Index No. 151019/2016
Justice Cynthia Kern

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

In the Matter of

JESSICA HUSEMAN,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent,

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

# RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS VERIFIED ANSWER

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## PRELIMINARY STATEMENT

Petitioner Jessica Huseman ("Petitioner") brings this Article 78 proceeding pursuant to the Freedom of Information Law, Public Officers Law ("Pub. Officers Law") §§ 84, *et seq.* ("FOIL"). Petitioner seeks an order directing Respondent New York City Department of Education ("DOE") to produce certain materials Petitioner sought through four written FOIL requests. DOE withheld portions of some of the materials responsive to one of these requests on the grounds that federal educational privacy law prohibits their disclosure, and Petitioner challenges this partial withholding. Petitioner further alleges that the three remaining FOIL requests have been constructively denied. Finally, Petitioner seeks declaratory relief in regard to DOE's FOIL practices and attorney's fees.

With respect to the materials which DOE withheld, the federal Family Educational Rights and Privacy Act (FERPA) prohibits the disclosure of the detailed information concerning special education needs of individual students which appears in these materials. Federal regulations make clear that it is not sufficient to redact "personal identifiers" such as names and

Social Security numbers if the remaining information would allow "a reasonable member of the school community" to identify the student described in the records. Petitioner's demand that DOE segregate the information that DOE is prohibited from disclosing under FERPA from the information that may be disclosed, for each of the thousands of records she seeks, would require hundreds of hours of effort and would constitute an unreasonable burden on DOE, particularly since DOE cannot assign this sensitive work to an outside contractor.

With respect to the FOIL requests that Petitioner claims DOE constructively denied, Petitioner's claim is without merit. DOE at no time denied Petitioner's requests, and has continually provided her with updated estimates as to when these records would likely be produced. Regardless, Petitioner's claim of constructive denial is moot, as DOE has now either produced to her the records responsive to these requests or provided her with a date certain by which the records will be produced.

The amount of time that DOE took or has taken to produce these records is in all respects reasonable, given the volume, nature, and breadth of material Petitioner has sought. Petitioner submitted eight FOIL requests to DOE over the course of approximately five months, four requests of which are at issue in this proceeding. Petitioner's requests during this time period sought fourteen different types of records in total, many of which are voluminous and some of which contain significant amounts of material exempt from disclosure. DOE's ongoing efforts to diligently respond to these requests – along with hundreds of other FOIL requests from other sources – have led to near-monthly disclosures of records to Petitioner over the past six months. Indeed, over the past six months the DOE has produced to Petitioner approximately 347,600 records in response to her various FOIL requests. DOE's efforts with respect to Petitioner's various requests have been in all respects lawful, proper, and reasonable.

Further, while Petitioner seeks a declaration that DOE's practice of issuing extension letters for FOIL requests is improper, declaratory relief is unavailable in an Article 78 proceeding brought pursuant to FOIL. To the contrary, the exclusive remedy provided by the FOIL statute is for judicial review of the denial or constructive denial of a FOIL request. In addition, even if Petitioner's claims in this regard were proper, the Appellate Division, First Department ("First Department") has held that extension letters permissibly extend an agency's time to respond under the FOIL statute.

Finally, it is premature to address the issue of attorney's fee as Petitioner has not been adjudicated as substantially prevailing.

## STATEMENT OF FACTS

Respondent respectfully refers the Court to the Affirmation of Joseph Baranello, dated April 4, 2016 ("Baranello Aff."), and to the Affirmative Statement of Pertinent and Material Facts contained within Respondent's Verified Answer, for a complete description of the substance and procedural history of the FOIL requests at issue, including Petitioner's FOIL request of June 11, 2015 seeking data from DOE's Special Education Call Center (the "First Request"), Petitioner's FOIL request of June 11, 2015 seeking purchase records for instructional technology (the "Second Request"), Petitioner's FOIL request of July 1, 2015 seeking four separate types of records (the "Third Request"), and Petitioner's FOIL request of September 18, 2015 seeking emails to and from DOE's FOIL office in relation to her other FOIL requests (the "Fourth Request"), as well as a description of DOE's ongoing efforts to respond to numerous other FOIL requests made by Petitioner and a description of the basis for DOE's withholding of responsive materials from its response to the First Request pursuant to Pub. Officers Law § 87(2)(a).

