

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

In the Matter of

SARAH SOUTHEY,

Petitioner,

-against-

CITY UNIVERSITY OF NEW YORK,

Respondent.

Index No.: _____

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules.

MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

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PRELIMINARY STATEMENT

Petitioner Sarah Southey brings this lawsuit to challenge the City University of New York's denial of her Freedom of Information Law request for CUNY's investment holdings reports and contracts with certain businesses. Ms. Southey, a CUNY Law student involved in on-campus advocacy for Palestinian human rights, seeks these records to support student efforts to advocate for CUNY's divestment from certain companies implicated in Israel's military campaigns. CUNY's denial of these records, which would shed critical light on how the university is investing and spending public money and support Ms. Southey's freedom of expression, is impermissible under FOIL.

To justify its refusal to disclose its investment records, CUNY raises FOIL's trade secrets exemption. The trade secrets exemption, which under FOIL must be construed narrowly to permit maximum public access to government records, plainly does not apply because records disclosing the investment holdings of a public entity are not a "trade secret" and CUNY cannot show that the disclosure of the records would result in a substantial competitive injury to its investment manager. CUNY previously disclosed its investment reports to students engaged in a similar prison-divestment campaign. Moreover, these sorts of investment records are routinely published by private institutions, as well as by New York State agencies and comparable institutions of higher education in accordance with the important public policies of transparency in government and having an informed electorate about the government's dealings. But rather than disclose the records again, CUNY asserts that it can keep these important documents secret. It cannot.

CUNY also impermissibly denied Ms. Southey's request for contracts between CUNY and certain businesses by failing to diligently search for responsive records. That at least some contracts exist and are within CUNY's control is evident in publicly available state procurement records, which explicitly reference the contracts.

Because CUNY’s denials are unsupported both legally and as a matter of public policy, this Court should grant the petition and order the production of Ms. Southey’s requested records. Should the Court order disclosure, Ms. Southey respectfully submits that an award of reasonable attorney’s fees is appropriate.

FACTUAL BACKGROUND

Petitioner, Sarah Southey, is a student at the City University of New York School of Law where she is pursuing a legal education and a career as a public interest lawyer (affirmation of Sarah Southey ¶ 1 [“Southey Affirmation”]). The City University of New York (“CUNY”) touts itself as “the nation’s leading engine of social and economic mobility” (City University of New York School of Law, *About CUNY Law*, <https://www.law.cuny.edu/about-us/> [last accessed Nov. 1, 2024] [“About CUNY Law Webpage”]), and is “the nation’s largest urban public university” spanning twenty-five campuses across New York City’s five boroughs (City University of New York, *About CUNY*, <https://www.cuny.edu/about/> [last accessed Nov. 1, 2024]).

CUNY’s only law school (“CUNY Law”) was founded in 1983 with a mission “to train outstanding public interest lawyers dedicated to using the law as a tool for social good” (About CUNY Law Webpage). As part of that mission, CUNY Law “seek[s] to not only expand access to justice but also to transform the very idea of what justice looks like.” (*Id.*)

Motivated by her longstanding interest in social justice and CUNY Law’s promises to offer an education in service of the public, social good, and “movement-led lawyering,” Ms. Southey chose to join the CUNY Law community to support its efforts to “address overlapping and intersecting injustices and oppression” (Southey Affirmation ¶¶ 2–3). She has vigorously pursued opportunities to engage in social justice campaigns both in- and outside the classroom (*id.* ¶ 4). In particular, Ms. Southey has sought to help advance and “support[] the movement for Palestinian liberation,” joining CUNY for Palestine (“C4P”) and CUNY Law Students for Justice in Palestine

(“CUNY Law SJP”), two student groups engaged in on-campus advocacy on the issue (*id.* ¶ 5). Having “CUNY divest from companies that profit from Israeli settler-colonialism and genocide” is a central goal for C4P and CUNY Law SJP. (*Id.*)

Presently, and historically, CUNY campuses, including CUNY Law, have been steeped in the public discourse and protest activity concerning a host of political issues (*id.* ¶ 6). This has included discussion regarding the rights of Palestinians and criticism of the Israeli government and its military actions. (*See id.*) Calls for divestment, including calls for CUNY to support the Boycott, Divestment, and Sanctions (“BDS”) movement, have been at the heart of student activism on this issue; student-led resolutions, public statements, and the “historic, nationwide student encampments [that] captured global attention—including in Palestine and Gaza—in the Spring of 2024,” have all included divestment demands that are informed by public reporting on CUNY’s investments and contracts (*id.* ¶¶ 6–7). Faculty at CUNY also have contributed to the public discourse regarding Palestinian human rights more broadly and divestment specifically, underscoring the significant public interest in this issue (*see id.* ¶ 7).

