To be Argued by:
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New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of

MICHAEL GRABELL,

Petitioner-Respondent,

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

– against –

NEW YORK CITY POLICE DEPARTMENT,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

At issue on this appeal is the public's right to information about the use by police of a surveillance tool that emits toxic radiation to look behind walls, inside cars and through clothing. Specifically at issue is the refusal by defendant-appellant New York City Police Department ("the Police Department") to disclose any information whatsoever in response to a Freedom of Information Law (FOIL) request submitted by petitioner-respondent Michael Grabell (Grabell), seeking information about the risks to public health, the impact on personal privacy, and the costs to taxpayers of the Police Department's use of mobile vans equipped with "Z-backscatter" X-ray technology. The Supreme Court correctly determined that the Police Department had no authority under FOIL to withhold most of this information, and appropriately awarded attorney's fees to Grabell because the Police Department unreasonably refused to disclose any information.

Grabell is an investigative reporter for ProPublica who has reported widely on the international controversy surrounding Z-backscatter technology. This technology can detect the hidden presence of illicit materials, such as drugs or bombs. But it does so by spraying X-ray radiation so powerful and dangerous that use of the technology is banned in Europe, not allowed in American airports, and used by U.S. Customs and Border Protection only when no humans are present.

In 2012 Grabell submitted a FOIL request seeking basic information about the public's health risks created by the Police Department's use of the equipment, its policies to minimize those risks and to protect personal privacy when the see-through technology is used, and the costs to New York taxpayers of deploying this technology. In response, the Police Department refused to disclose anything at all about its vans, contending that releasing *any* information—even about health risks and privacy protections—could allow terrorists to assess how powerful the vans are and how to evade detection. The Supreme Court properly rejected the Police Department's refusal to disclose this information of vital public concern.

Through this appeal the Police Department continues to press for open-ended authority to withhold any and all information that could possibly be relevant to a terrorist attempting to evade detection. This self-claimed authority has no basis in law, and it has no proper application in any event to Grabell's requests for health, privacy and cost information relating to the Police Department's activities. If accepted by this Court, the authority to withhold information that is sought by the Police Department would make democratic oversight of police activity all but impossible. Its appeal should flatly be rejected.

After careful review of the evidence submitted by the Police Department, the Supreme Court concluded that its claims about the potential "ineffectiveness in counterterrorism" were speculative, at best, and illogical as applied to most of the

information Grabell requested. The court found that the Police Department's refusal to disclose information violated FOIL because the Police Department did not make a particularized demonstration that any FOIL exemption applied, and failed to establish that appropriate redaction would not fully answer its concerns about protecting non-routine investigative procedures and ensuring public safety. The Police Department also failed to demonstrate that it had properly searched for records concerning the protection of privacy. The Supreme Court found that Grabell had substantially prevailed in his claim and, because the Police Department's blanket refusal was so "egregious" and contrary to the policy of FOIL, awarded Grabell his costs and attorneys' fees.

The Supreme Court's order should be affirmed in all respects.

QUESTIONS PRESENTED

1. Does FOIL permit the Police Department to withhold all documents containing any information that might potentially "undermine its counter-terrorism capability," without any particularized demonstration that a specific FOIL exemption authorizes the information to be withheld, and without any obligation to redact and withhold only exempt material?

The Supreme Court answered this question "no."

2. Does FOIL's law enforcement exemption permit the Police Department to withhold information concerning the impact of its activities on

public health, personal privacy, and taxpayer costs contained in documents that are not created "for law enforcement purposes" or whose disclosure would not reveal a "non-routine" law enforcement technique?

The Supreme Court answered this question "no."

3. Does FOIL's life/safety exemption permit the Police Department to withhold information concerning the impact of its activities on public health, personal privacy and taxpayer costs without a particularized demonstration that disclosure would create an actual risk of harm to specific individuals?

The Supreme Court answered this question "no."

4. Can the Police Department be required to provide an affidavit from a person with actual knowledge of the search conducted for documents requested under FOIL after its conclusory certification that no documents could be located was contradicted by a Police Department affidavit explaining why the responsive documents that existed were properly withheld?

The Supreme Court answered this question "yes."

5. Can the Police Department be required to pay attorney's fees under FOIL after its blanket refusal to produce any documents was found to be unreasonable, and the key information requested was ordered to be produced?

The Supreme Court answered the question "yes."

COUNTER-STATEMENT OF THE CASE

This appeal arises out of an investigation by petitioner-respondent Michael Grabell (Grabell) into the implications for public health, personal privacy and taxpayer costs of the Police Department's use of controversial X-ray surveillance technology. Grabell is a journalist for ProPublica, a Pulitzer Prize-winning news organization committed to "investigative journalism in the public interest." (R38.) He has written extensively about the international controversy surrounding Z-backscatter technology, and its use by law enforcement on mobile vans. (R8, 55.) Recognizing the critical public interest at stake, in 2012 submitted a FOIL request for documents relating to the Police Department's use of the vans. (R44.)

A. The Substantial Health and Privacy Concerns Surrounding Z-Backscatter Technology

A Z-backscatter van is a minivan equipped with technology that sprays X-ray radiation. The radiation fans out in a pattern that allows it to detect explosives, drugs, and other matter inside vehicles and buildings within a certain operational radius. (R55-56.) The radiation emitted by the van produces visual images that can be reviewed in real time or stored for later analysis. (R57-58.) Backscatter X-ray technology was briefly used by the Transportation Security Administration in passenger scanners at airports, before the program was terminated due to privacy concerns. (R58.)

The existence of Z-backscatter vans is no secret, and detailed descriptions of their capabilities can be found with a simple Google search. The capabilities of this technology have been widely discussed in mainstream publications. *See, e.g.*, *Z Backscatter*, American Science & Engineering, http://as-e.com/resource-center/technology/z-backscatter/ (last visited Sept. 21, 2015) (detailing the precise science behind Z-backscatter technology). It is also well known that the Police Department has employed this technology since at least 2004. *See* Richard Esposito & Ted Gerstein, *Bomb Squad: A Year Inside the Nation's Most Exclusive Police Unit* 152 (2007).

The use of Z-backscatter technology involves significant risks to health and privacy. Backscatter X-ray technology was banned from European Union airports in 2011 due to the health risks arising from exposure to its radiation. (R56.) Unlike airport scanners, the beams in a backscatter van cannot be directly aimed at a single target. Therefore, bystanders are also exposed to its radioactive effects (R64-66.) The manufacturer of the Z-backscatter vans, American Science & Engineering Inc., has noted that the level of radiation exposure from the vans is 140% as much as that associated with the use of a backscatter airport scanner. (R56.) Most worryingly, the type of radiation employed by the Z-backscatter vans—ionizing radiation—is the type of radiation commonly associated with cancer and genetic mutations. (R56.) Given such concerns, the U.S. Border Patrol

does not permit their use on vehicles entering the country unless all passengers first exit the vehicle and stand a safe distance away. (R57.) Indeed, even New York's own state laws severely restrict who may use such technology. "No person other than a professional practitioner . . . a physician's assistant . . . or, a certified nurse practitioner . . . shall direct or order the application of radiation from radiation equipment . . . to a human being." Pub. Health. L. § 225, pt. 16.19(a).

According to readily public information, Z-backscatter vans cost between $729,000 and $825,000, depending on how they are equipped. (R58.) The Police Department continues to use such vans, but refuses to disclose how much it has spent on them, what assessment it has made of the health risks and how to minimize them, or what steps have been taken to protect personal privacy when the vans are used.

B. The Police Department's Blanket Refusal to Disclose Any Information About It's Use of this Technology

By letter dated February 15, 2012, Grabell requested that the Police Department disclose seven categories of information aimed at revealing any public health risks and privacy concerns arising from its use of Z-backscatter vans, and assessing the cost to taxpayers:

1. Lists and reports dealing with past missions/deployments of the Z-backscatter van;
2. Departmental policies and training materials regarding the Z-backscatter van;

3. Legal opinions or policy decisions outlining permitted uses of the Z-backscatter van;

4. Contract documents regarding Z-backscatter van purchasing;

5. Tests and reports regarding the radiation dose, or other health and safety consideration effects, of the Z-backscatter van;

6. Records and policies relating to data storage, including outlines of the privacy protections that might be in place; and

7. Contents of the image databases captured and stored by the Z-backscatter vans.

(R44-45.)

The Police Department flatly denied each of Grabell's various requests. (R47.) Initially, it asserted that all of the requested information was exempt from disclosure either under FOIL's law enforcement exemption, Public Officers Law (POL) § 87(2)(e)(iv), as documents describing "non-routine criminal investigative techniques or procedures," or under POL § 87(2)(g) as "intra-agency materials." (R11.) The Police Department gave no particularized explanation of how those exemptions applied or whether redaction was possible. The Police Department also represented that after a diligent search it had not located any documents called for by Grabell's requests 6 and 7, seeking privacy policy and copies of stored images captured by the vans. The Police Department alleged it "does not possess any records responsive to [these requests]." (R78.)

