SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of	:	
NEW YORK STATE DEFENDERS ASSOCIATION,	:	
Petitioner,	:	
	:	Index No. _____
-against-	:	
NEW YORK STATE POLICE; LAURIE M. WAGNER, in her official capacity as Records Access Officer of the New York State Police; and WILLIAM CALLAHAN, in his official capacity as Administrative Director of the N.Y. State Police,	:	
Respondents.	:	
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	:	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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Dated: April 7, 2010
New York, New York

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PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of Petitioner, the New York State Defenders Association ("NYSDA"), and the right of the public under the Freedom of Information Law ("FOIL") to have access to records related to policies and procedures employed by the New York State Police ("State Police").

Concerned about coerced confessions and wrongful convictions, Petitioner submitted a FOIL request to Respondents seeking written policies or memoranda concerning policies pertaining to the videotaping, audio taping, or electronic recording of interviews, interrogations, confessions, or statements of criminal suspects in police custody.

Respondents denied Petitioner's request, asserting that the responsive records are "records which were compiled for law enforcement purposes, and which, if disclosed, would reveal non-routine investigative techniques and procedures." N.Y. Pub. Off. Law § 87(2)(e)(iv).

The State Police should be compelled to produce the responsive records for two reasons. First, the State Police failed to provide "particularized and specific" facts justifying its belief that the requested records are exempt from disclosure. N.Y. Pub. Off. Law § 87(2). Instead, the State Police merely parroted the language of the statutory exemption, and thus failed to satisfy their burden of proving that the requested record falls squarely within an enumerated exemption. N.Y. Pub. Off. Law § 87(2).

Second, The Court of Appeals has made it clear that the so-called "law enforcement" exemption to FOIL can only shield records from disclosure where disclosure "would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 573 (1979). Subsequent cases within the Appellate Division,

including many implicating the State Police, have reaffirmed the *Fink* standard, while identifying what types of documents can legitimately be withheld under the exemption. Applying this standard, the requested records do not fall within the law enforcement exemption. Because the State Police have improperly withheld responsive documents and Petitioner has exhausted its administrative appeals, Petitioner seeks relief from this Court.

STATEMENT OF FACTS

NYSDA's mission is to improve the quality and scope of publicly supported legal representation to low income people. NYSDA is the largest criminal defense bar association in New York and among the first statewide defense organizations to be established in the country. NYSDA long has been concerned about coerced confessions and wrongful convictions. *See* Affirmation of Jonathan Gradess ¶ 2 (Apr. 2, 2010) (hereafter "Gradess Aff.").

NYSDA is supportive of widespread videotaping and audiotaping of suspect interrogations, both as a procedural protection for suspects and a way minimize wrongful convictions. As a result of this organizational interest, on November 2, 2009, the NYSDA sent a FOIL request to the State Police seeking written policies or memoranda concerning policies pertaining to the videotaping, audio taping, or electronic recording of interviews, interrogations, confessions, or statements of criminal suspects in police custody. *See* Gradess Aff. ¶ 3.

In response to the NYSDA's FOIL request, the State Police, in a letter dated November 12, 2009, stated that the Department would need up to twenty business days to determine whether it would grant or deny NYSDA's request. *See* Gradess Aff. ¶ 4.

On December 16, 2009, Captain Laurie Wagner of the State Police denied the request, stating that the responsive records are "records which were compiled for law enforcement

purposes, and which, if disclosed, would reveal non-routine investigative techniques and procedures." *See* Gradess Aff. ¶ 5.

William Callahan, the Administrative Director of the State Police, rejected NYSDA's administrative appeal in a letter dated January 22, 2010, providing no additional grounds for the State Police's denial. *See* Gradess Aff. ¶ 6.

Having exhausted its administrative remedies, Petitioner filed this Article 78 complaint.

