

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

HUMAN RIGHTS DEFENSE CENTER

Petitioner,

-against-

NEW YORK STATE OFFICE OF THE
ATTORNEY GENERAL; MICHAEL
JERRY, in his official capacity as Records
Access Officer; and KATHRYN
SHEINGOLD, in her official capacity as
FOIL Appeals Officer

Respondents.

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

Index No.

Oral Argument Requested

VERIFIED PETITION

Petitioner Human Rights Defense Center, by its attorneys at Covington & Burling LLP, submits this Verified Petition pursuant to Article 78 of the Civil Practice Law and Rules and respectfully shows that:

PRELIMINARY STATEMENT

1. The Human Rights Defense Center (“HRDC”) is seeking relief from this Court because the Office of the Attorney General (“OAG”) has constructively denied its request for records under the Freedom of Information Law (“FOIL”).

2. On August 16, 2018, HRDC wrote to the OAG seeking records of all claims or litigation against the New York State Department of Corrections and Community Supervision (“NYS DOCCS”), the New York State Police, and the State of New York for events or circumstances occurring at or related to the facilities of NYS DOCCS or the New York State Police.

3. Such request sought records relating to claims or litigation in which the State of New York, its insurers, and/or the Comptroller's office paid \$1,000 or more (or \$30,000 or more, in the case of litigation or claims arising from automobile accidents) to resolve the claim or litigation.

4. On September 24, 2018, the OAG purported to grant the FOIL request, stating that it would take until March 24, 2021—exactly 2.5 years later—to prepare and send the requested records.

5. Later, the OAG stated that it would produce some responsive records by February 28, 2020.

6. As explained below, such a long timeframe to respond to a public records request is unreasonable on its face and constitutes a constructive denial under N.Y. Public Officers Law § 89(4)(a). This constructive denial is not in accordance with any exemptions from FOIL, and is thus arbitrary and capricious. The Court should compel the OAG to release the requested records within 60 days, which is a reasonable amount of time to respond given the nature of the request.

JURISDICTION AND VENUE

7. Petitioner has exhausted all administrative remedies, which means that this Court has jurisdiction over the instant matter under N.Y. Public Officers Law § 89(4)(b) and N.Y. C.P.L.R. § 7801.

8. The venue lies in Albany County, New York under N.Y. C.P.L.R. §506 because both the initial constructive denial and the appellate decision upholding such constructive denial were undertaken by departments of the OAG located in Albany County.

FACTUAL BACKGROUND

A. Human Rights Defense Center's Background and Mission

9. For more than twenty-eight years, HRDC has worked in the core of this nation's criminal justice system—its prisons and jails—to ensure the humane and constitutional treatment of incarcerated individuals.

10. Through education, advocacy and outreach, HRDC works to safeguard the basic human rights of incarcerated individuals, and to ensure public transparency and oversight of the nation's publicly-funded carceral facilities.

11. To accomplish its mission, HRDC gathers information from governmental entities around the country and publishes the information in its journals and on its websites.

12. HRDC publishes and distributes books, magazines, and other information containing news and analysis about prisons, jails, and other detention facilities, prisoners' rights, court rulings, management of prison facilities, prison conditions, and other matters pertaining to the rights and interests of incarcerated individuals.

13. HRDC publishes two magazines: *Prison Legal News (PLN)* and *Criminal Legal News (CLN)*.

14. *PLN* is a legal journal that reports news and litigation about carceral facilities. *PLN* has published monthly since 1990 and is delivered to over 9,000 people in all 50 states, although the estimated actual readership is around ten times that number. *PLN's* subscribers include lawyers, journalists, judges, courts, public libraries, and universities. *PLN* also maintains a website that receives about 100,000 visitors per month.

15. *CLN* is a legal journal launched in November 2017. *CLN* reports on criminal law decisions from the states and federal systems, focusing on legal developments affecting the fact

and duration of confinement. *CLN* also covers civil rights litigation against police, prosecutors, and court systems.

16. HRDC publishes books about the criminal justice system and legal issues affecting prisoners.

17. In recent years, HRDC has published information obtained through public records requests on the expenditure of public funds by state and local correctional facilities to compensate victims of wrongdoing by public employees.

18. Such information is undoubtedly in the public interest, and promotes HRDC's mission to safeguard the rights of incarcerated individuals.

