

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

ALEXANDER HAGAN, as President of and on behalf of UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL UNION NO. 854, I.A.F.F., STEPHEN CASSIDY, as President of and on behalf of UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, I.A.F.F., AFL-CIO, EDWARD BURKE, and JOSEPH HENNELLY, individually, and on behalf those similarly situated,

Petitioners,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

CITY OF NEW YORK, and BILL DE BLASIO, as Mayor of the City of New York, and NEW YORK CITY FIRE DEPARTMENT, and DANIEL A. NIGRO, as Commissioner of the New York City Fire Department and as Chairman of the New York City Fire Pension Fund,

Respondents.

Index No. 012574/2014

IAS Part 73

Sweeney, J.

**NOTICE OF MOTION TO INTERVENE ON
CONSENT**

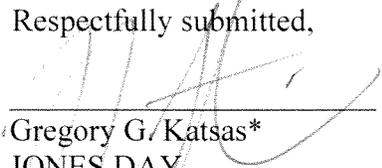
PLEASE TAKE NOTICE that upon the Affirmation of Joshua S. Stillman in Support of Proposed Intervenor-Respondent Empire Center for Public Policy, Inc. (“Empire Center”)’s Motion to Intervene, Empire Center’s proposed Verified Answer, Empire Center’s Memorandum of Law in Support of its Proposed Verified Answer, and the affidavit of Tim Hoefler, the undersigned counsel will move that this Court, IAS Part 73 (Sweeney, J.), Room 761, at the Kings County Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on December 15, 2014, at 9:30 AM, or as soon thereafter as counsel can be heard, issue an order

permitting the Proposed Intervenor to intervene in this proceeding as a Respondent pursuant to Rule 7802(d) of the New York Civil Practice Laws and Rules.

Petitioners and Respondents in this proceeding, through counsel, have consented to this motion.

Dated: November 19, 2014

Respectfully submitted,



Gregory G. Katsas*
JONES DAY
51 Louisiana Avenue, N.W.
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*Attorneys for Proposed Intervenor-
Respondent the Empire Center for Public
Policy, Inc.*

**SUPREME COURT OF THE STATE OF NEW YORK
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Respondents.

Index No. 012574/2014

IAS Part 73

Sweeney, J.

**AFFIRMATION OF JOSHUA S. STILLMAN
IN SUPPORT OF MOTION TO INTERVENE
ON CONSENT**

JOSHUA S. STILLMAN, an attorney duly admitted to practice law before the courts of the State of New York, herein affirms the truth of the following, upon information and belief, under penalties of perjury, pursuant to the New York Civil Practice Law and Rules § 2106:

1. I am an associate of the law firm Jones Day, attorneys for Proposed Intervenor-Respondent Empire Center for Public Policy, Inc. ("Empire Center"). As such, I am fully familiar with the facts and proceedings of this case. This affirmation is respectfully submitted in support of Empire Center's motion for leave to intervene in this action as a respondent. Empire

Center's proposed Verified Answer and Memorandum in Support are attached hereto as Exhibits A and B, respectively.

2. Both Petitioners and Respondents, through counsel, have indicated that they consent to Empire Center's motion to intervene in this proceeding.

PRELIMINARY STATEMENT

3. Proposed Intervenor-Respondent Empire Center is a think-tank that seeks to shed light on issues of public concern, including public spending on pensions. As part of its mission to increase awareness and prevent fraud and abuse, Empire Center seeks to publish data on its website, including the names and pensions of retired public employees in New York City. This information is necessary to scrutinize spending on a case-by-case basis and to shed light on potential fraud and abuse. Empire Center utilizes requests to state and local government agencies under the Freedom of Information Law ("FOIL") to obtain this information.

4. In litigation that concluded only months ago, certain New York City and State agencies refused to provide retirees' names in response to Empire Center's FOIL requests. The New York City Teachers' Retirement System ("NYC-TRS"), represented by Corporation Counsel, argued, *inter alia*, that disclosure of the names would be an unwarranted invasion of privacy because the Internet might allow for the discovery of the retirees' addresses. Rejecting this argument as "speculative," the New York Court of Appeals ruled in favor Empire Center, and ordered the names disclosed. *See Empire Ctr. for N.Y. State Policy v. N.Y. State Teachers' Ret. Sys.*, 23 N.Y.3d 438, 446 (2014).

5. Following this ruling, Empire Center submitted FOIL requests to all New York State and City retirement systems requesting the names and pensions of all retired employees receiving a public pension. Petitioners here discovered that the New York City Fire Department ("FDNY") and the New York City Fire Department Pension Fund (the "Pension Fund") intended

to comply, and filed the instant Article 78 proceeding in an attempt to block the release of this information. Petitioners make many of the same arguments raised by Corporation Counsel, and rejected by the Court of Appeals, in the prior FOIL litigation.

6. Empire Center seeks leave to intervene in this proceeding as a respondent. Empire Center should be allowed to intervene as an “interested person” under the liberal standard of CPLR § 7802(d), because this case may determine the fate of its FOIL requests. Moreover, Empire Center’s presence is necessary to ensure that its interests—and the public interest furthered by disclosure—are vigorously represented. Respondents here are New York City and its fire department, represented by Corporation Counsel, which only months ago made the same privacy argument to the Court of Appeals as Petitioners make here, in an attempt to prevent disclosure of the names of public pensioners. Moreover, Respondents have indicated that they will not fully oppose the relief sought by Petitioners. Finally, Empire Center’s request will allow it to participate from the very outset of this proceeding, and will not prejudice any of the current parties—who have all consented to Empire Center’s intervention. For these reasons, and with the consent of both Petitioners and Respondents, Empire Center respectfully requests leave to intervene in this proceeding as a respondent.

BACKGROUND

7. Proposed Intervenor-Respondent Empire Center is a think-tank based in Albany that is dedicated to informing the public about various important issues of public concern, including public spending and pension reform. *About Us*, <http://www.empirecenter.org>. As part of its mission, Empire Center operates a website that allows the public to see how state and local tax dollars are spent. The data on Empire Center’s website include detailed data on expenditures for public pensions. By publishing this data, Empire Center seeks to, *inter alia*, expose potential fraud and abuse in the public pension system.

8. In 2012, as in earlier years, Empire Center submitted various FOIL requests to state and local retirement systems for public-school teachers. The requests sought the names of retired members and the pension that each member was drawing. Unlike earlier years, those retirement systems refused to provide the names of their retirees.

9. In the ensuing litigation over Empire Center's FOIL requests, the New York City Teachers Retirement System, represented by New York City Corporation Counsel, vigorously resisted disclosure. Corporation Counsel argued that Public Officers Law § 89(7) exempts from disclosure the names and addresses of retirees. Corporation Counsel also argued that disclosure of retirees' names would constitute an "unwarranted invasion of personal privacy" exempt from disclosure under Public Officer Law § 87(2)(b). On the latter point, Corporation Counsel argued that disclosure of the names of retirees "could result in access to the address of those retirees, as well as other personal information," given the "wealth of information [that is] readily available through access to the internet." *See* Brief of N.Y.C. Teachers Retirement System, attached hereto as Ex. C. at 32, 35.

10. The New York Court of Appeals rejected these arguments, ruled in favor of Empire Center, and directed the agencies to disclose the retirees' names. First, the Court of Appeals held that Public Officers Law § 89(7) "exempts 'the home address . . . of a retiree,' but not the retiree's name." *Empire Ctr. for N.Y. State Policy*, 23 N.Y.3d at 444-45. Next, the Court rejected the argument that releasing the retirees' names would constitute an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b). The Court explained: "the idea that anyone's privacy will be invaded [by the release of the names] is speculative." *Empire Ctr. for N.Y. State Policy*, 23 N.Y.3d at 446.

11. Following the Court of Appeals' ruling in May, Empire Center submitted FOIL requests for the names of retirees drawing a public pension to requests to all New York State and

City retirement systems. Affidavit of Tim Hofer, attached hereto as Exhibit D, ¶ 6. As alleged by petitioners here, the FDNY informed petitioners on or about August 18, 2014, that it planned to release the names of pensioners in response to FOIL requests filed by Empire Center and the New York Times. Pet. ¶ 19. In response, Petitioners initiated the instant Article 78 proceeding, seeking to prevent the release of retirees' names. Petitioners raise the same and similar arguments as those put forth by Corporation Counsel in the prior NYC-TRS litigation and rejected by the Court of Appeals. Pet. ¶¶ 32-35. And Respondents have indicated that they will not fully oppose the relief sought by Petitioners. Though no relief has yet been granted in this proceeding, the FDNY has decided to withhold the requested information pending its outcome. Hofer Aff. ¶ 7.

12. Empire Center now moves for leave to intervene as a respondent, to protect its interests and the public interest in receiving the information for which it has submitted a FOIL request, and to prevent that interest from being advocated solely by the Respondents, who have indicated that they will not fully oppose Petitioners' request for relief, and who are represented by Corporation Counsel, who just months ago argued vigorously *against* disclosure of the information at issue. Moreover, both Petitioners and Respondents have consented to the Empire Center's intervention in this matter.

ARGUMENT

Empire Center Should be Allowed to Intervene In This Article 78 Proceeding

A. Standards for Intervention Under CPLR § 7802(d)

13. CPLR § 7802(d) provides that “[i]ntervention in proceedings pursuant to CPLR [A]rticle 78 is permitted for interested persons and is a matter addressed to the sound discretion of the court.” *White v Incorporated Vil. of Plandome Manor*, 190 A.D.2d 854, 854 (2d Dep’t 1993) (internal quotation marks omitted). An “interested person” is one “who will be directly

affected by the outcome of the proceeding,” *id.*, and who has “a real and substantial interest in the outcome of the proceedings,” *Bernstein v Feiner*, 43 A.D.3d 1161, 1162 (2d Dep’t 2007).

14. The standard for intervention in an Article 78 proceeding is more relaxed than the intervention standard applicable to actions. CPLR § 7802(d) “grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013[, which govern intervention] in an action.” *Bernstein*, 43 A.D.3d at 1162. For example, while intervention as of right in an action under CPLR § 1012 requires a showing that “representation of the person’s interests by the parties is or may be inadequate and the person is or may be bound by the judgment,” intervention in an Article 78 proceeding merely requires a showing that the proposed intervenor is an “interested person.” *Compare* CPLR § 1012(a)(2) *with* CPLR § 7802(d). Moreover, while intervention as of right in an action under CPLR § 1012(a) requires a showing that the motion is “timely,” “[t]he court has discretion to allow intervention in a CPLR [A]rticle 78 proceeding at any time, provided the movant is an interested person.” *Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 28-29 (2d Dep’t 1985).

15. Proposed Intervenor-Respondent Empire Center amply meets these requirements for intervening in this Article 78 proceeding. First and foremost, Empire Center is plainly an “interested person” because it will be directly affected by the outcome of this proceeding—the fate of Empire Center’s FOIL request will be determined by this proceeding. That alone is sufficient to justify intervention. Moreover, intervention is necessary to ensure that Empire Center’s interests are vigorously represented. And granting intervention will not prejudice any existing party—who have all consented to Empire Center’s intervention.

A. Empire Center is an “Interested Person”

16. The Court should allow Empire Center to intervene because it is an “interested person” under CPLR § 7802(d). An “interested person” is one “who will be directly affected by

the outcome of [the] proceeding,” *White*, 190 A.D.2d at 854, and who has “a real and substantial interest in the outcome of the proceedings,” *Bernstein*, 43 A.D.3d at 1162. This proceeding concerns whether the City and the FDNY will or will not be enjoined from complying with Empire Center’s request for information pursuant to the FOIL. If Petitioners prevail, Empire Center will not receive the information that it seeks from Respondents; if Petitioners fail, Empire center will receive the information. It is thus plain that Empire Center will be “directly affected by the outcome of these proceedings,” because the fate of its FOIL request turns entirely on the Court’s resolution of the instant petition. For the same reason, Empire Center’s interest in this proceeding is obviously real and substantial. *See, e.g., Mulgrew v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, 31 Misc. 3d 296, 298 (Sup. Ct. N.Y. Cnty. 2011), *aff’d*, 87 A.D.3d 506 (1st Dep’t 2011) (permitting FOIL requester to intervene in nearly identical circumstances). *See also John Doe No.1 v. Glickman*, 256 F.3d 371, 380 (5th Cir. 2001) (permitting a party requesting information under the federal Freedom of Information Act (“FOIA”) to intervene in an action seeking to prevent the release of the requested information); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1184 (8th Cir. 2000) (same).¹

17. Because Empire Center is an “interested person,” it satisfies the standard for intervention in this proceeding under CPLR § 7802(d).

B. Intervention Is Necessary To Ensure Empire Center’s Interests Are Vigorously Protected

18. Empire Center’s presence as a respondent is required to ensure that its interests—and the public interest in disclosure of the disputed information—are vigorously represented. Although CPLR § 7802(d) does not require a showing that Empire Center’s interests may not be

¹ New York’s intervention standards are “patterned” on the federal rules governing intervention. *See Vantage Petroleum v Bd. of Assessment Review*, 91 A.D.2d 1037, 1040 (2d Dep’t 1983).

adequately represented by Corporation Counsel, this concern strongly supports intervention here. As discussed above, New York City, represented by Corporation Counsel, vigorously contested FOIL requests indistinguishable from the one that prompted this proceeding, making many of the same arguments made by Petitioners here. In fact, the City pursued that litigation all the way up to the New York Court of Appeals. And here, Respondents have indicated that they will not fully oppose the relief requested by Petitioners.

19. Therefore, Intervention is necessary to ensure that Empire Center's interest—and the public interest—in disclosure is vigorously represented.

C. Empire Center's Motion is Timely and Will Not Prejudice the Current Parties

20. In an Article 78 proceeding, courts have discretion to allow intervention “at any time, provided the movant is an interested person.” *Elinor Homes Co.*, 113 A.D.2d at 28-29. Nonetheless, the timing of Empire Center's motion further supports intervention. The motion is made at the very outset of this proceeding. Granting intervention will allow Empire Center to participate from the beginning. Moreover, it will not prejudice any of the current parties, who have all consented to Empire Center's intervention in this proceeding.

CONCLUSION

21. For the foregoing reasons, Proposed Intervenor-Respondent Empire Center respectfully requests leave of the Court to intervene in this action as a respondent.

Dated: New York, New York
November 19, 2014

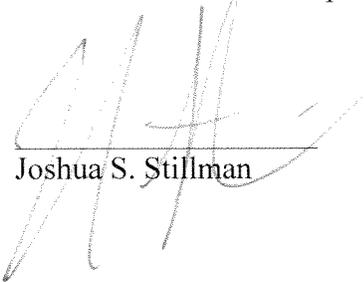

Joshua S. Stillman

EXHIBIT A

**SUPREME COURT OF THE STATE OF NEW YORK
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Index No. 012574/2014

IAS Part 73

Sweeney, J.

