SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the matter of the application of CONSTANCE MALCOLM, FRANCLOT GRAHAM, COMMUNITIES UNITED FOR POLICE REFORM, and THE JUSTICE COMMITTEE,

Petitioners-Plaintiffs,

Index No. 100466/17

Motion Seq. No. 1

IAS Part 13
(Mendez, J.)

For Judgment and Order Pursuant to Article 78 and § 3001 of the Civil Practice Law and Rules

- against -

The NEW YORK CITY POLICE DEPARTMENT, and JAMES P. O'NEILL, NYPD COMMISSIONER, in his official capacity,

Respondents-Defendants.

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

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I. RESPONDENTS HAVE NOT ADEQUATELY DESCRIBED THE RECORDS WITHHELD OR ACCOUNTED FOR RECORDS THAT PETITIONERS REASONABLY DESCRIBED IN THE REQUEST.[1]

The Final Determination does not adequately describe the records Respondents withheld or offer particularized justifications for withholding particular records. *See* Petitioners' MOL at p. pp. 4-5. Respondents' Answer does not cure those defects. *See* Rs' MOL p. 1 n. 2, *citing* Answer ¶¶ 174-177 and 187-199. For example, Respondents make sweeping claims that all records responsive to Requests Nos. 5(d), 6-9, 11-15, 18-19, 21-39, and 41-44 were "compiled by" IAB for law enforcement purposes and are also exempt from disclosure because they are all "personnel records." Answer ¶¶ 174-177, 190, 192, 194. Beyond that, many of the records and categories of records sought in the Request apparently remain unaccounted for in the Final Determination or Answer. For example, Respondents state that some documents provided along with the Final Determination granted Requests Nos. 1, 5(a), 5(b), 5(c), 10, and 16-17, and 19-20 to a certain, unexplained extent, without saying which documents provided were responsive to which Requests, without describing which documents were located and withheld, and

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[1] As may also be relevant in this connection, without specifying where or how, Respondents say that the Request did not sufficiently describe the documents requested. *See, e.g.,* Answer ¶ 198 (stating that a "diligent search was conducted for all records which were not exempt from disclosure pursuant to Sections 87(2)(e)(i) and 87(2)(a) of the Public Officers Law, and *records either could not be located based on the information described* or are exempt….") (emphasis added). As described in the Petition, after the Request was made, Respondents never communicated to Petitioners that the Request allegedly failed to describe the records sought in some manner, and never assisted Petitioners in re-formulating portions of the Request, if necessary, in light of the manner in which Respondents create, store, and index potentially responsive records. Those failures violated the requirements that the NYPD actively assist requesters in identifying the records sought under such circumstances, including 21 NYCRR 1401.2(b)(2), 21 NYCRR 1401.2(b)(3), 21 NYCRR 1401.5(c)(1), and 43 RCNY 1-05(b)(3). Although those arguments are raised in the Petition, *see, e.g.,* Petition ¶ 74 n. 6, Respondents do not address them. Additionally, at the time the Request was made, the NYPD was required to, and did not maintain the "reasonably detailed current list by subject matter, of all records in the possession of the agency" required under 87(3)(c) of the FOIL, 21 NYCRR 1401.2(b)(1), 21 NYCRR 1401.6, 21 NYCRR 1401.6(d), and 43 RCNY 1-03(a), nor publish that subject matter list on its website as is required under 87(3)(c) of the FOIL and 21 NYCRR 1401.6(d). The lack of the required, published subject matter list makes it difficult, if not impossible, for a person who does not know exactly which records may exist, and what to call them, to "reasonably describe" the records.

without saying which records were either not searched for, or searched for, but not located. *See* Answer ¶¶ 187, 189. Because Respondents have not explained which records disclosed as part of the Final Determination purport to respond to which parts of the Request, it is difficult to tell which parts of the Request Respondents have yet to respond to in the first instance. For example, of the records Respondents say were provided to the extent that Respondents "granted" the Request:

- **Requests Nos. 1 and 5(a)** seek records, including DD-5's, UF-49's, and other, similar police reports, regarding the purported drug sales or criminal conditions that led the SNEU team to target the bodega at East 228th Street and White Plains Road for the surveillance that led to their stalking, and ultimately killing, Mr. Graham. None of the records disclosed are those records or contain the information sought by Petitioners. Nor are they the records NYPD officials apparently relied on in making public statements to the press described in the Request to justify the initial police surveillance of Mr. Graham. None of the few pages of "summary" records that Respondents did provide explain, or suggest an explanation for, the reasons for which Mr. Graham drew the attention of the SNEU team that ultimately killed him.

- The Request describes police covertly surveilling, stalking, and stopping and/or arresting two perceived friends of Mr. Graham. **Request No. 5(b)** seeks records, including DD-5's, UF-49's, and others, similar police reports, regarding their purported conduct, and police responses to it, prior to Haste's shooting Mr. Graham. **Request No. 5(c)** seeks such records regarding not only Mr. Graham's shooting, but also medical care provided to Mr. Graham, searches for evidence related to the shooting, and steps taken to ensure the integrity of the scene of the shooting.[2]

- The Request describes uses of force against, and other mistreatment of, Mr. Graham's grandmother, Ms. Hartley, and Mr. Graham's parents. **Request No. 10** seeks records memorializing or reflecting uses of force, and justifications for

[2] Requests for such records are repeated or echoed in other Requests. *See, e.g.,* Requests Nos. 6-8(a) (seeking, *inter alia*, Radio Communications and Memo Book Entries containing observations about Mr. Graham's two perceived friends and evidence regarding the shooting), 9 (seeking Memo Book Entries, Stop Question and Frisk Reports, Summonses, and/or arrest processing paperwork related to the law enforcement actions taken regarding Mr. Graham's two perceived friends on February 2, 2012), 11-15, 17-20 (various records regarding medical care provided to Mr. Graham, crime scene integrity, and evidence treatement). It is not clear which, if any, record(s) Respondents believe are responsive to Requests 5(b) and 5(c), partially or otherwise.

them, against not only Mr. Graham, but also against Ms. Hartley and Ms. Malcolm.[3]

- **Request No. 16** seeks records reflecting the steps that NYPD officers took to inform Mr. Graham's family about his death and the surrounding circumstances, as required by the NYPD Patrol Guide. It does not appear that any records disclosed by Respondents address this aspect of the Request.

- **Requests Nos. 17 and 19-20** seek records showing the collection, transmittal, and chain of custody and testing of property and other evidence related to Mr. Graham's shooting, including Haste's firearm, Mr. Graham's property, and the marijuana allegedly recovered. Requests for such records are repeated or echoed in other Requests. *See, e.g.,* Request No. 18. It does not appear that any records disclosed by Respondents address those aspects of the Request.

Representative (and not exhaustive) examples of other records and categories of records sought in the Request and unaccounted for, insufficiently accounted for, or in connection with which an apparently inapplicable (or insufficiently justified) exemption has been claimed, appears to have been invoked in the Final Determination or Answer, follow:

- **Request No. 2** seeks Tactical Plans or other plans for February 2, 2012, including such plans regarding the observation of the bodega.

- **Requests Nos. 3-4** seek 47th Precinct Roll Calls and Command Logs.

- **Requests Nos. 5(d), 27, and 30-32** seek records about investigations undertaken or contemplated related to leaks made by NYPD officers to the media revealing Mr. Graham's alleged criminal history information, which was sealed and prohibited from disclosure.

