To be Argued by:
ALIA L. SMITH
(Time Requested: 15 Minutes)

Court of Appeals
of the
State of New York

Albany County Clerk's Index No. 1221/12
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 –
NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
Respondent-Respondent.

New York County Clerk's Index No. 102055/12
In re Application of
EMPIRE CENTER FOR NEW YORK STATE POLICY,
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– against –
TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK,
Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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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- THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, Respondent-Appellee	Albany Co. Index No.: 1221-12
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DISCLOSURE STATEMENT

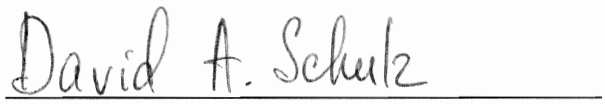
Pursuant to 22 N.Y.C.R.R. 500.1(f), Petitioner-Appellant states that its name has changed from Empire Center for New York State Policy to Empire Center for Public Policy, Inc. ("Empire Center"). Empire Center states that it has applied for

status as a nonprofit corporation under Section 501(C)(3) of the Internal Revenue Code, and has no corporate parents, subsidiaries or affiliates.

Dated: New York, New York
August 23, 2013

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP



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QUESTIONS PRESENTED

(1) Does a narrow exception provided in Section 89(7) of the Freedom of Information Law, which exempts from mandatory public disclosure (a) both the name and home address of a "beneficiary of a public employees' retirement system," but (b) only the home address of a "retiree of a public employees' retirement system," permit a public pension fund to withhold the names of all retirees receiving public pensions?[1]

The courts below answered this question "yes." CR. 43-44; SR. 48-50.

(2) Does Section 87(2)(b) of the Freedom of Information Law, which exempts from mandatory public disclosure information that would constitute an "unwarranted invasion of personal privacy," permit a public pension fund to withhold the names of retirees drawing taxpayer-funded pensions?

The Supreme Court, New York County, answered this question "yes." CR. 8-10. The question was not reached by the First or Third Department, or by Supreme Court, Albany County.

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[1] As indicated by the caption, this Brief addresses the decisions in both *Empire Center for New York State Policy v. New York State Teachers' Retirement System* (3d Dep't, Albany Cnty.) ("*Empire Center v. NYS-TRS*") and *Empire Center for New York State Policy v. Teachers' Retirement System of the City of New York* (1st Dep't, N.Y. Cnty.) ("*Empire Center v. NYC-TRS*"). The record for *Empire Center v. NYS-TRS* will be cited as "SR.;" the record for *Empire Center v. NYC-TRS* will be cited as "CR." The orders of the First Department and Third Department from which Petitioner-Appellant appeals, and the orders of this Court granting leave to appeal, are appended at the end of the respective records.

JURISDICTIONAL STATEMENT

Jurisdiction exists to hear these appeals under CPLR § 5501 because the orders appealed from are final orders raising issues of law. Jurisdiction exists under CPLR § 5602 because this Court granted Petitioner- Appellant's motions for leave to appeal on June 26, 2013. CR. 42; SR. 47.

PRELIMINARY STATEMENT

These Article 78 proceedings challenge an abrupt about-face by two public employee retirement systems that in 2012 refused to disclose the names of their members receiving taxpayer-funded pensions, even though they had routinely made this information available in the past under the Freedom of Information Law, Pub. Off. Law § 87, *et seq.* ("FOIL"). This reversal by the New York State Teachers' Retirement System ("NYS-TRS") and the Teachers' Retirement System of the City of New York ("NYC-TRS") makes it impossible for the public to fully assess their operations or to detect instances of fraud and abuse. It defeats FOIL's core purpose of informing citizens about the actions of government and the use of taxpayer funds.

The courts below affirmed these denials of previously public information as permitted by FOIL's Section 89(7), even though there has been no change in the laws governing public disclosure of the pension information. They permitted pensioners' names to be withheld by reading this Court's decision applying Section

89(7) in *New York Veteran Police Association v. New York City Police Department Article 1 Pension Fund*, 61 N.Y.2d 659 (1983) ("*Veteran Police*") as requiring this result—a strained reading no one had given to that holding for more than 25 years, and one that is plainly incorrect.

Veteran Police does not even purport to address the specific issue raised here, and the interpretation given to FOIL's Section 89(7) by the courts below cannot be squared with the statute's express language, its legislative history, its past application, or the fundamental objectives of FOIL. Section 89(7) narrowly authorizes taxpayer-funded pension systems to withhold the names of "beneficiaries" of deceased retirees, but not the names of all "retirees" currently drawing public pensions. The plain language of the exemption allows only the addresses of "retirees" to be withheld—but *not* their names—and was uniformly understood and applied in this manner for decades. There is no proper basis in law for pensioners' names now to be withheld from the public.

