COURT OF APPEALS
STATE OF NEW YORK

THE EMPIRE CENTER FOR NEW YORK STATE POLICY, A Project of the Manhattan Institute for Policy Research, Inc., Petitioner-Appellant, -against- NEW YORK CITY POLICE PENSION FUND, Respondent-Respondent.	New York County Clerk's Index No.: 105839/10 Appellate Division, First Department No. 2011/5315

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT upon the accompanying (1) Memorandum in Support of Petitioner-Appellant's Motion for Leave to Appeal, (2) order of the Appellate Division (with Notice of Entry), (3) order of the IAS court, (4) Record in the Appellate Division, and (5) briefs in the Appellate Division, Petitioner-Appellant will move this Court, at the Court of Appeals Hall, Albany, NY, on December 19, 2011, for an order, pursuant to C.P.L.R. 5516 and 22 N.Y.C.R.R. 500.22, granting it leave to appeal to this Court the order of the Appellate Division, First Department, dated October 18, 2011, and for any other or further relief it deems just, proper and necessary.

PLEASE TAKE FURTHER NOTICE THAT answering papers, if any, must be served and filed in the Court of Appeals with proof of service by the return date of this motion.

Dated: New York, New York
December 5, 2011

Respectfully submitted,

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

David A. Schulz
Alia L. Smith
321 West 44th Street, Suite 510
New York, NY 10036
(212) 850-6100; (212) 850-6299 (fax)

Attorneys for Petitioner-Appellant
The Empire Center for New York State Policy

TO:
Michael A. Cardozo
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
Of counsel: Francis F. Caputo and Elizabeth I. Freedman
efreedman@law.nyc.gov

COURT OF APPEALS
STATE OF NEW YORK

THE EMPIRE CENTER FOR NEW YORK STATE POLICY, A Project of the Manhattan Institute for Policy Research, Inc., Petitioner-Appellant, -against- NEW YORK CITY POLICE PENSION FUND, Respondent-Respondent.	New York County Clerk's Index No.: 105839/10 Appellate Division, First Department No. 2011/5315

DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. 500.1(f), Petitioner-Appellant The Empire Center for New York State Policy states that it is a project of the Manhattan Institute for Policy Research, which is 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
December 5, 2011

Respectfully submitted,

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

David A. Schulz
Alia L. Smith
321 West 44th Street, Suite 510
New York, NY 10036
(212) 850-6100; (212) 850-6299 (fax)

Attorneys for Petitioner-Appellant
The Empire Center for New York State Policy

COURT OF APPEALS
STATE OF NEW YORK

THE EMPIRE CENTER FOR NEW YORK STATE POLICY, A Project of the Manhattan Institute for Policy Research, Inc., Petitioner-Appellant, -against- NEW YORK CITY POLICE PENSION FUND, Respondent-Respondent.	New York County Clerk's Index No.: 105839/10 **MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-APPELLANT'S MOTION FOR LEAVE TO APPEAL**

Pursuant to C.P.L.R. 5516 and 22 N.Y.C.R.R. 500.22, Petitioner-Appellant The Empire Center for New York State Policy ("Empire Center") respectfully submits this memorandum in support of its motion for leave to appeal.

PRELIMINARY STATEMENT

The decision of the Appellate Division in this case permits public pension funds for the first time to refuse to inform taxpayers about the payments they make to retired employees—information that has been readily available for decades and that is critical to effective public oversight. In a brief two-paragraph decision, the First Department held that Respondent-Appellee, New York City Police Pension Fund (the "Fund") no longer needs to disclose under the Freedom of Information Law ("FOIL"), Pub. Off. Law § 87, *et seq.*, the names of retired police officers who are receiving taxpayer-funded pensions. The court effected this abrupt change solely on its reading of this Court's decision 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 holding that an exemption in FOIL requires this result—a conclusion not supported by the *Veteran Police* opinion itself, the express statutory language of the exemption, or its consistent, contrary application for the past 28 years.