Ms. Southey and the student groups’ calls for divestment are “part of a tradition of economic protests that are deeply rooted in anti-apartheid movements, including the movement for Palestinian liberation” (*id.* ¶ 6). CUNY is no stranger to these kinds of campaigns, and these tactics are not uniquely employed by advocates for Palestinian human rights (*see id.* ¶ 8). Indeed, advocates supporting the rights of incarcerated people have engaged in similar campaigns at CUNY. (*Id.*) Most relevant for the purposes of this petition, in 2015, representatives from a prison-divestment group sought—and procured—CUNY’s investment reports through a FOIL request. (*Id.*; affirmation of Guadalupe Aguirre [“Aguirre Affirmation”], exhibit E, CUNY Investment Holdings Report, dated Sept. 30, 2014 [“2014 CUNY Investment Holdings Report”].) They sought

these records as part of their advocacy calling for divestment from companies that are financially involved with prisons and jails (Southey Affirmation ¶ 8). Notably, other public entities, including public universities and the New York State Comptroller, routinely publish investment-related documents, including those that reveal the entity's financial holdings in specific companies and equities (*see* Aguirre Affirmation, exhibit F, exemplars of publicly available investment holdings reports). Documents concerning public agencies' investment policies and practices are important sources of information for the public's awareness about its government's financial dealings and support the public's ability to engage in informed public discourse and advocacy (*see* Southey Affirmation ¶¶ 8–9).

Ms. Southey supports and organizes for BDS on campus and Palestinian rights more broadly as a member of C4P and CUNY Law SJP (*id.* ¶¶ 5–9). As part of her advocacy, Ms. Southey filed a request under the Freedom of Information Law (“FOIL”) to CUNY's central office seeking various records pertaining to CUNY's investment policies and practices (*id.* ¶ 9), the procedural history of which is outlined below. Ms. Southey sought these records on behalf of C4P and CUNY Law SJP. (*Id.*) In addition to her strongly held beliefs that “economic forms of protests are integral to the struggle for Palestinian liberation,” Ms. Southey's BDS-related advocacy at CUNY Law is animated by her conviction that the public, particularly university students, has a right to know and determine how universities invest taxpayer money. (*Id.*)

PROCEDURAL HISTORY

A. Ms. Southey's FOIL Request and CUNY's Records Access Officer's Decision

Ms. Southey submitted her request under the Freedom of Information Law to CUNY on March 13, 2024 (Aguirre Affirmation, exhibit A). Relevant to this petition, Ms. Southey sought:

- 1) “All records and reports regarding CUNY Portfolio Holdings . . . including but not limited to

CUNY’s Long-Term Investment Pool (LTIP) and Short-Term Investment Pool (STIP) (including any CUNY campus(es) specifically and any College Foundations) since January 1, 2020”; and 2) “All contracts between CUNY (including any CUNY campus(es) specifically and any College Foundations) and all of the companies listed below including a copy of the contract, dates of contracts, and amounts of contracts.” (*Id.*) The list included 30 entities, such as Dell, Boeing, Lockheed Martin, Chevron, PUMA, SodaStream, and Siemens.¹ (*Id.*)

In response, CUNY sought “clarify[ing]” information to process the request (Aguirre Affirmation, exhibit B, full correspondence between Sarah Southey and CUNY at 15). Most relevant for the purposes of this petition, CUNY asked Ms. Southey to “specify the time period (starting date and/or year)” for her request for its contracts with the various companies. (*Id.*) Ms. Southey clarified that she sought “All contracts currently in effect as of . . . March 20, 2024” (*id.* at 12). On March 27, 2024, CUNY requested additional information, this time asking Ms. Southey to “specify which ‘records’ and which ‘reports’” pertaining to CUNY’s investments she sought (*id.* at 9). Responding to CUNY’s inquiry, Ms. Southey clarified that she sought “all portfolio holdings reports listing stockholdings by amount” (*id.* at 8). On April 1, 2024, Ms. Southey further provided an example of the type of reports she sought in the form of a portfolio holding report from 2014 that CUNY had previously released via a similar FOIL request (*id.* [referencing an “attached portfolio holding report with stock holding amounts from 2014”]). On April 15, 2024, CUNY informed Ms. Southey that it needed until April 23, 2024, to respond to her FOIL request (*id.* at 7).