- **Requests Nos. 6-7** seek recordings of 311 or 911 calls and internal NYPD radio communications.

- **Request No. 11** seeks records reflecting Mr. Graham's injuries and regarding ambulance or other emergency medical response, including records identifying non-NYPD first responders, the time they were first called, and the time they left in the ambulance.

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[3] Requests for such records are repeated or echoed in other Requests. *See, e.g.,* Requests Nos. 8(c) (seeking Memo Book Entries of officers who interacted with Ms. Hartley, Ms. Malcolm, or Franclot Graham on February 2, 2012); 22-23 (video and audio of police interactions with them). It does not appear that any records disclosed by Respondents address those aspects of the Request.

- **Request No. 13** seeks Crime Scene Unit and other crime scene-related records created between February 2-5, 2012, including photographs or video.

- **Request No. 14** seeks records reflecting steps NYPD officers took to preserve or document evidence related to the shooting and the crime scene, including photographs or video, NYPD procedures related to integrity and treatment of crime scene.

- **Request No. 15** seeks records reflecting the treatment by NYPD officers and emergency medical responders of Mr. Graham and Mr. Graham's body, including his body bag and the chain of custody of his body.

- **Request No. 25** seeks records from the Office of the Chief Medical Examiner of the City of New York ("OCME") or Fire Department of the City of New York ("FDNY") within Respondents' care regarding Mr. Graham's shooting, injuries, medical treatment, and the treatment of his body, including his autopsy.

- **Request No. 26** seeks video or audio recordings, and other records, regarding observations of the bodega, Mr. Graham, police interactions with Mr. Graham, the circumstances leading up to the NYPD entry into the private apartment at 749 East 229th Street, and other enumerated manners.

- **Requests Nos. 27-29** seek statements made to the press by Respondents regarding Mr. Graham, Haste's shooting Mr. Graham, and any related events, including, but not limited to, any related investigations, disciplinary actions, or prosecutions, as well as notes and other records relied on by NYPD officials in making such public statements to the press.

- **Requests Nos. 30-33** seek records reflecting the means by which officers may access sealed criminal history information, records identifying the dates and times of searches for Mr. Graham's criminal history information between February 2-5, 2012, and the identities of the searchers, and records regarding investigations into the apparent NYPD leak of Mr. Graham's sealed criminal history information.

- **Request Nos. 39, 40, and 44** seek records reflecting NYPD policies in effect in 2012, including NYPD Patrol Guide Provisions, Interim Orders, Administrative Orders, and training materials, related to 18 enumerated topics.

- **Requests Nos. 41 and 43** seek, among other things, communications between the NYPD and City Hall, the United States Department of Justice, the Bronx County District Attorney, and City Council members regarding Mr. Graham's shooting and related investigations, disciplinary actions, or prosecutions.

- **Request No. 45** seeks a February 2012 SNEU Operations internal NYPD review conducted in the wake of Haste's killing Mr. Graham**.**

II. RESPONDENTS HAVE NOT JUSTIFIED WITHHOLDING RESPONSIVE RECORDS UNDER § 87(2)(e)(i).

On the NYPD's view, because the IAB opened an investigation into Haste's killing Mr. Graham on February 2, 2012, every record that the IAB requested or received in that investigation, or made a part of its "file" – regardless of the record's "nature" - was "compiled by" IAB for law enforcement purposes. *See, e.g.,* Ds' MOL at pp. 7-8. For example, according to ¶¶ 174-177, 190, 192, 196, of the Answer, *all* documents responsive to Requests 5(d), 6-9, 11-15, 18-19, 21-39, and 41-44 were "compiled by" IAB for law enforcement purposes in terms of the relevant § 87(2)(e) analysis.

That over-expansive view of which documents should be considered "compiled by" the IAB for purpose of Respondents' § 87(2)(e) objections is directly contrary to the Court of Appeals' analysis in *Lesher v. Hynes*, 80 A.D.3d 611 (2nd Dept. 2011), *aff'd,* 19 NY3d 57, 64-67 (2012).[4]

Thus, the nature of the documents and the status of the investigation are the key factors courts must consider in evaluating an agency's claimed reliance on the 87(2)(e)(i) exemption. For example, where there is an actual, ongoing law enforcement investigation or criminal proceeding involving the records sought, identifying the particular investigatory records and the particular criminal proceeding can amount to sufficiently identifying the potential interference sufficient to warrant withholding records related to the arrest or prosecution from disclosure, albeit in a "generic" way. *Lesher*, 80 A.D.3d at

[4] There, the Court of Appeals analyzed the legislative history of 5 USC § 552(b)(7)(A), the federal analogue on which FOIL § 87(2)(e)(i) was based, explaining that Congress enacted "Exemption 7A" because federal courts had been interpreting the previous version of the exemption "too broadly for Congress's taste" by withholding "material from disclosure *so long as it was kept in an investigatory file compiled for law enforcement purposes, without regard to the nature of the documents or the status of the investigation*." *Lesher,* 19 NY3d at 64-65 (emphasis added), citing and discussing *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 228-29 (1978).

612-13 ("A criminal prosecution is a 'particular kind [] of enforcement proceeding[]' where 'disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings'" (citing *Robbins*, 437 U.S. at 236; *Legal Aid Society v. NYPD*, 274 A.D.2d 207 (1st Dept. 2007), *leave to appeal den'd*, 15 NY2d 956 (2000); *Pittari v. Pirro*, 258 A.D.2d 202 (2nd Dept. 1999)).

Respondents claim that the NYPD "has met its burden of justifying denial of access to responsive records compiled by IAB for law enforcement purposes." Rs' MOL at p. 9, quoting *Pittari v. Pirro*, 258 A.D.2d 202, 205 (2nd Dept. 1999) *quoting NLRB v. Robbins Tire & Rubber Co.,* 431 U.S. 214, 222 (1978). However, as was the case in *Lesher,* 80 A.D.3d at 612, in *Pittari*, the Petitioners were either criminal defendants awaiting pending criminal prosecution, or their counsel, seeking records regarding their arrests and pending criminal prosecutions.[5] The concerns cited by the Courts in *Pittari* and *LAS v. NYPD* regarding the ways in which disclosure of records related to those ongoing criminal prosecutions would potentially harm or impede those prosecutions – including concerns about interference with the orderly process of statutory disclosure, the possible creation of delays in the criminal proceeding generated by litigation around disclosure in a related records access proceeding, or other concerns around potential

[5] Specifically, in *Pittari*, while the defendant's prosecution was ongoing, the Chief Attorney of the Legal Aid Society of Westchester County, his counsel, had sought all documents "pertaining to" the defendant client's "arrest and prosecution" as well as all documents relating to the cases of the defendant client's "accomplices". 258 A.D.2d at 203. The Court held that "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL." 258 A.D.2d at 204. Because it was undisputed that the criminal prosecution against the defendant client was ongoing, the Court upheld the denial of access to record regarding the client defendant's "arrest and prosecution" under 87(2)(e)(i), reasoning: "Based upon these undisputed facts a generic determination could be made that disclosure under FOIL would cause interference." 258 A.D.2d at 207 (citing and discussing casces regarding ways in which disclosures of records would interfere with an ongoing criminal proceeding). *LAS v. NYPD* led to a similar result because the same undisputed facts – that the defendant sought records regarding their arrest and prosecution while the prosecution was pending – justified the "generic determination" that there would be interference with the prosecutions.

chilling effects on prosecution - are simply not applicable to potential administrative trials such as Morris's and McLoughlin's.

