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

In the matter of GERSH KUNTZMAN, JESSE COBURN, KEVIN DUGGAN, and OPEN PLANS, INC., Petitioners, - against - NEW YORK CITY DEPARTMENT OF TRANSPORTATION, Respondent, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	Index No.

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT AND VERIFIED PETITION

Respectfully submitted,

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PRELIMINARY STATEMENT

New York's Freedom of Information Law ("FOIL") provides the public and the press the right to promptly access public records. *See* Public Officers Law § 84. The law exists to protect democracy, forcing open the government and enabling anyone to oversee the work of agencies. *Id*. But effective oversight is thwarted when an agency fails to provide the public with timely access to its records. Waiting to release records until they are outdated or no longer newsworthy means that, too often, access delayed is access denied. For that reason, FOIL requires agencies to respond to records requests within a reasonable timeframe, typically in 20 business days, and it establishes a framework to make sure agencies consider each request individually and respond expeditiously. *See* Public Officers Law § 89(3)(a).

However, the New York City Department of Transportation ("DOT") systematically ignores FOIL's requirements. It tells nearly all requesters that the agency will take six months before it decides whether it will even grant or deny a request. The agency has imposed this half-year delay on more than 98 percent of the FOIL requests it received over the last three years. Rather than complying with its obligations, DOT has essentially re-written the law by fiat, simply ignoring the requirements that it does not like. By flouting the law, DOT makes it essentially impossible for the press or citizens to engage in effective oversight.

DOT's delays regularly harm *Streetsblog NYC*, a local news organization that reports on the City's transportation policy. *Streetsblog's* reporting often requires access to DOT's public records. Yet it is unable to obtain the records in a timely way. In request after request — even simple requests seeking a single, clearly identifiable document — DOT reflexively claims the same extended, months-long delay. In doing so, the agency violates FOIL and impedes the ability of the public, including *Streetsblog's* reporters, to understand DOT's actions.

Streetsblog files this Article 78 action to seek redress of DOT's unlawful actions. First, this Court should order that DOT immediately produce the records requested in *Streetsblog's* five unfulfilled requests. These requests have been constructively denied. DOT imposed a six-month delay on each one — delays that are not reasonable because, contrary to the law, they are not individualized to the circumstances of each request, are not adequately explained, and are excessively long. Article 78 relief is mandatory where, as here, an agency constructively denies a request by failing to provide a reasonable decision date.

Second, this Court should enjoin DOT's practice of unlawfully imposing boilerplate, months-long delays for nearly every request it receives. Absent a court order, DOT has demonstrated that it will continue to make *Streetsblog* and other requesters wait months for responses, even though that is unreasonable and unjustified. This Court has the inherent equitable power to issue such an injunction, or to declare that DOT's practice of delays is unlawful, and it should exercise that power to protect the public's right to an open, transparent government.

STATEMENT OF FACTS

Streetsblog NYC is a news outlet devoted to "connect[ing] people to information about how to reduce dependence on private automobiles and improve conditions for walking, biking, and transit." *About*, Streetsblog NYC, https://nyc.streetsblog.org/about. Its writing raises the profile of these issues with policymakers and turns arcane topics like parking requirements and induced traffic into accessible stories for a broad audience. Information from DOT is central to *Streetsblog's* ability to conduct its reporting and inform its audience.

A. DOT's Standardized Delays and Copy-and-Paste Explanations

Streetsblog regularly files FOIL requests with DOT, and the Department consistently claims the same extension for itself to respond. In response to dozens of requests that *Streetsblog* has submitted to DOT since June 2021, DOT stated the same thing:

> Due to the volume of FOIL requests which DOT receives per year and that we generally process such requests in the order in which they are received, we expect to provide you with a response on or about the date indicated above.

E.g., Exs. 2 & 20. In each instance, regardless of the breadth or complexity of the request, DOT's response never changed, and it imposed the same delay, providing an estimated date of completion that stretched about six months after the initial request.

For example, on January 12, 2024, *Streetsblog* submitted a request for a copy of a single DOT contract. Ex. 33 (FOIL request number FOIL-2024-841-00290). To ease the Department's search, *Streetsblog* provided the specific contract number, the vendor, and the contract's purpose. *Id*. DOT responded that, "[d]ue to the volume of FOIL requests which DOT receives per year and that we generally process such requests in the order in which they are received," it expected to complete the request by July 12, 2024 — six months after the request was filed. Ex. 34. In another request, *Streetsblog* sought the DOT Commissioner's official calendar for a single day: January 2, 2024. Ex. 35 (FOIL request number FOIL-2024-841-00291). Yet DOT responded the same way, claiming that, "[d]ue to the volume of FOIL requests which DOT receives per year and that we generally process such requests in the order in which they are received," it expected to take six months to complete the request. Ex. 36. *Streetsblog* is still waiting for a response to five requests, each of which were filed months ago.

