

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

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In the Matter of

Index No.

ANDREW M. STENGEL

Mot. Seq. 001

Petitioner,

For Judgment Pursuant to Article 78  
Of the Civil Practice Law and Rules

-against-

CYRUS VANCE, JR., in his official capacity as  
District Attorney of New York County,  
And SUSAN ROQUE

Respondents.  
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MEMORANDUM OF LAW IN SUPPORT OF PETITION

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Dated: New York, New York  
October 22, 2018

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### **PRELIMINARY STATEMENT**

This petition arises from a Freedom of Information Law (“FOIL”) request sent by Andrew M. Stengel to the New York County District Attorney’s Office (“the DA’s Office”). The subject of the request is a list of adverse credibility findings against New York City Police Officers maintained by the DA’s Office, which denied the request initially and again on administrative appeal. The DA’s Office claimed that that the records did not exist because it was not a “list” and that the records were exempted because they were work product and prepared in anticipation of litigation. On this Article 78 proceeding, Respondents should be compelled to disclose the records requested via FOIL, and Petitioner should be awarded attorneys fees.

Before reaching the merits of the denial, this court must determine the scope of judicial review which is limited to the “particularized and specific” justifications in the initial denial. Under this standard, Respondent is limited on this petition to arguing that the documents do not exist. The other justifications are waived.

However, even if the court reviews all of the justifications on the merits, the records must be disclosed for three reasons.

First, the records do in fact exist. Respondent claimed that they need not produce the records because they were not maintained in a “list.” This is not the standard. FOIL requests need only reasonably describe the records, which Petitioner did.

Second, the records are not specifically exempted from FOIL disclosure by statute. Respondent claimed that the documents were privileged as materials prepared for litigation or work product under CPLR Article 38 or Criminal Procedure Law (“CPL”) § 240. But, these statutes do not specifically exempt documents from FOIL disclosure. Additionally, the materials were not prepared for litigation with Petitioner and are not work product. Regardless, any

potential privilege has been waived because Respondent routinely discloses the records to third parties.

Third, public policy favors disclosure. The purpose of FOIL is to shed light on the government, however bright the bulb. The DA's Office has attempted to erect an impermissibly opaque shield around a matter of the utmost importance: the credibility of law enforcement, principally members of the New York City Police Department ("NYPD"), at trial. How can the public have confidence that the administration of criminal justice is fair to defendants who are charged with crimes when the DA's Office is hiding critical information?

Because the FOIL denial was without any merit, Petitioner is entitled to attorney's fees.

### LEGAL STANDARD

"FOIL imposes a broad duty on government to make its records available to the public."<sup>1</sup> "It is axiomatic that government records are presumptively subject to disclosure unless, specifically exempted by statute. The agency denying access must demonstrate that the requested records fall squarely within a FOIL exemption by articulating a particularized and specific justification. Moreover, FOIL is to be read liberally and its exemptions read narrowly."<sup>2</sup> If the agency "fails to prove that a statutory exemption applies, FOIL compels disclosure."<sup>3</sup> If a only portion of a record is exempt, the record must be produced with the exempt portion redacted.<sup>4</sup>

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<sup>1</sup> *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 (1996)

<sup>2</sup> *Mantica v New York State Dept. of Health*, 248 AD2d 30, 32 (3d Dept 1998), affd, 94 NY2d 58 (1999) (quotation cleaned up)

<sup>3</sup> *Data Tree, LLC v Romaine*, 9 NY3d 454, 463 (2007)

<sup>4</sup> *Whitfield v Bailey*, 80 AD3d 417, 418–19 (1st Dept 2011)

## ARGUMENT

***I. Respondents are limited to the FOIL exceptions cited in the June 7, 2018, FOIL denial.***

Judicial review of administrative determinations, such as FOIL denials, is “limited to the grounds invoked by the agency.”<sup>5</sup> Any issue or argument not raised by the agency during the initial determination is unpreserved for review by either administrative appeal or judicial review.<sup>6</sup>