In a subsequent message that same date, CUNY again sought additional information from

¹ Ms. Southey’s FOIL request also sought two additional sets of records pertaining to CUNY’s investment policies not at issue here. The FOIL request which sets out these additional items, as well as the full list of companies for which the contracts are sought, is attached as **Exhibit A** to the Aguirre Affirmation.

Ms. Southey. Namely, CUNY inquired into how Ms. Southey had obtained the 2014 portfolio holding report and whether she had obtained it from CUNY (*id.* at 5). Ms. Southey confirmed that CUNY had provided the 2014 portfolio holding report via a prior FOIL request. (*Id.*)

On April 23, 2024, CUNY again delayed its response date for Ms. Southey's FOIL request (*id.* at 4). This time, CUNY stated it would respond to the request by May 24, 2024. (*Id.*)

On May 24, 2024, CUNY largely denied Ms. Southey's request. In response to the investment holdings reports at issue here, CUNY invoked Public Officers Law ("POL") section 87(2)(d), also known as the "trade secrets exemption," to fully withhold every part of every responsive investment report (*id.* at 1–2). Specifically, CUNY claimed such records "were submitted by a commercial enterprise and, if disclosed, would cause substantial injury to the competitive position of the subject enterprise" (*id.* at 2). CUNY further noted that because "FOIL disclosure is the sole means by which competitors can obtain the requested information. . . . the concern for substantial injury to the competitive position of the subject enterprise is significantly greater." (*Id.*)

Regarding Ms. Southey's request for CUNY's active contracts with various companies, CUNY claimed to have conducted a comprehensive search at the University Central Office that failed to yield any responsive records. (*Id.*) In addition, CUNY directed Ms. Southey to resubmit this part of her request to the CUNY colleges. (*Id.*)

B. The Administrative Appeal and CUNY's Decision Upholding the Denial of the Request

Ms. Southey timely appealed CUNY's denial of her request, challenging both the applicability of the trade secrets exemption to CUNY's investment holdings reports and the adequacy of CUNY's search for its existing contracts with the various businesses (Aguirre Affirmation, exhibit C, June 21, 2024 administrative appeal letter). In challenging the applicability

of FOIL’s trade secrets exemption, Ms. Southey reiterated that CUNY had previously released its investment reports in response to a FOIL request several years prior. (*Id.* [“CUNY’s response is even more puzzling because virtually identical records . . . were released in 2015”].) Figure 1 below is an excerpt of CUNY’s previously disclosed investment report, the full version of which is attached as **Exhibit E** to the Aguirre Affirmation.

City University of New York (CUNY)
Portfolio Holdings by Manager as of September 30, 2014
 Manager A

<u>Region/Country/Security</u>	<u>Total Size of Holding (\$000)</u>
<u>North America - Dev.</u>	
United States	
Yum Brands Inc	120.2
<u>Europe - Dev.</u>	
Luxembourg	
Tenaris Sa	246.3
Portugal	
Jeronimo Martins	97.1
United Kingdom	
Bhp Billiton Plc	118.0
Sabmiller Plc	208.3
Standard Chart Plc	217.2

Figure 1 – CUNY Investment Holding’s Report dated September 30, 2014 (excerpt)

CUNY upheld its denial of the FOIL request. As to Ms. Southey’s request for CUNY’s investment reports, CUNY reasserted that responsive records were exempt under POL § 87(2)(d) (Aguirre Affirmation, exhibit D, CUNY denial of administrative appeal, dated July 9, 2024). CUNY further stated, “the decisions about which stocks to purchase were made by the investment manager. Those investment decisions reflect the trade secrets and strategies of the investment manager, and public dissemination of information related to those strategic decisions could

reasonably be expected to harm the competitive position of the managing company” (*id.* at 4). In response to Ms. Southey’s invocation of CUNY’s prior release of its investment reports, the appeals officer dismissed it as “meritless,” first noting that the 2015 production listed the type of details CUNY now claims would harm the investment manager (*id.* at 5). Second, CUNY stated that a different company is responsible for managing the account at issue. (*Id.*) Third, CUNY asserted that the 2014 report had been produced erroneously. (*Id.*) CUNY’s response did not address or in any way discuss the possibility of redaction (*see id.* at 4–5).

CUNY’s FOIL appeals officer also upheld its denial regarding the request for current contracts between CUNY and various businesses, reasserting that had not located any responsive records (*id.* at 5–6).

