SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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In the matter of the application of GWEN CARR, COMMUNITIES UNITED FOR POLICE REFORM, and JUSTICE COMMITTEE,

Petitioners,

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

- against -

THE NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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VERIFIED PETITION

Index Number:

RJI No.:

Petitioners GWEN CARR, COMMUNITIES UNITED FOR POLICE REFORM ("**CPR**"), and JUSTICE COMMITTEE ("**JC**") (collectively, "**Petitioners**"), by their duly authorized attorneys, Gideon Orion Oliver and the New York Law School Racial Justice Project, hereby make the following Verified Petition against Respondent New York City Police Department ("**NYPD**" or "**Respondent**"):

PRELIMINARY STATEMENT

1. The origin of this Petition traces back to the death of Eric Garner after NYPD members, including former NYPD member Daniel Pantaleo, used force on him in the course of arresting him on July 17, 2014.

2. In spite of the substantial amount of publicity that Garner's death has received since then, much of the information surrounding his death and the steps the City of New York did and did not take in response to it remains completely in the dark, especially information about NYPD's role in his death and subsequent measures taken by the City of New York and

City agents, including NYPD agents, to investigate and discipline involved NYPD members, or otherwise to prevent any further tragedy similar to Garner's death.

3. On August 27, 2019, Petitioners—Eric Garner's mother and members of the general public with commitments in the police reform issue—filed a request pursuant to New York Freedom of Information Law ("FOIL"), Article 6, §§ 84-90 of the New York State Public Officers Law, and the related regulations of the New York State Committee on Open Government ("COOG") at Chapter 21 of the New York Code of Rules and Regulations ("NYCRR") Part 1401 (the "COOG Regulations") [1] (the "**Request**"), in order to bring as much of that information as possible to light.

4. Also as part of their effort to bring the information surrounding Garner's death to light for their benefit as well as for the benefit of the general public, Petitioners, along with allies, filed on August 27, 2019, a litigation petition in New York State Supreme Court under New York City Charter § 1109 ("Section 1109"), seeking a judicial inquiry into the violations and neglect of duty by a number of individuals that are formerly or currently associated with the City of New York and the NYPD, in connection with Eric Garner's death. *See Matter of Carr, et al. v. de Blasio, et al.,* New York County Index No. 101332/19; 70 Misc 3d 418, 421 (Sup Ct, NY County Sept. 24, 2020), *aff'd*, ___AD3d___, 2021 NY Slip Op 04412, *13 (July 15, 2021).

5. When Petitioners filed the August 27, 2019 Request, Respondent had already gathered many of the records responsive to the Request before or in connection with the various investigations referred to in the Request as well as former NYPD member Daniel Pantaleo's

[1] Under FOIL § 89(1), the COOG is charged with assisting agencies with implementing and complying with the FOIL and has enacted the COOG Regulations, which agencies must adhere to in implementing the FOIL. Under FOIL §89(1)(b)(ii), the COOG issues FOIL advisory opinions. FOIL §§ 89(1) and 89(1)(b)(1).

NYPD Departmental Trial, which had concluded earlier in August of 2019, prior to Petitioners' filing of the Request.

6. Given the FOIL's broad disclosure requirements and underlying legislative intent to promote public disclosure, Petitioners are presumably entitled to the records sought in the Request unless Respondent establishes the applicability of statutorily provided exemptions. Respondent has not. Far from it.

7. Rather, ever since the Request was filed, Respondent has failed to comply with numerous requirements under the FOIL and the COOG Regulations in handling the Request. For example, Respondent has failed to provide a date certain and only provided estimated dates by which it would complete responding to the Request. Those estimated dates were not reasonable under the circumstances of the Request. Respondent repeatedly purported to "extend" those dates, without authority or justification. And Respondent's untimely responses to the Request and Petitioners' appeal failed to explain or justify Respondent's decisions to withhold or redact records.

8. Although Petitioners tried to resolve these issues through an administrative appeal, Respondent once again failed to handle the appeal in a manner consistent with the FOIL by ignoring Petitioners' appeal on the ground of constructive denial.

9. Given Respondent's unfaithful and non-cooperative handling of the Request, Petitioners hereby submit this Petition to this Court to vindicate their rights under the FOIL with respect to the records sought in the Request.

10. Although Petitioners are pursuing a Section 1109 proceeding and this FOIL Petition with different objectives in mind, as Petitioners file this Petition, the have a pressing need to receive in the very near future the records that Petitioners are entitled to under the FOIL.

11. Hon. Erika M. Edwards, who is presiding over the Section 1109 case, recently scheduled a judicial inquiry hearing that is scheduled to begin on October 25, 2021. The Court has made it clear that the Court will not be addressing the propriety of Respondent's response to the Request. For that reason, among others, Petitioners are not filing this matter as related to the Section 1109 judicial inquiry.

12. However, the Section 1109 judicial inquiry will include Petitioners and their allies' examinations of witnesses about Mr. Garner's death and its surroundings. Therefore, Petitioners' possession of the records sought in this Petition in advance of that hearing is critical for Petitioners to have meaningful opportunities to examine those witnesses at the hearing, and to shed light on the critical topics covered in the records Respondent has withheld or redacted. In other words, Petitioners have a serious, and urgent, need for *prompt* access to all of the records they have sought in the Request.

13. That said, under no circumstances do Petitioners wish to delay the scheduled beginning of the Section 1109 inquiry in order for the Court to determine this FOIL matter. Even if the records sought in the Request are disclosed near the conclusion of, or after, the Section 1109 Inquiry, Petitioners can, and intend to, publicize and otherwise use them to advance their goals of seeking transparency, accountability, and some measure of justice around Eric Garner's death.

14. For these reasons, Petitioners respectfully request that the Court grant Petitioners *prompt* access to all remaining documents that Respondent has not yet disclosed that are responsive to the Request and not subject to an applicable exemption that Respondent has properly invoked and justified.

PARTIES

15. Petitioner GWEN CARR is Eric Garner's mother and the Administrator of Mr. Garner's estate. She has been fighting for transparency, justice, and the firing of officers responsible for killing her son and related misconduct for over 7 years.

16. Petitioner COMMUNITIES UNITED FOR POLICE REFORM ("CPR") is a self-described "unprecedented campaign that is working to end discriminatory policing in New York. …. advancing policies that protect the safety and rights of all New Yorkers to create true community safety. … fighting to hold police accountable for violating New Yorkers' constitutional rights. …training communities to know their rights and to observe and document police abuse. … engag[ing] in strategic direct action, organizing and civic engagement to build the power of communities most impacted by abusive policing….[a]nd … in Albany and at City Hall demanding law and policy changes that advance police accountability to improve safety for communities." *See* http://changethenypd.org/. A list of CPR member organizations can be found here: http://changethenypd.org/campaign/intro-members.

17. Petitioner JUSTICE COMMITTEE ("JC") is a not-for-profit 501(c)(3) organization that is incorporated in New York State. JC is among the CPR member organizations. *See* http://www.justicecommittee.org/. JC is a grassroots organization dedicated to building a movement against police violence and systemic racism in New York City. JC's membership is multi-racial, but majority Latino/a, and includes families who have lost loved ones to the police, as well as other members of impacted communities.

18. Petitioners CPR and JC have supported Ms. Carr in political organizing and public policy campaigns for justice and accountability related to Mr. Garner's killing for years.

19. Respondent NEW YORK CITY POLICE DEPARTMENT is a municipal agency subject to the FOIL and the COOG Regulations at 21 NYCRR Part 1401.

20. Respondent's general offices are located at 1 Police Plaza, New York, NY 10038.

VENUE

21. The acts and omissions complained of herein took place in New York County.

22. Respondent's offices are located in New York County.

23. Therefore, venue is proper in New York County pursuant to CPLR §§ 506(b) and 7804(b).

FACTS

Petitioners' August 27, 2019 FOIL Request (Ex. 1)

24. On **August 27, 2019,** Petitioners, through counsel, submitted the Request to Respondent, addressed to Respondent's Records Access Officer ("RAO"), by mail and electronically through the NYC OpenRecords portal. A true copy of the Request is attached as Exhibit 1.

25. Through the Request, Petitioners sought disclosure of 62 reasonably described categories of records regarding, among other related topics: the death of Eric Garner on July 17, 2014, including the events leading up to it; misconduct related to the killing; statements made to the NYPD, the media, and/or prosecutors related to the killing; investigations, disciplinary actions, and/or prosecutions, if any, into and/or related to the killing and related events (including leaking confidential information to the media related to Mr. Garner and the killing); the outcomes of those investigations, disciplinary proceedings, or prosecutions; and all of the transcripts, exhibits, motions, decisions, and other material related to the Civilian Complaint Review Board's prosecution and public administrative trial of Daniel Pantaleo, adjudicating whether his conduct that resulted in Eric Garner's death on July 17, 2014 met the elements of a crime. *See* Ex. 1 at pp. 3-17 (Background); 17-29 (FOIL Request).

26. The Request asked that Respondent "produced the records demanded in electronic format, by e-mail" to Petitioners' counsel "if electronic file size permits, or if it is possible to transmit the documents securely through links to cloud storage or other, similar means." *See* Ex. 1 at p. 29.

27. The Request also stated:

> The records sought are reasonably described below after the BACKGROUND section. If you disagree and find that the documents requested are not reasonably described, please contact us as soon as possible to begin the process of assisting us in identifying the requested records and, if necessary, in re-formulating the request "in a manner that will enable the agency to identify the records sought", including by identifying to us "the manner in which the records" sought related to Mr. Garner's killing, death, and related investigation(s), prosecution(s), and disciplinary action(s) "are filed, retrieved or generated."

See Ex. 1 at p. 2 n. 1, citing, *inter alia,* 21 NYCRR § 1401.2(b)(2) (discussed below).

28. Additionally, the Request asked that Respondent provide "the name, **e-mail address,** mailing address, and facsimile number of the person or body to whom [Petitioners] should direct an administrative appeal in connection with this request" – Respondent's Records Access Appeals Officer ("RAAO"). *See* Ex. 1 at p. 29 (emphasis in original).

Respondent's August 29, 2019 Receipt E-mail (Ex. 2)

29. On **August 29, 2019**, Respondent acknowledged its receipt of the Request through an email (the "**Receipt E-mail**"). A true copy of the Receipt E-mail is attached hereto as Exhibit 2.

30. In the Receipt E-mail, Respondent stated that "[b]efore a determination can be rendered [on the Request], further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located" and estimated that "th[e] review will be completed, and a determination issued within 90 business days . . . ."

31. Rather than providing the name and contact information of the RAAO, the Receipt E-mail stated:

> This is not a denial of the records you requested. Should your request be denied in whole or in part, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

Respondent's January 10, 2020 Response Letter (Ex. 3)

32. On **January 10, 2020**, Respondent provide Petitioners a response on the Request (the "**January 10, 2020 Response**"), a true copy of which is attached as Exhibit 3.

33. The January 10, 2020 Response stated:

> Please be advised that this office requires additional time to determine your request. This office receives a very large number of FOIL requests. We make every effort to process FOIL requests as expeditiously as possible, in the order in which they are received . . . .

34. The January 10, 2020 Response provided an "estimate that the processing of" the Request "will be completed by March 10, 2020" and endeavored to justify the delay by checking off boxes in a form letter stating: "[r]ecord(s) are located in several locations and are difficult to search or locate"; "[n]umerous records must be reviewed in order to determine whether disclosure is required"; "[r]ecord(s) have not yet been received from other NYPD unit(s)"; and "[r]equest is extremely voluminous and/or complex."

35. Rather than providing the name and contact information of the RAAO, the January 10, 2020 Response stated:

> This is not a denial of the records you requested. Should your request be denied in whole or in part, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

Respondent's E-mail Correspondence on March 2, 2020 (Ex. 4)

36. On **March 2, 2020**, Respondent sent Petitioners an email through the NYC OpenRecords portal (the "**March 2, 2020 E-mail**"). A true copy of the March 2, 2020 E-Mail is attached hereto as Exhibit 4.

37. In the March 2, 2020 E-mail, Respondent stated that it had "extended the time to respond to" the Request "for the following reasons: You can expect a response on or about Tuesday, March 3, 2020" and that "additional time is needed to process [the Request]; however, a partial disclosure of records is expected to be ready tomorrow, March 3, 2020."

Respondent's March 3, 2020 First Production (Ex. 5)

38. On **March 3, 2020**—more than 180 days after Respondent acknowledged its receipt of the Request—Respondent made Respondent's "First Production" in response to the Request, stating in an accompanying e-mail that Respondent had "responded to" the Request "with the following file(s)." A true copy of the cover e-mail disclosing the First Production is attached hereto as Exhibit 5.

39. Respondent's March 3, 2020 First Production disclosed 1,978 pages comprising around 163 documents responsive to the Request.[2]

40. Among the disclosures in the First Production were, according to a related letter Respondent sent on June 7, 2021 (Ex. 15 below), "1,979 records on March 3, 2020 (Complaint Report, Arrest Report, Precinct Detective Squad case file, Crime Scene Unite case file, Department Trial records, Activity logs, Patrol Guide procedures."

Respondent's March 3, 2020 Letter (Ex. 6)

[2] Petitioners are not including copies of the records produced in response to the Request as part of the Petition. However, Petitioners are prepared to submit all of the records Respondent has disclosed for *in camera* review, if the Court desires.

41. As part of the First Production, Respondent included a March 3, 2020 letter (the "**March 3, 2020 Letter**"). A true copy of the March 3, 2020 Letter is attached hereto as Exhibit 6.

42. The March 3, 2020 Letter stated that the March 3, 2020 Letter and the First Production "addresses records …requested in items 9, 11, 12, 19, 24, 43, 57, 58, 29, 60, and 61" of the Request and that, as to those items: "…access is granted, and various portions of the records responsive to your request, totaling 1,978 pages, are enclosed…bear[ing] Bates Numbers 1-1978."[3]

43. The March 3, 2020 Letter further stated:

> A review of additional records is currently underway. We anticipate the disclosure of further responsive documents on or about March 16, 2020. Additional disclosures will be made on a periodic, rolling basis. It is anticipated that a complete review of records responsive to your request, and subsequent disclosure of all non-exempt records, will be completed within 6 months. This estimate was made by taking into account the volume of documents requested, the time involved in compiling and reviewing the materials, and the complexity of determining whether the materials fall within one of the exceptions to disclosure.

44. Finally, the March 3, 2020 Letter stated:

> This letter is not intended to, nor should be deemed to be, a final response with respect to your FOIL request, as our review and production remains ongoing. To the extent you believe you need to appeal any portion of this letter and accompanying disclosure to the Department's Records Access Appeals Officer in order to preserve your rights under FOIL, the Department will extend the time for you to submit such appeal until thirty (30) days after the final production of records in response to your request.

[3] Notably, later correspondence from Respondent indicated that only access to *some* records responsive to the listed Item Nos. in the Request was granted as part of the First Production. By way of representative (not exhaustive) example, Respondent later stated that records responsive to parts of Item No. 11 had been redacted; that records responsive to Item No. 19 were not reasonably described after all.

45. Neither the March 3, 2020 Letter nor the First Production indicate which records produced as part of the First Production respond to which item(s) in the Request.

