

To be Argued by:
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New York Supreme Court
Appellate Division—First Department

THE EMPIRE CENTER FOR NEW YORK STATE POLICY,
a Project of the Manhattan Institute for Policy Research, Inc.,

Petitioner-Appellant,

– against –

NEW YORK CITY POLICE PENSION FUND,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

| | |
|----------------------------------------------------------------------------------------------------------------------------|----|
| TABLE OF AUTHORITIES | ii |
| QUESTIONS PRESENTED | 1 |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF FACTS AND PROCEDURAL HISTORY | 3 |
| ARGUMENT..... | 7 |
| I. THE FUND BEARS THE BURDEN OF DEMONSTRATING THAT A FOIL EXEMPTION APPLIES..... | 7 |
| II. NO SPECIFIC STATUTORY AUTHORIZATION PERMITS THE NAMES OF RETIRED POLICE OFFICERS TO BE WITHHELD..... | 10 |
| III. THERE IS NO FACTUAL BASIS TO CONCLUDE THAT DISCLOSING THE NAMES OF RETIREES WILL ENDANGER LIFE OR SAFETY | 15 |
| A. The Fund Is Required To Make A Particularized Showing That A Danger To Life Or Safety Exists | 16 |
| B. Unsubstantiated Speculation Is Not A Proper Basis To Withhold Information Under FOIL..... | 18 |
| CONCLUSION | 23 |

TABLE OF AUTHORITIES

| | Page(s) |
|---------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| CASES | |
| <i>Bahnken v. New York City Fire Department</i> , 17 A.D.3d 228 (1st Dep't 2005)..... | 17 |
| <i>Brian L. v. Administration for Children's Services</i> , 51 A.D.3d 488 (1st Dep't 2008)..... | 11 |
| <i>Buffalo Broadcasting Co. v. New York State Department of Correctional Services</i> , 155 A.D.2d 106 (3d Dep't 1990)..... | 18 |
| <i>Canal Carting, Inc. v. City of New York Business Integrity Commission</i> , 66 A.D.3d 609 (1st Dep't 2009)..... | 12 |
| <i>Capital Newspapers Div. of Hearst Corp. v. Burns</i> , 67 N.Y.2d 562 (1986)..... | 7, 8, 16, 17 |
| <i>Connolly v. New York Guard</i> , 175 A.D.2d 372 (3d Dep't 1991) | 18 |
| <i>Encore College Bookstores v. Auxiliary Service Corporation of State University of New York at Farmingdale</i> , 87 N.Y.2d 410 (1995) | 7 |
| <i>Fink v. Lefkowitz</i> , 47 N.Y.2d 567 (1979)..... | 7, 17 |
| <i>Friedman v. Connecticut General Life Insurance Co.</i> , 9 N.Y.3d 105 (2007) | 11 |
| <i>Gannett Co., Inc. v. County of Monroe</i> , 45 N.Y.2d 954 (1978)..... | 15 |
| <i>Gould v. New York City Police Department</i> , 89 N.Y.2d 267 (1996)..... | 8, 9 |
| <i>Harvey v. Hynes</i> , 174 Misc. 2d 174 (Kings Co. 1997) | 9 |

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| <i>Johnson v. New York City Police Department</i> , 257 A.D.2d 343 (1st Dep’t 1999)..... | 16 |
| <i>Kwasnik v. City of New York</i> , 262 A.D.2d 171 (1st Dep’t 1999)..... | 13 |
| <i>Laureano v. Grimes</i> , 179 A.D.2d 602 (1st Dep’t 1992)..... | 9, 17 |
| <i>Leyton v. City University of New York</i> , 25 Misc. 3d 1214(A), 2009 WL 3321434 (N.Y. Co. Oct. 8, 2009)..... | 9 |
| <i>M. Farbman & Sons v. New York City Health & Hospitals Corp.</i> , 62 N.Y.2d 75 (1984)..... | 7, 17 |
| <i>Mantica v. New York State Department of Health</i> , 94 N.Y.2d 58 (1999)..... | 7 |
| <i>Miracle Mile Associates v. Yudelson</i> , 68 A.D.2d 176 (4th Dep’t 1979)..... | 13 |
| <i>New York Teachers Pension Association, Inc. v. Teachers’ Retirement System of the City of New York</i> , 98 Misc. 2d 1118 (N.Y. Co. 1979), <i>aff’d</i> , 71 A.D.2d 250 (1st Dep’t 1979)..... | 15 |
| <i>New York Veterans Police Association v. New York City Police Department</i> , 61 N.Y.2d 659 (1983)..... | 10 |
| <i>Newsday, Inc. v. Empire State Development Corp.</i> , 98 N.Y.2d 359 (2002)..... | 9 |
| <i>Newsday, Inc. v. Sise</i> , 71 N.Y.2d 146 (1987)..... | 8 |
| <i>Pennington v. Calabrese</i> , No. 2002/155, 2002 WL 31885409 (Erie Co. Nov. 25, 2002), <i>aff’d in relevant part</i> , 4 A.D.3d 778 (4th Dep’t 2004)..... | 17, 19, 20 |
| <i>Rocovich v. Consolidated Edison Co.</i> , 78 N.Y.2d 509 (1991)..... | 12 |

