SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

In the Matter of,	:	
NEW YORK CIVIL LIBERTIES UNION,	:	Index No. _____
Petitioner,	:	
-against-	:	
ERIE COUNTY; and CHERYL GREEN, County Attorney for Erie County,	:	
Respondents,	:	
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules.	:	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Respectfully submitted,

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Dated: New York, NY
June 7, 2010

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PRELIMINARY STATEMENT

This Article 78 petition seeks to vindicate the right of the public to obtain information about Respondent Erie County's use of taxpayer resources to fund the County's obstructionist approach to state and federal investigations and legal challenges regarding inhumane and unconstitutional conditions at Erie County correctional facilities. The County's effort to block such investigations and vigorously litigate such legal challenges has generated controversy among Erie County residents, in the press, and within the Erie County government, some of whose officials have questioned the County's approach. Much of this controversy has centered on the expense of taking such an aggressive stance. Nonetheless, the County Attorney refused to produce public records in response to a Freedom of Information Law ("FOIL") request by Petitioner the New York Civil Liberties Union ("NYCLU") seeking information about the cost of this approach to the taxpayer. In so doing, the County flouted its statutory obligation to justify withholding records with specific and particular findings, instead issuing vague pronouncements that merely parroted the terms of certain statutory exemptions and did not discuss their application to the records sought. Moreover, the County invoked plainly inapplicable exemptions – some of which are not even recognized under law – in its attempt to circumvent FOIL's principles of open government and public accountability. Having exhausted its administrative remedies, the NYCLU now asks the Court to order Erie County to comply with its obligations under FOIL and provide the public with these records about government expenditures. Because of the patent inadequacy of the County's response, Petitioner also requests that the Court award Petitioner its attorneys' fees.

FACTUAL BACKGROUND

The Controversy Surrounding Erie County's Correctional Facilities

For more than a decade, Erie County's correctional facilities have been the subject of controversy. Most recently, two facilities – the Erie County Holding Center ("ECHC") and the Erie County Correctional Facility ("ECCF") – have been the subject of investigations by the New York State Commission on Corrections and the United States Department of Justice, Civil Rights Division. *See* Affirmation of Corey Stoughton in Support of Verified Petition (June 7, 2010) at ¶ 3-5 (hereinafter, "Stoughton Affirmation"). Both of these investigations led to lawsuits challenging unconstitutional and inhumane conditions and practices at these facilities. *Id.*

Since the inception of these investigations and throughout the course of the lawsuits, Erie County has adopted an obstructionist approach – for example, reportedly refusing to provide state and federal investigators with access to information, rejecting reform proposals that would settle the suits, and hiring expensive outside counsel to litigate these suits aggressively. *See* Matthew Spina, *Collaboration, Not Confrontation, Marks Another County's Response to Jail Probe*, Buff. News (Dec. 3, 2009); Matthew Spina, *County Pays Firm $140,000 in Fees for Lawsuit That Has Barely Begun*, Buff. News (Jan. 26, 2010); *Jail Still in Crisis*, Buff. News (Mar. 4, 2010); Matthew Spina, *Recent Holding Center Hanging Cited in Justice Dept. Filing*, Buff. News (Mar. 6, 2010); Opinion-Editorial, *Hard Time at the Jail*, Buff. News (Mar. 18, 2010) Matthew Spina and Nancy Fischer, *3rd Suicide Reported at County Jail in 4 Months*, Buff. News (Apr. 4, 2010); Opinion-Editorial, *Sheriff Should Step Down*, Buff. News (May 25, 2010); Matthew Spina, *Video on Alleged Jail Beating Withheld*, Buff. News (May 27, 2010) (attached to Stoughton Affirmation as Ex. B). This has prompted some Erie County residents – including

some government officials – to question the wisdom and the expense of the County's approach to these matters. *See id.*

The NYCLU's FOIL Request, the County's Failure to Meet its Statutory Obligations, and its Ultimate Wrongful Denial of the Request