B. The FOIL Requests

19. HRDC made its records request in a letter sent via email dated August 16, 2018. *See* Affirmation of Swati R. Prakash in Support of the Human Rights Defense Center's Article 78 Petition ("Prakash Aff."), Exhibit A, HRDC FOIL Request for Settlements and Verdict Records, Aug. 16, 2018.¹

20. The request letter specified that it requested documents pursuant to N.Y. Pub. Off. Law §§84 through 90. HRDC requested records related to any payments of \$1,000 or more (or \$30,000 for automobile accidents) paid by certain New York agencies to resolve claims or litigation occurring at state correctional facilities. This request includes settlements, damages, attorney fee awards, and sanctions. *Prakash Aff. Exhibit A, HRDC FOIL Request for Settlements and Verdict Records, Aug. 16, 2018.*

21. HRDC specified that responsive records would include:

¹ All exhibits are attached to the accompanying Affirmation of Swati R. Prakash in Support of the Human Rights Defense Center's Article 78 Petition ("Prakash Aff.").

1. Records, regardless of physical form or characteristics, of all claims or litigation brought against (1) the NYS DOCCS, and/or its employees or agents, (2) the New York State Police, and/or its employees or agents, and/or (3) the State of New York, for events or circumstances occurring at or related to any NYS DOCCS or New York State Police facility, in which payments totaling \$1,000 or more (or, in the case of litigation or claims arising from automobile accidents, payments totaling \$30,000 or more) were disbursed from January 1, 2010, to the present, showing:
 - The name of all parties involved;
 - The case or claim number;
 - The office or jurisdiction in which the case or claim was brought (e.g., US District Court for the Southern District of New York, New York Supreme Court, an administrative forum, etc.);
 - The date of initiation and resolution of the claim or litigation;
 - The amount of money involved, if any, in the resolution and to whom it was paid.
2. For each claim or litigation detailed above:
 - The complaint or claim form and any amended versions;
 - The decision, verdict form, final judgment, settlement agreement, consent decree, release, or other paper that resolved the case.

22. On August 24, the OAG Records Access Officer acknowledged receipt of the request and notified HRDC that it would determine whether it would grant or deny the request on or before September 24, 2018. Prakash Aff. Exhibit B, OAG Acknowledgement, Aug. 24, 2018.

23. On September 24, Assistant Attorney General Michael Jerry of the OAG advised HRDC that the OAG was preparing a response to the FOIL request, and that it would take 2.5 years—that is, until March 24, 2021—to complete that response. Prakash Aff. Exhibit C, OAG Initial Response, Sept. 24, 2018.

24. On September 28, HRDC submitted a follow-up inquiry asking whether the OAG would provide a rolling production of documents. Prakash Aff. Exhibit D, Correspondence Between HRDC and OAG Regarding Rolling Production, Sept. 28, 2018.

25. In response, on September 28, 2018, Mr. Jerry advised only that available documents would be produced on a rolling basis “to the extent we are able,” *id.* and expressed the “hope” that the OAG would have the request “substantially completed prior to the final delay date,” Prakash Aff. Exhibit E, OAG Email to HRDC, Sept. 28, 2018.

26. HRDC timely appealed this constructive denial in a letter sent to the OAG on October 24. Prakash Aff. Exhibit F, HRDC Appeal of Initial OAG Decision, Oct. 24, 2018. In its appeal, HRDC argued that OAG’s estimate of more than two years to complete an initial response was manifestly unreasonable and violated the applicable FOIL statute, which requires an agency’s timeframe for granting a request to be “within a reasonable period.” *Id.* (citing N.Y. Pub. Off. Law § 89(3)(a)).

27. The OAG responded on November 8, 2018. Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018. In it, the letter conclusorily noted that the March 24, 2021 disclosure date given was “reasonable under the circumstances,” but explaining only that “[r]ecords responsive to the particulars of your request cannot be precisely electronically identified for review and disclosure,” and that “[t]he date was selected based on the time anticipated to be needed to provide a comprehensive response to your request, including offsite retrieval from multiple locations and manual review of the results of a broadly-cast, over-inclusive search that would retrieve potentially-responsive records as well as thousands of non-responsive records.”

28. The OAG’s letter of November 8, 2018 also acknowledged that the Records Access Officer was “able to identify and retrieve some records responsive to your request and those will be disclosed via rolling production by February 28, 2020 to the extent they are not

subject to any exceptions established by Public Officers Law § 87(2),” suggesting that disclosure potentially would not even begin for 18 months.

CAUSE OF ACTION: ARTICLE 78 REVIEW
OF A WRONGFUL DENIAL OF A FOIL REQUEST

29. Article 78 is the appropriate method for obtaining judicial review of agency determinations concerning FOIL requests. *See* N.Y. Pub. Off. Law § 89(4)(b).