The decision below is plainly wrong on the law, and if not corrected by this Court will have a significant negative impact far beyond the denial of the specific FOIL request at issue in this case. The decision drastically reinterprets Pub. Off. Law § 89(7) ("Section 89(7)") to exempt from disclosure information concerning the expenditure of billions of dollars in public funds. 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, the decision is now being relied upon by public pension funds across the State to refuse to make available information needed to understand local payrolls, to uncover fraud, and to debate meaningfully the scope of government benefits programs.[1] The ruling undermines this State's broad policy of disclosure, mandated in FOIL, and contravenes the common understanding that "official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

This case presents a novel legal question with a broad impact on issues of extreme public importance. It deserves further review by this Court.

PROCEDURAL HISTORY AND TIMELINESS

A. The FOIL Request at Issue

On January 22, 2010, Empire Center submitted a FOIL request seeking from the Fund "a list of all retired members of the New York Police Department Pension Fund" together with their names, gross retirement benefit for the years 2006 through 2009; indication of which system the retiree belongs to; retirement date; and date of commencement of retirement system membership. (R. 15.)[2] Empire Center is a non-profit think tank that operates a web portal through which taxpayers can share, analyze and

---

[1] *See, e.g.*, Jacob Gershman, *Appeals Court Blocks Access to Police Pension Data*, THE WALL STREET JOURNAL, Oct. 18, 2011 *available at* http://blogs.wsj.com/metropolis/2011/10/18/appeals-court-blocks-access-to-police-pension-data/ (as a result of ruling in this case, administrators of other city pension funds have stopped releasing the names of people collecting pensions).

[2] References to the Record on Appeal, submitted herewith, will be cited as "R.__".

compare data from counties, cities, towns, villages, school districts and public authorities throughout New York.[3] Its prior requests for pension data had regularly been answered by public pension funds.[4]

In response to the routine request here, the Fund changed course and refused to provide the names of its retirees who were receiving benefits. (R. 16.) An immediate appeal by Empire Center was summarily denied on April 1, 2010. (R. 17-18.) The appeal officer pointed for authority to Section 89(7), which provides, in pertinent part:

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

Ignoring the provision that permits only the *address* of a "retiree" to be withheld, the appeal officer cited the separate provision that exempts from disclosure the *names and addresses* of "beneficiaries of a public employee's retirement system." He asserted that the retirees are "beneficiaries" within

---

[3] The Empire Center's website contains data about all areas of government spending, and gives New Yorkers a clearer view of how their state and local tax dollars are spent. *See* SEETHROUGHNY, http://www.seethroughny.net.

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

the meaning of Section 89(7), even though the statute uses the terms "retiree" and "beneficiary" distinctly and does not exempt retiree names from disclosure. (R. 17.)

The appeal officer also advanced the counter-intuitive theory that names of retired police officers are exempt from disclosure under FOIL's personal privacy exemption and life and safety exemption, Pub. Off. Law §§ 87(2)(b) and (f), speculating that disclosure of the names could possibly subject police officers' homes to a greater risk of burglary because gun thieves would consider retired police officers more likely than others to have a gun at home. (R. 17-18.)

B. Proceedings in the IAS Court

On April 23, 2010, Empire Center timely filed a petition under Article 78 in Supreme Court, New York County, challenging the Fund's decision and seeking to compel release of the requested pension information. (R. 11-14.) On December 30, 2010, the IAS court (Carol E. Huff, J.S.C.) denied the petition in a brief opinion that adopted the reasoning of the Fund in full. The court noted that both "the name and address of a 'beneficiary' of a public employees' retirement system" may be withheld under Pub. Off. L. § 89(7), and agreed that a "retiree" could be considered a "beneficiary" within the meaning of this provision, without commenting on the separate provision of the same statute that does not permit the name of a "retiree" to be withheld and without reconciling the inconsistency created by the Fund's reading of the law. (R. 6-9.)

The court also agreed that the Fund might properly withhold the names of retirees under the privacy and safety exemptions, crediting the Funds' illogical conjecture about the potential for burglary—conjecture for which the Fund could advance no evidentiary support. Despite the public availability of police retiree names for decades, the Fund was unable to cite a single instance of a robbery tied in any way to the disclosure of pension information.