On October 8, 2009, prompted by this controversy and by the public's right to understand the fiscal consequences of the County's actions, the NYCLU filed a Freedom of Information Law ("FOIL") request seeking records related to the "expenditure of county funds to defend against formal investigations and legal actions related to [ECCF and ECHC]." *See* FOIL Request (Oct. 8, 2009) (attached to Stoughton Affirmation as Ex. C). In particular, the FOIL request focused on expenditures related to investigations and legal actions dealing with "allegations of unconstitutional conditions, excessive force, denial of medical or psychological care, or wrongful injury or death" at the two facilities. *Id.*

Within this category of records, the request more specifically described the records sought. *Id.* In Part 1, the request sought "budget documents authorizing or allocating" such expenditures. *Id.* In Part 2, the request sought "records of any litigation costs, attorney's fees, damage awards and settlement payments" relating to the specified categories of legal actions regarding the two facilities. *Id.* In Part 3, the request sought "receipts, invoices and expense reports" documenting such expenses. *Id.* In Part 4, the request sought "time sheets" recording County employee time spent responding to or defending against the specified actions. *Id.* And in Part 5, the request sought contractual agreements with any attorney or law firm to represent the County or its agents in relation to the specified investigations and legal actions. *Id.*

Because of a recent change in address, the FOIL request was not received by the County until October 16, 2009. Stoughton Affirmation ¶ 9. On October 19, 2009, the County stated that

it would respond to the request within twenty business days. *See* Acknowledgment Letter (Oct. 19, 2009) (attached to Stoughton Affirmation as Ex. D).

On November 23, 2009, having received no response from the County, the NYCLU filed an administrative appeal based on the County's failure to respond within its self-selected twenty-day deadline. *See* First Administrative Appeal (Nov. 23, 2009) (attached to Stoughton Affirmation as Ex. E). Thereafter, the County requested an additional thirty business days to respond to the request. *See* Letter from S. Calhoun to C. Stoughton (Nov. 23, 2009) (attached to Stoughton Affirmation as Ex. F). Although this request violated FOIL's requirement to state specific reasons for the need for an extension of time beyond twenty business days, the NYCLU nonetheless agreed to stay its administrative appeal pending the County's response. *See* Letter from C. Stoughton to S. Calhoun (Nov. 30, 2009) (attached to Stoughton Affirmation as Ex. G).

On January 6, 2010, the County denied the NYCLU's request. *See* Letter from S. Calhoun to C. Stoughton (Jan. 6, 2010) (attached to Stoughton Affirmation as Ex. H). The denial was based on six grounds: (1) the NYCLU did not adequately describe the records sought to enable the County to locate them; (2) some of the records were protected by the attorney-client privilege; (3) some of the records were protected attorney work product; (4) disclosure of some of the records would constitute an unwarranted invasion of privacy; (5) some of the records are exempt as intra-agency materials; and (6) disclosure of some of the records "could cause substantial injury to the competitive position of the County in both pending and future litigation." *Id.* The County did not provide any justification for applying these exemptions to the records requested and did not explain the manner in which the NYCLU's request was inadequate for purposes of locating responsive records.

On February 2, 2010, the NYCLU administratively appealed the County's denial. *See* Second Administrative Appeal (Feb. 2, 2010) (attached to Stoughton Affirmation as Ex. I). In addition to questioning the basis for applying the invoked exemptions and asking for a more specific and particularized justification for their application, the appeal challenged the County's assertion that the request was insufficiently specific to allow the County to locate the records and, to the extent that the County continued to feel unable to locate the records, requested a conference with the County's records access officer to resolve the alleged deficiency in the request in light of the method by which the County maintains its records. *Id.* Pursuant to binding regulations promulgated by the Committee on Open Government, an agency's records access officer "is responsible for assuring that agency personnel . . . . assist the requester in identifying requested records, if necessary." 21 NYCRR § 1401.2(b)(2).