Respondent's March 3, 2020 E-Mail (Ex. 7)

46. Also on March 3, 2020, Respondent sent Petitioners correspondence through the NYC OpenRecords portal (the "**March 3, 2020 E-mail**"). A true copy of the March 3, 2020 E-mail is attached hereto as Exhibit 7.

47. In the March 3, 2020 Email, Respondent stated that it had "extended the time to respond to" the Request "for the following reasons: You can expect a response on or about Monday, March 16, 2020" and that "additional time is needed to process [the Request]; however, a partial disclosure of records is expected to be ready on or about Monday, March 16, 2020."

48. Like in its March 2, 2020 E-mail, Respondent stated in the March 3, 2020 E-mail that another partial disclosure of the records would take place on or about March 16, 2020 but did not provide any date by which it would complete its response to the Request.

Respondent's Second through Fifth Productions

49. As seen below, between July 20, 2020 and February 26, 2021, Respondent made additional productions of records responsive to the Request.

50. With respect to the Second Production through the Fifth Production, Respondent did not indicate which items, if any, in the Request the records that were produced responded to.

51. Also respect to the Second Production through the Fifth Production, documents contain substantial redactions, but Respondent failed to justify any of those redactions.

52. After the March 3, 2020 E-mail that estimated another partial disclosure would take place on or about March 16, 2020, Respondent did not provide any further information

about when records would be produced, or when Respondent's response to the Request would be complete.

Respondent's July 20, 2020 Second Production (Ex. 8)

53. On **July 20, 2020**, Respondent made Respondent's "**Second Production**" in response to the Request, stating in an accompanying e-mail that Respondent had "responded to" the Request "with the following file(s)." A true copy of the cover e-mails disclosing the Second Production are attached collectively hereto as Exhibit 8.

54. Respondent's July 20, 2020 Second Production disclosed a few hundred pages comprising around 209 separate documents responsive to the Request.[4]

55. Among the disclosures in the Second Production were OCME autopsy photographs, medical records, and responses to IAB subpoenas for cell phone records.

56. Respondent did not identify which records produced as part of the Second Production respond to which item(s) in the Request.

57. To the extent the records disclosed with the Second Production contained redactions, Respondent did not explain Respondent's grounds for redacting the records.

[4] According to a related letter Respondent sent on June 7, 2021 (Ex. 15 below), Respondent claims to have disclosed 2,823 "records" (pages, not separate documents) consisting of "Department Trial records, Videos, IAB subpoenas, OCME photographs, FDNY records, Training records & materials, [and] medical records." However, as seen above, Respondents' July 20, 2020 Second Production only disclosed a few hundred pages of OCME autopsy photographs, medical records, and responses to IAB subpoenas for cell phone records. On September 9, 2021 and September 10, 2021, counsel for Petitioners e-mailed Respondent's RAO stating that Respondents' July 20, 2020 Second Production only disclosed a few hundred pages of OCME autopsy photographs, medical records, and responses to IAB subpoenas for cell phone records, did not include 2,823 records or pages total, and did not include Department Trial records, Videos, FDNY records, or Training records & materials, as Respondent's June 7, 2021 letter stated. As of today, September 13, 2021, Respondent has not responded to Petitioners' September 9 and 10, 2021 e-mails.

58. Respondent did not provide any further information about when other records would be produced, when Respondent's response to the Request would be complete, or any reason for Respondent's repeated delays in responding to the Request.

Respondent's October 1, 2020 Third Production (Ex. 9)

59. On **October 1, 2020**, Respondent made Respondent's "**Third Production"** in response to the Request, stating in an accompanying e-mail that Respondent had "responded to" the Request "with the following file(s)." A true copy of the cover e-mail disclosing the Third Production is attached hereto as Exhibit 9.

60. Respondent's October 1, 2020 Third Production disclosed 1,000 pages comprising numerous separate documents responsive to the Request.

61. Among the disclosures in the October 1, 2020 Third Production were, according to a related letter Respondent sent on June 7, 2021 (Ex. 14 below), "1,000 records on October 1, 2020 (Training materials, Medical records)."

62. Respondent did not identify which records produced as part of the Third Production respond to which item(s) in the Request.

63. To the extent the records disclosed with the Third Production contained redactions, Respondent did not explain Respondent's grounds for redacting the records.

64. Respondent did not provide any further information about when other records would be produced, when Respondent's response to the Request would be complete, or any reason for Respondent's repeated delays in responding to the Request.

Respondent's January 13, 2021 Fourth Production (Ex. 10)

65. On **January 13, 2021**, Respondent made Respondent's "**Fourth Production"** in response to the Request, stating in an accompanying e-mail that Respondent had "responded to"

the Request "with the following file(s)." A true copy of the cover e-mail disclosing the Fourth Production is attached hereto as Exhibit 10.

66. Respondent's January 13, 2021 Fourth Production disclosed 1,000 pages comprising numerous documents responsive to the Request.

67. Among the disclosures in the January 13, 2021 Fourth Production were, according to a related letter Respondent sent on June 7, 2021 (Ex. 14 below), "1,000 records on January 13, 2021 (Training materials, Medical records)."

68. Respondent did not identify which records produced as part of the Fourth Production respond to which item(s) in the Request.

69. To the extent the records disclosed with the Fourth Production contained redactions, Respondent did not explain Respondent's grounds for redacting the records.

70. Respondent did not provide any further information about when other records would be produced, when Respondent's response to the Request would be complete, or any reason for Respondent's repeated delays in responding to the Request.

Respondent's February 26, 2021 Fifth Production (Ex. 11)

71. On **February 26, 2021**, Respondent made Respondent's "**Fifth Production"** in response to the Request, stating in an accompanying e-mail that Respondent had "responded to" the Request "with the following file(s)." A true copy of the cover e-mails disclosing the Fifth Production are attached collectively hereto as Exhibit 11.

72. Respondent's February 26, 2021 Fifth Production disclosed 1,832 pages comprising numerous separate documents responsive to the Request.

73. Among the disclosures in the February 26, 2021 Fifth Production were, according to a related letter Respondent sent on June 7, 2021 (Ex. 14 below), "1,832 records on February

26, 2021 (Training materials, Medical records, District Attorney's Office investigation records, ICAD records)."

74. Respondent did not identify which records produced as part of the Fifth Production responded to which item(s) in the Request.

75. To the extent the records disclosed with the Fifth Production contained redactions, Respondent did not explain Respondent's grounds for redacting the records.

76. Respondent did not provide any further information about when other records would be produced, when Respondent's response to the Request would be complete, or any reason for Respondent's repeated delays in responding to the Request.

Petitioners' April 29, 2021 Appeal of Respondent's Handling of the Request (Ex. 12)

77. On **April 29, 2021**, Petitioners' counsel filed via e-mail an administrative appeal to Respondent's Records Access Appeals Officer ("RAAO") (the "Appeal"). A true copy of the Appeal and the documents submitted with it are collectively attached hereto as Exhibit 12.[5]

78. Petitioners incorporate by reference the facts and arguments in the April 29, 2021 Appeal as is fully stated herein.

79. In the Appeal, Petitioners provided Respondent with factual background on the Request (Ex. 12 at pp. 1-3) as well as on the Section 1109 Inquiry (Ex. 12 at pp. 3-4); detailed explanations as to their understandings of the "Relevant Statutory Framework", including "The FOIL's Broad Presumption of Access", "FOIL Responses : Timing and Substance", "Withholding or Redacting Records Based on FOIL § 87(2) Exemptions", "Denials, Appeals,

[5] At some points, the Appeal mistakenly refers to provisions of "22 NYCRR…" when it should refer to provisions of the COOG Regulations at "21 NYCRR…"

and Appeal Determinations", and "The Repeal of Civil Rights Law § 50-a and Subsequent, Related Litigation." *See* Ex. 12 at pp. 4-14.

80. Additionally, Petitioners appealed Respondent's handling of the Request on various grounds, including, but not limited to, Respondent's failures to comply with the FOIL and COOG Regulations, constructive denial of the Request, and failure to establish its entitlement to rely on any exemption from the FOIL's broad disclosure requirements as to records that had been withheld or redactions that had been made to records that had been produced by then. *See* Ex. 12 at pp. 14-18. Some of those arguments are summarized below – all of them are incorporated by reference into Petitioners' challenge to Respondent's handling of the Request.

The Appeal argued that Respondent failed to comply with 21 NYCRR §§ 1401.2(b)(2), 1401.2(b)(3), and 1401.5(c)(1)

81. In the Appeal, Petitioners argued Respondent could not claim that the Request did not reasonably describe the records sought or that the requested records would be unreasonably voluminous or that locating the records sought would involve substantial effort, since

Respondent had not complied with the requirements in 21 NYCRR §§ 1401.2(b)(2)[6], 1401.2(b)(3)[7], or 1401.5(c)(1)[8]. *See* Ex. 12 at pp. 14-15.

The Appeal argued that Respondent failed to comply with other provisions of the FOIL and COOG Regulations and that Petitioners properly made the Appeal on constructive denial grounds

82. In the Appeal, Petitioners also argued that, although Respondent timely acknowledged receipt of the August 27, 2019 Request, Respondent did not comply with its obligations to respond to the Request in specific manners as prescribed under the relevant

[6] Under 21 NYCRR §1401.2(b)(2), an agency responding to a FOIL request is required to "[a]ssist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records." *See* 21 NYCRR §1401.2(b)(2).

[7] Under 21 NYCRR § 1401.2(b)(3), "when a request is voluminous or when locating the records sought involves substantial effort", an agency responding to a FOIL request must "[c]ontact persons seeking records, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested." *See* 21 NYCRR §1401.2(b)(3).

[8] Under 21 NYCRR § 1401.5(c)(1). within five business days of receiving a FOIL request, an agency must inform the requester if it believes the request does not reasonably describe the records sought, and provide "direction, to the extent possible, that would enable that person to request records reasonably described." *See* 21 NYCRR § 1401.5(c)(1).

statutes and regulations. *See* Ex. 12 at pp. 14-18, citing FOIL § 89(3)(a)[9] and 21 NYCRR §§ 1401.02(b)(2), 1401.2(b)(3), 1401.5(c)(1), 1401.5(c)(3)[10], 1401.5(c)(4)[11], and 1401.5(d)[12].

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[9] In pertinent part, under FOIL § 89(3)(a), within five business days of receiving a FOIL request, an agency "shall" do one of three things: (1) "make such record available to the person requesting it"; (2) "deny such request in writing"; or (3) "furnish a written acknowledgment 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 . . . ." Under option three,

> [i]f an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records 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.

See FOIL § 89(3)(a).

[10] Under 21 NYCRR § 1401.5(c)(3), within five business days of receiving a FOIL request, an agency "shall" respond by "(3) acknowledging the receipt of a request in writing, including an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than twenty business days after the date of the acknowledgment, or if it is known that circumstances prevent disclosure within twenty business days from the date of such acknowledgment, providing a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part." *See* 21 NYCRR § 1401.5(c)(3).

[11] Under 21 NYCRR § 1401.5(c)(4), "if the receipt of request was acknowledged in writing and included an approximate date when the request would be granted in whole or in part within twenty business days of such acknowledgment, but circumstances prevent disclosure within that time, providing a statement in writing within twenty business days of such acknowledgment stating the reason for the inability to do so and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part." *See* 21 NYCRR § 1401.5(c)(4).

[12] 21 NYCRR § 1401.5(d) enumerates factors "agency personnel shall consider" when "determining a reasonable time for granting or denying a request under the circumstances of a request" under FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c)(3) and (4):

> [T]he volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to

(….continued)

83. The Appeal also demonstrated that, under FOIL § 89(4)(a)[13], 21 NYCRR § 1401.5(e)[14], and 21 NYCRR § 1401.7(c)[15], an agency's failure to comply with the requirements

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> determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

See 21 NYCRR § 1401.5(d).

[13] In pertinent part, FOIL § 89(4)(a) states that the "failure by an agency to conform to" FOIL § 89(3) "shall constitute a denial" that may be subject to appeal. *See* FOIL § 89(4)(a).

[14] Under 21 NYCRR § 1401.5(e), in pertinent part, an appeal may be taken in "situations in which an agency":

> …
> (3) furnishes an acknowledgment of the receipt of a request within five business days with an approximate date for granting or denying access in whole or in part that is unreasonable under the circumstances of the request;
>
> (4) fails to respond to a request within a reasonable time after the approximate date given or within twenty business days after the date of its acknowledgment of the receipt of a request;
>
> (5) determines to grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request, but fails to do so, unless the agency provides the reason for its inability to do so in writing and a date certain within which the request will be granted in whole or in part;
>
> (6) does not grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request and fails to provide the reason in writing explaining its inability to do so and a date certain by which the request will be granted in whole or in part; or
>
> (7) responds to a request, stating that more than twenty business days is needed to grant or deny the request in whole or in part and provides a date certain within which it will do so, but such date is unreasonable under the circumstances of the request.

See 21 NYCRR § 1401.5(e).

[15] In pertinent part, under 21 NYCRR § 1401.7(c), "[i]f an agency fails to respond to a Request as required in" 21 NYCRR § 1401.5 "such failure shall be deemed a denial of access by the agency." *See* 21 NYCRR § 1401.7(c).

of FOIL § 89(3) or 21 NYCRR § 1401.5(c) amounts to a constructive denial of a FOIL request that may be appealed, so Petitioners properly made their appeal on constructive denial grounds.

The Appeal argued that the "approximate date" of "within 90 business days" for a further response to the Request in the August 29, 2019 Receipt E-mail was not a "date certain" that was "reasonable under the circumstances of the request"

84. In the Appeal, Petitioners argued that the "approximate date" of "within 90 business days" provided in the August 29, 2019 Receipt E-mail was not a "date certain" that was "reasonable under the circumstances of the request" as required under FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c)(3), taking into account the factors set out in 21 NYCRR § 1401.5(d). *See* Ex. 12 at pp. 14-15.

85. Petitioners pointed out that several of the factors enumerated in 21 NYCRR § 1401.5(d) were apparent to Respondent when Respondent received the Request on August 27, 2019:

> Request's volume and complexity, as well as the need to review a substantial number of responsive records for potentially applicable exemptions, were apparent on the face of the Request from the outset. Those are facts the NYPD knew and took into account as soon as the NYPD received the Request. Moreover, the records responsive to the Request were already all, or virtually all, easy to retrieve when the NYPD received the Request, including because they had been gathered in preparation for Pantaleo's administrative trial that concluded in June 2019….And…the reasonableness of the NYPD's responses to the Request should also be viewed against the backdrop of the representations counsel from the New York City Law Department representing the Respondents in the Section 1109 matter made to the Court.

See Ex. 12 at pp. 15-16.

The Appeal argued that the August 29, 2019 Receipt E-mail did not provide a statement in writing about the reason for Respondent's inability to grant the Request within 20 business days

86. Additionally, in the Appeal, Petitioners argued that the August 29, 2019 Receipt did not "provid[e] a statement in writing about the reason for the inability to grant" the Request

within 20 business days as both FOIL § 89(3)(a) and 22 NYCRR § 1401.5(c)(3) require when an agency provides a date certain for granting the request in whole or in part beyond 20 business days from the date it acknowledges receiving a FOIL request. *See* Ex. 12 at p. 15.

