

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



In re Application for a Judgment under Article 78 of  
the Civil Practice Law and Rules and other relief by

Index No.: 13100580

MICHAEL GRABELL,

Petitioner,

**VERIFIED PETITION**

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

2013 APR -9 PM 1:28  
CITY OF N.Y. LAW DEPT.  
OFFICE OF CIVIL COUNSEL

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner Michael Grabell, by and through undersigned counsel, respectfully alleges as follows:

1. This proceeding is brought against Respondent New York City Police Department (“NYPD”) pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”), New York Public Officers Law § 84 et seq. (the “Freedom of Information Law” or “FOIL”), and CPLR § 3001.

2. This proceeding arises out of Respondent’s failure to disclose certain documents requested by Petitioner Grabell relating to the use of a police vehicle known as a Z Backscatter Van. As set forth below, Respondent’s refusal to disclose this information violates the express statutory mandate of FOIL. It conceals important information from the public concerning the health and safety effects, privacy implications, and budgetary impact of the Z Backscatter Vans, as used by the NYPD, and it defeats the public interest.

## PARTIES, JURISDICTION, AND VENUE

3. Petitioner Michael Grabell is a staff writer at ProPublica, an independent, non-profit newsroom that produces investigative journalism in the public interest. ProPublica's place of business is located at One Exchange Plaza, 55 Broadway, 23rd floor, New York, N.Y., 10006.

4. Respondent New York City Police Department is an "agency" within the meaning of Public Officers Law § 86(3), with its place of business located at One Police Plaza, Madison Street, New York, N.Y., 10038.

5. The actions of Respondent complained of herein are final in nature and cannot be reviewed adequately by another court, entity, or officer. This Court thus has jurisdiction over this matter pursuant to Public Officers Law § 89(4)(b), Article 78 of the CPLR, and CPLR § 3001.

6. Pursuant to CPLR § 506(b) and CPLR § 7804(b), this proceeding is commenced in New York County because Respondent is located in this County, and because this County is within the judicial district in which Respondent made the determinations complained of and refused to perform the duties specifically enjoined upon it by law.

## FACTS

7. On February 15, 2012, Mr. Grabell submitted a FOIL request to Respondent seeking disclosure of certain information relating to the Z Backscatter Van used by the NYPD. Specifically, Petitioner Grabell's FOIL request sought the following seven items:

- Any lists or itineraries of past missions/deployments of the Z Backscatter Van as well as any memos, debriefings, or after-action reports on past missions/deployments of the Z Backscatter Van.
- The department's policies and procedures regarding the Z Backscatter Van as well as any training materials.
- The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z Backscatter Van can and cannot be used.
- Any contracts and supplemental contracting documents regarding the purchase of the Z Backscatter Van.

- Any tests or reports regarding the radiation dose or other health and safety effects of the Z Backscatter Van.
- Any records related to data storage, including but not limited to: type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored.
- The contents of the image databases used and/or created by the Z Backscatter Van.

(A true and correct copy of Petitioner's February 15 FOIL request is attached hereto as Exhibit A.)

8. Petitioner subsequently received a letter dated April 18, 2012, notifying him in blanket terms that his request was "denied under Public Officers Law section § 87 (2)(e)(iv) in that such law enforcement records, if disclosed, would reveal criminal investigative techniques or procedures. Additionally, such records are intra-agency materials and are exempt from disclosure under Public Officers Law § 87 (2)(g)." (A true and correct copy of Respondent's April 18 letter is attached hereto as Exhibit B.)

9. On May 15, 2012, Petitioner filed a timely administrative appeal from Respondent's denial. Petitioner's appeal noted that, while portions of the denied records could be withheld or redacted under the statutes cited by Respondent in its April 18 letter, the vast majority of the records are public and can be segregated for release. Petitioner stressed that the withheld documents would greatly inform the public about a government agency funded with tax dollars and would not reveal criminal investigative techniques or procedures. (A true and correct copy of Petitioner's May 15 administrative appeal is attached hereto as Exhibit C.)