30. HRDC has requested, pursuant to the Freedom of Information Law, a request for a discrete and identifiable set of public records from the OAG, which HRDC described with particularity.

31. The 18- to 30-month long timeframe set by the OAG to respond to the HRDC’s narrowly tailored request fails to comply with the directives of N.Y. Pub. Off. Law §89(3), which states that a date set for responding to a request must be reasonable.

32. Setting an unreasonable date constitutes a constructive denial of the request. N.Y. Pub. Off. Law § 89(4)(a) (“Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial); *see also* New York Department of State, Committee on Open Government, *Explanation of Time Limits for Response (June 2005)*, <https://www.dos.ny.gov/coog/explanation.html> (“if the specific date given [by an agency for granting access to requested records] is unreasonable, a request may be considered to have been constructively denied”); *Matter of Linz v. The Police Department of the City of New York*, 226 New York L.J., Dec. 17, 2001, at 18, col. 1. (Sup. Ct. New York County 2001) (“In the absence of a specific statutory period, this Court concludes that respondents should be given a reasonable period to comply with a FOIL request.”).

33. Such a constructive denial was arbitrary, capricious, an abuse of discretion and patently unreasonable.

34. HRDC has a right to timely information regarding settlements paid using taxpayer dollars related to incidents in state correctional facilities.

35. The OAG, despite stating it would turn over material on a rolling basis, has not produced a single page of material, despite the passage of more than six months since its initial response.

36. HRDC exhausted its administrative remedies when it appealed the initial constructive denial, and the FOIL Appeals Officer in the OAG's Office denied the appeal.

37. The OAG has not provided a reasonable justification for the excessive timeframe it has set. Its proffered justifications—namely, that finding responsive records would involve electronic searches that would yield thousands of non-responsive results, would require “offsite retrieval” and manual review—could apply to nearly any FOIL request and do not adequately explain why a response would take more than a year.

38. The legal basis for HRDC's petition is set forth in the accompanying Memorandum of Law in Support of Verified Petition, and is incorporated by reference herein.

RELIEF REQUESTED

39. Petitioner seeks judgment:

- a. Pursuant to C.P.L.R. § 7806, directing Respondent to comply with their duty under FOIL to perform an adequate search for the records requested in Petitioner's FOIL request dated August 17, 2018, and to disclose all responsive records within 60 days of the Court's order;
- b. Pursuant to New York Pub. Off. Law § 89, awarding attorneys' fees and reasonable litigation costs; and

c. Granting such other order and further relief as the Court deems just and proper.

Dated: New York, New York
March 8, 2019

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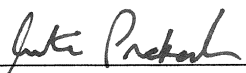
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VERIFICATION

SWATI R. PRAKASH, an attorney duly admitted to practice in the State of New York, affirms that she has reviewed the foregoing petition pursuant to Article 78 of the New York Civil Practice Law and Rules with Petitioner, and that all factual allegations are true upon personal knowledge or upon information and belief. Pursuant to § 3020 New York Civil Practice Law and Rules, the Petitioner is not verifying because it is a domestic corporation that is not in the county where this pleading is being made, nor in the county where this attorney has her office.


Swati R. Prakash
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018

Sworn to before me this
8 day of March, 2019


NOTARY PUBLIC

MOISES VELAZQUEZ ALVAREZ
Notary Public, State of New York
No. 01VE4949372
Qualified in NEW YORK County
Commission Expires APRIL 3, 2019

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MEMORANDUM OF LAW IN
SUPPORT OF VERIFIED PETITION

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This Memorandum of Law is submitted in support of the Verified Petition seeking a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”). The proceeding concerns a New York Freedom of Information Law (“FOIL”) request made by the Human Rights Defense Center (“HRDC” or “Petitioner”) that was constructively denied by the Office of the Attorney General (“OAG” or “Respondent”). As stated below, the 18-month timeframe the OAG gave to comply with the FOIL request was unreasonable, particularly in light of the presumptively reasonable 20-day time frame to respond set out in the FOIL statute. This Court should compel production of the requested documents within 60 days, as well as award attorneys’ fees to HRDC.