A. RESPONDENTS HAVE NOT SHOWN THAT DISCLOSURE OF RECORDS RESPONSIVE REQUESTS 5(d), 6-9, 11-15, 18-19, 21-39, and 41-44 WOULD INTERFERE WITH MORRIS'S OR MCLAUGHLIN'S ADMINISTRATIVE DISCIPLINARY TRIALS (IF RESPONDENTS EVER SCHEDULE OR CONDUCT THEM).

In this case, Respondents have not provided information or arguments based on which this Court could, or should, make the sort of "'generic determinations of likely interference'", *see, e.g., Lesher*, 19 NY.3d at 66, that would be likely to occur as a result of disclosure of the records responsive to Requests Nos. 5(d), 6-9, 11-15, 18-19, 21-39, and 41-44 that Respondents claim are exempt from disclosure on § 87(2)(e)(i) grounds. Although § 87(2)(e)(i) does not specify a particular type of judicial proceeding or any particular phase within one, Respondents must still make a showing that disclosure of the records sought would interfere with a particular judicial proceeding.

In that connection, Respondents repeatedly claim that disclosure of any of those records "would interfere with pending departmental disciplinary proceedings against Sergeant Morris and Officer McLoughlin by prejudicing NYPD's ability to conduct fair, impartial, and objective disciplinary trials by revealing NYPD's prosecutorial strategies and inciting public opinion against these individuals." RS' MOL at pp. 2, 9, citing Answer ¶ 192 (Requests Nos. 5(d) 6-9, 11-15, 18-19, 21-24, 26-39, and 41-44).

However, Respondents do not explain, even in a generic or general way, *how* the release of *which* records or categories of records could even theoretically interfere with the NYPD's ability to conduct fair, impartial, and objective disciplinary trials. Notably, the trial to be conducted is an administrative disciplinary hearing before a presumptively

neutral fact-finder – the NYPD's Deputy Commissioner of Trials or another administrative judge – who presumably will not be influenced by "public opinion" – rather than a jury.

Additionally, as seen in II(c) below, upon information and belief, many of the records at issue in these Requests, and/or the information contained in them, were publicly disclosed during Haste's administrative disciplinary hearing. Morris and McLaughlin were present at, and witnesses for Haste in, that proceeding. It is therefore not credible to assert that will or are likely to reveal "NYPD's prosecutorial strategies." Those strategies have already been revealed, and publicly, including to Haste, Morris, and McLaughlin.

To the extent Respondents seek to rely on the pendency of Morris's and McLaughlin's administrative disciplinary proceedings, the Court should reject those arguments not only on the merits, but also on equitable (*laches*) grounds. Although Respondents apparently retain the ultimate authority to schedule administrative trials regarding outstanding administrative charges and specifications at any time between 2012 and now, Respondents have simply chosen not to do so. The delay in conducting Morris's and McLaughlin's administrative trials is entirely attributable to Respondents and Respondents' position that otherwise responsive documents cannot be disclosed to them until the judicial proceedings have been concluded has disadvantaged and frustrated Petitioners' rights to access the records sought in the Request and to make lawful and appropriate uses of those records and the information in them in their campaigns for justice for Ramarley Graham and related police accountability.

Additionally, Respondents sweep a number of categories of records and specific records into the § 87(2)(e)(i) ambit, the revelation of which would not appear to threaten to interfere with the identified "threats" to the fair administration of Morris's or McLaughlin's administrative trials, if Respondents ever schedule or conduct them. For example: Records that were disclosed to Haste's, Morris's, or McLaughlin's attorneys in their administrative proceedings; records that were marked or admitted as exhibits in connection with Haste's highly public administrative trial; records whose contents were revealed, and records related to public testimony, in Haste's highly public administrative trial; and records that are not apparently relevant to Haste's, Morris's, or McLoughlin's administrative proceedings.

Some examples of records falling into the latter category are records regarding: purported drug sales or criminal conditions at the bodega where police surveilled, and then stalked, Mr. Graham, which police said led Haste's, Morris's, and McLoughlin's SNEU team to stake out the bodega; SNEU Tactical and/or other plans; 47th Precinct Roll Calls and Command Logs; investigations undertaken into apparent NYPD leaks of Mr. Graham's alleged criminal history; Mr. Graham's injuries and emergency medical response; medical care provided to Mr. Graham; the chain of custody and treatment of Mr. Graham's body; uses of force against, or other mistreatment of, members of Mr. Graham's family; depictions of the crime scene; integrity of the crime scene; chain of custody records regarding evidence including Haste's gun and marijuana allegedly recovered; NYPD Patrol Guide provisions and training materials; NYPD statements to the press; and NYPD communications with City Hall, the United States Attorney's Office, and other agencies.

B. MANY OF THE CATEGORIES OF RECORDS SOUGHT IN THE REQUEST ARE TYPICALLY SUBJECT TO DISCLOSURE.

In considering whether to adopt Respondents' arguments that would sweep almost all of the records sought by Petitioners under the confidentiality rug, Petitioners respectfully submit that many of the categories of records and specific records sought in the Request are typically subject to disclosure.[6]

C. MANY OF THE RECORDS SOUGHT IN THE REQUEST ARE SUBJECT TO DISCLOSURE BECAUSE THEIR CONTENTS HAVE ALREADY BEEN PUBLICLY DISCLOSED, INCLUDING THROUGH WITNESS TESTIMONY AT HASTE'S ADMINISTRATIVE TRIAL.

As argued in pp. 10-11 Petitioners' MOL, *Moore v. Santucci*, 151 A.D.2d 677 (2nd Dept. 1989) and its progeny hold that, once records that would otherwise have been