**PROPOSED VERIFIED ANSWER BY PROPOSED INTERVENOR-RESPONDENT
EMPIRE CENTER FOR PUBLIC POLICY, INC.**

PRELIMINARY STATEMENT

By this answer, Proposed Intervenor-Respondent the Empire Center for Public Policy, Inc. ("Empire Center") asks the Court to reject all of Petitioners' claims and deny Petitioners' requests for relief.

Proposed Intervenor-Respondent Empire Center, in filing this answer to Petitioners' Verified Petition, responds paragraph by paragraph, upon knowledge to itself and upon information and belief as to all other matters, as follows:

THE PARTIES

1. Without sufficient information or knowledge to admit or deny the allegations.
2. Without sufficient information or knowledge to admit or deny the allegations.
3. Without sufficient information or knowledge to admit or deny the allegations.
4. Without sufficient information or knowledge to admit or deny the allegations.
5. Without sufficient information or knowledge to admit or deny the allegations.
6. Without sufficient information or knowledge to admit or deny the allegations.
7. Without sufficient information or knowledge to admit or deny the allegations.
8. Without sufficient information or knowledge to admit or deny the allegations.
9. Admit.
10. Admit.
11. Upon information and belief, admitted.
12. Upon information and belief, admitted.

PRELIMINARY STATEMENT

13. No response is required to the statement regarding the nature of the action.
14. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

15. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

16. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

17. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

18. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

BACKGROUND AND FACTS¹

19. Without sufficient information or knowledge to admit or deny the allegations.

20. Without sufficient information or knowledge to admit or deny the allegation regarding what was said at the meeting. Otherwise, the allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

21. Without sufficient information or knowledge to admit or deny the allegations regarding what was said at the meeting. Otherwise, denied upon information and belief.

22. Without sufficient information or knowledge to admit or deny the allegation.

23. Without sufficient information or knowledge to admit or deny the allegation.

24. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

25. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

26. The allegation is a legal conclusion to which no response is required. To the

¹ To the extent any response is required to Petitioners' subheadings, which are argumentative, they are denied.

extent a response is required, the allegation is denied.

27. POL § 87(2)(b) speaks for itself and therefore no response is required.

28. POL § 87(2)(b) speaks for itself and therefore no response is required.

29. The allegation is a legal conclusion to which no response is required. No response is required to Petitioners' description of the legal standard.

30. The allegation is a legal conclusion to which no response is required. No response is required to Petitioners' description of the legal standard.

31. Upon information and belief, admit that Petitioners do not protest the release of pension amounts. Otherwise, the allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

32. Denied upon information and belief.

33. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

34. POL § 87(2)(f) speaks for itself and therefore no response is required. Without sufficient information to admit or deny that certain retirees have permits to have firearms in their residences. Otherwise the allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

35. Without sufficient information to admit or deny that certain retirees had the power to arrest suspects or issue and serve violations. Otherwise, denied upon information and belief.

FIRST CAUSE OF ACTION

36. Repeat and reallege all of the responses to allegations set forth in paragraphs "1" through "35" of the Verified Petition as if fully set forth herein.

37. New York City Administrative Code § 13-316(b) speaks for itself and therefore no response is required.

38. Without sufficient information or knowledge to admit or deny the allegations.

39. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

40. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

41. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

42. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

SECOND CAUSE OF ACTION

43. Repeat and reallege all of the responses to allegations set forth in paragraphs “1” through “42” of the Verified Petition as if fully set forth herein.

44. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

45. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

46. The allegation is a legal conclusion to which no response is required. To the extent a response is required, the allegation is denied.

DEMAND FOR RELIEF

Admit plaintiffs seek the relief requested. Deny plaintiffs are entitled to the relief they seek.

Deny each and every allegation in the verified complaint not specifically responded to above.

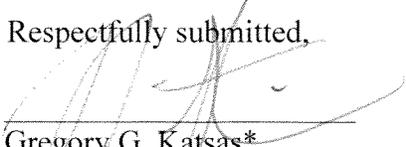
AFFIRMATIVE DEFENSES

1. The Petition fails to state a claim as a matter of law.
2. Petitioners have no right to bring an action to compel Respondents to invoke a discretionary Freedom of Information Law (“FOIL”) exemption.
3. The requested information does not fall into any FOIL Exemption.
4. New York City Administrative Code § 13-316(b) does not bar the release of the requested information or impose any procedural requirements for the release of information under FOIL. To the extent it does, it is preempted by FOIL and the governing regulations.
5. Petitioners are not entitled to injunctive relief, or any other relief they seek.

WHEREFORE, Proposed Intervenor-Respondent Empire Center requests that the Court deny Petitioners’ application for relief and dismiss the Verified Petition in its entirety.

Dated: November 19, 2014

Respectfully submitted,



Gregory G. Katsas*

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*Seeking leave for admission *pro hac vice*

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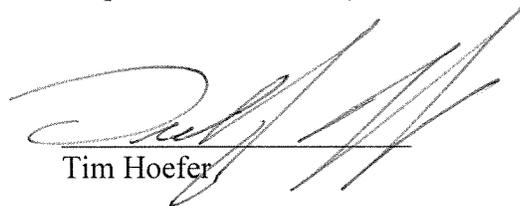
*Attorneys for Proposed Intervenor-
Respondent the Empire Center for Public
Policy, Inc.*

VERIFICATION

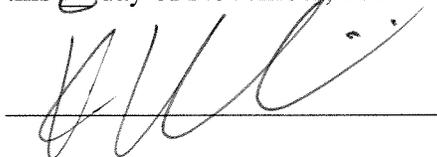
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Tim Hoefler, being duly sworn, deposes and says:

1. I am the executive director of the Empire Center for Public Policy, Inc. ("Empire Center"), the Proposed Intervenor-Respondent in this proceeding.
2. I have reviewed the foregoing Proposed Answer and aver that the contents are true to the best of my knowledge and belief except as to those matters contained therein that are alleged on information and belief, which I believe to be true, and those allegations that are legal conclusions, to which no response is required.
3. This verification is made by me as an officer of Empire Center pursuant to CPLR § 3020(d).


Tim Hoefler

Sworn before me
this 8 day of November, 2014



MARGARET KAVITA FULLER
Notary Public, State of New York
No. 01FU6240204
Qualified in Saratoga County
Commission Expires April 25, 2015

EXHIBIT B

**SUPREME COURT OF THE STATE OF NEW YORK
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Sweeney, J.

**MEMORANDUM OF LAW IN SUPPORT OF PROPOSED VERIFIED ANSWER BY
PROPOSED INTERVENOR-RESPONDENT
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*Seeking leave for admission *pro hac vice*

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(212) 326-3939

Attorneys for Proposed Intervenor-Respondent Empire Center for Public Policy, Inc.

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PRELIMINARY STATEMENT

Proposed Intervenor-Respondent Empire Center for Public Policy, Inc. (“Empire Center”) is a think-tank that seeks to shed light on issues of public concern, including public spending on pensions. As part of its mission to increase awareness and prevent fraud and abuse, Empire Center seeks to publish data on its website, including the names and pensions of retired public employees in New York City. This information is necessary to scrutinize spending on a case-by-case basis and to shed light on potential fraud and abuse. Empire Center utilizes requests to state and local government agencies under the Freedom of Information Law (“FOIL”) to obtain this information.

In litigation that concluded only months ago, the Court of Appeals rejected certain New York City and State agencies’ attempt to refuse to provide retirees’ names in response to Empire Center’s FOIL requests. The New York City Teachers’ Retirement System (“NYC-TRS”) argued that FOIL exempted the names and home addresses of retirees. Rejecting this reading of the statute, the Court of Appeals held that that FOIL draws a firm distinction between the names and the addresses of retirees, and “exempts ‘the home address . . . of a retiree,’ but not the retiree’s name.” *Empire Ctr. for N.Y. State Policy v. N.Y. State Teachers’ Ret. Sys.*, 23 N.Y.3d 438, 444-45 (2014) (“*Empire Center*”). NYC-TRS also argued that disclosure of the names would be an unwarranted invasion of privacy because the Internet might allow for the discovery of the retirees’ addresses. Rejecting this argument as “speculative,” the New York Court of Appeals ruled in favor Empire Center, and ordered the names disclosed. *See id.*

Following this ruling, Empire Center submitted FOIL requests to all New York State and City retirement systems requesting the names and pensions of all retired employees receiving a public pension. Petitioners here discovered that the New York City Fire Department (“FDNY”) and the New York City Fire Department Pension Fund (the “Pension Fund”) intended to comply,

and filed the instant Article 78 proceeding in an attempt to block the release of retiree's names. Petitioners make many of the same arguments rejected by the Court of Appeals in the prior FOIL litigation.

Petitioners' application for relief should be denied and the Petition dismissed with prejudice, for several reasons. First, Petitioners have to right to bring this action to compel Respondents to invoke a permissive, discretionary exemption to disclosure. Disclosure under FOIL is *mandatory*, unless an exemption applies, in which case it is up to the agency's *discretion* whether or not to release the information. FOIL does not prohibit disclosure of the information at issue.

Second, Petitioners have not even met their heavy burden to establish that any FOIL exemption applies. The Court of Appeals has already determined that the privacy exemption does not apply to retirees' names in its recent binding *Empire Center* decision, and Petitioners have provided no reason to disregard that decision. Their showing of potential harm is exceedingly thin and speculative—relying on a mere two affidavits setting forth speculative fears—and certainly no more forceful than the similar showing recently rejected by the Court of Appeals. They rely on the same argument already rejected by the Court of Appeals—that disclosure of names is tantamount to disclosure of addresses—and ignore the Court of Appeals' clear ruling that FOIL draws a firm distinction between the two. Moreover, much of the information is already publicly available on the Empire Center's website and elsewhere: the names and prior pensions of retirees as of 2010 are public, as are the names and prior salaries of New York City employees that have retired since 2010. Petitioners' failure to point to any serious or widespread harm resulting from the long-standing public availability of the names and prior incomes of retirees shows that they cannot establish that harm will result from the release of retirees' names here.

Third, Petitioners' odd and novel argument that a provision of the New York City Administrative Code requires the Board of Trustees of the FDNY Pension Fund to hold a vote in order to respond to a FOIL request must be rejected. The Administrative Code provision would be preempted by FOIL if it were read to impose this kind of onerous obstacle on FOIL filers. And in any event, there is no indication that this provision was intended to work any such drastic change to settled procedures under FOIL, under which all government documents are presumptively open to the public.

Fourth, Petitioners' request for extraordinary injunctive relief must be rejected, as Petitioners cannot establish any of the required elements.

BACKGROUND

Proposed Intervenor-Respondent Empire Center is a think-tank based in Albany and dedicated to informing the public about various important issues of public concern, including public spending and pension reform. *About Us*, <http://www.empirecenter.org>. As part of its mission, Empire Center operates a website that allows the public to see how state and local tax dollars are spent. The data on Empire Center's website include detailed data on expenditures for public employee salaries and public pensions that was previously obtained via FOIL requests. For example, the data includes the names and pensions of retirees in the FDNY Pension Fund for 2009 and 2010,¹ as well as the names and salaries of New York City public employees for 2012-2013 and prior fiscal years.²

¹ See Empire Center, New York City Fire Department Pension Fund Data Notes, <http://seethroughny.net/data-notes/nycfdpf-data-notes/> ("The New York City Fire Department Pension Fund data, as provided by the fund, includes benefit rates, retirement dates and last known employers when available for every individual who collected benefits in calendar years 2009 and 2010.").

² See Empire Center, New York City Payroll Data Notes, <http://seethroughny.net/data-notes/new-york-city-data-notes/> ("The New York City data, as provided by the city Office of Payroll Administration, New York City Police Department and Districts Attorney, include

By publishing this data, Empire Center seeks to inform an ongoing and important dialogue about public expenditures and provide the public with the tools to expose individual cases of fraud and abuse in the public pension system. Individual cases of fraud, such as illegal “double-dipping” into the retirement system through unauthorized post-retirement public employment, can only be detected with access to the names of pensioners. “[L]inking specific pensions to individuals [has] exposed some of the most egregious abuses of the pension system, such as salary spiking and pension padding, that led to reforms.” *Troubling Trend*, WATERTOWN DAILY TIMES (Mar. 1, 2013).³

For example, through public data linking specific pensions to individuals, the New York Post was able to uncover a New York City fireman who received a disability pension of three-quarters pay, \$86,000 per year, for “bronchial asthma” while he regularly trained and competed in the top of his age group as an elite triathlete. See Carl Campanile, *86G Disability Pension for Marathon Man*, N.Y. POST (July 6, 2010).⁴ And the New York Times was able to uncover the fact that as many as 97 percent of Long Island Railroad career employees in one year applied for and received disability payments. The individual names of these pensioners allowed the newspaper to discover dozens of these pension recipients on the golf course, despite being classified as occupationally disabled. See Walt Bogdanich, *A Disability Epidemic Among a Railroad’s Employees*, N.Y. TIMES (Sept. 20, 2008).⁵ This data has also enabled the media to

(continued...)

names, positions and salaries for employees who worked for the city during the 2012-13, 2011-12, 2010-11, 2009-2010, 2008-09, and 2007-08 fiscal years.”).

³ Available at <http://www.watertowndailytimes.com/article/20130301/OPINION01/703019977>.

⁴ Available at <http://nypost.com/2010/07/06/86g-disability-pension-for-marathon-man/>.

⁵ Available at http://www.nytimes.com/2008/09/21/nyregion/21lirr.html?pagewanted=all&_r=0.

report on lawful, but controversial practices, such as retirees collecting pensions in excess of their base pay through greatly increased overtime during the final three years of employment. See Jonathan Bandler, *Public Workers Enjoy Golden Nest Eggs*, THE JOURNAL NEWS (May 11, 2010).⁶

Empire Center utilizes requests to state and local government agencies under FOIL to obtain this information about public retirees and employees. Empire Center has been successful in this endeavor because it is the long-standing public policy of New York that “[s]ince tax dollars are spent to pay public employees, the public has a right to know certain facts relating to such employment[, such as a] . . . public employee’s name, public office address, title and salary.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 109 A.D.2d 92, 94 (3d Dep’t 1985), *aff’d*, 67 N.Y.2d 562 (1986). FOIL itself requires that covered entities such as New York City maintain a presumptively public record of the “name, public office address, title and salary of every officer or employee of the agency.” Public Officers Law § 87(3)(b). And reflecting this long-standing policy, the City of New York has itself published the names and salaries of City employees in its yearly “Civil List” since 1883.⁷

In 2012, as in earlier years, Empire Center submitted various FOIL requests to state and local retirement systems for public-school teachers. The requests sought the names of retired members and the pension that each member was drawing. Unlike in earlier years, those retirement systems refused to provide the names of their retirees.

⁶ Available at <http://www.lohud.com/article/99999999/WATCHDOG/105040010/Public-workers-enjoy-golden-nest-eggs>.

