

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

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REMAPPING DEBATE,

Index No.: **13-100638**

Petitioner,

*-against-*

NEW YORK CITY POLICE  
DEPARTMENT,

Respondent.

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**MEMORANDUM OF LAW IN SUPPORT OF  
PETITIONER REMAPPING DEBATE'S VERIFIED ARTICLE 78 PETITION**

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## TABLE OF CONTENTS

	PAGE NO(s):
Table of Authorities .....	ii-iii
Preliminary Statement .....	1
Facts .....	2
A. Parade Permit FOIL Request .....	3
B. Sound-Device FOIL Request .....	5
Argument .....	7
I. PETITIONER IS ENTITLED TO A JUDGMENT PURSUANT TO ARTICLE 78 ORDERING RESPONDENT TO DISCLOSE THE REQUESTED PARADE PERMIT DOCUMENTS AND SOUND-DEVICE PERMIT DOCUMENTS FORTHWITH .....	7
A. The Documents Requested by Petitioner Are Public Records Subject to Disclosure Under FOIL .....	8
B. Respondent Has Wrongfully Denied Petitioner's FOIL Request by Failing to Disclose the Requested Records .....	10
C. Respondent Has Wrongfully Denied Petitioner's Administrative Appeal.....	13
D. Petitioner is Entitled to Relief Under Article 78 of the CPLR .....	14
II. PETITIONER IS ENTITLED TO REASONABLE ATTORNEYS' FEES AND LITIGATION COSTS UNDER N.Y. PUBLIC OFFICERS LAW § 89(4)(C) .....	15
Conclusion .....	17

TABLE OF AUTHORITIES

PAGE NO(s):

Cases:

*Beechwood Restorative Care Center v. Signor*,  
5 N.Y.3d 435, 842 N.E.2d 466, 808 N.Y.S.2d 568 (2005)..... 10-11

*Beechwood Restorative Care Ctr. v. Signor*,  
11 A.D.3d 987, 784 N.Y.S.2d 750 (4th Dep’t 2004), *aff’d*,  
5 N.Y.3d 435, 842 N.E.2d 466 (2005).....15

*Capital Newspapers Div. of Hearst Corp. v Burns*,  
67 N.Y.2d 562, 505 N.Y.S.2d 576 (1986).....7

*Capital Newspapers Div. of Hearst Corp. v. Whalen*,  
69 N.Y.2d 246, 505 N.E.2d 932 (1987).....8

*Gould v. New York City Police Dept.*,  
89 N.Y.2d 267, 675 N.E.2d 808 (1996).....8

*Hearst Corp. v. City of Albany*,  
88 A.D.3d 1130, 931 N.Y.S.2d 713 (3rd Dept. 2011).....11

*Legal Aid Soc. v. New York State Dept. of Corrections and Comm. Supervision*,  
\_\_ N.Y.S. 2d \_\_, 2013 WL 1337953 (3rd Dep’t. April 4, 2013).....12

*Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*,  
62 N.Y.2d 75, 476 N.Y.S.2d 69 (1984).....7

*Molloy v. New York City Police Dept.*,  
50 A.D.3d 98, 851 N.Y.S.2d 480 (1<sup>st</sup> Dep’t, 2008).....12

*New York Comm. for Occupational Safety & Health v. Bloomberg*,  
72 A.D.3d 153, 892 N.Y.S.2d 377 (1st Dep’t 2010).....7

*New York Times Co. v. City of New York Police Dept.*,  
959 N.Y.S.2d 171 (1st Dep’t. 2013).....12

*Powhida v. City of Albany*,  
147 A.D.2d 236, 542 N.Y.S.2d 865 (3rd Dep’t 1989) .....16

*Rattley v. New York City Police Dept.*,  
96 N.Y.2d 873, 756 N.E.2d 56, 58 (2001).....12

**Statutes:**

Article 6 of the N.Y. Public Officers Law ..... 1

CPLR 7803 ..... 1

N.Y. Code § 10-108(e) ..... 3, 9

N.Y. Code § 10-110(a) ..... 3, 9

N.Y. Pub. Off. Law § 86..... 3,8

N.Y. Pub. Off. Law § 87(2) ..... 10

Public Officers Law § 89(2) ..... *passim*

Petitioner Remapping Debate submits this memorandum of law in support of its verified petition.