The Appeal argued that Respondent's January 10, 2020 Letter did not comply with the FOIL and COOG Regulations

87. Also in the Appeal, Petitioners argued that Respondent's January 10, 2020 Letter (Ex. 3) did not comply with the FOIL and COOG Regulations, including FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c), as it did not provide any response authorized thereunder. *See* Ex. 12 at pp.15-16.

88. For example, the Appeal argued, "the second 'estimate[d] . . . processing' date of March 2, 2020 contained in the January 10, 2020 Letter equally was not a 'date certain,' and it was not 'reasonable' under the circumstances" as required under and within the meaning of FOIL § 89(3)(a) and 21 NYCRR §§ 1401.5(c)(3), 1401.5(c)(4), and 1401.5(d).

89. And, by way of further example, the Appeal argued, there are no provisions in the FOIL or COOG Regulations for "repeated delays" — such as the repeated delays leading up to and including the further delay estimated in the January 10, 2020 Letter. *See* Ex. 12 at p. 16, citing FOIL § 89(3)(a) and 21 NYCRR §§ 1401.5(c)(3) and a February 16, 2018 Advisory Opinion from the COOG (FOIL-AO-f19646, the "2/16/18 COOG Opinion") (discussed in the Appeal, elsewhere in the administrative record, and below, and attached as Exhibit 18 hereto).

90. Next, the Appeal argued that, to the extent the January 10, 2020 Letter contains some reasons for the March 2, 2020 "estimated" response date provided in it, "they are too little, too late," including because FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c)(3) required Respondent to provide "its reasons for not being able to process the request within 20 business days of acknowledging its receipt in writing, along with the required "date certain," within five

business days of receiving the Request" and "January 10, 2020 was far too late to provide such reasons." *See* Ex. 12 at p. 16.

91. The Appeal continued to explain why the reasons Respondent included in the January 10, 2021 Letter did not justify the delays in Respondent's handling of the Request as of April 29, 2021:

> Setting aside that the reasons in the January 10, 2020 Letter were untimely, the "reasons" contained in it – check marks in form boxes – did not justify the NYPD's handling of the Request as of that date. For example, the letter's statements that the NYPD "receives a very large number of FOIL requests" and "[makes] every effort to process" them "as expeditiously as possible, in the order in which they are received" do not justify the extensive delays the NYPD had engaged in as of January 10, 2020. Those are simply generic statements about the NYPD's FOIL operations. Nor did the additional reasons checked off on boxes in the boilerplate form in the January 10, 2020 Letter – that potentially responsive records were "located in several locations" and were" difficult to search or locate"; such records were "archived and…difficult to locate and retrieved"; "[n]umerous records" needed to "be review[ed] in order to determine whether disclosure is required"; "[r]ecord(s) ha[d] not yet been received from other NYPD unit(s);" and that the "[R]equest is extremely voluminous and/or complex" – justify the extensive delays the NYPD had engaged in as of January 10, 2020 (and beyond). As previously discussed, the Request's volume and complexity were apparent on its face from the outset of the Request, and the vast majority, if not all, of records sought in the Request were prepared and gathered in preparation of Pantaleo's administrative trial. Even if those records were "located in several locations," they were not "difficult to search or locate" or "retrieve." The need to review the records to determine whether disclosure was required was also apparent beginning when the NYPD received the Request. And most, if not all, of the records sought in the Request had presumably been through review for potential privacy and other, similar concerns by at least the NYPD related to their disclosure and use in connection with Pantaleo's administrative trial. The NYPD's blanket statements on those points, without more, are insufficient to satisfy its obligations under FOIL § 89(3)(a) and 22 NYCRR § 1401.5(c)(3) to respond to the Request in the manner and within the timeline as prescribed therein.

See Ex. 12 at pp. 16-17.

The Appeal argued that Respondent lacked the authority to extend its time to respond to the Request, causing repeated delays, without justification

92. The Appeal further argued that Respondent's March 2, 2020 E-mail (Ex. 4) and March 3, 2020 Letter (Ex. 6) purporting to "extend[] the time to respond to" the Request and that they "also did not comply with the FOIL and COOG Regulations, including FOIL § 89(3)(a) and 22 NYCRR § 1401.5(c)" in that they "did not provide any response authorized by the FOIL or COOG Regulations, and were simply more of the very 'repeated delays' that the NYPD well knows are unauthorized" and that it lacked authority under the FOIL or COOG Regulations to engage in. *See* Ex. 12 at p. 17.

The Appeal argued that the March 16, 2020 estimated response date provided on March 3, 2020 was not a date certain that was reasonable under the circumstances of the Request, and that Respondent had never provided a date certain, or even an estimated date, by which it would make a final determination on the Request

93. The Appeal argued that the March 16, 2020 estimated response date provided in the March 3, 2020 Letter was neither "an 'extension' or other type of response to the Request that was authorized under the FOIL or COOG Regulations…[n]or was it reasonable under the circumstances of the Request." *See* Ex. 12 at p. 17.

94. The Appeal also argued that, as of the April 29, 2021 Appeal, more than 20 months after Respondent's receipt of the Request, Respondent had not provided a date certain, or even an estimated date, by which it would make a final determination on the Request – let alone a reasonable one. *See* Ex. 12 at p. 17.

The Appeal asked that Respondent indicate which parts of the Request the records it had produced responded to and explain, and provide appropriate justifications for, the redactions Respondent applied to them

95. The Appeal asked that Respondent indicate which parts of the Request the records it had produced responded to and explain, and provide appropriate justifications for, the redactions Respondent applied to them:

> Notwithstanding these productions, the NYPD has not indicated to which parts of the Request those records are responsive. The NYPD's failure to specify its responses with respect to each of the specific demands in the Request and its failure to match the records it has produced with applicable demands have left the Requesters in the dark about the progress of the Request. In addition, in spite of the extensive redactions in some of the records produced thus far, the NYPD has not cited any provision of the FOIL or provided any information to support those redactions.

See Ex. 12 at p. 17.

> **The Appeal reminded Respondent that failure to respond to the Appeal within ten business days by either releasing the records sought in the Request or fully explaining in writing the reasons for further denial would constitute a constructive denial of the Appeal, that "remand" for further processing by the RAO is not authorized, and that litigation would ensue if Respondent did not timely and appropriately respond to the Appeal**

96. The April 29, 2021 Appeal further reminded Respondent of its obligations to respond it in writing by releasing the records sought in the Request or fully explaining in writing the reasons for further denial within ten business days (or by May 13, 2021), as required under FOIL § 89(4)(a)[16]. *See* Ex. 12 at p. 18.

97. The Appeal also reminded Respondent that, under FOIL § 89(4)(b)[17] and 21 NYCRR § 1401.7(f)[18], an agency's failure to respond to an administrative appeal within ten business days by either "fully explain[ing] in writing to the person requesting the record the

[16] With few exceptions, all of which are not applicable here, FOIL § 89(4)(a) requires that, within ten business days of receiving a FOIL Appeal, an agency must "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." *See* FOIL § 89(4)(a).

[17] FOIL § 89(4)(b) provides that failures to respond to an administrative appeal within ten business days by either "fully explain[ing] in writing to the person requesting the record the reasons for further denial, or [providing] access to the record sought" as is required b FOIL § 89(4)(a)""shall constitute a denial" of the appeal. *See* FOIL § 89(4)(b).

[18] Under 21 NYCRR § 1401.7(f), "[a] failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal."). *See* 21 NYCRR § 1401.7(f).

reasons for further denial, or [providing] access to the record sought" will amount to a constructive denial of the appeal. *See* Ex. 12 at p. 18.

98. Relatedly, the Appeal reminded Respondent that "[t]here is no provision in the FOIL or COOG Regulations for remanding the matter for further processing." *See* Ex. 12 at p. 18, citing FOIL § 89(4)(a); 21 NYCRR § 1401.7; and the September 21, 2020 COOG Opinion (FOIL-AO-19780, the "9/21/20 COOG Opinion"), which Petitioners referred to in the Appeal and the July 18, 2021 Letter, a copy of which is attached hereto as Exhibit 20.

99. In pertinent part, the 9/21/20 COOG Opinion states:

> [T]here is nothing in the FOIL that authorizes a FOIL appeal officer to 'remand' a FOIL request back to the records access officer for further review. The FOIL states that the appeal officer is obligated to either fully explain in writing the reasons for further denial 'or provide access to the record sought.' In our view, the appeal determination 'remanding' your request to the FOIL officer for processing is not sufficient to comply with law."

See Ex. 20, quoted in Ex. 12 at p. 10.

100. Also, in pertinent part, the Appeal reminded Respondent that an agency's constructive denial of an appeal because the agency's response "failed to conform with" FOIL § 89(4)(a) shall be subject to review in a CPLR Article 78 proceeding. *See* FOIL § 89(4)(b); 21 NYCRR § 1401.7(i).[19] *See* Ex. 12 at p. 18.

101. Finally, the Appeal stated that failure to respond to the Appeal by either producing the records sought in the Request or fully explaining in writing the reasons for further denials of access within ten business days would result in litigation on or after May 14, 2021. *See* Ex. 12 at p. 18.

[19] Under both FOIL § 89(4)(b) and 21 NYCRR § 1401.7(i), "[a] final denial of access to a requested record . . . shall be subject to court review" in a proceeding under CPLR Article 78. *See* FOIL § 89(4)(b); 21 NYCRR § 1401.7(i).

Respondent's May 11, 2021 Letter (Ex. 13)

102. On **May 11, 2021**, the RAAO sent via e-mail related to the Appeal (the "**May 11, 2021 Letter**"). A true copy of the May 11, 2021 Letter is attached hereto as Exhibit 13.

103. The May 11, 2021 Letter stated that the Appeal was "premature because, as of the date of [the Appeal], the Records Access Officer (RAO) had not yet issued a determination on [the Request], and, therefore, [the Appeal] lacked the predicate denial of access."

104. The May 11, 2021 Letter further stated that the Appeal was premature because, Respondent claimed, the RAO had acknowledged receipt of the Request in a timely manner, otherwise handled the Request properly by providing an approximate date when a determination would be made on the Request (approximately 90 business days after August 29, 2019), commencing a search for responsive records, and subsequently making five rounds of production beginning on March 3, 2020.

105. The May 11, 2021 further stated that the Appeal was premature because "as of this writing, the RAO has not completed review and disclosure of responsive records and has yet to make a final determination; therefore, the undersigned is unable to issue a substantive appeal determination."

106. In the May 11, 2021 Letter, Respondent claimed that the August 29, 2019 estimate that a determination would be made in approximately 90 business days "was made by taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exception to disclosure."

107. In the May 11, 2021 Letter, Respondent also claimed that, "due to the NYPD's response to the COVID-19 pandemic, FOIL disclosures were subject to longer than normal response times" and cited that claim as a justification of Respondent's handling of the Request.

108. Respondent has not specified how the COVID-19 pandemic has impacted its FOIL operations generally or with respect to the Request, either in the May 11, 2021 Letter or anywhere else.

109. The May 11, 2021 Letter ends: "As of this writing, responsive records remain under review and disclosures of those records are expected to continue. It is estimated that the RAO will issue a determination following the completion of the ongoing review and subsequent disclosure of responsive records."

110. Respondent's May 11, 2021 Letter did not provide any of the responses required and/or authorized under FOIL § 89(4)(a) and 21 NYCRR § 1401.7(f). Specifically, Respondent's May 11, 2021 Letter failed to "fully explain in writing…the reasons for further denial, or provide access to the record sought" and because it was not proper "to purport to 'remand' the matter for further processing, thereby causing additional delays."

111. And, beyond that, Respondent's May 11, 2021 Letter did not respond to or address any of the facts or arguments raised in Petitioners' April 29, 2021 Appeal, including the facts and arguments summarized above.

Respondent's May 26, 2021 Sixth Production

112. On **May 26, 2021**, Respondent made Respondent's "**Sixth Production"** in response to the Request, stating in an accompanying e-mail that Respondent had "responded to" the Request "with the following file(s)."

113. Respondent's May 26, 2021 Sixth Production disclosed thousands of pages of documents responsive to the Request.

114. Among the disclosures in the May 26, 2021 Sixth Production were, according to a related letter Respondent sent on June 7, 2021 (Ex. 14 below), 15,280 records on May 26, 2021 (Training materials, Medical records, DA's Office investigation records, IAB emails, various IAB records, ICAD records, COMPSTAT records.

115. Respondent did not identify which records produced as part of the Sixth Production respond to which item(s) in the Request.

116. To the extent the records disclosed with the Sixth Production contained redactions, Respondent did not explain Respondent's grounds for redacting the records.

117. Respondent did not provide any further information about when other records would be produced, when Respondent's response to the Request would be complete, or any reason for Respondent's repeated delays in responding to the Request.

Respondent's June 7, 2021 Seventh Production

118. On **June 7, 2021**, Respondent made Respondent's "**Seventh Production"** in response to the Request, stating in an accompanying e-mail that Respondent had "responded to" the Request "with the following file(s)."

119. Respondent's June 7, 2021 Seventh Production disclosed thousands of pages of documents responsive to the Request.

120. Among the disclosures in the June 7, 2021 Seventh Production were, according to a related letter Respondent sent on June 7, 2021 (Ex. 14 below), "10,873 records (media) on June 7, 2021."

121. Respondent did not identify which records produced as part of the Seventh Production respond to which item(s) in the Request.

122. To the extent the records disclosed with the Seventh Production contained redactions, Respondent did not explain Respondent's grounds for redacting the records.

123. Respondent did not provide any further information about when other records would be produced, when Respondent's response to the Request would be complete, or any reason for Respondent's repeated delays in responding to the Request.

Respondent's June 7, 2021 Letter (Ex. 14)

124. On **June 7, 2021**, the RAO sent Petitioners a letter related to the Request (the "**June 7, 2021 Letter**") purporting to summarize the "series of disclosures" that Respondent had made as of that date. A true copy of the June 7, 2021 Letter is attached as Exhibit 14.

125. The June 7, 2021 Letter further stated: "This letter is to inform you that the June 7, 2021 disclosure is the final production of records related to this FOIL request and that a final determination shall be issued within the next five (5) business days."

126. There was no June 14, 2021 letter from Respondent.

Respondent's June 18, 2021 Letter (Ex. 15)

127. Only after counsel for Petitioners complained to a representative of the New York City Law Department who was counsel for the Respondents in the § 1109 Inquiry that Respondent had not provided the June 14 letter as promised did Respondent send Petitioners another letter related to the Request.

128. On **June 18, 2021**, the RAO sent Petitioners another letter in response to the Request (the "**June 18, 2021 Letter**"). A true copy of the June 18, 2021 Letter is attached as Exhibit 15.

Respondent claimed to have conducted diligent searches for all records responsive to the Request

129. In the June 18, 2021 Letter, the RAO stated that a "diligent search was conducted" for all records responsive to the Request. *See, e.g.,* Ex. 15 at p. 1.

