

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

BRENNAN CENTER FOR JUSTICE AT
NEW YORK UNIVERSITY SCHOOL OF LAW,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent,

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

Index No. _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 Proceeding asserts the right of Petitioner, the Brennan Center for Justice at New York University School of Law (“Brennan Center”),¹ and the public to access public records relating to the monitoring of social media by the New York Police Department (“NYPD”). Specifically, the NYPD has refused to release, among other things, records reflecting the NYPD’s collection of individuals’ social media account information, records showing how the NYPD uses social media to detect and monitor protests, and training documents related to the use of social media monitoring.

2. It is a matter of public record that the NYPD monitors social media to track protestors, investigate alleged crimes, and identify suspects based on their networks of associations. In light of the risks arising out of the NYPD’s use of social media, using real or

¹ This pleading does not purport to convey the position, if any, of the New York University School of Law.

undercover accounts and third-party monitoring tools, to conduct surveillance of individuals because of their social networks or posts, the public has a strong interest in understanding how, and the extent to which, the NYPD monitors social media and the training it provides to prevent abuses. Despite widespread public interest in these practices, the public lacks information about the actual parameters of the NYPD's monitoring of social media. The design and application of these practices could materially affect the civil rights of New Yorkers.

3. New York's Freedom of Information Law ("FOIL") expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. Pub. Off. Law § 84. FOIL proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is antithetical to our form of government. *Id.* Therefore, pursuant to FOIL, *all* government records are presumptively open for public inspection and copying. *Id.* Although this presumption is subject to certain statutory exceptions, those exceptions are to be narrowly construed, and it is the burden of the public agency (here the NYPD) to prove that a requested record fits within the exception. Pub. Off. Law § 89(4)(b).

4. The Brennan Center filed a FOIL request in January 2020 with the NYPD FOIL Unit for various categories of public records regarding the department's policies and contracts for monitoring social media.

5. The NYPD at first denied the request but then granted the Brennan Center's appeal and remanded for a collection and production of records. Three years have since passed, and the NYPD has failed to produce the vast majority of what was requested. Instead, the NYPD has engaged in a persistent pattern of delay. Throughout, the Brennan Center has undertaken considerable efforts to secure the NYPD's cooperation and compliance with its own agreement

to produce responsive records. Over the years, the Brennan Center has organized multiple calls with the NYPD and its counsel; sent repeated communications seeking updates; and continuously narrowed its proposals for collection. None of these efforts has had success. The NYPD's constructive denial of the Brennan Center's request requires this petition.

6. This Article 78 petition seeks to compel the NYPD to comply with its statutory mandate under FOIL and respectfully asks this Court to direct the NYPD to provide Petitioner with records in response to its FOIL request.

PARTIES

7. Petitioner Brennan Center is a non-profit, non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center's work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protections in the fight against terrorism. Through its Liberty and National Security Program, the Brennan Center seeks to ensure that law enforcement agencies execute their responsibilities in compliance with constitutional and statutory limits.

8. Respondent NYPD is an agency administered under New York City Administrative Code, Title 14. The NYPD is responsible for law enforcement in the City of New York and is subject to the requirements outlined in FOIL. *See* Pub. Off. Law § 84, *et seq.*

FACTS

9. On January 30, 2020, the Brennan Center sent a FOIL request (the "Request") to the NYPD's FOIL Unit, seeking information about the NYPD's practices in monitoring social media. (A copy of the request is annexed as Exhibit 1.) The NYPD acknowledged receipt on February 3, 2020 (Ex. 2), and then on February 19, 2020, denied the Request. Ex. 3. The

Brennan Center timely appealed (Ex. 4), and on March 18, 2020, the Records Access Appeals Officer denied the appeal. Ex. 5.

10. “Upon further review,” however, the Records Access Appeals Officer “amended” that appeal determination and on September 30, 2020 “remanded” the Request to the Records Access Officer “for a further search to be conducted for the requested records.” Ex. 6.