| | |
|---------------------------------------------------------------------------------------------------|----|
| <i>Washington Post Co. v. New York State Insurance Department</i> , 61 N.Y.2d 557 (1984) | 17 |
| <i>Westchester Rockland Newspapers, Inc. v. Kimball</i> , 50 N.Y.2d 575 (1980) | 16 |
| <i>In re Yolanda D.</i> , 88 N.Y.2d 790 (1996) | 12 |

STATUTES

| | |
|--------------------------------|--------|
| N.Y. Stat. § 97 | 11 |
| Pub. Off. Law § 87(2)(b) | 5, 15 |
| Pub. Off. Law § 87(2)(f) | 5 |
| Pub. Off. Law § 89(4)(b) | 16 |
| Pub. Off. Law § 89(7) | passim |

OTHER AUTHORITIES

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| FOIL-AO-7717 (May 19, 1993), <i>available at</i> http://www.dos.state.ny.us/coog/ftext/f7717.htm | 13, 15 |
| FOIL-AO-8398 (Aug. 8, 1994), <i>available at</i> http://www.dos.state.ny.us/coog/ftext/f8398.htm | 23 |
| FOIL-AO-8775 (Apr. 13, 1995), <i>available at</i> http://www.dos.state.ny.us/coog/ftext/f8775.htm | 13 |
| FOIL-AO-9742 (Oct. 24, 1996), <i>available at</i> http://www.dos.state.ny.us/coog/ftext/f9742.htm | 13, 14 |
| FOIL-AO-11239 (Jan. 6, 1999), <i>available at</i> http://www.dos.state.ny.us/coog/ftext/f11239.htm | 18, 19 |

FOIL-AO-14468 (Jan. 21, 2004), *available at*
<http://www.dos.state.ny.us/coog/ftext/f14468.htm> 22, 23

FOIL-AO-17955 (Jan. 8, 2010), *available at*
<http://www.dos.state.ny.us/coog/ftext/f17955.html> 12, 13, 23

QUESTIONS PRESENTED

1. Is a statutory exemption permitting the “name and address of a beneficiary of a public employees retirement system” to be withheld from disclosure under the Freedom of Information Law, limited to the name and address of the beneficiary designated by a public employee to receive his or her pension benefits in the event of death?

The IAS court answered this question “No.”

2. Does the Freedom of Information Law require an agency to provide more than speculation and conjecture before it can withhold information on the ground that disclosure would “endanger life and safety”?

The IAS court answered this question “No.”

PRELIMINARY STATEMENT

This Article 78 proceeding challenges the refusal of Respondent-Appellee, New York City Police Pension Fund (“Fund”) to disclose under the Freedom of Information Law, Pub. Off. Law § 87, *et seq.* (“FOIL”), information about police pension payments that has, until now, routinely been disclosed. Specifically, the Fund refuses to disclose the names of retired police officers when it releases information on the level of pensions being paid to retirees. There is no lawful basis to withhold this information,

and the Fund's refusal to make the information public renders it impossible for taxpayers to have a clear and total understanding of how their tax dollars are being used, an issue of clear public importance.

Petitioner-Appellant, The Empire Center for New York State Policy ("Empire Center"), is a policy project dedicated to providing maximum information to taxpayers and policy makers to foster dialog about the best and most effective use of public funds. In recent years, the Empire Center has compiled on its website detailed data about how local governments and agencies spend tax dollars, including their significant expenditures on pensions and benefits for public employees.

The singular refusal of the Fund to make public the names of the individual retirees currently receiving pensions makes it impossible for the Empire Center to provide comprehensive comparative data to the public, and frustrates the public's ability to exercise oversight on the use of taxpayer funds. The Fund's refusal violates its statutory duty under FOIL, and defeats FOIL's core purposes of informing the public about the actions of government agencies and the expenditure of taxpayer funds.

The IAS court erroneously upheld the Fund's position, based on a misreading of a law protecting the privacy of the *beneficiaries* of

pensioners—a law that has no bearing on the names of *pensioners* themselves. Nor was the court correct in citing speculation about the potential for burglaries at the homes of retired police officers to justify withholding their names. The law quite clearly requires the Fund to make public the names of individuals receiving pensions, as other public pension funds across the state recognize.