Respondent claimed to have produced certain records without redactions, including some "partial disclosures"

130. The RAO further stated that "records have been disclosed with no redactions applied" to the following Item Nos.: "5 (partial), 7, 8, 9, 10, 11b, 16 (partial), 17, 20, 24-26, 28-31, 35-37, 38 (partial), 39 (partial), 43-44, 51, and 57-62." *See* Ex. 15 at p. 1.

131. The RAO explained that the partial disclosure related to Item Nos. 5[20] and 16[21] was limited to "the memo book entries directly related to the date of the incident."

132. The RAO explained that the partial disclosure related to Item No. 38[22] was limited to the "CCRB records directly related to the incident," claiming that other responsive records were subject to withholding pursuant to "Public Officers Law § 87(2)(b)."

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[20] Item No. 5 in the Request seeks "[m]emo Book entries from NYPD officers at the 120th Precinct documenting conditions policing operations conducted from June 1, 2014 through August 1, 2014 related to 202 Bay Street and the area surrounding Tompkinsville Park." *See* Ex. 1 at p. 18.

[21] Item No. 16 in the Request seeks "Any other records (including Memo Book entries) recording or reflecting NYPD observations made on July 17, 2014 in or around Tompkinsville Park regarding conditions in or around the Park, or related to Mr. Garner or his death or the police response thereto on July 17, 2014." *See* Ex. 1 at p. 20.

[22] Item No. 38 in the Request seeks "CCRB Histories and any underlying records related to any CCRB Complaints against Adonis, Meems, Saminath, Bannon, Damico, Furlani, Pantaleo, or Ramos between 2005 and 2015, including, but not limited to, any such records created pursuant to PG 211-114 ("Investigations By Civilian Complaint Review Board") and any related Request For Records And/Or Information Regarding CCRB Case (PD 149-164) form(s)." *See* Ex. 1 at p. 35.

133. The RAO explained that the partial disclosure related to Item No. 39[23] was limited to only "unsealed records," and that other responsive records were denied pursuant to "Public Officer's Law § 87(2)(a) and Criminal Procedure Law § 160.50."[24]

Respondent claimed it could not locate certain records sought in the Request

134. In the June 18, 2021 Letter, the RAO stated that, after a "diligent search for all records responsive to [Petitioners'] request," no records were found for the following Item Nos.: 1, 2, 4, 6, 11a, 15, 22, 27, 48, 49, 52, 54, 55, and 56." *See* Ex. 15 at p. 1.

Respondent claimed Petitioners did not reasonably describe certain records in the Request

135. In the June 18, 2021 Letter, the RAO stated that various portions of the Request "do not reasonably describe a specific record in a manner that could leave to its retrieval," specifically Item Nos. 19, 23, 33, 34, and 42. *See* Ex. 15 at p. 2.

Respondent claimed to have redacted and/or withheld some categories of records based on a claimed exemption or exemptions

136. In the June 18, 2021 Letter, the RAO stated that Respondent had disclosed records responsive to Item Nos. 3, 12-14, 18, 21, 38, 40, 41, and 45-47 with redactions made pursuant to FOIL § 87(2). *See* Ex.15 at pp. 2-3.

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[23] Item 39 in the Request seeks "Records reflecting or related to the questioning, surveillance, detention or arrest of Ramsey Orta or any other witness to Mr. Garner's death, including any related Memo Book entries, Stop, Question, and Frisk Reports, Summonses, Desk Appearance Tickets, arrest processing paperwork, criminal court complaints, written or videotaped statements, DD-5's, or any other records memorializing conversations between Mr. Orta or any other witness and NYPD personnel." *See* Ex. A at p. 25.

[24] Petitioners do not seek to challenge Respondent's determinations to withhold records that are subject to sealing under CPL § 160.50 or to redact information revealing information related to such sealed records, except that Petitioners object to Respondent's withholding or redacting such records relating to CPL § 160.50 information (or other private information) related to Mr. Garner.

137. In the June 18, 2021 Letter, the RAO stated that some of the records Respondent disclosed in response to Item Nos. 3, 12-14, 18, 21, 38, 40, 41, and 45-47 were redacted "where the disclosure of certain personally identifying information would constitute an unwarranted invasion of privacy," invoking FOIL § 87(2)(b), "and/or could endanger the life or safety of these individuals," invoking FOIL § 87(2)(f). *See* Ex.15 at pp. 2-4.

138. In the June 18, 2021 Letter, the RAO stated that some of the records Respondent disclosed in response to Item Nos. 3, 12-14, 18, 21, 38, 40, 41, and 45-47 were redacted *and/or withheld* because the records would reveal "non-routine criminal investigative techniques or procedures…specifically as it pertains to homicide and/or internal investigations conducted by" Respondent, invoking FOIL § 87(2)(e)(iv). *See* Ex.15 at p. 4.

139. In the June 18, 2021 Letter, the RAO stated that some of the records Respondent disclosed in response to Item Nos. 3, 12-14, 18, 21, 38, 40, 41, and 45-47 were redacted *and/or withheld* because they were "inter-agency or intra-agency records that do not contain: i.) statistical or factual tabulations or data; ii) instructions to staff that affects the public; iii.) final agency policy or determinations; or, iv.) external audits," invoking FOIL § 87(2)(g). *See* Ex.15 at p. 4.

Respondent withheld all records responsive to Item Nos. 50 and 54

140. In the June 18, 2021 Letter, the RAO stated that Respondent withheld all records in their responsive to Item Nos. 50[25] and 54[26] as inter-agency or intra-agency records, invoking

[25] Item No. 50 in the Request sought "[r]ecords, including memoranda and electronic records such as e-mails, reflecting communications between the NYPD and the New York City Law Department between 2014 and the present regarding Mr. Garner's death or actual or potential investigation(s) or prosecution(s) related to Mr. Garner's death."
[26] Item No. 54 in the Request sought "[r]ecords, including memoranda and electronic records such as e-mails, reflecting communications between the NYPD, any representative(s) of the PBA, and/or Stuart London about managing public access, press access, and/or protests outside
(….continued)

FOIL § 87(2)(g), as well as on attorney-client privilege grounds, invoking FOIL §87(2)(a) and New York Civil Practice Law and Rules ("CPLR") § 4503. *See* Ex.15 at pp. 4-5.

141. For each claimed exemption mentioned above, Respondent only provided boilerplate recitations of its understanding of the applicable legal standards related to the exemption – no facts or argument about how or why the exemption should apply.

142. With few exceptions, the June 18, 2021 Letter did not say which records were redacted for which reasons.

143. Additionally, Respondent has not stated which claimed exemption(s) apply to which records or categories of records, except as to the records the RAO stated Respondent had withheld responsive to Item Nos. 38, 39, 50, and 54.

144. Finally, the June 18, 2021 Letter concluded by providing, for the first time, the contact information for the RAAO that Petitioners had explicitly asked for in the Request:

> Should you so desire, you may appeal this decision or any portion thereof. Such an appeal must be made in writing within thirty (30) days of the date of this letter, and must be forwarded to: Sergeant Jordan S. Mazur, Records Access Appeals Officer, New York City Police Department, One Police Plaza, Room 1406, New York, NY 10038. Your appeal may also be submitted via email to FOILAppeals@NYPD.org.

See Ex. 16 at p. 6.

Petitioners' July 18, 2021 Letter to Respondent (Ex. 16)

145. On **July 18, 2021**, Petitioners responded to Respondent's June 18, 2021 Letter with Petitioners' own letter (the "**July 18, 2021 Letter**"). A true copy of the July 18, 2021 Letter and the documents submitted with it are attached collectively as Exhibit 16.[27]

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of One Police Plaza for the duration of the Pantaleo administrative trial that was held between May 13, 2019 and June 6, 2019."

[27] The July 18, 2021 Letter mistakenly refers to a May 27, 2021 production when it should refer to a May 26, 2021 production.

146. In the July 18, 2021 Letter, Petitioners reminded Respondent of their arguments in the Appeal "that repeated delays including extensions of approximate response dates that are unreasonable under the circumstances and appeals determinations that purport to 'remand' the matter for further processing violate the FOIL." *See* Ex. 16 at pp. 1-2, citing FOIL § 89(4)(a), 21 NYCRR § 1401.7(f), as well as the 2/16/18 COOG Opinion and 9/21/20 COOG Opinion.

147. With respect to the May 26, 2021 Sixth Production and June 7, 2021 Seventh Production, the July 18, 2021 Letter stated that they each included "records that were redacted without any indication as to why" and that "because Request they respond to, there is no way of knowing which records the NYPD disclosed in response to which paragraph(s) of the Request." *See* Ex. 16 at p. 2.

148. Also in the July 18, 2021 Letter, consistent with Petitioners' position articulated in the Appeal, Petitioners informed Respondent that Respondent's May 11, 2021 Letter did not comply with FOIL § 89(4)(a) and 21 NYCRR § 1401.7(f) and was not an authorized or appropriate response to the Appeal in that Respondent's May 11, 2021 Letter failed to "fully explain in writing…the reasons for further denial, or provide access to the record sought" and because it was not proper "to purport to 'remand' the matter for further processing, thereby causing additional delays." *See* Ex. 16 at pp. 2-3, citing FOIL § 89(4)(a), 21 NYCRR § 1401.7(f), as well as the 2/16/18 COOG Opinion and 9/21/20 COOG Opinion.

149. For example, the July 18, 2021 Letter stated:

> The NYPD's handling of the FOIL was ripe for litigation under the FOIL and CPLR Article 78 ten business days after April 29, 2021….The 6/18 Letter ends with the language that the NYPD usually includes in FOIL final determinations about the need to submit appeals to your attention within 30 days. However, as the Appeal made clear, the NYPD's final determination was due ten business days after the Appeal was filed, and the NYPD's handling of the Request was ripe for litigation under the FOIL and CPLR Article 78 at that time, so the NYPD' use of "final determination" in connection with the NYPD's subsequent correspondence

> that came more than ten business days after the NYPD's receipt of the April 29, 2021 Appeal are improper.

See Ex. 16 at pp. 2-3.

150. Nevertheless, the July 18, 2021 Letter stated that, "to the extent the NYPD believes, or may take the position, that the 6/18 Letter must be appealed, you should consider this an appeal of every aspect of the NYPD's handling of the Request," including "all of the facts, records, and arguments in the Appeal" as well as additional arguments in the July 18, 2021 Letter. *See* Ex. 16 at p. 3.

151. The July 18, 2021 Letter stated that Respondent had "provided responsive records, with many redactions, in a way that will render judicial review of the propriety of the NYPD's responses to the Request [difficult, if not impossible]":

> First, because the NYPD has not stated which of the records it has produced are responsive to which paragraph(s) of the FOIL, it is impossible for Petitioners to evaluate the extent of the NYPD has conducted diligent searches and/or provided all of the records required in response to the Request. Please provide a log indicating which records the NYPD has produced respond to which paragraph(s) of the Request. Second, because the NYPD has not provided a log indicating the grounds based on which it has redacted the records it has produced, it is impossible to know why redactions were applied to redacted records, or to evaluate the propriety of those redactions. Please provide a log stating the ground for each redaction for each record produced with redaction(s).

See Ex. 16 at p. 3.

Respondent's claims to have conducted diligent searches for all records responsive to the Request

152. The July 18, 2021 Letter explicitly challenged Respondent's claim that Respondent conducted a "diligent search" for all of the relevant records responsive to the Request. *See* Ex. 16 at pp. 3-4.

Records Respondent claimed to have produced without redactions

153. For instance, first, the July 18, 2021 Letter provided a few representative examples of categories of records that were reasonably described in the Request, and which Respondent said it had "disclosed with no redactions applied", but that had Respondent had in fact either not searched for diligently, or had withheld:[28]

a. "[A]lthough Paragraphs 9, 10, and 30 of the Request sought, among other things, audio recordings of 311/911 calls and internal NYPD communications, no such" audio recordings were produced.

b. "[W]hile Paragraphs 28 and 29 of the Request sought, among other things, video and audio recordings of all NYPD and civilian witness interviews, no such recordings were disclosed."

c. "[T]he 6/18 Letter states that the NYPD only made partial productions as to records responsive to 4 of the paragraphs in the Request. The NYPD has not justified its decisions to limit its searches for or productions of such records."

See Ex. 16 at p. 3.

Records Respondent claimed it could not locate and Records Respondent claimed Petitioners did not reasonably describe

154. Additionally, next, the July 18, 2021 Letter provided a few representative examples of categories of records that Respondent claimed to have searched for but not found:[29]

> To the extent the next paragraph in the 6/18 letter claims that the NYPD conducted a diligent search for records responsive to certain paragraphs of the Request but was unable to locate any such records, those claims are beyond belief. For example, it is beyond belief that the NYPD could not find any records related to the purported quality-of-life-threatening conditions related to cigarette sales at or around 202 Bay Street or meetings or communications at which they were discussed responsive to Paragraphs 1-2, 4, 6, and 11 of the Request, or any communications between the NYPD and the Mayor, City Hall, or the City Council responsive to Paragraphs 48-49 of the Request.

[28] Specifically, Respondent represented that it had searched diligently for and disclosed un-redacted records responsive to Item Nos.: "5 (partial), 7, 8, 9, 10, 11b, 16 (partial), 17, 20, 24-26, 28-31, 38 (partial), 39 (partial), 43-44, 51, and 57-62" in the Request. *See* Ex. 15 at p. 1.
[29] Specifically, Respondent claimed that, after a "diligent search for all records responsive to [Petitioners'] request," no records were found for the following Item Nos.: 1, 2, 4, 6, 11a, 15, 22, 27, 48, 49, 52, 54, 55, and 56." *See* Ex. 15 at p. 1.

See Ex. 16 at p. 4.

155. Additionally, next, the July 18, 2021 Letter provided a few representative examples of categories of records that were reasonably described in the Request, which Respondent said were not reasonably described: [30]

> To the extent the next paragraph in the 6/18 letter claims that the NYPD conducted a diligent search for records responsive to certain paragraphs of the Request but was unable to locate any such records, those claims are beyond belief. For example, it is beyond belief that the NYPD could not find any records related to the purported quality-of-life-threatening conditions related to cigarette sales at or around 202 Bay Street or meetings or communications at which they were discussed responsive to Paragraphs 1-2, 4, 6, and 11 of the Request, or any communications between the NYPD and the Mayor, City Hall, or the City Council responsive to Paragraphs 48-49 of the Request.

See Ex. 16 at p. 4.

156. As to Respondent's claim – made for the first time in Respondent's June 18, 2021 Letter – that Petitioners did not reasonably describe certain categories of records sought in the Request, Petitioners' July 18, 2021 Letter reminded Respondent of its obligations:

> As stated in pages 14-15 of the Appeal, under 21 NYCRR § 1401.5(c), within five business days of acknowledging receipt of the Request, the NYPD was required to inform the Requesters that the Request or any portion of it did not "reasonably describe the records sought," and provide them "direction, to the extent possible, that would enable" the Requesters "to request [the] records" in a manner the NYPD would agree "reasonably described" the records. Nor did the NYPD take any steps, at any time, to assist the Requesters "to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" as is required under 21 NYCRR §1401.2(b)(2). The Request reasonably describes the records sought. The NYPD's assertions that certain categories of records were not "reasonably described" are self-serving. If the Request did not reasonably describe certain records sought, the NYPD was obliged to provide information and assistance long ago.