In order to preserve a FOIL exemption, the agency must “articulate [a] particularized and specific justification for denying disclosure.”<sup>7</sup> This means that an agency must either cite to the specific Public Officers Law (“POL”) section exempting disclosure or mirror the language of such section.<sup>8</sup> In *Maideros*, the respondent denied a FOIL request citing POL § 87(2)(e).<sup>9</sup> During the Article 78 proceeding, the respondent argued that the records were exempt under POL § 87(2)(e)(iv).<sup>10</sup> The Court of Appeals refused to consider this argument because respondents did not explicitly cite subsection (iv).<sup>11</sup> Any FOIL denial that fails to reach this level of specificity is waived.<sup>12</sup>

Accordingly, Respondent may only rely upon the particularized and specific exemptions cited in the initial June 7, 2018, denial of Petitioner’s FOIL request, and “the court is powerless to affirm the [FOIL denial] by substituting what it considers to be a more adequate or proper basis.”<sup>13</sup> However, the initial letter does not meet the particularized and specific standard. It cites to POL § 89(3) without referencing any specific subdivision. It also claims that the

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<sup>5</sup> *Maideros v New York State Educ. Dept.*, 30 NY3d 67, 74 (2017)

<sup>6</sup> *Bernstein v. Department of State, Div. of Licensing Services*, 96 A.D.3d 1183, 1184 (3d Dept 2012)

<sup>7</sup> *Maideros*, 30 NY3d 74

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

materials were prepared in anticipation of litigation but critically fails to cite to the POL section which would exempt such information.<sup>14</sup> Without citing to the POL, this any argument that the records are prepared in anticipation of litigation is unpreserved for judicial review.

At the administrative appeal level Respondent cited a number of other exemptions. None of these should be considered because they were not raised in the initial denial. Despite this procedural defect, the remainder of this brief addresses all FOIL exemptions on the merits.

***II. POL § 89(3) does not apply because the records exist.***

Respondent claimed that it does not possess the requested records.<sup>15</sup> While Respondent is under no obligation to create new records,<sup>16</sup> the requested records do in fact exist. Respondent admits that it “maintains information regarding a court’s adverse credibility finding,”<sup>17</sup> and an assistant district attorney declared in open court that this information is contained in a “list.”<sup>18</sup> Ultimately whether the materials were maintained as a list or some other format is irrelevant, as FOIL “requires only that the records be reasonably described so that the respondent agency may locate the records in question.”<sup>19</sup> Petitioner’s request meets this standard.

***III. POL § 87(2)(a) does not exempt the records from disclosure***

**1. CPLR Article 31 and CPL § 240 are not statutes specifically exempting the records from FOIL disclosure.**

A state agency may deny access to information that is “specifically exempted from disclosure by state or federal statute.”<sup>20</sup> Relying on this exception, Respondent claimed that the

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<sup>14</sup> *Id.*

<sup>15</sup> See Ex. E, G

<sup>16</sup> POL § 89(3)

<sup>17</sup> Ex. E

<sup>18</sup> Ex. A at 3.

<sup>19</sup> *M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp.*, 62 NY2d 75, 82-83 (1984) (quotation cleaned up)

<sup>20</sup> POL § 87

disclosure exceptions found in CPLR § 3101 and CPL § 240 specifically exempted the requested records from disclosure. However, neither section of law exempts records from FOIL disclosure.

The Court of Appeals has stated that neither Article 31 of the CPLR and CPL § 240 specifically exempt documents from disclosure under FOIL. In *Farbman*, the Court of Appeals held “that CPLR Article 31 is not a statute specifically exempting public records from disclosure under FOIL.”<sup>21</sup> The court limited its holding and refused to address whether the work product and anticipation of litigation doctrines exempted documents from FOIL disclosure.<sup>22</sup> The Court of Appeals in *Gould* extended this reasoning to the CPL.<sup>23</sup> There, the court held that CPL § 240, which governs disclosure in criminal prosecutions, did not exempt records from FOIL disclosure because the CPL “does not specifically preclude defendants from seeking these documents under FOIL.”<sup>24</sup>