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[6] By way of providing some representative examples, here are some of the types of records sought in the Request that are typically subject to disclosure. **DD-5's (Complaint Follow-Up Reports)**: *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277 (N.Y. 1996); *Mitchell v. Slade*, 173 A.D.2d 226, 227 (1st Dept. 1991); *Alicea v. NYPD*, 287 A.D.2d 286, 286 (1st Dept. 2001); *Sowell v. NYPD*, 292 A.D.2d 187, 187 (1st Dept. 2002); **UF-49's (Unusual Occurrence Reports)**: *Newsday, Inc. v. NYPD*, 133 A.D.2d 4, 17 (1st Dept. 1987); **Radio Communications (NYPD, 311, 911)**: *The New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005); *Lynch v. City of Troy*, 33 Misc.3d 174, 180; 927 N.Y.S.2d 752, 757 (2011 N.Y. Slip Op. 21248) (Supreme Court, Rensselaer County, New York, June 21, 2011); **Memo Book Entries**: *Gould v. NYPD*, 89 NY2d 267, 273 (1996); *Sanders v. Bratton*, 278 A.D.2d 10, 12 (1st Dept. 2000); *Sowell v. NYPD*, 292 A.D.2d 187, 187 (1st Dept. 2002); **Videos**: *Lynch v. City of Troy*, 33 Misc.3d 174, 180; 927 N.Y.S.2d 752, 757 (2011 N.Y. Slip Op. 21248) (Supreme Court, Rensselaer County, New York, June 21, 2011); *Rodriguez v. Johnson,* 17 Misc.3d 1120(A); 851 N.Y.S.2d 73 (2007 N.Y. Slip Op. 52086(U)) (Supreme Court, Bronx County, New York, October 23, 2007); *Pennington v. Clark*, 16 A.D.3d 1049, 1051; 791 N.Y.S.2d 774, 776 (2005 N.Y. Slip Op. 02022) (Supreme Court, Appellate Division, Fourth Department, New York, March 18, 2005); **Firearms Discharge Report**: *Newsday, Inc. v. New York City Police Dept.*, 133 A.D.2d 4, 15-16 (1st Dept. 1987); **Crime Scene Photographs**: *Edwards v. NYS Police*, 44 A.D.3d 1216 (3rd department); *Eberhart v. Crozier*, No. 09 Civ. 4813, 2010 WL 234822, at *2-3 (SDNY 2010); *Young v. McGinnis*, 411 F.Supp.2d 278, 294 (EDNY 2003); **Laboratory Examinations**: *Sanders v. Bratton*, 278 A.D.2d 10, 13 (1st Dept. 2000); **Ballistic and Fingerprint Tests**: *Moore v. Santucci*, 151 A.D.2d 677, 678-79 (1989); *Mitchell v. Slade*, 173 A.D.2d 226, 226-227 (1st Dep.t 1991); *Fink v. Lefkowitz*, 63 A.D.2d 569, 611 (1978); **Evidence Logs and Tags / Chain of Custody Information**: *Sanders v. Bratton*, 278 A.D.2d 10, 10 (1st Dept. 2000); **Property Invoices/Vouchers**: *Sanders v. Bratton*, 278 A.D.2d 10, 10 (1st Dept. 2000); and **Witness Statements**: *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 276-79 (N.Y. 1996); *Exoneration Initiative v. NYPD*, 114 A.D.3d 436, 440 (1st Dept. 2014); *Friedman v. Rice,* 134 A.D.3d 826, 831-36 (2nd Dept. 2015); *Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292 (3rd Dept. 2009); *Johnson v. City of New York*, 257 A.D.3d 343, 348 (1st Dept. 1999); *Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dept. 1992); *Cornell v. NYPD*, 153 A.D.2d 515, 517 (1st Dept. 1989), *app den'd*, 75 N.Y.2d 707 (1990). Further, NYPD Patrol Guide provisions are publicly available, and must be published on the NYPD's website, pursuant to NYC Administrative Code § § 14-164. The NYPD Patrol Guide is available online at http://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page

confidential "have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public."[7] Respondents have little to say about *Moore v. Santucci*. On the main, they argue that *Moore* "narrowly applies only where the judicial proceeding has reached its conclusion and also only to witness statements that were withheld from disclosure pursuant to § 87(2)(e)(i)." Rs' MOL at p. 9, citing *Moore*, 151 A.D.2d at 679.[8] However, those narrow readings of *Moore* are belied by *Moore* itself, the logic of *Moore,* and the above citations, which apply *Moore* more broadly.

III. RESPONDENTS HAVE NOT JUSTIFIED ENTITLEMENT TO WITHHOLD MOST OF THE RECORDS SOUGHT UNDER CIVIL RIGHTS LAW ("CRL") § 50-a.

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[7] 151 A.D.2d at 679-80; *see also, e.g., Sanders v. Bratton*, 278 A.D.2d 10, 12-13 (1st Dept. 2000) (applying *Moore v. Santucci* to a "Tactical Plan" that had been the subject of testimony in open court), *abrogated on other grounds in Rattley v. NYPD*, 96 N.Y.2d 783 (2001); *Laureano v. Grimes*, 179 A.D.2d 602 (1st Dept. 1992) ("even if there had been any expectation of confidentiality at the time the statements were given, it has been lost, since these witnesses later testified against petitioner at trial"); *Pennington v. Calabrese*, Index No. 2002/155, 2002 WL 31885409, at *2 (Sup. Ct., Erie Co., Nov. 25, 2002) (Unreported) (applying *Moore v. Santucci* analysis in rejecting § 87(2)(f) personal privacy exception to photograph of assistant county medical examiner who testified in open court); *Rainbow News 12 Company* v. *DA of Suffolk Co.*, 1992 WL 427579, at *2 (Sup. Ct. Suffolk Co. June 8, 1992) (Unreported) (applying *Moore v. Santucci* analysis to reporters' request for videotaped confessions of witnesses who testified at trial).

[8] In this connection, Respondents cite *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153 (1987), noting that "information from…juror questionnaires were exempt….notwithstanding the fact that some juror information has been made public during the jury selection process". Rs' MOL at p. 10. As is relevant here, *Sise* holds only that, where – unlike in this case – there are specific and unequivocal statutory prohibitions on the disclosure of a particular type of record absent a court order, information in the record that was not disclosed in open court may not be subject to disclosure under the FOIL. 71 NY2d at 152-53. In *Sise,* the prohibition was codified in Judiciary Law § 509(a), which prohibited disclosure of jury questionnaires "except to the county jury board or as permitted by the appellate division." *Id*. at 148. The Court rejected Newsday's *Moore v. Santucci*-type argument "that because the names and addresses [contained in the juror questionnaire] have already been made public during *voir dire*, … their release … could result in no further invasion of their privacy interests" because the "record … clearly [showed] that, in *voir dire*, the home addresses of the jurors were *not* disclosed." Rs' MOL at p. 10 (emphasis added). Unlike *Sise,* in this case there is no statutory provision even arguably barring disclosure of categories of the vast majority of records or particular records at issue, let alone a clear one. And contrary to the situation in *Sise* in which the record demonstrated that the underlying information had *not* been publicly disclosed, the records and/or information contained in the records, which were disclosed leading up to, and/or during, Haste's trial, were in fact publicly disclosed. *Sise* is therefore unavailing to Respondents. Beyond relying on *Sise,* Respondents also essentially say refer to their arguments that disclosure of documents would interfere with Morris's and McLoughlins' administrative disciplinary proceedings within the meaning of FOIL § 87(e)(2)(i) and that the documents are also subject to withholding under CRL § 50-a. *See* Rs' MOL at pp. 9-10.

Throughout Respondents' CRL § 50-a arguments, Respondents apparently conflate Petitioners' calls that Morris and McLoughlin – as well as numerous other officers who were responsible for killing Mr. Graham, abusing his family, and other, related misconduct - "should be fired" with threats sufficient to show "a substantial and realistic possibility of reprisals and harassment if their personnel records were disclosed to the public" due to the "sensitive nature and widespread publicity" around the "Incident." *See* Rs' MOL at pp. 11-14. Respondents accuse Petitioners of "advocating for reprisals and harassment against" Haste, Morris, and McLoughlin.[9] Yet Respondents do not point to any instances of Petitioners' advocacy seeking "reprisals" or "harassment" aside from calls for firing officers and other, similar calls for police accountability, which are clearly not the sort of "threats" sufficient to justify interference with Petitioners' association, advocacy, and petitioning – conduct protected by the First Amendment to the U.S. Constitution and the attendant provisions of the New York Constitution. Nor do Respondents explain how any instances of Petitioners' advocacy that police officers who engaged in misconduct "should be fired" constituted threats rising to the level of a "substantial and realistic possibility of reprisals" or "harassment" – all terms with clear First Amendment resonance and implications.