[30] Specifically, Respondent claimed that the Request did "not reasonably describe a specific record in a manner that could leave to its retrieval' as to Item Nos. "19, 23, 33, 34, and 42." *See* Ex. 15 at p. 2.

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See Ex. 16 at p. 4.

157. Relatedly, the August 27, 2019 Request itself reminded Respondent of some of those obligations. Specifically, the Request also stated:

> The records sought are reasonably described below after the BACKGROUND section. If you disagree and find that the documents requested are not reasonably described, please contact us as soon as possible to begin the process of assisting us in identifying the requested records and, if necessary, in re-formulating the request "in a manner that will enable the agency to identify the records sought", including by identifying to us "the manner in which the records" sought related to Mr. Garner's killing, death, and related investigation(s), prosecution(s), and disciplinary action(s) "are filed, retrieved or generated." *See, e.g.,* 21 NYCRR § 1401.2(b)(2)….

See Ex. 1 at p. 2 n. 1.

158. Additionally, as stated in Petitioners' July 18, 2021 Letter, the April 29, 2021 Appeal also reminded Respondent of those obligations, stating:

> The COOG Regulations further require that agencies subject to the FOIL must take timely steps to aid requesters in framing, clarifying, and refining their FOIL requests, in each case in which the agency believes such a request is overbroad, or does not reasonably describe the records sought. Those requirements recognize that agencies, not FOIL requesters, know best how they themselves refer to, index, and store their own records and information. For example, within five business days of receiving a FOIL request, an agency must inform the requester if it believes the request does not reasonably describe the records sought, and provide "direction, to the extent possible, that would enable that person to request records reasonably described." 21 NYCRR § 1401.5(c)(1). Additionally, an agency responding to a FOIL request is required to "[a]ssist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records." 21 NYCRR §1401.2(b)(2). And, "when a request is voluminous or when locating the records sought involves substantial effort", an agency responding to a FOIL request must "[c]ontact persons seeking records, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested." 21 NYCRR §1401.2(b)(3).

See Appeal at pp. 7, 14-15, cited in Petitioners' July 18, 2021 Letter at p. 4.

159. Respondent did not inform Petitioners that the Request or any portion of it did not "reasonably describe the records sought," or provide them "direction, to the extent possible, that would enable" the Requesters "to request [the] records" in a manner the NYPD would agree "reasonably described" the records, within five business days of receiving the Request, as required under 21 NYCRR § 1401.5(c), or at any time.

160. Nor did the NYPD take any steps to assist the Requesters "to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" as is required under 21 NYCRR §1401.2(b)(2), at any time.

Records Respondent claimed to have redacted and/or withheld based on a claimed exemption or exemptions

161. The July 18, 2021 Letter also provided representative examples of categories of records that Respondent claimed to have redacted and/or withheld based on a claimed statutory exemption or exemptions under the FOIL, beginning with a complaint that Respondent's June 18, 2021 Letter only invoked "boilerplate language describing the NYPD's position as to the standards involved in various exemptions including FOIL §§ 87(2)(b), 87(2)(f), 87(2)(g), and 87(2)(e)(iv)" and continuing:[31]

[31] Specifically, Respondent claimed that Respondent had disclosed records responsive to Item Nos. 3, 12-14, 18, 21, 38, 40, 41, and 45-47 with redactions made pursuant to FOIL § 87(2); some were redacted *and/or withheld* because the records would reveal "non-routine criminal investigative techniques or procedures…specifically as it pertains to homicide and/or internal investigations conducted by" Respondent, invoking FOIL § 87(2)(e)(iv); and some were redacted *and/or withheld* because they were "inter-agency or intra-agency records that do not contain: i.) statistical or factual tabulations or data; ii) instructions to staff that affects the public; iii.) final agency policy or determinations; or, iv.) external audits," invoking FOIL § 87(2)(g). *See* Ex.15 at pp. 3-4 (emphasis added).

> As stated above, however, because of the way the NYPD has produced the records, there is no way to match up any redaction applied with any claimed exemption. And beyond that, the boilerplate language contained in the 6/18 Letter describing the NYPD's position as to the standards involved in various exemptions is insufficient to establish the NYPD's entitlement to rely on any claimed exemption. For example, at no point does the 6/18 Letter even attempt to explain, in a general way, the privacy or safety implications that might be involved.

See Ex. 16 at p. 4.

Records Respondent withheld that were responsive to Item Nos. 50 and 54

162. Finally, the July 18, 2021 Letter challenged Respondent's withholding of all records responsive to Item Nos. 50 and 54 of the Request on intra-agency/inter-agency deliberative process and attorney-client privilege grounds, invoking FOIL §§ 87(2)(a) and 87(2)(g) and CPLR §§ 3101(c) and 4503, as well as fact (as opposed to opinion) work product, non-privileged communications, and information contained in responsive inter- and intra-agency records that is subject to disclosure under FOIL § 87(2)(g). *See* Ex. 16 at pp. 4-5.

Respondent's August 2, 2021 Letter (Ex. 17)

163. On **August 2, 2021** - nearly a full year after Petitioners submitted the August 27, 2019 Request - Respondent sent a letter (the "**August 2, 2021 Final Letter**") treating Petitioners' July 18, 2021 Letter as an administrative appeal of Respondent's June 18, 2021 Letter and purporting to provide Respondent's final agency determination. A true copy of the August 2, 2021 Final Letter is attached as Exhibit 17.

164. Respondent's August 2, 2021 Letter purported to deny in part and grant in part what Respondent interpreted as Petitioners' administrative appeal in Petitioners' July 18, 2021 Letter.

165. Preliminarily, without an explanation, Respondent's August 2, 2021 Letter purported to deny Petitioners' July 18, 2021 Letter to the extent that it asked that Respondent

provide "a log indicating which records produced respond to which paragraph(s) of [Petitioners'] request." *See* Ex. 17 at p. 1.

Respondent's claims to have conducted diligent searches for, and produced, all records responsive to the Request

166. Respondent's August 2, 2021 Letter purported to grant Petitioners' July 18, 2021 Letter to the extent that it challenged some of Respondent's claims that it had conducted diligent searches for the certain records, providing explanations and making additional disclosures as follows:

a. "Your appeal first references Paragraphs 9, 10, and 30 of your initial request; an additional diligent search was conducted for recordings of 311 or 911 calls (Item No. 9) and "job runs" – also known as "radio runs" (Item No. 10)- and those records are enclosed herein."

b. "Regarding the request for video recordings (Item No. 30), enclosed herein is all ARGUS camera video maintained."

c. "Regarding your reference to Paragraphs 28 and 29 of the initial request seeking video and audio recordings of interviews with Members of the service and civilians, respectively, enclosed herein are all audio recordings maintained."

See Ex. 17 at p. 1.

167. As to Respondent's partial disclosure of records related to Item Nos. 5 and 16, Respondent's August 2, 2021 Letter upheld the RAO's determination and reasoning in the June 18, 2021 Letter in its entirety, and provided additional arguments why, according to Respondent, it would have "require[d] extraordinary efforts to locate records responsive to [the Request]" as it relates to Memo Book entries other than those "directly related to the date of the incident." *See* Ex. 17 at pp. 1-2.

168. In those arguments, Respondent takes the broadest possible interpretation of Item Nos. 5 and 16 in the Request and describes an over-complicated and inefficient means of searching for responsive records that overstates the nature and extent of the searches that would

be necessary to comply with Item Nos. 5 and 16 in the Request. For example, the records in the Pantaleo administrative proceeding, and other records of which Respondent is aware, establish that reports about purported quality of life conditions "related to 202 Bay Street and the area surrounding Tompkinsville Park" and alleged sales of untaxed cigarettes had made their way so far up the chain of command that, "[i]n March 2014, Lieutenant Christopher Bannon, the Special Operations Lieutenant for the 120 Precinct in Staten Island, attended a meeting at One Police Plaza focusing on" those very "qualify-of-life conditions" and "[d]uring that meeting" he "was specifically tasked with addressing the illegal sale of untaxed cigarettes in the vicinity of 200 Bay Street, Staten Island, near Tompkinsville Park" such that "[f]rom March 28 to July 16, 2014, multiple untaxed cigarette sale arrests were made at or near the targeted area." *See* Hon. Rosemarie Maldonado, NYPD Deputy Commissioner of Trials, written Decision in *Matter of Daniel Pantaleo*, Case No. 2018 198274, at p. 3 (citing testimony from Lt. Bannon). So, rather than searching all memo book entries in the laborious method Respondent suggests would be necessary to fulfill this aspect of the Request, Respondent could produce, at a minimum, the records and information that led to the March 2014 meeting at One Police Plaza at which Lt. Bannon was tasked with taking enforcement actions to address alleged untaxed cigarette sale-related conditions related to 202 Bay Street and the area surrounding Tompkinsville Park as well as records related to the "multiple untaxed cigarette sale arrests" that "were made at or near" that area, which Lt. Bannon's testimony described as "the targeted area."

169. Relatedly, as mentioned above, Respondent has ignored its obligations to engage in the dialogues required under 21 NYCRR § 1401.2(b)(2), 1401.2(b)(3), and 1401.5(c) given its position that the Request does not reasonably describe some of the records sought and/or seeks a

voluminous amount of records and/or that locating some of the records sought will take substantial effort.

170. Had those dialogues happened, as the applicable COOG Regulations required, Petitioners would be better positioned to explain to the Court the various ways in which Respondent's arguments and explanations describe the most complicated, least efficient means of searching for responsive records.

171. Beyond that, Respondent's August 2, 2021 Letter purported to grant Petitioners' July 18, 2021 Letter to the extent that it sought access to "records 'related to the purported quality-of-life threatening conditions related to cigarette sales at or around 202 Bay Street" and enclosed certain responsive records. *See* Ex. 17 at p. 3.

172. Additionally, Respondent's August 2, 2021 Letter purported to grant Petitioners' July 18, 2021 Letter to the extent that it sought access to records responsive to Item No. 39 related to "interviews of Mr. Ramsay Orta regarding the incident" and enclosed certain responsive records. *See* Ex. 17 at p. 3.[32]

Records Respondent claimed Petitioners did not reasonably describe

173. Respondent's August 2, 2021 Letter purported to uphold the RAO's determination memorialized in the June 18, 2021 Letter that the request did not reasonably describe certain records, stating: "the appeal is denied and the NYPD maintains its position that

[32] Respondent's August 2, 201 Letter also explained that Respondent had only withheld responsive records "that have not been sealed in accordance with [New York] Criminal Procedure Law § 160.50." *See* Ex. 17 at p. 3. Petitioners do not challenge the determination to withhold records that are sealed under CPL § 160.50, except to the extent that Respondent might seek to invoke that provision to withhold records related to Mr. Garner's criminal history information.

those portions of your request identified in the RAO determination fail to reasonably describe a record in a manner that could enable a search." *See* Ex. 17 at p. 3.

Records Respondent claimed to have redacted and/or withheld based on a claimed exemption or exemptions

Item No. 38 Seeking CCRB histories and underlying records related to complaints against NYPD members and former NYPD members Adonis, Meems, Saminath, Bannon, D'Amico, Furnali, Pantaleo, or Ramos between 2005 and 2015

174. Next, Respondent's August 2, 2021 Letter purported to uphold the RAO's determination to withhold everything aside from "those CCRB records directly related to the incident" responsive to Item No. 38 - invoking the unwarranted invasion of personal privacy exemption in FOIL § 87(2)(b). *See* Ex. 17 at pp. 2-3.

175. Relatedly, Respondent's August 2, 2021 Letter purported to uphold the RAO's determination all "Police Officer records related to an investigation for which a finding of 'unsubstantiated,' 'unfounded,' or 'exonerated' has been issued," claiming that "disclosure of the records would constitute an unwarranted invasion of personal privacy," and invoking FOIL §§ 87(2)(b) and 89(2). *See* Ex. 17 at pp. 3-4.

176. In the August 2, 2021 Letter, Respondent also took the position that law enforcement disciplinary records as defined in FOIL § 86(6) are only subject to disclosure when there is a "law enforcement disciplinary proceeding" – meaning one in which, citing FOIL § 86(7), both "the commencement of any investigation **AND** any subsequent hearing or disciplinary actions":

> Pursuant to Public Officers Law §86(6), "[l]aw enforcement disciplinary records" means any record created in furtherance of a "law enforcement disciplinary proceeding." Public Officers Law §86(7) defines a "[l]aw enforcement disciplinary proceeding" as "the commencement of any investigation **AND** any subsequent hearing or disciplinary action." The rules of statutory interpretation dictate that the legislature means what it says, and says what it means; in other words, the intent of the legislature in unambiguously defining a "law

> enforcement disciplinary proceeding," taken from the plain language and meaning of the statute, was to create a two-pronged test in which both an investigation **AND** a subsequent hearing/disciplinary action must exist for records to be considered "disciplinary records." Accordingly, absent a "subsequent hearing or disciplinary action," records pertaining to a matter resulting in *only* "any investigation" – including any investigations resulting in a disposition of "unfounded," "exonerated," or "unsubstantiated" – are not considered disciplinary records and are not responsive to your request for "disciplinary actions."

See Ex. 17 at p. 2.

177. All told, Respondent has withheld *all* records regarding *all* unsubstantiated, unfounded, and exonerated CCRB complaints against Pantaleo and *all* records regarding all CCRB complaints against the 7 other NYPD members named, regardless of outcome, and has produced only some records regarding the CCRB complaint, investigation, and related proceedings against Panteleo related to killing Mr. Garner. *See* Ex. 17 at pp. 2-3.

Records Respondent withheld that were responsive to Item Nos. 50 and 54

178. Respondent's August 2, 2021 Letter purported to uphold the RAO's determination to withhold records responsive to Item Nos. 50 and 54, claiming that "a diligent search was conducted and it was determined that the disclosure of responsive records would require extraordinary efforts not required under the FOIL," invoking FOIL §§ 87(2)(a), 87(2)(b), and 87(2)(g). *See* Ex. 17 at p. 4.

179. Respondent's August 2, 2021 Letter also explained:

> As it pertains to your request for "memoranda and electronic records such as e-mails, reflecting communications between the NYPD and the New York City Law Department" regarding Mr. Garner's death and the subsequent investigation(s), the search revealed a total of 31,640 items and 17,869,183 "unindexed items," meaning data that is not searchable by words (e.g., scanned PDFs, documents without words like pictures and video). As it pertains to your request for "memoranda and electronic records such as e-mails, reflecting communications . . . about managing public access, press access, and/or protests outside of One Police Plaza" during the administrative trial of Mr. Pantaleo, the search revealed a total of 1,423 items and 7,564 "unindexed items."

> Accordingly, the review and subsequent application of exemptions to these records would prove unduly burdensome.

See Ex. 17 at p. 4.

180. Consistent with Respondent's decision to treating Petitioners' July 18, 2021 Letter as an administrative appeal of Respondent's June 18, 2021 Letter and purporting to provide Respondent's final agency determination, the August 2, 2021 Letter ends: "You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision." *See* Ex. 17 at p. 4.