DOT's practice of granting itself six-month response deadlines is not limited to FOIL requests from *Streetsblog*. Rather, this is a practice that DOT employs in the vast majority of requests it receives. Public data show that of the 21,298 requests that DOT received between June 1, 2021 and August 23, 2024, more than 98 percent were delayed by greater than 170 days. Lloyd

Aff.; OpenRecords, City of New York, https://a860-openrecords.nyc.gov/request/view_all.[1] The average wait time for all of those requests was 182 days — more than six months. *See id*. These standardized delays are thus a widespread practice for DOT that is not limited only to requests from *Streetsblog*.

B. FOIL's Background and Deadlines

FOIL establishes a comprehensive timeline for agencies to respond to requests. The law's timing requirements aim to carry out its purpose of ensuring the public's right to know, in a timely way, what the government is doing. *See Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (explaining that FOIL "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"). In enacting FOIL, the Legislature declared that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible," and "the public, individually and collectively and represented by a free press, should have access to the records of government" in accordance with FOIL. N.Y. Pub. Off. Law § 84.

To carry out those goals, FOIL — along with its implementing regulations — imposes a series of deadlines for an agency to respond to a request. An agency must initially acknowledge the request within five business days and provide "an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than 20 business days after the date of the acknowledgment." 21 N.Y.C.R.R. § 1401.5(c)(3). If the agency knows that it cannot meet this 20-day deadline, it must

[1] This data was collected from the New York City OpenRecords website. *See* Lloyd Aff. & Petition n.1. The Court may take judicial notice of this data because it derives from an official government source, the New York City OpenRecords website. "[M]aterial derived from official government Web sites may be the subject of judicial notice." *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dep't 2009).

provide "a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part." *Id.*; *see also* N.Y. Pub. Off. Law § 89(3)(a) (same). In other words, an agency must grant or deny the request within 20 business days of acknowledging it, or else explain why it cannot and give a reasonable "date certain" when it will grant or deny the request. *Id*.

Notably, each of these timing requirements demands that the agency's response date be "reasonable," and both the statute and regulations specify that reasonableness is measured based on the specific request at issue. The statute requires that the date must be "reasonable under the circumstances of the request." N.Y. Pub. Off. Law § 89(3)(a). And the regulations set out factors that must be considered in assessing reasonableness, including "the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time." 21 N.Y.C.R.R. § 1401.5(d). Thus, the statute and the majority of regulatory factors focus on the particular request, not on general issues that could apply to any request.

FOIL's timing requirements are critical to fulfilling the law's goal of extending public accountability and promoting democratic participation in government. As in any information access law, "information is often useful only if it is timely." *Open Soc'y Just. Initiative v. Cent. Intel. Agency*, 399 F. Supp. 3d 161, 164 (S.D.N.Y. 2019) (quoting House report on the Freedom of Information Act, H.R. Rep. No. 93-876, at 6271 (1974)). Excessive delay in providing information to the public prevents effective oversight and "is often tantamount to denial." *Id*.

Indeed, an agency's "failure to comply" with FOIL's timing requirements "shall constitute a denial of a request." 21 N.Y.C.R.R. § 1401.5(e); *see also* N.Y. Pub. Off. Law § 89(4)(a) ("Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.").

The regulations provide specific examples of circumstances in which a request is deemed to be denied because an agency violates the timing requirements. 21 N.Y.C.R.R. § 1401.5(e). Three of those examples mirror DOT's actions here. A request is denied when an agency (1) gives an "approximate date for granting or denying access in whole or in part that is unreasonable under the circumstances of the request"; (2) "does not grant a request in whole or in part within 20 business days . . . and fails to provide the reason in writing explaining its inability to do so"; or (3) states "that more than 20 business days is needed to grant or deny the request in whole or in part and provides a date certain within which it will do so, but such date is unreasonable under the circumstances of the request." *Id*.

C. *Streetsblog's* Outstanding Requests

Streetsblog currently has five outstanding requests awaiting responses from DOT. All of them were filed months ago, received the same standardized response from DOT, and face the same six-month delay before the Department says it will substantively respond to the requests.