## ARGUMENT

### POINT I

### DOE IS NOT REQUIRED TO UNDERTAKE THE EXTRAORDINARY EFFORT REQUIRED TO SEPARATE DISCLOSABLE MATERIAL, IF ANY, FROM NON-DISCLOSABLE MATERIAL FOR THE THOUSANDS OF RECORDS SOUGHT IN THE FIRST REQUEST

Within approximately three months of Petitioner's submission of the First Request, DOE produced an Excel spreadsheet containing approximately 2,900 records responsive to Petitioner's request for data regarding complaints made to the Special Education Call Center during the specified time period. (Baranello Aff. ¶ 14.) The records produced included information on the school to which each complaint pertained where available, the date the complaint was opened, the status of the complaint, the resolution status, the source of the contact, the topic area to which the complaint related, and the sub-topic area to which the complaint related. (Id.) DOE did not produce detailed narratives of the content of each complaint or the actions taken by DOE to address each complaint. (Id. ¶ 15.) DOE did not produce these fields because it determined that it was prohibited from doing so by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

#### A. The Requirements of FERPA

FOIL provides an exemption for records that are specifically exempted from disclosure by state or federal statute. Pub. Officers Law § 87(2)(a). Access to education records of students, and specifically to personally identifiable information of students and their families, is governed by FERPA, 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. Part 99. FERPA prohibits the disclosure of such records, absent written consent from the parent of the student, a subpoena or court order, or the applicability of some other exception. 20 U.S.C. §

1232g. The statute further provides that federal funds for educational programs shall be withheld from a school district that violates FERPA. 20 U.S.C. § 1232g(b)(2).

The U.S. Department of Education has emphasized, most notably in the preamble to the 2008 final rule that revised (among many other provisions) the definition of "personally identifiable information" found in the regulations promulgated under FERPA, that "FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students." 73 Fed. Reg. 74,806, 78,834 (Dec. 9, 2008). The definition of personally identifiable information therefore encompasses various types of information, including basic information like a student's name, address, date of birth, and other direct or indirect identifiers. See 34 C.F.R. § 99.3. While FERPA's implementing regulations include a de-identification provision, which permits an educational agency such as DOE to release education records without consent after removal of all personally identifiable information, it also requires the educational agency to make "a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably identifiable information." 34 C.F.R. § 99.31(b).

In the context of determining whether records constitute personally identifiable information and, if so, how to de-identify such records, the U.S. Department of Education has indicated that "[t]he simple removal of nominal or direct identifiers, such as name and SSN (or other ID number) does not necessarily avoid the release of personally identifiable information." 73 Fed. Reg. 74,806, 74,831. In fact, FERPA's regulations define "personally identifiable information" very broadly, to encompass other types of information, including information that is linkable to a specific student and would allow a "reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with

reasonable certainty." 34 C.F.R. § 99.3. Moreover, as the U.S. Department of Education noted in the preamble to the 2008 revisions, this new standard was promulgated to afford greater and clearer protection against the disclosure of student records than was provided by the standard it replaced. 73 Fed. Reg. 73,806, 74,831.

Virtually all of the detailed narratives sought by Petitioner in the First Request contain direct personal identifiers such as student and parent names, dates of birth, student ID numbers, home addresses, and home phone numbers. (Baranello Aff. ¶ 20.) Moreover, DOE determined that redacting these personal identifiers from the detailed narratives would be insufficient to satisfy FERPA's demanding standards. (Id.) Because the complaints all relate to special education, they describe potentially unique combinations of student disabilities and educational services, especially since the data identifies (as Petitioner requested) the particular school to which each complaint relates. (See id. ¶¶ 20-21.)

For example, many of the complaints concern situations in which a student has received a new or different diagnosis, necessitating new or different educational or related services. Because a specific set of special education services at a specific school can be unique, a reasonable member of the school community could read such a detailed narrative and identify the student by the services described, thereby learning private information about the student's disability status. (See id. ¶ 21.)