Some Relevant COOG Opinions (Exs. 18-20)

181. A true copy of the **February 16, 2018** Advisory Opinion from the COOG (FOIL-AO-f19646, the "**2/16/18 COOG Opinion**"), which Petitioners referred to in the Appeal and the July 18, 2021 Letter, is attached hereto as Exhibit 18.

182. As seen above, the 2/16/18 COOG Opinion outlined an agency's obligations under the FOIL and COOG Regulations to respond to a FOIL requester in certain authorized ways within certain specified time periods, including by providing estimated response date(s) and/or a "date certain" that are reasonable under the circumstances of the FOIL request; that "[t]here is no provision" in the FOIL "that permits repeated delays" and/or extensions of time to respond to a FOIL request, particularly not without an appropriate and articulated justification.

183. Beyond that, in the case that led to the 2/16/18 COOG Opinion, as here, the requester had filed an administrative appeal on constructive denial grounds after the NYPD had engaged in repeated and unjustified delays, purporting to extend its time to respond to the FOIL request at issue.

184. A true copy of the **December 11, 2017 Letter** from Respondent's RAO in the FOIL matter that led to the 2/16/18 COOG Opinion is attached hereto as Exhibit 19.

185. As noted in the July 18, 2021 Letter, Respondent's May 11, 2021 Letter "is substantially the same as the December 11, 2017 letter that led to the 2/16/18 COOG Opinion." There, as here, Respondent's RAAO took the position that the appeal at issue was "premature because, as of the date of [the Appeal], the Records Access Officer (RAO) had not yet issued a determination on [the request at issue], and, therefore, [the appeal] lacked the predicate denial of access" and because "the RAO has not completed review and disclosure of responsive records and has yet to make a final determination; therefore, the [RAAO was] unable to issue a substantive appeal determination." *See* Ex. 16 at p. 2; *compare* May 11, 2021 Letter (Ex. 13) *with* December 11, 2017 Letter (Ex. 19).

186. A true copy of the **September 21, 2020** Advisory Opinion (FOIL-AO-19780, the "**9/21/20 COOG Opinion**"), which Petitioners referred to in the Appeal and the July 18, 2021 Letter, is attached hereto as Exhibit 20.

187. A true copy of **the January 4, 2005** COOG Advisory Opinion (FOIL-AO-15096, the "**1/4/05 COOG Opinion**") is attached hereto as Exhibit 21.

188. A true copy of the **December 20, 2017** COOG Advisory Opinion (FOIL-AO-19639, the "**12/20/17 COOG Opinion**") is attached hereto as Exhibit 22.

189. In each of the COOG Opinions included as Exs. 20-22, the COOG concluded that, under FOIL § 89(4)(a), "there is nothing in the FOIL that authorizes a FOIL appeal officer to 'remand' a FOIL request back to the records access officer for further review." Rather, "[t]he FOIL states that the appeal officer is obligated to either fully explain in writing the reasons for further denial 'or provide access to the record sought.'" And, an "appeal determination "remanding" [a] request to the FOIL officer for processing is not sufficient to comply with law." *See* Exs. 20-22.

190. Although Respondent was aware of these legal principles, as articulated in the above-referenced COOG Opinions, including, but not limited to, because Petitioners raised them in the Appeal and the July 18, 2021 Letter, Respondent simply ignored them, and failed to comply with the FOIL and the COOG Regulations in Respondent's handling of the Request.

The June 12, 2020 repeal of New York Civil Rights Law § 50-a and FOIL amendments

191. The June 12, 2020 repeal of New York Civil Rights Law § 50-a and simultaneous amendments to the FOIL caused a sea change in the public disclosure laws' treatment of law enforcement disciplinary records. As explained in the Appeal:

> On June 12, 2020, New York's legislature simultaneously repealed New York Civil Rights Law ("CRL") § 50-a and enacted sweeping revisions to the FOIL, making all records related to law enforcement disciplinary investigations and proceedings presumptively available under the FOIL, subject to specific, enumerated redactions designed to protect truly private information such as home addresses, personal phone numbers, medical information, and the like. *See* S. 8496, 243rd Leg., Reg. Sess. (N.Y. 2020) (available online at https://www.nysenate.gov/legislation/bills/2019/s8496); NY Pub. Off. L. §§ 86(6) through 86(9), 87(4-a), 87(4-b), 89(2-b), and 89(2-c).
>
> As a result of the sweeping changes in the applicable provisions of New York law that took effect on June 12, 2020, all "law enforcement disciplinary records" within the meaning of FOIL § 86(6), including records of "law enforcement disciplinary proceedings" within the meaning of FOIL § 86(7), are now presumptively subject to disclosure under the FOIL. *See* FOIL §§ 86(6) and 86(7); *see also, e.g., Schenectady Police Benevolent Assn v. City of Schenectady*, 2020 NY Misc. LEXIS 10947, 2020 NY Slip Op 34346[U], at 8-11 (Sup. Ct., Schenectady County 2020) ("*Schenectady PBA"*) ("with the repeal of CRL §50-a, FOIL requests for law enforcement personnel records are now to be considered in a light that makes them available unless a particular record, or portion thereof, falls within a recently enacted statutory exception or a pre-existing one which the legislature left unaltered"); *Buffalo Police Benevolent Association, Inc. v. Brown*, 69 Misc.3d 998, 1001, 1004 (Sup. Ct., Erie County 2020) ("*Buffalo PBA*") ("What petitioners find objectionable is specifically authorized by statute." "Public Officers Law §86(6)(a), now provides law enforcement disciplinary records that must presumptively be disclosed include 'any record created in furtherance of a law enforcement disciplinary proceeding [including] complaints, allegations, and charges against an employee'").…

See Ex. 12 at pp. 10-14.

192. Attached as Exhibit 23 is a true copy of the Bill Text of S. 8496, 243rd Leg., Reg. Sess. (N.Y. 2020) (available online at https://www.nysenate.gov/legislation/bills/2019/s8496)).

193. Attached as Exhibit 24 is a true copy of the text of the Sponsor Memo related to S. 8496, 243rd Leg., Reg. Sess. (N.Y. 2020) (available online at https://www.nysenate.gov/legislation/bills/2019/s8496)).

194. As a result of the repeal of CRL § 50-a and the related amendments to the FOIL, FOIL §§ 86(6) through 86(9) now provide:

> 6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
>
> (a) the complaints, allegations, and charges against an employee;
>
> (b) the name of the employee complained of or charged;
>
> (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
>
> (d) the disposition of any disciplinary proceeding; and
>
> (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.
>
> 7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.
>
> 8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

> 9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

See FOIL §§ 86(6) through 86(9).

195. "Relatedly," as the Appeal explained, "in recognition of officers' privacy concerns related to certain information contained in such records, the legislature modified relevant privacy provisions of the FOIL, so that the FOIL now requires the redaction of certain specific information prior to disclosing such records, *see* FOIL §§ 87(4-a) and 89(2-b)." *See* Ex. 12 at p. 12.

196. And so, by operation of FOIL § 87(4-a), FOIL § 89(2-b) now requires redaction of:

> (a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;
>
> (b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;
>
> (c) any social security numbers; or

> (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article."

FOIL § 89(2-b).

197. "In addition to those mandatory redactions," as explained in the Appeal, "the new FOIL provisions permit the withholding or redaction of *only* such records related to "minor, technical infractions that do not involve interactions with the public, are not of public concern, and are not connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities." *See* FOIL §§ 86(9); 87(4-b); and 89(2-c), cited in Ex. 12 at p. 13.

198. "In determining that all law enforcement disciplinary records should be public, with the exception of certain narrow, enumerated redactions that may be made on privacy grounds consistent with FOIL §§ 86(9), 87(4-a), 87(4-b), 89(2-b), and 89(2-c)," as the Appeal further explained:

> …the New York legislature explicitly, and carefully, balanced law enforcement officers' privacy interests in protecting such records from disclosure, including under the exemptions in FOIL §§ 87(2)(b) and 87(2)(f) regarding privacy and safety, against the strong public interest in disclosure of such law enforcement personnel and disciplinary records, and determined that continuing the regime of secrecy created by former CRL § 50-a would be "contrary to public policy." S. 8496, 243rd Leg., Reg. Sess. (N.Y. 2020). "In the balance between the public's right of access and the impact of disclosure upon the officer, the legislature has now made clear that the latter (the impact upon the officer) must bow to the former (the public's right of access)." *Schenectady PBA*, 2020 NY Misc. LEXIS 10947 at *12-14, 17-18.

See Ex. 12 at p. 13.

The *Uniformed Fire Officers Association, et al. v. de Blasio, et al.* ("*UFOA*") litigation

199. In a substantial, early challenge to the sea change with respect to public disclosure of law enforcement disciplinary records described above, in *Uniformed Fire Officers Association v. de Blasio*, 20 Civ. 05441 (KPF) ("*UFOA*"), police and other unions sought to bar the release of police disciplinary records sought through the FOIL –including, and especially, records related to non-final, unproven, and unsubstantiated matters.

200. On July 14, 2020, New York police, firefighter, and correction officer unions sued the City of New York, New York City Mayor Bill de Blasio, and various other officials in New York State Supreme Court, winning a temporary restraining order blocking the public disclosure of "any records concerning Unsubstantiated and Non-Final Allegations or settlement agreements as defined in the … Petition*." See Uniformed Fire Officers Assn. v De Blasio*, 2020 NY Slip Op 32313[U], *2 (Sup Ct, NY County 2020); *Uniformed Fire Officers Assn. v De Blasio*, 973 F3d 41, 45 (2d Cir 2020).

201. On July 16, 2020, the UFOA matter was subsequently removed from New York State Supreme Court to the U.S. District Court for the Southern District of New York. *See Uniformed Fire Officers Association v. de Blasio,* No. 20-cv-05441 (KPF)(RWL) (SDNY), Dkt. 5 (Notice of Removal).

202. On July 22, 2020, the District Court in substance extended the limited temporary restraining order the New York Supreme Court had issued. *See, e.g., Uniformed Fire Officers Assn. v De Blasio*, 973 F3d *at 45-46; Uniformed Fire Officers Association v. de Blasio*, No. 20-cv-05441 (KPF)(RWL) (SDNY), Dkt. 91 (July 22, 2020 transcript).

203. The Defendants in the *UFOA* litigation included the New York City Police Department and the Civilian Complaint Review Board. They were represented by the Office of the Corporation Counsel.

204. In a **July 17, 2020** letter submitted to the *UFOA* Court by the Law Department on behalf of the NYPD, CCRB, and other New York City agency and individual defendants (the "**July 17, 2020 *UFOA* Letter**"), Respondent, through counsel, took a very different position than Respondent is now taking with respect to the disclosure of law enforcement disciplinary records, including such records related to "unsubstantiated, exonerated, and unfounded allegations." A true copy of the July17, 2020 *UFOA* Letter is attached as Exhibit 25 hereto.

205. As Respondent then explained, through counsel:

> On June 12, 2020, the New York State Legislature and the Governor repealed Civil Rights Law § 50-a. The Plaintiff's are attempting to subvert the clear intent of that legislative action, which was to increase transparency by permitting the disclosure of the very disciplinary records (unsubstantiated, exonerated, and unfounded allegations) that the Plaintiff's now seek to enjoin. The law enforcement unions, including Plaintiffs, attempted to lobby the legislature to exclude unsubstantiated, exonerated and unfounded allegations from disclosure. Had the legislature wanted to categorically exempt these records from disclosure, it would have done so in the legislation repealing § 50-a. Plaintiffs should not be permitted to contravene the legislature's purpose in repealing § 50-a through this litigation….
>
> The types of records Plaintiffs seek to prevent from disclosure – Unsubstantiated and Non-Final Allegations … – have, for years, already been released for other public employees. Despite this, Plaintiffs fail to identify any examples where the release of the exact same disciplinary files has resulted in irreparable harm to any employee. For example, the Report and Recommendations of the New York City Office of Trials and Administrative Hearings ("OATH") which include disciplinary determinations of firefighters and correction officers have been public for many years. Notably, these decisions detail allegations against individuals and include whether the allegations are unsubstantiated or otherwise unfounded.[1] Given that this type of material has long been publically available, and Plaintiffs failure to point to even one instance where the public disclosure resulted in harm to other individuals, it is clear that the release of the records Plaintiffs seek to prevent disclosure of, will not cause irreparable harm…
>
> Since the repeal of Civil Rights Law §50-a on June 12, 2020, CCRB has been releasing records, including of complaints unfounded, unsubstantiated or exonerated, in response to FOIL requests.

See Ex. 25 at pp. 1-3.

206. Following extensive briefing and argument, in an **August 21, 2020** Decision denying the unions' request for a preliminary injunction ("the **August 21, 2020 *UFOA* Decision**"), the District Court addressed the unions' arguments that their members would suffer irreparable harm in terms of "[r]eputational harm and loss of privacy." August 21, 2020 *UFOA* Decision at pp. 4, 11-16, 34-37, and 41-42, *affirmed, Uniformed Fire Officers Association v. de Blasio*, Nos. 20-2789-cv(L), 20-3177-cv(XAP), 2021 U.S. App. LEXIS 4266, at 14 (2nd Cir. Feb. 16, 2021) (Summary Order). A true copy of the transcript of the August 21, 2021 *UFOA* Decision is attached as Exhibit 26 hereto.

207. *Inter alia,* in *UFOA*, the Southern District noted that there was no "generalize[d] privacy right inherent in the disciplinary records of public employees," *see* Ex. 25 at p. 15, and explained:

> [P]laintiffs work in law enforcement, and the very nature of their roles, vis-à-vis the public, is very different from other City employees. They are not similarly situated. … Officers patrol the streets with firearms and are authorized to use force under the aegis of state power. . . . . As the city and the state legislature articulated [in repealing 50-a and amending the FOIL] there are strong governmental interests in accountability and transparency. And the role of police officers in society, the unique responsibilities they carry, the harms they are capable of inflicting on the public, also explain why the City might choose to release records about investigations into allegations of misconduct, but might not proactively release similar records by other city employees, such as teachers or sanitation workers, who do not have similar powers.

Id. at 36.

208. On a related Article 78 state claim over which the District Court had jurisdiction, the District Court further held that "the legislature [had] thoroughly and considered rejected" the unions' "arguments for exempting unsubstantiated, unfounded, and exonerated allegations from disclosure", reasoning:

> ...as evidence that the legislature considered plaintiffs' concerns about privacy and safety, they made a reasoned determination to enact the provisions additional

> to the New York Public Officers' Law, which requires the redaction of certain information in law enforcement disciplinary histories,….
>
> [T]he decision to amend Section 50-a was not made haphazardly. It was designed to promote transparency and accountability, to improve relations between New York's law enforcement communities and their first-responders and the actual communities of people that they serve, to aid law makers in arriving at policy-making decisions, to aid underserved elements of New York's population and ultimately, to better protect the officers themselves. The decision to amend was also made with due regard for the safety and privacy interests of the affected officers. Amendments were made to the Public Officers Law that mandated the redaction of certain categories of information that permitted the withholding of other categories of information.

Ex. 25 at pp. 37, 41-42.

