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

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In the matter of :
YOAV GONEN and
THE CITY REPORT, INC., : Index No. 159794/2023
:
Petitioners, :
:
For a Judgment Pursuant to Article 78 :
of the Civil Practice Law and Rules :
:
-v- :
:
NEW YORK CITY
POLICE DEPARTMENT, :
:
Respondent. :

--- x

PETITIONERS' REPLY IN FURTHER SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

New York City news outlet *The City* and senior reporter Yoav Gonen ("Media Petitioners") filed this action last October seeking the production of the entire investigative file concerning an ongoing story they broke on an alleged abuse of authority by the New York City Police Department ("NYPD")'s top uniformed officer. But instead of either producing these records or justifying its withholdings as required, the NYPD now claims that this case is moot because on February 29, 2024, it voluntarily disclosed two records in a case file containing only "the notification made to IAB following the [underlying] arrest of a former NYPD police officer." Affirmation in Support of Cross-Motion to Dismiss ("Resp.'s Cross-Motion"), Doc. No. 14, at 5 n.2. In disclosing these records, the NYPD zeroed in on Media Petitioners' reference to a specific case number—which is just one part of the full Freedom of Information Law request—to avoid producing the investigative records that the request actually seeks. *See, e.g.*, Respondent's Memorandum of Law, Doc. No. 37 ("Resp.'s Br.") at 1-2.

The Court should reject the NYPD's transparent legal maneuver. First, Media Petitioners' request, taken in context and under the circumstances, as required, reasonably described and clearly sought the entire investigative file. The NYPD is well aware of the material Media Petitioners are seeking. It has not only failed to meet its burden to show that the request as written was insufficient to locate the records sought, but also has neglected its duty under FOIL's implementing regulations to assist a requester seeking access to records. Second, even if the Court were to find that the request did not reasonably describe the records, the Court of Appeals has ruled that "petitioner does not have to restart the FOIL process anew" where, as here, "it would be an exercise in futility and a waste of administrative and judicial resources to require petitioner to request documents merely for respondent to restate the same bases for denial." *See infra* at 7. Because Media Petitioners substantially prevailed here and the NYPD has not and cannot demonstrate any reasonable basis for the withholdings, the

Court should release the entire investigative file to Petitioners and award them attorney's fees and costs.

ARGUMENT

I. BECAUSE THE NYPD HAS NOT PROVIDED INFORMATION REQUIRED TO BE PRODUCED UNDER FOIL, THIS ACTION IS NOT MOOT

"The disclosure of documents" by an agency does not "moot" an Article 78 proceeding where the agency continues to withhold documents, and the petitioners challenge the agency's withholdings. *Barry v. O'Neill*, 185 A.D.3d 503, 505 (1st Dep't 2020) (citing *Madeiros v. New York State Educ. Dep't,* 30 N.Y.3d 67, 72 (2017)). If an agency continues to withhold documents because it "is unable to locate" them "after a diligent search, Public Officers Law § 89 (3) requires the agency to certify that it does not have possession of a requested record or that such record cannot be found after diligent search[.]" *DeFreitas v. New York State Police Crime Lab*, 141 A.D.3d 1043, 1044 (3d Dep't 2016).

The NYPD argues that Media Petitioners' case is moot because it has produced redacted documents contained in the administrative case notification opening file cited in the FOIL request. But that production is insufficient to moot the case for three reasons. First, Media Petitioners' request, taken in context and under the circumstances, as required, reasonably described and clearly sought the entire investigative file and not just the produced documents. Second, the NYPD failed to show that the request as written was insufficient to locate the remaining records sought. Third, the NYPD neglected its duty under FOIL's implementing regulations to assist a requester seeking access to records.

A. Media Petitioners' Request, Taken in Context and Under the Circumstances, Reasonably Described and Clearly Sought the Entire Investigative File

The Court of Appeals has interpreted FOIL to require an agency to grant a request for non-exempt public records where it is reasonably described, "taken in context and under the circumstances," so as to enable the agency to locate the records. *Friedman v. Rice*, 30 NY3d 461, 473

(2017) (citing N.Y. Pub. Off. Law § 89(3)). That is, in order to deny a FOIL request based on its scope, "the agency must demonstrate that the description is 'insufficient for purposes of locating and identifying the documents sought.'" *Jewish Press, Inc. v New York City Dept. of Educ.*, 183 AD3d 731, 732 (2d Dep't 2020) (quoting *Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 (1986)). When the FOIL request is sufficient to locate the records, "the agency cannot complain about the nomenclature of the request as described." *Jewish Press*, 183 AD3d at 732.