ARGUMENT

As explained by the Court of Appeals, “[i]t is settled that FOIL is based on the overriding policy consideration that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government” (*see Capital Newspapers, Div. of Hearst Corp v Whalen*, 69 NY2d 246, 252 [1987] [cleaned up]; *accord Friedman v Rice*, 30 NY3d 461, 475 [2017]; POL § 84 [1977]). Consistent with these principles, government records are “presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of [FOIL]” (*Gould v New York City Police Dept.*, 89 NY2d 267, 274–275 [1996]). Moreover, “FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government” (*Capital Newspapers*, 69 NY2d at 252). To invoke a particular exemption in denying the public access to records, an agency must “articulate particularized and specific justification” for its withholding of records (*Friedman*, 30 NY3d at 475 [cleaned up]). “Only where the material requested falls squarely within the ambit of one of [FOIL’s] exemptions may disclosure be withheld” (*id.* [cleaned up]).

I. RELEASE OF CUNY'S INVESTMENT HOLDINGS REPORTS WOULD NOT RESULT IN A "SUBSTANTIAL" COMPETITIVE INJURY TO THE INVESTMENT MANAGER AND THEREFORE ARE NOT EXEMPT UNDER FOIL'S TRADE SECRETS EXEMPTION.

CUNY argues that it should be able to invoke the "trade secrets" exemption to shield all records showing in which companies it invests public money. However, FOIL does not permit such a withholding because 1) the records do not constitute a "bona fide trade secret," which CUNY does not dispute, and 2) CUNY has not shown that disclosing such records would result in a "substantial competitive injury."

Under POL § 87(2)(d), an agency may withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If an agency establishes that the disputed records are "bona fide trade secrets," FOIL permits their withholding (*see Verizon New York, Inc. v New York State Pub. Serv. Commn.*, 137 AD3d 66, 72–74 [3d Dept 2016]). The Court of Appeals has defined a trade secret "as any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to gain an advantage over competitors who do not know or use it" (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407 [1993]).

Under the trade secrets exemption, an agency also may withhold records "submitted to the agency by a commercial enterprise . . . and [whose] disclos[ure] would cause substantial injury to the competitive position of the subject enterprise" (*Verizon New York, Inc.*, 137 AD3d at 68–69, 73–74 [cleaned up]). To establish "that disclosure will cause [the subject enterprise] to suffer a competitive injury," CUNY's evidence must be "specific [and] persuasive" (*see Matter of Markowitz v Serio*, 11 NY3d 43, 51 [2008]). "[W]hether substantial competitive harm exists . . .

for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means” (*Encore Coll. Bookstores, Inc. v Auxiliary Serv. Corp. of SUNY at Farmingdale*, 87 NY2d 410, 420–421 [1995] [cleaned up] [adopting analogous FOIA standard as a rule for determining substantial competitive injury under POL § 87 [2] [d]]).

Here, CUNY does not contend that any of the investment reports are bona fide trade secrets, and therefore the applicability of POL § 87(2)(d) to CUNY’s investment records hinges on whether CUNY offers specific and persuasive evidence that producing the records would cause a substantial competitive injury to its investment manager (*see Markowitz*, 11 NY3d at 51). It does not.

CUNY’s prior disclosure of its investment reports significantly undermines CUNY’s claim that release of its existing reports would lead to a substantial competitive injury to its investment manager (*see Encore Coll. Bookstores, Inc.*, 87 NY2d at 420 [1995] [holding that if “the material is available from other sources . . . its disclosure is unlikely to cause competitive damage”]. Regardless of whether CUNY believes it should not have released analogous investment reports in 2015, the fact remains that it did (Aguirre Affirmation, exhibit D at 5 [claiming the prior release of analogous records was “erroneous” in CUNY’s administrative appeal denial]). And CUNY conspicuously fails to identify any, much less a substantial, competitive injury to its investment manager from the actual disclosure of the prior investment holdings report, thereby calling into question “the commercial value of the requested information to competitors” (*see Encore Coll. Bookstores, Inc.*, 87 NY2d at 420 [“Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the

submitting enterprise.”]). Because the sky did not fall due to this prior release, here the risk of competitive injury is not even theoretical—which itself would fail to meet the test to assert the trade secrets exemption (*see id.*; *Markowitz*, 11 NY3d at 51)—but is purely imagined.