While the Court of Appeals has not conclusively resolved the issue, other courts have concluded that the relevant privileges do not exempt records from FOIL disclosure.<sup>25</sup> In *Burke*, the court specifically held that the privileges found in CPLR Article 31 do not exempt records from disclosure via FOIL.<sup>26</sup> The court reasoned that “specifically exempted from disclosure” instead referred to “to such information as income tax and juvenile and youthful offender proceedings.”<sup>27</sup>

This holding is further supported by the plain language of CPLR § 3101 or CPL § 240. As the *Farbman* and *Gould* courts noted, neither section explicitly exempts records from FOIL

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<sup>21</sup> *M. Farbman & Sons, Inc.* 62 NY2d 81-82 (quotation cleaned up)

<sup>22</sup> *Id.*

<sup>23</sup> *See Gould* 89 NY2d 267

<sup>24</sup> *Id.* at 274

<sup>25</sup> The First Department has not directly addressed whether the Article 31 exemptions apply to FOIL. Cases have assumed that the exemptions apply without grappling with the holdings in *Farbman* or *Gould*. It appears that this argument would be a matter of first impression in the First Department.

<sup>26</sup> *Burke v Yudelson*, 81 Misc. 2d 870, 877–78 (Sup Ct, Monroe County 1975), *affd*, 51 AD2d 673 (4th Dept 1976)

<sup>27</sup> *Id.*

disclosure. The legislature could have included such language and in fact did so in other sections of the CPLR. CPLR § 4503 extends the attorney client communications privilege to administrative proceedings, which would include FOIL. The legislature chose not to include this language in CPLR Article 31 or CPL § 240, and thus they do not specifically exempt any records from disclosure under FOIL.

Even if these procedural laws specifically exempted the records requested by Petitioner by FOIL, they would not apply to the records at issue as discussed below.

**2. The records were not made in anticipation of litigation.**

Under CPLR § 3101(d)(2), material prepared in anticipation of litigation need not be turned over in a civil action unless the party seeking discovery has a substantial need for the material and cannot obtain them without undue hardship.<sup>28</sup> This protection however is limited in scope. Materials prepared in anticipation of litigation are not protected from discovery in a *separate* litigation.<sup>29</sup> In other words, a party may only invoke this protection in the litigation for which the materials were prepared.<sup>30</sup>

The scope of this privilege in the context of a FOIL request was directly addressed by the court in *McCrary*.<sup>31</sup> There, respondents denied a FOIL request by claiming that the requested material was prepared in anticipation of separate litigation.<sup>32</sup> The court disagreed and compelled

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<sup>28</sup> CPLR § 3101(d)(2)

<sup>29</sup> *Bennett v Troy Record Co.*, 25 AD2d 799, 799–800 (3d Dept 1966) (“the phrase in preparation for litigation refers exclusively to the instant litigation and does not grant immunity from disclosure to material prepared for prior litigation”); *McCrary v Vil. of Mamaroneck*, 34 Misc. 3d 603, 623 (Sup Ct, Westchester County 2011) (“CPLR 3101(d)(2) applies only to material prepared in anticipation of the litigation in which the protection is invoked”); *Chem. Bank v Arthur Andersen & Co.*, 143 Misc. 2d 823, 826 (Sup Ct, N.Y. County 1989) (material prepared for other litigation was not protected because “it was not prepared for the case at bar”)

<sup>30</sup> *Id.*

<sup>31</sup> *McCrary*, 34 Misc. 3d at 623.

<sup>32</sup> *Id.*

disclosure because the requested material was not prepared in anticipation of the Article 78 proceeding.<sup>33</sup>

This same reasoning applies to Petitioner's request. Respondent admits that the requested material is prepared for use in "the office's prosecution."<sup>34</sup> This admission conclusively establishes that the requested records were prepared for separate litigation, and thus they are not protected by CPLR § 3101(d)(2).