Indeed, even when the services described in a complaint are not unique, but merely uncommon, the detailed narratives frequently contain other information that, in combination, would allow a reasonable member of the school community to identify the student with reasonable certainty. For example, the detailed narratives can contain information regarding the student's grade level, the names of the student's teacher and other service providers, and

whether the student has siblings at the school (and whether those siblings also receive special education services). While any of these pieces of information alone may not directly identify a student, in combination they pose a serious risk that a reasonable member of the school community would be able to identify the student described in the complaint. (See id. ¶ 22.)

Accordingly, DOE reasonably determined that FERPA prohibits the release of such detailed and sensitive information regarding the special education needs and services of individual students, and withheld this information from the records produced to Petitioner in response to the First Request.

**B. Petitioner's Demand for Redaction**

Petitioner argues that even if the records she sought in the First Request contain information that DOE is prohibited from producing under FERPA, "DOE was required to redact that information, not withhold the entire data field." (Memorandum in Support of Verified Petition (hereinafter "Pet'r's Mem.") at 14.) But even if these fields contain data that could be produced subject to redaction without violating FERPA, the extraordinary effort required to redact the thousands of records sought by Petitioner, in a manner that satisfies that strict standards imposed by FERPA, would require many hundreds of hours of work and would constitute an unreasonable burden on DOE.

Each of the approximately 2,900 records responsive to the First Request contains a detailed narrative of a complaint that must be redacted to at least some extent, and that may need to be redacted completely in many cases. A large number of the records also contain "notes" on the actions taken by DOE employees to resolve the complaint. The notes typically contain the text of emails sent or summaries of phone calls or meetings conducted in the course

of resolving a complaint, and require significant redaction of student-specific information.[1] In some cases, these notes also incorporate internal correspondence among DOE employees deliberating over the proper way to resolve a complaint, and therefore constitute pre-decisional materials subject to FOIL's intra-agency exemption. Pub. Officers Law. § 87(2)(g); (see Baranello Aff. ¶ 24.)

There are approximately 2,200 such "notes" that correspond to the approximately 2,900 records responsive to the First Request. In addition to the redaction of direct personal identifiers in these notes, DOE would be required to compare the information in each detailed complaint narrative with the information in its associated notes, to ensure that the combination of this information does not paint such a unique portrait that a reasonable member of the school community could identify the student with reasonable certainty. For example, even if a complaint does not describe the student's particular special education services in detail, the associated notes frequently include emails from the student's principal, teacher, and/or service providers that carefully review the student's particular services as part of addressing how to resolve the complaint. (Id. ¶ 25.)

DOE estimates that it will take an average of approximately 8 minutes to redact each of the approximately 2,900 records and their associated "notes." This would require approximately 386 hours of redaction time. In addition to the time necessary to redact each record, because of the sensitive nature of the student-specific information contained in these records, each record would need to be carefully reviewed to ensure that its disclosure, in redacted

[1] Each of the approximately 2,900 responsive records also contains a data field that briefly summarizes the actions taken by DOE and typically refers to the "notes" for more detailed information. These summaries of actions taken by DOE also contain student-specific information and therefore may not be disclosed without significant redaction for the same reasons that apply to the detailed complaint narratives and the "notes." (See Baranello Aff. ¶ 24.)

form, would not violate FERPA. The DOE estimates that this careful review of the redactions made to the approximately 2,900 records and their approximately 2,200 associated notes would require an average of an additional 6 minutes per record, because the reviewer would need to conduct a substantially similar comparison of all of the information available in each record and its associated notes to ensure that the redactions required by FERPA were performed. This would require approximately 290 hours to review the redactions, for a total of approximately 676 hours. In many cases, officials at individual schools would need to be consulted about the potential uniqueness of the substance of a special education complaint, requiring even more review time. (Id. ¶ 26.)

The FOIL statute provides that:

> [a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article.

Pub. Officers Law § 89(3) (emphasis added). Thus, where an agency cannot engage an outside professional service, a request can properly be denied if the request is voluminous or if providing the requested records is burdensome. This reading is supported by the subsequent text of § 89(3)(a), which provides that "[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so." Id. (emphasis added).

