in his individual capacity. Therefore, the instant action against County Executive Mangano is redundant and should be dismissed.

Attorney's Fees

Public Officers' Law §89(c) provides that the court, in a FOIL proceeding, may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in "*which such person has substantially prevailed, but only when (i) the agency had no reasonable basis for denying access; or (ii) the agency failed to respond to a request or appeal within the statutory time.*" NY Public Officers Law §89(4)(c) *Emphasis added.*

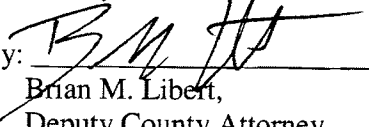
Even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court. *Maddux v New York State Police*, 64 AD3d 1069, 1070 (3d Dept 2009), *lv to appeal denied*, 13 NY3d 712 (2009); *see also, Matter of Henry Schein, Inc. v. Eristoff*, 35 AD3d 1124, 1126 (3d Dept. 2006). Given that the County had a reasonable basis in law for its "denial," an award of attorneys' fees would be inappropriate. *Capital Newspapers Div. of Hearst Corp. v City of Albany*, 63 AD3d 1336, 1339 (3d Dept 2009) *lv to appeal granted*, 13 NY3d 707 (2009) and *affd as mod*, 15 NY3d 759 (2010).

CONCLUSION

For the foregoing reasons the Petition should be dismissed in its entirety with costs and disbursements. If the Court finds that some or part of the FOIL responses are inadequate or improper the County respectfully requests that the court review those items *in camera* before any final determination is made.

Dated: Mineola, NY
December 05, 2013

CARNELL T. FOSKEY
Acting County Attorney,
County of Nassau

By: 
Brian M. Libert,
Deputy County Attorney
One West Street
Mineola, NY 11501
(516) 571-3015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator NELLA
REBELLO and ROTH & ROTH, LLP.,

Plaintiffs,

-against-

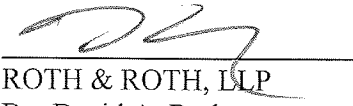
THOMAS DALE, COMMISSIONER NASSAU COUNTY POLICE
DEPARTMENT, NASSAU COUNTY POLICE DEPARTMENT,
EDWARD MANGANO and COUNTY OF NASSAU,

Defendants.
-----X

COUNSELORS:

PLEASE TAKE NOTICE, that annexed is a true copy of an Judgment duly entered in
the office of the Clerk of the within named Court on July 24, 2014.

Dated: New York, New York
August 26, 2014


ROTH & ROTH, LLP
By: David A. Roth
Attorneys for Plaintiffs
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020
Our File No.: 5961

TO:
CARNELL T. FOSKEY
Nassau County Attorney
Attorney for Defendants
1 West Street
Mineola, New York 11501
(516) 571-3056

LEAHEY & JOHNSON, P.C.
Attorney for Respondents
120 Wall Street, Suite 2220
New York, New York 10005
(212) 269-7308

At IAS Part 11 of the Supreme Court of the
State of New York, County of Nassau, held
at the Courthouse, 100 Supreme Court Drive,
Mincola, New York on 17, April 2014
JW

Present: Honorable Karen V. Murphy
Justice of the Supreme Court

-----X
ESTATE OF ANDREA REBELLO by Administrator
NELLA REBELLO and ROTH & ROTH, LLP,

Index #: 11906/2013

Petitioners,

JUDGMENT

-against-

for
SSC
THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, Nassau County Police Department
EDWARD MANGANO and COUNTY OF NASSAU,

Respondents.
-----X

for
SSC
NOW, on the motion of David A Roth, the attorney for Petitioners herein, upon the findings
and on the order to show cause dated 10-1-13, the affirming B.L. dated 12-6-13
and the reply of David Roth dated 12-20-13
made in the instant action, the factual and legal determinations made and set forth in the decision.

dated March 18, 2014, it is hereby

ORDERED AND ADJUDGED that Pursuant to Public Officers Law §87 the Respondent
improperly denied the Petitioners' access to documents, records, files and information contained in
various FOIL requests made to the Respondents. The Respondents have failed to demonstrate their
entitlement to any statutory exemption including one predicated upon Public Officers Law §
87(2)(e)(i). Although the Respondents initially invoked several grounds for exemptions to
Petitioners' FOIL requests, Respondents in their answering papers chose to rely exclusively upon
the "investigation" exemption contained in Public Officers Law § 87(2)(e)(I), and abandoned all other
exemptions. Respondents, having failed to demonstrate their entitlement to a statutory exemption,
shall within 15 days make available for copying and inspection all documents, records, files and

information described herein as follows:

a. June 7, 2013 FOIL request:

- ✓ All audio communications for all channels and all frequencies, both public and private, the original digital files/recordings, analog recordings, written transcripts of any recordings, between police officers, Command, and EMS workers as well as ESB (Emergency Service Bureau), BSO (Bureau Special Operations and Hostage Negotiation Unit), and Nikolas Budimlic, complete and without redactions which were recorded during any active police investigation of the May 17, 2013 shooting. This includes but is not limited to:
 - ✓ Sprint tapes
 - ✓ Sprint reports
 - ✓ All incoming and outgoing police radio communications
 - ✓ Command communications between all officers
 - ✓ Dispatch recordings
 - ✓ Police radio runs
 - ✓ Radio to radio communications
 - ✓ EMS transmissions
 - ✓ ESB transmissions
 - ✓ BSO transmissions
- ✓ Any and all reports, including but not limited to police reports, crime victim reports, aided reports and all other records and documents.

b. June 14, 2013 FOIL request:

- ✓ All sprint reports for the incident including all channels.
- ✓ All of the complete audio recordings, without redactions, for all channels, regarding this incident, all communications which were recorded of Police Department or County employees including officers, supervisors, Brass, Command, EMT, BSO, or any agents and/or employees of the County not identified herein, and any other such communications including the EMS calls with regard to this incident.
- ✓ All photos and video of the crime scene, including those depicting Andrea Rebello and Dalton Smith.
- ✓ All police reports, Aided reports, Unusual Incident/Occurrence reports, as well as any other reports that are completed at this time by the Nassau County Police Department or any other County department and/or agency regarding this incident.
The identity of the Police Department personnel and/or drivers that correspond to the radio motor patrol (RMP) car numbers/call signs that are on the audio recordings referred to above in paragraph 2, including but not

- ↘ limited to 101, 102, 104, 105, 107, 108., 110, 141, 144, 145, 306, 324, 344, 2351, 2361, BSO as well as any other of the police RMP car numbers/call signs for officers that were at the scene.
- ↘ Information regarding the identity of the Police officer who shot and killed Andrea Rebello.
- ↘ Information regarding the identity of the person who held Andrea Rebello hostage.
- ↘ Information as to whether or not Commissioner's Procedural Order, order no. 7-95 titled "Procedure Relating To Hostage/Barricade Incidents" was in effect at the time of the incident. Additionally if the Commissioner's Procedural Order was changed, updated, or modified provide the pertinent orders or guidelines that were in effect on May 17, 2013 relating to Hostage/Barricade incidents. If there were no procedures in place then that information as well.

c. July 26 2013 FOIL request:

- ↘ All Nassau County 911 operator, Police Communications Operators (PCO) and PCO Supervisors training manuals, pamphlets, training materials, lesson plans and other manuals that contain codes and instructions that are relied upon in the performance of the PCO and PCOS job duties in effect for the years 2003 through 2013.
- ↘ The entire Investigative file from Homicide Squad regarding the shooting incident of May 17, 2013 at 213 California Avenue, Uniondale.
- ↘ The entire Investigative file from BSO (Bureau of Special Operations) regarding the shooting incident of May 17, 2013 at 213 California Avenue, Uniondale.
- ↘ The entire Investigative file from IAB (Internal Affairs Bureau) regarding the shooting incident of May 17, 2013 at 213 California Avenue, Uniondale.
- ↘ The entire list of records created by the Homicide Squad, BSO, IAB and any other department, section, squad or division of the Nassau County Police Department regarding the shooting incident of May 17, 2013 at 213 California Uniondale; and it is further

ORDERED AND ADJUDGED that the Court shall undertake an *In Camera* inspection of

Kor
JS the items listed below that were provided to the Petitioners but were redacted. The Petitioners have within 5 days of service of a copy of this judgment a notice of entry provided the Court with the redacted records to review. The Respondents shall supply the unredacted records to the Court forthwith for its review.

SC

1. ~~CD entitled 05/17/13 213 California Ave Uniondale Radio F5 0228:46-0826:21;~~
2. ~~CD entitled 05/17/13 213 California Ave Uniondale Radio F, BSO, Freq 8 0826:05-1741:37;~~
18. Event Search 5/17/13 2:28:33;
24. NCPD Background Event Chronology Event Number 130248000;
35. NCPD Unit Information;
46. Event Search 5/17/13 3:44:54;
57. NCPD Background Event Chronology Event Number 130248045;


and it is further

ORDERED AND ADJUDGED that The Respondents shall provide FOIL subject matter ^{requests} ~~list~~ or provide a clear statement indicating whether, in fact, they have been maintained. (*Marino v Bodner*, 9 Misc3d 1105 (A) [Supreme Court, New York County, 2005]) within 15 days; it is further

ORDERED AND ADJUDGED that County Executive Edward Mangano is dismissed as a Respondent from this action; ~~it is further~~.

~~**ORDERED AND ADJUDGED** that Petitioner's herein have substantially prevailed in this Article 78 Proceeding and may submit a further application for reasonable attorneys' fees and costs.~~

ENTERED


KAREN V. MURPHY
Justice, Supreme Court
Nassau County

ENTERED

Judgment entered this
___ day of April 2014

JUL 24 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE

CLERK OF THE COURT

13--011906

NASSAU INDEX # _____
FILED

JUL 24 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE



NASSAU COUNTY CLERK'S OFFICE
ENDORSEMENT COVER PAGE

Recorded Date: 07-28-2014 Record and Return To:
Recorded Time: 11:31:14 a

Liber Book: J 3791
Pages From: 78
 To: 82

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Number: 1222
Ref #: 13--011906
Doc Type: C40 JUDGMENT - LIBER & PAGE

Plnt: REBELLO, NELLA
Plnt: REBELLO, ANDREA
Dfnd: NASSAU COUNTY POLICE DEPT
Dfnd: NASSAU COUNTY

	Taxes Total	.00
	Recording Totals	.00
POB001	Total Payment	.00

THIS PAGE IS NOW PART OF THE INSTRUMENT AND SHOULD NOT BE REMOVED
MAUREEN O'CONNELL
COUNTY CLERK



2014072801222

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

I, Diane R. Clemendor, being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in the Kings County in the State of New York.

On, August 26, 2014, I served a true copy of the annexed **Judgment with Notice of Entry** by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

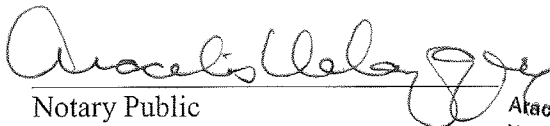
CARNELL T. FOSKEY
Nassau County Attorney
Attorney for Defendants
1 West Street
Mineola, New York 11501

LEAHEY & JOHNSON, P.C.
Attorney for Respondents
120 Wall Street, Suite 2220
New York, New York 10005



Diane R. Clemendor

Sworn to before me this 26th
day of August, 2014



Notary Public

Aracelis Velazquez
Notary Public, State of New York
No. 01VE6237946
Qualified in Queens County
Commission Expires: March 28, 2015

Index #: 11906/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
ESTATE OF ANDREA REBELLO by Administrator NELLA
REBELLO and ROTH & ROTH, LLP.,

Plaintiffs,

-against-

THOMAS DALE COMMISSIONER NASSAU COUNTY
POLICE DEPARTMENT, NASSAU COUNTY POLICE
DEPARTMENT, EDWARD MANGANO and COUNTY OF
NASSAU,

Defendants.

-----X

JUDGMENT WITH NOTICE OF ENTRY

The below signature attests to the following papers: *JUDGMENT WITH NOTICE OF ENTRY*

By: 

David A. Roth

ROTH & ROTH, LLP
Attorneys for Plaintiff
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

ESTATE OF ANDREA REBELLO by
Administrator NELLA REBELLO and ROTH &
ROTH, LLP,

Index No. 11906/13

Petitioner(s),

Motion Submitted: 12/20/13

Motion Sequence: 001

-against-

THOMAS DALE COMMISSIONER NASSAU
COUNTY POLICE DEPARTMENT, NASSAU
COUNTY POLICE DEPARTMENT, EDWARD
MANGANO and COUNTY OF NASSAU,

Respondent(s).

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

In a proceeding pursuant to CPLR Article 78, the petitioners Estate of Andrea Rebello, by her administrator, Nella Rebello and Roth & Roth, LLP, move for an order, *inter alia*, compelling the various respondents to produce stated documents and materials pursuant to the Freedom of Information Law (*Public Officers Law, Art., 6*)

On May 17, 2013, an armed intruder entered an off-campus residence near Hofstra University and held several of the residents hostage at gun point, demanding money and valuables (Pet., ¶¶ 19-21). The police were later summoned and one of the responding officers allegedly entered the home alone (Pet., ¶¶ 19-20). The petitioners herein, Estate of

Andrea Rebello and Roth & Roth, LLP, et., al ["the petitioners"], contend that the officer confronted the intruder in the house and fired some eight shots, one of which struck Rebello in the head, causing her death. According to the petitioners, the intruder was also killed, but apparently never discharged his weapon (Pet., ¶ 19).

Thereafter, in June and July of 2013, the petitioners filed a series of requests for information and documents with some nine different County agencies pursuant to the "Freedom of Information Law" (e.g., **Public Officers Law § 84**, et., seq.) (Pet., ¶¶ 26-47; Exhs., "A"- "D", "F", "R"). Specifically, the petitioners' largely similar FOIL requests were filed with, *inter alia*, the County of Nassau, The Nassau County Comptroller's Office and the Nassau County Police Department ["the NCPD"].

Among other things, the various requests sought: sprint reports; 911 calls; police radio communications; police and crime victim reports; EMS transmissions; any relevant video recordings or photos; the shooting officer's identity; the medical examiner's file; "911" training manuals and related materials; information as to whether a so-called "Commissioner's Procedural Order 7-95" pertaining to "Hostage/Barricade Incidents," was in effect at the time of the incident; and, *inter alia*, the investigative file from the Homicide Squad regarding the shooting (Pet., ¶¶ 26, 27, 30, 44; 82-83).