The NYPD acts as if Media Petitioners' request only pertains to an IAB case number concerning the administrative case notification opening the investigation at issue into Chief Maddrey. *See* Resp.'s Br. at 5. In certifying that "there are no additional records within IAB case number 2021-26524," the NYPD purposefully ignores the full text of the request which seeks the actual investigative file. *Id.* The fact that Media Petitioners identified a case number indisputably connected to the full investigative file in no way nullifies their express request for "the investigative file," which "should include but not be limited to a closing memo" that "explains the reason that IAB arrived at the disposition it reached." Pet., Ex. A.

The Court must consider the full language of the request and its context and circumstances in determining its scope. *Friedman,* 30 NY3d at 473. In a strikingly similar case to this one, the Court of Appeals rejected an agency's claim that a request concerning an "entire case file" should be narrowly construed because it specifically sought only the documents provided to a panel reviewing the case. *Friedman,* 30 NY3d 461 at 473. The Court instead adopted the petitioner's broader construction: "taken in context and under the circumstances, petitioner's request reasonably described, and therefore clearly sought, all documents that would be part of the reinvestigation process." *Id.* The Court looked to context outside the scope of the request itself in determining whether it was reasonably described and credited language in an agency press release indicating that "experts had

been appointed" to a panel reviewing the case to "'work alongside' the agency and 'oversee the investigation.'" *Id.*

Here, the context and circumstances of Media Petitioners' FOIL request likewise made clear that they sought more than just documents triggering the opening of an investigation. Media Petitioners specifically requested from the NYPD "a copy of the investigative file for IAB case 2021-26524" that "should include but not be limited to a closing memo" that "explains the reason that IAB arrived at the disposition it reached." Pet., Ex. A. Information concerning the close of the investigation indisputably was not contained in the case opening notification number Media Petitioners cited but instead in a case number that is inextricably intertwined with this case number. *See* Resp.'s Cross-Motion at 5 n.2.

In Media Petitioners' administrative appeal, they went on to specifically reference the Civilian Complaint Review Board's independent investigation into Chief Maddrey concerning the "incident at issue here" and cited an article in which police told Petitioners that the internal investigation that is the subject of this request "found no misconduct by Maddrey." *See* Pet., Ex. D. Again, prior to litigation, Media Petitioners made clear they were seeking "the investigative file" which "concerns allegations of police misconduct that were substantiated by the Civilian Complaint Review Board, have been widely reported on, and that the Brooklyn District Attorney's Office released a trove of information about." *See* Pet., Ex. G. Much like in *Friedman*, there is ample context to support Media Petitioners' claim that the request encompasses Maddrey's "entire case file." *Friedman*, 30 NY3d at 473. The NYPD's argument that the Court should reduce the entire request to a single case number contradicts the Court of Appeals' decision in *Friedman* and must therefore be rejected.

B. The NYPD Failed to Show That the Request Was Insufficient to Locate the Documents Sought

The Court of Appeals has long recognized that an agency cannot claim that a request is insufficiently described where it is "able to locate the documents[.]" *Konigsberg*, 68 N.Y.2d at 245. The

burden is on the agency to demonstrate that an "electronic word search" or "other reasonable technological effort" would not locate an electronic record; merely claiming that the records are in a separate file is plainly insufficient. *Goldstein v. Inc. Vill. of Mamaroneck*, 221 A.D.3d 111, 119 (2d Dep't 2023).

Here, the NYPD only certified in producing certain records that "there are no additional records within IAB case number 2021-26524," Resp.'s Br. at 5, which in no way meets its burden to search for the requested "copy of the investigative file" that "should include but not be limited to a closing memo" that "explains the reason that IAB arrived at the disposition it reached." Pet., Ex. A. The NYPD has not even attempted to demonstrate, as it must, that it is somehow unable to locate the related full investigative file concerning Chief Maddrey's alleged abuse of authority. Nor can it given the context here, and thus the requested investigative file must be produced.

C. The NYPD Neglected its Duty to Assist a Requestor Seeking Access to Records

Under FOIL's implementing regulations, an agency has a duty to "assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records." 21 NYCRR 1401.2(b)(2). As the First Department recently recognized, the agency's "obligation" to assist a person seeking access to records has the force of law. *Desser v. Pascal*, 216 A.D.3d 452, 452–53 (1st Dep't 2023).