Other public entities, including those of public universities, routinely publish similar investment-related records identifying their holdings (*see* Aguirre Affirmation, exhibit F, investment holdings reports by another New York agency and the University of California and University of Texas systems). Indeed, federal law requires many *private* institutions to publicize even more detailed information identifying quarterly stockholdings to the Securities and Exchange Commission through the SEC’s “Form 13F” (U.S. Securities and Exchange Commission, *Information Required of Institutional Investment Managers Pursuant to Section 13(f) of the Securities Exchange Act of 1934 and Rules Thereunder*, <https://www.sec.gov/files/form13f.pdf> [last accessed Nov. 1, 2024]). As a result, the same type of information CUNY characterizes as a “trade secret” is routinely made public by, for example, hedge funds that publicly report their investment holdings and amounts on a quarterly basis (*see e.g.* HedgeFollow, *13f Filings by Hedge Funds & Institutions*, <https://hedgefollow.com/13f> [last accessed Nov. 1, 2024]). These practices further undermine the purported commercial value of CUNY’s investment reports to competing businesses. Were it truly the case, as CUNY contends, that providing a snapshot of specific stock holdings would somehow “reflect the trade secrets and strategies of the investment manager” sufficient to expect “harm [to] the competitive position of the managing company” (*see* Aguirre Affirmation, exhibit D at 4–5), similar investment reports by comparable public and private entities would not readily be available to the public (*see Encore Coll. Bookstores, Inc.*, 87 NY2d at 420).

A closer look at the report CUNY produced in 2015 highlights the limited utility of the reports *to competitors* in particular—the relevant FOIL inquiry here. That report merely lists, by

manager and region, two columns of information: the company and the total size of CUNY's holding (*see* 2014 CUNY Investment Holdings Report). Such limited information—while valuable to the public's understanding of how the government invests taxpayer money—does not provide information regarding the underlying “strategic decisions” leading to those holdings or secret formulas that could possibly be exempted under POL § 87(2)(d).² And to the extent CUNY maintains that its current investment reports provide significantly different, or more detailed, information than that prior report, its conclusory assertions that the release of the new report would cause a substantial competitive injury are insufficient under FOIL (*see Markowitz*, 11 NY3d at 51; *Newsday, LLC v Nassau County Police Dept.*, 222 AD3d 85, 93 [2d Dept 2023] “[c]onclusory assertions that are not supported by any facts are insufficient” to meet an agency's burden when raising a FOIL exemption]).

Even if CUNY could demonstrate that any additional details in its current investment reports were properly exempted under FOIL—which it has not and likely cannot—CUNY is not entitled to withhold the *entirety* of the reports Ms. Southey seeks. Rather, CUNY must redact that sensitive material and produce the portions of the records that would not cause a substantial competitive injury to the investment manager (*see e.g. New York State Defenders Assn. v New York State Police*, 87 AD3d 197 [3d Dept 2011] [where agency failed to articulate any persuasive reason why the records could not have been redacted and released, the trial court erred in determining that agency had a reasonable basis for withholding the entirety of the records sought]).

Finally, CUNY's invocation of the trade secrets exemption in this case is antithetical to

² The Petitioner does not concede that if the report did reveal information regarding such decisions they would automatically be exempt under POL § 87(2)(d); CUNY could only exempt such material upon a specific and persuasive showing that publicizing information about those strategic decisions would cause a substantial competitive injury to the investment manager (*see Markowitz*, 11 NY3d at 51).

FOIL's goal of promoting open government and government accountability. The right of the public to access information about how and where the government is spending taxpayer money is central to the "purpose of FOIL . . . to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse" (*see Encore Coll. Bookstores, Inc.* 87 NY2d at 416).

For all these reasons, because CUNY has failed to show—and because it cannot show—that release of its investment reports would cause its investment manager to suffer a substantial competitive injury, this Court should order it to produce the records.

II. CUNY FAILED TO DILIGENTLY SEARCH FOR RESPONSIVE CONTRACTS IN ITS POSSESSION AS REQUIRED BY FOIL.

FOIL requires an agency's search for records be "diligent" (POL § 89 [3] [a]). "[E]ven where an entity properly certifies that it was unable to locate requested documents after performing a diligent search, the [party] requesting the documents may nevertheless be entitled to a hearing on the issue where he or she can articulate a demonstrable factual basis to support the contention that the requested documents existed and were within the entity's control" (*see Jackson v Albany County Dist. Attorney's Off.*, 176 AD3d 1420, 1421–22 [3d Dept 2019] [cleaned up]). CUNY has fallen short of that standard here, failing to release contracts that it likely has, according to publicly available state records.

