2017 and 2018 Freedom of Information Law Case Law Summaries

Major Decisions

- **Abate v. County of Erie**, 152 A.D.3d 177, 54 N.Y.S. 3d 821, Appellate Division, Fourth Department (June 30, 2017)

A request for 911 recordings was made by petitioner via CPLR Article 31 discovery. While court acknowledged that such recordings may not be disclosed in response to a FOIL request, the court "thus join[ed] our colleagues in the Second Department in concluding that County Law § 308 (4) 'is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order' (*Anderson*, 134 AD3d at 1062)."

- **Empire Center for Public Policy, Inc. v. NYC Office of Payroll Administration**, 158 A.D.3d 529, 68 N.Y.S.3d 716, Appellate Division, First Department (February 15, 2018)

Petitioner's request for payroll information regarding all NYC employees was granted in part, but the agency denied access to records reflecting undercover officers' salaries, contending that disclosure would pose a security threat to those officers. A January 17, 2017 Supreme Court decision held that agency failed to demonstrate how the disclosure of the payroll information, without any accompanying identifying information, would pose a security threat to the officers. Supreme Court ordered disclosure. Respondents appealed and Appellate Division reversed and dismissed the petition on the ground that petitioner had failed to exhaust its administrative remedies. Petitioner had administratively appealed an alleged constructive denial, but did not appeal the agency's determination regarding rights of access.

- **Matter of Friedman v. Rice**, 30 N.Y.3d 461, 68 N.Y.S.3d 1, Court of Appeals (November 21, 2017)

Court of Appeals clarified the proper interpretation of §87(2)(e)(iii) of FOIL, under which an agency may seek to exempt from public inspection those records, or a portion thereof, "compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation." Court held "that a government agency may rely on this exemption only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred."

- **Gartner v New York State Attorney General's Office**, 160 AD3d 1087, 75 N.Y.S.3d 102, Appellate Division, Third Department (April 5, 2018)

There is no legal authority under FOIL to allow a petitioner or independent third party to conduct a search of an agency's records to locate responsive documents; such a search would be improper because it would inevitably permit the person to view agency records that were not responsive or that were exempt from disclosure.

Inter-agency materials exception did not apply to prevent disclosure of communications between Attorney General's office and counsel for another government entity involved with use of charitable endowments, when Attorney General's office was not assisting the endowment agency as a government entity in its

endeavors, but instead was involved in the agency's transactions under the Attorney General's statutory obligations to protect charitable beneficiaries and the public in situations where a trustee or not-for-profit corporation desires to modify restrictions on a charitable endowment or sell substantially all of its assets.

- **Matter of Green v. Annuci**, 70 N.Y.S.3d 746, 59 Misc.3d 452, Supreme Court, Albany County (September 11, 2017)

Video footage of prison incident did not qualify as "personnel record" under Civil Rights Law §50-a, and, thus, did not fall within scope of FOIL exemption for information specifically authorized to be withheld by statute. Since video could be used for several purposes, including evaluating an officer, but video was not used exclusively to evaluate officers, video was record of event and incident that occurred at correctional facility, depicting actual acts and conduct of individuals, not unsubstantiated allegations or complaints, and any use of video to subsequently degrade, embarrass, or impeach integrity of an officer would be due to subjective fault of officer.

- **Matter of Jacobson v. Ithaca City School District**, 53 Misc.3d 1091, 39 N.Y.S.3d 904, Supreme Court, Tompkins County (September 23, 2016)

When determining whether the School District could pass along to the requestor the actual cost of redacting a video recording in order to blur images of students, muffle or obscure student voices, and/or eliminate references to student names or identifiers, the Court held that a "public agency generally may not impose its cost of complying with a FOIL request upon the requesting party; however, it may recover any costs directly associated with redaction of responsive records." Committee note: "costs directly associate with redaction" (i.e., blurring/editing a video) should be distinguished from "review of the content of requested records to determine the extent to which records must be disclosed or may be withheld," the "costs" for which the regulations promulgated by the Committee specifically prohibit an agency from passing along to the requestor (21 NYCRR 1401.8(a)(3)).

