

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

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In the Matter of the Application of  
YOAV GONEN and  
THE CITY REPORT, INC.,

Petitioners,

-against-

**AFFIRMATION IN  
SUPPORT OF CROSS-  
MOTION TO DISMISS**

Index No. 159794/2023  
(Kelley, J.)

NEW YORK CITY  
POLICE DEPARTMENT,

Respondent.

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

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**STEVEN DRENNEN**, an attorney duly admitted to practice before the courts of this state, affirms under penalty of perjury pursuant to New York Civil Practice Law and Rules (“CPLR”) Rule 2106 that the following statements are true except for those made upon information and belief, which he believes to be true:

1. I am an attorney in the office of MICHAEL GERBER, Deputy Commissioner, Legal Matters of the New York City Police Department (“NYPD”).

2. I submit this affirmation, on behalf of Respondent, in support of Respondent’s cross-motion to dismiss this proceeding on the grounds that (1) Petitioners fail to state a claim upon which relief may be granted in that the records sought are specifically exempted from disclosure by N.Y. Criminal Procedure Law (“CPL”) § 160.50, and are, therefore, not subject to Freedom of Information Law disclosure pursuant to N.Y. Public Officers Law (“POL”) § 87(2)(a); and (2) Petitioners fail to state a claim upon which relief may be granted because the records

Petitioners seek are specifically exempted from disclosure by POL §§ 87(2)(b) and 89(2)(b), and granting such other and further relief as this Court may deem just and proper. Respondent reserves the right to serve and file a verified answer should the instant cross-motion to dismiss be denied.<sup>1</sup>

3. I have prepared this affirmation upon information and belief, based upon information contained in the records of this matter maintained in the ordinary course of business by the NYPD, and based on information received from other employees of the NYPD, which I believe to be true and accurate.

### **PRELIMINARY STATEMENT**

4. Petitioners bring this proceeding pursuant to CPLR Article 78 and POL § 84, *et. seq.*, also known as the Freedom of Information Law (“FOIL”), seeking a copy of the investigation file for NYPD Internal Affairs Bureau (“IAB”) case number 2021-26524. *See* NYSCEF Doc. No. 1.

5. A diligent search for responsive records has been conducted, and pursuant to that search, the entire investigation file was located. The file consisted of a four page report, which contained two attachments. The investigation file was created pursuant to an arrest which was subsequently sealed.

6. The records sought by Petitioners are barred from release as sealed records, and they were properly withheld pursuant to POL § 87(2)(a) and CPL §160.50. The records were also withheld due to privacy concerns pursuant to POL §§ 87(2)(b) and 89(2)(b). Accordingly, the petition fails to state a cause of action, and this proceeding should be dismissed in its entirety.

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<sup>1</sup> If the Court denies the cross-motion to dismiss, pursuant to CPLR § 7804(f) and *Camacho v. Kelly*, 57 A.D.3d 297 (1st Dept. 2008), Respondent will explore all exemptions in a verified answer. Accordingly, only certain dispositive arguments are addressed herein.

## **FACTUAL BACKGROUND**

### **Petitioners' FOIL Request**

7. By Open Records request dated September 14, 2022, Petitioners submitted a request, pursuant to FOIL, for a copy of the investigation file for IAB case number 2021-26524. See NYC Open Records email, dated September 14, 2022, a copy of which is annexed hereto as Exhibit "1."

8. By email dated September 16, 2022, the NYPD's Records Access Officer ("RAO") acknowledged receipt of Petitioners' request and provided an estimate of when a determination would be made. See NYC Open Records email, dated September 16, 2022, a copy of which is annexed hereto as Exhibit "2."

9. By email dated February 6, 2023, the RAO provided a new estimate of when a determination would be made. See NYC Open Records email, dated February 6, 2023, a copy of which is annexed hereto as Exhibit "3."

10. By email dated May 5, 2023, the RAO denied access to the records pursuant to POL § 87(2)(b), in that disclosure would constitute an unwarranted invasion of personal privacy. See NYC Open Records email, dated May 5, 2023, a copy of which is annexed hereto as of Exhibit "4."

11. By letter dated May 22, 2023, Petitioners appealed the RAO determination to the NYPD's Records Access Appeals Officer ("Appeals Officer"). See letter by Heather E. Murray, dated May 22, 2023, a copy of which is annexed hereto, without attachments, as Exhibit "5."

12. By letter dated June 5, 2023, the Appeals Officer denied Petitioners' appeal pursuant to POL § 87(2)(a) and CPL § 160.50, which prohibit the disclosure of sealed records; and pursuant to § 87(2)(b) in that disclosure would constitute an unwarranted invasion of personal

privacy. See letter by Jordan S. Mazur, dated June 5, 2023, a copy of which is annexed hereto as Exhibit “6.”