⁷ See Mike McIntire, *You Can't Fight City Hall, But You Can See How Much Everyone There Makes*, N.Y. TIMES (March 5, 2006), available at http://www.nytimes.com/2006/03/05/nyregion/05pay.html?pagewanted=all&_r=0. The 2013 civil list, setting forth the names and salaries of City employees, including Fire Department employees, is available online at http://www.nyc.gov/html/records/downloads/pdf/civil_pdf_noadr_Y2013.pdf.

In the ensuing litigation over Empire Center's FOIL requests, the NYC-TRS, represented by New York City Corporation Counsel, vigorously resisted disclosure. NYC-TRS argued that Public Officers Law § 89(7) exempts from disclosure the names and addresses of retirees. It also argued that disclosure of retirees' names would constitute an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b). On the latter point, it argued that disclosure of the names of retirees "could result in access to the addresses of those retirees, as well as other personal information," given the "wealth of information [that is] readily available through access to the internet." Stillman Aff. Ex. C, at 32, 35.

The New York Court of Appeals rejected these arguments, ruled in favor of Empire Center, and directed the agencies to disclose the retirees' names. First, the Court of Appeals held that FOIL draws a firm distinction between the names and the addresses of retirees, and "exempts 'the home address . . . of a retiree,' but not the retiree's name." *Empire Center*, 23 N.Y.3d at 444-45. Next, the court rejected the argument that releasing the retirees' names would constitute an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b). The Court explained: "the idea that anyone's privacy will be invaded [by the release of the names] is speculative." *Empire Center*, 23 N.Y.3d at 446.

Following the Court of Appeals' ruling in May, Empire Center submitted FOIL requests for the names of retirees drawing a public pension to all New York State and City retirement systems. Hoefer Aff. ¶ 6. The FDNY informed Petitioners on or about August 18, 2014, that it planned to release the names of retirees in response to FOIL requests filed by Empire Center and the New York Times. Pet. ¶ 19. In response, Petitioners initiated the instant Article 78 proceeding, seeking to prevent the release of retirees' names. Petitioners raise the same and similar arguments as those previously rejected by the Court of Appeals, principally that the privacy exemption is implicated because the Internet might be used to find the addresses of

retirees whose names are released. Pet. ¶¶ 32-35. Though no relief has yet been granted in this proceeding, the FDNY has decided to withhold the requested information pending its outcome. Hoefer Aff. ¶ 7.

ARGUMENT

Petitioners' application for relief should be denied and the Petition dismissed with prejudice, for several reasons. First, Petitioners have no right to bring this action to compel Respondents to invoke a permissive, discretionary FOIL exemption. To the contrary, FOIL *compels* disclosure (if no exemption applies) and *permits* disclosure (if an exemption applies). With limited exceptions not applicable here, it does not *prohibit* disclosure. FOIL does not provide for suits seeking to require state agencies to invoke permissive FOIL exemptions and block disclosure of information. Second, Petitioners have not even met their heavy burden to establish that any FOIL exemption applies in the first place. The Court of Appeals has already determined that the privacy exemption does not apply to retirees' names in its recent binding *Empire Center* decision, and Petitioners have provided no reason to disregard that decision. Their showing of potential harm is exceedingly thin and speculative, and no more forceful than the similar showing recently rejected by the Court of Appeals. Moreover, much of the information is already publicly available on the Empire Center's website, and Petitioners have failed to show that any serious or widespread harm has resulted. Third, Petitioners' odd and novel argument that a provision of the New York City Administrative Code requires the Board of Trustees of the FDNY Pension Fund to hold a vote in order to respond to a FOIL request must be rejected. The Administrative Code provision would be preempted by FOIL if it were read to impose this kind of onerous obstacle on FOIL filers. And in any event, there is no indication that this provision was intended to have any application to FOIL requests. Fourth, Petitioners'

request for extraordinary injunctive relief must be rejected, as Petitioners cannot establish any of the required elements.

I. PETITIONERS HAVE NO RIGHT TO COMPEL RESPONDENTS TO INVOKE PERMISSIVE EXEMPTIONS TO DISCLOSURE

Petitioners seek to compel Respondents to invoke permissive, discretionary exemptions to disclosure under FOIL, but FOIL does not provide them with any right to do so. FOIL is based on a recognition “that government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government.” Public Officers Law § 84. “FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986). Under FOIL, disclosure is mandatory unless the requested records fall into one of the enumerated statutory exemptions, in which case the government *may* withhold the records. “[W]hile an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency’s discretion to disclose such records . . . if it so chooses.” *Id.* at 576; *accord* N.Y.S. Committee on Open Government, Opinion No. FOIL-A0-15701 (December 20, 2005) (“Even when agencies may have the ability to deny access to records, they are not required to do so and may assert their discretionary authority to disclose.”);⁸ *Buffalo Teachers Fed’n, Inc. v. Buffalo Bd. of Educ.*, 156 A.D.2d 1027, 1028 (4th Dep’t 1989) (“Although the Board of Education is not

⁸ Available at <http://docs.dos.ny.gov/coog/ftext/fl15701.htm>. The New York State Committee on Open Government’s advisory opinions have been recognized as persuasive authority in interpreting FOIL. See *Kwasnik v. City of NY.*, 262 A.D.2d 171, 172 (1st Dep’t 1999) (“This result is supported by opinions of the Committee on Open Government, to which courts should defer . . .”).

required to disclose the home addresses of its employees, it may, should it choose, grant access to information which is exempt from disclosure under FOIL.” (citations omitted)).

FOIL enumerates certain very limited circumstances in which a party may challenge an agency’s decision to release information—none of which applies here. FOIL provides procedures for parties that submit certain trade secrets and “critical infrastructure information” to request that the information be held exempt from disclosure and to seek judicial review of decisions to disclose, *see* Public Officers Law § 89(5)(a)-(d). Basic principles of statutory interpretation dictate that the Legislature’s decision to provide for challenges to a decision to release information in only two limited circumstances means that it did not intend those procedures to be available in other circumstances, such as those present here. *See generally Commonwealth of the N. Mar. I. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013) (“[T]he failure of the Legislature to include a term in a statute is a significant indication that its exclusion was intended.”). *See also Baynes v. Fairport Cent. Sch. Dist.*, No. 2006/07768, Slip Op. at 6-8 (Sup. Ct. Monroe Cnty., Nov. 1, 2006) (union had no standing to bring suit to block FOIL disclosure because FOIL did not authorize such a suit).⁹ Therefore, FOIL does not authorize an action such as this one. And even if it did, the suit would fail on the merits because disclosure is at most permitted, but not prohibited.

While a few Appellate Division cases have considered challenges to decisions to release information pursuant to FOIL, these cases establish only that if an agency has to undertaken to disclose based on a legally erroneous conclusion that an exemption is inapplicable, the court may correct the legal error and remand for the agency to determine whether to invoke its discretion.

⁹ Decision available on the New York State Committee on Open Government’s website, at <http://www.dos.ny.gov/coog/pdfs/casestudies/baynes.pdf>

That is fundamentally different from the broader relief that Petitioners erroneously seek here: an order prohibiting disclosure.

In the two Second Department cases, a party that had submitted trade secrets and similar information to municipalities brought Article 78 proceedings seeking to block the release of the information in response to a FOIL request. The Second Department did determine that the municipalities had erroneously concluded that the relevant FOIL exemption did not apply, but the only relief granted to the petitioners was to “remit the matters to the respective municipalities in order to allow them to exercise their discretion as to whether to disclose [the documents] notwithstanding that the [documents] fall under FOIL’s statutory exemption for substantial competitive injury.” *See Verizon N.Y., Inc. v. Devita*, 60 A.D.3d 956, 957 (2d Dep’t 2009); *accord Verizon N.Y. Inc. v Mills*, 60 A.D.3d 958, 960 (2d Dep’t 2009).¹⁰ These cases show that the discretionary nature of FOIL’s exemptions limits the relief available to, at most, remitting the matter to the agency to enable it to exercise its discretion to nonetheless release the information should it so choose. Thus, the statute and the case law show that the kind of relief requested in the instant petition—an injunction *definitively prohibiting* the release of information under FOIL—is unavailable.

Therefore, Petitioners have no right to maintain an action seeking to compel respondents to withhold information in response to Empire Center’s FOIL request, and the Petition must be dismissed.

¹⁰ When considering an Article 78 petition seeking to block the release of teachers’ names in response to a FOIL request, the First Department did not explicitly consider whether judicial review was available, but did conclude that the agency had properly determined that FOIL’s privacy exemption did not apply. *Mulgrew v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, 87 A.D.3d 506, 507 (1st Dep’t 2011).

II. THE REQUESTED INFORMATION IS NOT EXEMPT FROM DISCLOSURE UNDER FOIL

Even if Petitioners had the right to bring an action to instruct Respondents not to release information under FOIL, they would bear a heavy burden. Under FOIL, the default rule is that “all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted.” *Burns*, 67 N.Y.2d at 566. Given the important public policies furthered by FOIL, “FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.” *Capital Newspapers Div. of Hearst Corp v. Whalen*, 69 N.Y.2d 246, 252 (1987) (citations and internal quotation marks omitted). Moreover, “the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” *Burns*, 67 N.Y.2d at 566; *accord* Public Officers Law § 89(4)(b). *Cf.* Public Officers Law § 89(5)(e). Thus, as the party resisting disclosure, Petitioners bear a heavy burden here that they cannot and do not meet under either FOIL’s privacy or safety exemptions.

A. The Privacy Exemption Does Not Apply

FOIL’s privacy exemption allows an agency to withhold information only when disclosure “would constitute an *unwarranted* invasion of personal privacy.” Public Officers Law § 87(2)(b) (emphasis added). For this exemption to apply, two requirements must be satisfied: first, the agency must show that the records in question implicate a significant “legally protected privacy interest.” *N.Y. Times Co. v. City of N.Y. Fire Dep’t*, 4 N.Y.3d 477, 485 (2005). Second, if so, the agency must show that the “privacy interests at stake [outweigh] the public interest in disclosure of the information.” *Id.*

Here, Petitioners fail to make either showing. The Court of Appeals has already decided that the privacy exemption does not apply to retirees' names in its recent binding decision in *Empire Center*, and Petitioners have provided no reason to disregard that decision.

1. Petitioners have not shown that retirees have a significant privacy interest in their names.

Petitioners cannot show any significant privacy interests in the names of retirees. It is the longstanding policy and practice under FOIL that the names and salaries of individuals being paid by public funds should be publicly available. The Legislature mandated in FOIL that covered entities such as New York City maintain a presumptively public record of the "name, public office address, title and salary of every officer or employee of the agency." Public Officers Law § 87(3)(b). This reflects the longstanding public policy in New York that "[s]ince tax dollars are spent to pay public employees, the public has a right to know certain facts relating to such employment[, such as a] . . . public employee's name, public office address, title and salary." *Burns*, 109 A.D.2d at 94. Thus, courts have repeatedly required the names and salaries of current and former public employees to be disclosed under FOIL.¹¹ Thus, the names and incomes of individuals receiving public salaries and public pensions is not the type of

¹¹ See, e.g., *Bumpus v. NYC Transit Auth.*, 66 A.D.3d 26,33 (2d Dep't 2009) (noting "[FOIL] § 89 would require the disclosure of the employee's name"); *Buffalo Teachers Fed'n*, 156 A.D.2d 1027 (disclosing names of school board employees); *Faulkner v. Del Giacco*, 139 Misc. 2d 790, 794-95 (Sup. Ct. Albany Cnty. 1988) (disclosing names of prison guards); *Gannett Co. v. County of Monroe*, 59 A.D.2d 309 (4th Dep't 1977) (disclosing names, titles, and salaries of terminated employees), *aff'd*, 45 N.Y.2d 954 (1978).

The Committee on Open Government has also repeatedly instructed that public employees' names must be disclosed. E.g., FOIL-A0-7717 (May 19, 1993), available at <http://www.dos.state.ny.us/coog/ftext/f7717.htm> (names of public employees and retirees subject to disclosure); accord FOIL-A0-11355 (March 2, 1999), available at <http://docs.dos.ny.gov/coog/ftext/f11355.htm> ("a record identifying agency employees by name, public office address, title and salary" must be available for disclosure).

information “that would ordinarily and reasonably be regarded as intimate [and] private” under FOIL. *Hanig v. NY. State Dep’t of Motor Vehicles*, 79 N.Y.2d 106, 112 (1992).

Moreover, much of the information in question here is *already public*. The City of New York has itself published the names and salaries of City employees in its yearly “Civil List” since 1883. The names and pensions of retirees in the FDNY Pension Fund for 2009 and 2010 were previously released to Empire Center, which publishes this information on its website.¹² Moreover, the names and salaries of New York City public employees were also released to the Empire Center for 2013-2014 and prior fiscal years, which are also available on the Empire Center’s website.¹³ Thus, the *names* of retirees are already public: The names of retirees as of 2010 are included in the pension data, and the names of Fire Department employees who have retired since 2010 are included in the NYC payroll data. The *prior incomes* of retirees are already public too: The prior pensions of retirees as of 2010 is included in the pension data, and the prior salaries of Fire Department employees that have retired since 2010 are included in the NYC payroll data.

For example, consider the two retirees that have put forth affidavits in support of the petition here. Edward Burke, a former Fire Fighter, retired in 2005 from the Fire Department. Burke Aff. ¶ 2. The Empire Center’s website shows that “Edward C. Burke” received a pension

¹² See Empire Center, New York City Fire Department Pension Fund Data Notes, <http://seethroughny.net/data-notes/nycfdpf-data-notes/> (“The New York City Fire Department Pension Fund data, as provided by the fund, includes benefit rates, retirement dates and last known employers when available for every individual who collected benefits in calendar years 2010 and 2009.”).

¹³ See Empire Center, New York City Payroll Data Notes, <http://seethroughny.net/data-notes/new-york-city-data-notes/> (“The New York City data, as provided by the city Office of Payroll Administration, New York City Police Department and Districts Attorney, include names, positions and salaries for employees who worked for the city during the fiscal years ending June 30, 2014, June 30, 2013, June 30, 2012, June 30, 2011, June 30, 2010, June 30, 2009, and June 30, 2008.”).

of \$91,717 in 2010.¹⁴ Joseph Hennelly, a former Supervising Fire Marshall, retired from the Fire Department on June 24, 2014. Hennelly Aff. ¶ 2. The Empire Center’s website shows that in 2013, before he retired, Hennelly earned \$152,442.¹⁵ For Messrs. Burke and Hennelly, as for other retirees, the only impact of Respondents’ complying with the Empire Center’s FOIL request will be to bring their prior published incomes up to date.