### **PRELIMINARY STATEMENT**

Petitioner Remapping Debate, a not-for-profit news website devoted to reporting on a wide variety of public policy issues, brings this proceeding pursuant to the Freedom of Information Law (“FOIL”), Article 6 of the N.Y. Public Officers Law, and CPLR 7803, to vindicate its right to access public records in the possession of the New York City Police Department (“NYPD”): (a) relating to a sample of applications for “parade” permits – the type of permit needed to engage in a protest demonstration (“Parade Permit FOIL Request”); and (b) relating to a sample of applications for sound-device permits – the type of permit needed to use sound amplification equipment (“Sound Device FOIL Request”). Contrary to the requirements of FOIL, and contrary to the public interest, the NYPD has denied Petitioner’s access to these records for more than 10 months. In so doing, the NYPD has deprived Remapping Debate of its ability to analyze for the public the extent to which the Police Department burdens citizens in their exercise of their First Amendment rights and the extent to which Police Department practices have changed over time. The time has come for this Court to intervene.

Petitioner submitted the Parade Permit FOIL Request and the Sound-Device FOIL Request, on May 24, 2012 and May 25, 2012, respectively. Nearly ten months later, Respondent has failed to produce a single document. Instead, Respondent has provided serial letters stating that the records have not been produced because the “records have not been received from other NYPD units” – which itself is not a grounds for delay, much less for an outright denial, of a FOIL request.

The NYPD has failed to offer any legitimate reason for non-compliance. The NYPD as a whole has obligations pursuant to FOIL and, here, no justification was offered as to why the units or personnel in the NYPD who *did* have custody of the records had not produced them. After the NYPD failed to produce a single record, Remapping Debate appealed the constructive denial of its requests. The NYPD denied the appeals by relying on its own failure to act: since the Department had not *formally* denied the requests, it argued, the appeals were “premature.” In denying the appeal, Respondent again ignored its statutory mandate to provide the public with access to public records within a reasonable time frame.

More than six months after the filing of the appeals, and well after their denial as “premature,” no records have been produced. Having exhausted its administrative remedies, Petitioner now asks the Court to hold that Respondent has violated its obligations under FOIL and to order Respondent to immediately provide to Petitioner all documents responsive to Petitioner’s FOIL requests. Because Respondent lacked and lacks a reasonable basis for denying the requested public records or for its delay, Petitioner also requests that the Court award Petitioner its attorneys’ fees and litigation costs.

## FACTS

Remapping Debate is a not-for-profit news publication that engages in original reporting on a variety of issues relating to public policy. Petitioner’s publications include reporting relating to the right to assemble and engage in political demonstrations. *See, e.g.*, Mike Alberti, *Demonstrators beware: you won’t be seen or heard*, Remapping Debate (May 16, 2012), *available at* [www.remappingdebate.org/node/1274](http://www.remappingdebate.org/node/1274). It is a registered assumed name of the Anti-Discrimination Center, Inc. (“ADC”), a New York not-for-profit corporation.

Respondent New York City Police Department is an “agency” that is obliged to maintain and produce public records pursuant to the Public Officers Law. N.Y. Pub. Off. Law § 86(3). The NYPD requires applicants to submit applications for parade permits and for sound-device permits. N.Y. Code § 10-110(a); N.Y. Code § 10-108(e).

#### **A. Parade Permit FOIL Request**

On May 24, 2012, Petitioner submitted the Parade Permit FOIL request. Ex. A.<sup>1</sup> That request was carefully time-limited to reduce the burden on Respondent: out of a 45-year period, Petitioner asked for records from two fiscal years in the Vietnam War era, one fiscal year during the administration of former Mayor David Dinkins, the fiscal year in the Bloomberg era that encompassed the 2004 Republican National Convention, and the period beginning July 1, 2011. In other words, Remapping Debate decided *not* to ask for 45 years of records. Likewise, Remapping Debate limited its request by geography. Rather than seeking records relating to parade permit applications for parades anywhere in the city, it limited the request to those where the parade route was wholly or partially in Manhattan.

Petitioner received an acknowledgment of the FOIL Request by a letter dated June 5, 2012 that was signed by Richard Mantellino, NYPD Lieutenant and Records Access Officer. Ex. B. Lt. Mantellino stated that the NYPD expected to respond within twenty (20) days informing Petitioner of the status of the FOIL Request. Petitioner received nothing within twenty days.