Thus, an agency is not required to provide records in response to a FOIL request if the effort required to do so is unreasonable. For example, in New York Comm. for Occupational Safety and Health v. Bloomberg, 72 A.D.3d 153 (1st Dep't 2010), the City argued,

in part, that responding to petitioner's extensive FOIL request would be burdensome and would unreasonably tax limited City resources. The First Department noted that the FOIL request "presents a situation where the volume of records is undisputedly large, and those records not only need to be retrieved and reproduced from a wide variety of sources, but redacted as well." Id. at 162. The Court recognized the validity of the City's position, but because the respondent agency did not allege the burden imposed by the request in sufficient detail, it ordered a hearing to determine, inter alia, "whether an undue burden would be created by requiring the City to respond to [petitioner's] request." Id. See also Cnty. of Suffolk v. Long Is. Power Auth., 119 A.D.3d 940, 942 (2d Dep't 2014) (remitting for hearing to determine, inter alia, if "requested data or records [] could be retrieved or extracted with reasonable effort") (emphasis added); Weslowski v Vanderhoef, 98 A.D.3d 1123, 1131 (2d Dep't 2012) (same).

In this case, DOE cannot reasonably engage an outside professional service to provide the extensive redaction required to produce the records sought by Petitioner in the First Request. Properly redacting these records requires an understanding of what constitutes an uncommon or unique combination of education services, such that removing direct personal identifiers is inadequate to protect the student's identity. An outside firm would lack sufficient familiarity with the DOE school system to know, for example, whether placement of a child in a class with no more than six students is common or uncommon at a particular school. Given the multitude of different combinations of special education services described in these thousands of records, and the need to consult with individual schools in many cases to determine the uniqueness of particular situations, it is not possible for DOE to outsource this work. In addition, providing an outside firm with data containing information on medical diagnoses for thousands of students raises its own serious privacy concerns. (Baranello Aff. ¶ 27.)

There is a general recognition that agencies need not engage in herculean efforts to respond to a FOIL request, particularly when the agency cannot reasonably hire an outside service to conduct these extensive activities. DOE cannot produce the records sought by the Verified Petition in connection with the First Request without undertaking the extraordinary effort necessary to review each of the approximately 2,900 detailed complaint narratives and their approximately 2,200 associated notes, determine how uncommon the particular mix of special education services described in each record is, and perform the necessary redactions. Given the fact-intensive nature of the redaction required, it is not feasible to hire an outside firm to conduct this work. Under these circumstances, DOE should not be required to disclose the requested detailed narratives, summaries of DOE actions, and their associated "notes." See Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 466 (2007) ("If such [private] information cannot be reasonably redacted from the electronic records, then such records may not be subject to disclosure under FOIL."). [2]

## POINT II

## THE PETITION IS MOOT TO THE EXTENT IT SEEKS REVIEW OF THE ALLEGED CONSTRUCTIVE DENIALS

In her Verified Petition, Petitioner seeks records responsive to her Second, Third, and Fourth Requests, which she alleges were constructively denied. During the pendency of this litigation, however, DOE has either produced to Petitioner the documents she seeks or has

[2] In the event that the Court determines that DOE is required to undertake the extraordinary effort of redacting the thousands of records sought by Petitioner in the First Request, DOE reserves its right to require Petitioner to pay the costs of such effort to the extent permitted by Pub. Officers Law §§ 87(1)(c), 89(3)(a). See FOIL-AO-19021 (May 15, 2013) (advising that agencies are permitted to charge FOIL requesters for the cost of redacting electronic records); FOIL-AO-17606 (Mar. 31, 2009) (stating that the Committee on Open Government understands the FOIL statute to "permit an agency to pass on costs for redacting records, when utilizing computer technology, and when more than two hours is required to do so").

committed to producing them by May 13, 2016 and April 29, 2016, for the Third and Fourth Requests, respectively. Accordingly, to the extent the Petition seeks judicial review of the alleged constructive denial of the Second, Third, and Fourth Requests, the Petition is moot.