- **Matter of Kirsch v. Board of Education of Williamsville Central School District**, 152 A.D.3d 128, 57 N.Y.S. 3d 870, Appellate Division, Fourth Department (July 7, 2017)

Court held that Petitioner had standing to seek to compel school **board** and school district to comply with her FOIL request for certain e-mail records of superintendent of school district, although FOIL request was made by petitioner's attorney, where administrative appeal letter expressly stated that attorney was making the request on behalf of petitioner. Court also held that school district was required to provide petitioners with requested e-mails under FOIL, with any claimed exemptions from disclosure documented in a privilege log for review by the court; petitioners reasonably described requested e-mails to enable school district to identify and produce records, and school district could not evade broad disclosure provisions of statute upon naked allegation that request would require review of thousands of records.

- **Matter of Kosmider v. Whitney**, 75 N.Y.S.3d 305, 160 A.D.3d 1151, Appellate Division, Third Department (April 12, 2018)

Request for copies of the electronic voting ballot images recorded by voting machines was denied by Respondent County based on an interpretation of the Election Law. Respondents contended records could only be disclosed by court order. However, the request did not concern the actual paper ballots in

which the votes were cast, but rather electronic copies of those ballots that were transferred to a memory card. Court ruled that once copies of the paper ballots were transferred to an electronic media and therefore preserved, the likelihood that the images or data could be tampered with is non-existent and the request was ordered to be granted. Appellate Division affirmed stating "We conclude that, once electronic ballot images have been preserved in accordance with the procedures set forth in Election Law § 3–222(1), there is no statutory impediment to disclosure and they may be obtained through a FOIL request." Has been appealed to Court of Appeals

- **Lucas v. Board of Education of East Ramapo Central School District**, Supreme Court, Rockland County (October 5, 2017)

Court, in its discretion, awarded attorney's fees: "Respondent failed to acknowledge receipt of Petitioners' FOIL requests, failed to either grant or deny Petitioners' FOIL requests and failed to render a decision with respect to Petitioners' appeals of the constructive denials of their FOIL requests… Rather, only after Petitioners commenced the within Article 78 proceeding did Respondent eventually provide the documents requested under FOIL. As such, the Court finds the purpose in permitting an award of attorney's fees and costs in a proceeding such as this—to deter unreasonable delays and denials of access—is entirely warranted."

- **Matter of Mazza v. Village of Croton-on-Hudson**, 140 A.D.3d 878, 33 N.Y.S.3d 426, Appellate Division, Second Department (June 8, 2016)

Petitioner made a request to the Village for police records relating to a criminal investigation regarding allegations Petitioner sexually abused minors. Village claimed entire file was exempt pursuant to Civil Rights Law 50-b(1). Trial court dismissed the petition and petitioner appeals. Appellate Division held: "Civil Rights Law § 50-b(1) 'does not justify a blanket denial of a request for any documents relating to a sex crime. If a requested document does not contain information that tends to identify the victim of a sex crime, and the FOIL request is otherwise valid, the document must be disclosed' (Matter of Fappiano v New York City Police Dept., 95 NY2d 738, 748). The agency must make a particularized showing that the statutory exemption from disclosure pursuant to Civil Rights Law § 50-b(1) applies to all the records that the petitioner seeks." Appellate Division determined that trial court should have conducted an in-camera inspection and remanded the case for such review.

- **Matter of New York Civil Liberties Union v. New York City Police Dept**., --- N.E.3d ----, 2018 N.Y. Slip Op. 08423

Order that compelled the NYPD to disclose redacted decisions of police officer disciplinary hearings reversed. Appellate court held that since the decisions are made confidential by Civil Rights Law, §50-a (police officers' personnel records used to evaluate performance regarding continued employment or promotion), agency is not obligated to disclose records, even in redacted form. Appellate Division decision upheld by Court of Appeals

- **Matter of New York Times Co. v. New York State Executive Chamber**, 57 Misc.3d 40556 N.Y.S.3d 821, Supreme Court, Albany County (July 6, 2017)