In the second week of July, Petitioner received a letter signed by Lt. Mantellino. Ex. C. The letter informed Petitioner that Officer Rivera had been assigned to the request and revised the date by which the Department expected to complete its determination of the request

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<sup>1</sup> All numbered exhibits referenced herein are attached to the Affidavit of Andrew G. Celli, Jr., which is attached to the Petitioner’s Memorandum of Law in Support of Petitioner’s Verified Article 78 Petition.

to September 6th. Ex. C. The only purported reason given for the delay was that “records have not been received from other NYPD units.” The letter did *not* state that “records are located in several locations and are difficult to search or locate,” that the “records are archived and are difficult to locate and retrieve,” that “numerous records must be reviewed in order to determine whether disclosure is required,” or that the “request is extremely voluminous and/or complex” – even though the form provided by the NYPD listed these as potential reasons Respondent could check off to explain the delay.

On July 16, 2012, Mike Alberti, the Remapping Debate reporter who had submitted the FOIL requests, had a telephone conversation with Officer Rivera in which he requested that any documents related to the FOIL requests be provided as they become available, at the earliest possible date. Officer Rivera responded that it would not be possible to comply with that request.

September 6, 2012, the date specified in Respondent’s delay letter of July 3rd, came and went and no records were produced. Instead, by letter dated September 6th, Respondent repeated its July boilerplate delaying tactic. Ex. D. Once again, the letter informed Petitioner that Officer Rivera had been assigned to the request. Once again, the expected date of substantive response was extended (this time to October 9th). Once again, the *only* reason cited for the delay was because “records have not been received from other NYPD units.”

On September 19, 2012, Petitioner filed an administrative appeal. Ex. E. The basis for the appeal was Respondent’s constructive denial of Petitioner’s requests, its failure to produce records within the statutory time period, and its failure to provide any specific or substantive explanation for the continuing delay in processing Petitioner’s request.



Respondent did not provide Petitioner with any written update on the status of its FOIL request during the period from September 2012 to March 2013.

Petitioner received a letter dated March 8, 2013 from the Records Access Appeals Officer denying Petitioner's appeal on the grounds that it was premature. Ex. F. Petitioner has exhausted its administrative remedies. Petitioner has still not received any records from Respondent, and it has still not received any letter from respondent updating its September 2012 letter setting forth October 9, 2012 as the expected time for the Department's response.

#### **B. Sound-Device FOIL Request**

On May 25, 2012, Petitioner submitted the Sound-Device FOIL request. Ex. G. That request contained the same temporal limitations as the Parade Permit FOIL request and further limited the request to records concerning applications made to Manhattan precincts.

Petitioner received an acknowledgment of the FOIL Request by a letter dated June 5, 2012 that was signed by Lt. Mantellino. Ex. H. Lt. Mantellino stated that the NYPD expected to respond within twenty (20) days and inform Petitioner of the status of the FOIL Request. Petitioner did not receive a response to the FOIL request by July 3, 2012, twenty (20) business days after Lt. Mantellino's June 5, 2012 letter.

On July 10, 2012, Petitioner submitted a follow up request to Lt. Mantellino and informed him that Petitioner had received no records or correspondence in regard to the Sound-Device FOIL request. Shortly thereafter, Petitioner received a letter from Respondent that was dated July 3rd. Ex. J. The letter informed Petitioner that Officer Rivera had been assigned to the request and revised the date by which the Department expected to complete its determination of the request to September 5th. Ex. J. The only reason given was because "records have not been received from other NYPD units." The letter did *not* state that "records are located in

several locations and are difficult to search or locate,” that the “records are archived and are difficult to locate and retrieve,” that “numerous records must be reviewed in order to determine whether disclosure is required,” or that the “request is extremely voluminous and/or complex” – even though the form provided by the NYPD listed these as potential reasons Respondent could check off to explain the delay. In short, the response to the Sound-Device FOIL request was effectively identical to that made in response to the Parade Permit FOIL Request.

On September 5, 2012, the date specified in Respondent’s delay letter of July 3rd, no records were produced. Instead, by letter dated September 5th, Respondent repeated its July boilerplate delaying tactic. Ex. K. Once again, the letter informed Petitioner that Officer Rivera had been assigned to the request. Once again, the expected date of substantive response was extended (this time to October 5th). Once again, the *only* reason cited was because “records have not been received from other NYPD units.”