On February 19, 2010, Erie County denied the NYCLU's administrative appeal, repeating the same blanket justifications offered in its original denial and citing various cases without explaining how they applied to the records at issue. *See* Letter to C. Stoughton from Erie County FOIL Appeals Officer (Feb. 19, 2010) (attached to Stoughton Affirmation as Ex. J). The County did not respond to the NYCLU's request for a conference with the County's records access officer. *Id.*

ARGUMENT

The Court should order Erie County to produce the records sought in the NYCLU's FOIL request. That request reasonably describes the delineated categories of financial records sought, and the County has made no effort to meet its burden to demonstrate otherwise. Indeed, any claim that the County is not capable of locating responsive records is belied by the County's refusal to engage the NYCLU in a cooperative effort to resolve any ambiguity in the request in

light of the method by which the County retains records – an effort required by FOIL's implementing regulations. Moreover, the five exemptions summarily invoked by the County to justify withholding records plainly do not apply, and the County's failure to provide a "particularized and specific justification" for their application violates FOIL. The County's refusal to comply with its statutory and regulatory obligations, thus necessitating this Article 78 enforcement proceeding, also entitles Petitioner NYCLU to its attorneys' fees.

I. THE FREEDOM OF INFORMATION LAW ESTABLISHES A BROAD RIGHT OF PUBLIC ACCESS TO GOVERNMENT RECORDS.

The Freedom of Information Law, codified at sections 84 to 90 of the New York Public Officers Law, establishes New York State's strong commitment to open government and public accountability. *See Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 565 (1986). As noted in the statute's legislative declaration:

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

Public Officers Law § 84. The declaration also states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible" and further that "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society." *Id.*

The scheme of FOIL is straightforward. Section 87 provides that government agencies "shall . . . make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within certain exemptions specified in the statute. Public Officers Law § 87(2). In amending the statute to increase public access to government records in 2008, the Legislature re-emphasized the breadth of the statute's intended reach:

> The legislation supports the position that has been taken in numerous court decisions that government records in all forms, including non-paper records, are preemptively open for public inspection and copying unless those records fall within a specific statutory exemption. The courts also have repeatedly ruled that these exemptions are to be narrowly construed.

See Legislative Memo, Justification for A.809-C, 231st Sess., Reg, Sess. (2008).

Section 89 of the Public Officers Law contains the provisions addressing the procedure for processing FOIL requests. Section 89(3) specifies how an agency is to process an initial request; section 89(4)(a) provides that a person whose request is denied can appeal that denial to the agency; and section 89(4)(b) provides that a person whose administrative appeal is denied may bring an action under Article 78 to challenge the denial. An agency's failure either to provide written explanation of the reason(s) for denial, respond within the statutory timeframe, or to provide access to the requested materials as required by section 89, constitutes a "constructive denial" of the FOIL request and entitles the person who made the request to seek relief pursuant to Article 78.

Finally, FOIL authorizes the Committee on Open Government to oversee and issue advisory opinions interpreting FOIL. Public Officers Law § 89(1)-(2). Because the Committee is the administrative agency charged with oversight of the Freedom of Information Law, its interpretation of the statute, "if not irrational or unreasonable, should be upheld." *Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971).

II. THE COUNTY MAY NOT WITHHOLD RECORDS ON THE BASIS THAT THE NYCLU'S REQUEST DID NOT REASONABLY DESCRIBE THE RECORDS SOUGHT.

The County has asserted that it cannot produce any of the records sought by the NYCLU because the NYCLU has not reasonably described those records such that the County can locate them. *See* Public Officers Law § 89(3)(a) (requiring that the records sought in a FOIL request be

"reasonably described"). This is not a valid ground for denying the NYCLU's request, for three reasons. First, the County failed to meet its burden to identify any vagueness or complexity in the NYCLU's request that interferes with its ability to locate the requested records. Second, it is simply not the case that the NYCLU's request is unclear in any way. The request straightforwardly seeks records that the County maintains documenting its expenditures on particular matters – in this case, matters related to formal investigations and lawsuits regarding allegations of unconstitutional conditions, excessive force, denial of medical or psychological care, or wrongful injury or death at two correctional facilities. Finally, the County unreasonably ignored the NYCLU's request to meet with the County records access officer to discuss ways to overcome any barriers to the County's ability to locate documents. Binding agency regulations interpreting the FOIL statute state that an agency is obliged to participate in such a meeting. The County's refusal to do so forfeits its objection on this ground.

