

2016 Open Meetings Law Case Summaries

- **Matter of Thomas v. New York City Dept. of Education**, 145 A.D.3d 30, Appellate Division, First Department (October 25, 2016)

New York City “School Leadership Teams” (SLTs) are public bodies subject to the Open Meetings Law as they are established pursuant to state law and are part of the New York City Department of Education’s governance structure. “SLTs have decision making authority to set educational and academic goals for a school through the [comprehensive education plan]. The notion that SLTs merely serve an advisory role is not supported by the regulatory history.” Supreme Court held, and Appellate Division affirmed, that respondents violated Open Meetings Law by denying general public access to a meeting of a NYC public school’s SLT.

Index: Public Body

- **McCabe v. Town of Hempstead**, Supreme Court, Nassau County, Index no. 6892/2016 (January 5, 2017)

Motion by plaintiffs for a preliminary injunction enjoining defendants (Town) from enforcing an amendment to a Town building zone ordinance granted on the basis that plaintiffs had shown enough of a likelihood of success on the merits in establishing good cause for their claim of violation of the Open Meetings Law. At the outset of a public hearing regarding a controversial amendment to a local building zone ordinance, the proposed amendment was itself amended to delete a “24/7 time requirement” for free compressed air at local gasoline stations and only require the service station provide free compressed air “when the gasoline station is opened for business.” Members of the public that wished to speak to the “24/7” issue were reminded that the Town was not seeking a 24/7 time requirement. The Board reserved decision at the end of the public hearing. However, the resolution adopted several months later included the 24/7 requirement. The Court held that “[t]he express amendment to the amendment at the outset of the public hearing, to delete the ‘24/7 time requirement,’ followed by the unexplained reinsertion of that requirement in the resolution approved months later, appears on its face to be an attempt to circumvent the purpose of the Open Meetings Law.”

Index: **New: Injunctive Relief**

2016 Freedom of Information Law Case Law Summaries

Major Decisions

- **Hernandez v. Office of the Mayor of the City of New York**, 100 A.D.3d 555 Appellate Division, First Department (November 27, 2012)

Petitioner brought an Article 78 action following a denial by the Mayor's Office of a FOIL request for certain emails between the Mayor's office and a nominee for New York City School Chancellor. Appellate Division First Department agreed with the court below that the emails in question must be disclosed because they do not fall within the Inter/Intra Agency materials exemption of §87(2)(g). The court found that the nominee for School Chancellor was not an agent of the City for purposes of the "Intra-Agency" exemption because she had not yet been retained and because she was not acting "simply as an outside consultant on behalf of the City, but was a private citizen with interests that may have diverged from those of the City."

Index: Inter & Intra-Agency Materials; Consultant Records

- **Livson v. Town of Greenburgh**, 141 A.D.3d 658, Appellate Division, Second Department (July 20, 2016)

Petitioner, president of a civic association, requested a list of e-mail addresses and names of persons signed up for news alerts on the Town's website ("the gblast"). In response to the Town's assertion that disclosure would constitute an unwarranted invasion of personal privacy, the Supreme Court granted the petition, and directed the Town parties "to disclose, in electronic form, the names and email addresses of subscribers of the gblast." The court conditioned the disclosure upon a direction to the petitioner to "not reproduce, redistribute or circulate the gblast or use the information contained therein for solicitation, fund-raising or any commercial purpose." The Appellate Division, Second Department upheld the Supreme Court's decision and held that in denying petitioner's request for the email list, "the Town parties did not articulate the applicability of any enumerated exemptions under Public Officers Law §89(2)(b), nor did they show that the privacy interests at stake outweigh the public interest in disclosure of the information ...The Town parties' contention that disclosure of the requested email addresses would render the gblast subscribers more susceptible to phishing, spamming, and other email scams is speculative; the Town parties failed to show that disclosure of the information would make the gblast subscribers more susceptible to such acts than they ordinarily would be."

