SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

In the matter of TINA TRASTER and TINA TRASTER PRODUCTIONS, LLC d/b/a/ ROCKLAND COUNTY BUSINESS JOURNAL, Petitioners, - against - ROCKLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY, Respondent, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	Index No. 034589/2025

PETITIONERS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF VERIFIED PETITION

Respectfully submitted,

Michael Linhorst
Heather E. Murray
Cornell Law School First Amendment Clinic
Myron Taylor Hall
Ithaca, New York 14853
Tel.: (607) 255-8518
mml89@cornell.edu
hem58@cornell.edu

Counsel for Tina Traster and Tina Traster Productions, LLC

TABLE OF CONTENTS

I. Respondent Fails to Carry Its Burden of Proving That Each Withholding Falls Squarely Into One of FOIL's Exemptions. 3

II. Respondent Fails to Justify Any Withholding of Records Responsive to Part Two of the Request. 5

a. Respondent Continues to Ignore the Intra-Agency Exemption's Carve-Outs for Factual Material and Final Determinations. 6

b. Respondent's New Claim That Material Is Privileged Has Been Waived and Is Unsupported. 7

III. Respondent Fails to Show Any Records Meet the Requirements for the Trade Secrets or Personal Privacy Exemptions. 9

IV. The Court Should Order Disclosure of All Responsive Records With Only Minimal Redactions. 11

V. The Court Should Grant Petitioners Attorney's Fees and Litigation Costs. 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page(s)**

Ashland Mgmt. Inc. v. Janien,
82 N.Y.2d 395 (1993) 10

Cap. Newspapers Div. of Hearst Corp. v. Burns,
67 N.Y.2d 562 (1986) 3, 5

Coads v. Nassau Cnty.,
221 N.Y.S.3d 129 (2d Dep't 2024) 8, 9

Data Tree, LLC v. Romaine,
9 N.Y.3d 454 (2007) 3, 5, 11, 12

Gould v. New York City Police Dep't,
89 N.Y.2d 267 (1996) 6, 7, 11, 12

Hanig v. Dep't of Motor Vehicles,
79 N.Y.2d 106 (1992) 10

Humane Soc. of U.S. v. Fanslau,
54 A.D.3d 537 (3d Dep't 2008) 10

Hyatt v. State Franchise Tax Bd.,
962 N.Y.S.2d 282 (2d Dep't 2013) 8

In re Mazzone,
30 Misc. 3d 981 (Sup. Ct., Albany Cnty. 2011) 12

Luongo v. Recs. Access Officer, Civilian Complaint Rev. Bd.,
51 N.Y.S.3d 46 (1st Dep't 2017) 2

M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.,
62 N.Y.2d 75 (1984) 3, 11, 12

Madeiros v. New York State Educ. Dep't,
30 N.Y.3d 67 (2017) 7, 8

Markowitz v. Serio,
11 N.Y.3d 43 (2008) 9

Empire Ctr. for Pub. Pol'y v. Metro. Transit Auth.,
2021 N.Y. Misc. LEXIS 51220, *14 (Sup. Ct., New York Cnty. 2021) 12

Pro. Standards Rev. Council of Am. Inc. v. New York State Dep't of Health,
597 N.Y.S.2d 829 (3d Dep't 1993) 10

Reclaim the Recs. v. New York State Dep't of Health,
—— N.Y.S.3d ——, 2025 WL 1458089 (N.Y. May 22, 2025) 3, 5, 7, 8

Salzer ex rel. Salzer v. Farm Fam. Life Ins. Co.,
280 A.D.2d 844 (3d Dep't 2001) 8

Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills,
904 N.Y.S.2d 512 (3d Dep't 2010) 3, 11

Supinsky v. Town of Huntington,
225 N.Y.S.3d 672 (2d Dep't 2025) 11

Town of Waterford v. New York State Dep't of Env't Conservation,
18 N.Y.3d 652 (2012) 6

W. Harlem Bus. Grp. v. Empire State Dev. Corp.,
13 N.Y.3d 882 (2009) 3

Statutes

N.Y. Pub. Off. Law § 84 ..... 2, 13

N.Y. Pub. Off. Law § 87 ..... 2, 5, 6, 9

N.Y. Pub. Off. Law § 89 12

Despite the fact that bid-related records are generally subject to disclosure under New York's Freedom of Information Law ("FOIL"), Respondent redacted or withheld a huge volume of the requested records and has come nowhere close to meeting its burden to prove that each of its withholdings was proper. It claims that some documents are appropriately withheld under the "intra-agency" exemption, but it has simply ignored the fact that the exemption does not apply to factual material or final determinations, which must be produced. It has further claimed that some documents are privileged, but that claim is waived because it was not raised at the administrative stage — and, in any event, Respondent has not demonstrated that any privilege actually applies. For its claim that some material is redacted because it is a "trade secret," Respondent has utterly failed to meet the law's fact-intensive test for trade secrets. The same for its personal privacy claim; Respondent has not carried its burden of proof for any of its withholdings.