Grabell promptly filed an administrative appeal from the Police Department's blanket refusal to disclose information. (R49-50.) The Police

Department denied the appeal, but again failed to provide any particularized explanation of its rationale for invoking the two claimed exemptions. (R52.)

C. Grabell's Pursuit of Narrowed Requests In Court

On April 9, 2013, Grabell initiated this proceeding under Article 78 to compel the Police Department to disclose the requested information about its backscatter vans. Grabell objected to the Police Department's failure to provide a particularized explanation of how the various exemptions it invoked applied to the type of information he was seeking concerning public health risks, privacy protection and costs. (R41.)

In response, the Police Department walked away from its earlier claim that the "intra-agency" exemption applied, but now claimed that the "life/safety" exemption applied because disclosure of any information at all would allegedly create potential risks to its counterterrorism efforts. (R75.) The Police Department asserted that *every* aspect of *every* document was properly withheld under the law enforcement and life/safety exemptions. (R75.) An affidavit from Richard Daddario, Deputy Commissioner of Counterterrorism, (R86-94), stated that documents existed that would respond to each request, but asserted in general and conclusory terms that disclosure of any information about the Z-backscatter vans could compromise the Police Department's effectiveness in fighting terrorism. (R93.)

Apparently frustrated at the Police Department's blanket approach and the illogic of many of its stated concerns—given the public information already known about the capabilities of Z-backscatter vans—the Supreme Court ordered the parties to look carefully at the requests and exchange settlement proposals. In response, the Police Department insisted that it would disclose nothing and refused to explore any settlement. For his part, Grabell narrowed the language of his requests to make clear he was not seeking operational details or information about on-going investigations. He also eliminated the request for specific images recorded by the vans recorded by the vans that might disclose personal private information. (R12.) He modified the requests to seek the following:

1. Lists and reports dealing with past missions/deployments of the Z-backscatter van *unrelated to any ongoing investigation.*
2. Departmental policies and training materials regarding the Z-backscatter van.
3. Legal opinions or policy decisions outlining permitted uses of the Z-backscatter van.
4. Contract documents regarding Z-backscatter van purchasing, *sufficient to disclose only the total aggregate cost of the vans purchased and the total number of vans purchased.*
5. Tests and reports regarding the radiation dose, or other health and safety consideration effects, of the Z-backscatter van.
6. Records and policies relating to the storage of data collected by the vans, including any privacy protections that might be in place.

Even this clarified and limited proposal was rejected by the Police Department.

D. The Police Department's Appeal of The Carefully Circumscribed Disclosures Ordered By The Supreme Court

In an opinion dated December 9, 2014, the Supreme Court (Hon. Doris Ling-Cohan) ordered the Police Department to produce the great majority of the materials requested. The court found the justification of "counterterrorism" entirely insufficient to deny Grabell's request wholesale. "While the NYPD may have had a reasonable basis for withholding some of the documents that are responsive to petitioner's first five requests," the court noted, "it had no reasonable basis for withholding them all, or for failing to provide some of them in redacted form." (R20.)

The court also found the hypothetical harms identified by the Police Department insufficient to satisfy its obligation to present a particularized explanation of how FOIL's exemptions applied, particularly given the "potential health risks inherent in the use of backscatter x-ray technology." (R28.) The court recognized the validity of the Police Department's concerns about disclosing ongoing investigation or non-routine procedures, but found them not to apply to most of the information requested. It authorized the Police Department to make limited redactions but required most of the information sought to be disclosed.

The Order now before this Court requires the Police Department to produce the following narrowed categories of documents:

1. Summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation, redacted to omit any information explicitly describing a limitation, technical or other, on the use of the vans, the dates upon which one or more vans were deployed, and any information expressly disclosing the reason or reasons for any particular deployment of the vans;

2. The Police Department's policies and procedures regarding the vans as well as any training materials, redacted to omit any information explicitly describing a limitation, technical or other, on the use of the vans, or any information expressly disclosing a reason for a particular deployment of the vans;

3. The total aggregate cost of the vans purchased by or for the Police Department and the total number of vans purchased; and

4. Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter vans.

In addition to ordering these disclosures, the Supreme Court also ordered the Police Department to prepare an affidavit detailing its search for documents concerning its storage of images and data collected by the Z-Backscatter vans, in light of contradictory statements in the record about whether such documents exist. (R31.) Finally, because Grabell had substantially prevailed and because the Police Department's refusal to disclose was unreasonable, the court ordered the Police Department to pay Grabell's attorneys' fees as FOIL authorizes. (R26-29.)

ARGUMENT

I.
THE POLICE DEPARTMENT'S REFUSAL TO DISCLOSE ANY OF THE REQUESTED DOCUMENTS VIOLATES ITS STATUTORY OBLIGATIONS IN MULTIPLE RESPECTS

To withhold records under FOIL, an agency must make a particularized showing that the records fall under a specific statutory exemption. *See* POL § 87(2). The Police Department cites two statutory exemptions as relevant to its position, but essentially ignores their requirements and limitations. Instead, the Police Department asks this Court to endorse virtually limitless authority for the Police Department to withhold any information that could be of interest to potential terrorists. The "terrorism exemption" proffered by the Police Department is not tied to any statutory text and would exempt broad swaths of important information from disclosure, severely limiting public oversight and accountability of the police.

A. The Police Department Asserts a Terrorism Exemption that Has No Basis in Law or Fact

The Police Department asks this Court to exempt from disclosure any document that has a portion which "could provide an enterprising terrorist with enough information to tailor his conduct to avoid detection and execute a successful attack." NYPD Br. 16. While protecting the public from a terrorist attack is critically important, so too is the need for democratic oversight of our

institutions of government, including our police. FOIL contains no broad "terrorism exemption," and the Police Department's effort to invoke one here is baseless as a matter of law and fact.

As a matter of law, the Police Department is required to demonstrate that each of the records is properly subject to withholding under one of the FOIL exemptions. FOIL requires an agency to disclose its records upon request absent specific statutory authorization to withhold them. As the Court of Appeals explained in *Fink v. Lefkowitz*, FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." 47 N.Y.2d 567, 571 (1979). FOIL thus mandates that all agency records are presumptively open, and identifies the only grounds upon which an agency is permitted to withhold. To fulfill FOIL's transparency objective, the nine authorized exemptions are to be "narrowly interpreted, and the burden of demonstrating that requested material is exempt from disclosure rests on the agency." *Matter of M. Farbman & Sons, Inc. v. New York City Health and Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984); *see also Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996).

The Police Department's effort to bypass the statute and create a new exemption for information relevant to terrorists is improper and dangerous. Taken to its natural conclusion, such an exemption would defeat the very purposes of

FOIL: "to make government more transparent and open to broad public disclosure of information." NYPD Br. 17. It is not hard to conceive of a hypothetical scenario in which disclosure of almost anything the Police Department does "could" help a terrorist to plan a more effective attack. The Police Department seeks permission, in essence, to shield virtually all of its activities from public scrutiny.

Courts have universally rejected the type of effort advanced by the Police Department to create blanket objections to broad categories of information under FOIL. In *Fink*, the Court of Appeals made clear that FOIL strikes the balance "in favor of disclosure," by permitting information to be withheld only when "the governmental agency convincingly demonstrates" that an exemption applies, and that the exemptions are to be "narrowly constructed." *Fink*, 47 N.Y.2d at 571; *see also Gould*, 89 N.Y.2d at 275 (holding that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"). The Supreme Court properly followed *Fink*, recognizing that "the statutory exemptions are to be 'narrowly interpreted so that the public is granted maximum access to the records of government'" (R14) (quoting *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007)).

Moreover, the Police Department's terrorism objection would not justify its blanket refusal as a matter of fact, even if it had any basis in law. Much

information about the vans is already publicly available, rendering completely illogical many of the Police Department's arguments about the requested documents' potential value to terrorists. For example, the Police Department argues that disclosing the health risks of the vans would reveal their radioactive properties would and therefore could enable terrorists to evade detection, but fails to mention that anyone with an Internet connection can find the radioactive properties of the vans on the manufacturer's website. *See ZBV®: Safety*, American Science and Engineering, http://www.as-e.com/products-solutions/cargo-vehicle-inspection/mobile/product/zbv#safety (last visited Sept. 21, 2015).

The Police Department makes a similar argument that disclosing the cost of the vans will implicitly reveal their capabilities, ignoring that the range of costs is publicly available. What is not known is the cost of the Police Department's vans to New York taxpayers. (R9.) In offering up conclusory concerns about the value of disclosure to terrorists the Police Department simply fails to address the public accessibility of information that already exists. *See generally* R86-94. It also fails to address the public's strong interest in knowing the requested information about the health risks, privacy concerns and taxpayer costs relating to its use of the Z-backscatter vans..