209. The United States Court of Appeals for the Second Circuit heard oral argument on January 19, 2021 and then, on February 16, 2021, upheld the District Court's decision in its entirety, reasoning, *inter alia*:

> Even the Unions recognize that "the unique responsibilities of law enforcement officers set them apart." Unions Br. 56. Because the public has a stronger legitimate interest in the disciplinary records of law enforcement officers than in those of other public employees, the District Court correctly determined that there was a rational, nondiscriminatory basis for treating the two sets of records differently.

Uniformed Fire Officers Assn. v. de Blasio, 2021 U.S. App. LEXIS 4266, at *10-11.

210. On April 13, 2021, the *UFOA* plaintiffs voluntarily dismissed the litigation in its entirety.

211. Particularly against that backdrop, Respondent's determinations to withhold law enforcement disciplinary records responsive to the Request fly in the face of the legislative intent behind, as well as the plain letter of, the repeal of CRL § 50-a and amendments to the FOIL, as well as decisions by multiple courts that recently have ruled that it is now improper to withhold such law enforcement disciplinary records as Respondent has done here.

Some of Petitioners' Challenges to Respondent's Handling of the Request

212. Petitioners challenge all aspects of Respondent's handling of the Request and determinations to withhold and redact records responsive to the Request, and seek an order granting Petitioners *prompt* access to all remaining documents that Respondent has not yet disclosed that are responsive to the Request and not subject to an applicable exemption that Respondent has properly invoked and justified.

Petitioners request that the Court order Respondent to produce for *in camera* review all records responsive to the Request that Respondent located in its searches but withheld or redacted, as well as logs describing which records produced respond to which Item Nos. in the Request, and which redactions Respondent made, based on which claimed exemptions

213. Preliminarily, as seen above, Respondent has neither identified which Item Nos. in the Request the documents it has produced correspond to, nor which redactions Respondent made to those documents, for which reasons. Instead, although Petitioners asked Respondent to provide that information a number of times at the administrative level, Respondent refused.

214. The lack of that information frustrates Petitioners' ability to frame the issues for this Court to review, as well as this Court's ability to conduct the necessary judicial review.

215. It is difficult, if not impossible, to determine whether Respondent has produced all of the records subject to disclosure that are responsive to the Request without knowing which records Respondent produced correspond to which parts of the Request, and which records Respondent searched for but withheld, and which records Respondent did not search.

216. Therefore, Petitioners request that the Court order Respondent to produce for *in camera* review all records responsive to the Request that Respondent located in its diligent searches but withheld or redacted, and to produce to the Court and to Petitioners a log describing which redactions Respondent made, based on which claimed exemptions.

Petitioners challenge Respondent's claims to have conducted diligent searches for and disclosed responsive records

217. Although Respondent claims to have conducted diligent searches for responsive records, in Respondent's March 3, 2020 Letter (Ex. 6), in Respondent's June 18, 2021 Letter (Ex. 15) and then in Respondent's August 2, 2021 Letter (Ex. 17), as Petitioners did in both the Appeal and Petitioners' June 18, 2021 Letter, Petitioners challenge those claims.

218. In this case, Respondent has represented that it conducted diligent searches for and disclosed key responsive records, although it had demonstrably not disclosed – and therefore presumably it had also not diligently searched for – such records.

219. Additionally, Respondent has claimed that Petitioners have not reasonably described certain records, or that it could not locate certain records, although, as some of the examples below show, Petitioners did reasonably describe the records, and Respondent should have been able to locate them, if it had conducted diligent searches.

220. Because there are reasons to question Respondent's statements about what it has and has not searched for and disclosed, Petitioners ask that the Court direct Respondent to provide detailed affidavits from persons with knowledge of the nature and extent of all searches conducted for records responsive to the Request, describing all such searches, including the dates, times, and locations that were searched and the methods by which the searches were conducted.

The Request reasonably described the records sought and Petitioners challenge Respondent's determinations to the contrary

221. Petitioners challenge Respondent's claims in Respondent's June 18, 2021 Letter and August 2, 2021 Letter that the Request did not reasonably describe the records sought in Item Nos. 19, 23, 32, 33, 34, and 42.

222. Each of those records and categories of records sought in the Request were reasonably described. For example:

a. Item No. 19 seeks "[r]ecords reflecting compliance with PG 212-04 ("Crime Scene") related to integrity and treatment of crime scenes with respect to the scene of the encounter." Item No. 23 seeks "[r]ecords created consistent with PG 216-15 ("Notifications") regarding procedures to be followed "[w]hen it is necessary to notify relatives/friends of a deceased … person". These descriptions of the records requested merely ask for the records that these NYPD Patrol Guide provisions referred to require to be created. Although it may be the case that no such records were created, that is not what Respondent has said, Respondent has said that the records were not reasonably described. These requests reasonably describe the records sought.

b. The Request details at length statements made by NYPD commissioners and other public officials to the press about Mr. Garner, Pantaleo's killing of him, and other enumerated topics. *See, e.g.,* Ex. 1 at pp. 5-7. Item No. 32 seeks "[r]ecords relied on, or reflecting information relied on, by William Bratton, James O'Neill, or any other City or police official in making public statements to the press about Mr. Garner, Pantaleo's killing of Mr. Garner, or any related investigation(s), disciplinary action(s), or prosecution(s), including" certain specific statements. The Request reasonably describes these records.

c. The Request details leaks of Mr. Garner's sealed criminal history information and private medical information. *See, E.g.,* Ex. 1 at pp. 6-7. Item No. 33 in the Request seeks "[r]ecords reflecting any actual or potential investigation(s) into the release of Mr. Garner's sealed criminal history information." Item No. 34 in the Request seeks "[r]ecords reflecting any investigation(s) into the anonymous or confidential releases of other information to the media." These requests reasonably describe the records sought.

d. The Request quotes then-NYPD Commissioner Bratton stating that the NYPD would conduct a "sweeping review" of NYPD training and tactics that he ordered on July 22, 2014. Item No. 42 seeks "[r]ecords reflecting or related to the "sweeping review" of NYPD training and tactics that then-Commissioner Bratton ordered on July 22, 2014." This request reasonably describes the records sought.

223. Additionally in this connection, as seen above, although Petitioners repeatedly reminded Respondent of its obligations under the COOG Regulations to engage Petitioners in dialogue and provide certain information in the event Respondent believed that the Request did not reasonably describe the records sought, *see, e.g.,* ¶¶ 26, 80-81, 155-159, and 168-169 above,

Respondent never complied with those obligations, and its complaint that the Request did not reasonably describe certain records was untimely, and the Court should not permit Respondent to now complain that any of the records sought in the Request are not reasonably described.

Petitioners challenge Respondent's claims to have diligently searched for and made full responses to certain Item Nos. in the Request

224. With respect to records Respondent claimed to have diligently searched for and produced full relevant record responses in Respondent's March 3, 2020 Letter, Petitioners challenge Respondent's claims to have made diligent searches or full responses related to Item Nos. 11, 12, 19, 24, 43, 57, 58, 29, 60, and 61 in the Request.

225. Among other reasons, in subsequent correspondence from Respondent, Respondent said it had redacted, not searched for, not located, or withheld some of the records responsive to those Item Nos., contradicting Respondent's assertions in the March 3, 2020 Letter.

226. Also with respect to records Respondent claimed to have diligently searched for and produced full relevant record responses in Respondent's June 18, 2021 Letter, Petitioners challenge Respondent's claims to have made diligent searches or full responses related to Item Nos. 7-10, 11b, 17, 20, 24-26, 28-31, 35-37, 43, 44, 51, and 57-62 in the Request.

227. As to Item Nos. 9, 10, and 28-30, although Respondent claimed in Respondent's June 18, 2021 Letter to have diligently searched for and produced all responsive records, after Petitioners included them in a non-exhaustive list of records that Respondent had not by then apparently produced in Petitioners' July 18, 2021 Letter (Ex. 16), in Respondent's August 2, 2021 Letter (Ex. 17), Respondent disclosed, *inter alia*, core NYPD communications responsive to the Request in the form of "recordings of 311 or 911 calls …and 'job runs' – also known as 'radio runs'"; video footage related to Mr. Garner's killing; and "all audio recordings

maintained" of interviews with NYPD members and civilians related to Mr. Garner's killing – none of which had been disclosed prior to August 2, 2021, despite Respondent's representation to the contrary in Respondent's June 18, 2021 Letter.

228. Those disclosures included a trove of critical audio and video evidence, including all of the interviews of all relevant witnesses, that Respondent had previously not searched for or disclosed – despite its representations to the contrary.

229. Beyond that, there are other categories of records responsive to the Request as to which it appears Respondent simply has not produced any responsive records – by way of representative, not exhaustive, example:

a. Item Nos. 20 and 24 seek records created consistent with NYPD Patrol Guide provisions governing procedures for treating dead human bodies and safeguarding the property of deceased people. No such records appear to have been produced.

b. Item No. 31 seeks records reflecting communications containing inquiries from and statements to the press made by NYPD personnel regarding Mr. Garner, Mr. Garner's death, or any related actual or potential investigation(s), disciplinary action(s), or prosecution(s) between July of 2014 and the present. A small subset of responsive records appear to have been produced.

c. Item No. 51 seeks records "reflecting communications between the NYPD and the Office of the Comptroller between 2014 and the present, not including attorney-client privileged materials, regarding Mr. Garner's death or actual or potential investigation(s) or prosecution(s) related to Mr. Garner's death." No such records appear to have been produced.

d. Item No. 43 seeks "[r]ecords reflecting NYPD policies in 2014, including Patrol Guide Provisions, Interim Orders, NYPD Legal Bureau Bulletins, and other, similar documents" regarding certain enumerated topics. Item No. 44 seeks "records reflecting NYPD training in 2014, including the Recruit Training Manual, Police Student's Guide, and other such documents created and utilized the NYPD's Police Academy or any other NYPD unit involved in training NYPD officers in 2014, regarding" the topics identified in Item No. 43, as well as several other enumerated topics. Only some responsive records related to some of the topics listed in Item Nos. 43 and 44 of the Request appear to have been produced.

230. Additionally, on September 10, 2021, outside of the FOIL context, Respondent produced additional records responsive to Item Nos. 17 and 25-26 in the context of the Section 1109 Proceeding. Upon information and belief, Respondent had not previously disclosed those records in response to the Request.

Petitioners challenge Respondent's determinations to make partial productions related to certain Items Nos. in the Request

231. With respect to Item Nos. 5, 16, 38, and 39, in connection with which Respondent determined to search for and produce only some responsive records, Petitioners challenge Respondents' determinations to withhold certain records responsive to Item Nos. 5, 16, and 38.

232. As to Item Nos. 5 and 16, as outlined in ¶¶ 166-169 above, records, including Memo book entries, recording or reflecting NYPD observations of or documenting conditions policing operations conducted from June 1, 2014 and August 1, 2014 related to 202 Bay Street and the area surrounding Tompkinsville Park, clearly exist, and – despite its creative description of a particularly burdensome way to search for responsive records - Respondent has not justified its refusals to search for and produce Memo Book entries and other records responsive to Item Nos. 5 and 16. Petitioners challenge Respondent's determinations to withhold records responsive to Item Nos. 5 and 16.

233. As to Item No. 38, as outlined in ¶¶ 173-176 above, Respondent has withheld all records regarding all unsubstantiated/unfounded/exonerated CCRB complaints against Pantaleo and all records regarding all CCRB complaints against the 7 other NYPD members named, regardless of outcome, and has produced only some records regarding the CCRB complaint, investigation, and related proceedings against Pantaleo related to killing Mr. Garner. Petitioners challenge Respondent's determinations to withhold records responsive to Item No. 38.

234. As to Item No. 39, because Respondent has claimed it produced all records responsive to Item No. 39 except for records that have been sealed pursuant to CPL § 160.50, and absent reason to doubt that request, Petitioner does not seek to challenge Respondent's determination to withhold those sealed records.

Petitioners challenge Respondent's statements that Respondent diligently searched for, but could not locate, records responsive to certain Item Nos. in the Request

235. Petitioners challenge Respondent's claims that Respondent diligently searched for, but could not locate, records responsive to certain Item Nos. in the Request.

236. For example, in the June 18, 2021 Letter, the RAO stated that, after a "diligent search for all records responsive to [Petitioners'] request," no records were found for the following Item Nos.: 1, 2, 4, 6, 11a, 15, 22, 27, 48, 49, 52, 54, 55, and 56." *See* Ex. 15 at p. 1.

237. Petitioners contest Respondent's representation that Respondent conducted diligent searches for those records (and the other records responsive to the Request).

238. It is simply beyond belief that most of those categories of records do not exist. For example:

a. As stated in ¶ 167 above, Lt. Christopher Bannon attended a March 2014 meeting at One Police Plaza along with then-Chief of Department Phillip Banks, after which he "was specifically tasked with addressing the illegal sale of untaxed cigarettes in the vicinity of 200 Bay Street, Staten Island, near Tompkinsville Park" such that "[f]rom March 28 to July 16, 2014, multiple untaxed cigarette sale arrests were made at or near the targeted area.". Item No. 1 seeks "[a]ttendance, agenda, minutes, memoranda, and other records documenting who was present at and what was communicated at" that meeting. Item No. 2 seeks "[r]ecords documenting or reflecting investigations related to purported cigarette sales or other criminal conditions at or around 202 Bay Street and the area surrounding Tompkinsville Park between March 1, 2014 and August 1, 2014 that were conducted according to the directions of Chief Banks, including, but not limited to, surveillance photographs." The records reflects such records exist.

b. Item No. 27 in the Request seeks ["r]ecords created consistent with PG Section 218-04 ("Delivery Of Evidence To The Police Laboratory") related to Mr. Garner or his death." Upon information and belief, there was such evidence related to Mr.

Garner and his death that was delivered to the police laboratory. So, according to the NYPD Patrol Guide, the requested records should exist, and Respondent should have produced them.

c. Items 4, 6, 48-49, 52-53, and 55-56 in the Request seek "[r]ecords, including memoranda and electronic records such as e-mails, reflecting communications" between and among specific NYPD members and high-level policymaking officials regarding certain enumerated topics. *See* Ex. 1. For example, Item Nos. 4 and 6 seek internal NYPD communications "instructing the 120th Precinct to conduct conditions policing and operations between June 1, 2014 through August 1, 2014, related to 202 Bay Street and the area surrounding Tompkinsville Park" as well as communications reporting back about that conditions policing and operations. Item No. 15 seeks "[r]ecords, including memoranda and electronic records such as e-mails, reflecting communications on July 17, 2014 between/among NYPD personnel and the Mayor, the Office of the Mayor, the Mayor's Office of Criminal Justice, the Mayor's Community Assistance Office, or City Hall regarding Mr. Garner's death, the circumstances leading up to it, requests for medical assistance related to Mr. Garner, or investigations into those events, or any other, related events on July 17, 2014." And Item No. 48 seeks "[r]ecords, including memoranda and electronic records such as e-mails, reflecting communications between NYPD personnel and the Mayor, the Office of the Mayor, the Mayor's Office of Criminal Justice, the Mayor's Community Assistance Office, or City Hall between 2014 and the present, regarding Mr. Garner's death or actual or potential investigation(s) or prosecution(s) related to Mr. Garner's death." Clearly, such records were created. Petitioners reasonably described them. The records should have been preserved, they should exist, and Respondent should have produced them.