C. Proceedings in the Appellate Division

Following Empire Center's timely appeal, the Appellate Division, First Department on October 18, 2011, affirmed the holding of the IAS court solely on the basis of this Court's decision in *Veteran Police*. Op. at 1-2. The First Department read the *Veteran Police* decision to hold that Section 89(7) "exempts from disclosure *both* the names and addresses of retirees of the New York City Police Department receiving pensions and annuities" (emphasis added), even though the case held only that a *request* for both the names *and* addresses of retirees could properly be denied. The short opinion in that case did not address the significance of the different provisions in

Section 89(7) for "retirees" and "beneficiaries," and did not need to in resolving the issue presented. The Appellate Division did not explain how the *Veteran Police* holding applied to the narrower request here for *names alone*, did not attempt to show how its reading of Section 89(7) was consistent with established rules of statutory construction, and did not address the internal inconsistency created by the reading it applied.[5]

D. Timeliness of the Motion for Leave to Appeal

Notice of Entry of the Appellate Division decision was served on December 1, 2011. This motion for leave to appeal is timely made within 30 days of that service. *See* C.P.L.R. 5513(b).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal because the denial of Empire Center's Article 78 petition, affirmed by the Appellate Division, constitutes a final order within the meaning of C.P.L.R. 5602(a)(1).

QUESTION PRESENTED FOR REVIEW

Is the provision in Pub. Off. Law § 89(7) that exempts from FOIL's disclosure obligation the "name and address of a beneficiary of a public

---

[5] The First Department did not address the IAS Court's separate conclusion that the names of the police officers are exempt from disclosure under FOIL's privacy and safety exemptions.

employees retirement system" limited to the name and address of the beneficiary designated by a public employee to receive his or her pension benefits in the event of death, as public agencies and the Committee on Open Government have understood and consistently applied the exemption since it was enacted 28 years ago?

The First Department answered this question "No."

ARGUMENT

I.
THE DECISION BELOW INVOLVES AN ISSUE OF OVERWHELMING PUBLIC IMPORTANCE AND HAS AN IMPACT FAR BEYOND THIS SPECIFIC CASE

Review should be granted because the decision below presents a novel issue of extreme public importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4) (Court addresses issues that are "novel or of pubic importance"). This Court's FOIL decisions over the past 30 years make abundantly clear that agency decisions limiting the public's right to access government information are indeed a matter of public importance in this State. *See, e.g.*, *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252 (1987) (finding that any "narrow construction" of FOIL defeats an "important public policy"); *Weston v. Sloan*, 84 N.Y.2d 462 (1994) (recognizing the public importance of enforcing FOIL's disclosure obligation). Beyond the importance of disclosure under FOIL generally, the public has a particular interest in the pension information sought here. It involves the expenditure of billions of taxpayer dollars and the withheld information is needed to root out waste and fraud, and to inform public debate over government finances.

A. **The Decision Undermines the Policy of Disclosure Mandated by the Legislature**

The reading given to Section 89(7) contravenes this State's policy of broad disclosure of government information. In enacting FOIL, the Legislature stressed the critical importance of the public policy the statute embraced, 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.

Pub. Off. Law § 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).

The Legislature and this Court have directed a broad interpretation of FOIL because information about the actions and expenditures of government is essential for democratic decision-making, inhibits fraud, and allows the institutions of government to be held accountable. 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 v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410 (1995).

By sanctioning the Fund to withhold name of retirees receiving benefits, the decision below contravenes the fundamental policy of disclosure decreed in FOIL. The decision warrants review because it frustrates the ability of the public "to make intelligent, informed choices" about government finances or to "expos[e] waste, negligence and abuse" in the public pension system. *Id.*

B. The Decision Adversely Impacts the Public Interest Far Beyond the Specific FOIL Request At Issue

The decision in this case will have a major, adverse impact on the public interest far beyond the denial of the Fund's specific FOIL request.

Since the IAS Court initially upheld the Fund's re-interpretation of Section 89(7), other state pension funds have followed suit and—for the first time ever—have also begun rejecting FOIL requests for the names of retirees.[6]

The loss of this information is a matter of significant concern. Empire Center collects and publishes pensioner information specifically because:

> [T]axpayers 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.