11. Over the next several weeks, the Brennan Center and the NYPD conferred over the scope of production and negotiated search parameters to identify information responsive to the Request, with the Brennan Center supplying proposed search terms to the NYPD on November 3, 2020. *See* App’x G and H to Ex. 7 (as discussed below, Exhibit 7 is a copy of the Brennan Center’s November 1, 2023, appeal, which appended correspondence with the NYPD). Over the next few months, the Brennan Center consistently asked about status. The NYPD failed to provide a single estimate for when production would be made. Finally, on April 1, 2021, the NYPD committed to a “rolling production” of responsive information. *See* App’x H to Ex. 7.

12. Despite this commitment of a rolling production, the NYPD continued to delay. In response to the Brennan Center’s repeated outreach, the NYPD claimed multiple times that it would begin rolling productions—first around April 19, 2021, then around April 28, 2021, and then around June 1, 2021. *See* App’x G to Ex. 7. Each time, the NYPD’s claimed deadline came and passed without the NYPD producing any records.

13. In July 2021, more than three months after the NYPD had committed to make rolling productions, and more than 280 days since the Request had been remanded, the NYPD made a small production of documents, purportedly in response to some of the topics in the Request. *See* App’x I to Ex. 7. The NYPD did not respond to 10 of the 17 topics in the Request but assured that a further response would be issued before August 17, 2021 (*see id.*). The NYPD

further stated that “more records are being reviewed and evaluated for disclosure and future responses will be forth coming.” *See* App’x G to Ex. 7.

14. The NYPD missed its August 17, 2021, deadline. The Brennan Center followed up after the deadline had lapsed, and the NYPD responded that “[t]here will be a disclosure next week.” *See id.* The NYPD then missed that deadline, extending it first to October 2021, then mid-November 2021. The NYPD missed those deadlines too. After the Brennan Center conferred again with the NYPD, the NYPD made a second (and final) production of 43 pages on November 16, 2021. *See* App’x J to Ex. 7. The letter accompanying the production of records stated: “The search is ongoing for the remainder of your request It is anticipated that a further response will be issued on or before December 17, 2021.” *Id.* The Brennan Center has not received any records since that date, over 23 months ago.

15. Since November 2021, the Brennan Center has worked strenuously to secure the NYPD’s cooperation. Over the ensuing two years, the Brennan Center has made multiple search proposals to the NYPD, each time voluntarily narrowing the scope of the requested search. Each time, the NYPD responded only by providing the estimated size of the review, without making any counterproposals or providing information that would enable the parties to have a meaningful discussion about how to address the NYPD’s claims of burden. Each NYPD response, moreover, came only after considerable delay, forcing the Brennan Center continually to seek a response from the NYPD. The Brennan Center, for example, had to follow up nine times over the course of 2022, and organized calls with the NYPD on October 13, 2022, as well as April 20, April 28, May 11, and August 4, 2023, in an effort to develop a plan for the production of information responsive to the Request. *See* App’x G to Ex. 7.

16. In August 2023, the Brennan Center made a final attempt to obtain documents, voluntarily narrowing its proposed search parameters yet again in an effort to address the NYPD's claim of burden. After receiving no response from the NYPD, the Brennan Center asked for an update on September 7 and 20, 2023. *See id.* The NYPD provided no update.

17. On November 1, 2023, the Brennan Center appealed this constructive denial of its Request. *See Ex. 7.*

18. On November 16, 2023, the Records Access Appeals Officer replied, contending that the appeal was "premature." Ex. 8. The reply acknowledged that "no further records have been disclosed" since the NYPD's small production two years earlier. The Records Access Appeals Officer asserted, however, that the "NYPD is open to further conferral," and that the reason for the delay was that the NYPD FOIL Unit was still awaiting records corresponding to the Brennan Center's search proposal from almost *three months earlier*. The Records Access Appeals Officer provided no estimate of when the NYPD would make a determination of what to produce from those records once it collected them, let alone when it would produce the records.

19. Petitioner timely commenced this Article 78 proceeding within four months of the NYPD's constructive denial of its November 1, 2023 appeal, *see* CPLR § 217, to force the NYPD to comply with its obligations under FOIL and provide Petitioner with documents responsive to the Request.

VENUE AND JURISDICTION

20. Pursuant to CPLR § 7804(b) and 506(b), venue in this proceeding lies in New York County, the judicial district in which both Petitioner's and Respondent's principal offices are located.

