

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

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In the Matter of the Application of	:	
THE CITY and YOAV GONEN,	:	
	:	
Petitioners,	:	
	:	
-against-	:	Index No. 161633/2023
	:	
The NEW YORK CITY POLICE DEPARTMENT,	:	
and EDWARD A. CABAN, in his official capacity	:	
as Commissioner of the New York City Police	:	
Department	:	
Respondents.	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	
-----	X	

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION TO COMPEL
PRODUCTION OF RESPONSIVE RECORDS**

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I. PRELIMINARY STATEMENT

Pursuant to Section 202.8 of the New York Uniform Civil Rules, THE CITY and its reporter Yoav Gonen (“Gonen”) (“Petitioners”) respectfully move the Court to compel the New York City Police Department (“NYPD”) and its Commissioner Edward A. Caban (“Caban”) (collectively, “Respondents”) to produce records responsive to Petitioners’ New York Freedom of Information Law, N.Y. Pub. Off. Law §§ 84, *et seq.* (“FOIL” or the “Law”) request (“Request”). As discussed herein, Petitioners and Respondents filed a Stipulation of Adjournment on April 15, 2024, agreeing that Respondents would “commence productions of responsive records for Petitioners *on or before May 17, 2024.*” Stip. of Adjournment (Apr. 15, 2024) (emphasis added). Efforts by Petitioners’ counsel to ensure transmittal of such long-awaited production through meet and confer discussions have been unsuccessful. Accordingly, Petitioners respectfully request that the Court enter the proposed order filed herewith requiring Respondents to comply with its production obligations.

II. BACKGROUND AND PROCEDURAL HISTORY

THE CITY is a nonpartisan, nonprofit news organization that provides high quality, in-depth accountability reporting on issues affecting those who live and work in New York City. *See* THE CITY, <https://www.thecity.nyc> (last visited May 26, 2024). Gonen is a reporter for THE CITY, where he covers City Hall and law enforcement. On August 15, 2022—nearly *two years* ago—Petitioners submitted the Request to the NYPD via its online portal. Verified Pet. ¶ 15 (“Pet.”). Petitioners requested the following documents:

For every case substantiated or partially substantiated by the Internal Affairs Bureau (IAB) whose disciplinary outcome was determined [between Jan. 1, 2022 and June 30, 2022], including cases where it was determined that no discipline was merited[:] (1) each . . . letter requesting that charges and specifications be served (. . . these are typically sent from IAB to the Department Advocate’s Office (DAO)); (2) each . . . charges and specifications document (these are typically

created by the DAO); (3) each . . . disposition of charges document (these are typically signed by the police commissioner or a designee), and; (4) in settled cases, each . . . negotiated settlement document (these are typically signed by the police commissioner or a designee).

Id. ¶ 16.

By email dated August 18, 2022, the NYPD acknowledged receipt of the Request and informed Petitioners they could “expect a response on or about Wednesday, January 4, 2023.” *Id.*

¶ 18. More than six months later, on May 22, 2023—having received no response to the Request nor any further correspondence from the NYPD—Gonen emailed the NYPD to administratively appeal the NYPD’s failure to timely respond, noting that the Request had been constructively denied. *Id.* ¶ 20–21. On May 23, 2022, the NYPD denied the administrative appeal, deeming it “premature” as the Records Access Officer “had not yet issued a determination on” the Request.

Id. ¶ 23. The NYPD’s May 23, 2023 letter conceded that “the time required to complete the request ha[d] surpassed the original estimate” and informed Petitioners that the Records Access Officer would issue a determination at an undetermined future date. *See id.* On August 8, 2023, having heard nothing further regarding the Request, Gonen followed up with the NYPD by e-mail. *Id.* ¶ 25. On August 21, 2023, the NYPD responded to that email by denying the Request in full.

Id. ¶ 26.