The order below should be reversed and the Fund directed to release the names of its pensioners as requested by the Empire Center.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Empire Center for New York State Policy

The Empire Center for New York State Policy is a project of the Manhattan Institute for Policy Research, a non-profit think tank located in Albany. *See* <http://www.empirecenter.org>. Its mission is to inform voters and policymakers about public issues such as “the economy, taxes and spending, public employment issues including pension reform . . . energy policy, health care and education.” *About Us, id.* To this end, Empire Center operates a web portal through which taxpayers can share, analyze and compare data from counties, cities, towns, villages, school districts and

public authorities throughout New York. Its website seeks to give New Yorkers a clearer view of how their state and local tax dollars are spent.¹

The website contains data about all areas of government spending, including the significant sums paid out by local governments as pensions to retirees.² The Empire Center collects this information because,

taxpayers foot the bill for the salaries of government workers and retirees, [and] they have a right to know who they are and how much they are paid, just like any private company's board of directors know who their employees are and how much they are paid. Access to this data also provides a means for scrutinizing spending on a case by case basis, adding a level of accountability previously unknown in government spending.³

B. The FOIL Request at Issue

On January 22, 2010, Empire Center submitted a FOIL request to the Fund seeking “a list of all retired members of the New York Police Department Pension Fund” together with the following information

¹ See SEETHROUGHNY, <http://www.seethroughny.net>.

² See *Payrolls & Pensions, id.*, <http://www.seethroughny.net/PayrollsPensions/tabid/55/Payrolls/StatePayroll/tabid/69/Default.aspx?BRANCHID=15>.

³ *Legal Battle for Public Access Heats Up*, THE EMPIRE CENTER FOR NEW YORK STATE POLICY, http://www.empirecenter.org/AboutUS/news_releases/2011/01/ppf13111.cfm.

concerning each retiree: name; retirement system registration number; last employer; gross retirement benefit for calendar years 2006, 2007, 2008, and 2009; indication of which system the retiree belongs to; retirement date; and date of commencement of retirement system membership. (R. 15.)⁴

In response, the Fund provided some of the requested information but unlike every other public pension fund, it refused to provide the names of the retirees. (R. 16.) The Fund did not initially explain its reasons for withholding the names.

Empire pursued an administrative appeal (R. 16), which was promptly denied on April 1, 2010 (R. 17-18). The appeal officer pointed to a provision of FOIL that “exempts from disclosure . . . the names of beneficiaries of a public employer’s retirement system,” and asserted that the retirees themselves are “beneficiaries” within the meaning of this exemption. (R. 17, citing Pub. Off. Law § 89(7).) He also advanced the alternate theory that names of retired police officers are exempt from disclosure under the personal privacy exemption and the life and safety exemption in FOIL, Pub. Off. Law §§ 87(2)(b) and (f), because “the risk of harm to the life, safety and privacy of these former police officers is significant.” (*Id.*) This position

⁴ References to the Record on Appeal will be cited herein as “R. ____”.

was not based on any factual evidence but on the speculation of the FOIL officer about what could conceivably happen if retirees' names were released. Specifically, he surmised that (1) releasing the names would allow criminals to find the addresses of retired officers online, (2) criminals would know that retired police officers are likely to keep weapons at their homes, and (3) criminals would therefore target retirees' homes for theft if retiree names were made public. (R. 18.)

C. Proceedings in the IAS Court

Empire Center filed a petition under Article 78 in Supreme Court, New York County, seeking to compel the Fund to release the information it is obligated to disclose under FOIL. (R. 11-14.) The IAS court (Carol E. Huff, J.S.C.) denied the Petition in a brief opinion that largely adopted the reasoning of the Fund. The court noted that “the name and address of a ‘beneficiary’ of a public employees’ retirement system” may be withheld under Pub. Off. L. § 89(7), and agreed that police retirees are “beneficiaries” within the meaning of the statute. The court then suggested that the Fund might also properly withhold the names of retirees under the FOIL provision exempting documents whose disclosure would constitute an unwarranted invasion of personal privacy and/or endanger the officer’s safety. Echoing

the Fund's position, the court speculated that releasing an officer's name could lead a criminal to locate the officer's address online, and then target that officer's residence in order to try to steal his or her weapons. (R. 8.)

This appeal followed.

ARGUMENT

I.

THE FUND BEARS THE BURDEN OF DEMONSTRATING THAT A FOIL EXEMPTION APPLIES

New York's Freedom of Information Law "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." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). It embraces a "strong commitment to open government and public accountability," *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986), and "imposes a broad standard of disclosure" upon governmental entities. *Mantica v. N.Y.S. Dep't of Health*, 94 N.Y.2d 58, 61 (1999); *M. Farbman & Sons v. NYC Health & Hosps. Corp.*, 62 N.Y.2d 75, 79-80 (1984). FOIL seeks to ensure government transparency through "maximum public access to government documents." *Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 416 (1995).