Despite the fact that "it seems unlikely that staff could not locate records pertaining to a case when the array of information" provided here was included in the request itself and in subsequent correspondence, the NYPD failed to even reach out to Media Petitioners in advance of denying the request to assist in identifying the records. Comm. on Open Gov't Advisory Op., FOIL-AO-9341 (Mar. 4, 1996), https://docsopengovernment.dos.ny.gov/coog/ftext/f9341.htm (quoting 21 NYCRR 1401.2(b)(2)) (opining that a request for investigative police reports met the reasonably described

standard where it cited to the docket number, arrest number and other identifying details). The agency's inaction here indisputably failed to meet its "duty of assuring that agency personnel 'assist the requester in identifying requested records.'" *Id.*

This duty is important because all agency records are "presumptively open to public inspection unless otherwise specifically exempted." *Capital Newspapers, Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566–67 (1986). A duty to assist requesters in identifying records serves multiple purposes: it assists requesters with obtaining public information even where a request is imperfect due to an agency's opaque indexing system; it aids agencies in properly interpreting the scope of requests; and it removes a stumbling block to FOIL's promise "to extend public accountability wherever and whenever feasible." N.Y. Pub. Off. Law § 84. This Court should "extend public accountability" here by finding that the NYPD failed to meet this important duty in connection with indisputably public records that must be released.

II. EVEN IF THIS COURT CONSTRUES MEDIA PETITIONERS' REQUEST NARROWLY, PETITIONERS STILL NEED NOT FILE A NEW REQUEST BECAUSE IT WOULD BE FUTILE

Even if a court finds that a request did not reasonably describe the records sought, the Court of Appeals recognizes that "petitioner does not have to restart the FOIL process anew" where, as here, "it would be an exercise in futility and a waste of administrative and judicial resources to require petitioner to request documents merely for respondent to restate the same bases for denial." *Friedman*, 30 N.Y. 3d at 475. The Court should therefore still reach the merits in this Article 78 proceeding.

The NYPD's argument that a new FOIL request must be filed is rooted in the "general rule requiring a party to exhaust administrative remedies before seeking judicial review of an agency's determination." *Id.; see* Resp.'s Br. at 9 (arguing that a new request must be filed because Media Petitioners purportedly only sought a copy of the administrative case file notifying IAB of the underlying arrest). But this requirement "need not be followed . . . when resort to an administrative

remedy would be futile."[1] *Friedman*, 30 N.Y. 3d at 473 (quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978)). In *Friedman*, the Court of Appeals found that the exhaustion rule's "goals would not be served by mechanical application of the rule" to a case where respondents would surely cite the same bases for denial of any new request and trigger the filing of another near-identical Article 78 proceeding. *Id.* at 474-75. The same is true in this case; requiring Media Petitioners to file another FOIL request will waste administrative and judicial resources because the parties will be forced to relitigate this case at a later date, where the NYPD would be allowed to "restate the same bases for denial" after it has affirmatively abandoned exemptions in its Answer and opposition papers. *Friedman*, 30 N.Y.3d at 475.

A. The NYPD Should Not Be Allowed to Relitigate Improperly Asserted Exemptions That It Abandoned in Its Answer and Opposition Papers

A party waives an argument by not raising it to the motion court. *See, e.g.*, *Sea Trade Mar. Corp. v. Coutsodontis*, 135 A.D.3d 442, 442 (1st Dep't 2016). Likewise, any "new arguments raised in successive briefing papers will not be considered where those arguments could have been raised in a previous submission." *Sharp v. Ally Fin., Inc.,* 328 F. Supp. 3d 81, 105 (W.D.N.Y. 2018) (collecting cases). Supplemental "briefing does not give [a party] a second bite at the apple." *EMA Fin., LLC v. AppTech Corp.,* No. 21-CV-6049 (LJL), 2022 WL 17352437, at *6 (S.D.N.Y. Dec. 1, 2022).

The NYPD affirmatively abandoned exemptions it relied on to withhold the entire investigative file by failing to assert them in its Answer or in its opposition papers. *See* Answer, Doc. No. 35, ¶ 46 (failing to cite interference with a law enforcement investigation or judicial proceeding as a basis for denial), ¶¶ 58-59 (narrowing scope of reliance on privacy exemption and CPL § 160.50 to just the redactions made to the released materials); Resp.'s Br. at 5-8. This Court should not give the

[1] The NYPD cites a single case, *Matter of Samuels*, for the proposition that Media Petitioners must file a new FOIL request to obtain the records actually sought. Resp.'s Br. at 8-9. But *Matter of Samuels* is a wholly irrelevant case concerning whether to toll the statute of limitations for a pro se petitioner. *See Matter of Samuels*, 2014 N.Y. Slip Op. 31581(U), at 3–4 (Sup. Ct., N.Y. Cty. 2014).