A. The County Failed to Meet Its Burden to Justify Withholding Records on the Ground That the Request Does Not Reasonably Describe Them.

In both its initial denial of the NYCLU's FOIL request and its denial of the administrative appeal, the County provided no explanation for why it seems to be unable to locate these records. It has not identified any vagueness in the NYCLU's request or provided any reason to believe that the records would be impossible, or even difficult, to locate. The law is clear that this failure to provide an explanation invalidates the County's attempt to avoid producing records under FOIL. *See Konigsberg v. Coughlin*, 68 N.Y.2d 245, 247 (1986) (holding that the agency must "establish that the demand was insufficient for purposes of enabling them to locate and identify the documents sought").

B. The NYCLU's Request Reasonably Describes the Records Sought.

Even if the County had complied with its statutory and regulatory obligations, it is clear that it could not have articulated a reasonable basis for withholding records, as the NYCLU's request did reasonably describe the records sought. To begin with, the request made it clear that the records sought concern County expenses related to a relatively narrow set of matters: namely, expenditures related to certain investigations and legal actions regarding two correctional facilities.

In particular, Part 2 of the request sought "records related to any litigation costs, attorney's fees, damages awards, and settlement payments paid by the County" regarding these investigations and legal actions. FOIL Request (Oct. 8, 2009) (attached to Stoughton Affirmation as Ex. B). Part 3 of the request sought "receipts, invoices, and expense reports documenting expenses" incurred as a result of the investigations and legal actions. *Id.* Part 4 of the request sought "time sheets (or records performing a similar function) recording time, including overtime, spent by any County employee in connection with the County's response to" the investigations and legal actions. *Id.* There is every reason to believe that these records of financial expenditures by the County are likely maintained in searchable form by the Comptroller's Office or another office responsible for reviewing, auditing and distributing County expenditures. The Erie County Charter states that the Comptroller bears the responsibility to be "the chief fiscal, accounting, reporting and auditing officer of the County" and to "oversee the fiscal affairs of the county including . . . general and operating fund revenues." Erie County Charter § 1902a. In particular, the Comptroller is to "[m]aintain the official accounting records for all receipts and disbursements of the county . . . and prescribe approved methods of accounting for county officers and administrative units in accordance with standards and policies prescribed by the New York state comptroller and the governmental

accounting standards board." *Id.* § 1902b. The Comptroller is also required to "[c]onduct financial and compliance audits of the records and accounts of all officers and employees charged with any duty relating to county funds." *Id.* § 1902e. The records are also likely maintained in searchable form by the County's Attorney's office or the Sheriff's office, as those are the agencies responsible for defending such legal claims and administering the named facilities, respectively. Moreover, the County has established a "Citizens Budget Review Commission," which receives reports about County expenditures from a variety of County government agencies, strongly suggesting that the County's agencies routinely maintain and share the kind of information sought in the NYCLU's request. *Id.* § 2618(a)-(g).

Part 5 of the request sought "records formalizing any agreement with any attorney or law firm to provide representation" in connection with the same matters described above. *Id.* These contracts and agreements should be easily identified and located by the County. Thus, it is quite clear that the NYCLU's request did "reasonably describe" the records at issue.

Thus, it is not the case that the County genuinely cannot be expected to understand what records the NYCLU sought and how it could locate them. *Konigsberg*, 68 N.Y.2d at 247. For that reason, the County should be ordered to produce records responsive to the NYCLU's request.

C. The County Has Forfeited Its Claim That it Cannot Locate the Records by Refusing to Accept a Meeting Between Its Record Access Officer and the NYCLU.