The openness required under FOIL extends to information concerning the allocation and use of taxpayer funds, including payments by public pension systems. Data on public expenditures for payroll and pension expenses are thus routinely provided to Empire Center by other government agencies, including those pension funds covering every other retired police officer in the state.⁵ Disclosure of this information is essential if citizens are to exercise effective oversight over the institutions of government, and the availability of this information advances FOIL's core purpose. As explained by the Court of Appeals, "all records of a public agency are presumptively open to public inspection and copying" in order to permit citizens to make informed choices and to expose waste, negligence and abuse by government agents. *See, e.g., Capital Newspapers*, 67 N.Y.2d at 566.

To ensure that these statutory objectives are fulfilled, the disclosure obligations of FOIL must be "liberally construed," and its exemptions "narrowly interpreted so that the public is granted maximum access to the records of government." *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 (1987) (citation omitted). *See also Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267,

⁵ *See, e.g., Payrolls & Pensions*, SEETHROUGHNY, <http://www.seethroughny.net/PayrollsPensions/tabid/55/Default.aspx> (collecting information on government payrolls, pensions, contracts, and earmarks).

274-75 (1996) (“exemptions are to be narrowly construed”); *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362 (2002) (information to be disclosed must fall “squarely within the ambit of one of these statutory exemptions”).

Within this context, the names requested by Empire Center are presumptively subject to disclosure, and it is the Fund that bears the burden of demonstrating that a FOIL exemption permits it to withhold those names. Moreover, the question of whether any FOIL exemption properly applies presents a purely legal issue to be resolved by the Court without deference to the Fund’s views. *E.g., Laureano v. Grimes*, 179 A.D.2d 602, 603-04 (1st Dep’t 1992) (no basis to defer to an agency decision on an issue of statutory interpretation); *Leyton v. City Univ. of N.Y.*, 25 Misc. 3d 1214(A), 2009 WL 3321434 (N.Y. Co. Oct. 8, 2009) (whether party has proven that a FOIL exemption applies is a legal determination involving no deference to an agency determination); *Harvey v. Hynes*, 174 Misc. 2d 174, 178 (Kings Co. 1997) (same).

II.

NO SPECIFIC STATUTORY AUTHORIZATION PERMITS THE NAMES OF RETIRED POLICE OFFICERS TO BE WITHHELD

The IAS court held that the names of public pensioners are specifically exempt from disclosure by statute, under Pub. Off. L. § 89(7). Its reading contradicts the plain language of the law and the law's prior consistent interpretation. The lower court was clearly incorrect.

Section 89(7) provides, in pertinent part:

Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment . . .

Pub. Off. L. § 89(7). In upholding the Fund's refusal to disclose names, Justice Huff interpreted the "beneficiar[ies] of a public employees' retirement system" to mean retirees receiving pensions. (R. 8.) The court cited *New York Veterans Police Ass'n v. New York City Police Department*, 61 N.Y.2d 659 (1983) to support this interpretation (*id.*), but that case involved a request for the "names *and addresses*" of "retirees," and does not address the issue of who is a "beneficiary" under Section 89(7).

Reading “beneficiary” to mean “retiree” violates basic principles of statutory construction and makes no sense. Section 89(7) has a specific provision dealing with “retirees.” It exempts from disclosure only “the address” (not the name) “of a retiree” of a public employee’s retirement system, such as the Fund. Section 89(7) has a separate exemption for the “name or home address of a beneficiary” of a public employees’ retirement system, which must plainly relate to a different group than “retirees,” or the statute makes no sense and is internally inconsistent.

It is black letter law that a court “must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and, where possible, should harmonize all parts of a statute with each other and give effect and meaning to the entire statute and every part and word thereof.” *Brian L. v. Admin. for Children’s Servs.*, 51 A.D.3d 488, 493 (1st Dep’t 2008) (citing *Friedman v. Conn. Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007)); accord N.Y. Stat. § 97 (a “statute . . . is to be construed as a whole, and all parts of an act are to be read and construed together”). The reading by the IAS court failed to do so.

Section 89(7) plainly addresses two separate groups of persons: (1) employees, former employees and retirees, whose names are *not exempt*

from disclosure, and (2) their beneficiaries (*i.e.*, the persons who receive benefits in the event of their death), whose names *are* exempt from disclosure. If the Legislature intended for a “retiree” to mean the same thing as a “beneficiary of a public employees’ retirement system,” then it would not have delineated the two groups as it did. The distinction made by the Legislature cannot simply be ignored. *See, e.g., In re Yolanda D.*, 88 N.Y.2d 790, 794-95 (1996) (statutes may not be interpreted to render any part “superfluous”); *Canal Carting, Inc. v. City of N.Y. Bus. Integrity Comm’n*, 66 A.D.3d 609, 611 (1st Dep’t 2009) (“[A]ll parts of a statute are intended to be given effect and . . . a statutory construction which renders one part meaningless should be avoided”) (quoting *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 515 (1991)) (omission in original), *leave to appeal denied*, 14 N.Y.3d 710 (May 11, 2010).