ARGUMENT

I. RESPONDENTS HAVE VIOLATED FOIL BY FAILING TO DISCLOSE RESPONSIVE RECORDS.

Given FOIL's strong presumption in favor of disclosure, the State Police have the burden of showing that otherwise responsive records should be shielded from the public eye. *See Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 110 (1992) ("[E]xemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption") (citing N.Y. Pub. Off. Law § 89(4)(b)); *see also* Comm on Open Gov't FOIL-AO-4903 (Agency must meet burden of proof imposed by Freedom of Information Law by demonstrating harmful effects that would arise from disclosure of records).

The State Police's lone ground for rejecting the NYSDA's FOIL request is the exemption for non-routine, investigative techniques, otherwise known as the "law enforcement" exemption. This exemption may only be used when disclosure of documents would enable suspects to "frustrate pending or threatened investigations...[or] use that information to construct a defense to impede a prosecution." *Fink*, 47 N.Y.2d at 572. Thus, where there exists a "substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel," the agency need not reveal otherwise responsive documents. *Id.* at 573.

In this case, the requested documents—regarding procedures for videotaping interrogations of criminal suspects—do not fall under this narrow exemption. Procedures designed to assure the veracity and evidentiary quality of confessions, unlike procedures that describe specific investigative or interrogative techniques, cannot be used by suspects to evade detection.

A. The State Police Have Not Satisfied Their Heavy Burden in Invoking Exemptions to Overcome the Strong Presumption of Access Under FOIL

The text of FOIL plainly indicates that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted. N.Y. Pub. Off. Law § 87(2). An agency that seeks to withhold a record has the burden of proving that the requested record falls squarely within an enumerated exemption. *Id.* To do this, the agency must articulate "particularized and specific" facts justifying its belief that the requested records are exempt from disclosure. *Id.* Conclusory averments, without more, are insufficient to meet the agency's burden. *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984). Because the State Police' denial of NYSDA's FOIL request merely parroted the language of the statutory exemption, the State Police has failed to satisfy its burden under FOIL.

Moreover, even if the State Police had provided "particularized and specific" facts supporting its claim that some material in requested records is exempt, this does not mean that the document is entirely exempt from disclosure. FOIL expressly provides that an agency may deny access to records "or portions thereof." N.Y. Pub. Off. Law § 87(2). As the Third Department has explained, "[N]ot all of a document is necessarily exempt because a portion of it would be." *Polansky v. Regan*, 81 A.D.2d 102, 104 (3d Dep't 1981) (citation omitted). To the contrary, the Court of Appeals has declared that "blanket exemptions" for particular documents,

or types of documents, are "inimical" to FOIL's policy of open governance. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996).

Reflecting this approach, New York courts have a well-established policy of ordering redaction where some, but not all, information in requested records is within a statutory exemption. In particular, ample authority in the Court of Appeals and below favors disclosure of records kept by police departments, even where some information in the records is exempt. *See Gould*, 89 N.Y.2d at 275 (ordering disclosure of NYPD complaint follow-up reports with opinions and analysis subject to the intra-agency exemption redacted); *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 159 (1999) (explaining that, for officer disciplinary reports, "disclosure for uses that would not undermine the protective legislative objectives [of the personnel records exemption] could be attained...through redaction by the agency having custody of the records"); *Johnson v. New York City Police Dep't*, 257 A.D.2d 343, 349 (1st Dep't 1999) (holding that disclosure of unredacted complaint follow-up reports could pose a threat to witness safety, but rejecting the NYPD's claim of a blanket exemption and instead ordering disclosure of the records with names and identifying information redacted); *Capital Newspapers Div. of Hearst Corp. v. Albany*, 63 A.D.3d 1336, 1339 (3d Dep't 2009) (finding that gun tags were exempt personnel records, but were nevertheless subject to disclosure, and stating that redacting officers names would "adequately protect the individual officers"), *leave to appeal granted*; *see also New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 486 (2005) (directing release of call tapes and transcripts of 911 calls from September 11, 2001 with portions revealing intimate moments of terror redacted to avoid violation of privacy under section 87(2)(b)); *Fink*, 47 N.Y.2d at 572-73 (ordering disclosure of a manual created to instruct

investigators into nursing home fraud, with specialized techniques subject to the law enforcement exemption redacted).