Subsequently, the designated FOIL officers for the various agencies, including the NCPD, the County of Nassau, and the Comptroller's office, denied the petitioners' requests, and/or alternatively, apprised the petitioners that their notices would be transferred to the appropriate agencies in whose custody the requested documents were reposed, primarily the NCPD (Pet., ¶¶ 29, 31-33, 41, 44). In issuing its initial denials, the NCPD advised the petitioners that the Police were conducting an investigation into the shooting, and that in light of that investigation, certain statutory FOIL exemptions were therefore applicable, including those conferred by Public Officers Law § 87[2][e][i] relating to, *inter alia*, ongoing law enforcement investigations (e.g., Pet., Exh., "O" *see also*, **Public Officers Law § 87[2][a], 2[e][iv], 2[g]; County Law § 308**). The petitioners later filed final appeals from the various agency denials, which appeals were then either denied, or granted in part (Pet., ¶¶ 26, 40-41; 45-46). However, to the extent that certain documents and/or redacted materials were provided, the petitioners contend the materials produced were non-responsive to the requests made; improperly redacted; and/or otherwise legally insufficient (Pet., ¶ 46-47; 48-49).

In September of 2013, the petitioners commenced the within proceeding pursuant to, *inter alia*, CPLR Article 78, alleging in sum that the denials issued were arbitrary, capricious and violated applicable disclosure requirements imposed by the Freedom of Information Law (**Public Officers Law, Art. 6**). The petition also alleges that the respondents failed to produce, upon request so-called document, "subject matter" lists pursuant to Public Officers

Law § 87[3][c] (Pet., ¶¶ 66-73). In pertinent part, Public Officers Law § 87[3][c] provides that, “[e]ach agency shall maintain: . . . a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available under this article” (Pet., ¶¶ 66-68).

The respondents have answered, denied the material allegations of the petition and interposed various affirmative defenses, including the first affirmative defense, which asserts that further disclosure is unwarranted because an ongoing investigation is currently being conducted by the police department (Ans., ¶ 13).

By order to show cause dated October, 2013, the petitioners now move for an order, *inter alia*: (1) compelling the respondents to produce the documents and materials requested in their various demands; and (2) requiring them to produce and/or establish subject matter lists pursuant to Public Officers Law § 87[3][c].

Notably, counsel for the respondents has advised that in the spirit of cooperation and pursuant to FOIL, on December 4, 2013, the NCPD forwarded additional documents to the petitioners; namely, what the respondents have described as “an expansive set [of] documents related to 911 Operator Training” (Libert Aff., ¶¶ 26-27; Exh., “A”).

Although in their underlying, administrative FOIL denial notices, the respondents invoked several exemption grounds (*e.g.*, **Public Officers Law § 87[2][a]**, **2[e][iv]**, **2[g]**; **County Law § 308**), in their opposing submissions, the respondents now rely exclusively upon the “investigation” exemption contained in Public Officers Law § 87[2][e][I], *i.e.*, no additional exemption theories have been advanced in their memorandum of law or their opposing affidavit and/or attorney’s affirmation (*e.g.*, Libert Aff., ¶ 25; Israel Aff., ¶¶ 3-5 *see also*, Resp’s Mem. of Law, 4-7). The respondents have, however, alternatively requested that the Court conduct an *in camera* review of the requested materials before ordering any disclosure (Libert Aff., ¶ 28; Resp; Mem of Law, p. 5).

In support of the foregoing exemption claim, the respondents have attached the five-paragraph affidavit of Det. Sgt. Israel Santiago, Commanding Officer of the NCPD’s Legal Bureau. In his affidavit, Det. Santiago states that he has spoken to other unnamed members of the Department, “and based on these conversations, I know that the investigation being conducted by the Homicide Squad is an active investigation and is not complete” (Santigao Aff., ¶¶ 3-4). Santiago further contends that any further disclosure at this time “would interfere with the open and ongoing police investigation and would impede the ability of the NCPD to complete the homicide investigation”, since the “Homicide Squad needs to take further action in relation to the evidence in order to close its investigation” (Santigao Aff., ¶ 4).

Upon the papers submitted, the order to show cause and petition should be granted to the extent indicated below.

“The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy” (*Matter of Alderson v New York State College of Agriculture and Life Sciences at Cornell University*, 4 NY3d 225, 230 [2005], citing *Matter of Newsday Inc. v. Sise*, 71 NY2d 146, 150 [1987], cert denied 486 US 1056 [1988]; see also, *Matter of Harbatkin v New York City Department of Records and Information Services*, 19 NY3d 373, 379-380 [2012]; *Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]).

An agency's records “are presumptively open to public inspection, without regard to need or purpose of the applicant. Consistent with these laudable goals, this Court has firmly held that ‘FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government’” (*Matter of Buffalo News, Inc. v Buffalo Enterprise Development Corporation*, 84 NY2d 488, 492[1994][citations omitted]).

Accordingly, “[w]hen faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search” (*Matter of Beechwood Restorative Care Center v Signor*, 5 NY3d 435, 440 [2005]; see also *Public Officers Law* §§ 87[2], 89[3]; *Matter of Leshner v Hynes*, 19 NY3d 57, 64 [2012]). “Put another way, in the absence of specific statutory protection for the requested material, the Freedom of Information Law compels disclosure, not concealment” (*Matter of Westchester Rockland Newspapers v Kimball*, 50 NY2d 575, 580 [1980]).

The Court of Appeals has emphasized that “[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; see, *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-463 [2007]). Wholly “blanket”-type statements and/or “[c]onclusory assertions that certain records fall within a statutory exemption,” are insufficient to sustain an agency’s burden with respect to a FOIL exemption (*Matter of Dilworth v Westchester County Dept. of Correction*, 93 AD3d 722, 724 [2d Dept 2012]; see, *Matter of Konigsberg v Coughlin*, 68 NY2d 245, 250-251 [1986]; *Matter of Madera v*

Elmont Public Library, 101 AD3d 726, 727 [2d Dept 2012]).

With respect to an investigation exemption, Public Officers Law § 87[2][e][i] excludes from the reach of a FOIL disclosure notice, those records “compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings” (*Pittari v Pirro*, 258 AD2d 202, 204 [2d Dept 1999]; see, *Matter of Lesher v Hynes*, *supra*; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]; *Matter of Legal Aid Society. v New York City Police Dept.*, 274 AD2d 207, 213 [1st Dept 2000]).

In *Matter of Lesher v Hynes*, *supra*, the Court of Appeals recently construed Public Officers Law § 87[2][e][i] and discussed an agency’s burden upon invoking that exemption. Guided by reference to relevant federal case law (e.g., *NLRB v Robbins Tire & Rubber Co.*, 437 US 214, 228-229 [1978]; 5 USC § 552[a]), the *Lesher* Court ultimately concluded that the involved agency, the Kings County District Attorney’s Office, had sustained its FOIL exemption burden. In so holding, the Court determined that a “document-by-document” showing of interference with an investigation would not be required under Public Officers Law § 87[2][e][i] (*Matter of Lesher v Hynes*, *supra*). Rather, and provided that a qualifying, law enforcement or court proceeding existed, an agency could permissibly demonstrate its entitlement to the investigation exemption by: (1) identifying general or so-called “generic” document description categories, as opposed to “document-by-document” descriptions, (*Matter of Legal Aid Society. v New York City*, *supra*, 274 AD2d 207, 213); and (2) thereafter describing “the generic risks posed by disclosure of these categories of documents” (*Matter of Lesher v Hynes*, *supra*, 19 NY3d at 67-68; see also, *Matter of Whitley v New York County District Attorney’s Office*, 101 AD3d 455 [1st Dept 2012]; *Matter of Legal Aid Society. v New York City*, *supra*, 274 AD2d 207, 213; *Pittari v Pirro*, *supra*, 258 AD2d 202, 205). The Court cautioned, however, that “not . . . every document in a law enforcement agency’s criminal case file is automatically exempt from disclosure simply because kept there” (*Matter of Lesher v Hynes*, *supra*, 19 NY3d at 67-68).