FOIL-2024-841-00447: On January 19, 2024, *Streetsblog* submitted a FOIL request seeking the results of an online survey that DOT conducted. Ex. 1. The request explained: "In October, 2023, Mayor Adams ordered more outreach to residents of Underhill Avenue regarding the unfinished bike boulevard project. The residents were surveyed via an online questionnaire. We are requesting the results of that survey and the raw responses on which it is based." *Id*. On January 24, 2024, DOT acknowledged the request with the same boilerplate language used in its prior response, estimating that it expected to respond "on or about" July 18, 2024. Ex. 2. On May

21, 2024, *Streetsblog* appealed this response as a constructive denial of the request. Ex. 3. DOT denied the appeal on May 31, 2024. Ex. 4. The request remains outstanding.

FOIL-2024-841-01249: On February 26, 2024, *Streetsblog* requested a "list of new pedestrian space DOT created in 2022 and 2023 under the Streets Plan." Ex. 5. DOT responded with the same boilerplate language used in its prior responses, estimating that it expected to respond "on or about" August 22, 2024. Ex. 6. On March 4, 2024, *Streetsblog* appealed this response as a constructive denial of the request. *Id*. DOT denied the appeal on March 18, 2024. Ex. 7. The request remains outstanding.

FOIL-2024-841-04120: On July 22, 2024, *Streetsblog* requested figures showing the number of pedestrians killed while jaywalking in New York City and the total number of pedestrian traffic fatalities in the city over the previous five years. Ex. 8. DOT responded with the same boilerplate language used in its prior responses, estimating that it expected to respond "on or about" January 23, 2025. Ex. 9. On July 29, 2024, *Streetsblog* appealed this response as a constructive denial of the request. *Id*. DOT denied the appeal on August 12, 2024. Ex. 10. The request remains outstanding.

FOIL-2024-841-04200: On July 24, 2024, *Streetsblog* requested "Commissioner Ydanis Rodriguez's official calendar" from a single day: July 1, 2024. Ex. 11. DOT responded with the same boilerplate language used in its prior responses, estimating that it expected to respond "on or about" January 27, 2025. Ex. 12. On August 2, 2024, *Streetsblog* appealed this response as a constructive denial of the request. Ex. 13. DOT denied the appeal on August 15, 2024. Ex. 14. The request remains outstanding.

FOIL-2024-841-04201: On July 24, 2024, *Streetsblog* requested "all emails and text messages sent or received on June 5 or June 6, 2024, by Ydanis Rodriguez in his official capacity

as DOT commissioner containing the words 'congestion' or 'tolling.'" Ex. 15. DOT responded with the same boilerplate language used in its prior responses, estimating that it expected to respond "on or about" January 27, 2025. Ex. 16. On August 2, 2024, *Streetsblog* appealed this response as a constructive denial of the request. Ex. 17. DOT denied the appeal on August 15, 2024. Ex. 18. The request remains outstanding.

D. *Streetsblog's* Other Recent Requests Suffered the Same Delays

Beyond the five open requests, DOT has responded the same way to numerous other FOIL requests from *Streetsblog*. Two of those requests were already described above: FOIL-2024-841-00290 and FOIL-2024-841-00291. *See supra* § A. The Complaint and Verified Petition details nine more examples. *See* Compl. & Pet. ¶¶ 55-98. In each one, DOT responded to *Streetsblog's* requests using precisely the same language and imposing the same six-month delay, even though the requests sought records as varied (and simple) as a phone or email directory, *id*. ¶¶ 61-64 (FOIL-2021-841-03298), records related to three specific DOT projects, identified by their project ID numbers, *id*. ¶¶ 65-68 (FOIL-2023-841-06682), and communications between the DOT Commissioner and a lobbying firm regarding a DOT program, *id*. ¶¶ 80-83 (FOIL-2023-841-06687).

* * *

In light of *Streetsblog's* outstanding requests, its many other requests to DOT that have faced the same boilerplate, six-month delays, and the government's data showing that such delays are imposed on the vast majority of the public's requests to DOT, *Streetsblog* has now commenced this hybrid proceeding under Article 78 to challenge DOT's failure to respond to the outstanding requests within a reasonable time and its policy or practice of imposing improper, undifferentiated delays on nearly all requests it receives.