Respondent repeatedly emphasizes, more than a dozen times, that it acted in "good faith." But good faith or not, that is not the standard that FOIL requires. The law requires agencies to apply exemptions narrowly, and it demands that the agency prove — not with conclusory statements, but with evidence — that each record it withheld falls squarely into one of those exemptions. *See* Petitioners' Memo. of Law ("Pet. Mem."), ECF No. 11, at 10-12.[1] Here, Respondent's filings include lengthy discussions about its RFP process, but hardly any evidence about whether its withholdings were legally permissible.[2]

[1] Page numbers cited in this brief refer to the NYSCEF-stamped page number rather than the document's internal page numbering.

[2] Additionally, the affidavit that Respondent filed by Gerard Damiani, Respondent's executive director, includes a number of improper legal conclusions and argumentation. *See, e.g.*, Damiani Aff., ECF No. 20, at ¶ 52 (opining that certain records are "pre-decisional deliberations and are considered exempt from FOIL" and that some documents "are protected by both Attorney-Client and Attorney-Work Product privileges"). The Court should strike the Damiani affidavit, or at least strike the legal conclusions and argumentation that it contains.

Respondent claims that it has "consistently fulfilled its obligations" under FOIL, Resp. Mem. of Law in Opp. ("Resp. Opp."), ECF No. 30, at 19, yet its brief highlights fundamental misunderstandings of the statute. It states, for instance, that FOIL exemptions are "statutory mandates" and "not discretionary." *Id*. at 21. In fact, the exemptions are discretionary. The law states that agencies "*shall*" provide the public access to "all records," but that agencies "*may* deny access to records or portions thereof that" that fall under one of the exemptions.[3] N.Y. Pub. Off. Law § 87(2) (emphasis added); *see also Luongo v. Recs. Access Officer, Civilian Complaint Rev. Bd.*, 51 N.Y.S.3d 46, 57 (1st Dep't 2017) ("Nothing in the Freedom of Information Law restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions." (cleaned up)). This emphasis on disclosure is rooted in the purpose of the statute itself. The Legislature declared that FOIL aims to "extend public accountability wherever and whenever feasible" because "government is the public's business" and "[t]he more open a government is with its citizenry, the greater the understanding and participation of the public in government." N.Y. Pub. Off. Law § 84. While Respondent may withhold records that it can prove fall squarely into an exemption, the standard for withholding is high, and all of Respondent's records are public unless proven otherwise.

Because Respondent has not carried its burden of proving that each withholding is properly justified by a FOIL exemption — indeed, it does not come close to such proof for any of its withholdings — this Court should order Respondent to produce all of the records that Petitioner

[3] More evidence of Respondent's fundamental misunderstandings: It attached a FOIL request to the Damiani Affidavit, yet it redacted it "to protect [the requester's] privacy," Damiani Aff. at 6, n.1 — even though FOIL requests, including the names of requesters, are already public. Comm. on Open Gov't, Advisory Op. 17692 (June 26, 2009), https://docsopengovernment.dos.ny.gov/coog/ftext/f17692.html (explaining that "names of requesters" are "accessible to the public," as are "the actual requests made under the Freedom of Information Law").

Tina Traster requested. At a minimum, the Court should order Respondent to provide the records for *in camera* review so that the Court can decide for itself whether any of the withholdings are proper. It should also order Respondent to produce, to both the Court and Petitioners, the privilege log that Respondent says it has created, and it should award attorney's fees and costs to Petitioners.