Petitioner requested emails ranging from 2011-2016, daily schedules of a state employee, Percoco, from 2011 to 2015, records pertaining to Percoco's return to the Executive Chamber, and emails between Percoco and members of the Executive branch staff. Executive Chamber contended that these documents were exempt because they were compiled for law enforcement purposes therefore, disclosure

would interfere with law enforcement investigation or judicial proceeding. For the law enforcement exemption to apply, the document must be created, gathered, or used by an agency for this purpose at some time before the agency invokes the exemption, and the court stated it had done so. However, Executive Chamber could not demonstrate that disclosure would interfere with an investigation or judicial proceeding because Chamber has no knowledge of prosecutor's strategy in the judicial proceeding. The Protective order issued by another court, the confidential informants, unwarranted invasion of personal privacy, and state or federal statute exemption do not apply because the Chamber failed to sustain their burden of proof that the record is exempt.

- **Outhouse v. Cortlandt Community Volunteer Ambulance Corps**., Index No. 2776-16, Supreme Court, Westchester County (February 7, 2017)

Records requested regarding an application to become a member of the Volunteer Ambulance Corps. were denied based on the Corps.' position that it is not an "agency" as defined by FOIL. The court, relying on judicial precedent and an opinion prepared by the Committee, granted the petition and stated: "based on Respondent's relationship with the town, it is clear that Respondent is performing a governmental function and is an 'agency' within the meaning of FOIL."

- **Matter of Rauh v De Blasio**, 75 N.Y.S.3d 15, 161 AD3d 120, 2018 N.Y., Appellate Division, First Department (May 1, 2018)

Reporters requested copies of correspondences between the Mayor or members of his administration and a PR firm. Agency denied access asserting the "intra-agency" exemption, claiming the PR firm was an "agent of the city." The court ruled that since the mayor's office did not formally retain the PR firm, the inter/intra agency exemption would not apply, and ordered disclosure. The court stated: "respondents' belated production of approximately 1500 additional documents, more than a year after petitioners submitted their FOIL requests and approximately two months after this proceeding was filed, and their apparent decision not to claim the exemption with respect to such correspondence in the future, only underscores the lack of reasonable basis for denying access." For this reason, the court awarded attorney's fees. Decision affirmed in its entirety by Appellate Division.

- **Time Warner Cable News NY1 v. N.Y.C. Police Dep't**, 2017 NY Slip Op 30707(U), Supreme Court, New York County (April 17, 2017)

Follow-up to court's August 1, 2016 interim order (**Time Warner Cable News NY1 v. New York City Police Department**,53 Misc. 3d 657, 36 N.Y.S.3d 579). Petitioner filed a motion to reargue the "burden" issue and both parties requested permission to appeal to the Appellate Division. Motions were granted. In addition, "respondents [were] directed to review the footage and determine, on an individual basis, whether the videos are subject to disclosure, and to provide petitioner a copy of those videos that do not contain exempt material within 60 days after this order is entered."

- **White v. Annucci**, Supreme Court, Albany County, Index No. 6326-16 (July 21, 2017)

The Court found that the proposed fee for "Lt. Review Time" was inconsistent with FOIL as such fee does not involve the preparation of records, but rather involves the time needed to review the records to

determine what portions must be disclosed or may be withheld. Recognizing that such review is necessary to protect the safety and security of DOCCS' facilities and to protect the privacy of other inmates, the Court declined to interpret FOIL and its assorted regulations to include this review time as time required to "prepare a copy of the requested record" for which a fee may be charged.

Minor Decisions

- **Borukhova v. City of New York, Office of Chief Medical Examiner**, Supreme Court, New York County (December 5, 2017)

Petitioner requested records relating to the Office of the Chief Medical Examiner's (OCME) investigation into her husband's death, including autopsy reports. City denied access relying on §87(2)(a) and NYC Charter §557(g) which governs access to records of the OCME. Petitioner argued that rights of access should have been governed by NYS County Law 677(3)(b). Court upheld denial and held that NYC Charter §557(g) has force and effect of state law and governs access to OCME records.

- **Bronx Defenders v. N.Y. City Police Dep't**, Supreme Court, New York County, May 19, 2017

Court denied respondents motion to dismiss on ground that it had certified that it did not possess any records responsive to the request. Court determined that there were inconsistencies between agency's position that it had certified that it did not possess responsive records and the affidavit of the agency's employee regarding the burden of producing a responsive record. Court made reference to 21 NYCRR 1401.2(b)(2), which requires the records access officer to "assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records." Court ordered respondents to file an answer to the petition.