B. *FOIL's Law Enforcement Exemption Only Applies to a Narrow Set of Records Where Disclosure Would Enable Suspects to Frustrate Investigations or Evade Detection.*

The seminal case interpreting the scope of the FOIL exemption for non-routine investigative techniques is *Fink v. Lefkowitz*, a case concerning access to records related to the Attorney General's investigation of the state's nursing home industry. 47 N.Y.2d at 569.

In 1974, amid widespread reports of abuse, fraud, and inadequate governmental supervision of the nursing home industry in the state, a Special Prosecutor was appointed and he proceeded to compile a comprehensive office manual entitled "Materials on the Nursing Home Investigation" for the use of his staff. In addition to providing an overview of the nursing home industry and the Medicaid reimbursement system, the manual contained "a step-by-step guide to an investigation and audit of a nursing home, including specific illustrations of some of the techniques and procedures which had proven successful in detecting nursing home fraud" and "a sample nursing home investigation" featuring the audit and investigative reports that had lead to a successful prosecution by the Deputy Attorney-General. *Id.* at 570.

Petitioner, an attorney for several nursing homes, requested a copy of the manual under the former version of the Freedom of Information Law. After his request was denied, pursuant to the exemption for non-routine investigative techniques, an Article 78 proceeding commenced. *Id.*

In rendering its decision, the Court of Appeals first described the purpose of the law enforcement exemption.

> Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information. However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

Id. at 572 (internal citations omitted).

The Court went on to distinguish records compiled for law enforcement purposes which illustrate investigative techniques from those which "articulate the agency's understanding of the rules and regulations it is empowered to enforce," stating, "Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed." *Id.* Making the latter type of records public, the Court declared, "does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements." *Id.* Thus, the Court applied the following standard to cases involving the scope of section 87(2)(e)(iv):

> Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is **whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel**...The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe.

Id. at 573 (emphasis added).

Under this standard, the *Fink* Court affirmed the withholding of specific audit procedures because disclosure would alert nursing home operators to items to which investigators would pay particular attention, thus enabling the operators to continue to evade their responsibilities under the law. *Id.*

Subsequent cases have upheld the *Fink* standard. In *Spencer v. New York State Police*, the Third Department considered a FOIL request from an inmate for "all investigative reports, memoranda, notebook records, prior statements of witnesses and scientific reports held by [the State Police] relating to the double homicide" for which he was convicted. *Spencer v. New York State Police*, 187 A.D.2d 919, 920 (3d Dep't 1992). The State Police rejected his request, citing section 87(2)(e)(iv).

The court held that petitioner was not entitled to disclosure of portions of the file relating to the "method by which respondent gathered information about petitioner and his accomplices from certain private businesses" because the disclosure of such information would "enable future violators of the law to tailor their conduct to avoid detection by law enforcement personnel." *Id.* at 922.

However, the court also declared that the remainder of the file, including portions of the file describing surveillance of places which petitioner was known to frequent and procedures regarding the establishment of roadblocks, had to be disclosed because, "[N]othing in the remainder of the file contains information pertaining to nonroutine investigatory procedures." *Id.* Pursuant to this holding, the court analyzed the responsive documents *in camera*, and disclosed a majority, though not all, of petitioner's requested documents. *Id.*

In a similar case, *Allen v. Strojnowski*, a convict requested information from the State Police and Westchester County District Attorney, including "physical evidence, such as tools and items of clothing, the names, addresses, and statements of confidential witnesses, Grand Jury testimony, and reports of microscopic comparisons." 129 A.D.2d 700, 701 (2d Dep't 1987). The court held that procedures relating to how police "process[] a homicide scene" could be shielded by the law enforcement exemption. *Id; see e.g. Ennis v. Slade*, 179 A.D.2d 558, 559

(1st Dep't 1992) ("Records of a "Buy operation" are compiled for law enforcement purposes and, if disclosed, would reveal confidential sources and information, as well as expert criminal investigative techniques); *O'Donnell v Donadio*, 259 A.D.2d 251 (1st Dep't 1999) (Canine training categories can be properly shielded from disclosure, as those would reveal non-routine criminal investigative techniques and procedures).

