

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

CITY OF BUFFALO and BUFFALO 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 seeks relief from this Court because the City of Buffalo and the Buffalo Police Department (“BPD”) have constructively denied the NYCLU’s September 15, 2020 request for records under the Freedom of Information Law. The request sought records involving the policies, practices, and conduct of the BPD, 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 Buffalo, but, nearly four months since the filing of the request, the respondents have still not granted or denied it or provided a substantive response. This is a clear violation of their obligations under FOIL. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to require the respondents to produce responsive records. The NYCLU 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 (C.R.L. § 50-a [repealed June 12, 2020]).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). Last year, however, amid the nationwide reckoning with racism following the

death of George Floyd, this untoward expansion and effort to withhold information from the public was reversed and repudiated when the legislature passed and Governor Andrew Cuomo signed the #Repeal50a Bill (S8496/A10611).

Despite this statutorily mandated requirement for transparency in New York, the respondents continue to shield crucial information regarding police misconduct from the public.

*The NYCLU's FOIL Request to the BPD*

The NYCLU submitted a FOIL request to the BPD on September 15, 2020, seeking records related to BPD conduct, many of which had previously been shielded from the public by section 50-a. The request sought documents related to BPD disciplinary records, use of force, stops, civilian complaints, policies, investigative reports, diversity, trainings, and collective bargaining agreements (*see* Exhibit B to the Verified Petition). Mr. Jeff Rinaldo acknowledged the request in a letter dated September 21, 2020. His letter stated, “[d]ue to the large number of requests the department is currently handling, please allow (40) business days” for a determination regarding the request (*see* Exhibit C to the Verified Petition).

Following that acknowledgment, the NYCLU received no further response to its FOIL request for significantly longer than 40 business days. By letter dated December 3, 2020, ten weeks after the BPD first acknowledged receipt of the FOIL request but failed to grant or deny it, the NYCLU filed an administrative appeal of the constructive denial of its FOIL request (*see* Exhibit D to the Verified Petition). The BPD failed to respond within ten business days as required under N.Y. Pub. Off. Law § 89(4)(a). On December 21, 2020, the NYCLU notified the BPD that its failure to respond within ten business days constituted a denial of the appeal, and that the NYCLU planned to pursue all available remedies based on this denial.

Given this apparent constructive denial, the NYCLU was prepared to file an Article 78 petition in January 2021, but held off on doing so upon receipt of a letter from the BPD on January 21, 2021, providing notice that it was ready to produce the disciplinary file of a single BPD officer, Lt. Michael A. Delong (*see* Exhibit E to the Verified Petition). While the production of the disciplinary file of Lt. Delong was a step in the right direction, it did not come close to fully and completely responding to the FOIL Request. In search of clarification, the NYCLU sent a letter to the BPD on January 29, 2021, noting that the BPD had still failed to address whether it would produce the remaining records sought in the FOIL request (*see* Exhibit F to the Verified Petition). The NYCLU then submitted payment for Lt. Delong's file on January 25, 2021, and again requested that the BPD promptly respond regarding whether and when it planned to provide records responsive to the remaining FOIL requests. The BPD never provided such information.

On February 3, 2021, the BPD produced Lt. Delong's discipline file via email. On February 5, 2021, the NYCLU acknowledged receipt and, for a third time, asked for the BPD's prompt response regarding whether and when it planned to provide records responsive to the remaining FOIL requests. After further unsuccessful attempts to contact the BPD on February 11 and February 25, 2021, the NYCLU filed another administrative appeal of the constructive denial of its FOIL request on March 11, 2021 (*see* Exhibit G of the Verified Petition), with the hopes of arranging a discussion to find a path forward for the production of the requested records. The BPD has yet to respond to this administrative appeal.

As of the filing of this petition, the BPD has produced only a portion of a single officer's disciplinary file, and still has not provided any date by which it intends to produce the remaining disciplinary files and other documents responsive to the NYCLU's FOIL requests, and has not identified any basis for withholding these outstanding materials. As detailed below, such a

categorical denial is inconsistent with FOIL's presumption that all public agency records are available to the public unless specifically exempted. Having exhausted administrative remedies, the NYCLU files this Article 78 petition seeking immediate production of responsive documents, as well as attorneys' fees and costs.

### **ARGUMENT**

#### **I. THE BPD VIOLATED FOIL BY FAILING TO PRODUCE 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 beyond one single unexplained partial file, the respondents have constructively denied the NYCLU's FOIL request. 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). Although the respondents claimed that they would not be able to provide a determination until November 19, 2020, that day has come and gone and respondents have still not provided any further responses beyond an unexplained partial record of Lt. Delong's file.

Considering the BPD's failure to comply with its FOIL obligations, the NYCLU appealed pursuant to 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" (Public Officers Law § 89 (4)(a)), the respondents have failed to respond.

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 NYCLU 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 NYCLU 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 NYCLU 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 BPD 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 appeals. They wholly 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 any of 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 commencement of the CPLR article 78 proceeding was what prompted the agency to produce responsive documents]; *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 one inadequate disclosure 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)). In one persuasive case, 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," 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 here 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 NYCLU respectfully requests that the Court order the City of Buffalo and the Buffalo Police Department to produce the records the NYCLU requested in its September 15, 2020 FOIL request, and to pay reasonable attorneys' fees and costs associated with this litigation.

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