- **Matter of Brown v. DiFiore**, 39 A.D.3d 1048, 33 N.Y.S.3d 327, Appellate Division, Second Department (May 25, 206)

Petitioner's request to District Attorney's office for "unusual occurrence addendums" and "scratch sheets" did not reasonably describe the records sought and was properly denied. Agency previously agreed to disclose copy of 911 recording but petitioner had yet to receive it. Appellate Division ordered disclosure.

- **Matter of Castorina v. De Blasio**, 56 Misc.3d 413, 55 N.Y.S.3d 599, Supreme Court, Richmond County (April 3, 2017)

Assemblymembers denied access to application materials connected with the NYC Identity Card program. The court held that petitioners did not have standing to challenge IDNYC law concerning the destruction of the records. Respondent stated that disclosure would constitute an unwarranted invasion of personal privacy, and redacting the personal information would be unreasonably difficult. In conclusion, the court held: "Petitioners however, have not specifically requested compliance with FOIL and a response to their FOIL requests. Considering the lack of a formal request, the unduly financially burdensome nature of the production, and lack of good cause shown, there is no reason for this Court to order the production."

- **Matter of Citizens for a Better Maspeth, Inc. v City of New York**, Supreme Court, Queens County (September 27, 2017)

Denial by City's Department of Homeless Services for client-level data upheld by court as records specifically exempt by state statute (Social Services Law §136). Also, disclosure would constitute unwarranted invasion of personal privacy and could endanger life or safety. Agency withheld RFP and proposals after homeless shelter conversion project had been discontinued on ground that disclosure would interfere with a current or imminent contract award. Since project had been discontinued, Court disagreed and ordered disclosure.

- **Cobado v. Benzinger**, 163 A.D.3d 1103, 80 N.Y.S.3d 529, Appellate Division, Third Department (May 29, 2018)

Petitioner requested records relating to his arrest from the New York State Police. Only obtained records after initiating an Article 78 proceeding. Appellate Division agreed with trial court that the matter was moot. However, the Appellate Division also determined that respondents failed to comply with the statutory time frames and that petitioner ultimately substantially prevailed and, as such, overturned the trial court's determination that the statutory prerequisites for awarding of attorney's fees had not been satisfied. Matter was remitted to Supreme Court for a determination as to whether petitioner is entitled to counsel fees and/or litigation costs and, if so, to calculate the reasonable amount of any award.

- **Matter of Collins v. New York City Police Dept**., 55 Misc.3d 1214(A), 58 N.Y.S.3d 873, Supreme Court, New York County (April 27, 2017)

NYPD denied request for records pertaining to a 1991 murder case on the ground that disclosure would constitute an unwarranted invasion of personal privacy of the witnesses; would endanger life or safety of witnesses; interfere with an ongoing investigation; and reveal confidential sources and non-routine investigative techniques. The petitioner had agreed to receive documents that contained redactions, and certain witnesses had testified at trial making the NYPD's argument regarding an invasion of privacy and confidential sources moot. The argument regarding law enforcement interference failed because the NYPD could not demonstrate that there was an ongoing investigation. Respondents could not meet their burden of proof.

- **Matter of Cook v. Nassau County Police Department**, 140 A.D.3d 1059, 34 N.Y.S.3d 150, Appellate Division, Second Department (June 22, 2016)

Following the Appellate Court's determination on an earlier appeal regarding the disclosure of the requested records (*see Matter of Cook v Nassau County Police Dept.*, 110 AD3d 718), the petitioner moved pursuant to Public Officers Law § 89(4)(c) for an award of an attorney's fee and litigation expenses, and the Supreme Court granted the motion. Appellate Division reversed on the ground that while the agency was required to disclose certain records, the petitioner had not "substantially prevailed."