Indeed, the New York Committee on Open Government (“COG”) has issued an advisory opinion specifically rejecting as “misplaced” the Fund’s “reliance on the term ‘beneficiary’ in section 89(7) of the statute in order to deny access to the names of persons receiving benefits from the Fund.”

FOIL-AO-17955 (Jan. 8, 2010), *available at*

<http://www.dos.state.ny.us/coog/ftext/fl7955.html>. As the opinion explains:

Based on the progression of the language of subsection (7) it is clear that a beneficiary is a person designated by a public employee to receive pension benefits in the event of the employee's death. . . . [T]he Fund has no basis to deny access to the names of those persons who are retired from public employment and receiving pension benefits.

Id. The COG's reading of the exemption is consistent with basic principles of statutory instruction and, as this Court has made clear, "courts should defer" to "opinions of the Committee on Open Government" concerning the meaning of FOIL. *Kwasnik v. City of N.Y.*, 262 A.D.2d 171, 172 (1st Dep't 1999); *see also, e.g., Miracle Mile Assocs. v. Yudelson*, 68 A.D.2d 176, 181 (4th Dep't 1979) (as "the state agency charged with administering the Freedom of Information Law," the Committee's interpretation of the statute, "if not irrational or unreasonable, should be upheld").

The COG repeatedly has emphasized that the names of retirees receiving pensions are subject to disclosure under FOIL.⁶ Consistent with its

⁶ *See, e.g.,* FOIL-AO-7717 (May 19, 1993), *available at* <http://www.dos.state.ny.us/coog/ftext/f7717.htm> (under § 89(7), "the name of a retiree is not the same as the name of the person designated by a retiree as a beneficiary"); FOIL-AO-9742 (Oct. 24, 1996), *available at* <http://www.dos.state.ny.us/coog/ftext/f9742.htm> (finding that "records concerning 'all retired pensioned employees'" of a certain municipality should be disclosed and that, as a general matter, records identifying employee names must be made available); FOIL-AO-8775 (Apr. 13, 1995),

understanding, every other police pension fund within the state has disclosed the names of its retirees to Empire Center in response to FOIL requests.

(R. 44, ¶ 3.) Even the Fund has applied this interpretation of the exemption in the past and released the names of its pensioners. *See* R. 33, ¶ 5 (the Fund “did release this information . . . in the past”).

The Fund acknowledged before the IAS court that FOIL does not exempt disclosure of the names, but argued that the legislation as written has “proven inadequate,” and therefore should be subject to a judicial re-interpretation. (R. 31.) But any such reinterpretation is for the legislature, not the courts. To judicially “reinterpret” the exemption would thwart both the plain language and the structure of the statute. It would defeat the primary purpose of FOIL to ensure that the government is held accountable for the massive public expenditures devoted to state employee pensions, including for retired police officers.

available at <http://www.dos.state.ny.us/coog/ftext/f8775.htm> (“the names and titles” of members of the New York State Teachers’ Retirement System are subject to disclosure under FOIL); FOIL-AO-7717 (although the home addresses of retirees may be withheld under § 89(7), “the names of retirees should be disclosed”).

III.
**THERE IS NO FACTUAL BASIS TO CONCLUDE
THAT DISCLOSING THE NAMES OF
RETIREES WILL ENDANGER LIFE OR SAFETY**

The IAS court noted its further view that the potential for danger to life or safety provided a “persuasive” reason to withhold the names of retired police officers. (R. 8)⁷ Without citing any record evidence, the court pointed to “the ease with which internet searches using only a name can identify the address associated with it,” and “the common perception that retired police officers possess firearms,” as sufficient to create a significant possibility that retirees would become “the target of burglaries” if the Fund released the names of its retirees. (*Id.*) This conclusion is purely

⁷ The IAS court cited § 87(2)(b), which is the FOIL exemption for information the disclosure of which would constitute an unwarranted invasion of personal privacy. But in describing the theory for withholding the names, the court referred only to “endangering of life or safety,” which is exemption § 87(2)(f). The court discussed only the safety exemption, and not the personal privacy exemption, and any argument that § 87(2)(b) prevents disclosure of names has been rejected by multiple authorities. *See, e.g., Gannett Co., Inc. v. Cnty. of Monroe*, 45 N.Y.2d 954 (1978) (county may not withhold names of its employees under § 87(2)(b)); *N.Y. Teachers Pension Ass’n, Inc. v. Teachers’ Ret. Sys. of the City of N.Y.*, 98 Misc. 2d 1118 (N.Y. Co. 1979) (requiring disclosure of a list of “present beneficiaries” of the Respondent Retirement System over objections that disclosure was an invasion of privacy), *aff’d*, 71 A.D.2d 250 (1st Dep’t 1979); FOIL-AO-7717 (“Records identifying public employees have long been available,” thus “the names of retirees must be disclosed.”).

speculative, wholly unsupported, and provides no proper basis to refuse to disclose the names.