Since the names and prior incomes of retirees are already public, Petitioners cannot show that releasing *updated* income information for these individuals will invade any significant, legally protected privacy interest. *See, e.g., Physicians Comm. for Responsible Med. v. Hogan*, 2010 NY Slip Op 51908(U), ¶ 8, 2010 WL 4536802, at *8 (Sup. Ct. Albany Cnty Nov. 3, 2010) (names of researchers subject to disclosure under the privacy exemption because “the extensive public record of the researchers’ academic activities . . . necessarily gives rise to a diminished expectation of privacy”); *N.Y. Times Co. v. N.Y. State Dep’t of Health*, 243 A.D.2d 157 (3d Dep’t 1998) (disclosing names of physicians maintained by state research system in part due to “wealth” of information already available). Therefore, Petitioners cannot show that retirees have a significant privacy interest in their names.

2. Petitioners have not shown that any significant invasion of privacy will occur.

Petitioners’ feeble showing of harm also falls well short of carrying their heavy burden. It is well-settled that a party resisting disclosure “cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.” *Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008). “[C]onclusory” allegations of potential harms are “insufficient to meet [the party’s] burden of

¹⁴ Database search for “Edward Burke” in the Empire Center’s Pensions database for the FDNY Pension Fund, <http://seethroughny.net/pensions/pensions-fire/>.

¹⁵ Database search for “Joseph Hennelly” in the Empire Center’s Payrolls database for the City of New York, <http://seethroughny.net/city-of-ny/>.

proof.” *Hopkins v. Buffalo*, 107 A.D.2d 1028, 1029 (3d Dep’t 1985). Here, Petitioners’ showing is extremely minimal, conclusory, and speculative. Petitioners’ entire showing consists of the conclusory allegation that that the Internet might be used to discover the home address of retirees, and that releasing retirees’ names would “heighten the risk of identity theft for these individuals.” Pet. at 7-9. This allegation is supported only by the affidavits of *two* retirees, who claim they are “concerned that with my name and current income published, along with the results of a simple internet search, I would be vulnerable to identity theft and predatory solicitations.” Burke Aff. ¶ 6; accord Hennelly Aff. ¶ 11.

This exceedingly thin and speculative showing is the *entirety* of what Petitioners have put forward in support of the extraordinary relief they request, and is devoid of any adequate evidentiary support. *See Belth v. N.Y. State Dep’t of Ins.*, 189 Misc. 2d 508, 511, 733 (Sup. Ct. N.Y. Cnty. 2001) (“[R]espondent’s conclusory and unsupported claim that Internet dissemination [of insurance industry employees’ names and salaries] can have a deleterious result . . . cannot serve as a basis for denial of petitioner’s FOIL request.”). Petitioners’ speculative fears also make no sense—the release of a name is not akin to the release of sensitive information such as a social security number, and Petitioners have not explained how it might even theoretically increase the risk of identity theft, much less shown instances of identity theft from the mere release of a name. Petitioners’ worries about increased “predatory solicitations” also make no sense, and are not supported by any evidence. If Petitioners were to receive phone solicitations, they could ask to be added to the national do-not-call list. If Petitioners are worried about increased junk mail somehow resulting from the public availability of their names, they have not shown that throwing it away constitutes any serious harm.

Moreover, as explained above, the names and prior incomes of the members of the Pension Fund are already public, yet Petitioners have not pointed to even a single instance of

identity theft, or any serious invasion of privacy as a result.¹⁶ Moreover, they have not addressed how the release of updated names and salaries could cause an unwarranted invasion of privacy, given that the retirees' names and incomes from prior years are already publicly available. Therefore, releasing the names of retirees—names which are already public—will not work an unwarranted invasion of privacy.

Furthermore, Petitioners' flimsy showing of harm and speculation regarding Internet searches is no less speculative and conclusory than the showing recently rejected by the Court of Appeals. In *Empire Center*, the NYC-TRS contended that it was entitled to withhold the names of retirees under FOIL's privacy exemption. The NYC-TRS argued that "disclosing the names of [its] retirees could result in access to the addresses of those retirees, as well as to other personal information." Stillman Aff, Ex. C, at 32. In support, it quoted the lower court's speculative musing that "[i]n this age of widespread internet access[,] it is increasingly easy to obtain addresses and other personal information of individuals." *Id.* But the Court of Appeals rejected the NYC-TRS's argument, reasoning that "[o]n this record, however, the idea that anyone's privacy will be invaded is speculative." *Empire Center*, 23 N.Y.3d at 446. Moreover, the Court of Appeals explained that FOIL makes a firm distinction between retirees' names and addresses, by exempting the latter but not the former from mandatory disclosure. *See id.* at 444-45.

Here, Petitioners' showing is no more forceful. Petitioners have merely put forth rank speculation from themselves and from a mere two retirees that disclosure of retirees' names

¹⁶ While Hennelly states that he was the victim of identity theft in the past, he does not allege that this was caused by the public availability of his name and income. *See Hennelly Aff.* ¶ 11. Nor would limited evidence of an isolated case carry any weight, considering that the names and incomes of hundreds of thousands of NYC employees and retirees have long been a matter of public record, and there has been no showing that this availability has increased the risk of identity theft to this group as a whole.

could lead to harm. They raise the same argument that the Court of Appeals has already rejected—that the Internet could be used to find retirees’ addresses if their names were released. *See Empire Center*, 23 N.Y.3d at 446. Therefore, the Court of Appeals’ recent rejection of similarly weak privacy arguments compels rejecting them here as well.

3. The public’s interest in monitoring public pensions outweighs any contrary interest.

Even if Petitioners had shown that disclosure of retirees’ names would impair significant privacy interests, that consideration would be outweighed by the public’s overwhelming interest in transparency. FOIL expresses New York’s “strong commitment to open government and public accountability.” *Burns*, 67 N.Y.2d at 565 (citations and internal quotation marks omitted). The law is based on “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). Promoting government accountability and informed democratic decision-making through the scrutiny of public expenditures is one of the core values promoted by FOIL: It seeks to provide “the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities and with an effective tool for exposing waste, negligence and abuse on the part of government officers.” *Burns*, 67 N.Y.2d at 566 (citations and internal quotation marks omitted).

Here, the public interest in knowing how taxpayer dollars are spent and allocated and preventing fraud and abuse is overwhelmingly strong. Billions of taxpayer dollars are spent on public pensions every year—an amount that is rapidly growing.¹⁷ Transparency is sorely needed to root out waste and fraud, and to inform an important ongoing public debate over government

¹⁷ *See New York’s Exploding Pension Costs*, Report of the Empire Center for N.Y. State Policy (Dec. 7, 2010), available at <http://www.empirecenter.org/publications/new-yorks-exploding-pension-costs/> (documenting hundreds of billions of dollars in pension funding and projecting pension contributions to increase).

finances.¹⁸ The names of retirees drawing public pensions are needed to track pension obligations over time, and to analyze how the pension systems function. Names of retired city employees linked to pension amounts have been “analyzed by policy groups and news organizations seeking to detect potential pension abuses or to understand the growth of pension spending.” D. Hakim, *City Pension Funds Refuse to Release Recipients’ Names*, N.Y. TIMES (July 20, 2011).¹⁹ As has been observed, the pension information historically gathered by Empire Center is also critical for “[a]cademic researchers, members of the public, and the press . . . to highlight incidents of excessively high pensions, wasteful spending, and abuse.” C. Bennett, *Cop Pensions Stay Undercover: Court*, N.Y. POST (Oct. 19, 2011).

Disclosure of retirees’ names assists in rooting out cases of individual fraud on the public pension system. “[L]inking specific pensions to individuals [has] exposed some of the most egregious abuses of the pension system, such as salary spiking and pension padding, that led to reforms.” *Troubling Trend*, *supra* note 3. And individual cases of fraud can *only* be detected with access to the names of pensioners. For example, in 2011, a former officer in the Rome Police Department was convicted of illegal “double-dipping” into the retirement system through unauthorized post-retirement public employment.²⁰ *See also, e.g.*, J. Gershman, *Appeals Court Blocks Access to Police Pension Data*, WALL STREET JOURNAL (Oct. 18, 2011) (data about

¹⁸ *See e.g.*, C. Bragg, *Stringer, Spitzer spar on pension costs*, CRAIN’S INSIDER (Aug. 13, 2013), available at <http://www.crainsnewyork.com/article/20130813/BLOGS04/130819971> (“both candidates agreed that the city’s pension funds . . . need reform”); S. Goldenberg, *Bloomberg: New York Could Face Same Fiscal Fate as Detroit*, N.Y. POST (Aug. 7, 2013), available at <http://nypost.com/2013/08/07/bloomberg-new-york-could-face-the-same-fiscal-fate-as-detroit/> (“During Bloomberg’s three terms, pension costs have ballooned from \$1.4 billion to \$8.3 billion.”).

¹⁹ Available at <http://www.nytimes.com/2011/07/21/nyregion/new-york-city-pension-funds-will-not-release-recipients-names.html>.

²⁰ *See* Press Release, Office of the N.Y. State Comptroller, DiNapoli, McNamara Pension Fraud Investigation Results in Conviction of Double-Dipping Retired Rome Police Officer (Feb. 18, 2011), available at <http://www.osc.state.ny.us/press/releases/feb11/021811.htm>.

public pensioners “has been widely used by media outlets to track spending patterns and put a spotlight on individual cases, such as so-called double-dippers who collect pension benefits and a public salary at the same time”). In 2010, it was discovered that individuals were cashing pension checks issues to dead pensioners in one New York City pension fund.²¹

Through public data linking specific pensions to individuals, the New York Post was able to uncover a New York City fireman who received a disability pension of three-quarters pay, \$86,000 per year, for “bronchial asthma” while he regularly trained and competed in the top of his age group as an elite triathlete. *See Campanile, supra* note 4. And the New York Times was able to uncover the fact that as many as 97 percent of Long Island Railroad career employees in one year applied for and received disability payments. The individual names of these pensioners allowed the newspaper to discover dozens of these pension recipients on the golf course, despite being classified as occupationally disabled. *See Bogdanich, supra* note 5. This data has also enabled the media to report on lawful, but controversial practices, such as retirees collecting pensions in excess of their base pay through greatly increased overtime during the final three years of employment. *See Bandler, supra* note 6.

Without the public availability of the names of retirees, the public would be deprived of one of its most powerful tools to combat individual fraud and abuse with respect to taxpayer-funded public pensions. Disclosing this information also furthers FOIL’s important goal of promoting government accountability, as it “can be useful in determining whether state laws and policies are being enforced,” such as laws against pension fraud. *Troubling Trend, supra*.

For these reasons, Petitioners’ thin, conclusory, and speculative showing cannot overcome the overwhelming interest in disclosure.

²¹ *See, e.g.*, Statement, Office of the N.Y. State Comptroller, Comptroller Liu Uncovers Pension Fraud—Suspects Cash in on Dead Pensioners (Sept. 27, 2010), <https://comptroller.nyc.gov/wp-content/uploads/2013/07/PR10-09-088.pdf>.

B. The Health and Safety Exemption Does Not Apply

A similar analysis applies to Petitioners' argument under FOIL's Health and Safety Exemption. FOIL provides that an agency may withhold records that, "if disclosed could endanger the life or safety of any person." Public Officers Law § 87(2)(f). As with the other FOIL exemptions, the agency bears the burden of "demonstrating that the requested material falls squarely within an exemption by articulating a particularized and specific justification for denying access." *Hogan*, 2010 NY Slip Op 51908(U), 2010 WL 4536802, at *3 (quoting *Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292 (3d Dept 2009)). The agency must "demonstrate a *non-speculative* causal connection between the release of responsive records and the possibility of danger to life or safety." *Id.* at *5 (emphasis added). Here, Petitioners' dire predictions about what might happen if retirees' names are released are highly speculative, conclusory, and defy common sense.

First, the relevant information is in large measure already public: The names of retirees in the Pension Fund as of 2010 are public, as are the names of FDNY employees in the years since 2010. When much of the relevant information is already public, FOIL's safety exemption is unlikely to apply. For example, when an agency sought to withhold the names of individuals conducting scientific research on animals based on the fear of "militant animal rights extremists," the court rejected the agency's safety arguments because "documents linking the subject researchers to animal research . . . already are available to the public through a wide array of sources." *Id.* at *4-*5. Thus, it was "highly speculative that the subject researchers (or any other person) could be endangered by granting [the] FOIL request[,] . . . given the plethora of information already available to the public about the subject researchers" *Id.* at *6-*7. Instead, withholding the documents would only "cordon off from public scrutiny" the government activities in question, and would "run counter to FOIL's broad standard of open

disclosure, which serves to achieve maximum public access to government documents.” *Id.* at *7 (internal quotation marks and citation omitted)

Given that the names of retirees are publicly available from other sources, Petitioners have 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 *5 (emphasis added). Petitioners put forward no adequate *evidence* that any harm will result from the release of retirees’ names, only speculative “fear[s]” that retirees will “become a target for vengeful convicted murders and arsonists.” Burke Aff. ¶ 5; accord Hennelly Aff. ¶ 8. Petitioners have pointed to *no* evidence that anyone’s life or safety has been endangered by the longstanding public availability of retirees’ names—in the case of the New York City Civil List, going all the way back to 1883. Petitioners’ fears also make little sense: given that they cannot point to a single instance of endangerment caused by the longstanding public availability of public employees’ names and incomes, it strains credulity to think that when those employees become retirees, they somehow face a greater exposure to danger from the release of their names.

Additionally, as explained above, Petitioners’ argument that the Internet might be used to look up the addresses of retirees if their names were disclosed has already been rejected by the Court of Appeals as both inconsistent with the basic structure of FOIL, which protects the release of addresses but not names, as well as “speculative.” *Empire Center*, 23 N.Y.3d at 446. Petitioners have no answer to the legal point, and their showing is no less speculative than that rejected by the Court of Appeals. Instead, withholding the retirees’ names would only “cordon off from public scrutiny” important information relating to public spending on pensions and preventing potential fraud and abuse, and would “run counter to FOIL’s broad standard of open disclosure.” *Hogan*, 2010 NY Slip Op 51908(U), 2010 WL 4536802, at *4-*5 (internal quotation marks and citation omitted).

Moreover, the two cases cited by Petitioners on this point are plainly distinguishable. *See* Pet'rs' Br. at 7-8; Pet. ¶¶ 32-34. They deal with the disclosure of *home addresses*, not names. In *New York Times Co. v. City of New York Police Department.*, 103 A.D.3d 405, 407 (1st Dep't 2013), the Appellate Division, First Department, held that the lower court had "erred in ordering respondent to release the *home addresses* of handgun licensees in electronic form." *Id.* (emphasis added). The same is true of *Goyer v. New York State Department of Environmental Conservation*, 12 Misc. 3d 261 (Sup. Ct. Albany Cnty. 2005), which held that "disclosure of *residential addresses* containing firearms could potentially endanger the life or safety of such license holders or others." *Id.* at 272 (emphasis added). Neither court indicated that the *names* alone of the individuals in question, as opposed to their addresses, could be withheld. Indeed, prior authority supports the *disclosure* of the names of pistol licensees. *See Goldstein v. McGuire*, 84 A.D.2d 697, 698 (1st Dep't 1981) (approved pistol licenses are "are public records and thus available . . . under [FOIL]." (citing *Kwitny v McGuire*, 53 N.Y.2d 968 (1981))). And if the names of gun owners can be disclosed consistent with the public-safety exemption, then surely the names of public pensioners can likewise be disclosed.