- **In re Correction Officers' Benevolent Association, et al. v. New York City Department of Correction, et al**., 157 A.D.3d 643, 67 N.Y.S.3d 639, Appellate Division, First Department (January 30, 2018)

Appellate Division affirmed trial court's decision and held that Petitioners' argument that the requested documents are effectively the final documents relating to a decision not to promote the Petitioners because there are no later documents providing reasons for the failures to promote, other than the

conclusory notification letters that the candidates were passed over, is unavailing. Respondents explain that, while the decision makers, including the Chief of Department who was the primary orchestrator, considered the requested documents in determining whom to promote, no documents exist encapsulating the final decision, other than the notice to petitioners.

- **Matter of Crown Castle NG East, LLC v. The Town of Hempstead**, Supreme Court, Nassau County, Index No. 2063/2017 (November 28, 2017)

Town relied on **Pittari** in denying access to a variety of Town records on the basis that petitioner was a defendant in a criminal proceeding and disclosure would interfere with the adjudication of those proceedings and the statutory provisions controlling discovery. Court held that Town had not met its burden of proof as to how disclosure would cause the harm envisioned by the statute. Court denied Town's request that they be permitted to submit an answer providing additional justification for non-disclosure. Court determined that petitioner had substantially prevailed and awarded attorney's fees.

- **Matter of DeFreitas v. New York State Police Crime Lab**, 141 A.D.3d 1043, 35 N.Y.S.3d 598, Appellate Division, Third Department (July 28, 2016)

Respondent failed to respond to petitioner's FOIL request and FOIL appeal. Following the commencement of the Article 78 proceeding, respondent advised petitioner that 1,356 pages of records responsive to his request would be sent to him upon payment of the statutory copying fee. Appellate Court upheld Supreme Court's dismissal of petition as moot and stated "Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties."

- **Empire Healthchoice Assurance, Inc. v. Metropolitan Transportation Authority**, 60 Misc.3d 1207(A), Supreme Court, New York County (June 19, 2018)

Court held that contrary to respondents' contention, the statistical and factual data on which respondents relied when reviewing RFP proposals are not exempt from disclosure. "Public Officers Law § 87(2)(g) expressly states that "statistical or factual tabulations or data" are not exempt as inter-agency or intra-agency materials. Presumably, agencies share statistical or factual data because the data might be useful in the decision-making process. Thus, respondents' analysis would render the exception to the exemption virtually meaningless." See also **Professional Standards Review Council of America Inc.**

- **Matter of Empire State Beer Distributers Association, Inc. v. New York State Liquor Authority**, 158 A.D.3d 480, 67 N.Y.S.3d 833, Appellate Division, First Department (February 8, 2018)

Appellate Division overturned trial court's order directing the Liquor Authority to disclose unredacted copies of stipulations entered into between Costco Wholesale Corporation and BJ's Wholesale Club, Inc. and the Authority (intervenors). Appellate Division held that the intervenors "met their burden of presenting 'specific, persuasive evidence that disclosure will cause [them] to suffer a competitive injury,' and did not 'merely rest on a speculative conclusion that disclosure might potentially cause harm' by leading to negative publicity." (internal citations omitted)

- **In re Energy & Environmental Legal Institute, et al. v. Attorney General of the State of New York**, 162 A.D.3d 458, 75 N.Y.S.3d 45, Appellate Division, First Department (June 7, 2018)

Appellate Division held that trial court had "correctly found that respondent's right to invoke the inter- or intra-agency exemption to FOIL as to an email message sent to respondent was not waived when the sender added a third party to the 'cc' field of the email and instructed the third party to print attached materials and deliver them to respondent, in the absence of any expectation that the third party would review the substance of those materials or disclose them to others."

- **Ferncliff Cemetery Association v. Beville**, 2017 NY Slip Op 30551(U), Supreme Court, Westchester County (March 27, 2017)

Cemetery association sought all records sent or received from any town official, board member, employee or agent regarding the association's right to build a cottage on its' property. The town delivered some records but withheld others citing attorney-client privilege and the intra-agency exemptions. The records were submitted to the court for an in-camera review. The court agreed that some records could properly be withheld. However, the court ordered the town to pay attorney's fees because it failed to timely provide the documents, set a date for when the request would be fully answered or give a reasonable basis for the denial of access to some of the records.