ARGUMENT

DOT should not be permitted to continue its unreasonable delays in responding to *Streetsblog's* outstanding requests, or to continue its practice of imposing blanket six-month delays on nearly every request it receives. The fact that dozens of *Streetsblog's* recent requests — and 98 percent of all of FOIL requests submitted to DOT — have triggered the same six-month delay demonstrates that such undifferentiated delays are the Department's standard practice, not isolated mistakes. DOT's pattern of delay undermines public oversight of the agency and undercuts the ability of the public to participate in government. Absent relief from this Court, DOT's practice will thus further infringe *Streetsblog's* right to timely receive public records in the future. This Court should therefore order DOT to respond to *Streetsblog's* five outstanding requests. The Court should additionally exercise its equitable power to enjoin DOT from continuing its unlawful practice of imposing undifferentiated and unjustified delays. At a minimum, the Court should declare the Department's practice unlawful.

I. Because DOT Constructively Denied *Streetsblog's* Outstanding Requests, This Court Should Order Production of Responsive Documents.

Each of *Streetsblog's* five outstanding requests has been constructively denied, both because DOT provided response deadlines that were unreasonable under the circumstances of each request, and because DOT failed to justify its delays with respect to each request's circumstances. DOT's denials of these requests were improper, as the Department has no legal basis for them. *Streetsblog* appealed each of the denials, and the appeals were denied. Thus, having exhausted its administrative remedies, *Streetsblog* is entitled to Article 78 relief, and the Court should order DOT to produce all responsive, non-exempt records within a reasonable time. N.Y. Pub. Off. Law § 89(4)(b).

A. DOT's responses failed to meet multiple FOIL requirements.

FOIL imposes two requirements on agencies that are relevant here, both of which DOT violated in its responses to *Streetsblog's* requests. First, the law requires that if an agency cannot grant or deny a request within five days, it must provide an "approximate date, which shall be *reasonable under the circumstances of the request*, when such request will be granted or denied." N.Y. Pub. Off. Law § 89(3)(a) (emphasis added). Second, if the agency is unable to provide the requested records within 20 business days, "the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part." *Id.* Each of these two requirements demands that the response date provided by the agency be tailored to the circumstances of each request. *See id*. But here, DOT has failed to meet either of those requirements.

The first of these requirements — that a delay must be reasonable based on the specifics of the individual request — is emphasized in FOIL's implementing regulations, which carry the force of law. *See* N.Y. Pub. Off. Law § 87(1). First, the regulations mirror the language of the statute, requiring an agency to provide a date for its response "which shall be reasonable *under the circumstances of the request*." 21 N.Y.C.R.R. § 1401.5(c)(3) (emphasis added). Second, the regulations provide six factors to help determine whether a delay is "reasonable." 21 N.Y.C.R.R. § 1401.5(d); *see Oustatcher v. Clark*, 198 A.D.3d 420, 423 (1st Dep't 2021) (explaining that response date must be "formulate[d] according to the prescribed factors," citing 21 N.Y.C.R.R. § 1401.5(d)). Four of those factors expressly require consideration of the particular request, not broader issues facing the agency. 21 N.Y.C.R.R. § 1401.5(d) (requiring consideration of "the volume of a request, the ease or difficulty in locating, retrieving or generating records, the

complexity of the request, [and] the need to review records to determine the extent to which they must be disclosed").

In short, a reasonable response date must be tailored to the particulars of the individual request. *See, e.g.*, *Empire Ctr. for Public Policy v. N.Y. State Dep't of Health*, 150 N.Y.S.3d 497, 499–501, 506 (Sup. Ct., Albany Cty. 2021) (holding that taking three months to make a decision and six months to produce records was not "reasonable under the circumstances" because the request was "straightforward"); *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 465 (2007) (noting that "the time needed to comply with the request may be dependent on a number of factors, including the volume of the request and the retrieval methods"). Faithfully applying the required factors — including the ease of locating the requested records and the complexity of the request — will necessarily result in differing response estimates for different requests. Thus, although an agency may also consider the "number of requests received by the agency," it cannot provide a boilerplate response that fails to account for the other five factors or any other specifics of the individual request. *See* 21 N.Y.C.R.R. § 1401.5(d).

Yet with all five of *Streetsblog's* outstanding requests — as well as the dozens of other FOIL requests it has filed since June 2021, *see* Stmt. of Facts § D, *supra* — DOT failed to tailor its response date to the specifics of each request. *Streetsblog's* requests are far from uniform in their volume and complexity. While one request seeks the Commissioner's calendar from a single day, Ex. 11 (request FOIL-2024-841-04200), another seeks statistics on pedestrian deaths, Ex. 8 (request FOIL-2024-841-04120), and another seeks a list of pedestrian spaces DOT created in 2022 and 2023, Ex. 5 (request FOIL-2024-841-01249). The 1401.5(d) factors counsel that the response dates for these requests should be different, as the "volume," "the ease or difficulty in locating, retrieving or generating records," and "the complexity" of each request is different. *See*

21 N.Y.C.R.R. § 1401.5(d). But DOT set a uniform, six-month deadline for each of them. DOT responded to the requests with nothing but a boilerplate deadline extension and a copy-and-paste explanation, providing no consideration of the 1401.5(d) factors or individualized decision dates. This lack of individualization alone establishes that the response dates are not "reasonable under the circumstances of the request." N.Y. Pub. Off. Law § 89(3)(a).