Respondents cite to *Luongo v. Records Access Officer*, *Civilian Complaint Review Board*, 51 N.Y.S.3d 46 (1st Dept. 2017) for the proposition that, because there is no statutory definition of "personnel records" aside from the requirement that they be "used to evaluate performance toward continued employment or promotion", and because,

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[9] *See* Rs' MOL at pp. 11 ("Indeed, Petitioners are leading a campaign to have every NYPD officer involved in the February 2, 2012 Incident fired and to obtain justice for Ramarley Graham that Petitioners feel has not yet been delivered. This strongly demonstrates why the protection of § 50-a is needed in this case"), 14.

Respondents claim, nearly every record relating to Ramarley Graham's shooting on February 2, 2012 and related investigations could be "used to evaluate" his, or Morris's or McLoughlin's, "continued employment", most of the records sought are "personnel records" subject to withholding under CRL § 50-a. *See* Rs' MOL at p. 12.

In this connection, the same caselaw and logic rejecting Respondents' position that every piece of paper that was used in Haste's disciplinary trial, or that may be used in Morris's or McLaughlin's, was "compiled for law enforcement purposes" within the meaning of FOIL § 87(2)(e), *see* II above, applies with equal force to refute Respondents' position that every such record is also automatically a "personnel record" under CRL § 50-a because it could be "used to evaluate" Morris's or McLoughlin's continued employment.

The "'nature and … use in evaluating an officer's performance,'" *Luongo*, 150 A.D.3d at 19, *quoting Matter of Prisoners' Legal Services of NY v. New York State Dept. of Correctional Services*, 73 N.Y.2d 26, 32 (1988), of the majority of the records sought in the request, show that they are not "personnel records." Many of the records and categories of records sought in the Request were not used in evaluating Haste's performance, have not been used in evaluating Morris's and/or McLoughlin's performance, and will likely not be used in any such evaluation. And, unlike the Civilian Complaint Review Board ("CCRB") records related to civilian complaints against an officer at issue in *Luongo,* many of the records and categories of records sought in the Request are not even arguably Haste's, Morris's, or McLoughlin's personnel records by the "nature" of the documents themselves.[10]

[10] For example, press statements, communications between the NYPD and City Hall, policies and procedures, training materials, medical records reflecting treatment given to Mr. Graham, and crime scene

In this connection, it is Respondents' burden to "demonstrate[e] that those documents" they claim are "'personnel records' for purposes of" CRL § 50-a are, in fact, personnel records, based on each record's "nature" and "use in evaluating an officer's performance". *Luongo*, 150 A.D.3d at 22-23. CRL § 50-a protections do not apply unless "a document qualifies as a 'personnel record'". *Id*. Respondents have not met that burden to demonstrate that any categories of records or specific records sought in the Request are "personnel records" under CRL § 50-a.[11]

Respondents have not shown that disclosure of any records would create a threat or present a "substantial and realistic potential for harm" in the form of "harassments or reprisals" or otherwise. *Luongo*, 150 A.D.3d at 25-26. In *Luongo*, NYPD Officer Daniel Pantaleo had received death threats and he and his family were under 24/7 police protection. *Id.* In this case, no such threatening conditions exist, or have been demonstrated on the record, with respect to Haste, Morris, McLoughlin, or any other NYPD officer or person. And, in contrast to having engaged in any threatening conduct, Petitioners have engaged in traditionally protected conduct, in the form of waging a political campaign to pressure City Hall and the NYPD to fire Haste, Morris, McLoughlin, and other officers, and for other, similar accountability.

To the extent that some of the records sought in the Request might be considered "personnel records" within the legitimate sweep of CRL § 50-a, this Court must not

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photos, videos, and other, similar records, to name a few categories are simply not "personnel records" by their "nature" within any reasonable stretch of the terms. They are only arguably so, on Respondents' view, because, Respondents say, they were "compiled by IAB", and because they may have been, and/or may in the future be, used in administrative trials.

[11] Respondents cite *NYCLU v. NYPD*, 148 A.D.3d 642 (1st Dept. 2017) to argue that written decisions resulting from NYPD disciplinary trials are confidential. In holding that written disciplinary decisions revealing the outcome of the trial are not themselves subject to disclosure, the Court made clear that the decisions included information that was not revealed at the public trials, and that the trials themselves were public, and not confidential.

simply uphold their withholding from disclosure. Rather, the Court must weigh the risks of embarrassment, humiliation, or other negative consequences that might befall subject officers, against Petitioners' clear, and strong, interests in accessing the records and information contained in them, and make a determination on the merits regarding whether the interests weigh in favor of, or against, disclosure. The merits favor disclosure to Petitioners.

IV. RESPONDENTS HAVE NOT JUSTIFIED ENTITLEMENT TO THEIR CLAIMED § 87(2)(g) ("INTER- OR INTRA-AGENCY MATERIALS") EXEMPTIONS.

FOIL § 87(2)(g) prohibits withholding of records that are "inter-agency or intra-agency materials which are … (i) statistical or factual tabulations or data; ii. instructions to staff that affect the public; [or] iii. final agency policy or determinations." 87(2)(g)(i) through 87(2)(g)(iii). Respondents claim that § 87(2)(g) exempts from disclosure what they call "certain policy documents", including all NYPD Patrol Guide provisions sought by Petitioners, as well as four training guides, and communications with the Bronx County District Attorney's Office and United State's Attorney's Office for the Southern District of New York. *See* Answer ¶ 177, citing Request ¶¶ 39 and 41.[12] As Respondents correctly point out, the inter- or intra-agency exception protects some pre-decisional material prepared to assist an agency decisionmaker in making a decision. As to those principles, Respondents' arguments mention only that "the requested internal and

[12] Respondents further claim that § 78(2)(g) exempts records responsive to Requests Nos. 18 (Firearm Discharge Report and other, similar records required to be created as a result of Haste's discharge of his firearm), 21 (records reflecting NYPD witness statements related to the shooting and related investigations), 22 (records reflecting non-NYPD witness statements related to the shooting and related investigations), 40 (records reflecting the contents of NYPD training in 2012 related to the 18 topics enumerated in Request 39), 43 (records reflecting communications between the NYPD and the Office of the Mayor and between the NYPD and the NYC Council), and 45 (2012 internal review of NYPD SNEU operations). *See* Rs' MOL at pp. 17-18, citing Answer ¶ 197.

external NYPD communications with other government agencies and internal reviews were properly withheld from disclosure because they consist of deliberations, recommendations, advice, and evaluation about the February 2, 2012 Incident and/or IAB's investigation into this Incident." Rs' MOL at p. 18, citing Answer ¶ 197 (referring to Requests ¶¶ 18, 21-22, 39-40, 43, and 45), without argument. However, many of the records Respondents claim should be withheld based on § 87(2)(g) (and on other grounds) contain statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations, subject to disclosure under 87(2)(g)(i) through 87(2)(g)(iii), or are otherwise subject to disclosure, notwithstanding the inter- and intra-agency materials exemption. Respondents have not justified their entitlement to withhold records based on that claimed exemption.

V. RESPONDENTS HAVE NOT JUSTIFIED ENTITLEMENT TO THEIR CLAIMED § 87(2)(b) ("PERSONAL PRIVACY") EXEMPTIONS.

Respondents have not justified entitlement to withhold records based on the § 87(2)(b) "personal privacy" exemption. *See* Rs' MOL at pp. 19-20, citing Answer ¶¶ 176, 180 and 198-99.[13]

Petitioners do not object to the redaction of dates of birth from the records produced as part of the Final Determination, or of names and vehicle numbers from the document Respondents refer to as "the list of incidents at the bodega".