Legal Battle For Public Access Heats Up, http://www.empirecenter.org/AboutUS/news_releases/2011/01/ppf13111.cfm. The information gathered by Empire Center is used by "[a]cademic researchers, members of the

---

[6] *See, e.g.*, Danny 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 (after ruling in this case, "the staffs of other city funds also stopped releasing names of pensioners"); Jacob Gersham, *Appeals Court Blocks Access to Police Pension Data*, THE WALL STREET JOURNAL, Oct. 18, 2011 ("administrators of other city pension funds, including the largest one, the New York City Employee Retirement System, stopped releasing the names of people collecting pensions"); Tim Hoefer, *Transparency Eclipse*, THE TORCH (Empire Center), Nov. 23, 2011, *available at* http://www.nytorch.com/?p=4838 (New York State Teachers' Retirement System has cited the decision in this case as grounds for reversing its policy of releasing the names of pension recipients).

public, and the press . . . to highlight incidents of excessively high pensions, wasteful spending, and abuse." Chuck Bennett, *Cop pensions stay undercover: court*, NEW YORK POST, Oct. 19, 2011, *available at* http://www.nypost.com/p/news/local/cop_pensions_stay_undercover_court_rUc3RCMs7GAr7Ila9BL0yL.

Indeed, information 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." Jacob Gersham, *Appeals Court Blocks Access to Police Pension Data*, THE WALL STREET JOURNAL, Oct. 18, 2011, *available at*, http://blogs.wjs.com/metroplis/2011/10/18/appeals-court-blocks-access-to-police-pension-data/. Past use of this information confirms that disclosure of pensioner names (as opposed to generic spending data) is hugely 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.** Recent examples include a news report about whether a former officer should have received an $86,000 disability pension for asthma when he is able to run a six-minute mile, and debate about whether "[a]n NYPD captain who did time at Rikers Island for assaulting his cop mistress" should be permitted to "keep his lucrative pension."[7]

[7] *See FDNY Marathoner Received $86K Disability Pension for Asthma*, NBC New York, July 6, 2010, *available at*

- **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."[8]

- **Disclosure of retirees' names assists in rooting out cases of individual fraud on the public pension system.** Earlier this year, for example, a former officer in the Rome police Department was convicted of "double-dipping" into the retirement system, the type of fraud that can only be detected with access to name of pensioners.[9]

- **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 just recently at one public pension fund.[10]

At bottom, disclosure of retirees' names is essential to make pension data truly useful for the very purposes intended by FOIL. It permits the public to

---

http://www.nbcnewyork.com/news/local/FDNY-Marathoner-Received-Disability-Pension-for-Asthma-97859344.html; Philip Messing, '*Beat*' *cop is fired*," NEW YORK POST, Feb. 14, 2011, *available at* http://www.nypost.com/p/news/local/manhattan/beat_cop_is_fired_y6uI40xEwH47B6XTmK0RfN.

[8] *See* Danny Hakim, *City Pension Funds Refuse to Release Recipients' Names*, N.Y. TIMES, July 20, 2011.

[9] *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.

[10] *See, e.g.*, Statement, Office of the NYC Comptroller, *Comptroller Liu Uncovers Pension Fraud – Suspects Cash in on Dead Pensioners*, Sept. 27, 2010, *available at* http://www.comptroller.nyc.gov/press/2010_releases/pr10-09-088.shtm.

find anomalies in the system, uncover fraud, make informed judgments about public pensions, and generally keep a close eye on the specifics of taxpayer expenditures.

As a result of the new interpretation of Section 89(7) in this case, the press and public cannot perform their "watchdog" role. This result is manifestly contrary to the public interest and particularly troubling given taxpayers' growing concerns over the fiscal constraints facing local and state governments. New York City contributed $2.2 billion to the police pension fund in fiscal year 2011, and is projected to spend $2.7 billion next year. C. Bennett, *Cop pensions stay undercover: court*, NEW YORK POST, Oct. 19, 2011. Altogether, New York City's support of the pension funds for civil servants, police personnel, firefighters, teachers and school administrators are projected to cost taxpayers $8.4 billion in fiscal 2012. *NYC pension board said to defer disclosure vote*, BLOOMBERG NEWS, June 9, 2011.

Political debate has increasingly included claims that such expensive public pension plans are creating serious long-term risks for government at all levels.[11] For example, the Syracuse *Post-Standard* just recently reported on the pressure to control the cost of the State's $147 billion pension system:

---

[11] *See, e.g.*, Roger Lowenstein, *The Next Crisis: Public Pension Funds*, THE N.Y. TIMES, June 25, 2010, available at http://www.nytimes.com/2010/06/27/magazine/27fob-wwln-t.html; *The*

> In 1991, retirees made up 27 percent of the state pension fund. By 2011, that number grew to 36 percent. The number of retired police and firefighters who belong to the pension fund nearly equals the number of active police and firefighters. It's up to taxpayers to keep the system healthy. This year, local governments must pay up to 22 percent of their payrolls into the retirement system.