The New York FOIL statute provides no specific timeframe within which an agency must respond to a request for documents, requiring only that the agency provide "a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied . . . ." Pub. Officers Law. § 89(3)(a). Indeed, the First Department has emphasized that the statute "mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute." N.Y. Times Co. v. City of New York Police Dep't, 103 A.D.3d 405, 407 (1st Dep't 2013). In determining what constitutes a date that is "reasonable under the circumstances," state regulations provide that:

> agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

21 N.Y.C.R.R. § 1401.5(d).

In this case, DOE has made substantial and reasonable efforts to respond to Petitioner's numerous FOIL requests. Petitioner submitted eight FOIL requests to DOE over the course of a five month period from June 2015 through November 2015, seeking 14 types of records. (Baranello Aff. ¶ 4.) DOE has consistently worked to respond to Petitioner's requests; between September 2015 and April 2016, DOE produced significant quantities of records to

Petitioner in response to her FOIL requests almost every single month. (Id. ¶ 7.) These productions to Petitioner are in addition to DOE's work responding to more than 1,000 FOIL requests received by the agency during calendar year 2015, from hundreds of FOIL requesters such as Petitioner. (Id. ¶ 5.)

Further, DOE has consistently communicated to Petitioner that its efforts to respond to her multiple FOIL requests were continuing. (See id. ¶ 34, 42, 49.) While DOE was able to respond to some of Petitioner' FOIL requests between September and December 2015, DOE was only in a position to complete its collection, review, and redaction of the records responsive to the Second, Third, and Fourth requests during the pendency of this litigation. (Id. ¶¶ 36, 45, 51.) At the time of filing Respondent's Verified Answer, DOE has produced records in final response to the Second Request, and in final response to one of the four parts of the Third Request. (Id. ¶¶ 36, 44.) In addition, DOE has committed to producing records in final response to the remaining three parts of the Third Request by May 13, 2016, and in final response to the Fourth Request by April 29, 2015. (Id. ¶¶ 45, 51.)

It is well-settled that when an Article 78 proceeding is brought alleging the constructive denial of a FOIL request, the production of responsive records during the pendency of the litigation renders the petition moot to the extent that it seeks production of records. See Braxton v. Comm'r, N.Y.C. Police Dep't, 283 A.D.2d 253, 253 (App. Div. 1st Dep't 2001) ("The petition was moot to the extent that documents were provided pursuant to petitioner's FOIL request . . . ."); Tellier v. N.Y.C. Police Dep't, 267 A.D.2d 9, 10 (1st Dep't 1999) ("The petition for records pursuant to FOIL was properly dismissed as moot to the extent that respondent provided petitioner with records responsive to the request during the pendency of the litigation."); Malerba v. Kelly, 211 A.D.2d 479, 480 (1st Dep't 1995) ("The proceeding has been

rendered moot insofar as it seeks the documents that were produced by respondent . . . ."); Newton v. Police Dep't of City of New York, 183 A.D.2d 621, 624 (1st Dep't 1992) ("[R]espondent's provision of documents regarding [petitioner's FOIL request] shortly after the petition was filed rendered moot that portion of petitioner's claim."). In this case, DOE either has produced or will produce by April 29, 2016 and May 13, 2016 records in response to the Second, Third, and Fourth requests, and therefore the Petition is moot to the extent it seeks documents in response to those requests.

DOE anticipates that some redactions to these materials may be necessary pursuant to one or more recognized FOIL exemptions before responsive documents can be produced to Petitioner. In the event that Petitioner elects to challenge any such redactions, DOE respectfully submits that the Court would not have jurisdiction over these claims in this proceeding because Petitioner would be required to exhaust her administrative remedies before challenging any such redactions in an Article 78 proceeding. Indeed, the First Department has consistently held that when an Article 78 proceeding is initiated challenging an alleged constructive denial of a FOIL request, and the respondent produces documents during the pendency of the litigation, the petitioner must exhaust her administrative remedies with respect to this new FOIL response and bring a new Article 78 proceeding alleging an improper partial denial. See Braxton, 283 A.D.2d at 253 ("[T]o the extent that the petition sought review of respondent's partial denial of his FOIL request, it was premature since petitioner failed to exhaust his administrative remedies."); Tellier, 267 A.D.2d at 10 ("The petition was otherwise properly dismissed for petitioner's failure to exhaust his administrative remedies, since his administrative appeal respecting requested records alleged to have been improperly withheld by respondent had not yet been determined."); Malerba, 211 A.D.2d at 480 ("[W]ith respect to the

remaining documents demanded, [the petition is] dismissible for failure to exhaust administrative remedies.") (internal citations omitted); Newton, 183 A.D.2d at 624 ("Until and unless petitioner perfects his administrative appeal, he is not entitled to judicial relief with respect to [the alleged partial denial]."). Should Petitioner seek to challenge any redactions in DOE's responses to the Second, Third, or Fourth Requests, she would accordingly be required to first exhaust her administrative remedies before seeking relief via an Article 78 proceeding.[3]