21. Article 78 of the CPLR (CPLR § 7804(b)) confers jurisdiction over this matter upon this Court.

22. This Court has jurisdiction over the matter because the NYPD's denial of the Brennan Center's appeal cannot be further "reviewed by appeal to a court or to some other body or officer." CPLR § 7801[1].

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

23. Petitioner repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

24. Article 78 is the appropriate method of review of final agency determinations concerning FOIL requests.

25. Petitioner has a legal right under FOIL to gain access to the public records requested in the Request.

26. FOIL recognizes the public's right to access and review government documents; agency records are presumed to be public and subject to disclosure under FOIL.

27. Respondent has not produced the records sought by Petitioner and have failed to properly invoke any exemptions under FOIL.

28. Respondent did not meet its burden to provide specific and particularized justification for withholding the requested records from disclosure under FOIL.

29. Petitioner has exhausted its administrative remedies and has no other remedy at law.

30. Petitioner has not made a prior application for the relief requested herein.

31. Because the NYPD had no reasonable basis for its categorical, constructive denial of the Request, Petitioner is entitled to attorney's fees under Public Officers Law § 89(4)(c).

CLAIM FOR RELIEF

Petitioner respectfully requests that this Court enter judgment, pursuant to CPLR 7806, on its behalf:

- a. directing the NYPD to comply with its duty under FOIL to provide Petitioner access to the requested records and documents responsive to Petitioner's FOIL request that are not subject to any exemption and to specifically identify and describe any documents allegedly exempt from disclosure;
- b. ordering, in the alternative, an *in camera* review of the responsive records in the event this would better inform the Court as to the contents and form of the records requested by Petitioner, as well as the need for redactions;
- c. awarding Petitioner its reasonable attorney's fees pursuant to Public Officers Law § 89(4)(c); and
- d. granting Petitioner such other and further relief as this Court deems necessary and equitable.

Dated: New York, New York
November 20, 2023

Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By: /s/ Rex Lee
Rex Lee

51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Attorneys for Petitioner

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Motion Sequence No. 001

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

Rex Lee
51 Madison Avenue, 22nd Floor
New York, New York 10010
Tel: (212) 849-7000
Fax: (212) 849-7100

Attorneys for Petitioner

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PRELIMINARY STATEMENT

Petitioner, the Brennan Center for Justice at New York University School of Law (the “Brennan Center”),¹ respectfully seeks Article 78 review of the constructive denial by respondent, New York City Police Department (“NYPD”), of the Brennan Center’s request under the Freedom of Information Law (“FOIL”) (Pub. Off. Law § 84 *et seq.*) for public records relating to the NYPD’s use of social media monitoring.

There have been widespread reports of the NYPD’s increased monitoring of social media to track protestors, investigate alleged crimes, and identify suspects based on their networks of associations. In light of the risks arising out of the NYPD’s use of social media, using real or undercover accounts and third-party monitoring tools, to conduct surveillance of individuals because of their social networks or posts, the public has a strong interest in understanding how, and to what extent, the NYPD monitors social media and the training it provides to prevent abuses. Seeking to advance that public interest, the Brennan Center requested 17 categories of documents, including policies governing the collection of location data, contracts for third-party monitoring tools, training materials regarding monitoring social media, records reflecting the use of social media to interact with civilians, and records regarding the use of social media to collect information about civilians other than in the context of a criminal investigation.

The NYPD constructively denied the Brennan Center’s request in violation of FOIL. The Brennan Center submitted its FOIL request in January 2020, *nearly four years ago*. At first, the NYPD expressly denied the request. Thereafter, its records access appeals officer granted the Brennan Center’s appeal and remanded for a collection and production of records. But that formal

¹ This brief does not purport to convey the position, if any, of the New York University School of Law.

response has barely mitigated the NYPD's continued unwillingness to produce documents. Since remanding, the NYPD has engaged in a persistent pattern of delay and obstruction, missing its own deadlines, then refusing to set new deadlines, all while failing to produce records relating to the vast majority of the Brennan Center's requests. Throughout, the Brennan Center has undertaken repeated and considerable efforts to secure the NYPD's cooperation and compliance with its own agreement to produce responsive records. Over the years, the Brennan Center has organized multiple calls with the NYPD and its counsel; sent repeated communications seeking updates; and continuously narrowed its proposals for collection, without ever receiving any counterproposal from the NYPD. Enough is enough. The NYPD's refusal to produce most records for more than three years, let alone provide an approximate date for compliance, amounts to a constructive denial in violation of FOIL. Accordingly, the Brennan Center respectfully requests that this Court grant its Verified Petition.