A government agency cannot simply abandon its responsibility to maintain government openness under FOIL by claiming it is not capable of locating records sought by the public. Recognizing that the public may not possess important information regarding how complex state agencies maintain various records, regulations implementing FOIL require that the records access officer of each agency "assist 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).

In response to the County's initial claim that the NYCLU's request was insufficiently described, the NYCLU requested a meeting with the County's records access officer to address any concerns the County had regarding the request. *See* Second Administrative Appeal (Feb. 2, 2010) (attached to Stoughton Affirmation as Ex. H). The County ignored this request, simply reiterating its conclusory and unsupported assertion that the NYCLU had not reasonably described the records sought. *See* Letter to C. Stoughton from Erie County FOIL Appeals Officer (Feb. 19, 2010) (attached to Stoughton Affirmation as Ex. I). As a result of this failure to meet its statutory and regulatory obligation to work with FOIL requestors to enable the County to locate records, the County cannot reasonably claim that it is incapable of locating those records. It has, therefore, forfeited this claim as a valid reason for denying the NYCLU's request.

III. THE COUNTY HAS NOT MET ITS BURDEN TO SHOW THAT THE EXEMPTIONS FROM DISCLOSURE IT INVOKES APPLY TO THE NYCLU'S FOIL REQUEST.

The County has invoked five exemptions to justify withholding the records requested in the NYCLU's FOIL: (1) attorney-client privilege; (2) attorney work product; (3) the personal privacy exemption; (4) the intra-agency records exemption; and (5) a purported exemption for information that "could harm [an agency's] litigation position." *See* Letter from S. Calhoun to C. Stoughton (Jan. 6, 2010) (attached to Stoughton Affirmation as Ex. G); Letter to C. Stoughton from Erie County FOIL Appeals Officer (Feb. 19, 2010) (attached to Stoughton Affirmation as Ex. I).

In so doing, the County merely quoted the language of the respective statutory exemptions, thus failing to meet its obligation to state a "particularized and specific justification" for withholding these records. The FOIL statute requires that an agency seeking to invoke a statutory exemptions "fully explain" its reason for denial in writing and carry the burden of proof on the applicability of any exemption. Public Officers Law § 89(4)(a)-(b). In order to meet that burden of proof, the agency must "articulate [a] particularized and specific justification" for withholding the record. *See West Harlem Bus. Grp. v. Empire State Development Corp.*, 13 N.Y.3d 882, 885 (2009); *Hearst Corp v. Burns*, 67 N.Y.2d 562, 566 (1986). Neither "parrot[ing]" the language of the statutory exemption relied upon nor offering "'conclusory characterizations' of the records sought" meets this burden. *West Harlem Bus. Grp.* at 884-85.

The inadequacy of the County's invocation of these exemptions is, standing alone, grounds for granting the relief Petitioner NYCLU seeks. However, even if the County had attempted to meet its burden, it could not have provided a "particularized and specific justification" for application of the exemptions, because they plainly do not apply to the records requested.

A. The Attorney Client Privilege Does Not Apply.

The County has claimed that Part 2 (seeking records of litigation costs, attorney's fees, damage awards and settlement payments), Part 3 (seeking receipts, invoices and expense reports), Part 4 (seeking time sheets) and Part 5 (seeking contractual agreements with lawyers) of the NYCLU's request are exempt from disclosure under the attorney-client privilege. *See* CPLR 4503 (defining the attorney-client privilege under New York law); Public Officers Law § 87(2)(a) (exempting from FOIL documents that are otherwise protected by state or federal statute).

The attorney-client privilege does not apply to any of these records because none consist of confidential attorney-client communications. The records sought relate to expenditures by the County in defending against specified investigations and lawsuits. *See* FOIL Request (Oct. 8, 2009) (attached to Stoughton Affirmation as Ex. B). They do not consist of legal advice or relate to confidential communications between lawyers and clients that are offered for the purpose of gaining legal advice. *See, e.g., Priest v. Hennessy*, 51 N.Y2d 62, 69 (2d Dep't 1980) ("[T]o make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a confidential communication made to the attorney for the purpose of obtaining legal advice or services.").