For these reasons, Petitioners' arguments under FOIL's safety exemption should be rejected.

III. THE NEW YORK CITY ADMINISTRATIVE CODE DOES NOT PROHIBIT RESPONDENTS FROM COMPLYING WITH EMPIRE CENTER'S FOIL REQUEST

Petitioners' odd and novel argument that the Board of Trustees of the FDNY Pension Fund must hold a vote each time it receives a FOIL request in order to release the requested information must be rejected. *See* Pet'rs' Mem. at 4-5 (citing N.Y.C. Admin. Code § 13-316). Petitioners do not cite a single case in support of this inventive argument, which, if accepted, would turn FOIL completely on its head and greatly restrict the public's access to public

information. Under FOIL, “*all* records of a public agency are *presumptively* open to public inspection and copying unless otherwise specifically exempted.” *Burns*, 67 N.Y.2d at 566 (emphases added), and no special action of high-ranking officials of covered agencies is required for their release. These decisions are not made at the level of the Board of Trustees, but instead are much more routine. Indeed, FOIL regulations require covered entities to designate a “records access officer” who is responsible for responding to FOIL requests, rather than the Board of Trustees. 21 N.Y.C.R.R. § 1401.2(b)(4).

The New York City Administrative Code provision cited by Petitioners is incapable of overriding FOIL procedures and creating additional hurdles for information requesters. FOIL itself establishes a procedural framework governing agency responses to FOIL requests, and agencies are not free to adopt more restrictive procedures. The Committee on Open Government’s FOIL regulations provide that “[n]o agency regulations shall be more restrictive than” the Committee’s procedural regulations, and that “[a]ny conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.” 21 N.Y.C.R.R. §§ 1401.1(b), (d). Under this principle, a state entity’s practice of “having its FOIL production prescreened by the entities it regulates” is in “direct conflict” with FOIL’s procedures because it delays responses to FOIL requests. *See Daily Racing Form Inc. v. State of N.Y. Racing and Wagering Bd.*, No. 108211/2003, slip op. at 2 (Sup. Ct. N.Y. Cnty. Nov. 20, 2003).²² Similarly here, if the Administrative Code were read as Petitioners suggest, it would impose onerous additional obstacles on FOIL filers and would be invalid.

Moreover, if the Administrative Code were read as Petitioners suggest, it would be preempted by FOIL. Localities’ authority to enact regulations is “conditioned on the exercise of

²² Decision available on the New York State Committee on Open Government’s website, at http://www.dos.ny.gov/coog/pdfs/casestudies/daily_racing_form.pdf.

such authority not being inconsistent with any State enactment.” *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107 (1983). This principle invalidates local laws that “impose prerequisite additional restrictions on rights under State law.” *Id.* at 108 (internal quotation marks omitted). Here, Petitioners’ construe § 13-302(b) to do just that by requiring a vote of the Board of Trustees to be held to answer any FOIL request—a “prerequisite additional restriction” on the availability of presumptively public documents under FOIL. *See Reese v. Mahoney*, slip op. at 3-4 (Sup. Ct. Erie Cnty. June 28, 1984) (more onerous administrative appeals procedure set forth in Erie County Local Law preempted by more lenient FOIL procedures).²³

In any event, Petitioners misread the Administrative Code. Here, Administrative Code § 13-316 is completely silent as to all matters respecting confidentiality, public access, or any other subjects that would be relevant to a FOIL exemption. Rather, the purpose of the statute solely concerns the administration of pension decisions, such as ensuring that “decisions on retirement are to be made by the vote of the Pension Board as a whole.” *Benson v. City of N.Y.*, 2007 NY Slip Op 27145, ¶ 2, 15 Misc. 3d 1022, 1024 (Sup. Ct. Kings Cnty. 2007). There is no indication whatsoever—let alone a clear one—that this provision ever purported to create an exemption to FOIL’s statutory scheme.

Petitioners thus err in suggesting that the Administrative Code somehow creates a FOIL exemption. For one thing, Administrative Code provisions such as this are incapable of creating FOIL exemptions. *See Brownstone Publishers, Inc. v. N.Y.C. Dep’t of Fin.*, 150 A.D.2d 185, 186-87 (1st Dep’t 1989). For another, this provision evinces no “clear legislative intent” to do so. *Burns*, 67 N.Y.2d at 567 (emphasis added).

²³ Decision available on the New York State Committee on Open Government’s website, at <http://www.dos.ny.gov/coog/pdfs/casestudies/reese.pdf>.

IV. PETITIONERS ARE NOT ENTITLED TO EXTRAORDINARY INJUNCTIVE RELIEF

Petitioners also fail to meet the heavy burden required for the extraordinary remedy of injunctive relief. “Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers.” *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep’t 2001). A party seeking a preliminary injunction must establish (1) the likelihood of success on the merits, (2) an irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990). “Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail” and “[i]f key facts are in dispute, the relief will be denied.” *Faberge Int’l, Inc. v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep’t 1985). Petitioners cannot establish any of these necessary elements, and their request for injunctive relief should be denied.

First, Petitioners cannot establish any likelihood of success on the merits. As discussed above, Petitioners’ claims fail for numerous reasons.

Second, Petitioners cannot show irreparable harm. “To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is *likely* to suffer irreparable harm if equitable relief is denied.” *Bank of Am., N.A. v. PSW NYC LLC*, 29 Misc. 3d 1216(A), 2010 WL 4243437, at *10 (Sup. Ct. N.Y. Cnty. 2010) (citation omitted; emphasis in original). The alleged irreparable harm must be “imminent, not remote or speculative.” *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep’t 1995). “[C]oncern[s],” *id.*, “[a]pprehensions,” *Lezell v. Forde*, 26 Misc. 3d 435,440 (Sup. Ct. Kings Cty. 2009), and “conclusory allegations,” *Tech. For Measurement, Inc. v. Briggs*, 291 A.D.2d 902, 903 (4th Dep’t 2002), do not suffice. As explained above, Petitioners’ showing of harm is wholly

speculative and conclusory. Moreover, their proffered parade of horrors resulting from the release of retirees' names is utterly unconvincing, given that retirees' names and prior incomes are already public, and Petitioners have not shown that any significant or widespread harm has resulted.

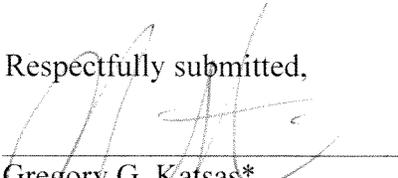
Third, the balance of the equities cuts strongly against Petitioners. If Petitioners were to succeed, it would deprive the public of up-to-date information regarding how tax dollars are spent and the information necessary to uncover and fight fraud and abuse in the public pension system. Especially given that the names and prior incomes of active and retired firefighters are already public, and that Petitioners rely on wholly speculative allegations of harm, Petitioners cannot overcome these weighty public interests that FOIL was designed to protect.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' application for relief and dismiss the Petition with prejudice.

Dated: November 19, 2014

Respectfully submitted,



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EXHIBIT C

New York County Supreme Court
Index No. 102055/2012

To be argued by:
ELIZABETH I. FREEDMAN
(10 minutes requested)

COURT OF APPEALS
STATE OF NEW YORK

In re Application of

EMPIRE CENTER FOR NEW YORK STATE POLICY,

Petitioner-Appellant,

For a Judgment under Article 78
of the Civil Practice Law and Rules

-against-

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF
NEW YORK,,

Respondent-Respondent.

RESPONDENT'S BRIEF

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October 9, 2013

APL-2013-00168

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COURT OF APPEALS
STATE OF NEW YORK

In re Application of

EMPIRE CENTER FOR NEW YORK STATE POLICY,

Petitioner-Appellant,

For a Judgment under Article 78
of the Civil Practice Law and Rules

-against-

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF
NEW YORK,,

Respondent-Respondent.

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

In this CPLR Article 78 proceeding challenging the denial of a FOIL request, petitioner-appellant Empire Center for New York State Policy ("Empire Center" or "petitioner") appeals, by permission of this Court, from a decision and order of the Appellate Division, First Department, entered February 28, 2013. That decision and order unanimously affirmed the judgment of the New York County Supreme Court (Stallman, J.S.C.) dismissing petitioner's CPLR Article 78 petition annulling respondent's determination, and denying petitioner's Freedom of Information Law ("FOIL") request seeking the names of retired members of respondent Teachers' Retirement System of the City of New York

("respondent" or "TRS"). The Appellate Division, First Department held that TRS's determination to withhold the names of retirees of the public retirement system, pursuant to the exemption set forth in New York Public Officers' Law ("POL") § 89(7), was not affected by an error of law, was consistent with that Court's prior interpretation of the exemption in a case involving a different pension fund, and which followed a prior controlling decision of this Court. The Appellate Division accordingly adhered to its prior holding, applying the principles of stare decisis to this issue of statutory interpretation (43-44).¹

QUESTION PRESENTED

Whether the Appellate Division, First Department properly affirmed the Supreme Court's judgment dismissing the Article 78 petition, and denying TRS's FOIL request seeking the names of TRS's individual retirees receiving a pension.

STATEMENT OF FACTS

On January 9, 2012, petitioner submitted a FOIL request to TRS, pursuant to POL § 84 et seq., requesting a list of all retired members of the TRS, including: name; last employer; cumulative years of service at retirement; gross

¹ Numbers in parentheses refer to pages in the Record on Appeal. Numbers in parentheses preceded by the letter "A" refer to pages in appellant's Appendix Pursuant to 22 NYCRR § 500.1(h).

retirement benefit for calendar years 2010 and 2011; retirement date; and date of commencement of retirement system membership for each retiree (21, 31-32).

On January 18, 2012, following an exchange of e-mails, the Director of Legal Services of TRS informed the Empire Center that TRS would provide it with a CD containing all of the information requested, except for the individual names of retirees, pursuant to Empire Center for New York State Policy v. New York City Police Pension Fund, 88 A.D.3d 520 (1st Dept. 2011), appeal dismissed, 18 N.Y.3d 901 (2012) (hereinafter referred to as "Empire Center v. NYCPPF") (22-23).

By letter dated January 18, 2012, to the TRS FOIL Appeals Officer, Empire Center appealed from the determination to withhold individual retirees' names, relying on its interpretation of POL § 89(7) as prohibiting the withholding of the name, and only permitting the withholding of the address of "an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system" (25-26). In petitioner's view, this section of the statute could be distinguished from that permitting the withholding of both the name and address "of a beneficiary of a public employees' retirement system" (25). Petitioner acknowledged that the Appellate Division, First Department reached a contrary conclusion in Empire Center v. NYCPPF, but argued that the

holding in that case contradicts the statutory language and the prior interpretation of POL § 89(7) since its enactment (26).

By letter dated February 7, 2012, the TRS FOIL Appeals Officer denied Empire Center's administrative appeal, based on Empire Center v. NYCPPF, 88 A.D.3d at 521, which held that "the names of retired members of a public employees' retirement system were exempted from FOIL disclosure by Public Officers Law § 89(7)" (27). The letter noted that the "Empire decision is "currently the applicable law in this Department" (28). The TRS FOIL Appeals Officer further stated that the denial of the FOIL appeal would be reviewed pending the final resolution of Empire Center v. NYCPPF, by the Court (28). Finally, the TRS FOIL Appeals Officer quoted the definition of "beneficiary" set forth in TRS's governing statute, as "any person in receipt of a pension, a pension-providing-for-increased-take-home-pay, an annuity, a retirement allowance or other benefit" (28). See New York City Administrative Code ("Admin. Code") § 13-501(12).

Empire Center's Prior Proceeding Against the New York City Police Pension Fund

In Empire Center v. NYCPPF, 88 A.D.3d at 520-21, the Appellate Division, First Department unanimously affirmed the New York County Supreme Court's order and judgment denying the Article 78 petition seeking an order directing disclosure under

FOIL for the names of all of the NYCPPF's retired members. The Appellate Division, First Department ruled as follows:

The petition was properly denied. In Matter of New York Veteran Police Assn. v. New York City Police Dept. Art. I Pension Fund (61 NY2d 659, 460 NE2d 226, 472 NY2d 85 [1983]), the Court of Appeals held that Public Officers Law § 89(7) exempts from disclosure both the names and addresses of retirees of the New York City Police Department receiving pensions and annuities. Thus, respondent correctly denied petitioner's FOIL request seeking the names of its retired members. Petitioner offers no persuasive argument distinguishing its FOIL request from that in Matter of New York Veteran Police Assn.

Id., 88 A.D.3d at 521.

Thereafter, this Court dismissed petitioner's appeal in Empire Center v. NYCPPF as untimely pursuant to CPLR § 5513(b). See Empire Center for New York State Policy v. New York City Police Pension Fund, 18 N.Y.3d 901 (2012).

Petitioner's CPLR Article 78 Proceeding

On or about March 1, 2012, petitioner commenced this CPLR Article 78 proceeding, challenging TRS's denial of Empire Center's final administrative appeal, and directing TRS to provide the names of TRS retirees, as sought in its FOIL request (12-20). On or about May 4, 2012 (as amended on May 21, 2012), respondent moved to dismiss the verified petition for failure to state a cause of action, pursuant to Empire Center v. NYCPPF, 88

A.D.3d 520 (1st Dept., 2011), appeal dismissed, 18 N.Y.3d 901 (2012) (29-37).

DECISIONS BELOW

New York County Supreme Court Judgment

By decision and judgment filed September 6, 2012, the Supreme Court, New York County (Stallman, J.) granted respondent TRS's motion to dismiss the petition in its entirety (5-10). Relying on Empire Center v. NYCPPF, the Supreme Court ruled as follows (7-8):

Respondent has demonstrated that petitioner has failed to state a cause of action upon which relief can be obtained. This exact issue, brought by the exact same petitioner, has already been decided in Empire Ctr. For N.Y. State Policy v. New York City Police Pension Fund, (88 AD3d 520 [1st Dept. 2011]). In that case, the Appellate Division, First Department held that the police pension fund correctly denied the FOIL request which sought the names of retirees receiving a pension and annuities. The Appellate Division, First Department followed precedent set in Matter of New York Veteran Police Assn. v. New York City Police Dept. Art. I Pension Fund, (61 N.Y.2d 659 [1983]). In that case, the Court of Appeals held that pursuant to Public Officers Law § 89(7), a petitioner is not entitled under FOIL to obtain the names and address of all New York City Police Department retirees. In light of the two aforementioned decisions, TRS is not obligated under FOIL to release the names of its retirees. Even viewing the allegations of petitioner in the light most favorable to petitioner, petitioner fails to state a cause of action upon which relief can be granted, as a matter of law.