A. The Fund Is Required To Make A Particularized Showing That A Danger To Life Or Safety Exists

In keeping with its mandate for maximum disclosure, FOIL places the burden of demonstrating a legal basis for withholding information squarely on the agency at all times:

In the event that access to any record is denied pursuant to [FOIL's exemptions], the agency involved shall have the burden of proving that such record falls within the provisions of [the exemption].

FOIL § 89(4)(b). *See also, e.g., Capital Newspapers*, 67 N.Y.2d at 566 (“the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption”); *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980) (“the burden of demonstrating that the material requested is exempt now falls squarely on the shoulders of the one who asserts it”) (citation omitted); *Johnson v. N.Y. City Police Dep't*, 257 A.D.2d 343, 346 (1st Dep't 1999) (burden rests with agency to “justify the applicability of the exemption upon which it relies”).

To meet its burden, an agency seeking to prevent disclosure must “articulate particularized and specific justification” for denying access. *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *see also M. Farbman & Sons, Inc.*, 62 N.Y.2d at 80 (same); *Capital Newspapers*, 67 N.Y.2d at 566 (same). It may not rely on “conclusory pleading allegations and affidavits” which are “without the benefit of evidentiary support.” *Washington Post Co. v. N.Y. State Ins. Dep’t*, 61 N.Y.2d 557, 567 (1984).⁸

Thus, for records to be exempt under § 87(2)(f), the agency must make a “particularized showing” that disclosure could endanger a person’s life or safety. Although the agency need not show that the allegedly endangered person has been subject to “a specific threat,” its refusal to disclose documents must be based “on more than mere speculation.” *Pennington v. Calabrese*, No. 2002/155, 2002 WL 31885409, *2 (Erie Co. Nov. 25, 2002), *aff’d in relevant part*, 4 A.D.3d 778 (4th Dep’t 2004).

“Conclusory allegations” of harm to life or safety are insufficient to justify

⁸ Moreover, in FOIL cases, a reviewing court does not apply the “arbitrary and capricious” standard typical in other Article 78 proceedings, given that “[the] party claiming exemption from disclosure . . . bears the burden of proving entitlement to the exemption.” *Bahnken v. N.Y. City Fire Dep’t*, 17 A.D.3d 228, 229-30 (1st Dep’t 2005); *see also Laureano*, 179 A.D.2d 603-04 (same). Rather, courts determine whether the denial is contrary to law.

withholding requested information. *Buffalo Broad. Co. v. N.Y.S. Dep't of Corr. Servs.*, 155 A.D.2d 106, 112 (3d Dep't 1990).

B. Unsubstantiated Speculation Is Not A Proper Basis to Withhold Information under FOIL

Given its statutory burden, the Fund cannot properly withhold retiree names on the entirely speculative basis that disclosure could theoretically facilitate a burglary. Instances in which courts have upheld an agency's decision to withhold information under § 87(2)(f) demonstrate the type of evidentiary showing the Fund was required to make—all involved real and legitimate threats to safety.

In *Flowers v. Sullivan*, for example, the court agreed that “specifications and other data relating to the electrical and security transmission systems of Sing Sing Correction Facility” could be withheld on safety grounds because disclosure might “impair the effectiveness of these systems and compromise [their] safe and successful operation.” 149 A.D.2d 287, 295 (2d Dep't 1989) (also noting that “these risks [were] magnified when we consider the fact that disclosure is sought by inmates”); *see also*, *e.g.*, *Connolly v. N.Y. Guard*, 175 A.D.2d 372, 372 (3d Dep't 1991) (certain (but not all) “mobilization plans and documents prepared for the . . . annual training exercises for respondent New York Guard” held to be exempt,

because release could harm lives and safety of guard members); FOIL-AO-11239 (Jan. 6, 1999), *available at* <http://www.dos.state.ny.us/coog/ftext/fl1239.htm> (information about physicians who had performed abortions subject to withholding for safety reasons, “given attacks on abortion providers, including the recent shooting of a physician in western New York”).