Index: Email; Privacy, List of Names and Addresses

- **McGhee v. New York City Police Department**, 52 Misc. 3d 1211(A), 41 N.Y.S.3d 720 (N.Y. Sup. Ct. 2016)

Petitioner filed a FOIL request for records relating to his criminal trial. Petitioner's request was denied on the ground that disclosure of the records "would interfere with law enforcement investigations or judicial proceedings." The Court held that, "while the agency need not specify the potential risk posed by disclosure for each and every document requested, it must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. . . . Here, by contrast, although respondents describe generic categories of records, they do not identify, even generically, the attendant risks that disclosure would pose to any future proceedings... Consequently, respondents may not rely on Public Officers Law § 87(2)(e)(i)." Court ordered the matter to be remanded to NYPD to render a determination consistent with its decision. See also: **Leshner, Pittari**

Index: Law Enforcement

- **Police Benevolent Association of New York, Inc. v. The State University of New York**, ___ A.D.3d___, Appellate Division, Third Department (December 29, 2016) (2016 NY Slip Op. 08918)

Petitioner challenged respondent's denial of a FOIL request for the resumes and related materials submitted by candidates who applied, but were not hired for, the position of University Police Chief at Alfred State College. Respondents denied petitioner's request on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The Supreme Court agreed that, given the prominent nature of the positions and the limited number of applicants, disclosure of the requested documents, even with appropriate redactions, could lead to the identification of the unsuccessful applicants. The Appellate Division, however, ruled that such speculation, does not rise to the level of a particularized and specific justification for denying access to the entirety of the records requested. The Appellate Division remanded the matter to the Supreme Court for an in camera inspection of the requested documents to determine the extent to which they contain information exempt from disclosure and whether such information can be redacted while still protecting the personal privacy of those individuals.

Index: Privacy, Public Employee; Home Address

- **Ripp v. Town of Oyster Bay**, 140 A.D.3d 775, Appellate Division, Second Department (June 1, 2016)

Town predicated release of the records sought upon prepayment of \$1,920 to cover estimated costs associated with production of the documents. Petitioner commenced an article 78 proceeding to compel the town to produce the documents.

Appellate Division, Second Department, found that where an agency conditions disclosure upon prepayment of costs or refuses to disclose records except upon payment of costs, it has the burden of "articulating a specific and particularized justification" for the imposition of those fees. Specifically, the agency must demonstrate that the fees to be imposed are authorized by the cost provisions of FOIL. Court held that while an agency may charge for employee time spent extracting or segregating data from an electronic database (see Public Officers Law § 87(1)(c)), FOIL does not permit an agency to charge for employee time spent searching for paper documents (see Matter of Weslowski v Vanderhoef, 98 AD3d at 1130). Court held that Town failed to demonstrate that the imposed costs were properly related to employee time spent retrieving electronic files, rather than a manual search for paper records, copies of which are available for a fee of up to \$.25 per photocopy.

Index: Fees; Fees, for Search; Fees Paid in Advance; Fees, Actual Cost

- **Robinson v. Cuomo**, New York State Supreme Court, Albany County, Index No. 5118-14 (April 30, 2015)

Denial of by New York State Police (NYSP) of records reflecting statistical information about the assault weapons registry kept by the NYSP was based on a determination that such records had been assembled or collected for purposes of inclusion in the NYSP SAFE Act database created pursuant to Penal Law §400.02 and that such records are confidential by statute. The NYSP argued that the statistical information was "derived from" documents that were assembled or collected for inclusion in the NYSP database and as such they are exempt from FOIL disclosure. The court disagreed with this conclusion, stating that "[b]y the [New York State] Police's own admission the records sought were neither assembled nor collected for 'inclusion' in the database but rather were 'derived' from records in the database" and, not the actual records themselves that were "assembled and collected for purposes of inclusion in such database." State Police were directed to provide Petitioners access to records sought.