Moreover, despite this lessened, “generic” standard of particularity, an “agency must still fulfill its burden under Public Officers Law § 89[4][b] to articulate a factual basis for the exemption” (*Matter of Lesher v Hynes*, *supra*, 19 NY3d at 67). Relatedly, vague allegations and/or attorney affirmations alone, will not suffice since, “evidentiary support is needed” (*Matter of Dilworth v Westchester County Dept. of Correction*, 93 AD3d 722, 724 [2d Dept 2012]; *Newsday LLC v Nassau County Police Dept.*, 2014 NY Slip Op 50044 [Supreme Court, Nassau County 2014] see also, *Matter of Washington Post Co. v New York State Ins. Co.*, 61 NY2d 557, 567 [1984]; *Matter of Madera v Elmont Public Library*, *supra*, 101 AD3d 726, 727; *Matter of Loevy & Loevy v New York City Police Dept.*, 38 Misc3d 950, 954-955 [Supreme Court, New York County 2013]; *Windham v City of New*

York Police Department, 2013 NY Slip Op 32418 [Supreme Court, New York County 2013]). In sum, the applicable “burden requires identifying the types of documents, their general content, and the risk associated with that type of content” (*Windham, supra*, at 7; see, *Matter of Lesh v Hynes, supra*).

With these principles in mind, and cognizant of the requirements that statutory exemptions must be “narrowly interpreted,” and established with “evidentiary” support (*Matter of Data Tree, LLC v Romaine, supra*, at 462; *Matter of Dilworth v Westchester County Dept. of Correction, supra*, at 724), the Court agrees that the respondents have failed to demonstrate their entitlement to a statutory exemption predicated upon Public Officers Law § 87(2)(e)(i).

Here, the respondents’ principal evidentiary submission, the one-and-a half page affidavit supplied by Det. Sgt. Santiago, is conclusory and contains virtually no descriptive facts upon which the Court can meaningfully weigh the viability of the claimed exemption (see, *Newsday LLC v Nassau County Police Department, supra*, at 9; *Matter of Loevy & Loevy v New York City Police Department, supra*, at 954-955 cf., *Matter of Lesh v Hynes, supra*; *Whitley v New York County District Attorney’s Office, supra*). Apart from the unelaborated assertion that they are “investigating the shooting,” the respondents have not described precisely what sort of investigation they are currently conducting, thereby complicating the task of assessing precisely what risks, if any, would ensue upon release of the requested materials.

More fundamentally, while properly framed, “generic” descriptions and statements may suffice (*Whitley v New York County District Attorney’s Office, supra*, at 455), the statements provided by, *inter alia*, Det. Santiago are not even sufficiently detailed to qualify as generically descriptive in content (see *Newsday LLC v. Nassau County Police Department, supra*, at 9). In *Lesh*, (*supra*), the Court of Appeals sustained an investigation exemption, but only because the District Attorney was able to articulate a series of concrete factual statements relating to specific document categories and then describe the relevant harm disclosure might create. More particularly, and upon upholding the exemption claim in *Lesh*, the Court relied on the fact that the District Attorney had “identified for Supreme Court the categories of records that he sought to withhold on the basis of the exemption, which included “correspondence with the United States Department of State “consist[ing] of crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements”; and (2) also “identified the generic harm that disclosure would cause – *i.e.*, [that] disclosure would necessarily interfere with law enforcement proceedings because the correspondence was “replete with information about the crimes committed,” and so its release posed an obvious risk of prematurely tipping the District Attorney’s hand” (*Matter of Lesh v Hynes, supra*, at 67-68).

At bar, however, Det. Santiago has not identified or referenced any document categories; nor has he articulated how the disclosure of the requested documents would impact upon whatever investigation the NCPD is currently conducting (*Newsday LLC v Nassau County Police Department*, *supra*; *Windham v City of New York Police Department*, *supra*; *Matter of Loevy & Loevy v New York City Police Dept.*, *supra*). Rather, his affidavit merely asserts in substance, that “the Homicide Squad needs to take further action in relation to the evidence in the order to close its investigation” (Santiago Aff., ¶ 5) – a circular statement which does not even generically identify the harm which would allegedly flow from disclosure of the documents or stated categories of documents. It bears noting that the largely oblique manner in which Det. Santiago’s affidavit has been worded, also suggests that he lacks personal knowledge of the pending investigation, since he states only that he has engaged in certain conversations with unidentified members of the NCPD concerning the investigation, and that based upon these conversations, he “knows” that the investigation has not been completed (*see*, Santiago Aff., ¶¶ 4-5)(*cf.*, *Matter of Madera v Elmont Public Library*, *supra*, at 727; *DeLuca v. New York City Police Department*, 261 AD2d 140 [concrete next step in investigation consisting of interview of injured officer sufficient basis upon which to deny petition for disclosure]).

The respondents alternatively argue that, even if the Court rejects their exemption claim, it should conduct an *in camera* examination of the materials before any release is finally directed (Ans., ¶ 16; 4th Aff. Def.).

Neither the petitioners, nor respondents, have provided the seven listed items that were disclosed by respondents, but were, according to petitioners, allegedly “incomplete and improperly redacted without particularization or specific justification” (Pet., ¶ 88). Thus, the Court cannot determine whether those items were improperly redacted. Accordingly, petitioners are directed to provide the listed items to this Court on or before March 31, 2014, and respondents are directed to provide unredacted copies of same on or before that same date, in order that this Court may conduct an *in camera* inspection to determine the propriety of the redactions allegedly made by respondent.

That branch of the motion which is for an order compelling the respondent NCPD to, *inter alia*, provide responses to the petitioners’ FOIL requests for “subject matter” lists, is granted to the extent that the respondents shall either produce the requested lists, or provide a clear statement indicating whether, in fact, they have been maintained (*Marino v Bodner*, 9 Misc3d 1105 (A) [Supreme Court, New York County, 2005]).

The Court disagrees that the list requests are “non justiciable” because the petitioners are allegedly required to show some sort of special standing or specific injury attributable to non-disclosure of the lists (Resp., Mem. of Law 7-9; Ans., ¶ 14 [2nd Aff. Def.]). Indeed,

“because FOIL has made full disclosure by public agencies a public right, the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, *supra*, at 566-567 *see also*, *Matter of Data Tree, LLC v Romaine*, *supra*, at 463; *Matter of Fappiano v New York City Police Dept.*, *supra*, at 748 [standing under FOIL is “as a member of the public”] *cf.*, *Matter of Marino v Morgenthau*, 1 AD3d 275 [1st Dept 2003]; *Matter of Allen v Strojnowski*, 129 AD2d 700 [2d Dept 1987]).