Lastly, the case of *De Zimm v. Connelie*, 102 A.D.2d 668 (3rd Dep't 1984), *aff'd* 64 N.Y.2d 860 (1985), is useful to differentiate the responsive records at issue in the instant case from the type of records that justifiably fall under the law enforcement exemption.

In *De Zimm*, petitioner, at the time he was involved in a criminal lawsuit, requested specific rules and regulations concerning the procedures followed when employing electronic surveillance and monitoring devices during criminal investigations. 102 A.D.2d at 669. The State Police refused to disclose the techniques, citing section 87(2)(e)(iv).

The court concluded, after an *in camera* review of responsive records, that the techniques described therein were not "routine." *Id.*; *see also N.Y. Civ. Liberties Union v. N.Y.C. Police Dep't*, 2009 N.Y. Misc. LEXIS 2542 (N.Y. Cty. Sup. Ct. 2009) (holding Public Officers Law § 87(2)(e)(iv) exemption applicable to document request dealing with Lower Manhattan Security Initiative because there is "nothing routine" about an anti-terrorist surveillance system). To the contrary, the court held:

> [E]avesdropping is an extraordinary measure employed in limited cases only. In our opinion, revealing information concerning eavesdropping techniques could allow miscreants to tailor their activities to evade detection. In particular, section 13G2 of article 13G of the manual discusses special restrictions placed upon the State Police in addition to those restrictions imposed by law. Thus, a person engaged in illegal activity with knowledge of these special restrictions would be alert for the techniques used in possible eavesdropping situations. In addition, section 13G11 mentions by trade name various devices used and section 13G9 contains a detailed procedure concerning the use of "slave or lease lines".

Id. at 671.

Unlike descriptions of eavesdropping techniques, *De Zimm*, *supra*, or detailed descriptions of how to detect fraudulent activity, *Fink*, *supra*, the responsive records in this case pose no threat to the State's ability to detect, interrogate, and convict criminal suspects. To the contrary, the procedures outlined in the responsive records are the epitome of routine, in that they apply to all criminal suspects in police custody subjected to recorded interrogations. *See* Comm on Open Gov't FOIL-AO-13330 (Police department guidelines giving uniformed police officers authority or direction to "strip search" individuals arrested for non-felony offenses should be disclosed insofar as they are "routine" or they would not endanger life or safety of any person).

Moreover, the procedures are likely subject to the discretionary authority of supervisors within the State Police, and do not contain information that would enable a suspect to evade prosecution. *See* Comm on Open Gov't FOIL-AO-4805 (Widely used records involving investigative techniques, **including procedures for interviewing potential witnesses** would not likely fall within scope of denial; authority to deny access under FOIL pertains only to those criminal investigative techniques and procedures that are not routine).

II. PETITIONER NYSDA 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. *See* N.Y. Pub. Off. 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." *See, e.g.*, *Beechwood Restorative Care Ctr. v. Signor*, 808 N.Y.S.2d 568, 571-72 (2005) (rejecting fee claim under former "interest to general public" standard). The legislative history to the 2006 amendment states that "[t]his bill strengthens the enforcement of [a 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 (emphasis added). 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." N.Y. Pub. Off. Law § 89(4)(c).

Based on failure of Respondents to demonstrate that the requested material indeed qualifies for exemption and the inapplicability of the law enforcement exemption to the records at issue in this case under the clearly established precedent of *Fink*, the State Police lack a reasonable basis in law for its wholesale denial of records requested in the NYSDA's request. Indeed, the NYSDA made every effort to avoid litigation, setting forth the rule established by *Fink* in its administrative appeal, urging State Police to produce the documents without need to resort to judicial intervention. Gradess Aff. ¶ 6.

CONCLUSION

For the foregoing reasons, the Court should direct Respondents to disclose records that are responsive to Petitioner's November 2, 2009 Freedom of Information Law request.

Respectfully submitted,

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