B. The Police Department Fails to Provide a Particularized Demonstration For Any Exemption

Under FOIL, when any agency withholds a document it must give "a particularized and specific justification for denying access." *Matter of Johnson v. New York City Police Dep't*, 257 A.D.2d 343, 349 (1st Dep't 1999) (quoting *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986)); *see also, Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 251 (1986); *Farbman & Sons*, 62 N.Y.2d at 80; *Fink*, 47 N.Y.2d at 571; *Cornell Univ. v. City of New York Police Dep't*, 153 A.D.2d 515, 516 (1st Dep't 1989). A justification is not sufficiently particularized if it amounts to mere "references to sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld." *Church of Scientology of New York v. State*, 46 N.Y.2d 906, 908 (1979). An agency must justify non-disclosure "in more than just a 'plausible fashion.'" *Data Tree*, 9 N.Y.3d at 462.

The Supreme Court correctly held that the Police Department's justifications for denying access were insufficiently particularized. (R24.) In denying Grabell's request initially, all the Police Department did was cite the law enforcement and intra-agency exemptions, with no explanation at all. (R47.) The Police Department did not distinguish among—or even acknowledge—the seven requests for quite different categories of information.

The Police Department then failed to provide sufficient particularity in defending its blanket refusal in court. It presented only conclusory statements by Deputy Commissioner Daddario. The "mere speculation" he provided did not explain how the general concerns being raised actually applied to the specific information at issue. (R19.) For example, the Police Department claimed that "[d]ocuments quantifying the radiation dose emitted by the van would reveal the power and capacity of the vans' x-ray capabilities," NYPD Br. 33, without explaining how this would aid terrorists given that the vans' capabilities are already publicly available. Nowhere did the Police Department justify its blanket refusal "in more than just a 'plausible fashion,'" *Data Tree*, 9 N.Y.3d at 462.

Citing *Matter of Whitley v. New York County District Attorney's Office*, 101 A.D.3d 455 (1st Dep't 2012), the Police Department insists that its expansive assertions of potential harm were sufficiently particularized, NYPD Br. 22. But the Police Department misreads *Whitley*. That case held that the respondents were not "required to set forth particularized findings" for "each responsive document." 101 A.D.3d at 455. There is, however, a big difference between not providing particularized findings for every document and not providing particularity for whole *categories* of documents.

The Police Department similarly mis-cites *J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983), for the proposition that it is permitted to make a

"generic determination" that a document is exempt. The Police Department claims that "[p]roviding a particularized reason for withholding the production of a specific document may unavoidably provide the FOIL applicant with insight and information which should not otherwise be revealed." NYPD Br. 22. The "generic determination" in *Stevens* was a determination that certain "categories" of documents may not be disclosed—something the Police Department has not provided. *Stevens*, 710 F.2d at 153. *Stevens* holds that an agency must give a particularized justification for each category of documents, just as the Supreme Court did here.

C. The Police Department Exceeds its Authority By Refusing to Disclose Redacted Copies

The Police Department's blanket non-disclosure violates FOIL in yet another respect. When some but not all parts of a document satisfy a FOIL exemption, the agency is not permitted to withhold the whole document. Instead, it must disclose all reasonably segregable non-exempt portions. Courts consistently have held that FOIL mandates redaction whenever possible: "That some portions of the records may be entitled to exemption does not warrant withholding [the records] completely." *Matter of Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984); *see also Matter of Schenectady Cnty. Soc'y for Prevention of Cruelty in Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011) (an agency "cannot refuse to produce the whole record simply because some of it may

be exempt from disclosure"); *Whitfield v. Bailey*, 80 A.D.3d 417, 418-19 (1st Dep't 2011) (same). The Police Department refused to disclose *any* information, even in redacted form.

Redacting sensitive law enforcement materials instead of refusing to disclose entire documents enables agencies to "strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files." *Gould*, 89 N.Y.2d, at 278. While the Supreme Court agreed that limited redactions of portions of documents in two categories is appropriate under the life/safety exemption, the Police Department had no basis for withholding the documents "in toto." (R29.) Specifically, it ordered redaction of information disclosing the vans' technical limitations, reasons for deployment of the vans, and the dates upon which the vans were deployed. (R30.)

The Police Department protests this balanced approach, claiming that redaction "is not enough to eliminate the harm that would be caused by the disclosure of the documents." NYPD Br. 26. Citing *Matter of Asian Am. Legal Def. & Educ. Fund*, 125 A.D.3d 531 (1st Dep't 2015) (*AALDEF II*), it suggests that terrorists could infer redacted information from unredacted information. In fact, the two cases are quite distinct. For one, the reports in *AALDEF* contained a "high level of detail," *Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't*, 41 Misc.3d 471, 476 (N.Y. Sup. Ct. 2013), *aff'd by AALDEF II* (*AALDEF*).

The Police Department has made no showing of similar detail in the requested records in this case. The nature of the information in *AALDEF* is also significantly different from the information here. In *AALDEF*, redacted parts of the documents contained detailed information concerning a covert domestic surveillance program, including the identities of undercover individuals. Finally, in *AALDEF*, much of the requested information concerning the covert operations program was not publicly known. This differs significantly from the instant case, as shown above.

In sum, the Police Department's attempt to rewrite FOIL by adding a "terrorism exemption," its failure to provide a particularized demonstration that a FOIL exemption applies, and its refusal to disclose non-exempt portions of redacted documents all violate the statutory mandates of FOIL.

II.
THE POLICE DEPARTMENT FAILED TO DEMONSTRATE THAT ANY REQUESTED DOCUMENTS SATISFY THE LAW ENFORCEMENT EXEMPTION

The Police Department cites the law enforcement exemption as a justification for its blanket denial of Grabell's requests, but then all but ignores this exemption's requirements. The exemption narrowly allows an agency to withhold documents if they were "compiled for law enforcement purposes" and their disclosure "would… reveal criminal investigative techniques or procedures, except routine techniques and procedures." POL § 87(2)(e)(iv). The Supreme Court correctly rejected the Police Department's sweeping and unfocused reliance on this

exemption. Many of the documents at issue were not created "for law enforcement purposes," and documents concerning public health risks, taxpayer expense and other aspect of the backscatter vans do not disclose "non-routine" investigative techniques within the meaning of FOIL.

A. The Law Enforcement Exemption Permits Agencies To Withhold Documents Only If They Are Compiled For Law Enforcement Purposes And Reveal Non-Routine Investigative Techniques

FOIL's law enforcement exemption allows an agency to withhold records if (1) they are "compiled for law enforcement purposes" and (2) their disclosure falls within one of 4 enumerated categories.[1] The Police Department argues that all of the requested documents fall within the category exempting documents that would "reveal criminal investigative techniques or procedures, except routine techniques and procedures." POL § 87(2)(e)(iv). The purpose of this exemption is to prevent "violators of the law" from learning "the non-routine procedures by which an agency obtains its information." *Fink*, 47 N.Y.2d at 572.

The exemption does not apply at all to publicly known investigative methods. Rather, it allows law enforcement records to be withheld only where

[1] In addition to being compiled for law enforcement purposes, to be exempt from disclosure a document must also: "i. interfere with law enforcement investigations or judicial proceedings; ii. deprive a person of a right to a fair trial or impartial adjudication; iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures." POL § 87(2)(e)(i)-(iv).

disclosure of an unknown procedure or technique would create a "substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel." *Id*. The exemption generally is reserved for "detailed, specialized methods of conducting an investigation into the activities of a specialized industry," *id.* at 573, and "highly detailed step-by-step depiction[s] of the investigatory process," *Matter of Spencer v. New York State Police*, 187 A.D.2d 919, 921 (3d Dep't 1992); *see also Matter of Beyah v. Goord*, 309 A.D.2d 1049, 1052 (3d Dep't 2003) (refusing to exempt documents that "do not set forth the methods of inquiry by which information concerning the incident was gathered"); *AALDEF*, 41 Misc.3d at 476 (exempting documents because they were "highly detailed and factual reports" that revealed non-routine techniques).

In *Fink*, the Court of Appeals explained the proper application of the law enforcement exemption. It stressed that the exemption is to be "narrowly constructed," 47 N.Y.2d at 571, and held that a manual describing nursing-home audit procedures was *partially* exempt from disclosure because the manual contained a "step-by-step guide to an investigation and audit of a nursing home." *Id.* at 569. As the Court explained, "[t]o permit disclosure of these time-tested techniques which have led to numerous successful prosecutions would have a dramatic impact on law enforcement investigations by alerting prospective

defendants to the course those inquiries would be likely to take." *Id.* at 572. And because the law enforcement exemption must be narrowly applied, the Court of Appeals required non-exempt material to be disclosed, on a page-by page basis. *See also Spencer*, 187 A.D.2d at 922 (reciting Supreme Court's disclosure errors on a page-by-page basis); *Matter of De Zimm v. Connelie*, 102 A.D.2d 668, 671 (3d Dep't 1984) (examining a section of an administrative manual in connection with law enforcement exemption).