The Court below also cited POL § 87(2)(b), which exempts from disclosure information that "would constitute an unwarranted invasion of personal privacy" (8). The Supreme Court noted that here, "there is a legitimate concern that releasing retirees' names 'would in effect provide access to the addresses of these retirees, as well as to other personal information' which could lead to an unwarranted invasion of privacy" (8). The Court further opined (9):

In this age of widespread internet access it is increasingly easy to obtain addresses and other personal information of individuals using only a name and, thereafter to disseminate the information to the world. Although the security interests of retired New York City police officers might arguably be different from those of other retired public employees, the Public Officers Law recognizes the interest in privacy of the names of retired public employees. (Public Officers Law §§ 87[2][b]; 89[7].)

The Supreme Court also cited POL § 89(7), and this Court's decision in Empire Center v. NYCPPF, which held that "for the purposes of FOIL, the terms retiree and beneficiary are indistinguishable, and therefore the names of retirees may also be withheld" (9). Finally, the Court noted that in New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477, 484 (2005), this Court held that the words spoken to "911" operators by individuals on September 11, 2001 were exempt from disclosure under FOIL, since disclosure would constitute an

"unwarranted invasion of personal privacy," and applied the same privacy considerations to exempt the information being sought here (10):

In so holding, the Court of Appeals once again articulated respect for privacy as an important public policy consideration, one recognized by FOIL itself. The privacy exceptions of Public Officers Law § 89(7) prevent petitioner from stating a cause of action as a matter of law.

The Supreme Court accordingly granted the motion of TRS to dismiss the Article 78 petition in its entirety, entering judgment in favor of respondent (10).

Appellate Division, First Department Decision and Order

By decision and order entered February 28, 2013, the Appellate Division, First Department unanimously affirmed the Supreme Court's judgment dismissing the petition seeking to annul TRS's determination denying Empire Center's FOIL request for the names of TRS's retired members. The Appellate Division adhered to this Court's and its own precedent, in ruling against Empire Center and denying the FOIL request (43-44):

Respondent's determination to withhold the names of retirees of the public retirement system, pursuant to the exemption set forth in Public Officers Law § 89(7) was not affected by an error of law (see Mulgrew v. Board of Educ. of the City School Dist. Of the City of N.Y., 87 AD3d 506 [1st Dept 2011], lv denied 18 NY3d 806 [2012]). Indeed, the determination is in accord with our interpretation of that exemption in Empire Ctr. for N.Y. State Policy v. New

York City Police Pension Fund (88 AD3d 520 [1st Dept 2011], 1v dismissed 18 NY3d 901 [2012]), which followed Matter of New York Veteran Police Assn. v. New York City Police Dept. Art. I Pension Fund (61 NY2d 659 [1983]). Accordingly, we adhere to our prior holding under the principle of stare decisis, which applies with particular force to issues of statutory interpretation (see Matter of Higby v. Mahoney, 48 NY2d 15, 18-19 [1979]).

Appellate Division, Third Department Memorandum and Order

In Empire Center for New York State Policy v. New York State Teachers' Retirement System, 103 A.D.3d 1009 (3d Dept., 2013), the Appellate Division, Third Department similarly relied on this court's ruling in New York Veteran Police Association, 61 N.Y.2d 659 (1983), to affirm the Albany County Supreme Court's judgment denying Empire Center's FOIL request for the names of the retired members of the New York State Teachers' Retirement System.

This Court granted Empire Center's motions for leave to appeal to this Court in both case (42).

RELEVANT STATUTES

The New York Freedom of Information Law ("FOIL"),
Public Officers Law § 87(2) states in relevant part as follow:

§ 87. Access to agency records

* * *

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

* * *

Public Officers Law § 89(2)(a) and (c), and § 89(7)
state in relevant part:

§ 89. General provisions relating to access to records; certain cases

* * *

2. (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

* * *

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

* * *

7. 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; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

New York City Administrative Code, Title 13, Chapter 4, § 13-501(12), governing the Teachers' Retirement System, defines "beneficiary" as follows:

12. "Beneficiary" shall mean any person in receipt of a pension, a pension-providing-for-increased-take-home-pay, an annuity, a retirement allowance, or other benefit as provided in this chapter.

ARGUMENT

THE APPELLATE DIVISION CORRECTLY RULED THAT THE NAMES OF THE INDIVIDUAL RETIREES ARE EXEMPT FROM DISCLOSURE UNDER FOIL, IN ACCORDANCE WITH THIS COURT'S RULING IN MATTER OF NEW YORK VETERAN POLICE ASSOCIATION V. NEW YORK CITY POLICE DEPARTMENT ARTICLE I PENSION FUND, 61 N.Y.2d 659 (1983).

The Appellate Division, First Department properly affirmed the Supreme Court's judgment upholding the denial of petitioner's FOIL request seeking the names of TRS's retired members, pursuant to POL § 89(7), in accordance with this Court's controlling decision in New York Veteran Police Association v. New York City Police Department Article I Pension Fund, 61 N.Y.2d 659 (1983) (hereinafter referred to as "Veteran Police"), on which it also correctly relied in its prior decision on this issue of statutory interpretation (43-44). At issue is the interpretation of POL § 89(7), which states in relevant part as follows:

§ 89. General provisions relating to access to records; certain cases

* * *

7. 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... .

Petitioner argues that this provision does not permit the exemption from disclosure of retirees who receive a pension, and that the "misguided reading of Section 89(7) is not compelled by the holding of Veteran Police" (Pet.'s Br. at 9). Empire Center argues that reading the terms "retiree" and "beneficiary" in the statute to mean the same thing, renders the two clauses internally inconsistent; violates fundamental principles of statutory construction; and violates the principle of giving statutory language its plain and ordinary meaning (Pet.'s Br. at 10-12). Petitioner claims that POL § 89(7) was understood, from its date of enactment, to differentiate between "beneficiaries" and "retirees" for purposes of FOIL (Pet.'s Br. at 12-13). It asserts that this "reinterpretation" of the statute defeats FOIL's objectives of open government, and policy of disclosure. It further claims that such an interpretation is not required under this Court's ruling in Veteran Police, since this Court in that case did not consider the issue presented here, namely, whether retiree names, without addresses, can be withheld, noting that the petitioner association in that case sought both the names and addresses of retirees (Pet.'s Br. at 13-21). Finally, petitioner argues that the disclosure of government retirees' names does not constitute an unwarranted

invasion of personal privacy, and is not exempt from disclosure under POL § 87(2)(b), arguing, inter alia, that the public interest in disclosure outweighs any asserted privacy interest in the names of the retirees (Pet.'s Br. 22-29).

None of petitioner's arguments have merit, however, and should be rejected, as they were in the Courts below. There is no reason for this Court to overturn its own legally correct and long-standing precedent, which correctly interpreted the statute in question at the time of its enactment in 1983. That interpretation has been the definitive interpretation, constituting the law on this issue, for 30 years, which the Legislature has not revised, corrected or altered by any subsequent amendments or legislative enactments. Any change in the interpretation of POL § 89(7) can and should be made by the Legislature, and not by the Court. If the long-standing, consistent interpretation of the statute "is not the desire of the Legislature, it can certainly amend the statute to provide otherwise." See Albany Law School v. New York State Office of Mental Retardation and Developmental Disabilities, 19 N.Y.3d 106, 123 (2012). Petitioner's attempt to circumvent this Court's holding in Veteran Police is unavailing.

In New York Veteran Police Association v. New York City Police Department Article I Pension Fund, 61 N.Y.2d 659, 660 (1983), this Court exempted from disclosure, under POL §

89(7), "the names and addresses of all retirees of the New York City Police Department currently receiving pensions and annuities." Id. at 660. This Court, in reversing the decision of the Appellate Division, First Department in that case, ruled as follows:

While the appeal to this court was pending, section 89 of the Public Officers Law was amended by adding a new subdivision 7 (L 1983, ch 783). The new statute provides that nothing in the Freedom of Information Law 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" or the name or address of the beneficiary of such system or of an application for appointment to public employment. The act became law June 30, 1983. Its provisions provide that it was to take effect immediately and to apply to any request for information for which there had been no final determination on the effective date, "including judicial review."

The provisions of the amendment apply to this proceeding which was pending before the court at the time it became effective and foreclose relief to petitioner.

Id. at 661 (emphasis in original).

As petitioner notes (Pet.'s Br. at 13-14), POL § 89(7) was enacted on July 30, 1983, while Veteran Police was pending on appeal in this Court (and before all briefs had been filed). On March 3, 1983, the Appellate Division, First Department in Veteran Police had reversed the Supreme Court's order denying access under FOIL to the names and addresses of all New York

City Police Department retirees receiving pensions and annuities, and ordered the retirees' names and addresses to be disclosed. See New York Veteran Police Association v. New York City Police Department Article I Pension Fund, 92 A.D.2d 772 (1st Dept., 1983). In his dissenting opinion, arguing that the FOIL request should have been denied on the basis of FOIL's statutory exemptions for personal privacy, solicitation and fund-raising, and safety concerns, Justice Murphy repeatedly referred to concerns involving the release of both the names and addresses of the retirees. See id., 92 A.D.2d at 775 (Murphy J., dissenting) ("The petition should have been denied . . . because petitioner undoubtedly intends to release the private names and addresses to its next fund raiser. Those names and addresses will also be used by petitioner for its commercial and professional fund-raising purposes"). Justice Murphy further aptly pointed out that "[i]f the Legislature wishes to disclose the names of police retirees, that is its prerogative and it may pass appropriate legislation." Id. at 775 (Murphy J., dissenting). Thus, certainly at issue and of concern and under consideration in Veteran Police was disclosure of not only the addresses, but also the names, of the Police Department retirees.

As noted, while the appeal in Veteran Police (which the City appellants perfected on or about June 8, 1983) was

pending in this Court, the Legislature exercised its prerogative to enact dispositive legislation on the issue, and made the new law effective immediately, and applicable to any FOIL request for which there was no final determination, including judicial review. Rather than requiring the disclosure of such information, the Legislative opted instead to shield from public disclosure the names and addresses of retirees and beneficiaries, thereby determining that such information would not be public information. The Legislature amended POL § 89 to add subdivision 7 (L. 1983, ch. 783), which was signed into law and became effective on July 30, 1983. Contrary to petitioner's hypothesis that the "legislative history confirms the distinction" made in POL § 89(7) between a "retiree" and a "beneficiary" at the time the bill was enacted (Pet.'s Br. at 10-11), the legislative history actually supports the legislative intent to exempt from disclosure both the names and addresses of all public employment retirees and beneficiaries receiving a public pension.

Several memoranda in the New York Legislative Service's Governor's Bill Jacket ("Bill Jacket") recommending approval of the 1983 FOIL amendment in issue, A. 5504, Ch. 783, Laws of 1983, substantiate that POL § 89(7) exempts from disclosure the names and addresses of all retirees of TRS currently receiving pensions and annuities (A39-65). For

example, the Report to the Governor on Legislation, dated July 15, 1983, recommending approval of the bill, issued by the New York State Comptroller's Office, states that the bill would provide that nothing in FOIL "shall require the disclosure of the home address of an officer or employee or a retiree of a public employees' retirement system, or the name or address of a beneficiary of such system . . ." (A50). Retirees who receive pensions are certainly beneficiaries of the employees' retirement system. The Memorandum of the New York State Governor's Office of Employee Relations dated July 25, 1983 states in relevant part as follows (A53):

This bill would amend the Public Officers Law with respect to the disclosure of names and home addresses of certain public officers and employees, and participants and beneficiaries of the public employees retirement system.

The bill would prevent access to the names and homes addresses except in cases where there would be a permissible invasion of personal privacy as defined in the Freedom of Information Law.

The Budget Report on Bills dated July 14, 1983 notes that the bill "seeks to reduce harassment of public employees and retirees" by "allowing agencies to not disclose agency lists of public employee home addresses," and by "allowing agencies to not disclose agency lists of public retirees" (A47). This Report thus acknowledges the Legislature's intent to protect

from disclosure two distinct categories of individuals, namely, agency lists of "public employee home addresses" (implicitly recognizing that the names of public employees, but not their addresses, can be disclosed); and agency lists of "public retirees" (implicitly recognizing that both the names and addresses of public employment retirees are exempt from disclosure). Thus, the legislative history of POL § 89(7) makes clear that public employment retirees' names and home addresses were both intended to be exempt from disclosure under FOIL. The withholding of names ("agency lists of public retirees") is entirely consistent with the intent to protect public employees and retirees from harassment and fraud (A47) -- especially given the ease with which a person provided with a list of names can use the internet to obtain addresses and other personal information.

The Budget Report foresaw that the passage of the proposed legislation "would also have the effect of overturning a recent State court decision that narrowly interpreted 'fundraising' to exclude 'dues solicitation,' which broadened access to lists of public employee and retiree address lists" (citing New York Teachers Pension Association, Inc. v. Teachers' Retirement System, 71 A.D.2d 250 (1st Dept., 1979), appeal denied, 49 N.Y.2d 701 (1980)) (A48). In that case, which required TRS to provide a list of the names and addresses of all

retired New York City school teachers, the courts used the terms "retiree" and "beneficiary" interchangeably. Id., 71 A.D.2d at 251, 257. The lower court in that case described the FOIL request at issue as a request for "a list of [TRS's] present beneficiaries," and directed TRS to provide the list because TRS had failed to demonstrate that the disclosure of such information "would result in economic or personal hardship to an individual retiree." New York Teachers Pension Association, Inc. v. Teachers' Retirement System, 98 Misc. 2d 1118, 1119 (Sup. Ct. N.Y. County 1979). The Appellate Division, First Department, in affirming the Supreme Court's judgment granting the Article 78 petition "in the nature of mandamus to compel disclosure of the names and home addresses of retired New York City school teachers from the Teachers' Retirement System of the City of New York" (71 A.D.2d at 251), directed TRS "to make available to petitioners a list of the names and addresses of its beneficiaries." Id., 71 A.D.2d at 257. The Legislature's enactment of POL § 89(7), in response to New York Teachers Pension Association, Inc. v. Teachers' Retirement System, 71 A.D.2d 250 (1979), overturned the outcome in that case requiring the disclosure of retirees' names and addresses.

Thus, from the point at which POL § 89(7) was proposed legislation, it was anticipated that it would further protect from disclosure lists of the names and addresses of public

employees and retirees. As demonstrated, the legislative history contains specific references to the reversal of New York Teachers Pension Association, Inc., the ruling in which, having previously compelled TRS to provide such a list, "broadened access to lists of public employee and retiree address lists" (A48), which the newly enacted bill would abrogate. TRS's decision to withhold the list of retirees' names when responding to petitioner's FOIL request was, therefore, completely justified by the legislative record.²

As TRS demonstrated, the documents in the Bill Jacket (including the Memorandum from the New York State Governor's Office of Employee Relations) overwhelmingly interpret POL § 89(7) as protecting the names of retirees from disclosure, and do so because they correctly infer the intent of POL § 89(7) to protect public employee retirees from invasion of privacy and harassment. See also Department of State Memorandum dated July 29, 1983, commenting on A. 5504, noting that FOIL implicitly allows agency discretion to withhold the names and home

² The sixteen documents contained in the Governor's Bill Jacket expressing a recommendation on the proposed legislation, although overwhelmingly in favor of the bill, or neutral toward it (eleven and four respectively) do not consistently interpret the proposed provision in the same manner (see A39-65). However, none of the documents specifically adopts the interpretation which petitioner is advocating here.

addresses under POL § 87(2)(b), where release would constitute an unwarranted invasion of personal privacy (A52).