Likewise, the conclusion of the Supreme Court, New York County, that releasing names of individuals receiving taxpayer-funded pensions would be an "unwarranted" invasion of privacy, represents an unprecedented expansion of privacy exemption that threatens to swallow FOIL's disclosure rule. The holding ignores that the names of public employees and their salaries are publicly available, and cannot be considered "private" in any meaningful sense. It equally

ignores the overwhelming public interest in disclosure of the names of retirees in order to monitor, assess and understand the public pension systems. Without this information, it is impossible to conduct many types of studies of pension payments over time, to evaluate fully the financial condition of the pension funds, or to monitor for fraud and abuse—interests of the public that render any minimal privacy invasion *not* "unwarranted" under FOIL.

At a time when government budgets at all levels are under intense pressure, and political battles are being waged over pensions provided to public employees, NYS-TRS and NYC-TRS should not be permitted to begin withholding the very information needed to understand the impact of pensions on public budgets and to debate meaningfully the proper scope of these benefits programs. The orders below should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Empire Center for Public Policy

Appellant, The Empire Center for Public Policy, Inc. ("Empire Center"),[2] is a think tank located in Albany. Its mission is to inform voters and policymakers about public issues such as "the economy, taxes and spending, public employment issues including pension reform . . . energy policy, health care and education."

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[2] Earlier this year, Empire Center for New York State Policy became the Empire Center for Public Policy, Inc. Its mission remains the same.

About Us, http://www.empirecenter.org. Empire Center is dedicated to providing comprehensive information to New York taxpayers and policy makers to foster dialog about the best and most effective use of public funds. To this end, Empire Center operates a web portal through which taxpayers can share, analyze and compare data from counties, cities, towns, villages, school districts and public authorities throughout New York. Its website seeks to give New Yorkers a clearer view of how their state and local tax dollars are spent.

In recent years, Empire Center has compiled on its website detailed data about how local governments and agencies spend tax revenue, including their significant expenditures on pensions and other benefits for public employees.[3] The Empire Center collects this information because

> taxpayers foot the bill for the salaries of government workers and retirees, [and] they have a right to know who they are and how much they are paid, just like any private company's board of directors know who their employees are and how much they are paid. Access to this data also provides a means for scrutinizing spending on a case by case basis, adding a level of accountability previously unknown in government spending.[4]

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[3] *See* SeeThroughNY, http://www.seethroughny.net; *Payrolls & Pensions*, *id.*, http://seethroughny.net/pensions/.

[4] *Legal Battle for Public Access Heats Up*, EMPIRE CENTER FOR N.Y. STATE POLICY, http://www.empirecenter.org/AboutUS/news_releases/2011/01/ppf13111.cfm.

B. The FOIL Requests at Issue

On January 9, 2012, Empire Center submitted FOIL requests to both the NYS-TRS and the NYC-TRS. SR. 18; CR. 16, 21. As in earlier years, the requests sought, among other things, the names of the retired members of each system and allowable information concerning the retirement benefits each member was drawing. *Id.* In response, both NYS-TRS and NYC-TRS provided some of the requested information, but unlike prior years, they both refused for the first time to provide the names of their retirees. SR. 19-20; CR. 14, 22-24.

Empire Center pursued administrative appeals (SR. 21-22; CR. 15, 25-26), which were promptly denied. SR. 23-26; CR. 15, 27-28. In both cases, the appeals officers stated that the requests for names were denied on the basis of the decision in *Empire Center for New York State Policy v. New York City Police Pension Fund*, 88 A.D.3d 520, 521 (1st Dep't 2011) ("*NYC Police Pension Fund*"), a recent two-paragraph opinion that had adopted a novel and strained interpretation of FOIL § 89(7) as allowing retiree names to be withheld.

As written, Section § 89(7) provides:

> 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 . . .

In *NYC Police Pension Fund*, the First Department read this language to authorize public pension funds to withhold the names of both retirees and their beneficiaries, even though the statute's plain language permits only the address (and *not* the name) of a "retiree" to be withheld. It asserted, without explanation, that this conclusion was compelled by the decades-old decision of this Court in *Veteran Police*, even though no one had ever previously construed that case in this way, or applied Section 89(7) in this manner.

C. The Decisions in the IAS Parts

Having exhausted its administrative remedies, Empire Center brought Article 78 proceedings against NYS-TRS and NYC-TRS in Supreme Court, Albany County, and Supreme Court, New York County, respectively. In the NYS-TRS case, the court (Hon. Christopher E. Cahill, J.S.C.) denied the Petition on the basis of the recent holding in *NYC Police Pension Fund*, but made clear that "this Court fully understands petitioner's frustration" with the statutory interpretation adopted in that case, because it lacked "supportive reasoning or explanation." SR. 5-7. Nevertheless, the Albany court concluded that "at the nisi prius level," it was "constrained to follow such precedent." *Id.* at 7.

In the NYC-TRS case, the court (Hon. Michael D. Stallman, J.S.C.) also dismissed Empire's petition on the basis of *NYC Police Pension Fund*. That court then continued on to hold that the names of retirees were also exempt from

disclosure under FOIL § 87(2)(b), because their disclosure could constitute an "unwarranted invasion of personal privacy." The court speculated that:

> [R]eleasing retirees' names 'would in effect provide access to the addresses of these retirees, as well as to other personal information,' which could in turn lead to an unwarranted invasion of privacy.