On November 29, 2023, Petitioners filed an Article 78 action to compel Respondents to comply with their duties under FOIL. *See Pet.*; Mem. ISO Verified Pet. On December 20, 2023, in a good faith effort to meet and confer about the Request and informally to resolve this matter, the parties filed a Stipulation of Adjournment, moving the return date of the Notice of Petition and Petition from January 3, 2024 to February 20, 2024. Stip. of Adjournment (Dec. 20, 2023). Counsel for the parties continued to accommodate those discussions, in a gesture of goodwill and patience, and twice more filed a Stipulation of Adjournment, moving the return date of the Notice

of Petition and Petition from February 20, 2024 to March 23, 2024, Stip. of Adjournment (Feb. 16, 2024), and then from March 23, 2024 to April 15, 2024, Stip. of Adjournment (Mar. 11, 2024). Finally, the parties resolved that Respondents would produce responsive records to Petitioners *on or before May 17, 2024* and thereafter on a rolling basis. *See* Stip. of Adjournment (Apr. 8, 2024) (“resolv[ing] for Respondents to commence productions of responsive records for Petitioners on or before May 17, 2024”). Petitioners relied on this representation in good faith.

On May 17, 2024, Respondents’ counsel called Petitioners’ counsel and explained that Respondents’ first release of records to Petitioners would be delayed until May 22, 2024. *See* Ex. 1. On May 22, 2024, Petitioners’ counsel emailed Respondents counsel’ requesting confirmation that records responsive to the Request would be transmitted via email by the end of the day. *See* Ex. 2. By phone call that day, Respondents’ counsel told Petitioners’ counsel that no records would be transmitted on May 22, 2024; Respondents’ counsel provided no alternative date by which records would be produced. Over the course of nearly two years—including six months of legal proceedings—and many discussions among counsel for both parties, Respondents have failed to produce a single page despite acknowledging that there are records to produce.

Counsel for Petitioners informed Respondents’ counsel via phone call on May 22, 2024, of the forthcoming nature of this Motion.

III. LEGAL STANDARD

The obligations of agencies under FOIL are straightforward: “When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document[.]” *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440–41 (2005) (emphasis added); FOIL § 89(3)(a). Agencies must undertake their obligations timely. *See, e.g., Empire Ctr. for Pub. Pol’y v. State*

Dep't of Health, 72 Misc. 3d 759, 769–70 (N.Y. Sup. Ct. Albany Cty. 2021) (“DOH informed Empire Center that it was unable to respond to the FOIL request, first because respondent needed time to locate the information and, thereafter, because it needs time to review [it]. . . . DOH has had ample time to respond[.] Its continued failure to provide petitioner a response, given the straightforward nature of the request . . . goes against FOIL’s broad standard of open and transparent government and is a violation of the statute.”).

Indeed, FOIL sets forth deadlines by which agencies must acknowledge, deny, or produce records in response to a request. Specifically, agencies must acknowledge, provide access to responsive records, or deny the request within five days of receipt. FOIL § 89(3)(a). Agencies’ letter of acknowledgement must include a date by which the request will deemed granted or denied, falling within twenty days of the date the acknowledgement was sent, unless circumstances of the request merit an extension. *Id.* If an extension is sought, the agency must explain to the requester why it is delaying its response and the delay must be reasonable. *Id.*

When agencies fail to meet their obligations to respond to requesters or promptly furnish records, requesters are entitled to seek judicial review of such a “constructive denial.” *See* FOIL § 89(4)(a), (b) (“any person denied access to a record may within thirty days appeal in writing such denial,” and in the case of an adverse determination, “may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.”). “[C]onstructive denial . . . goes against the purpose of FOIL, which is ‘to create a clear deterrent to unreasonable delays and denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of FOIL[.]’” *10ICO, LLC v. New York State Dep’t of Env’t Conservation*, 169 A.D.3d 1307, 1313 (3d Dep’t 2019) (quoting *New York C.L. Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep’t 2011)).

IV. ARGUMENT

Petitioners seek entry of the attached order requiring Respondents to issue their first production of responsive records that they contend are not exempt under FOIL within 10 days of such order, and to continue productions at a rate of no fewer than one thousand pages per month until productions are complete – which is consistent with the production that the NYPD agreed to make, but has repeatedly failed to commence.

To date, Petitioners have received no records responsive to their request, which has been pending for two years. Petitioners have been exceedingly accommodating in agreeing to multiple extensions requested by Respondents, but Respondents have repeatedly failed to abide by the deadlines agreed to by the parties. There is no lawful reason for Respondents' continued failure to meet their obligations under FOIL or their commitments to produce documents, and Petitioners' right to these records are being nullified by endless deferrals. Petitioners therefore seek relief under both FOIL and equitable relief to enforce compliance with the parties' prior stipulation.