In addition to the lack of individualization, the six-month delays are substantively unreasonable for these requests. It is not reasonable, for example, for DOT to take half a year or more to produce its commissioner's calendar for a single day. *See* Exs. 11 & 12 (request FOIL-2024-841-04200). It is equally unreasonable for DOT to take half a year to produce its commissioner's emails and texts from just two days that contained one of two keywords. *See* Exs. 15 & 16 (request FOIL-2024-841-04201). Neither these nor any of *Streetsblog's* requests should take anything close to half a year. And DOT's purported practice of "generally process[ing] [FOIL] requests in the order in which they are received," rather than taking into account their individual complexity, also violates Section 1401.5(d). *See* Comm. Open Gov't Advisory Op. 19355 (Jan. 13, 2016), https://docsopengovernment.dos.ny.gov/coog/ftext/F19355.html. DOT's failure to comply with Section 1401.5(d) in its responses to *Streetsblog's* outstanding requests renders DOT's decision dates unreasonable.

DOT violated FOIL in a second, independent way in its responses to *Streetsblog's* requests by failing to provide written justifications specific to each request. FOIL's implementing regulations require that when an agency provides a decision date that is more than 20 business days from the date of acknowledgment, it must furnish a written reason justifying the delay. 21 N.Y.C.R.R. § 1401.5(c)(3). At minimum, the explanation must faithfully apply the 1401.5(d) factors. *Id.* & § 1401.5(d). The requirement not only helps the requester understand why a

response is delayed, but also helps the judiciary and Committee on Open Government determine the reasonableness of the delay. *See, e.g.*, Comm. Open Gov't Advisory Op. 19671 (June 13, 2018), https://docsopengovernment.dos.ny.gov/coog/ftext/f19671.htm.

Here, DOT provided only boilerplate explanations, with no tailoring to any individual request. It claimed that it receives a large number of requests and processes "requests in the order in which they are received." *E.g.*, Exs. 2, 6, 9. But that is not an adequate explanation for the delays because it flouts DOT's obligation to consider the 1401.5(d) factors in calculating its response times. In addition, a consistently large volume of requests does not present the type of unusual circumstance that would justify lengthy delays. Comm. Open Gov't Advisory Op. 19671 (explaining "it would be unreasonable" for an agency to impose "a routine delay" caused by its own "fail[ure] to allocate resources sufficient to realize the intent of FOIL"). Thus, DOT's failure to comply with Section 1401.5(c)(3) is another reason why DOT's responses failed to comply with its FOIL obligations.

B. DOT's unreasonable delays and boilerplate explanations constitute constructive denials of *Streetsblog's* requests.

Each of DOT's two FOIL violations constitutes a constructive denial of the request. *See* N.Y. Pub. Off. Law § 89(4)(a) ("Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial."); 21 N.Y.C.R.R. § 1401.5(e). The regulations give examples of when an agency's "failure to comply" constitutes a denial. For instance, an agency providing an "approximate date for granting or denying access in whole or in part that is unreasonable under the circumstances of the request" — which is precisely what DOT did here — constitutes a denial. 21 N.Y.C.R.R. § 1401.5(e). Similarly, when an agency "provides a date certain" when it will respond "but such date is unreasonable under the circumstances of the request," the request has been denied. *Id*. And when an agency provides a response date that is

more than 20 business days from its date of acknowledgment but "fails to provide the reason in writing explaining its inability" to respond sooner — just as DOT has failed to do — that also constitutes a denial. *Id*.

Thus, each of these open requests was denied improperly. All agency records are presumptively public, unless they fall within certain narrowly defined exemptions. N.Y. Pub. Off. Law § 87(2). DOT has cited no exemption, and DOT thus has no basis for refusing to provide the requested records in a timely fashion.

Streetsblog filed administrative appeals of these denials with DOT, which the agency denied. *See* Exs. 3, 4, 6, 7, 9, 10, 13, 14, 17, 18. *Streetsblog* has therefore exhausted its administrative remedies and is entitled to seek redress through this Article 78 action. N.Y. Pub. Off. Law § 89(4)(b).

