

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

CITY OF ROCHESTER and ROCHESTER POLICE  
DEPARTMENT,

Respondents.

INDEX NO: \_\_\_\_\_

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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## **PRELIMINARY STATEMENT**

The New York Civil Liberties Union (“NYCLU”) seeks relief from this Court because the City of Rochester and the Rochester Police Department (“RPD”) have constructively denied the NYCLU’s September 15, 2020 request for records under the Freedom of Information Law (“FOIL”). The request sought records involving the policies, practices, and conduct of the RPD, many of which were made accessible by the June 2020 repeal of section 50-a of the Civil Rights Law. These records are vital to the public’s understanding of police accountability in Rochester, but nearly three months since the filing of the request, the respondents have not granted or denied it or provided a substantive response of any kind in clear violation of its obligations under FOIL. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to require the respondents to produce responsive records. The petitioner also seeks an award of attorneys’ fees and costs in light of the respondents’ failure to adhere to FOIL’s statutory requirements.

## **FACTUAL BACKGROUND & PROCEDURAL HISTORY**

Until this summer, the greatest obstacle to police transparency in New York was section 50-a, which generally excluded from disclosure “police personnel records used to evaluate performance towards continued employment or promotion” that were otherwise presumptively public. (C.R.L. § 50-a [repealed June 12, 2020]). Although the intended breadth of section 50-a when first enacted in 1976 was narrow, its scope quickly expanded, with police departments and unions leading the charge. Indeed, according to a report from the Department of State Committee on Open Government, by 2014, section 50-a had been “expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer” (*see* Exhibit A to the Verified Petition). However, amid the nationwide reckoning with racism following the death of

George Floyd, Governor Andrew Cuomo signed the #Repeal50a Bill (S8496/A10611) on June 12, 2020.

Despite this push for transparency in New York, the respondents continue to shield crucial information regarding police misconduct from the public. This year, the City of Rochester withheld body camera footage of RPD officers' interaction with Daniel Prude, a Black man who died one week after being hooded and pinned to the ground by RPD officers on March 23, 2020 (*see* Exhibit B to the Verified Petition). The City of Rochester spent months hiding this footage from the public, despite a FOIL request submitted by the Prude family's attorney on April 3, 2020 (*see* Exhibit C to the Verified Petition). This footage was not released to Prude's family until August 12, 2020 (*id.*).

Rochester's Deputy Mayor James P. Smith issued a report dated September 14, 2020 (revised September 16, 2020), finding that the City's "handling of the initial FOIL and appeal filed by the attorneys for Mr. Prude's family seemed disorganized," that the Municipal Attorney who handled the request appeared to "completely miss the significance of the subject matter," and that the Records Access Officer failed to review the body camera footage and notify the Mayor of his findings. Following the release of Deputy Mayor Smith's report detailing their failure to adequately respond to the Prude family's FOIL request, the Records Access Officer, Justin Roj, and Corporation Counsel, Tim Curtin, were suspended for 30 days without pay (*see* Exhibit B to the Verified Petition).

#### *The NYCLU's FOIL Request to the RPD*

The NYCLU submitted a FOIL request to the RPD on September 15, 2020, seeking records related to RPD conduct, many of which had previously been shielded from the public by section 50-a. The request sought documents related to RPD disciplinary records, use of force, stops,

civilian complaints, policies, investigative reports, diversity, trainings, and collective bargaining agreements (*see* Exhibit D to the Verified Petition). Mr. Roj acknowledged the request in an email dated September 22, 2020. His email stated that “[d]ue to the volume or complexity” of the request and because the “records are extensive and require more time for a complete search, legal review and redaction,” the City estimated that the request “will be completed on or about 3/31/21.” The email did not clarify whether the City was granting or denying any part of the request, and it implied that the City would not make even that threshold determination until March 2021, over six months after the request was filed (*see* Exhibit E to the Verified Petition).