A. FOIL Counsels In Favor Of Petitioners' Motion.

FOIL, of course, mandates timely compliance with the Law; it requires not only that agencies promptly produce records responsive to FOIL requests, N.Y. Pub. Off. L. § 89(4)(a), but provides that failure to do so is a “constructive denial” for which requesters may seek a judicial remedy. *See, e.g., New York Times Co.*, 103 A.D.3d 405, 408 (1st Dep't 2013). Courts have issued penalties against agencies that “engage[] in tactics to delay disclosure during the pendency of [a] proceeding.” *New York C.L. Union*, 87 A.D.3d at 339–40. In *New York Civil Liberties Union*, the Appellate Division awarded attorney fees to a requester after the agency “missed several deadlines agreed upon by the parties for further communication and were repeatedly unavailable by telephone when petitioner sought to follow up.” *Id.* at 339. Ultimately, the agency disclosed the

records a full year after the initial request was sent, and “only after further intervention by the court.” *Id.* The agency’s failure “to offer *any* excuse for their failure to timely respond to [the] request” paired with the requester’s “substantial efforts” to obtain the records “evinced a clear disregard of the public’s right to open government,” and consequently entitled the requester to attorneys fees. *Id.* at 339–40 (emphasis in original); *see also Empire Ctr., supra* (recognizing excessive delays in compliance as violative of the statute). To allow Respondents to continue to deny access to the records sought by Petitioner’s Request threatens to undermine the very “purpose of FOIL”—to encourage government agencies to respond to requests for records without unreasonable delay. *10ICO, LLC*, 169 A.D.3d 1307 at 1313.

B. Principles Of Equity Counsel In Favor Of Petitioners’ Motion.

Beyond FOIL, basic equity supports the instant relief, as well. Respondents have already agreed that they will produce responsive records and that there is nothing unreasonable about expecting them to do so.

Indeed, the parties are bound by the representations they make to the Court. *See, e.g., McCoy v. Feinman*, 99 N.Y.2d 295, 302, 785 N.E.2d 714, 719 (2002) (emphasis added), explaining that:

Stipulations not only provide litigants with *predictability and assurance* that courts will honor their prior agreements, but also promote judicial economy by narrowing the scope of issues for trial. To achieve these policy objectives, *a stipulation is generally binding on parties* that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court. When a stipulation meets these requirements, as it does here, courts should construe it as an independent contract subject to settled principles of contractual interpretation. As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress.

(citations omitted); *see also, e.g., Hoss Med. Servs., P.C. v. Gov’t Emps. Ins. Co.*, 4 Misc. 3d 521, 778 N.Y.S.2d 876 (Civ. Ct. N.Y.C. 2004) (parties were bound by stipulations in which they agreed

to produce person for deposition”); *Wolf v. Wolf*, 4 A.D.2d 952, 952, 167 N.Y.S.2d 798, 799 (1957) (parties “are bound by the terms of the stipulation *to which they assented*”) (emphasis added); *Marasco v. ExxonMobil Oil Corp.*, 224 A.D.3d 738, 740, 205 N.Y.S.3d 433, 436 (2024) (party was “bound by the stipulation” it had represented to the Court, where party had authority to enter such stipulation, and no evidence was presented to set aside stipulation). And, as noted above, Petitioners have relied upon Respondents’ representation regarding their purportedly forthcoming production, and “Plaintiff, of course, had the right to rely on the stipulation as made.” *Clark v. Delaware & Hudson R. Corp.*, 245 A.D. 447, 450, 283 N.Y.S. 739, 743 (3d Dep’t 1935).

Finally, Respondents have not provided Petitioners or this Court with any legitimate reason why they cannot timely institute productions, let alone by the deadlines that Respondents themselves have worked with Petitioners to set.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Motion to compel Respondents to commence production of responsive records within 10 days of the granting of this Motion, and to continue productions at a rate of no fewer than one thousand pages per month until productions are complete.

Dated: New York, New York
May 28, 2024

Respectfully submitted,

/s/ John M. Browning

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Certificate Pursuant to Part 202.8-b of the Uniform Civil Rules for the Supreme Court

I, John M. Browning, certify that, pursuant to Part 202 of the Uniform Civil Rules for the Supreme Court, the Memorandum of Law in Support of NYP Defendants' Motion to Dismiss the Complaint contains 2,207 words.

/s/ John M. Browning
John M. Browning