Streetsblog has waited long enough for records that should have been produced months ago. The Court should order DOT to immediately provide the records to *Streetsblog*. *See* CPLR § 7806.

II. This Court Should Enjoin DOT's Unlawful Practice of Setting Six-Month Response Deadlines.

DOT's across-the-board six-month delays imposed on *Streetsblog's* outstanding requests are hardly unique. Each of *Streetsblog's* requests to DOT since June 2021 — at least 33 of them in total — has been met by the same six-month delay. And it is the same story for thousands of other requests submitted over the past several years. *See* Stmt. of Facts § A, *supra*. DOT is attempting to re-write FOIL to suit its own preferences, ignoring the law's requirements and imposing different rules that it finds more convenient. Without judicial intervention, DOT's practice of unjustified, unreasonable delay will continue to violate *Streetsblog's* right to timely

access to public records, thereby impeding effective government oversight and democratic participation in government. *See* N.Y. Pub. Off. Law § 84.

This Court possesses inherent equity power to enjoin an agency's ongoing violation of FOIL. Just as federal courts do in analogous Freedom of Information Act ("FOIA") cases, the Court should exercise this power to protect *Streetsblog's* and the public's FOIL rights. The Court should enjoin DOT from continuing its unlawful practice of routinely issuing six-month FOIL delays that do not correspond to "the circumstances of the request" and failing to justify its delays with respect to each request's individual circumstances. At a minimum, this Court should employ its power under CPLR § 3001 to declare DOT's practices unlawful.

A. This Court has authority to enjoin unlawful government action in FOIL cases.

This Court possesses the necessary authority, derived from its inherent equity power, to enjoin an agency's ongoing violation of FOIL — just as federal courts do in analogous FOIA cases.

The Court's authority to issue injunctions derives from its "general original jurisdiction in law and equity." N.Y. Const. Art. VI § 7(a). Employing that equity power, New York courts regularly enjoin unlawful government action or declare it unlawful, including in Article 78 cases like this one. *See, e.g.*, *New York Statewide Coal. of Hisp. Chambers of Com. v. New York City Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 701 (2014) (affirming, in hybrid Article 78 proceeding, injunction and declaration of invalidity of a Board of Health rule because the rule was not within the Board's authority); *Clark v. Cuomo*, 66 N.Y.2d 185, 193 (1985) (enjoining Governor from providing agencies with receptacles for voter-registration forms); *Matter of Hebel v. West*, 25 A.D.3d 172, 175, 180 (3d Dep't 2005) (affirming injunction against designated marriage officers prohibiting them from performing unlicensed marriages); *see also* 42 Am. Jur. 2d

Injunctions § 157 ("Injunctive relief is available against agency actions when they will result in irreparable injury").[2]

The availability of injunctive relief is no different in FOIL cases. The statute does nothing to limit a court's equitable authority, and in fact anticipates that courts may use their full equitable powers, as the statute instructs litigants to sue an agency "pursuant to article seventy-eight," N.Y. Pub. Off. Law § 89(4)(b) — which, as discussed above, has long allowed for injunctive relief. Although the First Department has held that mandamus relief is not available under FOIL, *New York Times Co. v. City of New York Police Dep't*, 103 A.D.3d 405, 406 (1st Dep't 2013), that case has no bearing on injunctive relief. New York law draws a clear distinction between mandamus and injunctive relief.[3] While mandamus relief is traditionally a remedy at law, injunctive relief is a remedy in equity. *See, e.g.*, *Hamptons Hospital & Medical Ctr., Inc. v. Moore*, 52 N.Y.2d 88, 96-97 (1981) (holding hospital was not entitled to mandamus in Article 78 proceeding and converting action into one for injunction instead). And the nature of a remedy in equity is that it will issue when there is "no adequate remedy at law." *Grogan v. St. Bonaventure Univ.*, 91 A.D.2d 855, 855 (4th Dep't 1982) (citing *Kane v. Walsh*, 295 N.Y. 198, 205-206 (1946)). Accordingly, the unavailability of mandamus relief in the FOIL context has no effect on the availability of

[2] This Court's equitable authority to enjoin unlawful government action has deep historical roots in England's chancery courts. *See Niagara Falls Power Co. v Halpin*, 267 A.D. 236, 241 (3d Dep't 1943), *aff'd sub nom. Niagara Falls Power Co. v. White*, 292 N.Y. 705 (1944); *Belknap v. Belknap*, 2 Johns. Ch. 463, 473 (N.Y. Ch. 1817) (Kent, Ch.) (noting it is "well settled" that English chancery courts enjoined unlawful government action).