Following that acknowledgment, the NYCLU has received no further response to its FOIL request even though the NYCLU’s counsel made several follow-up phone calls to inquire about its progress. On a September 24, 2020 phone call, City of Rochester employee Amalia Bellucci referred the NYCLU’s counsel to Rochester Municipal Attorneys Stephanie Prince and Shani C. Mitchell, who she said would be handling the request. However, when asked for details about the delay on a September 28, 2020 phone call, Ms. Mitchell stated that she is not the Records Access Officer and did not know details about how the request was being handled. Ms. Mitchell memorialized this phone call in an email dated September 28, 2020, in which she directed the NYCLU to file an administrative appeal directly with her and stated that she was not aware of where the request was “in the queue” or “how it was currently being handled” (*see* Exhibit F to the Verified Petition).

Mr. Roj then acknowledged the original FOIL request for a second time in an email dated October 5, 2020, but again did not clarify whether the City was granting or denying the request or whether the City would make any substantive determination before March 2021 (*see* Exhibit G to the Verified Petition). By letter dated October 16, 2020, the NYCLU requested a phone call with

Mr. Roj to discuss a sensible path forward with respect to the request (*see* Exhibit H to the Verified Petition). Mr. Roj did not respond to this letter.

By letter dated November 10, 2020, eight weeks after the City first acknowledged receipt of the FOIL request but failed to grant or deny it, the NYCLU filed an administrative appeal for the constructive denial of its FOIL request with Mr. Roj and Ms. Mitchell (*see* Exhibit I to the Verified Petition).

As of the filing of this petition, the respondents still have not responded further to the request, provided a single document, claimed any exemptions, or responded to the administrative appeal. Having exhausted administrative remedies, the NYCLU files this Article 78 proceeding seeking immediate production of responsive documents, as well as attorneys' fees and costs.

### **ARGUMENT**

#### **I. THE RPD VIOLATED FOIL BY FAILING TO PRODUCE ANY RECORDS OR RESPOND TO THE APPEAL WITHIN THE STATUTORY TIME.**

By failing to provide any response to the initial FOIL request or the administrative appeal within the statutory time, the respondents have constructively denied the FOIL request in its entirety. Accordingly, the Court should order the respondents to immediately provide responsive documents.

The New York State Legislature, in enacting FOIL, created a broad right of public access to government records to foster transparency and accountability in government (Public Officers Law § 84). “All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)” (*Gould v New York City Police Dept.*, 89 N.Y.2d 267, 274-275 [1996]; *Buffalo News, Inc. v Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 [1994] [“All records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant.”]). In response to a

written request for records, “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” (*Legal Aid Soc. v New York State Dept. of Corr. & Community Supervision*, 105 A.D.3d 1120, 1121 [3d Dept 2013], quoting *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 N.Y.3d 435, 440-441 [2005]; see Public Officers Law § 89 (3)(a)). An agency is required to respond to a FOIL request within five business days, or provide a statement of the approximate date, which should be reasonable under the circumstances, when such request will be granted or denied. Public Officers Law § 89 (3)(a). The respondents failed to grant or deny the request and suggested that it would not respond until March 31, 2021, over six months after the request was made.

Considering the City’s failure to comply with its FOIL obligations, the NYCLU appealed pursuant to Ms. Mitchell’s instruction and Public Officers Law Section 89 (4). Despite being statutorily required to respond “within ten business days” by “explain[ing] in writing . . . the reasons for further denial, or provid[ing] access to the record sought,” the respondents again failed to respond (Public Officers Law § 89 (4)(a)).

The respondents’ actions constitute a constructive denial and entitle the petitioner to initiate an action in state court (*see* 21 NYCRR 1401.7(f) [“A failure to determine an appeal within 10 business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.”]; see *Council of Regulated Adult Liquor Licensees v City of New York Police Dept.*, 300 A.D.2d 17, 18 [1st Dept 2002] [“Petitioners exhausted all administrative remedies when, after submitting their appeal of the Department’s initial denial of their request, they received no reply from the Department within the statutorily mandated 10-day response period.”]; *Village of Brockport v Calandra*, 191 Misc.2d



718, 727 [Sup Ct, Monroe County 2002], *aff'd* 305 A.D.2d 1030 [4th Dept 2003] [“[w]here an appeal is not addressed within 10 days, the requesting party has exhausted its administrative remedies and may initiate a challenge to a constructive denial of access under CPLR article 78”]). Under these circumstances, the petitioner is entitled to an order requiring immediate compliance with FOIL including production of responsive documents.