1. Only documents that are compiled for law enforcement purposes are exempt.

The law enforcement exemption only applies to documents that "are compiled for law enforcement purposes." POL § 87(2)(e). The Police Department elides the statutory distinction between documents compiled by a law enforcement *agency* and documents compiled for law enforcement *purposes*, and seems to assume that any document held by a law enforcement agency is compiled for law enforcement purposes. This is not so. As a threshold matter, the law enforcement exemption applies only to documents prepared to aid in specific investigations and related law enforcement activities. It does not exempt all documents held by a law enforcement agency. If the Legislature intended for the exemption to apply to all documents compiled by a law enforcement agency, it would not have used the narrow term "compiled for law enforcement purposes."

New York Civil Liberties Union v. Erie County Sheriff's Office, 47 Misc.3d 1201(A) (Sup. Ct. Erie Cnty. 2015) (*NYCLU*), illustrates this principle. In that case, a Sheriff's Office had refused to disclose several kinds of documents for cellular tracking devices, including purchase orders, letters between the Sheriff's Office and the device's manufacturer, a non-disclosure agreement signed by those parties, and a procedural manual for officers using the devices in their investigations. Supreme Court held that none of these documents were "compiled for law enforcement purposes" and ordered their disclosure. *See id.* at 10-12. While all of the documents were compiled by the Sheriff's Office, none were compiled for or in relation to particular law enforcement investigations. In contrast, documents that *were* compiled for law enforcement purposes (but which the *NYCLU* court ordered disclosed nonetheless) clearly concerned particular law enforcement proceedings, such as complaint summary reports or logs. *See id.* at 12-13; *see also Faulkner v. Del Giacco*, 139 Misc.2d 790, 794 (Sup. Ct. Albany Cnty. 1988) (records not complied for law enforcement purposes where "*there is no indication in the record that any criminal proceedings have been initiated or are even contemplated*" (emphasis added)).

Similar interpretations of the parallel provision in the federal Freedom of Information Act (FOIA) are also "instructive." *Matter of Lesher v. Hynes*, 19 N.Y.3d 57, 64 (2012) (quoting *Fink*, 47 N.Y.2d at 572n.). As explained in

Benavides v. Bureau of Prisons, 774 F.Supp.2d 141, 145 (D.D.C. 2011), "[t]he fact that the relevant agency's principal purpose is the enforcement of criminal law does not absolve it of its obligation to demonstrate that the records at issue were compiled for a law enforcement purpose." To make this showing, "the government generally 'must identify a particular individual or incident as the object of the investigation and specify the connection of the individual or incident to a potential violation of law or security risk.'" *Id.* (quoting *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1056 (3d Cir. 1995)); *see also King v. U.S. Dep't of Justice*, 830 F.2d 210, 229 (D.C. Cir. 1987) (same); *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982) (same). As repeatedly recognized under FOIA:

> The appropriate test is whether the records indicate that the agency was gathering information with the good faith belief that the subject may violate or has violated federal law, or was merely monitoring the subject for purposes unrelated to enforcement of federal law.

Lamont v. Department of Justice, 475 F.Supp. 761, 773 (S.D.N.Y. 1979) (footnote omitted).

To assert the law enforcement exemption, the Police Department must show that the requested documents were compiled for a particular law enforcement proceeding. It has not done so, and it cannot do so for items such as the aggregate cost of equipment or results of studies concerning public health risks associated with its activities. *See, e.g.*, *NYCLU*, 47 Misc.3d at 10-12.

2. Only documents that reveal nonroutine investigative techniques are exempt.

To withhold the requested records, it was the Police Department's burden to show that they contain "nonroutine" investigative techniques. As *Fink* makes plain, this aspect of the exemption allows agencies to maintain in confidence their investigative techniques and procedures that would be compromised by disclosure. Only "extraordinary measure[s]" which, if disclosed, "could allow miscreants to tailor their activities to evade detection" fall within this exemption. *De Zimm*, 102 A.D.2d at 671.

The key question is whether disclosure of specific information would create a substantial likelihood that a criminal could evade detection. *See Fink*, 47 N.Y.2d at 572. The age of the technology is not relevant. *See Spencer*, 187 A.D.2d at 921. However, the availability of the information in the public sphere is highly relevant because, if the information is publicly known, criminals could use it evade detection, whether or not the requested documents are disclosed. *See Matter of Muniz v. Roth*, 163 Misc.2d 293, 297 (Tomkins Cnt'y Sup. Ct. 1994) (refusing to apply law enforcement exemption to fingerprint methodology that "was the subject of testimony in open court").

To the limited extent that some information requested by Grabell is not already public, and could be considered to disclose a non-routine investigative technique, the Supreme Court ordered it to be redacted. (R29.) The Police

Department has not demonstrated clear error or established a "substantial likelihood" that criminals could evade detection by use of the information that the Supreme Court ordered disclosed

The *Fink* court refused to withhold information that constitutes "merely a recitation of the obvious." *Id.* at 573. How the Police Department's vans generally operate is nothing but obvious. They are mobile scanning devices that may either drive around the city or scan vehicles at checkpoints (R55-56); *see also* Cargo & *Vehicle Inspection, ZBV*, American Science & Engineering, http://www.as-e.com/products-solutions/cargo-vehicle-inspection/mobile/product/zbv (last visited Sept. 21, 2015) (describing the operation of the Z-backscatter van). Procedures for using the vans that are neither detailed nor specialized is not properly withheld.

For example, the Police Department identified nothing specific in the requested documents concerning the health risks and costs of the van would shed any meaningful new light on the procedures for using the vans in specific investigations. The Police Department's conclusory assertion that disclosure of these documents "would permit those seeking to evade detection to adapt their plans in a manner most likely to yield a successful attack and to avoid engaging in conduct that has been subject to this surveillance technique in the past," NYPD Br. 25, if accepted by the Court, would allow it to exempt most everything it does from disclosure and oversight.

The Police Department argues that the Supreme Court misinterpreted *Fink*, but it is the Police Department, not the court, that misreads and misapplies *Fink*. According to the Police Department, "a substantial likelihood that violators could evade detection is a factor, not a prerequisite," in determining if the law enforcement exemption applies. NYPD Br. 23. The Police Department bases this claim on a statement in *Fink* that a substantial likelihood of evasion is "[i]ndicative, but not necessarily dispositive," of whether information is exempt, but the Police Department mistakes the Court's point. *Id.* at 23 (citing *Fink*, N.Y.2d at 572). The Court of Appeals said that the potential for evasion, alone, might not be *sufficient* to invoke the exemption in all cases; it did not say a potential to evade detection was *unnecessary*.

Unsurprisingly, the Police Department does not cite a single case that reads *Fink* to permit the exemption to be invoked where disclosure would not allow a criminal to evade detection. To the contrary, *Fink* and the many cases citing it accept that a substantial likelihood of evasion is a necessary key to withholding information under the law enforcement exemption. *See, e.g. Matter of Bellamy v. New York City Police Dep't*, 59 A.D.3d 353, 355 (1st Dep't 2009); *Beyah*, 309 A.D.2d at 1052; *Spencer*, 187 A.D.2d at 921; *Muniz*, 163 Misc.2d at 297.

The Police Department is equally off-base in claiming that the law enforcement exemption should be interpreted to adopt the "law enforcement

privilege" recognized at common law. NYPD Br. 18-19 (citing *In re Dep't of Investigation of City of New York v. Myerson*, 856 F.2d 481 (2d Cir. 1988); *United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986)). The Police Department nowhere explains how or why New York's FOIL encompasses the evidentiary privilege, and ignores that the FOIL exemption and the privilege serve very different purposes. The Police Department also fails to acknowledge that its argument has already been squarely rejected by the Court of Appeals. *See, e.g.*, *Washington Post*, 61 N.Y.2d at 567 ("FOIL expressly refers to statutory exemptions so that a common-law privilege is inapposite."); *Doolan v. Bd. of Co-op Educ. Servs., Second Supervisory Dist. of Suffolk Cnty.*, 48 N.Y.2d 341, 347 (1979) ("the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed").

B. The Documents At Issue Were Not Compiled for Law Enforcement Purposes and Do Not Reveal Non-Routine Investigative Techniques

The Supreme Court correctly held that the law enforcement exemption does not justify withholding all of Grabell's requested documents. The Police Department provided no evidence that most of the documents ordered to be disclosed were compiled for law enforcement purposes, and for those that were, it did not establish that they reveal any non-routine law enforcement techniques or procedures.