[3] In any event, the *New York Times* decision's holding that mandamus relief is never available in Article 78 review of FOIL determinations was incorrect. The statute and the Court of Appeals have each made clear that Article 78 leaves intact every right to relief that was previously available via the common-law writs, including mandamus. *Newbrand v. Yonkers*, 285 N.Y. 164, 174-75 (1941); *see also* CPLR § 7801 ("Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article").

injunctive relief here except to make it even clearer why such relief is necessary because *Streetsblog* has no adequate remedy at law.

Additionally, it is crucial that New York courts have the authority to enjoin an unlawful agency practice to fulfill the purpose of FOIL. Requesters' rights to public information would mean little if they had to fight over every request or else face a prolonged, unlawful delay before receiving a response, since, in seeking information under laws like FOIL, "stale information is of little value yet more costly than fresh information ought to be." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Such a system would also drive up costs for the government and courts, as they would face countless cases that could have been prevented by a single case that successfully obtained injunctive relief. Ironically, this litigation would also divert agency resources from responding to long-delayed FOIL requests, exacerbating the problem rather than solving it.

Indeed, in the parallel federal FOIA context, federal courts regularly exercise their equitable authority — the same inherent authority that this Court possesses — to enjoin agency policies or practices that violate FOIA.[4] Those courts acknowledge that their authority to enjoin unlawful FOIA practices derives from their "equitable powers." *Long v. I.R.S.*, 693 F.2d 907, 909 (9th Cir. 1982). For example, the D.C. Circuit reversed the dismissal of a requester's policy-or-

[4] The Court of Appeals has expressly blessed the use of FOIA case law to interpret FOIL provisions patterned after FOIA. *Lesher v. Hynes*, 19 N.Y.3d 57, 64 (2012). And FOIL shares the textual and structural features that the U.S. Supreme Court has said make equitable relief an appropriate vehicle for enforcing FOIA compliance. Specifically, the U.S. Supreme Court has pointed to FOIA's "broad language," "obvious emphasis on disclosure," "carefully delineated" list of exemptions, and use of district courts as its "enforcement arm." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974). FOIL relies on similarly "broad language," *see* N.Y. Pub. Off. Law § 84, employs an "obvious emphasis on disclosure," *see id*., includes a "carefully delineated" list of exemptions, N.Y. Pub. Off. Law § 87(2), and uses the New York Supreme Court as its "enforcement arm," N.Y. Pub. Off. Law § 89(4)(b).

practice claim where — just as in this case — the complaint alleged regular noncompliance with FOIA's time requirements and sought an injunction. *See Jud. Watch, Inc. v. Dep't of Homeland Sec.*, 895 F.3d 770, 779-80, 782 (D.C. Cir. 2018); *see also id*. at 784 (stating that "taking hundreds of days to process requests is [not] a permissible interpretation of an agency's obligations under FOIA"). Courts across the country have exercised their equitable authority to recognize FOIA policy-or-practice claims. *See, e.g.*, *id.* at 774 (explaining that "the court's precedent recognizes that a policy or practice claim may be predicated upon an agency's abuse of FOIA's statutory scheme"); *Hajro v. Citizenship Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016) ("[W]e have recognized a pattern or practice claim for unreasonable delay in responding to FOIA requests."); *Am. Soc'y for Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, 2021 WL 1163627, at *14 (S.D.N.Y. Mar. 25, 2021) ("This Court agrees with the D.C. Circuit's analysis and joins the other district courts in this Circuit in recognizing that FOIA policy and practice claims are justiciable."). As then-Judge Ketanji Brown Jackson explained, "'courts have a duty to prevent [an agency from] abus[ing]' the FOIA by adopting a policy that unreasonably and improperly delays the disclosure of records." *Muckrock, LLC v. Cent. Intel. Agency*, 300 F. Supp. 3d 108, 135 (D.D.C. 2018) (alterations in original) (quoting *Payne Enters.*, 837 F.2d at 494).

B. This Court should exercise its authority and enjoin DOT from continuing its practice of unlawful delay.

DOT has a clear practice of issuing blanket six-month delays for nearly every request it receives, without tailoring the response time to the particular request or providing request-specific explanations for the delays. This Court should enjoin DOT from continuing this unlawful practice to prevent serious and irreparable harm to *Streetsblog* and other FOIL requesters. At a minimum, the Court should declare the practice violates FOIL.