13. By letter dated September 29, 2023, Petitioners submitted a letter to the Appeals Officer asking him to reconsider his denial of their appeal. See letter by Heather E. Murray, dated September 29, 2023, a copy of which is annexed hereto as Exhibit “7.” The Appeals Officer did not grant reconsideration.

### **Article 78 Proceeding**

14. Petitioners’ attorney commenced the instant proceeding by Request For Judicial Intervention and Notice of Petition, dated October 5, 2023. Petitioners seek an order directing Respondent to disclose the records sought by Petitioners in the FOIL request. See NYSCEF Doc. No. 1 at ¶ 36.

### **Diligent Search**

15. A diligent search was conducted of the records of IAB, the location where responsive records would reasonably be maintained in the ordinary course of business.

16. The investigation file for IAB case number 2021-26524 was located during the diligent search. The entire file consisted of a four page report, which contained two attachments. The first attachment is an eight minute, forty-four second audio recording. The second attachment is a two page 911 report. IAB confirmed that there were no additional records generated for case number 2021-26524.

### **THE NYPD PROPERLY WITHHELD THE SEALED RECORDS IN ACCORDANCE WITH POL § 87(2)(a) AND CPL § 160.50**

17. POL § 87(2)(a) bars the public release of records whenever those records “are exempted from disclosure by state or federal statute.” See POL § 87(2)(a). Here, CPL § 160.50,

et seq., bars the release of sealed arrest records, and Petitioners are not otherwise entitled to those records.

18. CPL § 160.50(1)(c) states, in relevant part, that “all official records and papers...relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency.” See CPL § 160.50. The Court of Appeals has rejected a bright-line rule defining those items qualifying as “official records and papers” as such records and papers “are not always subject to easy identification and may vary according to the circumstances of a particular case.” See Prall v. N.Y. City Dep’t. of Corr., 971 N.Y.S.2d 821, 826 (Sup. Ct. Queens Co. 2013); Harper v. Angiolillo, 89 N.Y.2d 761 (1997); Katherine B. v. Cataldo, 5 N.Y.3d 196 (2005).

19. In the instant proceeding, Petitioners are seeking an IAB investigation file that pertains to the notification made to IAB after the arrest of a former NYPD police officer.<sup>2</sup> Upon commencement of the instant proceeding, the undersigned reviewed the contents of the investigation file and determined that the incident resulted in an arrest that was sealed. All of the records in the file – the four page report, which contains the facts of the arrest; the audio recording, which contains a recitation of the facts of the arrest from the precinct to the IAB Command Center; and the 911 report, which details the location and some facts of the arrest – are related to the arrest which has now been sealed. Additionally, each of those records contain information of the arrestee such as their name, home address, date of birth, phone number, or business address. As such, since the arrest is sealed, all of the records in the investigation file containing information about the

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<sup>2</sup> Petitioners repeatedly suggest throughout the Verified Petition that IAB Case Number 2021-26524 pertains to an investigation into alleged misconduct by NYPD Chief of Department Jeffrey Maddrey. However, IAB Case Number 2021-26524 pertains only to the notification made to IAB following the arrest of a former NYPD police officer. The arrest was later sealed.

arrest are now sealed as well and cannot be released under FOIL.

20. Furthermore, Petitioners do not benefit from the exceptions detailed in CPL § 160.50(1)(d). First, the records at issue have not been sealed for Petitioners' benefit, so Petitioners cannot access the records pursuant to the exemption that "records shall be made available to the person accused or to such person's designated agent." See CPL § 160.50(1)(d). Furthermore, Petitioners cannot obtain access to the records under the other exemptions as a law enforcement exempt agency. See CPL § 160.50(1)(d).

21. Finally, the Court of Appeals has made clear that Respondent is not required to produce sealed records with redactions to the requester. See N.Y. Civ. Liberties Union v. N.Y. City Police Dep't, 32 N.Y.3d 556, 570 (2018) (citing to Karlin v. McMahan, 96 N.Y.2d 842, 843 (2001) and Short v. Bd. of Managers of Nassau Co. Medical Center, 57 N.Y.2d 399, 401-403 (1982)) (where another statute conveys confidentiality and POL § 87(2)(a) exempts a record from release, the agency is not required to redact the record for release and the record can be withheld). Accordingly, the instant proceeding should be dismissed in its entirety as the sealed records sought by Petitioners are barred from disclosure by CPL § 160.50, and, as such, are specifically exempted from FOIL disclosure pursuant to POL § 87(2)(a).