**POINT III**

**PETITIONER IS NOT ENTITLED TO DECLARATORY RELIEF IN THIS PROCEEDING**

Petitioner requests that the Court "declare the DOE's practice of issuing serial denial letters and refusing to provide substantive administrative review from unreasonable delays and improper denials through the serial issuance of improper extension letters to be unlawful." (Pet'r's Mem. at 19.) This request for declaratory relief in regard to DOE's alleged "practice" cannot be secured through this proceeding, however, as the exclusive remedy available in an Article 78 proceeding brought pursuant to FOIL is judicial determination of the denial or constructive denial of the requested records.

The FOIL statute contains detailed provisions describing the judicial remedy available to a petitioner who seeks to challenge the agency's administrative determination of her request. Specifically, the statute provides that "a person denied access to a record in an appeal determination . . . may bring a proceeding for review of such denial" as an Article 78 proceeding. Pub. Officers Law § 89(4)(b). Courts have consistently interpreted this provision to mean that the

[3] In the event that Petitioner elects to challenge redactions included in any forthcoming FOIL production, Respondent respectfully requests that the Court retain jurisdiction over this proceeding in order to expedite the process of judicial review over any such future claims.

subject matter of such a proceeding is limited to the "review of such denial," and therefore limited to a review of whether the agency is required to disclose the particular records sought. As a result, the FOIL statute does not authorize declaratory or injunctive relief, since such relief goes beyond the scope of the documents sought in the particular FOIL requests at issue in a petition. See, e.g., N.Y. Times Co. v. City of New York Police Dep't, 103 A.D.3d 405, 406 (1st Dep't 2013) (rejecting petitioner's request for declaratory relief and holding that the FOIL statute does not authorize such relief). As a recent Supreme Court decision observed, in rejecting a similar request from a petitioner seeking declaratory relief in regard to an agency's FOIL unit, such a request is effectively "asking the Court either to engraft new forms of relief onto the existing statutory scheme, which is a legislative task, or, in effect, to recognize a new cause of action." Newsday LLC v. Nassau Cnty. Police Dep't, No. 8172/13, 2014 N.Y. Misc. LEXIS 179, at *22-23 (Sup. Ct., Nassau Co., Jan. 14, 2014). Petitioner cites to no case law holding that declaratory relief is appropriate in an Article 78 proceeding pursuant to FOIL, and Petitioner's improper request for declaratory relief that goes beyond the scope of the particular documents sought in her requests should be denied.

Regardless, even if Petitioner was entitled to seek declaratory relief in this action – though the FOIL statute does not authorize such relief – her request for such relief regarding the DOE's purported practice of issuing multiple extension letters should be denied. Nothing in the language of the FOIL statute prohibits an agency from revising the date by which it anticipates providing a response to a FOIL request. The statute merely requires that the timeframe an agency sets for responding to such requests "be reasonable under the circumstances." Pub. Officers Law. § 89(3)(a). If it is reasonable under the circumstances for an

agency to revise the date by which it estimates providing a response to a request, the agency has complied with the law.

Petitioner argues that the statute's requirement that an agency provide "the approximate date" and "a date certain" for when it anticipates responding to a FOIL request precludes the issuance of any extension letters. (Pet'r's Mem. at 16.) But the FOIL statute specifically sets no concrete limit on an agency's time to respond to FOIL requests – even though it does prescribe strict time limits for when an agency must acknowledge such a response, provide an estimated response date, and respond to a FOIL appeal – instead requiring agencies to respond to FOIL requests "within a reasonable period, depending on the circumstances." Pub. Officers Law § 89(3)(a), (4)(a). Petitioner's argument ignores the fact that circumstances may change, necessitating a revised reasonable estimate from the agency. This position is inconsistent with the statute's emphasis on reasonableness and finds no support in the applicable law.