CR. 8. In coming to this conclusion, the court cited no evidence (and NYC-TRS provided none) of any actual adverse impact on privacy over the decades when this information was routinely disclosed, or from data already released and posted on the Empire Center's transparency website.

D. Proceedings in the Appellate Divisions

Empire Center timely appealed both decisions. In the NYS-TRS case, the Appellate Division, Third Department, reluctantly affirmed the holding of the IAS court. It also acknowledged that "well settled principles of statutory construction lend support to the interpretation advanced by" Empire Center, but felt constrained by this Court's ruling in *Veteran Police*. SR. 49-50 (Slip Op. at 2-3). As the court in *NYC Police Pension Fund* had done, the Third Department wrongly read the *Veteran Police* decision to hold implicitly that Section 89(7) exempts from disclosure "*both* the names and home addresses of retirees of a public employees' retirement system." *Id.* (emphasis added).

In the NYC-TRS case, the First Department also affirmed, in part. It stated only that the "determination is in accord with our interpretation of" Section 89(7)

in *NYC Police Pension Fund* "which followed" *Veteran Police.* CR. 43-44 (Slip op. at 36-37). The First Department did not address the alternate holding that the names of retirees are exempt from disclosure under Section 87(2)(b).

Empire Center timely moved for leave to appeal each decision to this Court. Its motions were granted on June 26, 2013. CR. 42; SR. 47.

ARGUMENT

I.
SECTION 89(7) DOES NOT PERMIT THE NAMES OF RETIRED GOVERNMENT WORKERS DRAWING PUBLIC PENSIONS TO BE KEPT SECRET

The interpretation of Section 89(7) adopted by the courts below is plainly incorrect. The decisions disregard settled principles of statutory construction, contravene years of contrary precedent, and violate the principle that FOIL exemptions are to be narrowly construed to fulfill the statute's disclosure objective. The misguided reading of Section 89(7) is not compelled by the holding of *Veteran Police*, and if permitted to stand will seriously impair FOIL's core purpose.

A. The Reinterpretation of § 89(7) Adopted Below Violates Basic Principles of Statutory Construction and Ignores Decades of Contrary Understanding of the Law

A controlling legal issue on this appeal is the proper meaning to be given to the FOIL disclosure exemption provided in Section 89(7). That exemption contains a specific provision dealing with information about "retirees" receiving taxpayer-funded pensions. It exempts from disclosure only "the home address"

(not the name) *"of a retiree"* of a public employee's retirement system. Section 89(7) contains a separate exemption for both the name and home address *"of a beneficiary"* of a public employees' retirement system, which by its wording and structure within the statute applies to a different group than "retirees."

Notwithstanding the plain statutory language, the courts below read the terms "retiree" and beneficiary" to mean the same thing, making the more limited language about "retirees" entirely superfluous, and rendering the two clauses internally inconsistent. This interpretation violates the fundamental principle of statutory construction that a law should not be construed to render legislative language superfluous. *See, e.g.*, *In re Yolanda D.*, 88 N.Y.2d 790, 794-95 (1996) (statutes may not be interpreted to render any part "superfluous"); *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 515 (1991) ("a statutory construction which renders one part meaningless should be avoided") (citations omitted). To the contrary, a court is to give effect and meaning to the entire statute. *See Friedman v. Conn. Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007)); *accord* N.Y. Stat. § 97 ("A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.").

This principle should apply with particular force here because the legislative history confirms that the distinction in Section 89(7) between a "retiree" and a "beneficiary" was understood and intended at the time of passage. *See, e.g.,* A. 50

(Mem. of State Comp. Office, Bill Jacket, at 00010) (noting that the "bill will amend the Public Officers Law to 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 home address of a beneficiary of such system"); A. 47 (Budget Report, Bill Jacket at 000007) (noting that the new subdivision "does not require disclosure . . . of the *home addresses* of public employees or retirees *or* disclosure [of the] *names or home addresses* of public retirement beneficiaries") (emphasis added).

The interpretation given to Section 89(7) by the courts below also violates the principle that statutory language should be given its plain and ordinary meaning. *See, e.g., Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013) (courts must construe statutes "so as to give effect to the plain meaning of the words used") (citations omitted); *Crucible Materials Corp. v. N.Y. Power Auth.*, 13 N.Y.3d 223, 229 (2009) (same). The dictionary definition of a "beneficiary" is

> [a] person who is *designated* to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.); one *designated* to receive something as a result of a legal arrangement or instruction.

BLACK'S LAW DICTIONARY, 7th ed. (1999) at 149 (emphasis added). Applying this ordinary meaning, Section 89(7) addresses two separate groups: (1) employees,

former employees and retirees, whose names are *not exempt* from disclosure, and (2) their beneficiaries (*i.e.*, the persons designated to receive benefits in the event of their death), whose names *are* exempt from disclosure. Indeed, the Respondent retirement systems' own websites distinguish between "retirees" and "beneficiaries" in this same way, using the former term to refer to their retired members and the latter to refer to persons designated to receive benefits in the event of a retiree's death.[5] It is the plain and ordinary meaning of the terms.