Thus, there is certainly no "new interpretation" of POL § 89(7), as petitioner claims. The language of the statute, as interpreted by the courts since its enactment, as well as its legislative history, fully supports TRS's position, and the decision of the Courts below, that disclosure of public employment retirees' names is not required, and that such information is fully exempt from disclosure under FOIL. When this Court decided Veteran Police (61 N.Y.2d 659) in 1983, it reversed not only the First Department's decision in that case (see 92 A.D.2d 772), but also, in effect, New York Teachers Pension Association, Inc., 71 A.D.2d 250 (1st Dept., 1979), upon which the First Department in Veteran Police had relied.

As noted, the relevant provision of the Public Officers Law was amended to add § 89(7), while Veteran Police was pending in this Court. Accordingly, in the New York City Police Department Article I and II Pension Fund appellants' reply brief, which the Corporation Counsel's Office filed in this Court on or about September 16, 1983, the appellants argued that this Court should reverse the Appellate Division, First Department's ruling, and deny the FOIL request seeking the names and home addresses of retired police officers (not just the home addresses), based upon the dispositive legislation enacted on

July 30, 1983 (A36-38). The City appellants argued in their reply brief in that case as follows (A37):

Since respondent's request was for the names and home addresses of retired police officers receiving pensions from the City's public employees' retirement system (16), it falls squarely within the language of the new exemption from disclosure. Section 89(7) is clearly applicable to this case, as evidenced by the Legislature's mandate that the act take effect immediately and that it apply to "any request... for which there is no final determination, including judicial review" (emphasis added). L. 1983, ch. 783 § 2.

The City appellants in Veteran Police further specifically disputed in a footnote, as "simply untrue and unsupported by the Record," the petitioner's conclusory allegation that it was appellants' "current practice" to disclose the "names and addresses of retired police officers" to the public (A38). Certainly, what was at issue in Veteran Police, and what this Court ruled on in that case, was the applicability of the exemption for both the names and addresses of retired police officers receiving pensions, and not just an exemption for their home addresses, contrary to Empire Center's hypothesis that the focus in that case was the retirees' home addresses (Pet.'s Br. at 14-15). This Court squarely held that the newly enacted legislation foreclosed any relief to the petitioner in that case, which sought "access to the names and addresses of all retirees of the New York City Police Department currently

receiving pensions and annuities." New York Veteran Police Association v. New York City Police Department Article I Pension Fund, 61 N.Y.2d at 660-61.

Accordingly, contrary to petitioner's complaint about the "new interpretation" of POL § 89(7) (Pet.'s Br. at 20), this Court has interpreted POL § 89(7) thirty years ago to exempt from disclosure the names and addresses of all retirees. Moreover, in Veteran Police, this Court was the first to interpret the then newly enacted POL § 89(7). Thus, from the time § 89(7) was enacted, courts, including this one, have interpreted the statute as protecting from disclosure both names and addresses of public employment retirees, and not just their addresses.

It is petitioner's narrow interpretation of the statute that cannot be sustained, as it is far more likely that the Legislature intended to distinguish between active and retired officers and employees, by permitting the disclosure of the names (but not the addresses) of active officers and employees, but protecting both the names and addresses of retired officers and employees. This interpretation is entirely consistent with the definition of "beneficiary" in New York State and New York City retirement statutes.

Notably, TRS's governing statute defines the term "beneficiary" as "any person in receipt of a pension, a pension-

providing-for-increased-take-home-pay, an annuity, a retirement allowance, or other benefit as provided in this chapter." See Admin. Code § 13-501(12). Similarly, pertaining to the New York City Employees' Retirement System, Admin. Code § 13-101(8) defines "beneficiary" as "any person in receipt of a pension, an annuity, a retirement allowance, a death benefit or any other benefit provided by this chapter." Article 2 of the New York State Retirement and Social Security Law ("RSSL") at § 2(5) defines "beneficiary" as "[a]ny person in receipt of a retirement allowance, or other benefit pursuant to this article." RSSL Article 3-A, which applies to "any public retirement system of the state and to any public employee pension plan administered by such system" (RSSL § 151)), defines "beneficiary" as "a person who is receiving a benefit from a public retirement system of the state or who has met all of the conditions precedent for the actual receipt of a benefit from a public retirement system of the state . . ." (RSSL § 152(1)). Thus, the consistent definition of "beneficiary" in both the City and State retirement statutes is someone who receives a pension, annuity or retirement benefit, and is not limited, as petitioner would have it, to only the retirees' named beneficiaries.

As demonstrated, the New York City Administrative Code's statutory definition of a beneficiary includes all

individuals who receive benefits, whether they are retirees, or individuals who are designated by members or retirees to be the potential recipients of benefits. See, e.g., Katz v. New York City Teachers' Retirement Board, 291 N.Y. 360, 363 (1943) (under New York City Administrative Code, "a 'beneficiary' means a 'person in receipt of a pension, an annuity, a retirement allowance, or other benefit'"); see also Hiney v. Teachers' Retirement Board of the City of New York, 182 Misc. 147, 150 (Sup. Ct. N.Y. County 1944) (on the date the retirement was approved, "the retirement became an accomplished fact and the status of the deceased changed from that of contributor to beneficiary").

The Administrative Code's definition of a beneficiary closely tracks the well-accepted legal definition of a beneficiary. Black's Law Dictionary defines "beneficiary" as "[a] person who is designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, ect.); one designated to receive something as a result of a legal arrangement or instrument." Black's Law Dictionary (7th ed. 1999), at 149.

Generally, dictionaries provide two different definitions of beneficiary. One definition parallels the legal definition, defining "beneficiary" as "a person who derives advantage from something, especially a trust, will, or life

insurance policy." See [Oxforddictionaries.com](http://www.oxforddictionaries.com), <http://www.oxforddictionaries.com/us/definition/american-english/beneficiary>. In addition to that definition, another narrower definition of the term "beneficiary" is "a person, organization, etc., that receives money or property when someone dies." See [Merriam-Webster.com](http://www.merriam-webster.com/dictionary/beneficiary), <http://www.merriam-webster.com/dictionary/beneficiary>. In the broader, technical sense of the word, the term "beneficiaries" applies to both the initial recipient of the trust's benefits and to anyone eligible to receive benefits on the death of the initial recipient. In non-legal communications, the word "beneficiary" has been used in the narrower sense of a person who receives benefits upon the death of a benefactor. Numerous documents made available on the TRS website, www.trsnyc.org, do use the term "beneficiary" to refer to a person designated by a member or retiree to receive death benefits in the event of the member or retiree's death, as petitioner asserts (Pet.'s Br. at 12). However, in these documents, the term is used in the colloquial, non-technical sense set out in general dictionaries cited above, to distinguish all the recipients of benefits of the retirement system trust, from the subset of those eligible to receive benefits upon the death of an initial beneficiary. It is not a legal definition, but rather, is being used in that context to distinguish between the two categories on the website.

Moreover, the TRS website contains a "Legal Note" page, which cautions, inter alia, that "[t]he information provided on this website is based on currently available information, which may be subject to change, and, as such, should not be solely relied upon. . . . In all cases, the provisions of the governing laws, rules, and regulations will prevail." *Legal Note, TEACHERS' RETIREMENT OF THE CITY OF NEW YORK*, <https://trsnyc.org/trsweb/support/usingTheSite/legalNote.html>. In addition, *The TRS Retiree's Companion*, a document cited by Empire Center in its brief as an example of a TRS document that uses the term "beneficiaries" to refer to persons designated by a retiree to receive benefits (Pet.'s Br. at 12 n.5), also specifically notes that "[i]n all cases, the provisions of the governing laws, rules, and regulations will prevail." *The TRS Retiree's Companion, TEACHERS' RETIREMENT OF THE CITY OF NEW YORK*, at 74, at <https://trsnyc.org/WebContent/tools/brochure/retirees/Companion.pdf>.

Finally, a search of the TRS website reveals the same explicit notification that "[i]n all cases, the provisions of the governing laws, rules, and regulations will prevail," in 27 other documents that use the term "beneficiary" to refer to a person designated by a member or retiree to receive benefits in the event of the member or retiree's death. Thus, to the extent

the information provided on the website conflicts with the applicable law, the provisions of the law necessarily control.

Furthermore, petitioner's reliance on opinions issued by the New York Committee on Open Government ("COG"), which distinguish "retiree" from "beneficiary," and advocate for the disclosure of the names of retirees receiving pensions (Pet.'s Br. at 12-13), is unavailing, as these opinions are "neither binding upon the agency nor entitled to greater deference in an Article 78 proceeding than is the construction of the agency." Buffalo News, Inc. v. Buffalo Enterprise Development Corp., 84 N.Y.2d 488, 493 (1994) (quoting John P. v. Whelan, 54 N.Y.2d 89, 96 (1981)).

Petitioner's further arguments in support of its unfounded claim of a "new interpretation" of the statute, are that agencies have until recently "routinely" provided the names of their retirees and pension amounts in response to FOIL requests; and that several Committee on Open Government advisory opinions addressed this issue over the past two decades (Pet.'s Br. at 12-13). Both arguments are unavailing. Petitioner does not (and cannot) argue that agencies' prior voluntary practice of providing names somehow transforms that practice into a statutory legal obligation.³

³ To the extent petitioner is contending that TRS is somehow estopped from changing its position, it is well-settled that

As to the COG opinions, petitioner cites to four such opinions issued in 1993, 1995, 1996, and 2010 (Pet.'s Br. at 12-13). This hardly supports petitioner's assertion that this case represents a change in the way the statute has consistently been interpreted by the decisions of the Committee on Open Government on this issue (Pet.'s Br. at 12-13). Furthermore, such decisions are not entitled to more deference than the agency's own construction of the statute.

Finally, there is nothing in the Committee on Open Government's advisory opinions, or in petitioner's brief, that defines a "retiree" as excluding a "beneficiary," or that demonstrates that their meanings cannot be coterminous. Indeed, the Legislature could have used the terms "dependent" or "survivor" had it sought to limit the protection in POL § 89(7) to only recipients of statutorily defined dependent allowances or survivor benefits.

Empire Center's attempt to distinguish Veteran Police, maintaining that this Court did not decide the issue presented

estoppel is generally not available against a public agency. See Granada Buildings, Inc. v. City of Kinston, 58 N.Y.2d 705, 708 (1982) (noting that "because a governmental subdivision cannot be answerable for the unauthorized acts of its agents. . . we have frequently reiterated that estoppel is unavailable against a public agency"), reh'g denied, 58 N.Y.2d 825 (1983); Public Improvements, Inc. v. Board of Education of the City of New York, 56 N.Y.2d 850, 852 (1982). See also E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 370 (1988).

here, since only the names are being sought in this case, as opposed to the names and addresses that were requested in Veteran Police (Pet.'s Br. at 13, 15), is also unavailing. The Appellate Division, Third Department properly rejected this attempt to distinguish Veteran Police. See Empire Center for New York State Policy v. New York State Teachers' Retirement System, 103 A.D.3d 1009, 1010 (3d Dept. 2013). If only retirees' addresses were intended to be exempt from disclosure, this Court could have directed the agency to disclose the names, while redacting the addresses. See id. at 1010, citing Schenectady County Society for the Prevention of Cruelty to Animals, Inc. v. Mills, 18 N.Y.3d 42, 46 (2011), and Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 464 (2007). Instead, this Court held in Veteran Police that the then newly-enacted POL § 89(7) "foreclosed any relief to the petitioner therein."

Empire Center further argues that disclosure of the names of retirees would not constitute an unwarranted invasion of privacy, arguing, inter alia, that retirees have no significant privacy interest in their names (Pet.'s Br. at 22-29). Contrary to Empire Center's contention, however, the New York County Supreme Court here also properly invoked the privacy exemption in FOIL under POL § 87(2)(b), as yet another basis upon which to exempt disclosure under FOIL of the names of the retirees (8-10). The Court correctly relied, in part, on this

Court's ruling in New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477, 484 (2005), in which this Court "once again articulated respect for privacy as an important public policy consideration, one recognized by FOIL itself" (10). The New York County Supreme Court articulated compelling reasons for invoking FOIL's privacy exemption here (8-9):

Furthermore, Public Officers Law § 87(2)(b) excepts disclosure of information if it "would constitute an unwarranted invasion of personal privacy." In this case, there is a legitimate concern that releasing retirees names "would in effect provide access to the addresses of these retirees, as well as to other personal information," which could lead to an unwarranted invasion of privacy. . . . In this age of widespread internet access it is increasingly easy to obtain addresses and other personal information of individuals using only a name and, thereafter to disseminate the information to the world. Although the security interests of retired New York City police officers might arguably be different from those of other retired public employees, the Public Officers Law recognizes the interest in privacy of the names of retired public employees. (Public Officers Law §§ 87[2][b]; 89[7].)

As noted, disclosing the names of the TRS retirees could result in access to the addresses of those retirees, as well as to other personal information. Thus, such disclosure falls squarely within the protection of POL § 87(2)(b), as an "unwarranted invasion of personal privacy."

Petitioner argues that this Court's ruling in New York Times Company, 4 N.Y.3d 477, actually supports disclosure of the names of public employment retirees here, because the words of the public employees (911 operators and firefighters) in that case were found not to be exempt from disclosure, and were ordered to be disclosed (Pet.'s Br. at 28-29). However, this Court exempted the names, identifying information and actual words of the 911 callers (i.e., the category of individuals for which disclosure was sought in that case, comparable to the retirees in this case), finding the privacy concerns "compelling." Id., 4 N.Y.3d at 485-86. This Court thus recognized the paramount privacy implications in releasing names and other identifying information in those circumstances, pursuant to a FOIL request, and accordingly upheld the privacy exemption under FOIL for the names and other information, including even the words they spoke, of the callers. Id.; accord, New York Times Company v. Regenhard, 39 A.D.3d 414, 414-15 (1st Dept., 2007) (ordering redaction from tapes and transcripts of any 911 callers' identifying information that was repeated by the 911 operators, consistent with the Court's intent to protect the callers' and their family's personal privacy under POL § 87(2)(b)). The names of TRS retirees are similarly exempt from disclosure, to protect against the "unwarranted invasion of personal privacy" under § 87(2)(b).