239. The Request reasonably described those, as well as the other Item Nos. Respondent claims it searched for but could not locate. It appears that Respondent simply has not conducted diligent searches for responsive records, as Respondent has claimed. Petitioners therefore challenge Respondent's claims that Respondent diligently searched for, but could not locate, records responsive to certain Item Nos. in the Request.

Petitioners challenge Respondent's determinations to redact and/or withhold records based on claimed FOIL exemptions

240. Petitioners challenge all of Respondent's determinations to redact and/or withhold records based on claimed FOIL exemptions.

241. For example, in the June 18, 2021 Letter, Respondent stated that Respondent had disclosed records responsive to Item Nos. 3, 12-14, 18, 21, 38, 40, 41, and 45-47 with redactions made pursuant to FOIL § 87(2), and withheld records responsive to Item Nos. 38, 50, and 54, purporting to invoke various exemptions. *See, e.g.,* ¶¶ 135-142 above, citing Ex.15 at pp. 2-3.

242. Petitioners raised challenges to those redactions and determinations to withhold records in their July 18, 2021, Letter. *See, e.g.,* ¶¶ 146, 150, 160-161, citing Ex. 16 at pp. 4-5.

243. Respondent's August 2, 2021 Letter rejected those challenges and in adhered to Respondent's positions articulated in the June 18, 2021 Letter. *See, e.g.,* ¶¶ 173-179 above, citing Ex. 17 at pp. 2-4.

244. As to the 12 categories records withheld or redacted based on claimed exemptions, Respondent's August 2, 2021 Letter only addresses Respondent's position as to Item Nos. 38, 50, and 54.

245. In other words, Respondent's August 2, 2021 Letter is silent as to Item Nos. 3, 12-14, 18, 21, 40, 41, and 45-47.

246. To the extent Respondent's June 18, 2021 Letter or August 2, 2021 Letters attempt to invoke exemptions to disclosure under FOIL § 87(2) to justify withholding or redacting records, the parts of those letters discussing the exemptions merely summarize Respondent's view of the applicable legal standard. They do not make the factual showings required to justify withholding or redacting records based on any claimed exemption.

247. Respondent has not established its entitlement to withhold or redact any records based on any claimed exemption.

248. With respect to Item No. 38 seeking CCRB histories and underlying records against 7 NYPD members, Respondent has withheld all records regarding all

unsubstantiated/unfounded/exonerated CCRB complaints against Pantaleo and all records regarding all CCRB complaints against the 7 other NYPD members named, regardless of outcome, and has produced only some records regarding the CCRB complaint, investigation, and related proceedings against Pantaleo related to killing Mr. Garner.

249. Petitioners challenge Respondent's determinations to withhold all but a small handful of responsive records directly related to Mr. Garner's killing and one other incident involving Pantaleo.

250. In support of its arguments that all of the withheld "Police Officer records related to an investigation for which a finding of 'unsubstantiated,' 'unfounded,' or 'exonerated' has been issued," claiming that "disclosure of the records would constitute an unwarranted invasion of personal privacy," Respondent has improperly invoked FOIL §§ 87(2)(b) and 89(2), relying on old caselaw and Committee on Open Government opinions that almost exclusively pre-date the June 2020 repeal of CRL § 50-a and sea change in the FOIL regarding law enforcement disciplinary records , and all of which pre-date the District Court's and Second Circuit's decisions in the *UFOA* litigation, and other authority cited on this point in the Appeal. *See, e.g.,* Ex. 12 at pp. 10-14 (April 29, 2021 Appeal); Ex. 15 at pp. 2-3 (June 18, 2021 Letter); Ex. 17 at pp. 3-4 (August 2, 2021 Letter).

251. As set forth in ¶¶ 190-210 above, in the Appeal (Ex. 12 at pp. 10-14), and in the accompanying Memorandum of Law, in repealing CRL § 50-a and amending the FOIL in June of 2020, the New York legislature balanced the privacy interests of those law enforcement officers whose records, which were previously shielded almost entirely from disclosure by CRL § 50-a, are now subject to disclosure, and determined that the public interests in disclosure of those records ought weighed the officers' privacy interests in them. As a result, Respondent

cannot rely on FOIL §§ 87(2)(b) and 89(2) as grounds for withholding the many records they have withheld in response to Item No. 38 in the Request.

252. Relatedly, Respondent's position that, under the new FOIL regime in the wake of the repeal of CRL § 50-a and accompanying amendments to the FOIL, law enforcement disciplinary records are only subject to disclosure where there is both an investigation and a subsequent disciplinary action, s*ee, e.g.,* ¶ 175 above, citing Ex. 17 at p. 2 and FOIL §§ 86(6) and 86(7).

253. However, Respondent's self-serving interpretation of FOIL §§ 86(6) and 86(7) is wrong both on the face of the text and taking into account the relevant legislative history and case law that has emerged since the June 2020 repeal of CRL § 50-a and amendments to the FOIL, which make clear that records related to a matter that results in an investigation, but no further hearing or disciplinary action, are now subject to disclosure.

254. FOIL § 86(6) defines "Law enforcement disciplinary records" as "any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

> (a) the complaints, allegations, and charges against an employee;
> (b) the name of the employee complained of or charged;
> (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
> (d) the disposition of any disciplinary proceeding; and
> (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee."

FOIL § 86(6).

255. FOIL § 86(7) states: "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency." *See* FOIL § 86(7).

256. According to the Sponsor Memo:

> Due to the interpretation of § 50-a, records of complaints or findings of law enforcement misconduct that have not resulted in criminal charges against an officer are almost entirely inaccessible to the public or to victims of police brutality, excessive use of force, or other miscon- duct. The State Committee on Open Government has stated that § 50-a "creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred." FOIL's public policy goals, which are to make government agencies and their employees accountable to the public, are thus undermined. Police-involved killings by law enforcement officials who have had histories of misconduct complaints, and in some cases recommendations of departmental charges, have increased the need to make these records more accessible.

See Ex. 24.

257. Based on the plain text, the context, and the legislative history, it is clear the use of the word "and" in the phrase "the commencement of any investigation and any subsequent hearing or disciplinary action" in FOIL § 86(7) means to include matters in which an investigation was commenced *as well as* matters in which there was subsequent hearing or disciplinary matter, among those records that are now presumptively subject to disclosure, rather than establishing a regime under which *only* matters that have resulted in complaints, *and* subsequent action in the form of hearings or disciplinary action, are subject to disclosure.

258. Additionally, Respondent should be estopped from taking positions in response to the Request, or this litigation, that are at odds with the positions Respondent took, through counsel, in the *UFOA* litigation, when it said that law enforcement disciplinary records should be subject to disclosure under the post-50-a-repeal FOIL regime, regardless of whether a complaint resulted in discipline and regardless of a complaint's outcome.

259. Finally, Petitioners challenge Respondent's determinations to withhold all records responsive to Item Nos. 50 and 54.

260. With respect to Item Nos. 50 and 54, in their June 18, 2021 Letter, Respondent invoked both the inter-/intra-agency exemption in FOIL § 87(2)(g) as well as attorney-client privilege grounds for withholding all responsive records. *See, e.g.,* ¶ 139 above, citing Ex. 15 at pp. 4-5.

261. Petitions challenged those determinations in the July 18, 2021 letter. *See, e.g.,* ¶ 161 above, citing Ex. 16 at pp. 4-5.

262. In Respondent's August 2, 2021 Letter, Respondent purported to uphold the RAO's determination to withhold records responsive to Item Nos. 50 and 54, claiming that "a diligent search was conducted and it was determined that the disclosure of responsive records would require extraordinary efforts not required under the FOIL," invoking FOIL §§ 87(2)(a), 87(2)(b), and 87(2)(g). *See* ¶¶ 177-178 above, citing Ex. 17 at p. 4.

263. Specifically, the August 2, 2021 Letter described that a search for records responsive to Item No. 50 resulted in the discovery of "a total of 31, 640 items and 17,869,183 "unindexed items," meaning data that is not searchable by words (e.g., scanned PFDFs, documents without words like pictures and video." *See* Ex. 17 at p. 4.

264. The August 2, 2021 Letter also described that a search for records responsive to Item No. 54 resulted in the discovery of "1,423 items and 7,564 "unindexed items." *See* Ex. 17 at p. 4.

265. Respondent's August 2, 2021 Letter stated that, after conducting a "diligent search" after receiving Petitioners' July 18, 2021 Letter, Respondent "determined that the disclosure of responsive records would require extraordinary efforts" because "the review and subsequent application of exemptions" to certain records that were located "would prove unduly burdensome." *See* Ex. 17 at p. 4.

266. Respondent's claim that disclosing responsive records "would require extraordinary efforts not required under the FOIL" appears for the first time in Respondent's August 2, 2021 letter and in that respect it is a departure from the position in Respondent's June 18, 2021 Letter.

267. Notably, notwithstanding Respondent's obligations under the COOG Regulations to contact Petitioners long ago to assist Petitioners in understanding the manner in which responsive records are filed, retrieved, or generated, *see* 21 NYCRR § 1401.2(b)(2) in general, and the explicit requirement to "[c]ontact persons seeking records, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested" in the event Respondent believed the request was "voluminous" or when "locating the records sought involves substantial effort," *see* 21 NYCRR § 1401.2(b)(3), " - which, as documented above, Petitioners repeatedly reminded Respondent of – Respondent never contacted Petitioners as required to have those conversations.

268. As explained above in the context of Respondent's partial responses as to Item Nos. 5 and 16, without that information, Petitioners are not as well positioned as the law entitles them to be to explain to the Court why Respondent's assertions about the alleged voluminous or burdensome nature of searching for and responding to Item Nos. 50 and 54 mis-state or over-state the volume and burden that would be involved in searching for and producing records responsive to these aspects of the Request.

269. Additionally, Respondent has identified no provision of the FOIL that permits Respondent to refuse to search for or produce broad swaths of information, particularly not based on conclusory and untested claims as to burden. In fact, FOIL provides that an agency

> shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because

> the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover.

See FOIL § 89(3)(a).

270. That said, Respondent has provided virtually no information about how the records in question are stored, indexed, or searchable, or related to the actual or purported burdens that might be involved in searching, indexing, reviewing, and producing at least some of these almost 18 million records, and what Respondent *has* said does not add up. For example, Respondent includes among the examples of records that cannot be searched "scanned PDFs." But, of course, scanned PDFs are either searchable or can be modified so that they are searchable, with minimal burden. The only other example of records that Respondent claims it would be too burdensome to review and produce are "documents without words like pictures and video." Respondent says nothing about how many of these types of records there are or how burdensome they would be to review and produce.

271. Against that backdrop, Respondent has clearly not justified its entitlement to withhold all of the records it has located that respond to Item Nos. 50 and 54.

CAUSE OF ACTION

CPLR § 7803(3) REVIEW OF RESPONDENT'S HANDLING OF THE REQUEST AND APPEAL

272. Petitioners incorporate by reference all of the challenges to Respondent's handling of the Request articulated in the Petition above and in the exhibits thereto.

273. Respondent's handling of the Request and the Appeal have violated the FOIL and the COOG Regulations.

274. The Court should order Respondent to give Petitioners *prompt* access to all remaining documents that Respondent has not yet disclosed that are responsive to the Request and not subject to an applicable exemption that Respondent has properly invoked and justified.

275. CPLR Article 78 is the proper means to review Respondent's handling of the Request and violations of the FOIL and the COOG Regulations with respect to Respondent's handling of the Request.

276. The applicable standard of review under CPLR § 7803(3) is whether the Respondent's handling of the Request was "affected by an error of law."

277. This action is timely commenced with the applicable statute of limitations, including CPLR § 217(1).

278. No prior application has been made for the relief requested herein.

279. The Request reasonably described the requested records sought.

280. Petitioners had the right under the FOIL and the COOG Regulations to those records.

281. Respondent did not commence or conduct diligence searches for the records responsive to the Request in a timely manner, as required by the FOIL and COOG Regulations.

282. Respondent failed in its obligations under the FOIL and the COOG Regulations to respond to the Request within the required time periods.

283. Respondent has failed to justify Respondent's failures and refusals to produce records responsive to the Request.

284. Respondent has failed to justify Respondent's redactions in the produced records.

285. Respondent should produce all remaining documents that Respondent has not yet disclosed that are responsive to the Request and not subject to an applicable exemption that Respondent has properly invoked and justified.

286. The Court should award Petitioners attorney's fees, costs, and expenses under FOIL § 89(4)(c).

287. Respondent's handling of the Request has otherwise violated the FOIL and the COOG Regulations, including, but not limited to, as argued in Petitioners' April 29, 2021 Appeal and July 18, 2021 Letter, elsewhere herein, and in Petitioners' September 13, 2021 Memorandum of Law in Support of the Verified Petition ("Petitioners' MOL").

288. Petitioners respectfully incorporate by reference the facts and arguments contained in the Exhibits attached hereto, all of the prior paragraphs in this Petition, and Petitioners' MOL for the Court's consideration in determining whether Respondent's handling of the Request violated the FOIL and the COOG Regulations and whether to grant Petitioners the relief they request.

289. Finally, particularly given that Petitioners have been seeking the records described in the Request since August, 27, 2019 for more than 20 months and the 1109 Judicial Inquiry is currently scheduled to commence on October 25, 2021, Petitioners respectfully submit that it is long past time for Respondent to provide the records they have sought, and that there are strong public interests weighing against further delays and in favor of this Court's ordering *prompt* disclosure of those records.

CONCLUSION

WHEREFORE, Petitioners respectfully requests that this Court grant Petitioners a final judgment and order pursuant to CPLR Article 78 containing the following relief:

(a) Pursuant to CPLR § 7806, annulling Respondent's final determination and ordering Respondent to comply with Respondent's duties under the FOIL and the COOG Regulations by granting Petitioners *prompt* access to non-exempt responsive documents, or appropriate certifications as to the disposition of the requested records or Respondent's inability to locate them, along with the required, appropriately particularized, written explanations justifying any documents or information redacted or withheld, within a *prompt* date certain;

(b) Pursuant to FOIL § 89(4)(c), ordering Respondent to pay reasonable litigation costs and attorney's fees; and

(c) Such other and further relief as the Court may deem just and proper.

Dated: September 13, 2021
Brooklyn, New York

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Co-counsel for Petitioners

ATTORNEY VERIFICATION

STATE OF NEW YORK)
) ss.:
KINGS COUNTY)

GIDEON ORION OLIVER, an attorney admitted to practice in the courts of New York State, under penalty of perjury, affirms:

I have read the foregoing Verified Petition and know the contents thereof, and the same is true to my own knowledge, except as to matters therein state to be alleged on information and belief, and that as to those matters I believe them to be true.

Where based upon information and belief, the source of the information is apparent from the context or set forth parenthetically.

This Verification is made by me and not Petitioners on the basis of CPLR § 3020(d)(3). Petitioners are not within the county where I have my office.

PART 130 CERTIFICATION

To the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR).

Dated: Brooklyn, New York
September 13, 2021

GIDEON ORION OLIVER