- **Gooden v. New York City Police Department**, 52 Misc.3d 1206(A), 41 N.Y.S.3d 719, Supreme Court, New York County (May 16, 2016)

"The petition is dismissed as barred under the statute of limitations. Petitioner's second FOIL request from 2014 is a belated attempt to seek judicial review of petitioner's first FOIL request from 18 years ago, 1996. Petitioner's challenge to the 2014 denial is 'nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances.' (Matter of Corbin, 160 A.D.2d at 596, 554 N.Y.S.2d 240.)"

- **In the Matter of the Hearst Corporation et. al. v. New York State Department of Correction and Community Supervision***,* Index No. 88-16, Supreme Court, Albany County (September 19, 2016)

Petitioners requested documents relating to inmate grievances involving physical abuse and/or assault from seven facilities and the ensuing arbitration orders, decisions, and awards for three years. DOCCS denied disclosure stating the requested records were not reasonably described, not kept in a format that permits practical retrieval, and that the records are exempt because they are personnel records used for evaluating job performance. The court agreed that the records were not reasonably described, because DOCCS does not have a retrieval system which would allow it to reasonably locate the files; no obligation to search for a needle in a haystack, and that they are exempt as personnel records used for evaluating performance under section 50-a of Civil Rights Law.

- **Hearst Corporation v. Town of Milton**, Supreme Court, Saratoga County (October 30, 2017)

Town denied access to a "confidential" settlement agreement between the Town and a Town employee involving allegations of misconduct by a Town official. Court ordered disclosure (with name of complainant redacted) and opined that "A blanket exemption from FOIL by a promise of confidentiality

would eviscerate the FOIL statues (sic) and the legislative intent to foster transparency." Court also awarded attorney's fees on ground that "it took two appeals and approximately seven months for the respondent to release the settlement agreement."

- **Huseman v. New York City Department of Education**, 2016 N.Y. Slip Op. 30959(U), Supreme Court, New York County (May 25, 2016)

Court found that "Here, even if the fields in the records requested in [by Petitioner] contain data that could be produced subject to redaction without violating FERPA, the DOE has established that it, is unable to do so without unreasonable difficulty because of the undue burden it would place on the agency and the extraordinary effort it would take." Court also found that "that the DOE has sufficiently established that it cannot redact the information prohibited from disclosure by FERPA without unreasonable difficulty and thus, the remaining records sought in the First Request are exempt from disclosure under FOIL."

- **In the Matter of Latinojustice PRLDEF v. South Country Central School District,** Supreme Court, Suffolk County, 2018 N.Y. Slip Op. 51440(U) (October 12, 2018)

Court offered the opinion that "here it … seems inconceivable, and at the very least highly improbable, that the School District did not have and has not maintained any records, beyond a single, one-page flyer and a few code of conduct and disciplinary code and procedural provisions, that constitute, document, reflect or otherwise bear on its many efforts - including, but not limited to, gang-related school assembly programs and student meetings, administrator training in identifying gang-related activity, gang-resistance education programming, gang-related student disciplinary proceedings and suspensions, online monitoring related to detecting gang affiliation, activity and messaging, and the provision of instruction to suspended students - to address gang-related activity in its schools and among its students. Accordingly, the court finds that the petitioner has demonstrated sufficient factual bases to warrant a hearing as to whether there exist, or existed, within the School District's control."

- **Levy v. Clarkstown Central School District**, Supreme Court, Rockland County, Index No. 001800/2017 (May 9, 2018)

Court found that "there is a reasonable concern that the release of children's names, the exact time of pick-up and drop off of the children at their bus stops, the number of children at each bus stop, and the release of specific addresses where a single home is the location of the pick-up, may endanger the lives or safety of these children." However, Court held that the safety exemption "does not warrant an outright denial of Petitioner's request under FOIL to provide the bus routes." Court directed the District to provide the bus route information, redacted so as not to identify the names of the bus drivers or the children, the times of pick-up and drop-off, the number of children at each stop, and the specific street number where a single home is the location of the stop.