On September 20, 2012, Petitioner filed an administrative appeal. Ex. L. The basis of the appeal was Respondent’s constructive denial of Petitioner’s requests, its failure to produce records within the statutory time period, and its failure to provide any specific or substantive explanation for the continuing delay in processing Petitioner’s request.

During the pendency of the appeal (in a letter dated October 5th, *see* Ex. M), Respondent sent another letter that moved the estimated date for completion back to November 8th. It again stated that Officer Rivera was being assigned, and again recited only the “records not received from other units” language. Notwithstanding that letter, no records were received on or before November 8th. Petitioner never received an explanation for the delay or for the complete failure to produce any records.

Petitioner received no further communication from Respondent other than a letter dated January 4, 2013, denying Petitioner's appeal on the grounds that it was "premature." Ex. N.

Petitioner has exhausted its administrative remedies. Petitioner has still not received any records from Respondent.

## ARGUMENT

### I. **PETITIONER IS ENTITLED TO A JUDGMENT PURSUANT TO ARTICLE 78 ORDERING RESPONDENT TO DISCLOSE THE REQUESTED PARADE PERMIT DOCUMENTS AND SOUND-DEVICE PERMIT DOCUMENTS FORTHWITH**

Petitioner is entitled to a judgment by this Court ordering Respondent to disclose the requested documents forthwith. Although an agency action is generally reviewed in an Article 78 proceeding under an "arbitrary and capricious standard," a court reviewing a denial of a FOIL request applies a different rule. *See New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 158, 892 N.Y.S.2d 377, 380 (1st Dep't 2010). Under the statute, a court is required to presume that all records of a public agency are open to public inspection and copying unless they fall within a number of narrow exemptions outlined in the FOIL statute. *See Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 71 (1984). The burden is then on the government to establish that the requested material "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 577 (1986). "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose . . . . Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status

or need of the person making the request.” *M. Farbman & Sons, Inc.*, 62 N.Y.2d at 80, 464 N.E.2d at 439.

Here, the requested Parade Permit and Sound-Device documents are records of a public agency subject to disclosure under FOIL and not subject to any exemption to disclosure. To date, the NYPD has not provided the records requested nor has it provided an explanation for why such a request cannot be fulfilled. This constitutes a denial of Petitioner’s FOIL Requests. N.Y. Pub. Off. Law § 89(4)(a). Petitioner has exhausted its administrative remedies by appealing the denial of its FOIL Requests. Respondent denied the appeal by refusing to grant relief and by stating that the appeal was premature. Thus, the Court should immediately order and direct Respondent to provide copies of the requested documents.

**A. The Documents Requested by Petitioner Are Public Records Subject to Disclosure Under FOIL**

The documents requested by Petitioner in its FOIL Requests fall within the scope of records of a public agency presumptively subject to disclosure under FOIL. FOIL’s definition of an “agency” is defined broadly to include “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof . . . .” N.Y. Pub. Off. Law § 86(3). Similarly, FOIL defines the term “record” broadly and includes “any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever . . . .” N.Y. Pub. Off. Law § 86(4); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 248, 505 N.E.2d 932, 933 (1987).

Petitioner’s FOIL request clearly falls within the scope of FOIL. The NYPD is clearly an “agency” under the Public Officers Law. *Gould v. New York City Police Dept.*, 89

N.Y.2d 267, 278, 675 N.E.2d 808, 813 (1996) (noting that the Police Department “is indisputably an ‘agency’ for FOIL purposes”). The FOIL Request was directed to the NYPD for documents relating to the processing of applications for parades and sound-devices that take place in the City’s public domain. As part of its duties, the NYPD accepts and processes sound-device permit applications, N.Y. Code § 10-108(e) (requiring applicants seeking a sound-device permit to “file a written application with the police commissioner, at the police precinct covering the area in which such sound-device or apparatus is used or operated”) and parade permits, N.Y. Code § 10-110(a) (requiring applicants seeking a parade permit to obtain a written permit from the police commissioner.). Respondent is obligated to ensure that it abides by its disclosure obligations.