BACKGROUND

A. The Brennan Center's FOIL Request

The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice and advocates for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms. The Brennan Center is concerned with the dangers that national security policy and law enforcement and domestic counterterrorism policies pose to constitutional liberties. Through scholarship, legislative efforts, and legal advocacy, the Brennan Center seeks to keep the public informed of these issues and hold law enforcement agencies accountable to the rule of law. Access to public information—including the records of law enforcement agencies—is an essential element that enables the Brennan Center to advance its mission.

On January 30, 2020, the Brennan Center sent a FOIL request (the “Request”) to the NYPD’s FOIL Unit, seeking information about the NYPD’s practices in monitoring social media. *See* Petition, Ex. 1 (FOIL Request). “Social media monitoring” describes the use of platforms like Facebook, Twitter, and Instagram to collect information about individuals, perform investigations, and gauge public sentiment. This can be accomplished through individual, direct use of social media platforms and their search functions, including through the use of undercover social media accounts. Third-party monitoring tools are also available to identify trends and people’s networks via keywords, geographic locations, and data analysis.

According to a policy that the NYPD produced in response to a different 2015 FOIL request, officers are allowed to use social media in investigations, including by using fictional or undercover aliases.² The NYPD also uses social media to gauge public sentiment and track protestors. The NYPD reported sending surveys in the form of popup ads, for example, to thousands of New Yorkers each month via platforms like Facebook and Instagram to gauge public sentiment about the NYPD. The surveys were translated into measurable “trust scores” by an independent company, using an undisclosed methodology, and the results were sent to each precinct.³ The NYPD has also acknowledged using social media to monitor and identify parties that might lead to overcrowding, noise, or underage drinking.⁴

² *See* Chase Pashkowich, *NYPD Online Surveillance*, MUCKROCK, <https://www.muckrock.com/foi/new-york-city-17/nypd-online-surveillance-14466/#file-34135> (last visited November 15, 2023).

³ Rebecca Kesten, *NYPD Uses Tech To Gauge Citizens’ Sense Of Safety: It’s a ‘Shared Responsibility’*, FOX NEWS (Sep. 28, 2019), <https://www.foxnews.com/tech/app-helps-police-tap-into-citizen-sentiments>; Simone Weichselbaum, *How a ‘Sentiment Meter’ Helps Cops Understand Their Precincts*, WIRED (July 16, 2018), <https://www.wired.com/story/elucid-sentiment-meter-helps-cops-understand-precincts/>.

⁴ Jen Chung, *FYI: NYPD Maybe Be [sic] Following Your Twitter and Facebook*, GOTHAMIST (June 25, 2011), <https://gothamist.com/news/fyi-nypd-maybe-be-following-your-twitter-and-facebook>.

Several examples of the NYPD's use of social media stand out. During the Black Lives Matter protests, for example, the NYPD used social media to conduct surveillance of protesters.⁵ The NYPD monitored social media posts about upcoming actions, sharing screenshots of social media posts with top officials at the NYPD's Intelligence Bureau.⁶ In another example, in 2012 the NYPD arrested 19-year-old Jelani Henry on murder charges, based in large part on his social media associations and pictures with members of a local "crew."⁷ Mr. Henry spent two years on Rikers Island based on this "social media evidence" before his case was dropped and he was released. In 2016, the NYPD arrested 120 young men—almost all men of color—in one day, based on allegations that they were involved in gang-related conspiracies. Several of the cases, known collectively as the Bronx120, were built on social media "likes" or "shares," which contributed to charges of conspiracy.⁸ The prosecution used over 41,000 Facebook pages and records to build the Bronx120 case.⁹

Not surprisingly, there has been widespread public interest in law enforcement officers' use of social media monitoring. *See, e.g., Letter from Community Groups to City Council Member Donovan Richards, Chair, Committee on Public Safety*, N.Y. AMSTERDAM NEWS (Feb. 8, 2018), <https://amsterdamnews.com/news/2018/feb/08/dear-city-council-member-donovan->

⁵ Zolan Kanno-Youngs, *NYPD Emails Show Officers Surveilled Black Lives Matter Protesters*, WALL ST. J. (Jan. 17, 2019), www.wsj.com/articles/nypd-emails-show-officers-surveilled-black-lives-matter-protesters-11547771520.