The respondents further assert, and have interposed an affirmative defense alleging, that County Executive Edward Mangano has been redundantly named as a party to the proceeding in his official capacity only (Resp. Brief at 9-11; Pet., ¶ 15; Ans., ¶ 13 [3rd Aff. Def.]). In general, claims against public officials in their official capacities, *i.e.*, so-called “official capacity” claims, are instituted in order to facilitate the commencement of an action “against the entity of which the public officer is an agent” (*see*, *Matter of Kaczmarek v Conroy*, 218 AD2d 97, 101 [3d Dept 1995]; *Rini v Zwirn*, 886 F Supp 270, 281 [EDNY 1995]; *Orange v County of Suffolk*, 830 F Supp 701, 707 [EDNY 1993]; *see also*, *Goldberg v Town of Rocky Hill*, 973 F2d 70, 73 [2nd Cir 1992]; *Bristol v Queens County*, 2013 US Dist LEXIS 38673 [EDNY 2013]; *Guzman v Jacobson*, 1999 U.S. Dist LEXIS 201 [EDNY 1999]). Accordingly, it has been held that “[w]here the governmental entity can itself be held liable for damages as a result of its official policy, a suit naming the legislators in their official capacity is redundant” (*Rini v Zwirn*, *supra*, at 281; *Matter of Kaczmarek v Conroy*, *supra*, at 101).

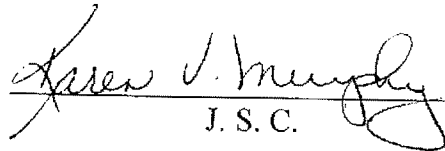
Here, the naming of County Executive Mangano in his official capacity is the functional equivalent of a proceeding against the County of Nassau, the real party in interest (*Rini v Zwirn*, *supra*). Under these circumstances, the Court agrees that the County Executive’s inclusion as a named-party to the proceeding is redundant within the meaning of the foregoing case law, and accordingly, the petition is dismissed insofar as asserted against him (*Matter of Kaczmarek v Conroy*, *supra*). The Court notes, in this respect, that the petitioners’ counsel has not addressed the relevant case law cited by the respondents (*see* Roth Reply Aff., 22-23).

Lastly, although the petitioners’ order to show cause requests an award of statutory counsel fees and costs (Order to Show Cause, decretal ¶ 5), their supporting papers advise that they are not, at this juncture, formally requesting an award of fees, but instead, are “putting the respondents on notice” that they intend to later request that relief if they prevail on their application (Roth [Main] Aff., ¶ 93; Roth [Reply] Aff., at 21).

The Court has considered the respondents’ remaining contentions and concludes that they are insufficient to defeat the petitioners’ motion to the extent indicated above.

The foregoing constitutes the Order of this Court.

Dated: March 18, 2014
Mineola, N.Y.


J. S. C.

ENTERED

APR 01 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE



New York City Transit

6096
merstein

(718) 694-4875

October 26, 2015

Roth & Roth, LLP.
192 Lexington Avenue/ Suite 802
New York, N.Y. 10016
Attn: Aracelis Velazquez
Paralegal

Re: Freedom of Information Law
Request No. 19542

Dear Ms. Velazquez

Pursuant to your FOIL request, the Transit Authority is pleased to produce its continued partial response to the following items:

No 2 – Space measurements -	4 pages
No 6- Train Trouble report	1 page
Nos. 7, 8, & 9 –G2s	7 pages
No. 10 -the FOIL search indicates that there is no G-2 for a Train dispatcher.	
No 12- Unusual Occurrence Report& Cleaning Report	2 pages
o. 14 - Consolidate Summary. We have redacted records that were not related to this incident	2 pages
No. 24 Records of prior claims at this location	1 page

I originally asked for \$ 10.25 for copies, however I made an error and over-charged you for these copies.

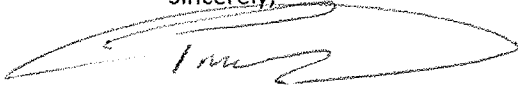
Since additional records will be provided shortly, I plan to deduct the over-payment from the cost of the future copies. Please accept my apologies for this error

Please note that the names, identifying codes of individuals, medical information, etc... are being withheld under the personal privacy exemption set forth in the Public Officers Law. Specifically, § 87 (2) authorizes an agency to deny access to records, which under § 87 (2) (b) "would constitute an

unwarranted invasion of personal privacy under the provisions of subdivision two of section eight-nine of this article.

If you wish to appeal this determination you have 30 days to file your appeal, in writing, with Thomas F. Prendergast, Chairman and CEO, MTA Headquarters, 2 Broadway, New York, NY 10004.

Sincerely,

A handwritten signature in black ink, appearing to read 'Prudence J. Jacobs', enclosed within a large, loopy oval shape.

Prudence J. Jacobs
Dep. FOIL Officer

Encl.

MTA NEW YORK CITY TRANSIT - DEPARTMENT OF SUBWAYS
DIVISION OF INFRASTRUCTURE
SPACE MEASUREMENT SURVEY

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LEGEND: R = RADIUS

TRAN = TRANSITION CURVE

TAN = TANGENT

REMARKS:

MTA NEW YORK CITY TRANSIT - DEPARTMENT OF SUBWAYS
DIVISION OF INFRASTRUCTURE
SPACE MEASUREMENT SURVEY

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1	1	TAN	4.50	2.00	1	1	R=2,160'	4.00	2.75	1	1	"	4.00	2.75	1	1	"	4.00	2.75
	2	"	4.25	2.50		2	"	4.00	3.00		2	"	4.00	3.00		2	"	4.00	3.00
	3	"	4.25	2.25		3	"	4.00	2.25		3	"	4.00	2.25		3	"	4.00	2.25
	4					4					4					4			
2	1	"	4.50	3.00	2	1	"	4.00	3.00	2	1	"	4.00	3.00	2	1	"	4.00	3.00
	2	"	2.75	3.50		2	"	5.00	3.25		2	"	5.00	3.25		2	"	5.00	3.25
	3	"	3.75	2.75		3	"	3.50	3.50		3	"	3.50	3.50		3	"	3.50	3.50
	4					4					4					4			
3	1	"	4.00	2.00	3	1	"	2.50	3.50	3	1	"	2.50	3.50	3	1	"	2.50	3.50
	2	"	4.50	2.00		2	"	3.00	4.50		2	"	3.00	4.50		2	"	3.00	4.50
	3	"	3.75	2.00		3	"	4.00	4.00		3	"	4.00	4.00		3	"	4.00	4.00
	4					4					4					4			
4	1	"	3.75	3.00	4	1	"	2.25	4.75	4	1	"	2.25	4.75	4	1	"	2.25	4.75
	2	"	4.50	3.50		2	"	3.00	5.25		2	"	3.00	5.25		2	"	3.00	5.25
	3	"	4.25	3.50		3	TAN	2.75	4.25		3	TAN	2.75	4.25		3	TAN	2.75	4.25
	4					4					4					4			
5	1	"	3.50	3.25	5	1	"	2.00	4.25	5	1	"	2.00	4.25	5	1	"	2.00	4.25
	2	"	3.00	3.75		2	"	2.50	4.50		2	"	2.50	4.50		2	"	2.50	4.50
	3	"	3.50	3.50		3	"	3.00	3.75		3	"	3.00	3.75		3	"	3.00	3.75
	4					4					4					4			
6	1	"	3.25	4.50	6	1	"	2.50	3.00	6	1	"	2.50	3.00	6	1	"	2.50	3.00
	2	"	2.75	4.75		2	"	2.50	3.50		2	"	2.50	3.50		2	"	2.50	3.50
	3	"	3.25	4.25		3	"	2.00	3.75		3	"	2.00	3.75		3	"	2.00	3.75
	4					4					4					4			
7	1	"	3.25	5.25	7	1	"	3.00	3.00	7	1	"	3.00	3.00	7	1	"	3.00	3.00
	2	"	3.00	5.75		2	"	3.25	2.75		2	"	3.25	2.75		2	"	3.25	2.75
	3	R=2,160'	3.75	5.25		3	"	3.50	3.00		3	"	3.50	3.00		3	"	3.50	3.00
	4					4					4					4			
8	1	"	4.00	5.00	8	1	"	3.00	3.00	8	1	"	3.00	3.00	8	1	"	3.00	3.00
	2	"	5.00	5.25		2	"	3.50	3.00		2	"	3.50	3.00		2	"	3.50	3.00
	3	"	5.75	5.50		3	"	3.25	2.75		3	"	3.25	2.75		3	"	3.25	2.75
	4					4					4					4			
9	1	"	4.50	2.50	9	1	"	3.25	2.50	9	1	"	3.25	2.50	9	1	"	3.25	2.50
	2	"	3.50	2.75		2	"	3.50	3.00		2	"	3.50	3.00		2	"	3.50	3.00
	3	"	4.00	2.75		3	"	3.50	2.50		3	"	3.50	2.50		3	"	3.50	2.50
	4					4					4					4			
10	1	"	2.75	2.75	10	1	"	3.00	3.50	10	1	"	3.00	3.50	10	1	"	3.00	3.50
	2	"	2.75	3.25		2	"	2.75	3.00		2	"	2.75	3.00		2	"	2.75	3.00
	3	"	3.50	2.50		3	"	3.50	2.50		3	"	3.50	2.50		3	"	3.50	2.50
	4					4					4					4			
11	1				11	1				11	1				11	1			
	2					2					2					2			
	3					3					3					3			
	4					4					4					4			

LEGEND: R = RADIUS

TRAN = TRANSITION CURVE

TAN = TANGENT

REMARKS:

MTA NEW YORK CITY TRANSIT - DEPARTMENT OF SUBWAYS
DIVISION OF INFRASTRUCTURE
SPACE MEASUREMENT SURVEY

SPACE MEASUREMENT					SURVEY				
Station		Div			Line			Sta #	
79TH STREET		IRT			7AV			312	
NORTHBOUND LOCAL					SOUTHBOUND LOCAL				
		DATE: 11/08/08					DATE: 11/08/08		
		TRACK#: B-4					TRACK#: B-1		
		CAR MODEL: R-62					CAR MODEL: R-62		
C	D	TRACK CONFIG	HORIZ	VERT	C	D	TRACK CONFIG	HORIZ	VERT
A	O				A	O			
R	O				R	O			
#	R				#	R			
1	1	TAN	4.00	2.75	1	1	2,160'	4.50	3.00
	2	"	4.00	2.50		2	"	5.25	3.25
	3	"	4.00	2.25		3	"	4.50	3.25
	4					4			
2	1	"	4.25	1.50	2	1	"	4.25	0.75
	2	"	4.00	1.25		2	"	4.50	1.50
	3	"	3.75	1.25		3	"	4.00	1.00
	4					4			
3	1	"	4.00	3.25	3	1	"	3.00	4.00
	2	"	5.00	3.25		2	"	4.00	4.50
	3	"	5.00	3.00		3	"	4.75	4.50
	4					4			
4	1	"	4.00	3.50	4	1	"	2.75	3.50
	2	"	5.00	3.25		2	"	4.00	4.50
	3	"	4.00	3.25		3	TAN	3.25	4.00
	4					4			
5	1	"	3.00	3.50	5	1	"	3.50	4.50
	2	"	3.00	4.25		2	"	3.00	4.50
	3	"	3.25	4.50		3	"	3.25	3.25
	4					4			
6	1	TAN	3.50	4.50	6	1	"	3.25	3.75
	2	"	3.00	5.00		2	"	2.75	4.50
	3	"	3.00	4.50		3	"	2.25	4.50
	4					4			
7	1	"	3.50	4.00	7	1	"	3.75	2.75
	2	"	3.25	5.00		2	"	4.25	2.25
	3	2,160'	4.00	4.50		3	"	4.25	3.00
	4					4			
8	1	"	4.00	4.50	8	1	"	3.50	3.50
	2	"	5.00	5.00		2	"	4.25	3.00
	3	"	6.00	5.50		3	"	3.50	3.00
	4					4			
9	1	"	4.50	4.00	9	1	"	4.00	2.25
	2	"	3.25	4.00		2	"	4.00	2.75
	3	"	4.25	3.00		3	"	3.75	2.50
	4					4			
10	1	"	3.00	2.75	10	1	"	3.75	2.75
	2	"	2.75	3.50		2	"	3.50	2.75
	3	"	3.00	3.50		3	"	3.75	2.75
	4					4			
11	1				11	1			
	2					2			
	3					3			
	4					4			

LEGEND : R = RADIUS

TRAN = TRANSITION CURVE
ALL MEASUREMENTS ARE IN INCHES.

TAN = TANGENT

REMARKS:

Requestor: JONES, HAROLD W.

Print Date: 09/23/2015

Print Time: 12:59:10



New York City Transit

Department of Subways - Division of Car Equipment
Rolling Stock Maintenance Information System

Parameters

From Date: *

To Date: *

Shop Id: *

Incident Id: 376316

Report: *

REQUEST FOR ASSISTANCE REPORT

Incident ID: 376316

Train Trouble: 07/01/15-034

Input by: MOHAMMED, GEARY

Status: CLS

Date of Incident: 7/1/15

MDBF Charge F:

Division: IRT

Line: 1

Interval: 0829

Interval Description: 242/SFY

Occured At: 79TH STREET

Trouble: BETWEEN PLATFORM AND CAR BODY

Train Consists: * Involved Car

S	2470	2469*	2468	2467	2466	2431	2432	2433	2434	2435
---	------	-------	------	------	------	------	------	------	------	------

Train Operator: DEJESUS

Conductor: FALCONE

Incident Time: 0:00

Time TTC Notified: 9:11

Time RCI Notified: 9:13

Time RCI Arrived: 10:44

Ready to Move: 10:46

Time Train Moved: 10:50

Road Car Inspector G. Mohammed on duty at 242nd Street was notified by DCE Emergency Response to meet the above train and submit the following report.

Train Operator operating in car 2470 reported: at 79st that while boarding the train, a customer slipped and his leg went between the platform and the train in the middle of car 2469. The customer informed the Train Operator that he had a muscle spasm in his leg and that's where his leg went down between the platform and the train. The customer was removed by EMS and the train continued in service.

RCI entrained upon return trip and found car 2469 to be well lit, and has dry floors, the threshold plates all intact and in good condition, air bag suspension was operating as intended, it was not sagging in any spot. The doors and AAS operated as intended.