Second, the requested documents clearly constitute “information” produced by an agency in a physical form. FOIL specifically exempts nine categories of records from disclosure: (1) records specifically exempted from disclosure by state or federal statute; (2) records that if disclosed would constitute an unwarranted invasion of personal privacy under Public Officers Law § 89(2); (3) records that would impair present or imminent contract awards or collective bargaining negotiations if disclosed; (4) trade secrets of a commercial enterprise which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise; (5) certain records compiled for law enforcement purposes that would if disclosed interfere with law enforcement investigations, deprive a person of a right to a fair trial, disclose confidential information relating to a criminal investigation, and reveal criminal investigation techniques; (6) records that if disclosed could endanger the life or safety of any person; (7) inter-agency or intra-agency materials that are not statistical tabulations, instructions to staff that affect the public, final agency policy, or external audits; (8) examination questions or answers which are requested

prior to the final administration of such questions; and (9) records that jeopardize the security of the agency's information technology assets. N.Y. Pub. Off. Law § 87(2). None of these diverse exemptions apply to the Sound-Device and Parade Permit FOIL Requests. Indeed, in its multiple communications with Petitioner, the Respondent has never so much as asserted a FOIL exemption as the basis for failing to disclose the requested documents. Nor has Respondent ever claimed that the documents do not exist. To the contrary, it has indicated that the documents do exist – albeit mysteriously – in the custody of “other NYPD units.”

**B. Respondent Has Wrongfully Denied Petitioner's FOIL Request by Failing to Disclose the Requested Records**

Respondent has denied Petitioner's FOIL Requests by failing to disclose the requested documents. FOIL sets forth a very clear procedural mechanism that requires public agencies to timely provide records, by specifying the manner and time in which the public agency must respond to such a request. A public agency that has received a written request for a record must, within five business days of receipt of the request, make the record available to the person requesting it, deny the request in writing, or furnish acknowledgment of the receipt of the request and a statement of an approximate date, reasonable under the circumstances, when the request will be granted or denied. N.Y. Pub. Off. Law § 89(3)(a). If the agency determines that it will grant a request in whole or in part, but is unable to do so in twenty days, the agency “shall state,” in writing, both the reason for its inability to grant the request within twenty business days, and a date certain within a reasonable period when the request will be granted in whole or in part. *Id.* Failure by an agency to conform to these provisions constitutes a denial of access to a record. *Id.* § 89(4)(a).

An agency's failure to produce documents within a reasonable timeframe constitutes a constructive denial of a FOIL request. In *Beechwood Restorative Care Center v.*

*Signor*, 5 N.Y.3d 435, 441, 842 N.E.2d 466, 469, 808 N.Y.S.2d 568, 571 (2005), the Court of Appeals emphasized the need for timely responses to FOIL requests. There, the respondent agency estimated that it would take 30 to 60 days to respond to a request, but ultimately produced documents that were only partially responsive to the request within the agency's own estimated timeframe. The Court of Appeals held that the agency's "failure to follow FOIL's requirements necessitated [the] lawsuit" to enforce the public's right of access to the requested documents. *Id.* The Court of Appeals made its decision mindful of the importance of providing open access to public records:

The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy. An agency's records are presumptively open to public inspection, without regard to need or purpose of the applicant. When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.

*Id.*, 5 N.Y.3d at 440-41(citations omitted).

As in *Beechwood*, in this case, the NYPD failed to either disclose the records, deny the request on the basis of a specific exemption, or certify that it does not possess the requested documents. As in *Beechwood*, the NYPD provided an estimate for when the documents would be produced, but failed to comply with that deadline. Indeed, the NYPD's failure here is more comprehensive than that of the agency in *Beechwood*: there *some* records were produced; here, after more than ten months, *not one document* related to *any* request has been produced. Unreasonable delays of this sort contravene the purpose of FOIL and are precisely what the statute is designed to guard against, because they have the practical effect of rendering the statute meaningless. *See, e.g., Hearst Corp. v. City of Albany*, 88 A.D.3d 1130, 1133, 931 N.Y.S.2d 713, 717 (3<sup>rd</sup> Dept. 2011) ("respondent's prolonged delay in releasing the documents" was a factor