1. The law enforcement exemption does not apply to the aggregate cost and numbers of the Z-backscatter vans.

Documents disclosing the total aggregate cost of the vans and the number of vans purchased were not compiled for law enforcement purposes and do not relate to any particular law enforcement proceedings. They are directly analogous to the purchase orders required to be disclosed in *NYCLU*, and do not satisfy the threshold requirement for exemption.

Disclosure of this information, moreover, would not reveal non-routine investigative techniques. As the court noted, the cost of the vans is already largely publicly available, and for that reason speculation that disclosure would lead to a substantial likelihood of evasion is illogical and baseless. (R21.) Similarly, knowledge of the total number of vans purchased would not lead to knowledge of "the number of Vans deployed at any given time, or the locations." *Id.*

The Supreme Court is entirely correct that knowledge of the number of vans at the Police Department's disposal does not reveal the number deployed, nor does it indicate when or where the vans are deployed. The Police Department speculates that an individual who knows the number of the Police Department's vans could "plan an attack at a time the vans would likely be otherwise occupied at public events," NYPD Br. 31, but fails to explain how this is so. No matter how few or how many vans the Police Department owns, knowing the number does not

create a "substantial likelihood" a criminal could infer its deployment so as to evade detection.

The Police Department is equally off-base in arguing that the cost of a van would provide information about its specific capabilities, NYPD Br. 31, since the capabilities of the vans are disclosed by its manufacturer. The Police Department provides no reason to believe this claim and, according to settled FOIL law bears "the independent burden of establish that the material [falls] squarely within the ambit of the statutory exemptions." *Konigsberg*, 68 N.Y.2d at 251; *see also Capital Newspapers*, 67 N.Y.2d at 566. Moreover, it is implausible. Due to the complexity of the vans, with no other contractual information, a given cost is likely to be compatible with a number of possible specifications. In any case, there is no reason to believe that knowing the aggregate cost of the vans and the total number of vans owned by the Police Department enables an inference to the cost of any single van, because there is no reason to believe that the vans cost the same amount. Unlike the detailed nursing home auditing process in *Fink*, disclosure would not allow criminals to evade detection.

Allowing the Police Department's broad interpretation of the exemption would alter FOIL in an unprecedented way and enable the Police Department to avoid disclosing what it pays for virtually *any* equipment it owns, from squad cars to bullet proof vests to guns and ammunition. The Police Department might have

good reason for spending taxpayer dollars on the vans, but disclosure is the only way to "hold the governors accountable to the governed." *Fink*, 47 N.Y.2d at 571 (internal citation omitted).

2. The law enforcement exemption does not apply to reports regarding the health risks of using the Z-backscatter vans.

Tests or reports regarding the radiation dose emitted and other potential effects on public health from use of the Z-backscatter vans do not satisfy the law enforcement exemption. Again, as a threshold matter, such documents were not compiled for law enforcement purposes because they were not prepared for any particular law enforcement proceeding. They are reports gathered to assess implications of use of the vans on general public health.

Moreover, disclosure of these documents, too, would not reveal nonroutine investigative techniques. Much of this requested information is publicly available, and Deputy Commissioner Daddario nowhere explains how disclosure of the vans' "x-ray capabilities would allow a would-be criminal to tailor his or her actions so as to thwart detection," given the already public information. (R22.) As the Supreme Court noted, this conclusory statement "is patently insufficient to meet NYPD's burden." *Id*. As courts repeatedly have explained, "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Matter of Baez v. Brown*, 124 A.D.3d 881, 883 (2d Dep't 2015) (quoting *Matter of Dilworth v. Westchester County Dep't of*

Correction, 93 A.D.3d 722, 724 (2d Dep't 2012); *see also Washington Post*, 61 N.Y.2d at 567; *Church of Scientology of New York*, 46 N.Y.2d at 908; *Villalobos v. New York City Fire Dep't*, 130 A.D.2d 935, 937 (2d. Dep't 2015) (finding conclusory statements insufficient to justify redactions).

The Police Department continues to assert on appeal that "[r]evealing the exact amount of the radiation dose emitted by the vans would expose the power and capacity of the mobile x-ray units," NYPD Br. 34, but does not explain how this would lead to any substantial likelihood of evasion given what already is known publicly about the vans. *See Baez*, 124 A.D.3d at 883 ("evidentiary support" needed to sustain a FOIL exemption). Moreover, the Police Department's claims that a terrorist could infer the vans' capabilities from their radiation doses *in no way* justifies withholding health and safety information beyond radiation that Grabell has requested.

The Police Department's citation to *Dilworth* is no answer to its erroneous application of the law enforcement exemption. In that case, the Second Department held that some (but not all) electronic video surveillance records of an inmate's time in jail were exempt under the life/safety exemption, POL § 87(2)(f), not the law enforcement exemption. The court did not hold that these electronic surveillance videos constituted nonroutine criminal investigative techniques or

procedures. Furthermore, jailhouse electronic surveillance is likely to reveal techniques and procedures, unlike health tests and reports.

The Supreme Court correctly noted the public's interest in knowing health and safety information about the vans. With no information about the Police Department's testing, the public has no basis to assess whether the Police Department is adequately maintaining the vans and employing the technology in a safe manner.

3. The law enforcement exemption does not apply to redacted copies of the Police Department's policies and training materials.

Redacted copies of the Police Department's policies and procedures regarding use of the vans, and related training materials, equally fail to satisfy the law enforcement exemption. General policies and training materials, properly redacted, will not disclose non-routine investigative techniques, nor reveal details of any particular law enforcement activity. Such policies are directly analogous to the manual concerning cellular tracking procedures that the *NYCLU* court recognized not to be compiled for law enforcement purposes within the meaning of FOIL. *NYCLU*, 47 Misc.3d at 12.

Recognizing the potentially sensitive nature of some information that policy documents might contain, the Supreme Court ordered redaction of "information explicitly describing a limitation, technical or other, on the use of the Van(s), or any information expressly disclosing a reason for a particular deployment of the

Van(s)." (R29.) This order narrowly tailors the exemption as FOIL requires, and the Police Department has no real answer to the propriety of the order. Without disclosure of such policies, the public has no basis to assess, for example, whether the Police Department is adequately protecting vulnerable populations, such as young children and pregnant women, from the potentially dangerous health effects of the vans. *See* Nat'l Institute for Science and Tech., *Technical Bulletin on Airport Backscatter X-ray Systems* (Jan. 20, 2011), *available at* http://www.nist.gov/pml/div682/technical-bulletin-on-airport-backscatter-x-ray-systems.cfm (last visited Sept. 21, 2015).

The Police Department ignores altogether such important policy information, and focuses on a concern that "any information that discloses the times, circumstances or locations for which an agency uses that technology permits enterprising terrorists to learn the inverse–namely, circumstances when an agency does *not* use the technology." NYPD Br. 29 (quoting R91). This reasoning does not apply to much of the policy information requested. For example, instructions and training on how to operate the scanning device do not in any way suggest where or when the vans will be used. Given that information about *why* the Police Department uses the vans is to be redacted, it unclear how anyone could infer the types of details suggested by the Police Department.

The Police Department strains to liken these materials to those the court deemed exempt from disclosure in *De Zimm*, but the documents at issue are very different. The documents in *De Zimm* contained trade names of electronic surveillance devices and a "detailed procedure concerning the use of 'slave or lease lines.'" *De Zimm*, 102 A.D.2d at 671. First, disclosure of trade names might aid individuals in inferring the specifications of a given device. However, the Supreme Court did not order disclosure of trade names, or indeed any information about any individual contract for purchase of a van. Second, as the Supreme Court found, there is an important difference between mobile surveillance devices (like vans) and stationary ones (like lease lines). (R19.) It is much easier for an individual to evade detection by a stationary object than a mobile one, since the individual knows the location of only the stationary device.

4. The law enforcement exemption does not apply to redacted copies of summary reports of past deployments.

The Supreme Court correctly held that appropriately redacted summary reports or after-action reports of past deployment that are not related to any ongoing investigation do not satisfy the law enforcement exemption. It took a balanced approach, redacting information that would reveal limitations of the vans, the reasons for deployment of the vans, and the dates of deployment. (R29.) Still, it held that Deputy Commissioner Daddario's claims that "any records about the Police Department's prior use of the Van(s) could lead to a circumvention of their

future effectiveness, does not rise to the required showing of a 'substantial likelihood' that such records would allow criminals to tailor their behavior so as to evade detection" and that they were "mere speculation" insufficient to justify a blanket application of the law enforcement exemption. (R19). Withholding these documents would be "inimical to FOIL's policy of open government." *Gould*, 89 N.Y.2d at 275.