I. Respondent Fails to Carry Its Burden of Proving That Each Withholding Falls Squarely Into One of FOIL's Exemptions.

As Petitioners explained in their opening brief — yet Respondent did not even address in its opposition — an agency attempting to prevent disclosure "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption." *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986); *see also* Pet. Mem. at 9-12. The State's highest court has emphasized time and again that it is the agency's "burden" to establish "a particularized and specific justification for denying access." *Id.*; *see also M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984) ("To give the public maximum access to records of government, these statutory exemptions are narrowly interpreted, and the burden of demonstrating that requested material is exempt from disclosure rests on the agency."); *Reclaim the Recs. v. New York State Dep't of Health*, —— N.Y.S.3d at ——, 2025 WL 1458089, at *5 (N.Y. May 22, 2025) (same).

The Court of Appeals has been clear that when it says "a particularized and specific justification" is required, it means what it says. It is not enough for an agency to make "conclusory characterizations" about why it believes the documents may be withheld. *W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 885 (2009). Nor may an agency rely on "speculation." *Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 904 N.Y.S.2d 512, 515 (3d Dep't 2010). Nor is it sufficient for the agency to show that it is "plausible" that the documents fall into a valid exemption. *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-63 (2007).

Rather, the agency must "*prove*" that the withholdings fall "*squarely* within a FOIL exemption." *Id*. (emphasis added); *see also id*. at 463 ("If the [agency] fails to prove that a statutory exemption applies, FOIL compels disclosure, not concealment.").

Respondent does not come close to meeting its burden here. Rather than proving that each withholding — meaning every redaction and every document that was not produced — "falls squarely" within one of FOIL's "narrowly interpreted" exemptions, Respondent merely offers "conclusory characterizations," "speculation," and, at times, nothing at all.

In their opening brief, Petitioners pointed to several examples of facially suspect withholdings, such as the redactions to one bidder's "qualifications and experience" and to another bidder's "projects completed within the past five years." Pet. Mem. at 7-8, 16. Respondent offered no response to those examples and nothing to prove that the redactions fall squarely into any exemption.

And it is not just those examples that lack any support from Respondent. In its opposition brief, Respondent offered some general statistics about its redactions, stating that it withheld, among other things, "75 instances of financial information related to annual contracting values, contract backlog, bonding capacity, tax information, and average values of contract," "5 instances of litigation and settlement related information," "14 instances of private personal information regarding licensing and certification," and various "instances of sensitive commercial information related to prior experience and reference projects," "supply chain," and "trade and industry references." Resp. Opp. at 16-17. It did not explain why any of this material falls squarely into any exemption. For instance, why would "litigation" information, which is presumably already public on a court docket, meet any FOIL exemption? Respondent does not say. How could "licensing and certification" information, which should also be publicly available from the relevant

licensing authority, meet any exemption? Respondent fails to explain. Why would a contractor's "prior experience" be a secret? No explanation there, either.

These are only examples. Respondent has done such a poor job of supporting each withholding with "a particularized and specific justification" that even now, after Respondent has filed its opposition brief and exhibits, Petitioners are still unable to go redaction-by-redaction to explain why each one is improper.

Respondent has failed to meet its burden with respect to *any* of its withholdings — it has not provided "a particularized and specific justification" to "prove" that *any* of its redactions or withheld documents fall "squarely" within one of FOIL's exemptions, as the law requires. *See Data Tree*, 9 N.Y.3d at 462-63; *Cap. Newspapers*, 67 N.Y.2d at 566; *Reclaim the Recs.*, —— N.Y.S.3d at ——, 2025 WL 1458089, at *5. Its withholdings cannot stand, and it must be ordered to produce all responsive records.

II. Respondent Fails to Justify Any Withholding of Records Responsive to Part Two of the Request.

With respect specifically to the records responsive to Part Two of Ms. Traster's request — which seeks "notes of the committee assessing the bids and any determination made to accept or reject a submitted bid," *see* Pet. Mem. § III — Respondent repeated its conclusory claim that they are all properly withheld under the intra-agency exemption, and it made a new unsupported argument for the first time, that some of the records can also be withheld under the attorney-client and work-product privileges, *see* Resp. Opp. at 21-23.

First, Respondent completely ignored the statutory carve-outs in the intra-agency exemption, which require disclosure of any factual information and final agency policy or determinations. N.Y. Pub. Off. Law § 87(2)(g). Any such material must be disclosed. In fact, Respondent failed to meet its burden of proving that the intra-agency exemption applies to *any* of

the material at all. The members of the committee assessing bids included several people from outside the agency, Damiani Aff. ¶ 34 (stating the committee included "outside consulting engineers" and the "project's architect," among others), and Respondent offered no evidence for why this material would still be subject to the intra-agency exemption. *See Town of Waterford v. New York State Dep't of Env't Conservation*, 18 N.Y.3d 652, 658 (2012) (analyzing circumstances in which communications with third party may be withheld under intra-agency exemption).