### **3. The records are not attorney work product.**

Under CPLR § 3101(c), attorney work product is absolutely privileged from disclosure in civil proceedings. However, this privilege only applies if the materials: (1) were prepared by an attorney; (2) were uniquely the product of the lawyer's learning and skills; and (3) reflect legal research, analysis, or opinion on a legal position.<sup>35</sup> If any of these conditions are not met, the work product privilege does not apply.<sup>36</sup> The work product exception must be construed narrowly<sup>37</sup>

The privilege does not cover all of an attorney's labors.<sup>38</sup> For example, information obtained as part of an attorney's "investigative efforts" is not work product even though legal training may be useful in such situations.<sup>39</sup> Even an attorney's report on a factual investigation does not qualify "if a lay person could have done the same thing."<sup>40</sup> Ultimately, the privilege

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<sup>33</sup> *Id.*

<sup>34</sup> Appeal Denial Letter at 2.

<sup>35</sup> *Venture v Preferred Mut. Ins. Co.*, 153 AD3d 1155, 1159 (1st Dept 2017); *Ford v Rector*, 111 AD3d 572, 574 (1st Dept 2013) (materials were not work product because they did not contain legal research or analysis nor render any legal opinion)

<sup>36</sup> *See id.*

<sup>37</sup> *Chem. Bank v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 AD2d 837, 837–38 (1st Dept 1979)

<sup>38</sup> *Hoffman v Ro-San Manor*, 73 AD2d 207, 211 (1st Dept 1980) ("[n]ot every manifestation of a lawyer's labors enjoys the absolute immunity of work product")

<sup>39</sup> *Spectrum Sys. Intern. Corp. v Chem. Bank*, 157 AD2d 444, 449 (1st Dept 1990), *affd as mod*, 78 NY2d 371 (1991)

<sup>40</sup> *James, Hoyer, Newcomer, Smiljanich and Yanchunis, P.A. v State, Off. of Atty. Gen.*, 27 Misc 3d 1223(A) [Sup Ct, N.Y. County 2010]

only protects material reflecting an attorney's "mental impressions, opinions, or legal theories."<sup>41</sup>

Courts consistently hold that information and facts gathered by an attorney are not work product.<sup>42</sup>

Under these standards, the records requested by Petitioner do not qualify as work product. Respondent "maintains information regarding a court's adverse credibility finding."<sup>43</sup>

This gathering of this information could have been done by a lay person. It does not require the unique skills of a lawyer nor does it reflect legal analysis. This material reflects only investigative work performed by attorneys, which does not qualify as privileged.

**4. Respondent waived any potential privilege by disclosing the underlying information to third parties.**

"When a party voluntarily gives to its adversary documents that share the thought processes of counsel, the work-product privilege disappears."<sup>44</sup> Respondent conceded that the requested materials are compiled so that "DANY can comply with [its] relevant disclosure obligations" in criminal prosecutions. If the records and information contained therein are maintained specifically to turn over to defendants who are charged with crimes, they are not privileged and must be disclosed to Petitioner.

**IV. Public policy mandates disclosure.**

The public policy embodied in FOIL would be thwarted if Respondent were allowed to withhold the records at issue. "FOIL implements the legislative declaration that government is

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<sup>41</sup> *People v Kozlowski*, 11 NY3d 223, 245 (2008)

<sup>42</sup> See e.g. *Spectrum*, 157 AD2d 448-49 (factual reports prepared by attorney acting as investigator are not work product and "attorney-client privilege extends only to communications and not facts"); *Geffner v Mercy Med. Ctr.*, 125 AD3d 802, 802-03 (2d Dept 2015) (audio recording of interview conducted by attorney not work product); *Hoffman*, 73 AD2d 211 ("the discovery of witnesses, even though the result of the attorney's zeal and investigative efforts, does not qualify as an attorney's work product"); *Aetna Cas. and Sur. Co. v Certain Underwriters at Lloyd's*, 263 AD2d 367, 368 (1st Dept 1999) (interview minutes and interviewee list prepared by attorneys was not work product); *McCrory*, 34 Misc. 3d 623 (Sup Ct, Westchester County 2011) ("Transcripts memorializing the statements of witnesses obtained during the discovery process do not constitute attorney's work product")