Index: Pistol License Information; Confidential by Statute

- **Time Warner Cable News NY1 v. New York City Police Department**, 53 Misc. 3d 657, 36 N.Y.S.3d 579 (August 1, 2016)

Petitioner requested copies of video recordings taken in conjunction with an NYPD voluntary program to employ body-worn cameras. The NYPD denied access to unedited video recordings, citing numerous exemptions. NYPD asserted that the FOIL request could be denied on the ground that it would be burdensome to comply with, but if the Court determined that it must comply with the FOIL, it is entitled to demand payment from a requestor reflecting the costs associated with making the necessary review and redactions. The Court agreed that portions of the body camera footage would likely be subject to one or more FOIL exemptions, but withheld judgment pending a hearing as to whether the review and redaction of the footage would be unduly burdensome. The Court, relying on an advisory opinion rendered by the Committee, held that if required to conduct the review, the NYPD may not pass the costs associated with reviewing or redacting the footage requested onto petitioner.

Index: Fees; Burdensome Request; **NEW: Body Cameras**

Minor Decisions

- **Competitive Enterprise Institute v. Office of the Attorney General**, 2016 N.Y. Slip Op. 51687 (November 21, 2016)

Court held that respondent OAG must provide more detail regarding its search for responsive records. Court also held that OAG's assertion that the records fell within one or more of five possible exemptions was "nothing more than a parroting of statutory language, and thus a complete failure of its obligation 'to fully explain in writing...the reason for denial of access.'" (internal citation omitted). FOIL request was referred back to OAG for a response within 30 days that fully complied with the intent and purpose of the law.

Index: Diligent Search for Records; Burden of Proof

- **Donovan v. Port Authority of New York and New Jersey**, New York State Supreme Court, New York County, Index No. 100388/2014

Relates to a FOIL request made to the Port Authority (PA) prior to a statutory amendment to deem the PA an "agency" as defined by FOIL. Access to PA records was previously governed by the PA's Freedom of Information Code. PA denied access to requested records on the basis that the records were "subject to express confidentiality provisions" contained in contractual agreements. The PA also asserted that disclosure of the responsive materials "would impair present or imminent awards or negotiations of leases, permits, contracts or other agreements related to the World Trade Center construction." (PA Freedom of Information Code §2a). Court held that respondents "failed to provide any rational basis for denying access" to the records, thus the determination must be deemed arbitrary and capricious. "The Court cannot simply assume that the Code exception applies just because the Port Authority recited it. Such blind deference would be inconsistent with the purpose of article 78 review."

The "arbitrary and capricious" standard was applied as opposed to the FOIL "error of law" standard, but in a footnote, the court states that if the "error of law" standard had been used, the outcome would be no different.

Index: **New Port Authority**

- **Hughes Hubbard & Reed LLP v. Civilian Complaint Review Board**, 53 Misc. 3d 947, Supreme Court, Kings County (August 17, 2016)

Court relied upon previous Appellate Decisions (Matter of Columbia-Greene Beauty Sch., Inc. v City of Albany, 121 AD3d 1369, 1371 (2014) and Matter of Hearst Corp. v New York State Police, 109 AD3d 32 (2013) in holding that a police officer's personnel records continue to be exempt from disclosure after officer departs from public service.

Court held that "Inasmuch as Civilian Complaint Review Board (CCRB) complaint records are used to determine whether to file disciplinary charges against a police officer for misconduct, and which are in fact used to prosecute the officer if a departmental disciplinary hearing is held, they necessarily constitute 'personnel records, used to evaluate performance toward continued employment or promotion' within the meaning of subdivision 1 of section 50-a of the Civil Rights Law." (internal quotations omitted)

Index: Police Officers' Personnel Records

- **Laveck v. Village Board of Trustees, Village of Lansing**, 42 N.Y.S. 3d 460, Appellate Division, Third Department (December 1, 2016)

Appellate Division held that respondent Village had not demonstrated that disclosure of the names, addresses, and other identifying information relating to participants in the Village's deer management program would constitute an unwarranted invasion of personal privacy or that disclosure could endanger the lives or safety of the program's participants. Village was directed to provide petitioner with unredacted copies of the requested records, in electronic form if possible. Although petitioner had substantially prevailed, Court declined to award attorney's fees, inasmuch as the redactions were made in good faith.