⁶ *Id.*

⁷ Ben Popper, *How The NYPD Is Using Social Media To Put Harlem Teens Behind Bars*, VERGE (Dec. 10, 2014), <https://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison>.

⁸ Max Rivlin-Nadler, *The Strange Aftermath of the Largest Gang Bust in New York History*, VICE (May 12, 2016), https://www.vice.com/en_ca/article/8gkwaa/the-strange-aftermath-of-the-largest-gang-bust-in-newyork-history.

⁹ Simon Davis-Cohen, *Video: The Heavy Hand Of New York's Social Media-Powered Policing*, FAST COMPANY (Apr. 19, 2019), <https://www.fastcompany.com/90337408/the-heavy-hand-of-new-york-city-social-media-fueled-policingvideo-documentary>.

richards-chair-co/; George Joseph, *Years After Protests, NYPD Retains Photos of Black Lives Matter Activists*, APPEAL (Jan. 17, 2019), <https://theappeal.org/years-after-protests-nypd-retains-photos-of-black-lives-matter-activists/>; Ali Winston, *Did the Police Spy on Black Lives Matter Protesters? The Answer May Soon Come Out*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/nyregion/nypd-black-lives-matter-surveillance.html>; Meredith Broussard, *When Cops Check Facebook*, ATLANTIC (Apr. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/>; Alice Spери, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren't in Gangs*, INTERCEPT (Apr. 25, 2019), <https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecutionrico/>.

Considering the public's significant interest in social media monitoring, the Brennan Center requested 17 categories of documents, including policies governing the collection of location data, contracts for third-party monitoring tools, training materials regarding monitoring social media, records reflecting the use of social media to interact with civilians, and records regarding the use of social media to collect information about civilians other than in the context of a criminal investigation. *See* Petition, Ex. 1 (FOIL Request).

B. The NYPD Constructively Denied The FOIL Request

The NYPD acknowledged receipt of the Brennan Center's Request in February 2020, then closed the inquiry several weeks later without providing access to any public records. Petition ¶ 9. The Brennan Center timely appealed, and NYPD denied the appeal in March 2020. *Id.* The NYPD reversed itself, however, in September 2020, amending the appeal determination “[u]pon further review,” and remanding the Request back to the Records Access Officer for a further search. *Id.* ¶ 10.

What followed was an endless run-around. Despite months of outreach by the Brennan Center, the NYPD failed to produce any records, let alone provide an estimate of when it would produce records. *Id.* ¶ 11. It was not until April 1, 2021, or six months after remand, that the NYPD committed to a “rolling production” of documents. *Id.* Despite this, another three months followed before the NYPD produced anything in July 2021, 286 days after the remand. *Id.* ¶ 13. Even then, its production was paltry and purported to respond to only a handful of the topics in the Request. *Id.* The NYPD represented at the time that it would provide a further response the next month, in August 2021. *Id.* Another four months passed, with the NYPD missing its own August 2021 deadline. *Id.* ¶ 14. In November 2021, following considerable effort by the Brennan Center, the NYPD made a small production of about 40 pages of records. *Id.* The NYPD again promised that “[t]he search is ongoing for the remainder of your request” and advised that “a further response will be issued on or before December 17, 2021.” *Id.* The Brennan Center received nothing that day, and has received no other documents in the two years that have elapsed since the roughly 40-page production. *Id.*

Instead, the NYPD strung the Brennan Center along for the next two years under the pretense of continuing to negotiate the parameters of its document search and collection. *Id.* ¶¶ 15-16. A pattern emerged. *Id.* At the NYPD’s request, the Brennan Center would propose search parameters. Receiving no substantive response, the Brennan Center would have to follow up, repeatedly. The NYPD would then respond only to reject the proposed searches, providing no counterproposal and typically providing little information that would enable the Brennan Center to craft alternative parameters. *Id.* The Brennan Center would make another proposal, hear nothing, follow up, receive another rejection, and the cycle would repeat. *Id.*