Relevant to this issue, Ms. Southey requested any existing contracts between CUNY and a list of several specific corporations (*see* Aguirre Affirmation, exhibit A). CUNY asserts that it has not identified any records held by the University Central Office responsive to this request (Aguirre Affirmation, exhibit D at 5–6). This claim is implausible because, at minimum, CUNY possesses responsive material reflecting a contract with the Dell corporation. Under state law, the New York State Comptroller's Office is required to provide the public with certain information about state

and local agencies' procurement practices and contracts (Office of the New York State Comptroller, *Procurement and Contracting in New York*, <https://www.osc.ny.gov/state-agencies/contracts> [last accessed Nov. 1, 2024]). Its 2023 reports (covering the time between April 1, 2023 to March 31, 2024) on “[a]ctive [a]gency [c]ontracts” and contracts reviewed by the state comptroller’s office specifically identify several contracts between CUNY and “Dell Marketing LP” (Aguirre Affirmation, exhibit G, New York State Comptroller’s Office 2023 Procurement Stewardship Act Reports).³

The state comptroller’s records also confirm that the contracts are within CUNY’s control. The state comptroller has designated the Dell contracts as “agency” contracts, as opposed to “centralized” (*id.*), which would be a “contract let by the Office of General Services . . . for use by State agencies and other authorized users” (Office of the New York State Comptroller, *XI.8.A Centralized Contracts*, <https://www.osc.ny.gov/state-agencies/gfo/chapter-xi/xi8a-centralized-contracts> [last accessed Nov. 1, 2024]). And the records explicitly name CUNY’s University Accounting Office as the “contracting department” (Aguirre Affirmation, exhibit G). Had CUNY conducted an adequate search for records responsive to Ms. Southey’s request for contracts, the search should have yielded, at minimum, these Dell contracts. Therefore, the Court should require CUNY to conduct a new search for and produce those contracts, along with any and all additional responsive contracts between CUNY and the other named corporations.

III. THE PETITIONER IS ENTITLED TO ATTORNEY’S FEES.

FOIL “authorizes an award of attorneys’ fees where the petitioner has substantially prevailed in the FOIL proceeding and the agency either lacked a reasonable basis for denying

³ Because the state comptroller’s spreadsheets are voluminous, Ms. Southey includes only an excerpted version that only provides fields pertaining to CUNY’s contracts. The highlighted fields indicate the contracts relevant to Ms. Southey’s request.

access to the requested records or failed to respond to a request or appeal within the statutory time” (*Madeiras v New York State Educ. Dept.*, 30 NY3d 67, 78 [2017] [cleaned up]). In cases where an agency makes no disclosures prior to a petitioner’s commencement of an article 78 proceeding, a petitioner can be found to have substantially prevailed where they successfully obtain post-commencement records, whether by court order or because the agency has voluntarily produced records in response to the litigation. (*See id.* at 79.) Where an agency lacked reasonable basis for its denials, an award of fees is mandatory (*see* Public Officers Law § 89 [4] [c] [ii]).

Here, for all the reasons described above, FOIL requires CUNY to produce responsive records and to conduct an additional search, and CUNY’s denials to date lack any reasonable basis. Accordingly, if the petitioner substantially prevails, this Court should grant Ms. Southey an award of reasonable attorney’s fees and costs.⁴

CONCLUSION

This case puts in stark relief the importance of FOIL not only for the purposes of having transparency in government, but also for having an engaged and informed society advocating for a say over how public institutions operate. CUNY cannot shirk its duty to release basic, yet important, investment-related records by impermissibly shielding them behind FOIL, which demands that its limited exemptions be interpreted narrowly in service of a broad presumption of access, or by failing to diligently search for records in their possession. For these reasons, and those outlined above, this Court should grant the petition, ordering CUNY to 1) produce responsive investment reports; 2) conduct a diligent search for responsive contracts, particularly those pertaining to Dell; and 3) pay reasonable attorney’s fees and costs.

⁴ Should the Court make the threshold determination that the petitioner is entitled to reasonable attorney’s fees, the petitioner would propose submitting full briefing to this Court on the specific number of hours and costs to which she is entitled.

Dated: November 1, 2024
New York, N.Y.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

I hereby certify that:

This brief complies with the word count limitation of 22 NYCRR §202.8-b because the total word count, according to the word count function of Microsoft Word, the word processing program used to prepare this document, of all printed text in the body of the brief, exclusive of the caption, table of contents, table of authorities and signature block is 4,791.

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