This Court addressed this point, in a case in which the New York State Teachers' union sought only the names, and not the addresses, of Charter School teachers pursuant to FOIL. In denying that request, this Court reasoned as follows:

Nor is there merit to NYSUT's contention that it is entitled to the teacher's names because it dropped its request for "names and addresses" and seeks only the names. Section 89(2)(b)(iii) would have little meaning if entities could circumvent the fundraising exemption by gaining access to only names and then linking them to a home address. The policy concerns underlying the personal privacy exemption are no less implicated under that scenario.

New York State United Teachers v. Brighter Choice Charter School, 15 N.Y.3d 560, 566 (2010). This Court found that the stated purposes for the request for names (dues collection) was in essence fundraising and, therefore, exempt under POL § 89(2)(b)(iii), which provides that lists of names and addresses are exempt from disclosure if the list will be used for "solicitation or fund-raising purposes." Id. at 564. This Court found that the petitioner's withdrawal of its request for addresses, and its request for names only -- when the petitioner clearly intended to contact the teachers -- did not alter the potential invasion of privacy which exempted the list from disclosure under FOIL, again noting that access to names easily provides access to addresses and other personal information.

Id. at 566. This Court thus recognized the ease with which addresses and other personal information can be obtained once names are disclosed.

As noted above, the legislative history of POL § 89(7) clearly sets forth the purpose of the proposed legislation as protecting retirees from harassment. To release the names of the retirees in TRS would in effect release access to their addresses and other personal information as well. Therefore, for the protections provided by POL § 87(2)(b) against an "unwarranted invasion of personal privacy" to have any meaning in an age where a wealth of information is readily available through access to the internet, the names as well as the addresses of the retirees must be exempt from disclosure under FOIL.

Thus, POL § 87(2)(b) provides an independent basis for non-disclosure of the names of retirees participating in public pension systems, as such disclosure would constitute an "unwarranted invasion of personal privacy," as the Supreme Court here concluded (8-10). This basis is entirely consistent with the stated legislative purpose of POL § 89(7), to prevent the harassment of public retirees. Accord, Long v. Office of Personnel Management, 692 F.3d 185, 189-90, 192, 195 (2d Cir. 2012) (holding that the personal privacy exemption in the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §

552(b)(6), exempts from disclosure the names of federal employees working in sensitive agencies and sensitive occupations, recognizing that such employees "have a cognizable privacy interest in keeping their names from being disclosed wholesale"); National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 878-79 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) (recognizing privacy interest in list of names of retired and disabled federal employees, finding no public interest in, and a modest personal privacy interest against, disclosure of the names and addresses of individuals receiving federal employee retirement benefits; court further declined to release only addresses without the names, since "the privacy concerns raised by the release of the addresses alone are substantially identical to those raised by the release of both the names and addresses").

Petitioner further argues that FOIL does not generally preclude the disclosure of names; and asserts that the public interest in overseeing pension funds outweighs any privacy interest in retirees' names (Pet.'s Br. at 23-28). However, the cases cited by petitioner in support of its argument that disclosure of the names of TRS participants would not fall into the invasion of privacy exception to FOIL (Pet.'s Br. at 26),

all relate to current public employees, not retirees.⁴ The concern for protecting retirees from harassment, articulated in support of the enactment of POL § 89(7), justifies the claim that the disclosure of retirees' names would indeed constitute an unwarranted invasion of privacy, as the Supreme Court here correctly found (8-9).

TRS's determination to withhold the names as well as the addresses of retirees is fully supported by both POL § 89(7) and § 87(2)(b). There is no inconsistency, or infirmity in this statutory interpretation, or change in the law or its interpretation, which has been the prevailing and only interpretation since 1983, when this amendment to FOIL was enacted.

⁴ The final case cited, Gannett Co. v. County of Monroe, 59 A.D.2d 309 (4th Dept., 1977), aff'd, 45 N.Y.2d 954 (1978) (Pet.'s Br. at 26) was decided prior to the enactment of POL § 89(7).

CONCLUSION

THE DECISION AND ORDER APPEALED FROM, AFFIRMING THE DENIAL OF PETITIONER'S CPLR ARTICLE 78 PETITION AND DISMISSAL OF THE PROCEEDING, SHOULD BE AFFIRMED, WITH COSTS.

Dated: New York, New York
October 9, 2013

Respectfully submitted,

MICHAEL CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondent-
Respondent.

By: *Elizabeth I. Freedman*
ELIZABETH I. FREEDMAN
Assistant Corporation Counsel

LEONARD KOERNER,
ELIZABETH I. FREEDMAN,
Of Counsel.

EXHIBIT D

2. Empire Center is a think-tank based in Albany, New York, dedicated to informing the public about various important issues of public concern, including public spending and pension reform. *About Us*, <http://www.empirecenter.org>. As part of its mission, Empire Center operates a website that allows the public to see how state and local tax dollars are spent. The data on Empire Center's website include detailed data on expenditures for public employee salaries and public pensions that was previously obtained via Freedom of Information Law ("FOIL") requests. For example, the data includes the names and pensions of retirees in the New York City Fire Department Pension Fund for 2009 and 2010,¹ as well as the names and salaries of New York City public employees for 2012-2013 and prior fiscal years.²

3. Empire Center utilizes requests to state and local government agencies under FOIL to obtain this information about public retirees and employees.

4. In 2012, as in earlier years, Empire Center submitted various FOIL requests to state and local retirement systems for public-school teachers. The requests sought the names of retired members and the pension that each member was drawing. Unlike earlier years, those retirement systems refused to provide the names of their retirees.

5. In the ensuing litigation over Empire Center's FOIL requests, the New York Court of Appeals ruled in favor of Empire Center, and directed the agencies to disclose the retirees' names.

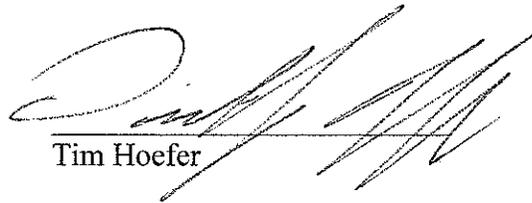
¹ See Empire Center, New York City Fire Department Pension Fund Data Notes, <http://seethroughny.net/data-notes/nycfdpf-data-notes/> ("The New York City Fire Department Pension Fund data, as provided by the fund, includes benefit rates, retirement dates and last known employers when available for every individual who collected benefits in calendar years 2009 and 2010.").

² See Empire Center, New York City Payroll Data Notes, <http://seethroughny.net/data-notes/new-york-city-data-notes/> ("The New York City data, as provided by the city Office of Payroll Administration, New York City Police Department and Districts Attorney, include names, positions and salaries for employees who worked for the city during the 2012-13, 2011-12, 2010-11, 2009-2010, 2008-09, and 2007-08 fiscal years.").

6. Following the Court of Appeals' ruling in May, Empire Center submitted FOIL requests for the names of retirees drawing a public pension to all New York State and City retirement systems. The New York City Fire Department ("FDNY") informed Empire Center on or about August 5, 2014 that it planned to release the names of retirees in response to the FOIL request. According to the Petition here, the FDNY informed Petitioners on or about August 18, 2014, that it planned to release the names of retirees in response to FOIL requests filed by Empire Center and the New York Times. Pet. ¶ 19. In response, Petitioners initiated the instant Article 78 proceeding, seeking to prevent the release of retirees' names. Pet. ¶¶ 32-35.

7. Though no relief has yet been granted in this proceeding, the records access officer for the FDNY has informed Empire Center that it will withhold the requested information pending the outcome of the instant proceeding. See Ex. A (emails between Empire Center and M. Kugelman).

Dated: Albany, NY
November 18, 2014



Tim Hoefler

ALBANY)
) SS:
NEW YORK)

SUBSCRIBED and sworn to (or affirmed) before me this 18 day of November, 2014, by TIM HOEFER, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

MARGARET KAVITA FULLER
Notary Public, State of New York
No. 01FU6240204
Qualified in Saratoga County
Commission Expires April 25, 2015



Notary Public

EXHIBIT A

From: "Kugelman, Maura (FDNY)" <Maura.Kugelman@fdny.nyc.gov>
Subject: FOIL Response
Date: August 5, 2014 at 8:53:13 AM EDT
To: 'Dan Russo' <drusso@empirecenter.org>

Mr. Russo,

I have the responsive records and will be forwarding them to you via US Mail later this week.

Thank you.

New York City Fire Department
Bureau of Legal Affairs
Freedom of Information Law Unit
9 Metro Tech Center
Brooklyn, NY
(718) 999-0293

From: "Kugelman, Maura (FDNY)" <Maura.Kugelman@fdny.nyc.gov>
Subject: Empire Center for Public Policy FOIL
Date: August 28, 2014 at 4:47:50 PM EDT
To: "Dan Russo (drusso@empirecenter.org)" <drusso@empirecenter.org>

The City of New York has received a petition seeking to preliminarily and permanently enjoin the City from releasing records responsive to the Freedom of Information Law ("FOIL") request that you have made regarding uniformed retirees.

Although the City intends to comply with its obligations under FOIL, the City has agreed to a stay of the release of records until the conclusion of the litigation.

Maura J. Kugelman
Records Access Officer
Interim Supervisor-Court Desk and Litigation Support
New York City Fire Department
Bureau of Legal Affairs
9 MetroTech Center
Brooklyn, NY 11201
(718) 999-1669

From: Dan Russo <drusso@empirecenter.org>
Subject: Re: Empire Center for Public Policy FOIL
Date: August 29, 2014 at 11:10:52 AM EDT
To: "Kugelman, Maura (FDNY)" <Maura.Kugelman@fdny.nyc.gov>

Dear Ms. Kugelman,

Thank you for the email. Could you please clarify the following: has the city been served with a court order or an injunction issued by a court? If so, please identify the judge who issued the order and any case or file number for the injunction.

Thank you,

Daniel Russo
Research Analyst
Empire Center for Public Policy
100 State Street, Suite 600
Albany, NY 12207
518-434-3100
drusso@empirecenter.org
www.EmpireCenter.org

From: "Kugelman, Maura (FDNY)" <Maura.Kugelman@fdny.nyc.gov>
Subject: RE: Empire Center for Public Policy FOIL
Date: August 29, 2014 at 3:03:01 PM EDT
To: 'Dan Russo' <drusso@empirecenter.org>
Cc: "Crane, Thomas (Law)" <tcrane@law.nyc.gov>, "Richter, Marilyn (Law) (MRichter@law.nyc.gov)" <MRichter@law.nyc.gov>

Dear Mr. Russo,

As of today, we have not received a court order or injunction. Attached is a copy of the papers that have been served on the City.

Maura J. Kugelman
Records Access Officer
Interim Supervisor-Court Desk and Litigation Support
New York City Fire Department
Bureau of Legal Affairs
9 MetroTech Center
Brooklyn, NY 11201
(718) 999-1669

From: Dan Russo [<mailto:drusso@empirecenter.org>]
Sent: Friday, August 29, 2014 3:23 PM
To: Kugelman, Maura (FDNY)
Subject: Re: Empire Center for Public Policy FOIL

Hello Ms. Kugelman,

Thank you for your email. However, I can't see how, since no injunction has been issued, there could be a reason to not provide us with the data immediately. Also, it is unclear that a lawsuit has actually been filed, only that the papers you provided me have been served to the city. Can you clarify all of this?

Thank you,

Daniel Russo
Research Analyst
Empire Center for Public Policy
100 State Street, Suite 600
Albany, NY 12207
518-434-3100
drusso@empirecenter.org
www.EmpireCenter.org

From: Kugelman, Maura (FDNY) <Maura.Kugelman@fdny.nyc.gov>
To: 'Dan Russo' <drusso@empirecenter.org>
Date: Tuesday, September 2, 2014 at 4:25:42 PM
Subject: RE: Empire Center for Public Policy FOIL

Mr. Russo,

As you know, the release of the records which you are requesting is the subject of a pending injunction application before the Supreme Court of the State of New York, County of Kings. We are mindful of the Court's jurisdiction over this matter, and we believe that the release of the requested information at this time could undermine the Court's oversight.

With respect to inquiries that you have made in other e-mails to me, please be advised that I will be providing you with the name and telephone number of the Law Department attorney who will be representing the City in connection with the injunction application. You will be able to refer those inquiries directly to that individual.

Thank you.

Maura J. Kugelman
Records Access Officer
Interim Supervisor-Court Desk and Litigation Support
New York City Fire Department
Bureau of Legal Affairs
9 MetroTech Center
Brooklyn, NY 11201
(718) 999-1669

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

ALEXANDER HAGAN, as President of and on behalf of UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL UNION NO. 854, I.A.F.F., STEPHEN CASSIDY, as President of and on behalf of UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, I.A.F.F., AFL-CIO, EDWARD BURKE, and JOSEPH HENNELLY, individually, and on behalf those similarly situated,

Petitioners,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

CITY OF NEW YORK, and BILL DE BLASIO, as Mayor of the City of New York, and NEW YORK CITY FIRE DEPARTMENT, and DANIEL A. NIGRO, as Commissioner of the New York City Fire Department and as Chairman of the New York City Fire Pension Fund,

Respondents.

Index No. 012574/2014

IAS Part 73

Sweeney, J.

AFFIRMATION OF SERVICE

JOSHUA S. STILLMAN, an attorney duly admitted to practice before the Courts of the State of New York and not a party to the above-captioned action, hereby affirms the following to be true, under penalty of perjury, pursuant to CPLR § 2106:

1. I am over 18 years of age and an associate at Jones Day, counsel for Proposed Intervenor-Respondent Empire Center for Public Policy, Inc. (“Empire Center”).

2. On November 19, 2014, I caused to be served a true and correct copy of the: (1) Notice of Motion to Intervene on Consent; (2) Affirmation of Joshua S. Stillman in Support of the Motion to Intervene on Consent ; (4) Empire Center’s Proposed Verified Answer; (5) Empire

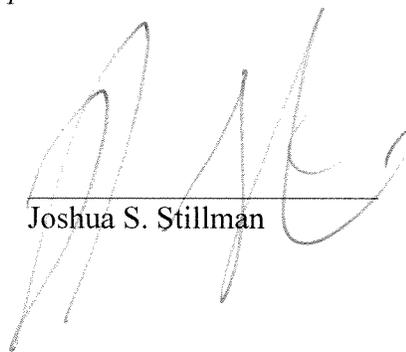
Center's Memorandum of Law in Support of its Proposed Verified Answer, and (5) the Affidavit of Tim Hoefer, by overnight mail and email to:

Harry Greenberg, Esq.
GREENBERG BURZICHELLI GREENBERG P.C.
3000 Marcus Avenue, Suite 1W7
Lake Success, New York 11042
Attorneys for Petitioners;

and:

Lauren Almquist Lively
NEW YORK CITY LAW DEPARTMENT
100 Church Street
New York, New York 10007
Attorneys for Respondents

Dated: November 19, 2014
New York, New York



Joshua S. Stillman