<sup>43</sup> Ex. E

<sup>44</sup> *Charter One Bank, F.S.B. v Midtown Rochester, L.L.C.*, 191 Misc. 2d 154, 160 (Sup Ct, Monroe County 2002)

the public's business. The statute proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Full disclosure by public agencies is, under FOIL, a public right and in the public interest."<sup>45</sup>

These policy considerations are magnified in this instance given the importance of the credibility of law enforcement witnesses in criminal prosecutions. Adverse credibility findings and other negative information about such witnesses must be disclosed by prosecutors to the defense.<sup>46</sup> In many cases the "credibility [of a police officer] is intertwined with the guilt or innocence of [a] defendant and raises Sixth Amendment concerns."<sup>47</sup> Prosecutors have a continuing obligation to disclosure so-called *Brady* and *Giglio* information to a defendant, which is either exculpatory in nature or impeaching of a prosecution witness.<sup>48</sup>

However, criminal defense practitioners are frequently reminded of the epidemic of wrongful convictions based on the failure to disclose *Brady* material.<sup>49</sup> A study by the Innocence Project determined that nearly three-quarters of the first 74 DNA-based exonerations were wrongful convictions based in part on *Brady* violations.<sup>50</sup>

Unfortunately, prosecutors seeking convictions may not give proper weight to their *Brady* and *Giglio* obligations. This injustice has prompted reforms to the criminal justice system. Recently, the New York Justice Task Force announced new rules that require judges presiding over criminal trials to issue an order notifying and reminding prosecutors and (defense attorneys) appearing before them of their professional responsibilities with respect to disclosure of *Brady*

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<sup>45</sup> *M. Farbman & Sons, Inc.*, 62 NY2d 79–80 (portions of quotation omitted and quotation cleaned up)

<sup>46</sup> See *Brady v. United States*, 397 US 742 (1970); *Giglio v. United States*, 405 US 150 (1972).

<sup>47</sup> *People v. Williams*, 7 NY3d 15, 25 (2006).

<sup>48</sup> See *People v. Vilardi*, 76 NY2d 67, 76 (1990); *People v. Ortiz*, 85 AD3d 588, 599 (1st Dept 2011)

<sup>49</sup> See, e.g., Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. Crim. L. & Criminal 415 (2010).

<sup>50</sup> Barry Scheck, Jim Dwyer & Peter Neufeld, *Actual Innocence* (1st ed. 2001).

and *Giglio* material.<sup>51</sup> Effective as of January 1, 2018, the rules are codified in the Uniform Rules for New York State Trial Courts.<sup>52</sup> The Order requires timely disclosures of *Brady* and *Giglio* material, at least 15 days before the commencement of a hearing, 15 days before the commencement of a misdemeanor trial and 30 days before commencement of a felony trial.<sup>53</sup>

The new rule rings hollow to many defendants charged with a crime because they never reach a hearing or trial. “Most criminal charges . . . ultimately are disposed of by means of guilty pleas, and an overwhelming majority of all criminal convictions result from guilty pleas. While no exact figures are available it has been estimated that up to 95 percent of all criminal convictions are achieved by means of guilty pleas.”<sup>54</sup> Unfortunately, even if exculpatory or impeaching material is uncovered after a guilty plea post-conviction *Brady* claims cannot be raised unless the evidence is “highly material to the defense.”<sup>55</sup>

In the environment of evidence that is withheld from the defense and the high rate of plea bargains there is a strong public policy for the disclosure of the records sought by Petitioner. The public policy consideration of a recent case supports Petitioner’s argument for release of the records sought. Adam Perlmutter, a New York-based criminal defense attorney, sent a FOIL request to the NYPD for the maintenance records for breathalyzer instruments associated with testing of arrestees for driving while intoxicated; the NYPD denied the FOIL request.<sup>56</sup> In an Article 78 proceeding, the Court ordered disclosure of the records. The Court reasoned that disclosure of the breathalyzer maintenance records would benefit the public regardless of what

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<sup>51</sup> See [www.nycourts.gov/press/pdfs/pr17\\_17.pdf](http://www.nycourts.gov/press/pdfs/pr17_17.pdf).