Index: Attorney's Fees; Endangerment; Privacy; Burden of Proof

- **Lee Enterprises, Inc. v. City of Glens Falls**, New York State Supreme Court, Warren County, Index No. 63270 (December 1, 2016)

City denied access to a copy of the hearing officer's report and recommendation relating to a terminated employee on the ground that the report and recommendation was "intra-agency material," was a preliminary, non-final recommendation, and the City Council did not adopt the entire report and recommendation, but instead merely accepted the final recommendation to terminate the employee. The City asserted that the report was not a final agency determination, and as such was exempt from disclosure. The Court disagreed with the City's expansive interpretation of the intra-agency exemption. The Court opined that "[a] disciplinary matter which is addressed in a hearing and culminates in the firing of a public employee does not fall within the intra-agency exemption simply because the agency claims to accept only the recommendation of the hearing officer, but the reasons therefor; particularly where, as here, no alternate reason or explanation is set forth by the agency for its action." Court found that, for the purpose of awarding attorney's fees, the petitioner had substantially prevailed and the City did not have a reasonable basis for denying access to the record.

Index: Inter & Intra-Agency Materials, Final Determination or Policy; Attorney's Fees

- **Matter of Karimzada v. O'Mara**, 111 A.D.3d 1088, Appellate Division, Third Department (Nov. 21, 2013)

Petitioner, a prisoner, requested certain documents pertaining to the taking of DNA and the testing of a blood sample. FOIL request was denied by State Police on the grounds that the requested records were exempt from disclosure as "DNA Records" under Executive Law §995-c. On appeal, Appellate Division

found that because, aside from lab reports, none of the requested records were kept in the State's DNA identification index, they do not fall within the ambit of "DNA Records" under Executive Law 995-c(6). As the NY State Police failed to prove the only ground invoked for exemption under FOIL, petitioner was entitled to receive requested records.

Index: Confidential by Statute; **NEW: DNA**

- **Matter of Moody's Corporation and Finance v. NYS Dept. Of Tax and Finance**, 141 A.D.3d 997, Appellate Division, Third Department (July 21, 2016)

Petitioner's FOIL request was denied pursuant to §87(2)(a) on the basis that the requested records were exempt from disclosure under NY Tax Law §211. Petitioner argued that only tax returns were subject to nondisclosure under this statute, not other related records. The court disagreed, saying "Contrary to petitioner's argument, the protections afforded by Tax Law § 211 (8) (a) are not limited to the return only" and "the confidentiality required by the statute necessarily extends to any document that reflects information included in a return." The court also opined that when "a document is exempt from disclosure pursuant to state statute, it may not be subjected to redaction."

Index: Confidential by Statute; Tax Records, Corporate or Personal

- **McGeehan v. East Hampton Union Free School District**, New York State Supreme Court, Suffolk County, Index No. 02667/2016 (December 14, 2016)

Court upheld school district's determination to withhold certain records relating to the decision not to renew the school's varsity softball coach's contract on the ground that the requested communications contained personally identifiable information regarding current or former students and as such, were made confidential by the Family Educational Rights and Privacy Act (FERPA) as well as the ground that disclosure would constitute an unwarranted invasion of personal privacy in consideration of the divisiveness in the community over the issue of the appointment of the coach.

Index: FERPA; Privacy

- **Rochester Democrat and Chronicle v. Town of Irondequoit**, Supreme Court of the State of New York County of Monroe 2016/02806 (July 22, 2016)

The Court found that the Town had not met its burden of proof and that its argument that release of a list of "zombie homes" could "endanger the life or safety of any person" was speculative. The Court noted recent amendments to Real Property Actions and Proceedings Law which would create a state-wide registry of such "zombie homes" and would require that "the [mortgage] servicer shall post a notice on an easily accessible part of the property that would be reasonably visible to the borrower, property owner or occupant." The Court opined that given this notice requirement the "Town has no reasonable basis to oppose Petitioner's FOIL request."