From the day it was enacted in 1983, Section 89(7) was understood and applied to make this distinction. Advisory opinions issued by the New York State Committee on Open Government – the state agency responsible for "overseeing and advising with respect to the Freedom of Information Law" – confirm that Section 89(7) was understood from the outset to treat "beneficiaries" as distinct from "retirees" for purposes of FOIL's disclosure obligations. As it has long instructed, under § 89(7), "the name of a retiree is not the same as the name of the

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[5] *See, e.g.*, *Learning About NYSTRS*, N.Y. STATE TEACHERS' RETIREMENT SYSTEM, http://www.nystrs.org/main/library/learningaboutstrs.html (breaking down "member statistics" among "active members," "retired members," and "beneficiaries"); *Forms/Tools*, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF N.Y., https://www.trsnyc.org/trsweb/tools/toolsLandingPage.html (listing forms for different groups: In-Service Members; Retired Members; and Beneficiaries"); *TRS Retiree's Companion*, at 71, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF N.Y, https://www.trsnyc.org/WebContent/tools/brochure/retireesCompanion.pdf (defining "benefits package" as "[a] package of information sent to *beneficiaries* after a TRS *retiree's* death. . .") (emphasis added).

person designated by a retiree as a beneficiary," and "the names of retirees must be disclosed." Committee on Open Government, FOIL-AO-7717 (May 19, 1993).[6]

Consistent with these interpretations, and applying the clear statutory language, pension fund systems across the state—including until recently both NYS-TRS and NYC-TRS—have routinely provided the names of their retirees and the amounts of their pensions in response to FOIL requests. SR. 13; CR. 16.

B. The Reinterpretation of § 89(7) Applied Below Is Not Required by the Holding in *Veterans Police*

The courts below declined to follow the plain language of § 89(7) because they read this Court's decision in *Veteran Police* as requiring this result. *Veteran Police* requires no such thing.

That decision arose out of a FOIL request in 1980 by the New York Veteran Police Association ("VPA") seeking the "names and addresses" of retired NYPD officers in order to provide services and information through mailed solicitations.

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[6] *Available at* http://www.dos.state.ny.us/coog/ftext/f7717.htm. *See also* FOIL-AO-8775 (Apr. 13, 1995), *available at* http://www.dos.state.ny.us/coog/ftext/f8775.htm ("names and titles" of members of retirement systems are subject to disclosure"); FOIL-AO-9742 (Oct. 24, 1996), *available at* http://www.dos.state.ny.us/coog/ftext/f9742.htm (requiring disclosure of "'all retired pensioned employees'"); FOIL-AO-17955 (Jan. 8, 2010), *available at* http://www.dos.state.ny.us/coog/ftext/f17955.html ("a beneficiary [as distinct from a retiree] is a person designated by a public employee to receive pension benefits in the event of the employee's death").

See A. 1-2 (VPA Petition ¶¶ 2, 7-8).[7] When the request was made, Section 89(7) had not yet been enacted, and NYPD denied the request on the grounds that disclosure of home addresses for "commercial or fundraising purposes would be an unwarranted invasion of privacy under Section 89(2)(b)(iii)," among other reasons. *Id.* at 9 (NYPD Br. at 4). The trial court upheld the denial, but the Appellate Division, First Department reversed by divided panel. *Id.* at 9-11 (NYPD Br. at 4-6); *see also N.Y. Veteran Police Ass'n v. NYPD Art. I Pension Fund*, 92 A.D.2d 772 (1st Dep't 1983). The majority of the Appellate Division found that VPA's desire for the list "to expand its membership through solicitation of those retirees" was not the type of "commercial or fundraising purpose" within the exemption of § 89(2)(b)(iii).[8]

When the case reached this Court, the principal briefing of both parties made clear that the issue presented was whether NYPD could legitimately withhold *home addresses* to block VPA from mailing solicitations to its retirees. *See, e.g.,* A. 17 (NYPD Br. at 12); A. 33 (VPA Br. at 11). Before briefing concluded, the newly-adopted Section 89(7) went into effect. NYPD then submitted a two-page

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[7] Archive copies of the relevant papers from *Veteran Police* are submitted for the Court's reference in an Appendix ("A. ___"), pursuant to Rule 500.1(h).

[8] At the time of the *Veteran Police* case, § 89(2)(b)(iii) provided that "the release of lists of names and addresses" could be an unwarranted invasion of personal privacy "if such lists would be used for commercial or fundraising purposes." The section has since been amended to apply to lists of names and addresses that may be used for "solicitation or fundraising purposes."

reply simply citing the new provision as controlling. It noted that "since respondent's request was for the names *and* home addresses of police officers receiving pensions, . . . it falls squarely within the language" of the new exemption. A. 37 (NYPD Reply Br. at 2) (emphasis added).