Where, on the other hand, potential harm is purely speculative and not based on actual evidence presented by the agency, courts have compelled disclosure. Thus, in *Physicians Committee for Responsible Medicine v. Hogan*, the court rejected an agency’s attempt to withhold the names of animal research scientists on safety grounds due to a general “history of violence by extremists.” 29 Misc. 3d 1220(A), 2010 WL 4536802 *3 (Albany Co. Nov. 3, 2010). Disclosure was required because the agency offered only conjecture and failed “to demonstrate a non-speculative causal connection between the release of responsive records and the possibility of danger to life or safety.” *Id.* at *4. The purposes of FOIL should not be thwarted, the court held, “on the basis that disclosure could upset or incite those who lack respect for the rule of law.” *Id.* See also, e.g., *Pennington*, 2002 WL 31885409, at *2 (requiring disclosure of photograph of medical

examiner who had testified at trial to wife of convict where record was “devoid of any indication that access to [the] photograph would inherently endanger his life or safety”).

So also here. The IAS court cited no evidence whatsoever that supported the Fund’s speculation about the potential for the release of retiree names to incite burglaries. The sole affidavit submitted by the Fund contains not a single word about the possibility of burglaries of firearms based on the release of police officer names. *See* R. 32-36. Indeed, the court’s speculation here is not only unsubstantiated, it is also counter-intuitive. The known home of a trained law enforcement officer would seem to be a *less* likely target for burglars, not a more likely one. Empire Center has been collecting and posting information about retired police officers for more than two years; there has never been even a hint of problem.

In *Physicians Committee*, the court also noted that denying disclosure would serve no purpose because the same information was “already available to the public through a wide array of sources.” *Id.* at *4. Again, the same is true here— withholding the names is entirely ineffective in protecting against burglaries because the names of police officers are easily obtainable elsewhere. If a burglar wanted to find the name of someone who

might have firearms at home, he or she could look, for example, at the New York City Civil List, which contains the names of all employees of the New York City Government, *including police officers*.⁹ Alternatively, a potential burglar might look at any of following websites:

NYPD | Precincts, NYC.GOV

<http://www.nyc.gov/html/nypd/html/home/precincts.shtml>
(compiling links to every precinct in the New York City Police Department; each precinct's web page identifies an officer by name and photograph);

NYPD Administration, NYC.GOV,

<http://www.nyc.gov/html/nypd/html/administration/administration.shtml> (listing names of all the New York City deputy police commissioners and chiefs);

City of Yonkers Police Department, YONKERS NY.GOV,

<http://www.yonkersny.gov/Index.aspx?page=204> (identifying, by name and photo, the head of every police division in Yonkers);

Auburn Police Detective Bureau, AUBURN POLICE

DEPARTMENT, <http://www.auburnpolice.com/detective/> (listing names of members of detective unit, youth bureau, identification bureau, and narcotics unit);

Actively Retired, available at

<http://www.nypd2.org/retirement/pdf/novdec2003.pdf>;

⁹ See *Labor Relations*, NYC.GOV (Apr. 1, 2010),

http://www.nyc.gov/html/records/pdf/govpub/civil_list_2009.pdf.

Specifically, the New York City Civil List “is the annual report of all City of New York employees listed by name, title, agency and salary.” See *Labor Relations*, NYC.GOV,

<http://www.nyc.gov/html/records/html/govpub/labor1.shtml>.

http://www.nypd2.org/retirement/html/retiree_act_retired_april.html (publication that is devoted to – and that names – retired New York City Police officers).¹⁰

In addition to these online sources, the names of police officers are also available in the real world. As the COG has explained, “police officers . . . typically identify themselves, wear nameplates, or display badge or shield numbers in the performance of their duties.”¹¹ As such, their names are in the public sphere and should not be withheld under FOIL. *Id.*

¹⁰ In addition, many police officer organizations and groups maintain websites in which numerous officers or former officers are named and sometimes pictured. *See, e.g.*, HOLY NAME SOCIETY, <http://www.nypdholyname.com/index2.html> (Catholic officers); *Board*, EMERALD SOCIETY, <http://www.nypdemeralds.com/board/> (officers of Irish heritage); *Delegates*, ASIAN JADE SOCIETY, <http://www.nypdajs.org/7.html> (officers of Asian heritage); *2011 Executive Board of Officers*, POLICEWOMEN’S ENDOWMENT ASSOCIATION, <http://www.nypdpea.com/ExecBoard.html> (women officers).