Introduction

New York’s Freedom of Information Law, “enacted in furtherance of the public’s vested and inherent right to know, affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities and with an effective tool for exposing waste, negligence and abuse on the part of government officers.” *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565–66, 505 N.Y.S.2d 576, (1986) (internal quotations and citation omitted). HRDC, in keeping with its mission to safeguard the basic human rights of incarcerated individuals, requested information from the OAG relating to the expenditure of public money to pay for the actions of abusive or negligent public employees. The public interest in access to settlement agreements and monetary judgments has been recognized by New York courts, which acknowledge that “when public monies are expended, the public should not be excluded from such information.” *Village of Brockport v. Calandra*, 191 Misc.2d 718, 725, 745 N.Y.S.2d 662, 668 (4th Dep’t 2002), *aff’d*, 305 A.D.2d 1030, 758 N.Y.S.2d 877 (2003).

Facts

HRDC seeks records related to any payments of \$1,000 or more (or \$30,000 for automobile accidents) paid by certain New York agencies to resolve claims or litigation occurring at state correctional facilities. This request includes settlements, damages, attorney fee awards, and sanctions.

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 - The name of all parties involved;
 - The case or claim number;
 - The office or jurisdiction in which the case or claim was brought (e.g., US District Court for the Southern District of New York, New York Supreme Court, an administrative forum, etc.);
 - The date of initiation and resolution of the claim or litigation;
 - The amount of money involved, if any, in the resolution and to whom it was paid.
2. For each claim or litigation detailed above:
 - The complaint or claim form and any amended versions;
 - The decision, verdict form, final judgment, settlement agreement, consent decree, release, or other paper that resolved the case.

On August 24, 2018, Assistant Attorney General Michael Jerry of the OAG acknowledged receipt of the FOIL request and advised HRDC that the OAG would notify HRDC of the status of its request on or before September 24, 2018. (Prakash Aff. Exhibit B, Correspondence from OAG to HRDC re: status of FOIL request, Aug. 24, 2018). On September 24, 2018, Assistant Attorney General (“Assistant AG”) Michael Jerry advised HRDC that the OAG was preparing a response to the FOIL request, and that it would take exactly 2.5 years—that is, until March 24, 2021—to complete that response. (Prakash Aff. Exhibit C, OAG Initial Response, Sept. 24, 2018). On September 28, HRDC submitted a follow-up inquiry asking whether the OAG would provide a rolling production of documents. (Prakash Aff. Exhibit D, Correspondence Between HRDC and OAG Regarding Rolling Production, Sept. 28, 2018). In response, Mr. Jerry advised only that available documents would be produced on a rolling basis “to the extent we are able,” *id.*, and expressed the “hope” that the OAG would have the request “substantially completed prior to the final delay date.” (Prakash Aff. Exhibit E, OAG Email to HRDC, Sept. 28, 2018).

HRDC timely appealed this constructive denial in a letter sent on October 24, 2018. (Prakash Aff. Exhibit F, HRDC Appeal of Initial OAG Decision, Oct. 24, 2018). In its appeal, HRDC argued that OAG’s estimate of more than two years to complete an initial response was manifestly unreasonable and violated the applicable FOIL statute, which requires an agency’s timeframe for granting a request to be “within a reasonable period.” *Id.* (citing N.Y. Pub. Off. Law § 89(3)(a)).

The OAG responded on November 8, 2018. (Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018). In it, the letter conclusorily noted that the March 24, 2021 disclosure date given was “reasonable under the circumstances.” *Id.* The OAG explained only

that “[r]ecords responsive to the particulars of your request cannot be precisely electronically identified for review and disclosure,” and that “[t]he date was selected based on the time anticipated to be needed to provide a comprehensive response to your request, including offsite retrieval from multiple locations and manual review of the results of a broadly-cast, over-inclusive search that would retrieve potentially-responsive records as well as thousands of non-responsive records.” *Id.*

The appeal letter also acknowledged that the Records Access Officer was “able to identify and retrieve some records responsive to your request and those will be disclosed via rolling production by February 28, 2020, to the extent they are not subject to any exceptions established by Public Officers Law § 87(2),” noted that it was a final determination and stated that HRDC could seek judicial rule under Article 78 of the New York Civil Practice Law & Rules. *Id.*

The OAG has constructively denied HRDC’s FOIL request (“Request”) and appeal by refusing to produce responsive materials’ prior to February 28, 2020—more than 18 months after the date of HRDC’s request. For the reasons stated herein, there is no legal or factual basis for the constructive denial.

Argument

I. Legal Standard

A. Article 78

In an Article 78 review of an agency decision, the court must examine “whether the administrative determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion.” *Hollander v. Suffolk County Dep’t of Soc. Servs.*, 140 A.D.3d 1064, 1065, 34 N.Y.S.3d 489, 491 (2d Dep’t 2016). “An arbitrary determination is one that is without a sound basis in reason, and is made without regard

to the facts.” *Matter of Gottlieb v. City of New York*, 129 A.D.3d 724, 725, 10 N.Y.S.3d 542, 544 (2d Dep’t 2015).