This Court then held, without significant discussion, that the VPA's FOIL request, seeking *both* the "names *and* addresses" of police "retirees," could properly be rejected under the new Section 89(7). The Court did not address—and the parties did not brief—the separate scope of the provisions for a "retiree" and a "beneficiary" in Section 89(7). There was no need to do so because the specific FOIL request at issue sought the *addresses* of retirees as well as their names, and that request could plainly be denied under the new statute.

The Court did not consider whether NYPD was permitted to withhold retiree names alone (without addresses), as Empire Center seeks here, because the VPA did not seek names alone—names alone would not have enabled VPA to solicit retirees as it sought to do. *Veteran Police* did not decide the issue presented here.

C. The Reinterpretation of § 89(7) Applied Below Defeats FOIL's Fundamental Objectives

The application of Section 89(7) in this case not only misreads the statute and the *Veterans Police* decision, it also defeats the policy of robust open government adopted in FOIL. Section 89(7) provides an exception to the broad disclosure mandate enacted in FOIL, and this Court's decisions have repeatedly

made clear that FOIL exemptions are to be narrowly construed to promote the governmental transparency that is FOIL's fundamental objective. *See, e.g.*, *Weston v. Sloan*, 84 N.Y.2d 462 (1994) (noting the public importance of enforcing FOIL's disclosure obligations); *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252 (1987) (FOIL's disclosure objective is an "important public policy"). This objective is particularly germane to the proper construction of Section 89(7), because public pensions involve the expenditure of billions of taxpayer dollars every year, and transparency is sorely needed to root out waste and fraud, and to inform an on-going public debate over government finances.

In enacting FOIL, the Legislature stressed the critical importance of the policy of disclosure embraced by the statute, finding that:

> [A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. . . .
>
> The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.

FOIL § 84. Since then, this Court repeatedly has reaffirmed the State's "strong commitment to open government and public accountability," *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 565 (1986), and underscored the importance of "an

expansive interpretation" of FOIL's disclosure obligation. *Newsday, Inc. v Empire State Dev. Corp.*, 98 N.Y.2d 359, 361-62 (2002) (citations omitted).

FOIL is intended to ensure that "the electorate [has] sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities'" and be "an effective tool for exposing waste, negligence and abuse on the part of government officers." *Burns*, 67 N.Y.2d at 566 (citations omitted); *accord Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of SUNY at Farmingdale*, 87 N.Y.2d 410, 416 (1995). Yet, the decisions in these cases defeat these basic objectives of the very statute the courts construed.

Informing the public about the expenditure of taxpayer funds is a core purpose of FOIL, and information about spending on public pensions—whether by NYS-TRS, NYC-TRS or other government pension funds[9]—is especially important. State and local governments spend *billions* of dollars annually to fund

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[9] Since the 2011 decision in *NYC Police Pension Fund*, six of the eight New York State and New York City pension funds have begun refusing to release the names of their retirees. *See, e.g.*, *Keep Public Information Public,* DEMOCRAT & CHRONICLE (Feb. 26, 2013), *available at* http://www.democratandchronicle.com/article/20130227/OPINION04/302270010/Keep-public-information-public ("several New York pension systems have reversed decades of public disclosure and refused to release details about who is receiving taxpayer-funded pensions and how much they are getting"); J. Spector, *State court ruling keeps teachers' pensions private*, POUGHKEEPSIE JOURNAL (Feb. 22, 2013), *available at* http://www.poughkeepsiejournal.com/article/20130222/NEWS/302220051/State-court-ruling-keeps-teachers-pensions-private ("Most public pension systems in New York have refused in recent years to release details about pension recipients and how much they are receiving in retirement.").

public employee pensions, and amounts are only growing.[10] The names of retirees drawing these pensions are needed to track pension obligations over time, and to analyze how the pension systems function. *See, e.g.,* J. Gershman, *Appeals Court Blocks Access to Police Pension Data*, WALL STREET JOURNAL (Oct. 18, 2011) (data about 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.")[11] Disclosing names also "can be useful in determining whether state laws and policies are being enforced." *Troubling Trend*, WATERTOWN DAILY TIMES (Mar. 1, 2013).[12]

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.

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[10] *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/Special-Reports/2010/12/pensionexplosion120710.cfm (documenting hundreds of billions of dollars in pension funding and projecting pension contributions to increase by $1.5 billion from 2011 to 2014 (an 18% increase) and more rapidly after 2014).

[11] *Available at* http://blogs.wsj.com/metropolis/2011/10/18/appeals-court-blocks-access-to-police-pension-data/.

[12] *Available at* http://www.watertowndailytimes.com/article/20130301/OPINION01/703019977.