Under New York law, a party is entitled to an injunction by showing "[1] that there was a violation of a right or threatened violation, [2] that there is no adequate remedy at law, [3] that serious and irreparable harm will result absent the injunction, and [4] that the equities are balanced in his or her favor." *Islamic Mission of Am., Inc. v. Mukbil Omar Ali*, 152 A.D.3d 573, 575 (2d Dep't 2017); 67A N.Y. Jur. 2d Injunctions § 155 (same). In FOIA cases, courts apply essentially the same test, tailored to the FOIA context: a plaintiff states a policy-or-practice claim by alleging "a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA's requirements" (which matches step one of New York's injunction test) and alleging "that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt records from the agency in the future" (steps two and three of New York's test). *Jud. Watch, Inc.*, 895 F.3d at 780. Importantly, the agency conduct need not be "egregious" to warrant injunctive relief, nor does it need to be a "formal" policy, rather than an "informal" practice. *Id*. at 779, 781; *see also Brusco v. State Div. of Hous. & Cmty. Renewal*, 239 A.D.2d 210, 211-12 (1st Dep't 1997) (recognizing New York courts may exercise review of informal agency practices).

Here, *Streetsblog* sets out more than enough facts to establish that DOT has a practice of violating FOIL, that the practice will continue to violate *Streetsblog's* rights absent an injunction, that *Streetsblog* has no adequate remedy at law, and that the equities are in *Streetsblog's* favor. The Department regularly — in nearly every case — gives itself a six-month deadline to respond to FOIL requests. It has done that for dozens of *Streetsblog's* requests filed since June 2021. DOT has done the same thing for 98 percent of *all* requests filed between June 1, 2021 and August 23, 2024. Six months is an extensive delay by any measure, particularly since the statute anticipates that responses typically will be completed in under 20 business days. N.Y. Pub. Off. Law § 89(3)(a). The uniformity of the delays demonstrates that these are not a handful of "isolated

mistakes," but rather a standard DOT practice. *See Jud. Watch, Inc.*, 895 F.3d at 778. Such long, undifferentiated delays harm the right of requesters, including *Streetsblog*, to obtain public records in a timely way, and they impede the Legislature's goal of enabling requesters to exercise effective government oversight. *See* N.Y. Pub. Off. Law § 84. These delays also violate statutory and regulatory requirements to provide a response date that is "reasonable under the circumstances of the request" and, for delays that stretch beyond 20 business days, provide a written explanation for the delay that is tailored to each request. N.Y. Pub. Off. Law § 89(3)(a); *supra* § I.A.

Thus, DOT's widespread practice violates FOIL, creates unreasonably long delays, and harms requesters' rights to access the records they seek. Without injunctive relief, *Streetsblog's* rights will continue to be violated. In addition to its five outstanding requests, *Streetsblog* regularly files new requests with DOT. Those requests will continue to face the same six-month delays without Court intervention. This Court should therefore enjoin DOT from continuing its unlawful practice and require it to comply with FOIL's requirements. At a minimum, the Court should declare DOT's practice unlawful. *See* CPLR § 3001; *Anson v. Inc. Vil. of Freeport*, 193 A.D.3d 799, 800 (2d Dep't 2021) (issuing both injunctive and declaratory relief).

III. This Court Should Award *Streetsblog* Costs and Attorney's Fees.

If this Court orders DOT to produce the requested records, *Streetsblog* will have "substantially prevailed." *Matter of Madeiros v New York State Educ. Dept.*, 30 N.Y.3d 67, 78-79 (2017). Once *Streetsblog* prevails, it is entitled to mandatory fees because DOT's denial of access is attributable to its unlawful practice, not any "reasonable basis." N.Y. Pub. Off. Law § 89(4)(c)(ii). Alternatively, this Court may award discretionary fees because DOT failed to respond to *Streetsblog's* appeal within the required 10 business days. N.Y. Pub. Off. Law § 89(4)(c)(i). This Court should therefore award costs and fees to *Streetsblog*.

CONCLUSION

For the foregoing reasons, this Court should order DOT to immediately produce records responsive to *Streetsblog's* five outstanding requests, and this Court should enjoin, or at least declare unlawful, DOT's practice of issuing unindividualized, six-month delays that do not correspond to "the circumstances of the request" and failing to justify its delays with respect to each request's individual circumstances.

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Respectfully submitted,

By: /s/ *Michael Linhorst*

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[5] Clinic students Andrew Brockmeyer, Evan Deakin, Sophia Gilbert and Cameron Misner and alumna Fernanda Pires Merouco worked on this brief and the accompanying hybrid Petition and Complaint. The Local Journalism Project and the Clinic are housed within Cornell Law School and Cornell University. Nothing in this brief should be construed to represent the views of these institutions, if any.

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 6,550 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