M. Breidenback, *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.[12] In this climate, the decision below to withdraw important, previously available information from the public is particularly disturbing.

Given its far-reaching adverse impact, the interpretation of Section 89(7) adopted by the Appellate Division deserves further review by this Court.

Pension Crisis: Promises Unkept, CBS News, Feb. 20, 2011, *available at* http://www.cbsnews.com/stories/2011/02/20/sunday/main20034120.shtml; David Paterson, *Gov. David Paterson Sounds Pension Alarm: On His Last Day in Office, Urges Focus on Crisis*, N.Y. DAILY NEWS, Dec. 31, 2010, *available at* http://articles.nydailynews.com/2010-12-31/news/27085937_1_public-pension-fund-returns-solvency. *See also*, Pension Tsunami, *available at* http://www.pensiontsunami.com/ (reporting on "multiple pension crises that are about to drown America's taxpayers").

[12] *See also New York's Exploding Pension Costs*, Report of the Empire Center for New York State Policy, Dec. 7, 2010, *available at* http://www.empirecenter.org/Special-Reports/2010/12/pensionexplosion120710.cfm (explaining the hundreds of billions of dollars necessary for pension funding).

II.
THE DECISION BELOW MISCONSTRUES THE PRIOR PRECEDENT OF THIS COURT AND DISREGARDS CLEAR STATUTORY LANGUAGE

Review should be granted for the further reason that the novel ruling below is fundamentally wrong on a significant issue of law. It misreads as controlling an inapposite opinion by this Court, disregards settled principles of statutory construction, and violates the fundamental FOIL principle that exceptions to disclosure are to be narrowly construed in order to achieve the statute's core objective of government transparency. Such plain errors of law, with such a significant adverse impact on the public interest, warrant the attention of this Court.

A. The First Department Misconstrued This Court's Holding in *Veteran Police*

The holding below misconstrues this Court's ruling in *Veteran Police*. The only explanation articulated by the First Department for its reversal of the long-standing application of Section 89(7) was its view that the *Veteran Police* opinion held both the names and addresses of police "retirees" to be exempt from disclosure. The decision, however, holds no such thing. The FOIL request in that case sought *both* the "names and addresses" of police "retirees," and the Court therefore ruled, without significant discussion, that the newly-enacted Section 89(7) precluded *that* request. The Court did not address the separate meanings of "retiree" and "beneficiary" as distinctly used in Section 89(7) because it did not need to do so—the request before it sought the addresses of retirees and was therefore plainly precluded under any possible reading.

Veteran Police is not controlling here, and review is necessary to correct the Appellate Division's fundamental misreading of that decision.

B. The New Interpretation of § 89(7) Adopted Below Ignores Its Express Language and and Renders the Statute Internally Inconsistent

The reading of Section 89(7) adopted below also violates basic principles of statutory construction and makes no sense. Section 89(7) has two clauses: The first provides that "[n]othing 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." Pub. Off. L. § 89(7) (emphasis added). The second clause provides, "nor shall anything in this article require the disclosure of the *name or home address* of a *beneficiary* of a public employees' retirement system . . ." *Id.* (emphasis added). Reading "beneficiary" to mean the same thing as "retiree" renders the statute internally inconsistent and violates a fundamental principle of statutory construction, by making the more limited restriction on "retiree" information entirely 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").

Nothing in the text of the Section 89(7) supports the reading applied below rendering the distinct terms "retirees" and "beneficiaries" coterminous. If the Legislature intended a "retiree" to mean the same thing as "beneficiary of a public employees' retirement system," then it would not have delineated the two groups as it did. Review should be granted because the reading of Section 89(7) adopted below is plainly incorrect. Courts must consider a statute as a whole and give effect and meaning to the *entire* statute. *Friedman v. Conn. Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007).