POST (Oct. 19, 2011).[13] For example, "linking 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.* Past use of this information confirms that disclosure of retiree names (as opposed to generic pension spending data) is important for many reasons, including:

> Disclosure of retirees' names fosters debate concerning the appropriate (and inappropriate) uses of the pension system and methods of calculating pension benefits. For example, one recent news article highlighted questions about the level of pensions granted to certain employees in the current economic climate.[14] Another looked at whether a former firefighter should have received an $86,000 disability pension for asthma when he is able to run a six-minute mile.[15]

> Disclosure of retirees' names allows Empire Center and others concerned about pension spending to perform year-to-year comparisons that would not be possible if payments to specific pensioners could not be matched up from one year to the next. 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."[16]

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[13] *Available at* http://www.nypost.com/p/news/local/cop_pensions_stay_undercover_court_rUc3RCMs7GAr7Ila9BL0yL.

[14] *See* M. Murphy, *et al.*, *More public employees striking it rich with 6-figure pensions*, NEWSDAY (Feb. 3, 2013), *available at* http://long.island.newsday.com/search/more-public-employees-striking-it-rich-with-6-figure-pensions-1.4555036.

[15] *See FDNY Marathoner Received $86K Disability Pension for Asthma*, NBC N.Y. (July 6, 2010), *available at* http://www.nbcnewyork.com/news/local/FDNY-Marathoner-Received-Disability-Pension-for-Asthma-97859344.html.

[16] *See* D. Hakim, *City Pension Funds Refuse to Release Recipients' Names*, N.Y. TIMES (July 20, 2011), *available at* http://www.nytimes.com/2011/07/21/nyregion/new-york-city-pension-funds-will-not-release-recipients-names.html.

- Disclosure of retirees' names assists in rooting out cases of individual fraud on the public pension system. For example, a former officer in the Rome Police Department was convicted of illegal "double-dipping" into the retirement system, the type of fraud that can only be detected with access to name of pensioners.[17]

- Disclosure of retirees' names enables Empire Center and other watchdog groups to ensure that dead people do not collect taxpayer-funded pensions. This practice was uncovered at one public pension fund in 2010 based on the availability of pensioners' names.[18]

At bottom, disclosure of the names of retirees drawing public pensions is needed to make other public pension data useful for the specific purposes intended by FOIL. It permits the public to find anomalies in the system, uncover fraud, make informed judgments about government pensions, and generally keep a close eye on the specifics of taxpayer expenditures.

If the new interpretation of Section 89(7) is permitted to stand, the press and public cannot perform their "watchdog" role or effectively oversee the billions of dollars New York State spends to support the pension funds of its civil servants, police personnel, firefighters, teachers and school administrators. This result is manifestly contrary to the purposes of FOIL and is particularly troubling given taxpayers' growing concerns over the fiscal constraints facing local and state

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[17] *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.

[18] *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), http://www.comptroller.nyc.gov/press/2010_releases/pr10-09-088.shtm.

governments.[19] NYS-TRS and NYC-TRS should not be allowed to keep this information hidden.

The decisions below misapply Section 89(7), misread *Veteran Police*, and undermine fundamental State policy embodied in FOIL The holdings are incorrect and should be reversed.

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[19] Political debate has increasingly included claims that expensive public pension plans are creating serious long-term risks for government at all levels. *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://www.nypost.com/p/news/local/mike_detroit_alarm_ixf4cWxI4SV12oVO1Q6X1H ("During Bloomberg's three terms, pension costs have ballooned from $1.4 billion to $8.3 billion."); Y. Roy, *Pension Costs: The Rising Tide*, NEWSDAY (Sept. 1, 2012), at A03 ("Local governments were hit Friday with another big increase in the rates they will have to pay to support New York's public-employee pension fund."); *The Bleeding Statewide*, N.Y. POST (Mar. 6, 2012), *available at* http://www.nypost.com/p/news/opinion/editorials/the_bleeding_statewide_ewLznhqgLQtlrgx6xqkkdI ("The overall burden [of pension spending] on local governments has soared 630 percent since 2002, and every corner of the state is suffering."); M. Breidenbach, *Police chiefs receive pension and government pay by switching departments*, SYRACUSE POST-STANDARD (Oct. 23, 2011), *available at* http://www.syracuse.com/news/index.ssf/2011/10/police_chiefs_receive_pension.html (reporting that "local governments must pay up to 22 percent of their payrolls into the retirement system"). *See generally, e.g.*, *Retirement Benefits: Who Pays the Bill*, THE ECONOMIST (July 27, 2013), *available at* http://www.economist.com/news/united-states/21582282-pensioners-are-pushing-many-cities-and-states-towards-financial-crisis-who-pays-bill; R. Lowenstein, *The Next Crisis: Public Pension Funds*, N.Y. TIMES (June 25, 2010), *available at* http://www.nytimes.com/2010/06/27/magazine/27fob-wwln-t.html; Pension Tsunami, A project of the California Public Policy Center, http://www.pensiontsunami.com/.