leading the court to conclude that respondent “evinced a clear disregard of the public’s right to open government”) (citations omitted); *Legal Aid Soc. v. New York State Dept. of Corrections and Community Supervision*, 2013 WL 1337953, \*1-2 \_\_ N.Y.S. 2d \_\_ (3<sup>rd</sup> Dep’t. April 4, 2013) (allowing an appeal of a constructive denial of a FOIL request and noting that the statute was recently amended in order to “create a clear deterrent to *unreasonable delays* and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL”) (emphasis supplied and internal citation omitted); *New York Times Co. v. City of New York Police Dept.*, 959 N.Y.S.2d 171, 174 (1st Dep’t. 2013) (respondent constructively denied appeal by failing to respond to appeal on a timely basis); *Molloy v. New York City Police Dept.*, 50 A.D.3d 98, 104, 851 N.Y.S.2d 480, 484 (1<sup>st</sup> Dep’t. 2008) (Catterson, J. concurring in part and dissenting in part) (noting that petitioner “correctly construed silence as constructive denial and had filed the article 78 petition”).

Respondent has utterly failed to comply with the procedural and substantive requirements of FOIL, thereby denying Petitioner’s FOIL Request. First, and most importantly, Respondent has failed to provide Petitioner with *any* documents responsive to its FOIL requests. Petitioner submitted its request over ten months ago, and has yet to receive a single document. This makes the non-compliance even more egregious than in *Beechwood*, where the respondent agency had at least produced *some* documents.

Second, Respondent has failed to explain adequately the reasons for the non-disclosure in writing. Other than stating that records “had not been received from other NYPD units” – which itself is a *non sequitur* and not an adequate reason for delay – Respondent has utterly failed to provide any explanation for failing to fulfill its FOIL obligations. Notably, Respondent has *not* stated that the requested records do not exist – and in any case, it has failed



to comply with the procedural requirements that require it to “certify that it does not have possession of a requested record or that such record cannot be found after diligent search.”

*Rattley v. New York City Police Dept.*, 96 N.Y.2d 873, 875, 756 N.E.2d 56, 58 (2001).

Third, to the extent that Respondent intends to disclose the documents, it has failed to fulfill the FOIL requests by a reasonable date. In its own letters, the NYPD most frequently estimated that Petitioner’s requests would be processed by the end of a twenty or thirty day period; at most, Respondent estimated that processing would take a maximum of sixty days. Respondent’s letters concede that a twenty to sixty day time frame was reasonable under the circumstances. *See* Public Officers Law § 89(3).

Respondent ignored its own estimates, and has failed to produce any documents *ten months* after the FOIL Requests were served. Respondent has abandoned the pretense of attempting to comply with the statute after repeatedly missing its own estimates: no new Parade Request estimate has been made since September; no new Sound Device Request estimate has been made since October. In sum, Respondent ignored and continues to ignore its statutory obligation to produce the records, or to certify that they do not exist.

In light of Respondent’s failure to disclose any requested documents, and its failure to conform to the procedural requirements of § 89(3)(a), Petitioner’s FOIL Request has been wrongfully denied by Respondent.

### **C. Respondent Has Wrongfully Denied Petitioner’s Administrative Appeal**

Petitioner has properly exhausted its administrative remedies by filing an administrative appeal that was denied by Respondent. FOIL sets forth an administrative appeal procedure for any person denied access to a record. N.Y. Pub. Off. Law § 89(4)(a). Within thirty days of denial of access, the person requesting the record may appeal in writing the denial

to the “head, chief executive or governing body of the entity, or the person therefor[e] designated by such head, chief executive, or governing body,” who, within ten business days of receiving such appeal, shall either provide access to the record sought or fully explain in writing the reasons for further denial. *Id.* “Failure by an agency to conform” to these provisions constitutes a denial of the administrative appeal. *Id.* § 89(4)(b)

After Respondent denied Petitioner’s FOIL request by failing to produce any documents, Petitioner filed a timely administrative appeal of the denial of its FOIL requests on September 19, 2012 and September 20, 2012.<sup>2</sup> It was not until January 4, 2013 and March 8, 2013, that Respondent formally denied the appeals of the Sound-Device FOIL Request and the Parade Permit FOIL Request, respectively, thus exhausting Petitioner’s administrative remedies.

The Court should note that those denials did not even bother to recite the excuse that “records have not been received from other NYPD units.” Instead, the sole rationale was that the appeals were purportedly “premature.” Claims of prematurity are absurd when production of records is months overdue. This rationale would allow a respondent agency to use its own unreasonable delays as a way of claiming “prematurity” in perpetuity. This Court should not allow Respondent to prevent access to public records in this way.