B. FOIL

Under FOIL, any individual can request records from a New York state or municipal agency, *see* N.Y. Pub. Off. Law §§ 84, 89(3),¹ and all records are presumed to be subject to public disclosure. Agencies must respond to a FOIL request within 20 business days. N.Y. Pub. Off. Law § 89(3)(a). If an agency needs more than 20 business days to meet its disclosure obligations, “the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain *within a reasonable period*, depending on the circumstances, when the request will be granted in whole or in part.” *Id.* (emphasis added). Accordingly, if the date certain is not “within a reasonable period,” as is the case here, the petitioner can treat it as a denial; i.e. it is deemed constructively denied. N.Y. Pub. Off. Law § 89(4)(a) (“Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial); *see also* New York Department of State, Committee on Open Government, *Explanation of Time Limits for Response (June 2005)*, <https://www.dos.ny.gov/coog/explanation.html> (“if the specific date given [by an agency for granting access to requested records] is unreasonable, a request may be considered to have been constructively denied”); *Matter of Linz v. The Police Department of the City of New York*, 226 New York L.J., Dec. 17, 2001, at 18, col. 1. (Sup. Ct. New York County 2001) (“In the absence of a specific statutory period, this Court concludes that respondents should be given a reasonable period to comply with a FOIL request.”). Courts review constructively denied FOIL requests

¹ “Records” comprise “any information kept, held, filed, produced or reproduced by, with or for an agency.” N.Y. Pub. Off. Law § 86(4).

under the same standard as actually denied FOIL requests. *See, e.g., Matter of Mohawk Book Co. v. State University of New York*, 288 A.D.2d 574, 575, 732 N.Y.S.2d 272, 274 (3d Dep't 2001) (analyzing agency's failure to respond as a constructive denial under exemption standards set forth in FOIL).

Whether an agency's proposed timeline for complying with a FOIL request is reasonable requires a case by case analysis, "taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure." *Id.* When an agency constructively denies a FOIL request by failing to conform to the provisions of N.Y. Pub. Off. Law § 89(3)(a), the petitioner is considered to have exhausted his or her administrative remedies, and can contest the denial in an Article 78 proceeding. *See, e.g. Kohler-Hausmann v. New York City Police Dep't*, 133 A.D.3d 437, 18 N.Y.S.3d 848 (1st Dep't 2015).

An agency's denial of a FOIL request is subject to judicial review pursuant to Article 78, N.Y. Pub. Off. Law § 89(4)(b), provided that the requester first exhausts his or her administrative remedies under § 89(4)(a). In an Article 78 review of an actually or constructively denied FOIL request, an agency bears the burden of justifying the denial. *See New York State Rifle & Pistol Ass'n, Inc. v. Kelly*, 55 A.D.3d 222, 223, 863 N.Y.S.2d 439, 441 (1st Dep't 2008) (for a formally denied request, "[t]he burden at all times rests with the agency to justify any denial of access to requested records"); *Benedict v. Albany County*, 22 Misc. 3d 597, 602, 867 N.Y.S.2d 906, 910 (Sup. Ct. Albany County 2008) (noting in review of a constructively denied FOIL request, that "the agency bears . . . at least an initial burden when it denies disclosure on a ground other than a statutory exemption").

To meet that burden, an agency must show that the material is not subject to FOIL disclosure, and must “articulate a particularized and specific justification for denying access.” *Burns*, 67 N.Y.2d at 566. Such a justification cannot be “general and conclusory,” and must not be contrary to the purpose and policy behind FOIL, namely that “a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions.” *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 931, 25 N.Y.S.3d 303, 304 (2d Dep’t 2016) (quoting N.Y. Pub. Off. Law § 84).

II. The OAG constructively denied HRDC’s request by setting a date for compliance more than a year into the future.

The OAG set an unreasonable date 18 months in the future for initially complying with HRDC’s Request, and potentially up to 2.5 years for full compliance, and thus constructively denied HRDC’s Request. In its original response to HRDC’s Request, the OAG estimated that it would take until March 24, 2021—a period of 2.5 years—to fully respond. On appeal, the OAG stated that it had agreed to modify its deadline to respond, at least with respect to some records, to February 28, 2020²—still more time than it took to erect the Empire State Building, and over 18 months from the date of the initial Request. This timeline is manifestly unreasonable under the circumstances here, where HRDC’s records request was described with reasonable particularity. FOIL does not recognize high volumes of responsive documents as a valid basis for denial, and public policy weighs strongly in favor of swift disclosure.