Train is to be sent to 240st Maintenance Facility after AM service for further investigation and repairs. MS1 Yohanan at 240th st Maintenance Facility and RTO/GLP were notified.

Train is OK for service. Train to be laid up at end of day at 240 STREET. RTO(GLP) is notified.

Shop Text:

RCI found car 2469 to be well lit, and has dry floors, the threshold plates all intact and in good condition, all lateral shocks was operating as intended. checked both sides no rubbing marks found. train preserviced ok. iv

CAR ACTIONS:

Car	Last Inspection Date	Last Inspection Type	Miles Since Last Inspection
2469	05/20/2015	SM2	6,517



New York City Transit

CORRESPONDENCE SHEET

From Rose A Falone Conductor 9/29/15 2015
 Name Title Pass Number

Line 1 Time 10:38 AM Day of Week Tues Date 9/29/15 Minutes Detention
 To: Supt EDMOND
 Subject: CUSTOMER INJURY @ 79th ST S/B

DO NOT WRITE IN THIS SPACE

ON July 1st, 2015, I MADE the 08:29 VAN CORTLANDT to SOUTH FARM.
 AT 79th street, WITH TRAIN IN THE STATION AND THE DOORS OPEN I CALLED
 MY PARTNER VIA THE INTERCOM, TO DE JESUS THAT I WAS UNABLE TO
 CLOSE THE FRONT SECTION DUE TO CUSTOMERS BLOCKING THE DOORWAYS
 IN THE 2ND CAR. A FEW SECONDS LATER MY T/O RESPONDED THAT A
 CUSTOMER TOLD HER THAT A MAN HAD FELL AND INJURED HIS LEG.
 THE TRAIN OPERATOR INITIALLY CALLED CONTROL, WENT TO SEE
 ABOUT THE INJURED CUSTOMER + REQUESTED MEDICAL ATTENTION,
 WHILE I MADE MY ANNOUNCEMENTS, AFTER INFORMING THE CUSTOMERS
 I TOO CALLED CONTROL OF THE INCIDENT. UPON REACHING THE
 INJURED CUSTOMER I CALLED CONTROL WITH A DESCRIPTION. HE WAS A
 BALD CAUCASIAN MALE, WEARING GLASSES, A WHITE SHIRT AND BLACK PANTS.
 THE INJURED CUSTOMER ^{STP} HE WAS BOARDING THE TRAIN WHEN HIS RIGHT
 LEG SLIPPED BETWEEN THE PLATFORM + THE TRAIN. THIS WAS THE 2ND
 CAR # 2469. I TOO REQUESTED ASSISTANCE AS WELL. THEN CONTROL
 INSTRUCTED MY TRAIN OPERATOR AND I TO DISCHARGE THE
 TRAIN AND FOR ME TO WAIT WITH THE INJURED CUSTOMER,
 AFTER FULLY DISCHARGING AND NOW WAITING WITH THE CUSTOMER.

Signature Rose A Falone # [redacted]



New York City Transit

CORRESPONDENCE SHEET

AM
PM

9/29/

2015

From
Name

Robert Falcone Conquest

Title

Pass Number

Line 1 Time 10:38 AM Day of Week Tues Date 9/29/15 Minutes DetentionTo: Sup't EDMONDSubject Customer Injury @ 79th St S/B

CONTROL THEN INSTRUCTED ME TO RETURN TO MY POSITION
BECAUSE SUPERVISION WAS ENROUTE. AND WOULD WAIT WITH
THE INJURED CUSTOMER AT WHICH TIME THE TRAIN WAS
RETURNING TO CUSTOMER SERVICE. I RETURNED TO MY POSITION
AND THEN CONTROL INSTRUCTED MY T/O AND I TO
PROCEED LIGHT AND GO IN SERVICE AT 79th St.

DO NOT WRITE IN THIS SPACE

Signature: [Signature]



New York City Transit

CORRESPONDENCE SHEET

AM 09/25 2015
PMFrom
Name

Regina Velazquez Train Operator

Title

Pass Number

Line

Time

Day of
Week

Date

Minutes Detention

To:

Sgt. Edmund

Subject

Customer Injury at 79th Street

On 9/1/2015, I, T/O R. Velazquez, job 107-1 operating car #2470 made the 6729 Via Cortlandt to South Ferry. At 79th Street the train was fully abreast in the station with the doors open when Y/L J. Falcone informed me via intercom that he was unable to close the front section due to customers blocking the doors in the second car. Simultaneously, a female customer knocked on my cab window and informed me that a male passenger had fell and injured his leg. I then notified Y/L Falcone via intercom and Train Control via radio of the situation. I secured my cab and went to investigate while Y/L Falcone made announcements. The injured customer was a male Caucasian in his 60's. He was sitting on the platform floor leaning against the pillar across from car #2469. The customer stated he fell between the platform and train while the doors were opened and injured his leg. I can't recall if the customer was extraining or detaining. I then updated Train Control and requested medical. Train Control instructed Y/L Falcone and I to (continue on page 2)

Signature:

Regina Velazquez

Page 1

DO NOT WRITE IN THIS SPACE



New York City Transit

CORRESPONDENCE SHEET

From Regina DeSena Train Operator AM 09/25 2015
 Name Title Pass Number

Line 1 Time Day of Week Date Minutes Detention

To: Supt Edmond

Subject Customer Injury at 79th Street

discharge the train and I/R Falcone to wait with the injured customer. After fully discharging the train, I returned to my position and waited for permission to proceed. Then Rail Control informed I/R Falcone and I that a Train Service Supervisor was en route to stay with the injured customer. Rail Control instructed I/R Falcone to return to his position for the train was back in customer service.

DO NOT WRITE IN THIS SPACE

Signature:

Regina DeSena

Page 2



New York City Transit

CORRESPONDENCE SHEET

From J Pimentel Title Train Sr Supr. AM 2015
 Name [REDACTED] Pass Number [REDACTED]

Line 1 Time [REDACTED] Day of Week Thurs. Date 9/24/15 Minutes Detention 10

To: Legal Department

Subject: Injured Customer at 79 St

DO NOT WRITE IN THIS SPACE

On July 1, 2015 I was Called by Rec
 to respond to an injured customer at 79 St
 When I arrived at 79 St there was
 White male Customer claiming injury to
 his right leg. Police and EMS were on
 the scene assisting the injured person
 and taken to the hospital for further
 treatment.

End of report

Signature: J Pimentel

09/25/2015 08:13 17184305185

NVCT

PAGE 01/02



New York City Transit

CORRESPONDENCE SHEET

0700 AM 0925 2015
PMFrom
Name

T. Williams

Title

TSS

Pass Number

Line

Time

0900

Day of
Week

WED

Date 070115

Minutes Detention

To:

Supt Salomons

Subject

I responded to the 0829 242/SF at 79st to aid an injured customer. I found a very heavy male sitting on the platform next to the train in the station. He stated that he weighed 350 pounds. He also stated that while attempting to board the train in the station with the doors opened his right leg slid between the second south car body and the platform edge. There was an approximately 4 inch gap between the car body and the edge of the platform. He stated that as his body was falling he managed to turn to his side and free his leg. He had a bruise on his right calf. He stated he had no other injuries. Fire Department Arrived at 0930. Engine NO: 74. EMS truck 11 Bravo badge NO: 7438 and Police officer 17230 also responded.