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[13] ¶ 176 of the Answer states that "IAB Compiled" Mr. Graham's "Medical Examiner's Report and AIDED Reports, and other medical records" as well as "Haste's medical records." ¶ 188(1) of the Answer states that dates of birth and police tax registration numbers were redacted from records produced as part of the Final Determination under § 87(2)(b) "because disclosure would constitute an unwarranted invasion of personal privacy." ¶ 198 of the Answer generically refers to a litany of "police officer and civilian witness statements, crime scene evidence, lab reports, and non-routine computer checks and notifications" linked to Requests Nos. 13-14, 17, 20, 26, and 34 in ¶ 199, and says they either could not be located, or are exempt based on FOIL Sections 87(2)(b), (e)(iii), (e)(iv), and 87(f), without explaining which records are exempt under which claimed exemption(s), or why.

However, Petitioners object to Respondents' remaining invocations of § 87(2)(b). For example, Petitioners object to the redaction of police tax registration numbers under § 87(2)(b), including because Respondents have not shown that disclosing them would amount to a privacy violation. *See, e.g., Exoneration Initiative v. New York City Police Dep't*, 114 A.D.3d 436, 43 (1st Dept. 2014) (directing disclosure of tax registration number of detective who recorded an informant's statement).

Petitioners reject Respondents' reliance on § 87(2)(b) to justify withholding Mr. Graham's own medical records and/or records containing his protected health information, as such records should have been released to Petitioners, who include Mr. Graham's next of kin and the Administratrix of his Estate. *See* IX below.

As to Haste's "medical records" - Petitioners recognize records that are truly "medical records" may be withheld from disclosure under the FOIL, and it may well be that police records contain some of Haste's legitimately protected health information that should be redacted before those records are disclosed. However, on the current record, Respondents have not sufficiently described the records in question, or taken any other steps, to justify withholding what they characterize as Haste's "medical records" based on this claimed exemption. Simply because Respondents call some otherwise unidentified records "medical records" does not necessarily entitle Respondents to withhold such records.

Finally in this connection, Petitioners object to Respondents' redaction of witness statements to "the IAB call-out report" and to all redactions to witness statements (*see* Rs' MOL at pp. 19-20), for the reasons explained in VI below.

VI. RESPONDENTS HAVE NOT JUSTIFIED ENTITLEMENT TO THEIR CLAIMED § 87(2)(e)(iii) ("CONFIDENTIAL SOURCE OR

INFORMATION RELATING TO A CRIMINAL INVESTIGATION") OR § 87(2)(f) ("LIFE AND SAFETY") EXEMPTIONS.

Respondents have not justified entitlement to withhold records based on the § 87(2)(e)(iii) exemption for records compiled for law enforcement purposes, the disclosure of which would reveal a "confidential source or disclose confidential information relating to a criminal investigation." *See* Rs' MOL at pp. 21-22, citing Answer ¶¶ 188 and 198. Respondents have not justified entitlement to withhold records based on the § 87(2)(f) exemption for records, the disclosure of which would "endanger the life and safety" of witnesses" *See* Rs' MOL at pp. 21-22, citing Answer ¶ 188.[14] Respondents say that because the records "describe and identify various witnesses and contain statements made by interviewed individuals and personal information about those individuals… they should not be released in order to protect the disclosure of personal information of witnesses and the information provided by witnesses." *See* Rs' MOL at pp. 21-22. However, Respondents cannot withhold records and information that are not subject to an exemption by saying that the records contain "personal information" – without saying more about what that information is or how disclosure of the information would reveal confidential information related to a criminal investigation.

Beyond that, regarding witness statements: In addition to the objections to withholding or redacting such statements above, Petitioners further object to the

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[14] ¶ 188 of the Answer says that redactions to certain (unspecified) records provided as part of the NYPD's Final Determination (*see* Answer ¶ 187) are justified since they consist of "information compiled for law enforcement purposes… because disclosure would reveal confidential information relating to the criminal investigation." *See* Answer ¶ 188(3). ¶ 188 of the Answer says that redactions were made to certain unspecified witness statements provided as part of the NYPD's Final Determination (*see* Answer ¶ 187) "because disclosure could endanger the life and safety of those individuals – police officers and civilians – who cooperated with the NYPD's investigation under 87(2)(f)." Answer ¶ 188(2). ¶ 198 of the Answer generically refers to a litany of "police officer and civilian witness statements, crime scene evidence, lab reports, and non-routine computer checks and notifications" linked to Requests Nos. 13-14, 17, 20, 26, and 34 in ¶ 199, and says they either could not be located, or are exempt based on FOIL Sections 87(2)(b), (e)(iii), (e)(iv), and 87(f).

wholesale withholding and/or redaction of the contents of witness statements, which contain factual data subject to disclosure, and are otherwise generally subject to disclosure, absent a showing that the statements were given with either an express or implied promise of confidentiality to the witnesses.[15] In this connection, "[c]onclusory statements are insufficient to deny access, as are categorical assertions that all law enforcement investigations will be harmed if witnesses' names are available through a FOIL request in this situation." *Carnevale*, 68 A.D.3d at 1292.[16]

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15 *See, e.g., Gould v. NYPD*, 89 N.Y.2d 267, 276-79 (1996) ("a witness statement [given to police] constitutes factual data insofar as it embodies a factual account of the witness's statements"); *Exoneration Initiative v. NYPD*, 114 A.D.3d 436, 440 (1st Dept. 2014) (directing disclosure of contents of unnamed informant's witness statement "in the absence of any evidence that this person received an express or implied promise of confidentiality"); *Friedman v. Rice,* 134 A.D.3d 826, 831-36 (2nd Dept. 2015) (Barros, J., dissenting) citing cases at 834 in which the First Department and "other departments… have held that an agency invoking the confidentiality exemption under FOIL must show facts and circumstances indicative of either an express or implied promise of confidentiality to the witnesses whose statements are being requested"); *Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292 (3rd Dept. 2009) ("Respondent has not asserted that the witnesses were confidential informants or that they requested or were promised anonymity"); *Johnson v. City of New York*, 257 A.D.3d 343, 348 (1st Dept. 1999) (directing disclosure of records containing witnesses names and addresses and substantive statements absent particularized showing of entitlement to exemption); *Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dept. 1992) (rejecting assertion of § 87(2)(e)(iii) exemption where "respondent never asserted that the persons who may have furnished statements to the police were promised confidentiality" because absent same "the exemption does not apply"); *Cornell v. NYPD*, 153 A.D.2d 515, 517 (1st Dept. 1989), *app den'd*, 75 N.Y.2d 707 (1990) (ordering disclosure of witness statements including names and addresses in the absence of allegations "that anyone was promised anonymity in exchange for his cooperation in the investigation so as to qualify as a 'confidential source'").