Moreover, Petitioner cites to no case law holding that an agency is precluded from issuing extension letters on FOIL requests. This is not because there is no relevant precedent on this issue. To the contrary, the First Department has recognized that an agency's own extension letters, even when issued multiple times, permissibly extend the date by which it is statutorily required to respond to the request.

For example, in a case that is factually very similar to the present matter, the petitioners submitted a FOIL request to DOE on May 7, 2010, and DOE initially "indicated that a response would be sent by June 7, 2010." Advocates for Children of N.Y. v. N.Y.C. Dep't of Educ., No. 107312/11, 2011 N.Y. Misc. LEXIS 5701, at *3 (Sup. Ct., N.Y. Co. Nov. 29, 2011). After DOE sent "a succession of letters to petitioners extending its time to comply with the request," petitioners submitted an administrative appeal to the agency on February 1, 2011,

alleging that their request had been constructively denied, and they subsequently brought an Article 78 proceeding challenging the alleged constructive denial. Id. The First Department rejected petitioners' claims of constructive denial, holding that "[p]etitioners' administrative appeal was premature, given that respondents' efforts to respond to the request within the applicable time limitations were ongoing." Advocates for Children of N.Y. v. N.Y.C. Dep't of Educ., 101 A.D.3d 445, 445-46 (1st Dep't 2012). In holding that "the applicable time limitations" had not been violated when petitioners filed their administrative appeal approximately nine months after their FOIL request was submitted, and eight months after the initial estimated date that DOE provided to petitioners, the First Department clearly accepted that a "succession" of extension letters validly extends an agency's applicable time to answer under the FOIL statute.

This same approach has been adopted by Supreme Court decisions addressing this issue. See, e.g., Gianella v. Port Auth. of N.Y. & N.J., No. 100605/14, 2014 N.Y. Misc. LEXIS 4283, at *2-3 (Sup. Ct., N.Y. Co. Sept. 14, 2014) (dismissing petitioner's constructive denial claim, brought after the agency sent petitioner nine consecutive extension letters, because "[w]here the Port Authority has yet to either grant or deny a FOIL request due to ongoing efforts to determine the accessibility of records, there is no constructive denial").

In contrast to the conclusions reached in these various cases, Petitioner relies solely on several advisory opinions of the Committee on Open Government (COG) suggesting that an agency's extension of the date by which it anticipates a response constitutes a constructive denial of the request. (Pet'r's Mem. at 16.) While these advisory opinions may reflect COG's interpretation of the FOIL statute, the Court of Appeals has held that "the advisory opinions of the Committee on Open Government 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 v. Buffalo Enter. Dev. Corp., 84 N.Y.2d 488, 493 (1994) (quoting John P. v. Whalen, 54 N.Y.2d 89, 96 (1981)). DOE's construction of the FOIL statute, consistent with the First Department's interpretation, is codified in the Chancellor's Regulations, which define a constructive denial as when a FOIL request "is neither granted nor denied . . . within the time limits set forth above or in the acknowledgment letter or any extension letter(s)." Chancellor's Regulation D-110(VIII)(A), annexed to Baranello Aff. as Exhibit C. Petitioner's argument to the contrary contradicts binding case law and is inconsistent with the statute's emphasis on reasonableness.

**POINT IV**

**IT IS PREMATURE TO ADDRESS THE ISSUE OF ATTORNEY'S FEES**

Under FOIL's fee-shifting provision, a court may only award reasonable counsel fees and litigation costs if certain statutory prerequisites are met. As a threshold matter, the court must determine whether the party seeking fees has substantially prevailed. Pub. Officers Law § 89(4)(c). If that finding is made, then other statutory prerequisites must be satisfied. It is only after such requirements are met that a court may determine whether a discretionary award of attorney's fees is appropriate. Id. Here, neither party has yet been adjudicated as substantially prevailing, and it is Respondent's position that the Petition should be denied. Accordingly, it is premature to address attorney's fees. See Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 441 (2005).

## CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Court dismiss the Verified Petition in its entirety, and that it be awarded such other and further relief as this Court deems just and proper.

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