Indeed, as to the potion of the NYCLU's request concerning contractual arrangements with attorneys or law firms and litigation expenses, the Court of Appeals has expressly ruled that the attorney-client privilege is inapplicable. *Id.* (holding that records relating to the payment of a fee between a client and its attorney do not "ordinarily constitute a confidential communication and, thus, are not privileged in the usual case," since the communication about the fee is unrelated to the legal advice given); *see also Orange County Pubs., Inc. v. County of Orange*, 168 Misc.2d 346 (N.Y. Sup. 1995) (holding that records concerning legal work performed by outside counsel for a county are not categorically exempt from FOIL under the attorney-client privilege); *People v. Cook*, 82 Misc.2d 875 (N.Y. Sup. 1975) (information concerning amounts billed, payments received, fee arrangements and retainer agreements are not protected by the attorney-client privilege); Committee on Open Government Advisory Opinion, FOIL-AO-14270 (Sept. 30, 2003) (finding that attorney billing statements are not generally exempt from FOIL under the attorney-client privilege). The same logic applies to each of the parts of the request that the County claims fall within this exemption.

B. The Work Product Privilege Does Not Apply.

The County has claimed that Part 2 (seeking records of litigation costs, attorney's fees, damage awards and settlement payments), Part 3 (seeking receipts, invoices and expense reports), Part 4 (seeking time sheets) and Part 5 (seeking contractual agreements with lawyers) of the NYCLU's request are exempt from disclosure as attorney work product. *See* CPLR § 3101 (defining the work product doctrine under New York law); Public Officers Law § 87(2)(a) (exempting from FOIL documents that are otherwise protected by state or federal statute).

The work product exemption is "limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor*, 425 N.Y.S.2d 619, 622 (1st Dep't 1980). This doctrine has no application to records of County financial expenditures of the type sought by the NYCLU's FOIL request, even when those expenditures relate to litigation or are paid to an attorney. *See Orange County Pubs.*, 168 Misc.2d at 347 (holding that records concerning legal work performed by outside counsel for a county are not exempt as attorney work product).

With regard to both the work product and attorney-client privilege exemptions, if it were the case that some of the responsive records contained exempt material – a fact the County has never actually asserted – the County still may not withhold those records. Instead, the County may, at most, redact the privileged communications or work product. *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985) (requiring an agency to disclose redacted records where portions of them contained exempted information). The County cannot, as it has done here, withhold the documents in their entirety.

C. The Personal Privacy Exemption Does Not Apply.

The County has asserted that records related to settlement payments, sought in Part 2 of the NYCLU's request, are exempt from disclosure because their release would constitute an unwarranted invasion of the privacy of persons who received payments. *See* Public Officers Law § 89(2)(b). Settlement agreements involving government agencies, however, are public records. Courts have repeatedly ordered such agreements be disclosed under FOIL because the public interest in disclosure outweighs any privacy interests, even when the agreements contain confidentiality clauses. *See, e.g., In the Matter of LaRocca v. Bd. of Educ. of the Jericho Union Free School District*, 220 A.D.2d 424, 424-26 (2d Dept. 1995); *Village of Brockport v. Calandra*, 745 N.Y.S.2d 662, 668 (N.Y. Sup. Ct. 2002); *In the Matter of "Anonymous", A Tenured Teacher v. Bd. of Educ. For the Mexico Central School District*, 616 N.Y.S.2d 867 (N.Y. Sup. Ct. 1994); Committee on Open Government Advisory Opinion, FOIL-AO-16721 (Aug. 7, 2007) (affirming that settlement agreements are not exempt under FOIL). Thus, there is no basis for withholding records related to settlement payments on this basis.

Moreover, even if there were any basis for concluding that § 89(2)(b) applied to the requested records, the exemption provides that records should be disclosed with identifying details redacted and does not permit wholesale withholding of such records, as the County has done here. *See* Public Officers Law § 89(2)(c)(i).