Signature:

DO NOT WRITE IN THIS SPACE



New York City Transit

CORRESPONDENCE SHEET

0700 AM 0925 2015
PM

From T. Williams Title TSS Pass Number [REDACTED]
Name

Line 1 Time 0900 Day of Week Wed Date 07015 Minutes Detention

To: Sgt Salomons

Subject Fire Department personnel decided
that due this customer being too heavy
to transport up the stairs at 72nd it
would be suitable to transport this
customer via subway train one stop
to 72nd where there is an elevator
to get him to street level. The customer's
information is: Merinstien, Gary M.
210 W 80th Street
Apt 1C
NY NY 10025
DOB 011656

This customer was taken to Lenox Hill
Hospital.

Signature: T. Williams

DO NOT WRITE IN THIS SPACE

CUSTOMER UNUSUAL OCCURRENCE REPORT

REVISED 7/08

WEATHER: Clear Fair Rain Snow
(Circle One)

Date Reported 07/01 20 15

This report is to be completed by the Supervisor or Manager. Attach the Customer Incident Report and CTA Cleaning Report to this report.

Item # _____ Station Location Code: 312 Line 1
Station 79th Broadway Booth No. R162 Division IRI
Place of Incident Boarding S/B TRAIN Time 0901 Date JULY 01, 2015
Name of injured/ill customer Undisclosed Age Adult Male ☒ Female _____
(circle one)

Address Undisclosed

Details of Occurrence (State Cause) A Div reported the 0829 #2 out of 242nd Street space car # 2469 male customer requesting medical due to leg pain. TPO and EMS responded. Male customer was rendered from the station conscious and alert via EMS

Emergency Booth Communications Utilized Yes ☐ No ☒ (Continued on Back)

Hospital Name [REDACTED] Doctor EMS # 7438 Admitted Yes ☐ No ☐ Unknown ☒

Claimed Injury/Illness (circle one) Unspecified leg pain

Was police officer present? Yes Name I. Adam Badge No. _____ Transit Bureau/Precinct No. #2
(Circle One)

Witness None reported Address None reported

Condition of Area at Time of Inspection Clean, Dry, well lit, no defects

Inspection by Kisha Drumgold S/SI [REDACTED] Date 07/01/15 Time 0945
Name Title Pass No.

Cleaning Report to be Submitted by Cleaner/TA Robin Wiley [REDACTED]
Pass No.

Superintendent Notified Gwendolyn Mulgine [REDACTED]
Pass No.

Supervisor Assigned Kisha Drumgold [REDACTED]
Pass No.

Incident Reported by A Div [REDACTED]
Name Title Pass No.

Remarks (State Other Departments Notified) RTO, RCC, Dist #1/125th Laington, TPO & EMS

Train Incident: Car Numbers 2469

Door No. _____ Leaving Terminal 242nd Street Time 0829

Received at Time 1200 Received by Y. Avvocato S/SI [REDACTED]
Name Title Pass No.

CTA Cleaning Report

DIVISION IRT
MTA NYCT Cleaner Robin Wiley Badge No. 2890 Pass No. [REDACTED]

This Cleaning Report must be completed on the date of the incident. Part I shall be prepared by a Supervisor or Station Agent. Part II must be completed by the Cleaner. THIS REPORT MUST ACCOMPANY THE INCIDENT REPORT.

PART I

This part must ONLY be completed by the Supervisor or Station Agent.

Date of Incident July 01 20 15 Time 0907 Line 1
Station 79th Broadway Exact Location Boarding s/b train
Name of Injured/Ill Undisclosed Address Undisclosed
Incident occurred Before Robin Wiley Pass No. [REDACTED] Arrived on Station
While Cleaner Robin Wiley (Complete Name) Was on Station
After Robin Wiley Left the Station
(Circle One) (Circle One)

PART II

This part must ONLY be completed by the above named Cleaner after Part I has been completed. All questions must be answered.

Please Check One: ☒ I am the Cleaner assigned to this station.
☐ I am the Cleaner who was reassigned to this station.

(THIS SECTION TO BE COMPLETED BY CLEANER ASSIGNED TO THE STATION)

I, Cleaner Robin Wiley Pass No. [REDACTED] was on duty at the 79th Street
on 7/1 2015 from 1200 to 1330 and cleaned the station.
(Date) (Time) (Time) (Station)

(THIS SECTION TO BE COMPLETED BY CLEANER ASSIGNED TO THE STATION OR REASSIGNED TO THE STATION)

Did you see the incident? NO

I inspected the part of the station where the incident occurred:

S/B platform Date 7/1 2015 Time 12:00 and left it clean and dry
(Place of Incident) (State Condition)

Weather conditions Clear

Was there any snow or ice on street surface? NO Was there any snow or ice on the part of Station involved in the incident? NO

Were there any defects or obstructions at place of the incident? NO

REMARKS (GIVE DETAILS AS TO CONDITIONS EXISTING AT THE TIME OF THE INSPECTION AND CORRECTIONS MADE AND ALL YOU KNOW ABOUT THIS INCIDENT)

I have no knowledge of what occurred

CLEANER'S SIGNATURE

Robin Wiley

Date: 7/1/15

MTA NEW YORK CITY TRANSIT
DIVISION OF STATION ENVIRONMENT AND OPERATIONS

CONSOLIDATED SUMMARY OF STATION ENVIRONMENT AND OPERATIONS
COVERING 24 HOUR PERIOD ENDING AT 2359 HOURS

WEATHER: FAIR

DAY: WEDNESDAY

DATE: JULY 1, 2015

CONSOLIDATED SUMMARY OF STATION ENVIRONMENT & OPERATIONS - JULY 1, 2015 (CONT'D)

12104 IRT

0907, 79th Street, "1" R162 - Supv. Drumgold ~~20051~~ reports unknown male taken ill on S/B train in car #2469. Removed to Lenox Hill Hospital. CPO 1 Adam, Transit Bureau 1 responded.

REPORT DATE 10/07/2015

01/01/05-07/07/15 TA 201507010001 001 REPORT FOR D FRASER
CLMT LEG SLIP/TRIP/FELL INBTWN TRAIN AND PLATFORM

PAGE 1

ACC-DATE PCKEY ACC-LOC
ACCDESC1
ACCDESC3

ACC-CODE EVENT DIVISON LOCATION BLIND ROUTE CLMFLAG STAIRWAY STATIONBUS
ACCDESC2
OPERATR1 OPERATR2

2012/10/17 TA201210170007 79 STREET-#1 & 9 only - MANH
AT 79TH STREET A FEMALE CAUCASIAN CUSTOMER (APPX 30)
BETWEEN THE CAR BODY AND THE PLATFORM. THE TRAIN WAS NOT

510 IRT 220 N 1 N R162 18
SLIPPED WHILE BOARDING THE TRAIN IN CAR #1853. HER FOOT WENT

2015/07/01 TA201507010001 79 STREET-#1 & 9 only - MANH
AIDED FELL BETWEEN GAP ON PLATFORM AND SOUTHBOUND #1 TRAIN. SUSTAINED INJURIES TO HIS LEG AND KNEE AND BRUISING. MOS WAS
NOT A WITNESS TO THIS INCIDENT.

510 IRT 220 N 1 Y R162
SUSTAINED INJURIES TO HIS LEG AND KNEE AND BRUISING. MOS WAS