In August 2023, the Brennan Center informed the NYPD that it was making one last effort at compromise and voluntarily proposed substantially narrowed parameters for a search. *Id.* ¶ 16. Hearing nothing once again, the Brennan Center sought an update on September 7 and 20, 2023. *Id.*

The NYPD provided no update. And it has provided no records since November 2021. Over the past three years, the Brennan Center has organized multiple calls with the NYPD to discuss how to work together to complete the Request. *Id.* ¶ 15. The Brennan Center narrowed the scope of the Request on six occasions, providing increasingly narrowed search parameters. *See id.* ¶¶ 15-16. Throughout, the Brennan Center has sent dozens of follow-up emails. The result has been two meager productions in July 2021 and November 2021 that are responsive to only a subset of the topics in the Request.

C. The Brennan Center Has Exhausted All Administrative Remedies

On November 1, 2023, the Brennan Center appealed this constructive denial of its Request.

The Brennan Center informed the Records Access Appeals Officer that:

Since November 16, 2021, the NYPD has not produced documents responsive to the Request, and it has failed to certify that it could not locate responsive, non-exempt records after a diligent search, as it is required to do pursuant to Public Officers Law § 89(3)(a). For almost two years, we have accommodated the NYPD's requests for extensions to produce either the documents or the required certification. But each extended deadline has passed without the provision of records from the NYPD. By failing to comply with its own deadlines and provide the responsive records within a reasonable timeframe, the NYPD has constructively denied the Request.

Id. ¶ 17. The Records Access Appeals Officer's reply was due on November 16, 2023. *See Pub. Off. Law* § 89(4)(a).

On November 16, 2023, the Records Access Appeals Officer replied, acknowledging that “no further records have been disclosed” since the NYPD's small production two years earlier. Petition ¶ 18. The Records Access Appeals Officer went on to contend, however, that the appeal

was “premature” because the “NYPD is open to further conferral.” He also claimed that the reason for the delay was that the NYPD FOIL Unit was still awaiting delivery of records in relation to the Brennan Center’s latest search proposal, even though the proposal was almost *three months old*, and even though it followed years-worth of efforts by the Brennan Center to negotiate with the NYPD. The Records Access Appeals Officer provided no estimate of when the NYPD would determine what to produce from those records once it received them, let alone “a date certain within a reasonable period” that it would produce the records, as required by FOIL. *See* Pub. Off. Law §§ 89(4)(b), 89(3)(a). This Article 78 petition followed.

ARGUMENT

I. THE NYPD’S DENIAL OF THE BRENNAN CENTER’S REQUEST MERITS ARTICLE 78 REVIEW

The Court of Appeals has consistently held that FOIL “expresses this State’s strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 505 N.Y.S.2d 576, 578 (1986); *see also Gould v. N.Y. City Police Dep’t*, 653 N.Y.S.2d 54, 57 (1996) (“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public.”); *Farbman & Sons, Inc. v. N.Y. City Health & Hosps. Corp.*, 476 N.Y.S.2d 69, 70-71 (1984) (“FOIL implements the legislative declaration that ‘government is the public’s business’, and imposes a broad standard of open disclosure upon agencies of the government.”) (internal citation omitted). FOIL “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*, 419 N.Y.S.2d 467, 470 (1979). To promote these principles, the Court of Appeals has made clear that “[a]ll government records are

thus presumptively open for public inspection and copying.” *Gould*, 653 N.Y.S.2d at 57 (emphasis added).

Police records are no exception. *See N.Y. Civil Liberties Union v. N.Y. City Police Dep’t*, 2011 WL 675562, slip op. at 11 (Sup. Ct. N.Y. Cnty. Feb. 14, 2011) (“All government documents, including police records, are presumptively available for public inspection and copying”). Thus, under *Gould* and other Court of Appeals precedents, Petitioner Brennan Center has a clear right under FOIL to the NYPD records sought in its Request. Because the Brennan Center is presumptively entitled to the requested records, the NYPD has the burden to prove that a requested record “falls squarely within the ambit of one of [FOIL’s] statutory exemptions” and is therefore not available for inspection. *Id.*

Under FOIL, “a person denied access to a record in an appeal determination under the provisions” governing appeals “may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.” Pub. Off. Law § 89(4)(b). Such a “proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” CPLR 217(1).