Addressing the matter of petitioner's request for Attorney's fees, the Court found that "Respondent's denial, given less than 30 days after Petitioner's request was not so egregious as to warrant an award of fees."

Index: Attorney's Fees; Endangerment

- **Schreier v. City of New York and Department of Records and Information Services**, New York State Supreme Court, New York County, Index No. 101643-2015

In response to petitioner's request for copies of microfilm containing indexes of certain marriage records filed by the City Clerk between 1908 and 1929 to be produced to her at the rate of \$35 per roll of microfilm, plus shipping, the records access officer notified the petitioner that she was welcome to visit the Municipal Archives to inspect and copy the microfilm. The petitioner contended that the City's refusal to copy and mail her the records constituted a formal denial of her FOIL request. After petitioner initiated the Article 78 proceeding, the City provided petitioner copies of the microfilm at her expense. Court found that petitioner was not denied access to the Municipal Archive where the film is located and that in light of the fact that petitioner was not denied access, awarding of attorney's fees and other litigation costs was unwarranted.

Index: Attorney's Fees

Updates to Current Summary:

- **Fanizzi v. Planning Board of Patterson**, ___ A.D.3d ___, Appellate Division, Second Department (December 14, 2016) (2016 NY Slip Op. 08361)

Petitioner requested copies of advance draft proposals and requested court order agency to comply with retention schedules, recover documents from developer and disclose. Supreme Court held petitioner's action was frivolous because she was given access to entirety of agency's file. Supreme Court dismissed the petitioner's held that architectural renderings temporarily left with Town Planner for the purpose offering informal advice to the developer had never become Town records subject to FOIL. Supreme Court further found that after 10 years of legal actions against the co-defendant developer; that this proceeding was undertaken primarily to harass with the intent of delaying the project. Court awarded attorney's fees to the agency, based on 22 NYCRR 130-1.1 (permits a court to impose financial sanctions and/or costs upon a party or attorney who engages in frivolous conduct).

Appellate Division reversed the Supreme Court's decision that the architectural renderings were never records subject to FOIL. Appellate Division held that while the records were in the Town's possession, they were records subject to FOIL. It was not clear whether the records were in the Town's possession at the time of the request, but on a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the pleading are deemed true. Deeming the allegation that the records were in the possession of the Town to be true and affording the petitioner the benefit of every favorable inference, the Appellate Division held that the petitioner sufficient alleged a cause of action pursuant to FOIL and that the Supreme Court should have denied the respondents' motions to dismiss. Appellate Division also held that the petitioner's conduct in commencing the proceeding was not frivolous and the Supreme Court should have denied the respondents' motions for imposition of costs and sanctions against the petitioner.

- **Matter of Gannett Satellite Information Network, Inc., v. County of Putnam**, 142 A.D.3d 1012, Appellate Division, Second Department (September 14, 2016)

Under Penal Law §400.00, names and addresses of pistol permit holders are a matter of "public record" and may be "publically disclosed", but that they may "opt-out" and are entitled to request an exemption from disclosure. Petitioner requested the names and addresses of pistol permit holders who did not opt out of disclosure. The Respondent denied the request on the basis of §87(2)(f) and as an unwarranted invasion of personal privacy. Supreme Court held that since the statute on which the request was based contains an opt-out provision, FOIL exceptions are inapplicable. Appellate Division upheld the Supreme Court decision, but found that the Supreme Court "erred to the extent that it directed disclosure of the records sought without consideration of whether any of the exemptions to FOIL disclosure contained in the Public Officers Law applies to prohibit disclosure of such records upon a FOIL request." Appellate Division concluded that the records sought did not fall squarely within any FOIL exemption and therefore affirmed the judgment granting the petition and directing disclosure.