#### **D. Petitioner is Entitled to Relief Under Article 78 of the CPLR**

Petitioner is entitled to relief under Article 78 of the CPLR and Public Officers Law § 89(4)(b). Pursuant to FOIL’s provisions, Petitioner received a final agency determination of its FOIL requests when Respondent denied Petitioner’s administrative appeal of the Sound-device FOIL Request on January 4, 2013, and when Respondent denied Petitioner’s administrative appeal of the Parade Permit FOIL Request on March 8, 2013. Having filed a

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<sup>2</sup> Petitioner filed a timely appeal within thirty days of Respondent’s letter dated September 5, 2012 for the Sound Permit FOIL Request, and within thirty days of Respondent’s letter dated September 6, 2012 for the Parade Permit FOIL request.

timely Article 78 proceeding and demonstrated that the requested documents are records of a public agency falling within the purview of FOIL's presumption that they be disclosed to Petitioner, Petitioner is entitled to the relief sought in this Article 78 proceeding. Petitioner respectfully requests that the Court order Respondent to immediately provide Petitioner with copies of documents responsive to the Parade Permit FOIL Request and the Sound-Device FOIL Request.

## **II. PETITIONER IS ENTITLED TO REASONABLE ATTORNEYS' FEES AND LITIGATION COSTS UNDER N.Y. PUBLIC OFFICERS LAW § 89(4)(C)**

Because Petitioner is certain to prevail in its Article 78 proceeding against Respondent, and because Respondent's failure to comply is without any reasonable basis, Petitioner requests an award of reasonable attorneys' fees and litigation costs on that basis. Under Public Officers Law § 89(4)(c), a court "may assess, against such agency involved, reasonable attorneys fees and other litigation costs reasonably incurred" by a petitioner "in any case under the provisions of this section in which such person has substantially prevailed, when: the agency had no reasonable basis for denying access; or the agency failed to respond to a request or appeal within the statutory time." A party may recover reasonable attorneys' fees under § 89(4)(c) by establishing that (1) it has "substantially prevailed," (2) the record sought was "of clearly significant interest to the general public," and (3) "the agency lacked a reasonable basis in law for withholding the record." *Beechwood Restorative Care Ctr. v. Signor*, 11 A.D.3d 987, 988, 784 N.Y.S.2d 750, 752 (4th Dep't 2004), *aff'd* 5 N.Y.3d 435, 842 N.E.2d 466 (2005).

Under the statutory language of Public Officers Law § 89(4)(c), Petitioner should receive an award of attorneys' fees and litigation costs due to Respondent's failure to produce documents responsive to Petitioner's original FOIL Requests within the statutorily-specified

time. Respondent's failure to respond has caused Petitioner to retain counsel and be exposed to attorneys' fees and litigation costs in prosecuting this Article 78 proceeding. Petitioner sought to resolve this matter without litigation by repeatedly submitting follow-up requests, and by submitting an administrative appeal. But Respondent has produced no documents. Petitioner will have substantially prevailed if it receives any documents in response to its request.

The documents sought are of significant interest to the general public. Parade permits and sound-device permits are essential to free expression. The requested documents provide information about how requests for parade activity have been handled by the NYPD over time, and allow the public to evaluate the fairness of procedures implemented by NYPD. The public clearly has a significant interest in ascertaining how the NYPD has treated requests to assemble and demonstrate on public sidewalks over time. The fact that the records are being sought for a journalistic investigation, and they likely will form the basis for public commentary, only highlights their importance. *See Powhida v. City of Albany*, 147 A.D.2d 236, 239, 542 N.Y.S.2d 865, 867 (3rd Dep't 1989) (awarding attorneys' fees in a FOIL proceeding and holding that documents were "clearly of significant interest to the public" where the requested documents would "significantly contribute[] to the general public's evaluation of one of the most important public agencies" – the local police department).

Similarly, Petitioner should receive attorneys' fees and litigation costs because Respondent lacks a reasonable basis for denying access to the requested documents. The Parade Permit documents and the Sound-Device Permit documents are proper records of a public agency subject to disclosure under FOIL. None of the nine statutory exemptions enumerated in FOIL exclude the requested documents from disclosure. Petitioner therefore respectfully requests an award of attorneys' fees and litigation costs.

**Conclusion**

For the reasons set forth above, Petitioner respectfully requests the Court grant the Order to Show Cause and relief requested in the Verified Petition.

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