The Brennan Center properly challenges the NYPD’s constructive denial of the Request. The Brennan Center has complied with FOIL and Article 78’s requirements. After enduring years of delay by the NYPD and its repeated failure to provide any timetable of when it would comply with the Request, the Brennan Center appealed. The Records Access Appeals Officer then replied to the appeal without expressly denying it, producing the records, or identifying an “approximate date” when a final determination would be made or a “date certain within a reasonable period” when documents would be produced. This reply amounted to a denial of the appeal. *See infra* § II (showing that the Records Access Appeals Officer’s failure to comply with FOIL’s

requirements amounted to a denial). The Brennan Center immediately commenced this proceeding (and well within four months of the Records Access Appeals Officer's reply on November 16, 2023), making this action timely.

II. THE NYPD'S CONSTRUCTIVE DENIAL OF THE REQUEST VIOLATES FOIL

Agencies have three options when responding to a FOIL request (i) disclose the requested records; (ii) deny disclosure; or (iii) acknowledge the request and provide an approximate date "reasonable under the circumstance of the request" when it will be granted or denied. Pub. Off. Law § 89(3)(a). Agencies have five business days to complete one of these actions. *Id.* And "[i]f an agency determines to grant a request in whole or in part" but "circumstances prevent disclosure ... within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part." *Id.* The NYPD did not come close to satisfying these requirements. While purporting to grant the Request, it continuously delayed responding in full for almost three years. Moreover, to the extent the NYPD provided deadlines for responding, it missed them all.

This delay is unreasonable as a matter of law and violates FOIL. Although "Public Officers Law § 89 (3) mandates no time period for denying or granting a FOIL request," *Matter of New York Times Co. v City of New York Police Dept.*, 103 A.D.3d 405, 407 (1st Dept 2013), when an agency provides "an approximate date by which it shall provide its response and fails to respond to a request within a reasonable time after the approximate date given," the FOIL request should be considered as constructively denied. *Gajadhar v. New York Police Dep't*, 61 Misc. 3d 1218(A), at *2 (Sup. Ct. N.Y. Cnty. 2018). That is precisely what occurred here. *See Matter of Newton v. Police Dep't*, 183 A.D.2d 621, 624 (1st Dep't 1992) ("[R]espondents' laxity in addressing

petitioner's request until legal action had been commenced warrants that [petitioner] be permitted to appeal the partial production of the documents.”).

Kohler-Hausmann v. New York City Police Dep't, 133 A.D.3d 437 (1st Dep't 2015), is instructive. There, the NYPD acknowledged receipt of the request but informed the petitioner only that “her FOIL request was still pending and that petitioner should not consider the letters a denial of her FOIL request.” *Kohler-Hausmann v. New York City Police Dep't*, 42 Misc. 3d 1214(A), at *1 (Sup. Ct. N.Y. Cnty. 2014). The petitioner filed an Article 78 proceeding, and the First Department ruled that “[b]y failing to respond for months after that deadline, NYPD constructively denied the FOIL request.” *Kohler-Hausmann*, 133 A.D.3d at 438.

Empire Ctr. for Pub. Pol'y v. New York State Dep't of Health, 72 Misc. 3d 759 (Sup. Ct. Albany Cnty. 2021), is in accord. In that case, Empire Center, a nonprofit, filed a FOIL request. *Id.* at 760. The records officer extended the time to respond several times without providing an outright denial or grant and without an approximate date for compliance. *Id.* at 760-61. Empire Center appealed and, after the denial of the appeal, filed an Article 78 proceeding claiming that the agency had “constructively denied disclosure of such records by, among other things, failing to provide an approximate date, which is reasonable under the circumstances, as to when respondent will respond to its FOIL request.” *Id.* at 763. The court agreed, ruling that the delay was unreasonable, the agency had constructively denied the request, and the petitioner had exhausted administrative remedies. *Id.* at 768. The court thus directed the agency to disclose the requested data. *Id.* The same result should follow here.