² The Agency’s initial estimate of precisely 2 years and 6 months to complete production, and its subsequent estimate that it could not provide an initial “rolling” production before February 28, 2020, calls into question whether either estimate reflects any actual calculation using reasonable assumptions and based on the agency experience—or if the Agency was merely pulling dates out of thin air.

A. HRDC's request described records with reasonable particularity.

The OAG tries in part to justify its extended multi-year timeline as reasonable by claiming HRDC's Request "cannot be precisely electronically identified for review and disclosure." (Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018). But that is not the law. A FOIL request must only reasonably describe the records requested, N.Y. Pub. Off. Law § 89(3), "so that the Respondent agency may locate the records in question." *Matter of M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69 (1984). In order to deny a FOIL request on this basis, the agency must show that "the descriptions [are] insufficient for purposes of locating and identifying the documents sought," not that the description is not "precisely" aligned with the agency's chosen system of recordkeeping. *Id.*

HRDC has asked for a discrete and identifiable set of cases and settlements from just two of the dozens of state agencies the OAG represents. It further kept the number of potentially responsive records within bounds by specifying a minimum payout by the agency (\$1,000 or \$30,000 in the case of an automobile accident).

Indeed, the OAG's justifications focus on problems with its own search capabilities and filing systems and not any inadequacy of the Request. The OAG describes HRDC's Request as requiring "a broadly-cast, over-inclusive search that would retrieve potentially-responsive records as well as thousands of non-responsive records." (Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018). But OAG gives no indication of what part of HRDC's Request is causing the OAG's search to be so unreasonably broad nor does it suggest that HRDC does not provide a detailed enough description "so that the agency may locate the

records in question,” *Farbman*, 62 N.Y.2d at 83.³ The OAG’s claim that it will have to conduct “offsite retrieval” and “manual review” of responsive as well as non-responsive records, is a general objection that could be used to delay responding to nearly any FOIL request. (Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018). The OAG’s response suggests that it cannot look up case or settlement information by defendant or locate files related to certain defendants once their existence is identified. This beggars belief. The OAG is not being asked to comb through decades-old paper files gathering dust in a warehouse. HRDC has asked for files from this decade, which is well into the era of e-filing and electronic storage of records.

The OAG further states that a preliminary review showed that providing a comprehensive response would require “a search involv[ing] the equivalent of an attempt to find the needle in the haystack.” *Id.* These contentions are puzzling. The OAG is the “People’s Lawyer,” and its office defends actions and proceedings on behalf of the state. *See* New York State Office of the Attorney General, *Overview Of The Functions Of The Office Of The Attorney General*, <https://ag.ny.gov/legal-recruitment/overview-functions-office-attorney-general> (last visited Jan. 31, 2019). Any legal organization of the size and scope of the Office of the Attorney General almost certainly has a records management system allowing for records to be located in less than a year and a half.

Indeed, even in its letter claiming that providing a comprehensive response requires finding a needle in a haystack, the OAG confirmed that it was “able to identify and retrieve some records responsive to [HRDC’s] request.” (Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018). This confirms that HRDC’s Request was sufficiently particularized, if

³ Indeed, the OAG’s response paradoxically acknowledges that “[r]ecords responsive to the *particulars* of your request cannot be precisely electronically identified for review and disclosure.” (Prakash Aff. Exhibit G, OAG’s Response to HRDC FOIL Appeal, Nov. 8, 2019).

even a preliminary search turned up responsive records that could be retrieved. Nonetheless, despite promising to make productions on a rolling basis, (Prakash Aff. Exhibit D, Correspondence Between HRDC and OAG Regarding Rolling Production, Sept. 28, 2018), the OAG inexplicably refused to produce the already-located documents any earlier than February 28, 2020, (Prakash Aff. Exhibit G, OAG Response to HRDC Appeal, Nov. 8, 2018), thus contradicting its commitment to the concept of “rolling production,” and highlights the arbitrary and capricious nature of the agency’s decision.

B. The potentially large volume of responsive records does not justify a yearlong production deadline amounting to constructive denial.