Second, Respondent's new claim about attorney-client privilege has been waived because it was not raised at the administrative stage; and even if it were not waived, Respondent has failed to prove that the material is subject to the privilege.

Thus, as with the rest of its withholdings, Respondent has not met its burden to prove that any of the records that are responsive to Part Two of the request can properly be withheld.

a. Respondent Continues to Ignore the Intra-Agency Exemption's Carve-Outs for Factual Material and Final Determinations.

Respondent correctly notes that the intra-agency exemption allows withholding applicable records "unless such materials consist of 'statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits,'" Resp. Opp. at 21 (quoting N.Y. Pub. Off. Law § 87(2)(g)) — but then it simply ignores that provision. Nowhere in its discussion of the exemption does it even mention this carve-out again. *See id*. at 21-23. It does not even attempt to prove that the records at issue here lack any "factual information" or final agency "determinations." As Petitioners explained in their opening brief, if any portion of an otherwise withholdable record contains "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process," it must be disclosed. Pet. Mem. at 20 (quoting *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 277 (1996)).

In ignoring this provision, Respondent leaves open the possibility that the *entirety* of the responsive records are "factual information" or "determinations" that must be disclosed. To the extent Respondent makes any argument in support of its intra-agency exemption claim, its statements are merely conclusory, with no factual support. *See* Resp. Opp. at 22 (claiming records "are clearly exempt from disclosure under FOIL to the extent that they contain deliberative or predecisional materials"). Therefore, Respondent fails to meet its burden of proving that the records are subject to the exemption, and the records must be disclosed.[4]

b. Respondent's New Claim That Material Is Privileged Has Been Waived and Is Unsupported.

Respondent's new claim, that the materials "are protected by both attorney-client and attorney work product privileges," Resp. Opp. at 17, also cannot justify withholding any records. The claim is both too late and unsupported.

A justification for withholding records is waived if the agency does not raise it during the administrative proceedings prior to litigation. *Reclaim the Recs.*, —— N.Y.S.3d at ——, 2025 WL 1458089, at *7; *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 74 (2017) ("[W]e reject the Department's reliance on [the FOIL exemption it claimed] . . . because the Department failed to invoke that particular exemption in its denial of petitioner's FOIL request."). Here, Respondent did not raise this privilege claim until its opposition brief in litigation. In its initial denial of Ms. Traster's request — where Respondent failed to even say that it was denying Part Two, and instead simply did not produce any records — Respondent did not mention privilege at all. Pet. Mem. at 8; Pet. Ex. 7. Respondent again failed to raise any privilege assertion when it denied Ms. Traster's administrative appeal. Pet. Mem. at 8; Pet. Ex. 9. Its administrative appeal denial

[4] Respondent also failed to address the fact that "blanket" withholdings — attempting, as it did here, to withhold all records responsive to a request category — "are inimical to FOIL's policy of open government." Pet. Mem. at 18-19 (quoting *Gould*, 89 N.Y.2d at 275).

only claimed that the Part Two records were "exempt from disclosure as pre-decisional materials that are part of the deliberative process." *Id*.

Raising this privilege claim now comes too late. In FOIL cases, like all other administrative law cases, courts "are limited to reviewing the justifications for denial that [the agency] provided at the administrative level." *Reclaim the Recs.*, —— N.Y.S.3d at ——, 2025 WL 1458089, at *7. As the State's highest court recently reiterated, if an agency makes a claim "for the first time during litigation," such an argument is "unpreserved." *Id*. "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency" at the administrative level, prior to litigation. *Id*. (quoting *Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 74-75 (2017)).

Therefore, this Court cannot consider Respondent's claim about privilege. But even if the claim were preserved, it would fail. For a communication to be protected by the attorney-client privilege, it "must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a legal rather than a commercial nature." *Hyatt v. State Franchise Tax Bd.*, 962 N.Y.S.2d 282, 296 (2d Dep't 2013) (holding that communications regarding patent licensing were "not legal in nature, but commercial, regardless of the status of [participants] as attorneys"). It also must have been "confidential," with no waiver of the privilege. *Coads v. Nassau Cnty.*, 221 N.Y.S.3d 129, 133 (2d Dep't 2024). As for the attorney work product privilege, this "is very narrowly construed." *Salzer ex rel. Salzer v. Farm Fam. Life Ins. Co.*, 280 A.D.2d 844, 846 (3d Dep't 2001). That privilege only applies to "materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his or her legal research, analysis, conclusions,

legal theory or strategy. Materials or documents that could have been prepared by a layperson do not fall within the attorney work product exception." *Coads*, 221 N.Y.S.3d at 133 (cleaned up).