The Police Department asserts that the Supreme Court misapplied the law enforcement to this category of documents, claiming that "if the locations where the vans have been deployed can be defined by one or more characteristics, someone might be able to infer locations in which the vans would likely not be used." NYPD Br. 25. Supreme Court properly rejected this reasoning. *See* (R18.) As the Supreme Court noted, the Police Department does not assert that locations actually *are* definable by characteristics that could lead to an inference about where the vans would likely not be used. In other words, the Police Department does not even assert, let alone show, that disclosure of these documents "*would*… reveal criminal investigative techniques or procedures, except routine techniques or procedures." POL § 87(2)(e)(iv) (emphasis added). It asserts only that there is some possible set of circumstances – not necessarily ones that actually exist – in which terrorists *could* successfully exploit the information in this category of documents.

If the Police Department could correctly apply the law enforcement exemption by asserting the *possibility* of circumstances in which disclosure could aid a terrorist then any document would be exempt under the law enforcement exemption, since such circumstances are always possible. As shown above, this would defeat the very purpose of FOIL. To trigger the law enforcement exemption, the Police Department needs to show – and at the very least assert – that summary reports actually *do* contain characteristics that would enable terrorists to evade detection. It makes no such showing, and has not met its burden to establish that "the material [falls] squarely within the ambit of the statutory exemptions." *Konigsberg*, 68 N.Y.2d at 251; *see also Capital Newspapers*, 67 N.Y.2d at 566.

Citing *AALDEF II*, the Police Department asserts that redaction is insufficient to "eliminate the harm that would be caused by the disclosure of the documents." NYPD Br. 26. However, as noted above, whether redaction is insufficient depends significantly on the facts of the case, and the facts of *AALDEF II* are vastly different from those of the instant case. In *AALDEF II*, the court held that redacted disclosure of highly detailed information concerning a covert surveillance operation would likely reveal the identities of undercover individuals, thereby botching the entire operation. *AALDEF II*, 125 A.D.3d at 532. Here, the Supreme Court ordered redaction of all potentially sensitive information, such as the vans' technical limitations and the reasons for deploying them. The Police

Department makes no showing that redacted documents would threaten to interfere with ongoing investigations as was the case in *AALDEF II*.

In short, the Supreme Court appropriately tailored the law enforcement exemption to carry out FOIL's disclosure mandate. Recognizing that portions of some documents are properly exempt from disclosure, it ordered their redaction. In so doing, the court followed the provision of the statute and settled precedent. (R20.) *See, e.g.*, *Gould*, 89 N.Y.2d at 275 (blanket nondisclosure of categories of documents is "inimical to FOIL's policy of open government"); *Schenectdy Cnty. Soc'y for Prevention of Cruelty in Animals, Inc. v. Mills*, 18 N.Y.3d, 42, 46 (2011). Its well-reasoned holding should be affirmed.

III.
THE POLICE DEPARTMENT FAILED TO DEMONSTRATE THAT ANY REQUESTED DOCUMENTS SATISFY THE LIFE/SAFETY EXEMPTION

The Police Department is on similarly weak ground in its effort to invoke the life/safety exemption as a justification for the blanket denial of Grabell's requests. The life/safety exemption, POL 6 § 87(2)(f), permits withholding of documents only when disclosure "could endanger the life or safety of any person." POL 6 § 87(2)(f). As the Supreme Court recognized, this exemption does not apply to most of the information sought because disclosure would not endanger specific individuals, and because conclusory allegations about possible negative consequences are not enough.

A. The Life/Safety Exemption Requires a Demonstrable Risk to Identifiable Individuals

The life and safety exemption exists to avoid creating dangers of harm to specific individuals, not to conceal entirely policies and activities undertaken to promote general public safety. The exemption may only be properly invoked when there is a relationship between the disclosure of information and an identifiable risk to specific individuals. *See*, *e.g.*, *Argentieri v. Goord*, 807 N.Y.S.2d 445, 447 (App. Div. 2006) ("[O]ne inmate's disclosure of information regarding another inmate's possible criminal activity would expose the disclosing inmate to an increased risk of retribution."); *John H. v. Goord*, 809 N.Y.S.2d 682 (App. Div. 2006) (exemption applied to disclosure of correctional officers' home addresses, social security numbers, and other such information). The Police Department advances no such particularized risk, and instead presents concerns about the effectiveness of broad policy choices. The possibility of generalized societal risk is insufficient to bring records under the life/safety exemption.

Again, even the Police Department's general concerns are unsupported by specific facts. "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Matter of Dilworth v. Westchester County Dep't of Correction,* 940 N.Y.S.2d 146 (App. Div. 2012). As in *Matter of Washington Post Co. v. New York State Ins. Dep't,* 463 N.E.2d 604, 608 (N.Y. 1984), the Police Department's claim of harm "is presented in the form

of conclusory pleading allegations and affidavits . . . without the benefit of evidentiary support. Consequently, the burden of proving that the records should be exempted in their entirety has not been met . . . . "). *See also Church of Scientology of N.Y. v. State of New York,* 387 N.E.2d 1216 (N.Y. 1979) ("There is no tender of any factual basis on which to determine whether the materials sought either fell outside the scope of mandated disclosure . . . .").

The Police Department's authority is not to the contrary. The Police Department claims that under *Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875 (1st Dep't 2011), *aff'd*, 20 N.Y.3d 1028 (App. Div. 2013), it is required only to demonstrate the *possibility* of endangerment, but even this low bar is not met by the Police Department's conclusory statements. Like *Argentieri*, *Bellamy* dealt with the disclosure of "identities of certain persons who spoke with police during the course of an investigation into this gang-related homicide ordered from prison." *Id.* at 876. Here, the Police Department does not identify any similar facts whose disclosure would threaten an ongoing investigation. *See, e.g.*, *AALDEF II*, 125 A.D.3d 531. Despite repeated invocation by the Police Department, *AALDEF II* is equally inapposite. In that proceeding, the FOIL inquiry in question was described as a "broadly worded request," containing "revelation[s] that a certain person, business, or organization was the subject of counterterrorism-related surveillance." *Id.* at 532. The disclosures ordered here contain no similar degree of

specificity. Unlike the cases it cites, the Police Department's assertions of risk do not involve the disclosure of specific investigations and instead are "improperly based solely upon speculation." *Mack v. Howard*, 937 N.Y.S.2d 785, 787 (App. Div. 2012). To invoke the "life and safety" exemption, the Police Department must "demonstrate a non-speculative causal connection between the release of responsive records and the possibility of danger to life or safety." *Physicians Comm. for Responsible Med. v. Hogan*, 918 N.Y.S.2d 400 (Table), 2010 WL 4536802, at *5 (N.Y. Sup. Ct. 2010). The Police Department failed to do so.

B. Disclosing the Documents At Issue Does Not Create a Demonstrable Risk of Harm to Any Identifiable Person

To justify its reliance on the life/safety exemption, the Police Department claims that the release of past van deployment reports, even in heavily redacted form, compromises its effectiveness in combating terrorism. Setting aside the fact that this has no bearing on the redacted information the Supreme Court ordered disclosed, the allegation that terrorists may draw inferences from deployment reports about what triggers van surveillance is a wholly hypothetical claim. Once the documents are redacted there is no reason to believe they will disclose any discernible pattern. Disclosure of the redacted documents, as ordered by the Supreme Court, does not entail the few imagined risks identified by the Police Department in its conclusory pleadings.

Given the specific concerns underpinning the life/safety exemption, the Supreme Court correctly limited the types of documents the Police Department could withhold and rejected its blanket claim that *all* information regarding any aspect of its Z-backscatter vans fell within the life/safety exemption.

1. The life/safety exemption does not apply to the aggregate cost and numbers of Z-backscatter vans.

The Police Department articulates no specific reason why disclosing the total cost and number of the Z-backscatter vans—presented in the format ordered by the Supreme Court—poses a safety risk. Since these costs are disclosed in aggregate form, it is not realistically possible that a terrorist entity might "work backwards" and ascertain the costs or capabilities of specific Z-backscatter van models. *See* (R21.) Further, disclosure of the number of vans currently in use does not reveal any details about the current deployment patterns of such vans.

2. The life/safety exemption does not apply to reports regarding the health risks of using the z-backscatter vans.

Information surrounding capabilities of backscatter X-ray technology is already in the public domain. *See, e.g.*, Leon Kaufman & Joseph W. Carlson, *An Evaluation of Airport X-Ray Backscatter Units Based on Image Characteristics*, 4 J. Transp. Sec. 73 (2011). Further information about the Police Department's specific consideration of the health risks poses no life/safety threat. To the contrary, the potential harms associated with the use of Z-backscatter vans are

quite real: Z-backscatter vans emit significant levels of ionizing radiation, as observed in statements uncontested by the Police Department. (R56.) This radiation affects both bystanders and vehicle passengers when the Z-backscatter technology is operating—again, uncontested fact. (R59.) Airport scanners producing *lower* levels of radiation than that produced by the Z-backscatter are banned in Europe. (R56.) The Supreme Court's order mandating the disclosure of "tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter vans" reflects the substantial public interest in this information. (R31.)