II.
DISCLOSURE OF RETIREE NAMES DOES NOT CONSTITUTE AN UNWARRANTED INVASION OF PRIVACY

Supreme Court, New York County, alone, upheld the refusal to disclose retiree names on the independent ground that their release would constitute an unwarranted invasion of privacy within the meaning of Section 87(2)(b). CR. 8-10 (Slip Op. at 3-5). The court reasoned that the Internet makes it "increasingly easy to obtain addresses and other personal information of individuals using only a name," so releasing retiree names "could lead to an unwarranted invasion of privacy" CR. 8-9 (Slip. Op. at 3-4, citing Respondent's motion papers).

In reaching this decision, the court cited no evidence of problems caused by the past release of this information right up through 2011. It also ignored myriad relevant cases holding that FOIL's privacy exemption does *not* prevent disclosure of the names of individuals receiving taxpayer money, and relied solely upon *New York Times Co. v. City of New York Fire Department* ("*N.Y. Times*"), 4 N.Y.3d 477 (2005), even though that case has nothing to do with any privacy interest in the names of public employees or retirees. The decision is plainly incorrect.

A. FOIL's Privacy Exemption Does Not Authorize Retiree Names to be Withheld

FOIL's privacy exemption allows an agency to withhold information only when disclosure "would constitute an *unwarranted* invasion of personal privacy." FOIL § 87(2)(b) (emphasis added). To withhold information under this exemption

an agency bears the burden of (1) establishing the existence of a significant privacy interest in the requested information, and (2) demonstrating that this privacy interest outweighs the public interest in disclosure.[20] *See N.Y. Times*, 4 N.Y.3d at 485; *Bellamy v. NYC Police Dep't*, 59 A.D.3d 353, 354-55 (1st Dep't 2009), *aff'd*, 80 A.D.3d 442 (2011). NYC-TRS, the only agency to invoke this exemption, made no such showing.

1. Retirees have no significant privacy interest in their names.

In FOIL § 89(2)(b), the Legislature identified the types of information it considers private. They include medical information, financial information, and information of "a personal nature reported in confidence." The delineated categories demonstrate that the privacy exemption is meant to apply to information "that would ordinarily and reasonably be regarded as intimate [and] private." *Hanig v. N.Y. State Dep't of Motor Vehicles*, 79 N.Y.2d 106 (1992).

Notably, the Legislature did not designate *names* as a type of private information intended typically to be within the exemption. Names of public employees and former public employees, in particular, are not the type of information considered "intimate and private" under the law. To the contrary:

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[20] This burden falls entirely on the agency seeking to withhold information. FOIL § 89(4)(b) ("the agency involved shall have the burden of proving that such record falls within the provisions of the [exemption]"). *See, e.g.*, *Burns*, 67 N.Y.2d at 566 ("agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption").

> Since tax dollars are spent to pay public employees, the public has a right to know certain facts relating to such employment. . . . [T]he acceptance of public employment carries with it a realization that certain facts relating to such employment must be public knowledge. This includes, for example, a public employee's name, public office address, title and salary.

Burns, 109 A.D.2d 92, 94 (3d Dep't 1985), *aff'd,* 67 N.Y.2d 562 (1986). *See also, e.g., Bumpus v. N.Y.C. Transit Auth.*, 66 A.D.3d 26, 33 (2d Dep't 2009) (noting "[FOIL] § 89 would require the disclosure of the employee's name").

The Supreme Court, New York County, nevertheless postulated that government retirees have a privacy interest in their names because releasing names "'would in effect provide access to the addresses of these retirees, as well as to other personal information.'" CR. 8 (Slip. Op. at 3). But neither that court nor NYC-TRS cited *any* evidence of identity theft or any other adverse consequence resulting from past disclosure under FOIL of the names of government retirees, even though until last year this information had routinely been made available for decades. CR. 16 (Pet. ¶ 9). There is nothing in the record to establish a significant privacy interest in the name of a former government employee, and the agency's unadorned speculation that release of the names could somehow invade privacy is wholly insufficient. *See Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (to meet its burden, an agency seeking to prevent disclosure must "articulate particularized and specific justification" for denying access); *accord M. Farbman & Sons, Inc. v.*

NYC Health & Hosps. Corp., 62 N.Y.2d 75, 83 (1984); *Burns,* 67 N.Y.2d at 566; *see also Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008) (agency invoking FOIL exemption "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm"); *Wash. Post Co. v. N.Y. State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984) (agency may not rely on "conclusory pleading allegations" which are "without the benefit of evidentiary support").

Moreover, keeping the names of retirees secret from the public would not be effective in protecting any tangible privacy interest in any event. Every year, New York City publishes a "civil list" containing the names of all employees of the New York City Government, including teachers.[21] A person whose intention is to steal the identity (or otherwise invade the privacy) of a retiree could simply look up old civil lists to find names of former employees and retirees. Thus, applying the privacy exemption here would serve only to prevent the public from reviewing important information about taxpayer-funded pensions, while doing nothing meaningful to protect any arguable privacy interest.