C. The New Interpretation of § 89(7) Adopted Below Conflicts with Decades of Contrary Interpretation

The reading of Section 89(7) adopted in this case represents a complete reversal of the way the statute has consistently been interpreted since it was first enacted. The advisory opinions issued over the past two decades by the New York Committee on Open Government – the state agency responsible for "overseeing and advising with respect to the Freedom of Information Law,"— confirms that Section 89(7) has, until now, been understood to treat "beneficiaries" as distinct from "retirees" for purposes of FOIL's disclosure obligations:

- Under § 89(7), **"the name of a retiree is not the same as the name of the person designated by a retiree as a beneficiary," and "the names of retirees must be disclosed."** FOIL-AO-7717, May 19, 1993, *available at* http://www.dos.state.ny.us/coog/ftext/f7717.htm.

- **"[T]he names and titles" of members of retirement systems are subject to disclosure** under FOIL. FOIL-AO-8775, Apr. 13, 1995, *available at* http://www.dos.state.ny.us/coog/ftext/f8775.htm.

- **Records naming "'all retired pensioned employees'" should be disclosed** pursuant to FOIL. FOIL-AO-9742, Oct. 24, 1996, *available at* http://www.dos.state.ny.us/coog/ftext/f9742.htm.

- **"[I]t is clear that a beneficiary is a person designated by a public employee to receive pension benefits in the event of the employee's death."** FOIL-AO-17955, Jan. 8, 2010, *available at* http://www.dos.state.ny.us/coog/ftext/f17955.html.

Indeed, until the Fund here denied Empire Center's request, pension fund systems across the state had routinely provided the names of pensioners and the amount of their pensions in response to FOIL requests. *See, e.g.*, R. 44, ¶ 3 (through prior requests, Empire Center obtained "the names of virtually every active and retired member of local and state police agencies in the State of New York"). Even the Fund acknowledges that, until now, it has released the names of its retirees and never previously read Section

89(7) to permit them to be withheld. *See* R. 33, ¶ 5 (the Fund "did release this information . . . in the past").

This Court should grant review because agencies and courts may not disregard rules enacted by the Legislature, even if they consider them unwise. Because other pension funds are already applying the reading endorsed by the Appellate Division, review is urgently needed to correct the fundamental error of law by the courts below.

CONCLUSION

For the foregoing reasons, Empire Center respectfully requests that this Court grant its motion for leave to appeal.

Dated: New York, New York
December 5, 2011

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

David A. Schulz
Alia L. Smith
321 West 44th Street, Suite 510
New York, NY 10036
(212) 850-6100; (212) 850-6299 (fax)

Attorneys for Petitioner-Appellant
The Empire Center for New York State Policy

DECISION AND ORDER OF JUSTICE CAROL E. HUFF, DATED DECEMBER 6, 2010 AND ENTERED DECEMBER 30, 2010 [6-9]

SCANNED ON 1/3/2011

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

PRESENT: CAROL E. HUFF, Justice — PART 32

Index Number : 105839/2010
EMPIRE CENTER FOR NYS POLICY
vs.
NYC POLICE PENSION FUND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

E 12/13/10 ac

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
DEC 30 2010
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
DEC 10 2010
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: DEC 06 2010

CAROL E. HUFF, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

---x

THE EMPIRE CENTER FOR NEW YORK STATE POLICY, A Project of the Manhattan Institute for Policy Research, Inc.,	:	Index No. 105839/10
Petitioner,	:	
- against -	:	
NEW YORK CITY POLICE PENSION FUND,	:	
Respondent.	:	

---x

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks an order directing full compliance with its Freedom of Information Law request, made pursuant to Public Officers Law § 89(4)(b), for information in connection with all retired members of respondent, the New York City Police Pension Fund (that is, all retired New York City police officers receiving a pension).

By letter dated January 22, 2010, petitioner sought the following information for each retiree: name; retirement system registration number; last employer; gross retirement benefits for calendar years 2006, 2007, 2008 and 2009; indication of which system the retiree belongs to; retirement date; and date of commencement of retirement system membership.

The Pension Fund provided all of the information in its possession (it contends there is no "retirement system registration number") except for the names of the retirees. Petitioner appealed the decision not to provide the names, and the appeal was denied in a letter dated April 1, 2010, on the grounds that POL § 89(7) exempts the names of beneficiaries of public employees' retirement systems, and that the disclosure of the names would endanger the retirees, who are former police officers.