3. The life/safety exemption does not apply to redacted copies of the Police Department's policies and training materials.

It is already a matter of public knowledge that Z-backscatter vans exist and are used by the Police Department. (R8-9.) Knowledge of the internal norms by which the Police Department seeks to balance privacy and security interests does not compromise the vans' technical effectiveness in fighting terrorism. Rather, such information provides the public with the ability to make informed decisions regarding the suitability of such a policing strategy. Moreover, the court ordered theses documents to be redacted so as not to disclose the reasons for specific Z-backscatter van deployments or the technical limitations inherent in the use of the vans. (R30.)

4. The life/safety exemption does not apply to redacted copies of summary reports of past deployments.

The Supreme Court properly ordered the disclosure of information on past uses of the Z-backscatter vans—information edited to redact all dates, reasons for deployment, and technological limitations of the vans. (R30.) The redactions required by the court break the Police Department's hypothesized chain of harm: from the information ordered to be disclosed, no terrorist could realistically learn steps to counter the present-day effectiveness of the Police Department's investigations using the Z-backscatter vans. *See supra* page 43.

IV.
THE SUPREME COURT APPROPRIATELY ORDERED THE POLICE DEPARTMENT TO CORRECT ITS CONTRADICTORY ASSERTIONS ABOUT THE EXISTENCE OF DOCUMENTS

The Supreme Court ordered the Police Department to submit an affidavit from a person "who can *describe* the search that the NYPD made for documents responsive to petitioner's sixth FOIL request, and the results of such search." (R31) (emphasis added). This order was warranted because the Police Department submitted two directly conflicting statements about the existence of documents responsive to Grabell's request for records on personal privacy protection. The Police Department first certified that it has no documents responsive to Grabell's request for records concerning the protection of personal privacy when Z-backscatter images are taken and stored. NYPD Br. 35 (R74.) Subsequently,

Deputy Commissioner Daddario provided a sworn statement that records responsive to *each* of Grabell's requests "were compiled" by the Police Department and were being withheld. (R90.) With these contradictory positions before it, the Supreme Court reasonably required the Police Department to explain itself, something the Police Department now surprisingly seeks to avoid.

The Second Department issued a similar order requiring a new certification where a separate police department disclosed notes regarding 18 interviews when the record indicated that at least 70 interviews had taken place. *Oddone v. Suffolk Cnty. Police Dep't*, 96 A.D.3d 758, 759 (2012) (holding that, where affiant "had 'been informed'" of a diligent search, "the respondents failed to conclusively demonstrate that the determination was not arbitrary and capricious").

The Police Department points to *Rattley v. New York City Police Dep't*, 96 N.Y.2d 873 (2001), which states that a proper search certification requires "[n]either a *detailed* description of the search nor a personal statement from the person who actually conducted the search." *Id.* at 875 (emphasis added). But the Court's order is entirely consistent with *Rattley*. The order asks only for an affidavit from somebody "who can describe the search," not for excessive detail by the actual person who conducted it. (R31.) Moreover, *Rattley* applies only where there is a good faith, uncontradicted certification, not where, as here, the record

indicates that an agency certification was "arbitrary and capricious," given the subsequent contradiction of sworn testimony.

The Supreme Court found that it was "inexplicable" for Daddario to spend so much effort fighting to prevent the release of documents that the Police Department claimed do not exist. (R26.) Moreover, the Police Department's initial assertion, if true, leads to seemingly bizarre—and perhaps alarming—conclusions. Grabell requested "NYPD's" final policy governing retention and storage of data gathered by vans . . ." It is difficult to believe that the Police Department has *no* written policy regarding whether images from the X-rays can be collected, or how data from the vans is stored. If the Police Department does not store any data, it must surely still have a written policy directing users to not store data. If it does *not* have a written policy, substantial questions about the Police Department's oversight of the use of these dangerous tools is called into serious question.

The Supreme Court properly found the Police Department's asserted certification to be inconclusive given the contradictory and "inexplicable" Daddario affidavit. If the Police Department really has no documents responsive to Grabell's request, then providing an affidavit should be relatively easy. The Police Department's concerted refusal to provide an affidavit is "inexplicable."

V.
THE SUPREME COURT PROPERLY AWARDED GRABELL HIS ATTORNEYS' FEES

After explaining why it was rejecting the Police Department's blanket exemption claims, the Supreme Court found that Grabell should be awarded attorneys' fees because Grabell "substantially prevailed" in obtaining compulsory relief on 5 out of 6 categories of his requests, and the Police Department "had no reasonable basis" for refusing to disclose even one single redacted document. The court properly found that the necessary statutory elements were present in this case and then awarded fees within its discretion. This Court should affirm the Supreme Court's order, thereby furthering FOIL's open-records policy.

A. FOIL Is Derived from FOIA And Adopts Its Important Fee-Shifting Policy

FOIL authorizes a court to award attorney's fees upon making two of three findings: first, that a petitioner "substantially prevailed," and second, that either "the agency had no reasonable basis for denying access" or "the agency failed to respond to a request or appeal within the statutory time." POL § 89(4)(c). After finding that the first *and* the second *or* third elements are met, a court may award fees in its sole discretion, *id.*, which is reviewed on a highly deferential abuse-of-discretion standard, *Capital Newspapers*, 63 A.D.3d at 1339; *Matter of Powhida v City of Albany*, 147 A.D.2d 236, 238-239 (3d Dep't 1989).

Neither of the statutory elements that the Supreme Court found to be satisfied in this case are defined textually or doctrinally. However, New York's FOIL "is patterned after" the federal Freedom of Information Act (FOIA). *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 418 (1995). As such, when interpreting undefined elements of FOIL, "[f]ederal case law and legislative history … are instructive." *Lesher*, 19 N.Y.3d at 64.

The statutory history of FOIL is one of ever-broadening authority to award attorneys' fees. New York completely rewrote FOIL, a few years after its initial passage, to incorporate new FOIA policy. *40 Years of FOIL*, *Committee on Open Gov.* 2, 4, 5 (2014), *available at* www.dos.ny.gov/coog/pdfs/Timeline2014.pdf. FOIL and FOIA now contain a fee-shifting provision that is extraordinary in American law—allowing petitioners to receive attorney's fees, contrary to the "American Rule" that litigants pay their own costs. New York adopted this fee-shifting provision to combat the "'sue us' attitude" that some agencies adopted to circumvent FOIL. *Assembly Mem. in Support*, at 1, Bill Jacket, L 1982, ch 73. Fee-shifting "create[s] a clear deterrent to unreasonable delays and denials of access[,] encourag[ing] every unit of government to make a good faith effort to comply with the requirements of FOIL." *Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3d Dep't 2013).

In 2006, the legislature made FOIL more oriented toward transparent government by dropping FOIL's previous statutory requirement that a petitioner's requested documents be "of clearly significant interest to the general public." L.2006, c. 492, § 1, *amending* L.2005, c. 22, § 1. This broadening of the statute came just one year after the Court of Appeals controversially declined to award attorneys' fees. *E.g.*, *The Committee on Open Government Mem. in Support*, at 1, Bill Jacket, L.2006, c. 492 (citing *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 442 (2005) as the reason for the statutory change).

The legislature continues to broaden the statutory authority of courts to award petitioners fees. The legislature recently adopted a bill that both drops the "reasonable basis" statutory element and removes judicial discretion, *requiring* a court to award attorneys' fees whenever a petitioner substantially prevails. A01438B, State Assem., Reg. Sess. (N.Y. 2015).[2]

B. The Supreme Court Properly Found Both that Grabell Substantially Prevailed and that the Police Department Had Unreasonably Withheld Documents

1. Grabell "substantially prevailed."

The term "substantially prevailed" was intentionally chosen to give judges broad authority to shift fees because—unlike the term "prevailing party," which is used in other fee-shifting statutes—the former phrase was not a term of art.

[2] Identical versions of the bill passed both houses but did so at the end of the 2015 Session. As such, the bill has not yet been delivered to the Governor.

L.1982, c. 73, § 2 (amending FOIL to adopt the phrase "substantially prevailed"); *see also Prevailing Party*, *Black's Law Dictionary* (10th ed. 2014). This adoption of a new broad term was "necessary" to implement FOIA's policy. *Kuzma v. I.R.S.*, 821 F.2d 930, 932 (2d Cir. 1987). While a "prevailing party" usually needs to obtain a consent decree or judgment, "substantially prevailed" was chosen because, in Judge Friendly's words, the legislature "clearly did not mean that where [a] suit had gone to trial and developments made it apparent that the judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information." *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976) (interpreting 5 U.S.C. § 552(a)(4)(E), which allows a complainant who "substantially prevail[s]" to earn attorney's fee). New York courts have likewise found that the fee-shifting policy of FOIL requires only that litigation cause a petitioner to obtain records; a judgment or consent decree is not needed. *New York State Defenders Ass'n v. New York State Police*, 87 A.D.3d 193, 195, 196 n.3 (2011).