<sup>52</sup> See 22 NYCRR 200.16/200.27.

<sup>53</sup> N.Y. State Justice Task Force, Report on Attorney Responsibility in Criminal Cases (Feb. 2017) App. B.

<sup>54</sup> 27 Am. Jur. Proof of Facts 2d 133 § 1 (Sept. 2018 Updated).

<sup>55</sup> *People v. Simmons*, 36 NY2d 126, 132 (1975).

<sup>56</sup> See *The Law Officers of Adam D. Perlmutter, P.C. v. New York City Police Department*, 2013 N.Y. Slip Op. 32532(U) \*1 (Sup. Court, N.Y. County 2013).

the records indicated.<sup>57</sup> The court stated that if the breathalyzers were well maintained it would bolster public confidence in the handling of DWI cases, and if they were faulty or defective it would bolster the public interest in preventing improper prosecutions.<sup>58</sup>

The same benefit to the public applies to the instant case. If a member of law enforcement has never had an adverse credibility finding or his or her veracity has never been questioned, it will increase confidence in the handling of criminal prosecutions. On the other hand, if a law enforcement witness's name is contained within the records, the disclosure of such to Petitioner will support the public interest in preventing improper prosecutions or leveling the playing field for criminal defendants when faced with the decision about whether to proceed to trial—where the People must prove all charged crimes beyond a reasonable doubt—or to accept a plea bargain, when offered. Respondent's refusal to turn over the records exemplifies a convict-at-any-cost mentality that erodes the public trust in the criminal justice system.

***V. Petitioner is entitled to attorneys fees.***

Under POL § 89(4)(c), a court shall award attorneys fees to a petitioner who has substantially prevailed if the agency had no reasonable basis for denying access to the records. Where an agency issues a blanket denial of a request, it must show that it had a reasonable basis for the entire withholding, and not just a portion.<sup>59</sup>

The fee provision was enacted to overcome “the ‘sue us’ attitude of some agencies, a stance found to be contrary to FOIL’s legislative intent.”<sup>60</sup> In 2006, the legislature expanded the bases on which a Petitioner could recover in an effort to “create a clear deterrent to unreasonable

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<sup>57</sup> *Id.* at \*7

<sup>58</sup> *Id.*

<sup>59</sup> See *Matter of New York State Defenders Assn. v. New York State Police*, 87 AD3d 193, 197 (3d Dept. 2011)

<sup>60</sup> See *Matter of New York Civ. Liberties Union v. City of Saratoga Springs*, 87 AD3d 338 (3d Dept. 2011) (quoting, Assembly Memorandum in Support, Bill Jacket, Ch. 73, L.1982).

delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.”<sup>61</sup>

As discussed above, Respondent had no reasonable basis for withholding the records and Petitioner should be awarded attorney’s fees.

### CONCLUSION

There is no question that the records requested by Petitioner should be disclosed. They were not prepared in anticipation of litigation and are not work product. In any event, they have also been disclosed to third parties, waiving any potential privilege. The records should have been disclosed initially. Instead, the DA’s Office adopted a sue-me attitude and has fought to protect the disclosure of records that might hamper criminal prosecutions. This can only serve to corrode the public trust in the fair operation of the criminal justice system. FOIL was specifically designed to remedy these indignities.

For these reasons, the petition should be granted, Respondent should be ordered to comply with the FOIL disclosure request of June 7, 2018, and Petitioner should be awarded his attorneys fees and litigation costs.

/s/Henry Bell  
Henry Bell, Esq.

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<sup>61</sup> *Id.* (quoting, Senate sponsor's Memorandum in Support, Bill Jacket, Ch. 492, L.2006).