The OAG also asserts that a long timeframe for production is required because of “the volume of records that must be reviewed in order to respond to your request.” (Prakash Aff. Exhibit C, OAG Initial Response, Sep. 24, 2018). However, “[a] request for disclosure should not be denied merely because the request is voluminous.” *Irwin v. Onondaga Cty. Res. Recovery Agency*, 72 A.D.3d 314, 318, 895 N.Y.S.2d 262, 265 (2010); *see also* N.Y. Pub. Off. Law § 89(3)(a) (“An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records . . . 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 same logic applies to constructive denials in the form of unreasonably long response times. A voluminous request does not justify an 18- to 30-month timeline to respond. “[R]espondents cannot evade the broad disclosure provisions of [FOIL] upon the naked allegation that the request will require review of thousands of records.” *Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249, 508 N.Y.S.2d 393, 395 (1986) (internal citations omitted). Even in examples where a FOIL request generates more than 10,000 responsive documents, agencies have been

able to complete their response in less than 90 days. *See, e.g., Miller v. New York State Dep't of Transportation*, 58 A.D.3d 981, 982, 871 N.Y.S.2d 489, 492 (3d Dep't 2009) (finding three months to review 11,000 documents was not excessive). Yet, here, the OAG fails to give an adequate explanation as to why this Request is so burdensome as to justify a timeline to respond in excess of 1.5 years. Its justifications are nothing more than the same type of “naked allegation that the request will require review of thousands of records” that the New York Court of Appeals has decisively rejected. *Konigsberg*, 68 N.Y.2d at 249, 508 N.Y.S.2d at 394.

C. Public Policy Favors Swift Disclosure of These Records.

FOIL was enacted to ensure “the public is aware of governmental actions.” *Havemeyer*, 136 A.D.3d at 930, 25 N.Y.S.3d at 304. Consistent with this purpose, HRDC’s FOIL Request seeks information regarding the expenditure of public money (above a nominal amount) about a time-sensitive matter that is currently the subject of considerable public interest: the state’s treatment of incarcerated individuals. These settlements are especially relevant to the public interest now, because they concern settlements paid out because of wrongdoing by taxpayer-funded public employees—and the public has a right to know about both the actions that led to the settlements as well as the state’s efforts to settle these matters. *See Calandra*, 191 Misc.2d at 726, 745 N.Y.S.2d at 670 (“With respect to settlement agreements, courts have found that they are “record[s] of clear significance to the general public as [they] concern . . . the functioning of government and its decision making process.”); *see, e.g., P.R. Lockhart, New York’s justice system failed Kalief Browder. Now the city will pay his family \$3.3 million*, VOX (Jan. 25, 2019 11:50 AM) <https://www.vox.com/2019/1/25/18196524/kalief-browder-estate-settlement-new-york-rikers> (describing settlement given to family of man who spent years as a teenager in pretrial detention and solitary confinement on Rikers Island despite never standing trial, and later committed suicide after alleging that he was beaten by guards and other prisoners); Janaki

Chadha and Sally Goldenberg, *Rikers Closure Plan Will Soon Begin Public Review*, POLITICO NEW YORK (Jan. 22, 2019 5:01 AM <https://www.politico.com/states/new-york/albany/story/2019/01/21/rikers-closure-plan-will-soon-begin-public-review-804670>) (noting New York City’s effort to close “a notoriously violent jail”); Alice Speri, *Rape Victim Who Smuggled DNA Evidence Out of Rikers Wins Settlement*, THE INTERCEPT (Feb. 11, 2019 1:44 p.m.) <https://theintercept.com/2019/02/11/rikers-island-sexual-assault-rape/> (summarizing the allegations of a woman who settled with New York City after accusing it of “‘deliberate indifference’ to the plight of women sexually abused by Rikers guards.”).

The public needs this information as New York is on the cusp of a true statewide debate on criminal justice reform. HRDC’s request came on the heels of a New York State Corrections Commission report recommending steps be taken to “expedite” the closing of the notoriously brutal Rikers Island jail in New York City, and also reflects a rising tide of public awareness of “systemic abuses,” in New York’s prisons, such as “a pattern of assaults by guards against inmates and a scourge of racism on the part of correction officers.” Lisa W. Foderaro, *New York State May Move to Close Rikers Ahead of City’s 10-Year Timeline*, N.Y. TIMES, (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/nyregion/rikers-island-jail-closing-timeline.html> (last visited Feb. 15, 2018). With a significant number of new state legislators arriving in Albany this year, 2019 is an important window for leveraging public interest in and awareness of police and correctional misconduct to enact meaningful reforms. *See, e.g.*, Kenneth Lovett, *EXCLUSIVE: Public defender groups calling for major criminal justice reforms by state*, N.Y. DAILY NEWS, (Nov. 14, 2018 3:45 a.m.) <https://www.nydailynews.com/news/politics/ny-pol-public-defenders-criminal-justice-reform-20181113-story.html> (last visited Feb. 15, 2019).