10. On December 19, 2012, Respondent denied Petitioner's appeal. Respondent's letter claimed that denial was appropriate pursuant to Public Officers Law § 87(2)(e)(iv) because disclosure "would reveal non-routine investigative techniques or procedures." Respondent also

based its denial on Public Officers Law § 82(2)(f), on the ground that “the utility of the ‘Z-backscatter scanner’ as a law-enforcement tool designed to protect public safety would be diminished if detailed information pertaining to its functioning and deployment could be used in an effort to foil the Z-backscatter van’s effectiveness, thus endangering public safety.” Finally, Respondent claimed that the requested records were exempt from disclosure pursuant to Public Officers Law § 87(2)(g) because they include “preliminary data and information which is deliberative and pre-decisional in nature.” Although Public Officers Law § 89(4)(a) requires Respondent to “fully explain in writing” the reasons for denial of an appeal, Respondent failed to do so. Its December 19 letter provided only conclusory assertions in support of its decision. (A true and correct copy of Respondent’s December 19 denial of the appeal is attached hereto as Exhibit D.)

#### **FAILURE TO DISCLOSE**

11. Petitioner Grabell hereby repeats and re-alleges paragraphs 1 through 10 as if fully set forth herein.
12. Under FOIL, all documents in the possession of the NYPD are presumed open and available for inspection by the public. Respondent may deny disclosure only if expressly authorized to do so by one of FOIL’s specific exemptions. The limited statutory exemptions are to be construed narrowly to carry out FOIL’s broad disclosure mandate.
13. Under FOIL, the NYPD has a duty to segregate and disclose non-exempt information in a document even when some information may properly be withheld.
14. In responding to Petitioner’s FOIL request, Respondent has wrongly withheld documents in their entirety and under claimed statutory exemptions that do not properly apply.

15. By its actions, Respondent has refused to perform the duty of disclosure enjoined upon it by FOIL, has erred as a matter of law in concluding that the records requested fall entirely within any FOIL exemption, and has otherwise acted arbitrarily and capriciously.

16. Respondent's denial has caused, and continues to cause, immediate and irreparable harm to the rights guaranteed to Petitioner and to the public at large under FOIL.

17. Petitioner has no adequate remedy other than this proceeding, and no previous application for the relief requested herein has been made.

18. Petitioner has exhausted his administrative remedies.

**FAILURE TO JUSTIFY NON-DISCLOSURE**

19. Petitioner Grabell hereby repeats and re-alleges paragraphs 1 through 18 as if fully set forth herein.

20. In responding to Petitioner's FOIL request, Respondent failed to provide a specific and particularized justification for withholding each document or portion thereof that it is refusing to disclose.

21. By its actions, Respondent has refused to perform a duty enjoined upon it by FOIL, erred as a matter of law, and otherwise acted arbitrarily and capriciously.

22. Respondent's failure has caused, and continues to cause, immediate and irreparable harm to the rights guaranteed to Petitioner and to the public at large under FOIL.

23. Petitioner has no adequate remedy other than this proceeding, and no previous application for the relief requested herein has been made.

24. Petitioner has exhausted his administrative remedies.

**WHEREFORE**, Petitioner respectfully requests this Court to grant judgment:

- (a) Declaring that Respondent has acted unlawfully in withholding from Mr. Grabell in their entirety documents that are not properly exempt from disclosure under

FOIL and enjoining Respondent to provide Petitioner with immediate access to all non-exempt documents or segregable sections of the documents he requested;

- (b) Awarding Petitioner his costs and attorneys' fees pursuant to Public Officers Law § 89(4)(c); and
- (c) Awarding Petitioner such other and further relief as the Court deems just and proper.

Dated: April 9, 2013  
New York, New York

Respectfully submitted,

MEDIA FREEDOM AND INFORMATION  
ACCESS LAW CLINIC  
Yale Law School  
40 Ashmun Street  
New Haven, CT 06511

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By:   
David A. Schulz, Supervising Attorney  
321 West 44th Street, Suite 1000  
New York, NY 10036  
Email: dschulz@lskslaw.com  
Tel: (212) 850-6100  
Fax: (212) 850-6299

*Attorneys for Petitioners*

# **EXHIBIT A**



Feb. 15, 2012

Records Access Officer  
NYC Police Department  
F.O.I.L. Unit – Legal Bureau  
One Police Plaza, Room 110-C  
New York, NY 10038

Under the New York Freedom of Information Law, I am requesting copies of the following documents regarding a police vehicle known as the Z-backscatter van.