The Supreme Court reasonably found that Grabell had "substantially prevailed" against NYPD. (R27.) Grabell ultimately obtained relief on *5* out of *6* categories. In four categories, the Supreme Court ordered NYPD to provide Grabell with documents. In Grabell's sixth category, the Supreme Court ordered the Police Department to provide an affidavit certifying that no responsive records

exist. (R31.) *See Legal Aid Soc.*, 105 A.D.3d at 1121-22 ("[F]ull compliance with the statute was finally achieved in the form of a certification … for the petitioner received the full and only response available pursuant to the statute under the circumstances).

No court has required a proportion-based approach to determining whether a petitioner has substantially prevailed. If any had, Grabell would undoubtedly have "substantially prevailed" because he obtained relief in 5 out of 6 categories. But courts are permitted to use their best judgment even when a petitioner has obtained a relatively low number of documents. While finding that a petitioner did not substantially prevail when he received just 17 out of 181 pages requested, the court stated that its determination was not a "necessar[y]" one and that a court could reasonably come out the other way. *Henry Schein, Inc. v. Eristoff*, 35 A.D.3d 1124, 1126 (3d Dep't 2006). Thus, a petitioner could substantially prevail even while only receiving nine percent of its requested documents.

In fact, this litigation centered not on the *number* of documents that Grabell would receive, but on whether Grabell would receive *any* documents. Because the Police Department's blanket assertion of privilege had "denied Petitioner's request in toto," Supreme Court found that receiving redacted documents was enough for Grabell to substantially prevail. (R27.) Of course, the court ordered *full* disclosure

in two categories, a full-performance affidavit attesting to a search in a fifth category, and in just two categories permitted only narrow redactions. (R30-31.)

Grabell's success compares favorably with others. In a case decided this year, also against the Police Department, a petitioner substantially prevailed where "[the Police Department] ultimately provided all but one of the documents in the FOIL request." *Bottom v. Fischer*, 129 A.D.3d 1604, 1605 (4th Dep't 2015). The Police Department claims that courts have found a petitioner did not substantially prevail where the petitioner received 2.5 out of 7 pages or where a petitioner received *every* page requested. NYPD Br. 43. In an unsubtle sleight-of-hand, however, the Police Department reports the disclosures ordered by the *trial* divisions and the holdings of the *appellate* divisions, but nowhere mentions that the appellate divisions partially reversed the disclosures in both cases. The appellate court "modified" the trial court's decision in the first case, reducing the 2.5 pages out of 7 to less than 1 page. *Exoneration Initiative v. New York City Police Dep't*, 129 A.D.3d 491 (1st Dep't 2015). In the second case, the appellate court again "modified" the trial court's decision, allowing one report but dropping the separate page count from all7 pages to 2, which was further redacted. *Exoneration Initiative v. New York City Police Dep't*, 114 A.D.3d 436, 440 (1st Dep't 2014).

To get around its case law weaknesses, the Police Department asserts that agencies have immunity from fee shifting when the agency begins to "work[] on and respond[] to a FOIL request" prior to Article 78 litigation. (R27.) Agencies enjoy no such broad grant of immunity, which would destroy FOIL's policy. Fee-shifting is inappropriate only when "it cannot be said … that the Department released the documents and records *because* of the commencement of litigation." *Matter of Friedland v. Maloney*, 148 A.D.2d 814, 816 (3d Dep't 1989) (emphasis added). But unlike the voluntary disclosure in *Friedland*, litigation will be the cause of the Police Department disclosing records because the Supreme Court had to *order* the Police Department to do so. The Supreme Court characterized the present case as one of "glaring contrast" to *Friedland*. (R28.) Whereas the agency in *Friedland* took "immediate steps . . . to attempt to fulfill the request" and shortly after voluntarily released *all* documents, 148 A.D.2d at 815-16, the Police Department "disclosed not a single document, even those in the public domain" and maintained that position throughout litigation despite Grabell having already "in good faith, narrowly sharpened his request." (R28).

Grabell, by his success, greatly increased the transparency of the government, "the hallmark of our great nation," (R28), by forcing the Police Department to disclose these documents. Accordingly, Grabell "substantially prevailed."

2. The Police Department had no reasonable basis for withholding all documents.

The Supreme Court properly abided by its § 89 statutory duty in making particularized findings that the Police Department had no reasonable basis for withholding the documents that the Police Department failed to disclose. Whether a respondent has a reasonable basis for withholding responsive documents is a question of law. *Niagara Environmental Action by Raymond v. City of Niagara Falls*, 63 N.Y.2d 651 (1984). A respondent's basis for withholding documents does not necessarily need to be correct to be reasonable; it just needs to have an arguable basis in the law. *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of State University of New York*, 169 Misc.2d 210 (Sup. Ct. King's County 1996), *reversed on other grounds*, 240 A.D.2d 490. For instance, an agency's ultimately incorrect belief that it needed to withhold documents to protect attorney-client privilege had a reasonable basis in law. *Norton v. Town of Islip* 17 A.D.3d 468, 469-70 (2d Dep't 2005). But it was patently unreasonable for an agency to withhold documents when there was controlling case law on the matter. *Banchs v. Coughlin*, 168 A.D.2d 711, 712 (3d Dep't 1990).

The Police Department tries to analogize the present case to *Miller v. New York State DOT*, where an agency reasonably withheld almost all documents responsive to a petitioner's request. 58 A.D.3d 981 (3d Dep't 2009). But the "glaring contrast" between the present case and *Friedland* is also present here. The

agency in *Miller* had good legal arguments and ultimately was overwhelmingly successful. The trial court dismissed the action entirely "with one limited exception" out of 11,000 documents. *Id.* at 982. Although the appellate court partially reversed, it still awarded only 58 out of 11,000 documents, or one-half of one percent of the actual request. *Id.* at 984-85.

The Police Department asserted blanket exemptions but had no good legal argument to back it up. The Supreme Court found that the Police Department's professed reasons for denying disclosure were "patently insufficient." (R22.) "Most egregiously," the Police Department asserted massive blanket exemptions, (R20), which are problematic because "blanket exemptions … are inimical to FOIL's policy of open government," *Gould*, 89 N.Y.2d at 275; *see also New York State Defenders Ass'n*, 87 A.D.3d 193 (blanket denials unreasonable).

The blanket exceptions were made worse by the importance of the documents Grabell requested and the serious health risks that Grabell alleged. The Police Department did not even dispute that backscatter vans "deliver a radiation dose approximately 40% larger than that delivered by a backscatter airport scanner." (R22.) This behavior offended "the hallmark of our great nation": transparent government. (R28.) After all, "[i]t is only through disclosure, public review and scrutiny, that potentially dangerous equipment and/or techniques, can be called into question." (R29.)

The Police Department complains that the Supreme Court did not give full deference to Daddario, but Daddario's affidavit both contradicted the Police Department's own assertions, *supra* Part IV., and was "inexplicable." (R26.) Furthermore, a policy of full deference would destroy FOIL's "presumption of access" and New York courts' long "practice of construing FOIL exemptions narrowly," *Capital Newspapers*, 67 N.Y.2d at 569. Even still, the court "[f]ully [took] into account the seriousness of Mr. Daddario's concerns," but found that they only amounted to "mere speculation." (R19.) Daddario's affidavit only had "9 paragraphs [that are] even directly relevant," but those few paragraphs asserted blanket exemptions. (R17.) Daddario's affidavit fell "far short of 'articulating a particularized and specific justification for denying access.'" (R19.)

The Supreme Court properly found that the Police Department's blanket assertion of *total* exemption was unreasonable, especially after the court had encouraged settlement and Grabell "sharply narrowed" his initial request, yet the Police Department refused to give any ground. The award of fees was particularly appropriate to induce the Police Department to cease such improper behavior. Indeed, the Police Department is recognized as a serial FOIL offender, and has been "ranked dead last" among New York City agencies for it FOIL compliance. *See* State of N.Y. Dep't of State Comm. on Open Gov't, Annual Report to the Governor and State Legislature 4 (2012), *available at*

http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf (last visited Oct. 3, 2015). This "regrettable situation" is particularly woeful given that "[t]he interactions between the public and the police can be filled with tension, more so than any other public agency." *Id*.

CONCLUSION

For each and all the foregoing reasons, the order of the Supreme Court should be affirmed in all respects.[3]

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Respectfully submitted,

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