## II. THE NYCLU IS ENTITLED TO ATTORNEYS’ FEES.

The petitioner respectfully requests an award of reasonable attorneys’ fees and litigation costs on two separate grounds, given the respondents’ complete failure to adhere to FOIL’s requirements. First, the petitioner is entitled to attorneys’ fees and costs because the respondents failed to provide any basis, reasonable or otherwise, for denying access to the records. Second, even if the petitioner were not entitled to mandatory fees—which it is—it is within this Court’s discretion to grant fees when a government agency flouts its legal obligations under FOIL by failing to respond to a FOIL request within the statutory time, as the City has done here.

Regarding the first ground supporting the award of attorneys’ fees, courts are required to assess reasonable attorneys’ fees and costs when a party has “substantially prevailed” and the agency had “no reasonable basis for denying access” to the records in dispute (Public Officers Law § 89 (4)(c)). The respondents constructively denied both the initial FOIL request and the administrative appeal. They therefore failed to articulate any basis, let alone a reasonable one, for denying access to the records. Further, if this Court orders the respondents to disclose the requested documents in response to this Petition, the NYCLU will have “substantially prevailed” for the purposes of this provision (*Matter of Madeiros v New York State Educ. Dept.*, 30 N.Y.3d 67, 79 [2017] [finding that the petitioner “substantially prevailed” when the respondent had “made no disclosures, redacted or otherwise, prior to petitioner’s commencement of this CPLR article 78

proceeding”]; *Bottom v Fischer*, 129 A.D.3d 1604, 1605 [4th Dept 2015] [petitioner substantially prevailed when respondent made disclosures only after “the court directed it to justify their nondisclosure”]). Having made no disclosures—redacted or otherwise—prior to the petitioner’s commencement of this proceeding, the petitioner is statutorily entitled to attorneys’ fees and costs.

Regarding the second ground supporting the award of attorneys’ fees, this Court has discretion to grant fees when a party has “substantially prevailed” and the “agency failed to respond to a request or appeal within the statutory time” (Public Officers Law § 89 (4)(c)). The Supreme Court in Rockland County held that where a respondent was “delinquen[t]” in adhering to FOIL’s statutory time, the petitioner was entitled to fees (*Lucas v Bd. Of Educ. of East Ramapo Cent. Sch. Dist.*, 57 Misc.3d 1207(A), 2017 NY Slip Op 51297[U], \*4 [Sup Ct, Rockland County 2017]). The Court found that because the respondent “failed to either grant or deny Petitioners’ FOIL requests and failed to render a decision with respect to Petitioners’ appeals of the constructive denials of their FOIL requests,” that the “purpose in permitting an award of attorney’s fees and costs in a proceeding such as this—to deter unreasonable delays and denials of access—is entirely warranted” (*id.*). Similarly, the respondents failed to respond to the NYCLU’s appeal within the statutory time-frame provided by New York Public Officers Law § 89 (4)(c)(ii) (*see South Shore Press, Inc. v Havemeyer*, 136 A.D.3d 929 [2d Dept 2016] [finding attorneys’ fees warranted where entity failed to comport with the statutory time limits of FOIL]; *Acme Bus Corp v County of Suffolk*, 136 A.D.3d 896, 898 [2d Dept 2016] [finding an award of attorneys’ fees appropriate, when, among other things “the respondents did not timely decide the petitioner’s agency appeal”]). As in *Lucas*, this Court should grant attorneys’ fees in order to dissuade further improper behavior such as the respondents’ actions here.

## CONCLUSION

For the foregoing reasons, the petitioner the NYCLU respectfully requests that the Court order the City of Rochester and the Rochester Police Department to produce the records the petitioner requested in its September 15, 2020 FOIL request, and to pay reasonable attorneys' fees and costs associated with this litigation.

DATED: New York, New York  
December 14, 2020

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