NYPD a second bite at the apple here, especially given that the NYPD claimed in its earlier Cross-Motion to Dismiss that upon the Court's denial of the motion, "Respondent will explore all exemptions in a verified answer." Resp.'s Cross-Motion at 2 n.1. *See, e.g.*, *Camarda v. Selover*, 673 F. App'x 26, 30 (2d Cir. 2016) ("Even where abandonment by a counseled party is not explicit, a court may infer abandonment from the papers and circumstances viewed as a whole." (internal quotation marks and citation omitted)).

Significantly, this is not the first time that the NYPD has improperly withheld records related to this incident. In January 2023, the NYPD claimed that body worn camera footage of the arrest of the retired officer had been sealed under CPL § 160.50. *See* Pet., Ex. F. But the Brooklyn District Attorney's Office shortly thereafter released "an enormous trove of footage" under FOIL "consisting of 36 videos culled from police body-worn cameras, and neighborhood and precinct house surveillance cameras[.]"[2] The public release of the footage regarding the underlying arrest by the DA's office conclusively demonstrates that there is no basis for the NYPD continuing to argue that CPL § 160.50 shields records related to either the underlying arrest at issue here or to Maddrey's role in voiding the arrest.

To avoid needlessly relitigating over these improper withholdings again upon filing a new request, this Court should proceed to the merits and grant the Petition. *See Friedman*, 30 NY3d at 474–75.

III. MEDIA PETITIONERS ARE ENTITLED TO ATTORNEY'S FEES AND COSTS

Media Petitioners are entitled to attorney's fees and costs regardless of how this Court rules on the scope of the request. They have—or will have—substantially prevailed, and the NYPD lacked a reasonable basis for denying Petitioner's request. *See* N.Y. Pub. Off. Law § 89(4)(c).

[2] *See* Yoav Gonen, *WATCH: Videos Show NYPD Chiefs Intervened Before Voiding of Ex-Cop's Gun Arrest*, THE CITY (Mar. 9, 2023), https://www.thecity.nyc/2023/3/9/23632499/nypd-police-jeffrey-maddrey-video.

If this Court construes the request narrowly, Media Petitioners have substantially prevailed because the NYPD would have disclosed all the information that Petitioners are entitled to. *See Cobado v. Benziger*, 163 A.D.3d 1103, 1106 (3d Dep't 2018). It is of no consequence that a requester believes he is entitled to more; attorney's fees are warranted whenever an agency produces the "full and only response available pursuant to the statute under the circumstances." *Legal Aid Soc'y v. N.Y. State Dep't of Corr. and Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3d Dep't 2013).

The NYPD claims that it had a reasonable basis for withholding the records under CPL § 160.50. But it has no basis for claiming that CPL § 160.50 applies to an IAB investigation. CPL § 160.50 requires the sealing of official records where a criminal proceeding has terminated in favor of the accused. Sealing often rests on a finding that the records fall "within the class of records required to be sealed." *New York Times Co. v Dist. Attorney of Kings County*, 179 AD3d 115, 121 (2d Dep't 2019). No showing has been made or can be that these internal investigative records fall within the class of records meant to be sealed. As this Court points out, the NYPD "did not cite a single case that holds that CPL 160.50 can be used to shield an entire IAB file from a FOIL request." *See* Decision and Order, Doc. No. 31. Accordingly, this Court should award Media Petitioners its "reasonable attorney's fees and other litigation costs." N.Y. Pub. Off. Law § 89(4)(c).

CONCLUSION

For all of the foregoing reasons, Media Petitioners respectfully request that this Court grant their petition seeking that this Court: (1) declare that the NYPD's denial of access to the requested records violates FOIL; (2) direct the NYPD to comply with its duty under FOIL and produce the requested records within twenty (20) days; (3) award Media Petitioners the attorney's fees and litigation

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costs incurred in obtaining the NYPD's belated compliance with this request for public records; and

(4) grant Petitioners such further relief as the Court deems just and proper.

Dated: March 12, 2024
Ithaca, NY

Respectfully submitted,

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