- **Lipsitz v. UBF Faculty-Student Housing Corp.**, Supreme Court, Erie County, Index No. 808537/2017 (January 3, 2018)

Court relied on **Quigley v. University at Buffalo Foundation, Inc.** decision in determining that respondent Housing Corporation, a not-for-profit created to support the purposes of the University at Buffalo by acquiring, constructing, renovating, and maintaining residential and other facilities for the use

of the University's faculty and students, was not an agency subject to FOIL nor was its governing body subject to the OML.

- **Logue v. New York City Police Department**, Index No. 153965/16, Supreme Court, New York County, (February 6, 2017)

Applicant requested records from NYPD that included pictures, videos, audio recordings, data, metadata, and communications between and among NYPD personnel regarding protests that occurred at Grand Central station. The NYPD asserted several blanket grounds for denial (i.e., law enforcement, endangerment) but failed to establish a causal connection between disclosure and the harm envisioned by the statute. Respondents failed to meet their burden of proof and the court ordered partial disclosure.

- **Morris v. Patience, as Secretary of the Senate**, Supreme Court, Albany County, Index No. 905460-17 (April 10, 2018)

Court ordered Secretary of the Senate to disclose the "published mail guidelines referenced in the New York State Rules of the Senate, Rule X. §9" on the ground that the guidelines are "instructions to staff that affect members of the public." (§88(2)(f) of FOIL)

- **Matter of Netsmart Tech, Inc. v. New York State Office for People with Developmental Disabilities***,* Index No. 4497-15, Supreme Court, Albany County (September 14, 2016)

Petitioners requested records regarding proposals and bids for a health records service system along with the scores of the bids, the methodologies for scoring, all internal communication involving the scores and all communications with bidders. The OPWDD denied the request based on two exemptions, first that disclosure of these records would impair present or imminent contract awards and second, that they involved inter and intra agency communications. OPWDD disclosed some records but not all after a bid was chosen. The court reviewed over 60 documents for in camera review. Court held that agency's denial was over-broad. Court granted access to some but upheld agency's denial of access to others. Still determined that petitioner had substantially prevailed and scheduled a hearing to determine attorney's fees.

- **Matter of O'Donnell v. New York City Police Department**, 56 Misc.3d 1213(A), 65 N.Y.S.3d 492, Supreme Court, New York County (July 14, 2017)

NYPD conducted additional searches as a result of petitioner's commencement of the Article 78 proceeding and subsequently produced the records sought prior to judicial intervention. As such, Court held that petitioner had substantially prevailed. As NYPD failed to respond to petitioner's appeal within the statutory time, petitioner had demonstrated his entitlement to attorney's fees and costs.

- **Matter of Pasek v. New York State Department of Health**, 151 A.D.3d, 1250, 56 N.Y.S.3d 627, Appellate Division, Third Department (June 8, 2017)

Provision of Education Law prohibiting disclosure of records relating to performance of a medical or a quality assurance review function only shields records from discovery in civil actions and does not protect them from a FOIL request. However, Statement of deficiencies and plan of correction, as well as

complaint/incident investigation report, compiled by DOH in the course of its investigation of hospital's treatment of patient, incorporated information collected by the hospital for quality assurance purposes that was exempt from disclosure under Public Health Law, and thus DOH, in responding to FOIL request, properly redacted such information pursuant to FOIL exception for records exempt from disclosure by state or federal statute.

- **Matter of Pendell v. Columbia County District Attorney's Office**, 166 A.D.3d 1088, 88 N.Y.S.3d 268, Appellate Division, Third Department (November 1, 2018)

The Appellate Division dismissed petitioner's appeal as academic. Although "[a] court is limited to considering only those exemptions to disclosure that are invoked by the party from whom disclosure is sought" (Matter of Rose v Albany County Dist. Attorney's Off., 141 AD3d 912, 914 [2016]), it is also well settled that a court "may take judicial notice of a record in the same court of either the pending matter or of some other action" (Matter of Allen v Strough, 301 AD2d 11, 18 [2002]). Appellate Division noted that the requested records and exhibits were furnished to petitioner's appellate counsel; therefore, respondent was under no obligation to furnish additional copies. Court also held that as petitioner received the requested records through his appellate counsel, whether respondent properly denied his Freedom of Information Law request had been rendered academic, and the appeal was dismissed.