16 The only cases Respondents cite to in this connection are *Exoneration Initiative v. NYPD,* 132 A.D.3d 545, 546 (1st Dept. 2015) ("*Exoneration Initiative II")*, *Bellamy v. NYPD,* 87 A.D.3d 874, 875 (1st Dept. 2011), and two unreported Supreme Court decisions, all of which are distinguishable. In *Exoneration Initiative II* and *Bellamy*, the First Department applied the standards articulated above to uphold redacting the identifying information of certain confidential witnesses. In *Bellamy*, the non-testifying witnesses made confidential statements in the context of a police investigation into a gang-related homicide that had been ordered from prison. In *Exoneration Initiative*, the records sought related to an attempted murder by shooting conviction and there were facts demonstrating real public safety concerns surrounding disclosure. On the record and "particular circumstances" in each of those cases, the harm that would come in identifying witnesses by revealing their names under the circumstances was patent. In *Lechner v. NYPD*, 52 Misc.3d 1206(A), 41 NYS3d 719 (Sup. Ct. N.Y. Co. July 8, 2016) (Unreported), the Intelligence Divisions records sought, regarding a counterterrorism investigation into the *Lechner* Petitioner, patently identified confidential sources and confidential information regarding a criminal investigation and their disclosure would have revealed specific Intelligence Division criminal investigative techniques. In *In re Porter v. David*, No. 402644/2012, 2014 WL 1510998 (Sup. Ct. N.Y. Co., April 10, 2014), the Petitioner had been convicted of a double homicide by shooting, the record included "specific elements of petitioner's crime and gang-related activity", and the Court found that disclosure of certain information contained in the documents sought "would create a danger to the victims' families and to witnesses who testified against petitioner at his trial."

In this case, Petitioners object to the withholding or redaction of the names of police witnesses, as well as the names of non-police witnesses who were not promised confidentiality, including, but not limited to, non-police witnesses who testified during, or whose testimony was relied on or referred to in, Haste's disciplinary trial.

Simply put, complete witness statements should be disclosed to the extent possible, with minimal redactions to protect real, confidential sources or information, if there are any instances of such, or where disclosure would create real safety risks. If such grounds for believing that there were confidential informants or safety threats exist, Respondents should make the required showings to support claiming exemptions based on those circumstances, which they have not.

VII. RESPONDENTS HAVE NOT JUSTIFIED ENTITLEMENT TO THEIR CLAIMED § 87(2)(e)(iv) ("CRIMINAL INVESTIGATIVE TECHNIQUES OR PROCEDURES") EXEMPTION.

Respondents have not justified entitlement to withhold records based on the § 87(2)(e)(iv) exemption for records compiled for law enforcement purposes, the disclosure of which would reveal "criminal investigative techniques or procedures, except routine techniques and procedures." *See* Rs' MOL at pp. 22-23, citing Answer ¶¶ 188 and 198.[17] Respondents further claim that training records, "the SNEU training guide, firearms tactics and training guide, and in service tactical training guide" are subject to withholding because their revelation "might alert criminals to the existence of non-routine techniques contained in these documents and thereby avoid detection". *See* Rs'

[17] ¶ 188 says that redactions were made to certain unspecified witness statements provided as part of the NYPD's Final Determination (*see* Answer ¶ 187) "because disclosure would reveal NYPD's non-routine criminal investigative techniques and alert criminals to the existence of such techniques and thereby enable them to avoid detection." Answer ¶ 188(4). ¶ 198 generically refers to a litany of "police officer and civilian witness statements, crime scene evidence, lab reports, and non-routine computer checks and notifications" linked to Requests Nos. 13-14, 17, 20, 26, and 34 in ¶ 199, and says they either could not be located, or are exempt based on FOIL Sections 87(2)(b), (e)(iii), (e)(iv), and 87(f).

MOL at pp. 22-23, citing Answer ¶¶ 177 (referring to Request No. 39), 188, and 198; *see also* Request Nos. 39-40. Respondents also claim that "non-routine computer checks" created regarding the investigation into Haste's shooting Mr. Graham are subject to withholding under § 87(2)(e)(iv) because they were "compiled by" specially trained "IAB investigators" who "have access to confidential databases and information" and whose "techniques are considered sensitive." *See* Rs' MOL at p. 22. Those representations from Respondents are not sufficient to justify withholding all records reflecting so-called "non-routine computer checks." And more generally, Respondents have not made the requisite factual showing to entitle them to claim the § 87(2)(e)(iv) exemption. As explained in Petitioners' MOL at pp. 16-17, the exemption only applies to *criminal* investigative techniques or procedures, which are *non-routine,* the revelation of which would frustrate "pending or threatened investigations" by allowing violators to "evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel", which could be used "to construct a defense to impede a prosecution." Respondents have not established that the revelation of the records and information they have withheld would reveal non-routine, criminal investigative techniques or procedures, frustrating investigations by revealing information they could use to evade detection or impede prosecution. Additionally, to the extent that any of the purported "criminal investigative techniques" or training records were the subject of testimony in, or otherwise revealed in connection with, Haste's disciplinary trial, they are subject to disclosure under *Moore v. Santucci*.

VIII. RESPONDENTS HAVE NOT JUSTIFIED WITHHOLDING THE MEDICAL EXAMINER'S REPORT FOR RAMARLEY GRAHAM UNDER (A) NYC CHARTER § 557(g); (2) EL § 995-d(1); OR (C) EL § 837(8), 9 NYCRR § 6150.4(b)(6), AND/OR CPL § 160.50.

As argued at pp. 18-19 of Petitioners' MOL, § 557(g) of the NYC Charter, New York Executive Law ("EL") § 995-d(1), EL § 837(8), 9 NYCRR § 6150.4(b)(6), or New York Criminal Procedure Law ("CPL") § 160.50 should not bar disclosure of the records sought related to Ramarley Graham, to Petitioner Malcolm, his mother and the Administratrix of his Estate, who stands in Mr. Graham's shoes for the purposes of seeking access to Mr. Graham's protected health information, medical records, and other confidential information**.**[18] In this connection, although Respondents argue at pp. 15-16 of their MOL that Ms. Malcolm's consent in Mr. Graham's stead may warrant release to Ms. Malcolm, but that withholding was nevertheless improper because there are also other Petitioners, that argument must fail. The relevant issue is whether Respondents had the necessary consent. They did – or they would have, had they asked for it. Notably, Respondents have never sought any release(s), written or otherwise, or other proof related to Mr. Graham's Estate, from Petitioners, authorizing the release of any records or information they now claim is exempt based on purported concerns for Mr. Graham's privacy. To the extent Respondents claim to require any written consent for the release of records or information responsive to the Request, Respondents should have so stated, and should have provided a proposed consent form, in responding to the Request, or at some time thereafter. Petitioners await proposed consent form(s) from Respondents.

A. Respondents argue that § 557(g) of the NYC Charter bars disclosure of the records sought in Request No. 25 from the OCME or FDNY related to Mr. Graham's

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18 For example, under "HIPAA" law, the personal representative of an Estate has the right to access the decedent's protected health information and the authority to authorize use and disclosures of the decedent's protected health information that are not otherwise permitted or required by HIPAA. *See* 45 CFR § 164.502(g)(4). By way of additional example, pursuant to NYC Office of Chief Medical Examiner regulations, an autopsy report may be requested by next of kin or others with a court order. *See* http://www1.nyc.gov/site/ocme/about/faq.page.

shooting, injuries, medical treatment, body, or autopsy. *See* Rs' MOL at pp. 14-16, citing Answer ¶ 196, citing Request No. 25. Even assuming, *arguendo*, that autopsy reports and OCME records such as the Medical Examiner's Report are exempt from disclosure under the FOIL by operation of NYC Charter § 557(g), Respondents' Final Determination, Answer, and MOL do not appear to account for the remaining records from the FDNY "related to Mr. Graham's shooting, injuries, medical treatment, [or] body." Additionally, to the extent that OCME records relate to Ramarley Graham, those records should be released to his Estate, as stated above.