- Any lists or itineraries of past missions/deployments of the Z-backscatter van as well as any memos, debriefings, or after-action reports on past missions/deployments of the Z-backscatter van.
- The department's policies and procedures regarding the Z-backscatter van as well as any training materials.
- The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used.
- Any contracts and supplemental contracting documents regarding the purchase of the Z-backscatter van.
- Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.
- Any records related to data storage including but not limited to: type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored.
- The contents of the image databases used and/or created by the Z-backscatter van.

The time frame for these records should be considered to be from the date of purchase to the date this request is filled.

Please note that I would like to receive the database in **electronic** format. I can accept the data in several formats (pdf, doc, etc.) and can accept the data on a variety of media (CD-ROM, e-mail attachment, etc.).

As provided under FOIL, I will expect a response within five business days with a reasonable date as to when I can expect to receive or obtain access to these records.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

Because time is very much a factor, I ask that you communicate with me by telephone or e-mail if you have any questions. My phone number is 917-512-0217, and my e-mail address is michael.grabell@propublica.org. To save time and cost, please e-mail the records if possible.



If you deny any part of this request, please cite each specific reason that you think justifies your refusal to release the information and notify me of appeal procedures available to me under the law.

Thank you for your assistance with my request.

Michael Grabell, staff writer  
Voice (917) 512-0217  
Fax (212) 785-2634  
[michael.grabell@propublica.org](mailto:michael.grabell@propublica.org)

# **EXHIBIT B**



POLICE DEPARTMENT  
LEGAL BUREAU  
F.O.I.L. UNIT, ROOM 110C  
ONE POLICE PLAZA  
NEW YORK, NY 10038

April 18, 2012

ProPublica  
Michael Grabell  
One Exchange Plaza, 23<sup>rd</sup> Fl  
New York, NY 10006

File # 2012PL-0850  
Your File #  
Z-Backscatter Van

Dear Mr. Grabell

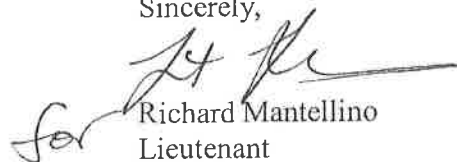
This is in response to your letter dated, February 15, 2012 in which you request access to certain records under the New York State Freedom of Information Law ("FOIL").

Your request for documents related to Z-backscatter van, are denied under Public Officers Law section § 87 (2)(e)(iv) in that such law enforcement records, if disclosed would reveal criminal investigative techniques or procedures. Additionally, such records are intra-agency materials and are exempt from disclosure under Public Officers Law § 87 (2)(g).

Should you so desire, you may appeal this decision or any portion thereof. Such an appeal must be made in writing, within thirty (30) days of the date of this letter, and must be forwarded to :

Jonathan David  
Records Access Appeals Officer  
New York City Police Department  
One Police Plaza-Room 1406  
New York, NY 10038-1497

Sincerely,



Richard Mantellino  
Lieutenant  
Records Access Officer

# **EXHIBIT C**



May 15, 2012

Jonathan David  
Records Access Appeals Officer  
New York City Police Department  
One Police Plaza, Room 1406  
New York, NY 10038-1497

Re: Freedom of Information Law Appeal

Dear Mr. David,

I am writing to appeal the denial of access regarding my request, made on February 15, 2012, and sent to Lt. Richard Mantellino, the records access officer for the New York Police Department. The response letter is dated April 18, 2012, and was received on April 23, 2012.

The records that were denied include contracts, policies, memos and other materials regarding the use of a police vehicle known as the Z-backscatter van. While portions of these records may be withheld or redacted under the statutes they cite, 87 (2)(e)(iv) and 87 (2)(g), the vast majority of the records are public and can be segregated for release. They would greatly inform the public about a government agency funded with tax dollars and would not reveal criminal investigative techniques or procedures.

Specifically, I requested copies of the following documents regarding a police vehicle known as the Z-backscatter van.

1. Any lists or itineraries of past missions/deployments of the Z-backscatter van as well as any memos, debriefings, or after-action reports on past missions/deployments of the Z-backscatter van.
2. The department's policies and procedures regarding the Z-backscatter van as well as any training materials.
3. The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used.
4. Any contracts and supplemental contracting documents regarding the purchase of the Z-backscatter van.
5. Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.
6. Any records related to data storage including but not limited to: type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored.
7. The contents of the image databases used and/or created by the Z-backscatter van.