For Respondent to claim the attorney-client privilege here, it would have to show that the communications facilitated legal advice, they were not of a commercial nature, and no one other than the attorney or client was a party to the communications. For the Respondent to claim the work-product privilege, it would have to show that the materials could not have been prepared by a non-attorney. Yet Respondent has made no showing at all in support of its conclusory privilege claim. *See generally* Resp. Opp. at 17, 19, 23. It does not even attempt to present the facts that would be needed to establish privilege or show that privilege was preserved despite the presence of "outside consulting engineers" and the "project's architect" on the evaluation committee, *see* Damiani Aff. ¶ 34. Even if the claim were timely, and it is not, it would have to be rejected.

III. Respondent Fails to Show Any Records Meet the Requirements for the Trade Secrets or Personal Privacy Exemptions.

As with the intra-agency exemption claim, Respondent's brief utterly fails to prove that it meets the trade secret exemption. An agency may only withhold material under this exemption if it is a "trade secret" or if disclosure "would cause substantial injury to the proposers' competitive position." N.Y. Pub. Off. Law § 87(2)(d). Respondent does not appear to be relying on the "substantial injury" provision — it discusses the test for determining if material is a "trade secret," but it does not make an argument that release of the material "would cause substantial injury." *See generally* Resp. Opp. at 23-26. Nor could it. Proving that the release of certain information "would cause substantial injury" to a company's competitive position requires certainty of harm, not speculation, and it requires evidence of that harm. Pet. Mem. at 14-18; *Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008) (requiring agencies to "present specific, persuasive evidence that disclosure

will cause [the company] to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm"). Respondent offers nothing of the kind.

Respondent instead hangs its hat on the "trade secrets" argument, claiming that the material it redacted meets the fact-intensive analysis required to determine if something is a true trade secret. But the idea that a company's "litigation" or "certifications" — to take just two examples of information that Respondent admits to redacting, *see* Resp. Opp. at 17 — are "trade secrets" defies belief. This public information is obviously not a "secret" that is "known to only one or a few and kept from the general public," nor does it meet the six factors set out for determining whether something is a trade secret. Pet. Mem. § II.b; *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 407 (1993). The same goes for a company's prior construction projects, third-party references, and much of the rest of the material that Respondent has admitted to redacting. *See* Resp. Opp. at 16-17. None of this is a "trade secret," and Respondent's conclusory claims to the contrary only highlight its failure to meet its burden of proof.

It is the same for Respondent's privacy exemption claim. While Petitioners do not seek private contact information, such as personal cell phone numbers and email addresses, Pet. Mem. at 12-13, Respondent is apparently redacting more than that, and it did not offer proof as to what its redactions are or why each record "would ordinarily and reasonably be regarded as intimate, private information." *Hanig v. Dep't of Motor Vehicles*, 79 N.Y.2d 106, 112 (1992); *see* Pet. Mem. § II.a. It also did not address any of the case law that Petitioners cited, which establish that, regardless of what Respondent told the companies or what the companies subjectively thought, there is no objectively reasonable expectation of privacy in material submitted in response to an RFP. *See Humane Soc. of U.S. v. Fanslau*, 54 A.D.3d 537, 538 (3d Dep't 2008); *Pro. Standards Rev. Council of Am. Inc. v. New York State Dep't of Health*, 597 N.Y.S.2d 829, 831 (3d Dep't

1993). Instead, Respondent's argument is simply conclusory. *See* Resp. Opp. at 28-29. It has again failed to meet its burden to show that any of its withholdings are lawful.