B. Respondents argue that EL § 995(d) bars disclosure of the records sought in Requests Nos. 5(c) (records memorializing observations, statements, and other facts regarding, *inter alia*, searches for marijuana, a gun, or any other shooting-related evidence, and any steps taken to ensure the integrity of the scene of the shooting), 13 (Crime Scene Unit or other records depicting evidence related to the shooting including, but not limited to, photographs or video), 14 (records reflecting compliance with NYPD Patrol Guide as to integrity and treatment of crime scene), 17, and 19-20 (records regarding evidence and treatment of evidence, including chain of custody and testing) simply by calling all potentially responsive records "DNA records from the crime scene". *See* MOL at pp. 14-16, citing Answer ¶ 196, citing Requests Nos. 5(c), 13-14, 17, and 19-20. First, EL § 995-d(1) only prohibits the disclosure of "records, findings, reports, and results of DNA testing performed on any person." EL § 995-d(1). On their face, the majority of the cited Requests seek records that cannot be considered "DNA records from the crime scene." Second, the text of EL § 995-d(1) plainly and clearly authorizes the release of even explicitly confidential records relating to "DNA testing performed on any

person" with "the consent of the subject of such DNA testing." EL § 995-d(1). Here, to the extent that what Respondents are calling the "DNA records" relate to Ramarley Graham's DNA, those records should be released to his Estate, as stated above. Finally, to the extent that Respondents may be entitled to redact or withhold some – no doubt small – subset of what Respondents are calling the "DNA records" related to "records, findings, reports, and results of DNA testing performed on" Haste's, or other, DNA, they have not made the requisite showing with respect to any particular record(s).

C. Respondents argue that EL § 837(8), 9 NYCRR § 6150.4(b)(6), and CPL § 160.50 entitle them to withhold "the criminal histories of Ramarley Graham and his siblings," *see* MOL at pp. 14-16, citing Answer ¶ 196, citing Requests Nos. 30 (records reflecting the means by which NYPD officers may electronically access criminal history information), 31 (records reflecting NYPD searches of Mr. Graham's sealed criminal history information between February 2-5, 2012, including records identifying the dates and searchers), and 32 (records regarding investigations into the unauthorized release of Mr. Graham's criminal history information that was published in *The Wall Street Journal* on February 3, 2012) as well as "the records relating to Richard Hastes Bronx criminal indictment," *see id*., citing Request No. 42 (records reflecting statements made to the grand juries in the *Haste* prosecutions).[19] Here, any records related to Mr. Graham's

[19] Additionally, Respondents ignore and mischaracterize portions of the Request seeking not criminal history information, but NYPD leaks of Mr. Graham's own criminal history information. Page 6 of the Request describes the February 3, 2012 NYPD leak of Mr. Graham's criminal history information including information that was sealed pursuant to CPL 160.50 at the time to *The Wall Street Journal*, the publication of that information, complaints from Mr. Graham's family to Respondents about the unauthorized disclosure of sealed criminal history information by NYPD officers, and Respondents' apparent failure to take any steps to investigate, or otherwise respond to, the leaks. *See* Request at p. 6. In relation to those leaks, and the lack of response from Respondents, the cited Requests Nos. 30-32, by their plain language, seek records reflecting the means by which officers may access sealed criminal history information, records identifying the dates and times of searches for Mr. Graham's criminal history information between February 2-5, 2012, and the identities of the searchers, and records regarding

criminal history, including records containing sealed criminal history information, should be released to his Estate, as stated above.[20] Regarding what Respondents call "the records relating to Richard Haste's Bronx criminal indictment" responsive to Request No. 42, Respondents have not identified with any particularity which records they are referring to. Petitioners respectfully submit that CPL § 160.50 cannot and should not be applied to sweep in any and all records mentioning or relating to the fact of Haste's indictment.

IX. IF THE COURT DOES NOT ORDER PRODUCTION OF RESPONSIVE RECORDS, THE COURT SHOULD CONDUCT *IN CAMERA* REVIEW.

If the Court does not direct production of the responsive records on the current record, Petitioners have requested that the Court conduct an *in camera* review of the records, *see, e.g.,* Ps' MOL at pp. 19-20 (citing cases).[21]

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investigations into the illegal leak. Such records are clearly not protected by CPL § 160.50 or any other exemption or privilege from disclosure cited by Respondents.

[20] CPL § 160.50(1)(c) provides for sealing of "official records and papers….relating to" an "arrest or prosecution" upon termination of the related criminal proceeding in favor of the accused. CPL § 160.50(1)(c). However, CPL § 160.50(1)(d) provides that "such records shall be made available to the person accused or to such person's designated agent." CPL § 160.50(1)(d). While NYS Division of Criminal Justice Services ("DCJS") regulations at 9 NYCRR § 6150.4(b)(6) promulgated pursuant to EL § 837(8) exempt from disclosure DCJS "information contained in the criminal history file" – including "rap sheets" - DCJS policy and practice permits disclosure of such information, including rap sheets, to the subject of the criminal history information. For example, DCJS publishes information on its website describing "How to Request Your New York State Criminal History." *See* http://www.criminaljustice.ny.gov/ojis/recordreview.htm#personalrecordreview.

[21] Respondents have also made this suggestion. *See* Ds' MOL at p. 3, n. 1. Courts have criticized over-reliance on the Court's *in camera* review authority by Respondents in cases such as these for improperly shifting of the burden of explaining and justifying documents withheld under the FOIL to the Court, and excluding adversaries from participating in the process. *See, e.g., Brownell v. Grady*, 147 Misc.2d 105, 108-09 (1990) (citing cases). Petitioners therefore submit that the Court should order disclosure of all records for which Respondents have not established entitlement to withholding, based on the current record. If, however, the Court is inclined to direct *in camera* review instead, Petitioners respectfully request that, in order to enable meaningful review (including, if necessary, meaningful appellate review), the Court direct Respondents to provide a index of the documents produced to Petitioners, as well as documents withheld from production, including the transcript of, exhibits related to, and all other records regarding Haste's administrative trial, indicating which documents are responsive to which requests, and connecting redacted and withheld documents with particular claimed exemptions, *see, e.g., Billups v. Santucci*, 151 A.D.2d 663, 665 (2nd Dept. 1989) (pointing up Court's discretion to "direct the respondent to index the documents produced so as to facilitate identification of those which are claimed to be exempt from disclosure").

X. THE COURT SHOULD AWARD PETITIONERS ATTORNEY'S FEES AND COSTS.

Petitioners believe they will substantially prevail, that Respondents' determinations to withhold most records responsive to the Request were not reasonable, and that the Court will so find. Petitioners respectfully request the opportunity to further address issues of fees and costs, if necessary, after the Court's decision is rendered.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that the Court will grant the relief sought in the Petition (except as limited in the July 27, 2017 So Ordered Stipulation in this matter withdrawing certain claims with prejudice), and/or grant such other and/or further relief as the Court may deem just and proper.

DATED: Brooklyn, NY
August 14, 2017

/S/

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