D. The Exemption for Intra-Agency Records Does Not Apply.

The County has asserted that records responsive to Part 3 of the NYCLU's request, seeking receipts, invoices and expense reports relating to defending against the specified investigations and legal actions, are exempt from disclosure under the intra-agency records exemption. *See* Public Officers Law § 87(2)(g) (exempting "inter-agency or intra-agency

materials which are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency or policy or determinations").

The records requested are not exempt for several reasons. First, they do not implicate agency decision-making or deliberative processes, nor do they constitute advice rendered for the purpose of agency decision-making. *See Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985) (holding that the purpose of the exemption is to protect "the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers."). Second, the exemption does not apply to factual information, and the records, which merely document County expenditures, are purely factual information. Public Officers Law § 87(2)(g); *Gould v. New York City Police Department*, 89 N.Y.2d 267, 277 (1996) ("Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making"). Finally, to the extent that they record transactions and expenditures paid to non-County personnel, the records sought plainly are not "intra-agency." *See Miller v. New York State Dept. of Transportation*, 871 N.Y.S.2d 489, 494 (3d Dep't 2009) (holding that communications with people outside the agency are not exempt).

For all of these reasons, it comes as no surprise that the Committee on Open Government has specifically found that "bills, vouchers, contracts and records involving expenditure of public moneys" must be disclosed and do not fall within any FOIL exemption. Committee on Open Government Advisory Opinion, FOIL-AO-13729 (Nov. 27, 2009).

E. Threat of "Injury to the Competitive Position of the County in Litigation" is Not a Valid Basis for Denying a FOIL Request.

The County has withheld records related to payments under settlement agreements on the basis that the records sought "could cause substantial injury to the competitive position of the

County in both pending and future litigation." *See* Letter from S. Calhoun to C. Stoughton (Jan. 6, 2010) at 2 (attached to Stoughton Affirmation as Ex. G); Letter to C. Stoughton from Erie County FOIL Appeals Officer (Feb. 19, 2010) at 3 (attached to Stoughton Affirmation as Ex. I). This is not a valid exemption to the FOIL statute and should be rejected by the Court out of hand. Erie County is not the first to attempt to create such an exemption, and it has been squarely rejected by the Appellate Division. *See Buffalo Broadcasting Co. v. New York State Dep't of Correctional Servs.*, 155 A.D.2d 106, 113 (3d Dept. 1990) (rejecting the agency's assertion that disclosure "would compromise current litigation"). The County has cited no statutory provision or case law endorsing such an exemption and, to Petitioner's knowledge, no such law exists.

IV. PETITIONER NYCLU IS ENTITLED TO ATTORNEYS' FEES.

Petitioner requests attorneys' fees and reasonable litigation costs under the Freedom of Information Law. Section 89(4)(c) authorizes a court to award reasonable attorneys' fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute. Public Officers Law § 89(4)(c).

Section 89(4)(c) was amended in 2006, in part, to remove the previous requirement that "the record involved was, in fact, of clearly significant interest to the general public." The legislative history to the 2006 amendment states that "[t]his bill strengthens the enforcement of such a right [citizens' right to access certain government records via FOIL requests] by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to respond in a timely fashion or deny access without any real justification." 2005 Legis. Bill Hist. N.Y, S.B. 7011.

Thus, the only showing that now must be made for an award of attorneys' fees under the Freedom of Information Law is that the petitioner substantially prevailed and that "the agency had no reasonable basis for denying access." Public Officers Law § 89(4)(c). As set forth above, Erie County had no reasonable basis for invoking the exemptions it has claimed to deny the public access to the requested records. Indeed, the public's right to access records of how government spends money could not be more straightforward. For these reasons, Petitioner is entitled to attorneys' fees.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court order the County of Erie to grant the NYCLU's FOIL request in full and award Petitioner its attorney's fees.

Respectfully submitted,

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