The time frame for these records, I specified, should be considered to be from the date of purchase to the date this request is filled.

Regarding the first reason for denial, the argument that disclosure would reveal criminal investigative techniques and procedures [87 (2)(e)(iv)], the statutory exemptions are intended to be specific in nature. The FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.

The exemption Lt. Mantellino cited specifically limits the scope by saying "records that ... reveal criminal investigative techniques and procedures **except routine techniques and procedures.**" This exception would include the use of police vehicles or equipment, such as the Z-backscatter van.

Request item #1, for example, (specifically lists or itineraries of past missions/deployments) should be disclosed under the same interpretation which allows closed case files and arrest records to be disclosed. The incident requiring police response has already occurred. The information in the lists, i.e. location and time of deployment and the fact that a backscatter van was present, would be readily visible to any citizen standing on a street corner where such police activity was occurring. Therefore, the fact that it happened and I was not present should not prevent me from learning about it later.

Similarly, Request item #7 (content of the image databases) should be treated no differently than the crime scene photos from a closed homicide file or accident case.

The information I am seeking would not provide such highly detailed step-by-step depictions of the investigatory process that would hinder important law enforcement work.

On the second reason for denial, Lt. Mantellino cites the section of the law dealing with intra-agency materials [87 (2)(g)]. But this section specifically says "the agency may deny access to records or portions thereof that are inter-agency or intra-agency materials **which are not** (ii) instructions to staff that affect the public, (iii) final agency policy or determinations, and (iv) external audits.

Request items #1 (memos, debriefing, or after action reports on past missions/deployments), #2 (the department's policies and procedures as well as training materials), and #6 (records related to data storage) are instructions to staff that affect the public.

Request items #2 (the department's policies and procedures), #3 (the final policy decision or interpretation of the law or legal opinion), and #6 (rules regarding data storage) are final agency policies and determinations.

Request item #5 (tests or reports regarding the radiation dose or other health and safety effects) are external audits.

Lt. Mantellino provides no basis for denying Request item #4 (contracts and supplemental contracting documents). Such documents are routinely disclosed in New York State and New York City as a matter of public information about government spending.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, 41 State Street, Albany, NY 12231.

Thank you for your assistance with my appeal.

Michael Grabell, staff writer  
Voice (917) 512-0217  
Fax (212) 785-2634  
[michael.grabell@propublica.org](mailto:michael.grabell@propublica.org)

One Exchange Plaza 23rd Floor New York, New York  
10006 212-514-5250 [propublica.org](http://propublica.org)

# **EXHIBIT D**



**POLICE DEPARTMENT**  
**Office of Deputy Commissioner,**  
**Legal Matters**  
**One Police Plaza, Room 1406A**  
**New York, New York 10038**

December 19, 2012

Michael Grabell, Staff Writer  
ProPublica  
One Exchange Place  
55 Broadway, 23<sup>rd</sup> Floor  
New York, New York 10006

**RE: FREEDOM OF INFORMATION LAW**  
**REQUEST: LBF #12PL100850**

Dear Mr. Grabell:

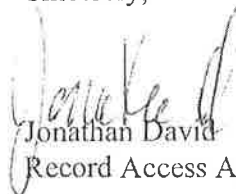
This is in response to your letter, dated May 15, 2012, appealing the determination of the Records Access Officer (RAO), dated April 18, 2012, regarding records related to “the Z-backscatter van” requested from the New York City Police Department pursuant to the Freedom of Information Law (“FOIL”) in your letter dated February 15, 2012.

The appeal is denied pursuant to Public Officers Law (POL) Section 87(2)(e)(iv) because disclosure of the requested records would reveal non-routine investigative techniques or procedures. In addition, the appeal is also denied pursuant to POL Section 87(2)(f), because the utility of the “Z-backscatter scanner” as a law enforcement tool designed to protect public safety would be diminished if detailed information pertaining to its functioning and deployment could be used in an effort to foil the Z-backscatter van’s effectiveness, thus endangering public safety. Moreover, to the extent that the requested records include preliminary data and information which is deliberative and pre-decisional in nature, such records are also exempt from disclosure pursuant to POL Section 87(2)(g).

Other exemptions under FOIL also may apply.

You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Sincerely,



Jonathan David

Record Access Appeals Officer

c: Committee on Open Government