- **In the Matter of Police Benevolent Association of New York State, Inc. v. State of New York et al**., 165 A.D.3d 1434, 86 N.Y.S.3d 246, Appellate Division, Third Department (October 18, 2018)

Petitioner's requested copies of records related to the hiring of certain individuals for high-ranking positions within the police departments of four SUNY institutions. Respondent denied on the ground that disclosure of the applications would constitute an unwarranted invasion of personal privacy and that the applications could not be redacted sufficiently to protect the identities of the applicants. Appellate Court opined that "it is possible, or even likely, that certain applications, or components thereof, may need to be redacted in their entirety given the distinctiveness of an applicant's education or employment history; however, such circumstances with respect to a single, or even several, applicants cannot justify a blanket denial of the release of 1,344 pages of application information from numerous applicants." Court directed SUNY institutions to release the documents sought with sufficient redactions to protect the identities of the applicants.

- **Matter of Rose v. Albany County. District Attorney's Office**, 141 A.D.3d 91234 N.Y.S.3d 753, Appellate Division, Third Department (July 14, 2016)

Court held "A court is limited to considering only those exemptions to disclosure that are invoked by the party from whom disclosure is sought." Also held that letter from county district attorney's office in response to individual's inquiry regarding whether he or she would receive reward in exchange for his or her testimony did not fall within scope of FOIL's safety exemption in its entirety. Could be disclosed in redacted form. See also: **Rose v. Albany County District Attorney's Office,** 111 AD3d 1123, 975 NYS2d 258 (3d Dept. 2013)

- **Matter of Shooters Committee on Political Education, Inc. v. Cuomo**, 147 A.D.3d 1244, 47 N.Y.S.3d 512, Appellate Division, Third Department (February 27, 2017)

The lower court's order partially granting disclosure of inter-agency documents was reversed because inter-agency communications along with privileged attorney-client communications justified denial of access. The court determined that these records were drafted for discussion purposes and not for final policy decisions.

- **Matter of Spring v. County of Monroe**, 141 A.D.3d 1151, 36 N.Y.S.3d 330, Appellate Division, Fourth Department (July 8, 2016)

Petitioner requested disclosure of approximately 200 documents, emails, and reports. After Supreme Court conducted an in-camera review, it directed disclosure of several documents. Respondents appealed. Appellate Court ruled that some of the records in question were exempt from disclosure due to attorney-client privilege, attorney work product and inter-agency exemptions.

- **Matter of Whitehead v. Warren County Board of Supervisors**, 165 A.D.3d 145286 N.Y.S.3d 241, Appellate Division, Third Department (October 18, 2018)

Petitioner requested copy of an engineering report. County denied on ground that records were "intra-agency" material. Subsequent to initiation of the Article 78 proceeding, respondent County disclosed copy of report. Trial court dismissed entire petition as moot. Petitioner appealed on ground that trial court should not have dismissed petition relating to costs and fees. The Appellate Division held that it was unable to conduct the necessary review to determine whether respondent reasonably withheld its initial disclosure of the report on the ground that it constituted inter- or intra-agency material that was not "statistical or factual tabulations or data" and remitted the matter to Supreme Court to conduct an in camera review of the responsive materials provided and determine whether respondent had a reasonable basis for denying petitioner's FOIL request. Appellate court ordered that if the Supreme Court determined that respondent lacked a reasonable basis to withhold the subject documents, Supreme Court should then determine, in its discretion, whether petitioner is entitled to the requested filing fees and costs.

- **Wright v. New York State Office of Temporary and Disability Assistance**, Index No. 508-16, Supreme Court, Albany County (February 15, 2017)

Applicant requested, pursuant to FOIL and the PPPL, records from the Office of Temporary and Disability Assistance(OTDA) that discuss or make reference to the applicant. ODTA denied access on the ground that records were "intra-agency material" (87(2)(g)). Petitioner asserted that "intra-agency material" is not a permissible ground for denial when records are requested pursuant to the PPPL. The court disagreed and upheld the agency's denial of access. Court also determined that the responsive e-mails, while records subject to FOIL, fell outside the PPPL's definition of record.