Neither the two meager productions the NYPD made two years ago nor its response to the Brennan Center’s November 2023 appeal compel a different result. For starters, it is well settled

that the disclosure of some documents “[does] not moot” an Article 78 proceeding if other documents are “still withheld.” *Barry v. O’Neill*, 185 A.D.3d 503, 505 (1st Dep’t 2020).

Turning to the NYPD’s reply to the appeal, that reply was contrary to FOIL’s requirements. In responding to an appeal, an agency must “fully explain in writing . . . the reasons for further denial, or provide access to the record sought.” Pub. Off. Law § 89(4)(a). The Records Access Appeals Officer did neither and instead claimed that the NYPD was “open to further conferral” and still collecting information. Moreover, the Records Access Appeals Officer failed to “furnish” a “statement of the approximate date” when a final determination would be made or a “date certain within a reasonable period” when the requested information would be produced. Pub. Off. Law § 89(3)(a). These requirements apply equally to an appeal as to the initial determination of the FOIL request. *See* Pub. Off. Law § 89(4)(a) (requiring an agency “to conform to the provisions of subdivision three [which includes the “approximate date” requirements]” when deciding an appeal). An agency’s “[f]ailure” to comply with these requirements “shall constitute a denial.” *Id.*; *see Empire Ctr.*, 72 Misc. 3d at 768 (finding that petitioner had exhausted administrative remedies in part because the agency’s appeal response did not disclose a “reasonable date for disclosing records”).

In addition to being expressly set forth in the statute, these requirements for reasonable timelines make sense. Otherwise, an agency can drag out a FOIL request in perpetuity. Here, the NYPD has had plenty of time to confer and collect responsive records; the Brennan Center spent *years* chasing the NYPD. Crediting the NYPD’s claim of being “open to further conferral” would thus only enable the NYPD to delay further. Based on the NYPD’s past practice in this case, without enforcement now, there is no telling when the NYPD will take the Brennan Center’s Request seriously.

III. THE BRENNAN CENTER IS ENTITLED TO ITS LEGAL COSTS, INCLUDING ATTORNEY'S FEES

The Brennan Center also requests attorney's fees and reasonable litigation costs under FOIL. Section 89(4)(c) grants a court discretion to award reasonable attorney's fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute.

The legislature amended Section 89(4)(c) of FOIL in 2006 to "strengthen compliance with [FOIL]" by "creat[ing] a clear deterrent to unreasonable delays and denials of access." 2006 Legis. Bill Hist. N.Y. S.B. 7011-A. Indeed, as the Court of Appeals noted in *West Harlem Bus. Grp. v. Empire State Dev. Corp.*, "litigation could have been avoided, or significantly limited, had [the agency] in the first instance complied with the dictates of FOIL" and provided a substantive response. 893 N.Y.S.2d 825, 826 (2009). Here, the NYPD's failure to fulfill its statutory duty "compelled [the petitioner] to bring suit to obtain either the documents or an explanation of [the NYPD]'s denial, the very information it should have received during the administrative appeals process." *Id.* at 827; *see also* Pub. Off. Law § 89(4)(a) (requiring agency to "fully explain in writing to the person requesting the record the reasons for further denial"). Any potential litigation here could have been avoided or limited if NYPD had reasonably fulfilled its statutory duty and provided the Brennan Center with a substantive response to its Request. Moreover, the Brennan Center put NYPD on notice that it had failed to meet its burden. In response, the NYPD continued to delay. An award of attorney's fees and costs is thus appropriate.

CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests that the Court grant the Verified Petition, enter a judgment directing the NYPD to disclose the documents requested in

the Request, and award the Brennan Center litigation costs and reasonable attorney's fees and such other relief the Court deems necessary and proper.

Dated: New York, New York
November 20, 2023

Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By: /s/ Rex Lee
Rex Lee

51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Attorneys for Petitioner

CERTIFICATION OF COMPLIANCE

This Memorandum complies with the word-count limit of 22 NYCRR 202.8-b because it contains 4010 words (based on the Microsoft Word word-count function), excluding the parts of the Memorandum exempted by the rule.

Dated: New York, New York
November 20, 2023

/s/ Rex Lee
Rex Lee

Attorneys for Petitioner