The State of New York, embodied by the OAG, has a fiduciary duty to protect the public fisc and a moral obligations to prevent abuse and violations of law by its employees that harm the citizens of New York. By delaying its production of records disclosing how much public funding is being used to adjudicate or settle claims of wrongdoing by public correctional facilities for more than a year and a half, the OAG is effectively shielding the actions of correctional and police employees from public oversight, and all but ensuring that these records will be produced only after the current peak of public interest in criminal justice reform has passed. The OAG's unreasonable delay is a constructive denial that fundamentally contravenes the purpose of FOIL.

III. The Court Should Award Attorneys' Fees Under N.Y. Public Officers Law §89(4)(c)

Public Officers Law §89(4)(c) authorizes the award of attorneys' fees in a FOIL action. It states that the court "may assess" attorney's fees and costs against an agency when the petitioner has substantially prevailed and the responding agency has failed to respond within the statutory time, and "shall assess" such fees and costs when a petitioner substantially prevails and the agency had no reasonable basis for denying access.

This section applies to constructive denials, including for failure to respond within the statutorily-mandated period. *See New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338, 926 N.Y.S.2d 732, 734 (3d Dep't 2011) (noting 2006 FOIL amendment "adding the failure to respond within the statutory time as an additional, alternative basis for an award of counsel fees" was enacted "in order 'to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL") (quoting New York State Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5.).

Here, the OAG's arbitrarily long time period to respond to HRDC's narrowly tailored request is precisely the type of "unreasonable delay" that justifies the award of attorneys' fees. For example, in *South Shore Press v. Havemeyer*, the responding agency failed to respond within the statutorily mandated time. *Havemeyer*, 136 A.D.3d at 930, 25 N.Y.S.3d at 304. On appeal, the respondent "informed the Petitioner that the FOIL request 'may be an unduly broad or voluminous request,' that 'would interfere with the day-to-day operations of an already heavily burdened department.'" *Id.* Finding both that the agency had no reasonable basis for denying access and that it failed to respond to a request within the statutory time, the Appellate Division awarded the petitioner attorneys' fees. *Id.* Here, as in *Havemeyer*, the OAG's objections are without merits, and this Court should award attorney's fees. *See also Kohler-Hausmann*, 133 A.D.3d 437, 18 N.Y.S.3d 848 (1st Dep't 2015) (awarding attorneys' fees to petitions after agency constructively denied FOIL request "[b]y failing to respond for months after" deadline); *Siani v. Clark*, 23 Misc.3d 1123(A), 886 N.Y.S.2d 69 (Sup. Ct. Albany County 2009) (citing agency's "delay [in producing responsive documents] beyond the statutory limits and beyond the extra time voluntarily afforded by petitioner" as a factor in awarding attorneys' fees to petitioner).

The OAG has offered no reasonable basis for denying access to the records. As detailed above, the OAG's naked assertions that HRDC's request is voluminous does not allow it to respond in a way that constructively denies HRDC's request. Moreover, the OAG is an agency that should know this. Refusing to produce even those records already identified as responsive before February 28, 2020, and arbitrarily deciding that complete production will take a total of 2 years and 6 months is manifestly unreasonable, arbitrary and capricious.

Conclusion

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.” Louis D. Brandeis, *Other People’s Money—And How The Bankers Use It* (1914) (The McClure Publications, copyright 1913, 1914). HRDC seeks information about legal action that result in compensation to New York prisoners who have been mistreated by public employees, funded by the taxpayers. The more light is shed on the issue, the more likely we are to be able to eradicate it. “The degree of civilization in a society can be judged by entering its prisons.” Fyodor Dostoyevsky, *The House of the Dead; or, Prison Life in Siberia* (1862) (Everyman’s Library, London: J. M. Dent & Sons (published 1911). In constructively denying HRDC’s request, the OAG has thwarted HRDC’s ability to “enter its prisons,” thus preventing a timely and informed debate about the degree of civilization of the society we live in.

For the foregoing reasons, the OAG without a reasonable basis constructively denied HRDC’s FOIL request. As such, HRDC’s FOIL request should be granted in all respects, and the court should order responsive records to be disclosed within 60 days. Further, HRDC should be awarded attorneys’ fees in connection with the instant matter.

Respectfully submitted,

Dated: New York, New York
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