Respondent first contends that petitioner lacks standing as a self-described "project," but petitioner does have standing as a non-profit corporation organized and existing under the laws of New York. Respondent also contends that petitioner is barred by the four-month statute of limitations pertaining to Article 78 proceedings (CPLR 217[1]), arguing that its 2010 request is merely duplicative of its 2009 request. However, petitioner's seeking an additional year's information in its 2010 request is sufficient to establish a that it is non-duplicative.

Public Officers Law § 84 is a Legislative declaration that the public "should have access to the records of government in accordance with the provisions of this article." Such access is not unrestricted. For example, POL § 87 provides that agencies may deny access where the information would constitute an unwarranted invasion of privacy (§ 87[2][b]) or could endanger the life or safety of any person (§ 87[2][b]).

POL § 89(7) further provides that the name and address of a "beneficiary" of a public employees' retirement system should not be disclosed. In New York Veteran Police Assn. v New York City Police Dept. Article I Pension Fund, 61 NY2d 659, 660 (1983), the Court of Appeals found that this provision applies to "all retirees of the New York City Police Department currently receiving pensions and annuities."

In addition, the argument that § 87(2)(b) applies is persuasive (endangering of life or safety). Considering the ease with which internet searches using only a name can identify the address associated with it, and the common perception that retired police officers possess firearms, the possibility of such retirees becoming the target of burglaries is significant.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: DEC 06 2010

CAROL E. HUFF
J.S.C.

Norman Goodman
Clerk

FILED
DEC 30 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

THE EMPIRE CENTER FOR NEW YORK STATE POLICY, A Project of the Manhattan Institute for Policy Research, Inc., Petitioner-Appellant, -against- NEW YORK CITY POLICE PENSION FUND, Respondent-Respondent.	New York County Clerk's Index No.: 105839/10 Appellate Division, First Department No. 2011/5315

NOTICE OF ENTRY

PLEASE TAKE NOTICE THAT the annexed Order was entered by the Appellate Division, First Department, on October 18, 2011.

Dated: New York, New York
December 1, 2011

Respectfully submitted,

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

David A. Schulz
Alia L. Smith
321 West 44th Street, Suite 510
New York, NY 10036
(212) 850-6100; (212) 850-6299 (fax)

Attorneys for Petitioner-Appellant
The Empire Center for New York State Policy

TO:
Michael A. Cardozo
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
Of counsel: Francis F. Caputo and Elizabeth I. Freedman
efreedman@law.nyc.gov

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 18, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5315 The Empire Center for New York State Policy, etc., Petitioner-Appellant, Index 105839/10

-against-

New York City Police Pension Fund, Respondent-Respondent.

Levine Sullivan Koch & Schulz, LLP, New York (David A. Schulz of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered December 30, 2010, denying the petition for an order directing respondent to comply with petitioner's Freedom of Information Law (FOIL) request for the names of all respondent's retired members, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

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 [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.*

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 18, 2011

CLERK

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

THE EMPIRE CENTER FOR NEW YORK STATE POLICY, A Project of the Manhattan Institute for Policy Research, Inc., Petitioner-Appellant, -against- NEW YORK CITY POLICE PENSION FUND, Respondent-Respondent.	Index No. 105839/10 **AFFIDAVT OF SERVICE**

STATE OF NEW YORK)
) **SS.**
COUNTY OF NEW YORK)

JESSICA CARLSEN, being duly sworn, deposes and says as follows:

1. I am a legal administrative assistant with the law firm of Levine Sullivan Koch & Schulz, L.L.P. I am not a party to this action, am over 18 years of age, and reside in Monmouth County, New Jersey.

2. On December 1, 2011, I caused a true copy of the annexed Notice of Entry and attached Order to be served by US first class mail upon:

Elizabeth I. Freedman
Office of the Corporation Counsel
for the City of New York
100 Church Street
New York, NY 10007.

Jessica Carlsen
Jessica Carlsen

Subscribed and sworn to before me
this 1st day of December, 2011

Scott Bailey
Notary Public

SCOTT BAILEY
Notary Public, State of New York
No. 01BA6201502
Qualified in New York County
Commission Expires March 2, 2013

{00461255;v1}