2. The public interest in overseeing public pension funds outweighs any privacy interest in retiree names.

Even if some privacy interest had been demonstrated, it would need to be balanced against the public interest in disclosure to determine if the privacy

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[21] *See Civil List*, NYC.gov, *available at* http://www.nyc.gov/html/records/htmlgovpub/home.shtml.

exemption could properly be invoked. New York courts repeatedly have held, in a variety of contexts, that releasing names of individuals—including public employees and former employees—does *not* constitute an "unwarranted" invasion of privacy under the FOIL exemption. *See, e.g.*, *Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42 (2011) (disclosing names and business addresses of licensed veterinarians); *Thomas v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 12 Misc. 3d 547 (Sup. Ct. N.Y. Cnty. 2006) (disclosing names of individuals on waiting list for public housing); *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); *Buffalo Teachers Fed'n v. Buffalo Bd. of Educ.*, 156 A.D.2d 1027 (4th Dep't 1989) (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-AO-7717 (names of public employees and retirees subject to disclosure); *accord* FOIL-AO-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 available for

disclosure); FOIL-AO-10873 (June 19, 1998), *available at* http://docs.dos.ny.gov/coog/ftext/f10873.htm (same).[22]

Any privacy interest in a name gives way in these situations to effect FOIL's goal of transparency. FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Fink*, 47 N.Y.2d at 571. The law establishes this right of access to records because information about the actions and expenditures of government is essential for democratic decision making—it enables citizens to hold the institutions of government accountable. As this Court has explained:

> [FOIL] affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing 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.

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[22] Personal information far more sensitive than a name has been ordered disclosed under FOIL, over privacy objections. *See, e.g.*, *Mulgrew v. Bd. of Educ.*, 31 Misc. 3d 296 (Sup. Ct. N.Y. Cnty. 2011) (requiring information concerning public employees' job performance to be disclosed), *aff'd*, 87 A.D.3d 506 (1st Dep't 2011); *Ruberti, Girvin & Ferlazzo, P.C. v. NYS Div. of State Police*, 218 A.D.2d 494 (3d Dep't 1996) (requiring educational background of police department personnel to be disclosed); *Powhida v. City of Albany*, 147 A.D.2d 236 (3d Dep't 1989) (requiring information about investigations into police misconduct to be disclosed); *Physicians Comm. for Responsible Med. v. Hogan*, 2010 WL 4536802, at *7 (Sup. Ct. Albany Cnty. Nov. 3, 2010) (requiring information concerning scientific researchers to be disclosed"); *Rainey v. Levitt*, 138 Misc. 2d 962 (Sup. Ct. N.Y. Cnty. 1988) (requiring Civil Service scores to be disclosed).

Burns, 67 N.Y.2d at 566 (citations omitted); *accord LaRocca v. Bd. of Educ.*, 220 A.D.2d 424, 429 (2d Dep't 1995).

In this case, public interest in the way taxpayer dollars are spent and allocated is particularly high, and the need for the names for proper oversight of public pension expenditures outweighs any possible privacy interest at stake. *See, supra,* pp. 17-21. There can be no serious question that the significant public interest in disclosure of retiree names overwhelms any privacy interest at stake.

B. The Sole Authority Cited Below Does Not Authorize Retiree Names to be Withheld, and Supports Disclosure

In holding that FOIL's privacy exemption applies, the Supreme Court, New York County, relied solely upon this Court's decision in *N.Y. Times*. That case had nothing to do with any privacy interest in the names of public employees or retirees, and it actually *supports* disclosure here.

In that case, the *New York Times* sought disclosure of copies of (1) telephone calls made to emergency services on September 11, 2001, and (2) interviews with firefighters conducted shortly after the attacks. The Fire Department objected on privacy grounds. With respect to the 911 calls, this Court held that the words spoken by the 911 *callers* could be redacted because disclosure of the very personal thoughts of "people confronted, without warning, with the prospect of imminent death," could constitute an unwarranted invasion of privacy. *N.Y. Times*, 4 N.Y.3d at 485. But the Court also held that "the words of the 911 operators" –

i.e., *the public employees answering the calls* – must be disclosed. *Id*. at 486-87. Likewise, the Court held that the interviews with the firefighters "are discloseable under FOIL" (with minor redactions allowable for statements "exceedingly personal in nature") because of the significant public interest in firefighters' recollections from that day. *Id*. at 490.

This point bears emphasizing: *N.Y. Times* holds that statements made by *public employees* (911 operators and firefighters) must be disclosed under FOIL over privacy objections. This Court approved a limited application of the privacy exemption in § 87(2)(b) to withhold profoundly personal statements by individuals *not* employed by the government, in a case involving "extraordinary facts." *Id*. at 484. Disclosing the names of public retirees drawing taxpayer-funded pensions in no way implicates similar privacy interests. The names were long disclosed with no adverse consequences, and no legitimate basis exists now to keep them secret.

CONCLUSION

For each and all of the foregoing reasons, this Court should reverse the decisions appealed from and direct NYS-TRS and NYC-TRS to disclose the names of individuals receiving pensions, as requested by Empire Center.

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Respectfully submitted,

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