¹¹ FOIL-AO-14468 (Jan. 21, 2004), *available at* <http://www.dos.state.ny.us/coog/ftext/f14468.htm>; FOIL AO-10099 (May 19, 1997), *available at* <http://www.dos.state.ny.us/coog/ftext/f10099.htm>. The fact that undercover officers do not publicly reveal themselves while working is also no bar to disclosure of the names sought by Empire for at least two reasons. First, Empire does not seek the names of officers currently working undercover, because its FOIL request is limited to retirees. Second, even if that were not the case, the names would still be disclosable because the Fund has made no showing that anyone would be able to link a particular name within a long list of names to an undercover assignment, thus endangering an officer’s safety. *See, e.g., id.*

The COG agrees that the “argument that disclosure of the name of a retired police officer could” cause burglaries or otherwise “endanger that person’s life or safety, without more, is without merit.” FOIL-AO-17955. It has stressed repeatedly that “disclosure of the identities and assignments of municipal employees, *including law enforcement officers*, would not in most instances endanger their lives or safety.” FOIL-AO-14468; FOIL-AO-10099; *see also* FOIL-AO-8398 (Aug. 8, 1994), *available at* <http://www.dos.state.ny.us/coog/ftext/f8398.htm> (names of deputy sheriffs should be released unless the document would reveal “that person’s assignment to an undercover or similar unit”).

In short, the decision of the IAS court is not supported by the record or the law. The court improperly upheld the Fund’s refusal to disclose information based on a conjecture that is contradicted by both logic and experience. The denial of access to government records cannot properly be based on the type of rank speculation offered by the Fund.

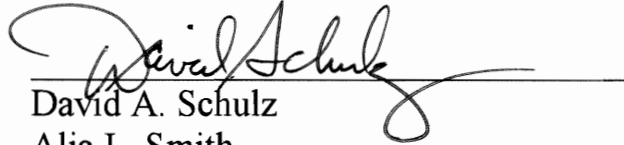
CONCLUSION

For each and all of the foregoing reasons, this Court should reverse the decision of the IAS Court and direct the Fund to disclose the names of individuals receiving pensions as requested by the Empire Center.

Dated: New York, New York
March 18, 2011

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

A handwritten signature in cursive script, appearing to read "David A. Schulz", is written over a horizontal line.

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to § 600.10(d)(1)(v) of the Rules for the Appellate Division, First Department, this brief was prepared using Microsoft Office Word 2003 in Times New Roman 14pt font and contains 4,826 words in those portions subject to the Rules.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE EMPIRE CENTER FOR NEW YORK STATE
POLICY, A Project of the Manhattan Institute for
Policy Research, Inc.,

Petitioner-Appellant,

-against-

NEW YORK CITY POLICE PENSION FUND,

Respondent-Respondent.

Index No. 105839/10

PREARGUMENT STATEMENT

Petitioner-Appellant, The Empire Center for New York State Policy, by its attorneys,
Levine Sullivan Koch & Schulz, L.L.P., submits this pre-argument statement pursuant to
C.P.L.R. 5531 and 22 N.Y.C.R.R. § 600.17:

1. The full title of this action is set forth in the caption.
2. The full name of the original parties are set forth in the caption.
3. The name, address, and telephone number of counsel for Petitioner-Appellant The

Empire Center for New York State Policy is:

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NEW YORK
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4. The names, address, and telephone number of counsel for Respondent-

Respondent New York City Police Pension Fund is:

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5. This appeal is taken from the Decision and Order of the Supreme Court of the State of New York, County of New York, filed December 30, 2010, attached hereto as Exhibit A. Petitioner-Appellant appeals from the portion of the Decision and Order denying its petition and dismissing the proceeding.

6. This is a proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules seeking judicial review of Respondent's refusal to disclose information sought by Petitioner-Appellant pursuant to the Freedom of Information Law, Public Office Law, §§ 84 *et seq.* Specifically, Petitioner-Appellant seeks disclosure of the name, last employer, retirement date and gross retirement benefit paid to each retired member of the New York City Police Pension Fund. (*See* Petitioner-Appellant's Petition, attached hereto as Exhibit B.)

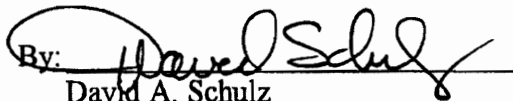
7. Justice Carol E. Huff, Part 32, disposed of the case by denying the petition and dismissing the proceeding.

8. Petitioner-Appellant seeks reversal on the grounds that the IAS court committed errors of fact and law. Respondent failed to meet its burden of establishing any basis in fact or law to withhold from the public the names and other requested information about those receiving retirement benefits from the New York City Police Pension Fund, and its refusal to disclose the requested information is contrary to law.

9. There are no related proceedings or appeals pending in any court.

Dated: New York, New York
January 11, 2011

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: 

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)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF
PERSONAL SERVICE**

I, _____, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On

deponent served the within: **Brief for Petitioner-Appellant**

upon:

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the attorney(s) in this action by delivering **2** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein, also by electronic service via email.

Sworn to before me on

Malika K. Julien
Notary Public State of New York
No. 01JU6096798
Qualified in New York County
Commission Expires September 4, 2011

Job # 235065