IV. The Court Should Order Disclosure of All Responsive Records With Only Minimal Redactions.

The Court should order Respondent to produce all responsive records that are not properly subject to one of FOIL's narrow exemptions. When, as here, an agency "fails to prove that a statutory exemption applies, FOIL compels disclosure, not concealment." *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007). Courts regularly order agencies to provide all such material to requesters. *See, e.g.*, *Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 904 N.Y.S.2d 512, 516 (3d Dep't 2010) ("With the agency having failed to establish an exemption, FOIL's broad standard of open disclosure and presumption of availability require that the [records] be disclosed."). The Court should do so here.[5]

The Court should also order Respondent to provide a copy of the "detailed privilege log" it says it has already prepared, Resp. Opp. at 17, to both the Court and to Petitioners. This log appears to be the detailed explanation for withholdings that Ms. Traster has asked Respondent to provide since even before she filed her administrative appeal, yet Respondent's brief is the first time it admits to having such a document. Producing the log may allow the parties to narrow any remaining dispute and assist the Court in determining whether any redactions are proper.

[5] At a minimum, the Court should inspect the withheld material — both the redacted documents and the fully withheld ones — *in camera* to determine which records must be produced. This *in camera* inspection is also widely accepted as a method of enforcing FOIL. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996) ("If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material."); *see also M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984); *Supinsky v. Town of Huntington*, 225 N.Y.S.3d 672, 675 (2d Dep't 2025) (ordering *in camera* review).

The Court should not agree to Respondent's proposal of "remanding" the matter back to the agency. Such a procedure is not an accepted way to resolve FOIL petitions. *See Data Tree, LLC*, 9 N.Y.3d at 463; *M. Farbman & Sons, Inc.*, 62 N.Y.2d at 83; *Gould*, 89 N.Y.2d at 275. To support its proposal, Respondent merely cites one unpublished decision from New York County, *Empire Ctr. for Pub. Pol'y v. Metro. Transit Auth.*, 2021 N.Y. Misc. LEXIS 51220, *14 (Sup. Ct., New York Cnty. 2021), and one decision in which the agency had not completed its search or production prior to litigation, *In re Mazzone*, 30 Misc. 3d 981, 984 (Sup. Ct., Albany Cnty. 2011) (remanding to agency, which had continued producing records "during the pendency of this proceeding"). This is not controlling authority, unlike such decisions as *Data Tree*, *M. Farbman* and *Gould*. Respondent has already had several chances to produce records in compliance with FOIL. Now, with its remand request, Respondent attempts to undercut FOIL's judicial review, allowing itself to be its own judge. Sending the matter back to Respondent would only further delay final resolution of this case and would ultimately require additional resources to be expended by the Parties and this Court.

V. The Court Should Grant Petitioners Attorney's Fees and Litigation Costs.

For the reasons described above and in Petitioners' opening brief, *see* Pet. Mem. at 21-22, Respondent had no reasonable basis to withhold the records Ms. Traster requested. FOIL requires an award of fees in this circumstance, and it also allows a court to award fees when, as here, the agency "failed to respond to a request or appeal within the statutory time." N.Y. Pub. Off. Law § 89(4)(c). Should Petitioners substantially prevail in this proceeding, this Court should grant attorney's fees and other litigation costs. Pet. Mem. § IV.

CONCLUSION

As the Legislature declared when it created FOIL, "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to

determinations is basic to our society." N.Y. Pub. Off. Law § 84. Yet Respondent's attempt to shield records from public disclosure, despite failing to prove that the records are properly exempted, threatens to thwart this essential promise of FOIL. For the reasons stated above and in Petitioners' opening Memorandum of Law, the Court should order Respondent to produce all responsive records, as the Respondent has failed to prove that any of its withholdings are lawful. At a minimum, the Court should order Respondent to provide the records for *in camera* review. It should further order Respondent to produce its privilege log to Mr. Traster and the Court, and it should order attorneys' fees and costs.

Dated: September 2, 2025

Respectfully submitted,

By: /s/ *Michael Linhorst*

Michael Linhorst
Heather E. Murray
Cornell Law School First Amendment Clinic
Myron Taylor Hall
Ithaca, New York 14853
Tel.: (607) 255-8518
mml89@cornell.edu
hem58@cornell.edu

Counsel for Tina Traster
and Tina Traster Productions, LLC

SECTION 202.8-b CERTIFICATION

I, Michael Linhorst, do hereby certify that this document complies with the word count limit set forth in Section 202.8-b of the Uniform Civil Rules. The word count of this Memorandum of Law is 4,161 words. The word count excludes any caption, table of contents, table of authorities, and signature block, and it is compliant with the word count limit. This document was prepared using Microsoft Word. The font of this document is Times New Roman, size 12.

/s/ *Michael Linhorst*
Michael Linhorst