**DISCLOSURE WOULD CONSTITUTE AN UNWARRANTED INVASION OF  
PRIVACY UNDER POL §§ 87(2)(B) AND 89(2)(B)**

22. POL § 87(2)(b) and POL § 89(2)(b) exempt from disclosure records, which "if disclosed would constitute an unwarranted invasion of personal privacy." See POL §§ 87(2)(b) and 89(2)(b). This exemption applies to identifying information of all individuals who have offered information to police during an investigation. See Exoneration Initiative v. New York City Police Dept., 114 A.D.3d 436, 439 (1st Dep't. 2014); see also Bellamy v. New York City Police Dept., 87 A.D.3d 874, 875 (1st Dep't. 2011); Zanuela v. Banks, 117 A.D.3d 1070, 1071 (2d

Dep't. 2014). Home addresses, social security numbers, and cell and home phone numbers have been deemed personal information exempt from disclosure based on the privacy exemption of FOIL. See Johnson v. NYPD, 257 A.D.2d 343, 348 (1st Dep't 1999).

23. The First Department has explained that the disclosure of personal information of witnesses who have offered information to law enforcement may “have a chilling effect on future witness cooperation.” Id. at 348. Disclosure of these records to a member of the public constitutes its release into the public domain: the information is thereby disseminated to the public at large and to all members of the public; any privilege or confidentiality which may have cloaked the information is lost beyond recall and cannot be reclaimed; and the release is final, for no control over its further dissemination can be exercised.

24. Here, the privacy interest of several individuals would be compromised if the withheld pages were disclosed. The information in the requested records includes witnesses' names, home addresses, dates of birth, and cell phone numbers. The records also include the sealed arrestee's name, home address, date of birth, home phone number, and business address. This information is extremely private to the sealed arrestee, the witnesses and their families. Disclosure would constitute a release into the public domain and any privilege or confidentiality which may have cloaked the information would be lost beyond recall.

25. Once the government agency has set forth a *prima facie* basis for exemption in order to protect privacy interests, the court must utilize the balancing test set forth in Goodstein v. Shaw, 119 Misc.2d 400 (Sup. Ct. N.Y. Co. 1983), which is also utilized under the federal Freedom of Information Act. See Dep't of Air Force v. Rose, 425 U.S. 352, 372-73 (1976). That test requires the court to balance the preservation of the public's interest in the release of the information at stake with the protection of the individual's right to privacy. In this case, the

balancing test fails to tip the balance in favor of disclosure as against the compromise of the privacy interests of the sealed arrestee and the witnesses. Here, the disclosure would serve ends entirely personal to Petitioners. There is no legitimate public interest in the public disclosure of personal information of the sealed arrestee and witnesses who furnished information to the Police Department that led to the sealed arrest of a former police officer.

**PETITIONERS' REQUEST FOR ATTORNEY'S FEES IS PREMATURE**

26. Here, Petitioners are not entitled to an award of attorney's fees and costs. Under the fee provisions of POL § 89(4)(c), regardless of which subsection applies (discretionary or mandatory award), in determining the availability of fees, the Court must first find that Petitioner substantially prevailed. "A petitioner 'substantially prevail[s]' under [POL] § 89(4)(c) when [he or she] 'receive[s] all the information that [he or she] requested and to which [he or she] is entitled in response to the underlying FOIL litigation.'" See Matter of Competitive Enter. Inst. v. Attorney Gen. of New York, 161 A.D.3d 1283, 1286 (3rd Dep't. 2018) (quoting Matter of New York State Defenders Ass'n v. New York State Police, 87 A.D.3d 193, 196 (3rd Dep't. 2011)).


27. Petitioners have not demonstrated that they have substantially prevailed to necessitate even contemplating an award of fees under either the mandatory or discretionary fee provisions. Accordingly, at this time, Petitioners are not entitled to fees or costs. Respondent reserves the right to fully address this issue if it becomes ripe.

**WHEREFORE**, by virtue of the foregoing, Respondent respectfully requests that this court grant the cross-motion to dismiss the instant proceeding in its entirety, issue an order denying the petition and dismissing the proceeding, and grant such other and further relief as may be just and proper.



The undersigned counsel certifies that, to the best of my knowledge, information and belief, formed after a reasonable inquiry, the presentation of the within litigation papers and of the contentions therein, is not frivolous as defined in subsection (c) of 130-1.1.

DATED: New York, New York  
December 21, 2023

  
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**CERTIFICATE OF  
COMPLIANCE**

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(Kelley, J.)

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POLICE DEPARTMENT,

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This affirmation is submitted in compliance with 22 NYCRR Section 202.8-b.

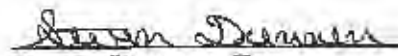
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