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

In the matter of the Application of NYP HOLDINGS, INC., SUSAN EDELMAN, AARON SHORT, and YOAV GONEN, Petitioners-Plaintiffs, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and Declaratory Judgment, - against - NEW YORK CITY DEPARTMENT OF EDUCATION and CARMEN FARIÑA as Chancellor of the New York City Department of Education, Respondents-Defendants.	Index No. _____

MEMORANDUM OF LAW IN SUPPORT OF
VERIFIED PETITION AND COMPLAINT

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PRELIMINARY STATEMENT

Petitioners NYP Holdings, Inc., Susan Edelman, Aaron Short, and Yoav Gonen bring this action because Respondents, the New York City Department of Education ("DOE") and Chancellor Carmen Fariña, have repeatedly failed to grant or deny access to public records pertaining to the New York City public schools in violation of the duties imposed on them by the Freedom of Information Law, N.Y. Pub. Off. Law § 84 *et seq.* ("FOIL") and the Committee on Open Government's implementing regulations, 21 N.Y.C.R.R. § 1401.1 *et seq.* (the "Implementing Regulations"). Instead, Respondents have engaged in a pattern and practice – hiding behind their unlawful agency regulation, Chancellor's Regulation D-110(VIII)(A) – of granting themselves endless monthly unilateral extensions of time to respond to Petitioners' FOIL requests, thereby flouting their duty under FOIL to make their records available to the public.

Since September 2014, Petitioners have submitted FOIL requests to DOE seeking a range of information relating to Department spending, employee attendance, test scoring manipulation, criminal records, and general misconduct in education, all of which the DOE is required to maintain by law. For twelve of those requests, DOE simply declined to respond, and instead has sent the same *pro forma* letter (the "Form Delay Letter") again and again granting itself extra time to grant or deny each request. With each Form Delay Letter, DOE includes a new "anticipated date" of response which, in reality, is nothing more than a placeholder date until DOE resets the clock to respond yet again with a new Form Delay Letter and a new "anticipated date" when its time runs out. DOE offers no legally-cognizable explanation for its continued delays, systematically failing to consider how long responding to a given request should reasonably take under the circumstances of each request. N.Y. Pub. Off. Law § 89(3)(a). Instead DOE kicks the proverbial can down the road to the Petitioners' and the public's

detriment, all the while claiming its delays are unreviewable because no constructive denial can occur until it misses one of its own moving-target deadlines. As of today, Petitioners are awaiting decision on ten of those requests each of which has been outstanding between more than six (6) and more than twenty (20) months.[1]

Most troubling is that the DOE's longstanding practice of issuing delay after delay without the possibility of judicial review is not merely the product of an overburdened FOIL office or the bad actions of a few government bureaucrats. Rather, DOE has adopted an official policy – Chancellor's Regulation D-110(VIII)(A) – that actually purports to *authorize* DOE to send these rote extension letters month after month without triggering a constructive denial, in effect, blocking any possible administrative or judicial review of the reasonableness of its delays. This regulation is contrary to the plain language and purpose of FOIL and its Implementing Regulations to which the DOE's regulations *must* conform. And even though both the FOIL and Implementing Regulations were amended in 2005 to address this and other problems associated with excessive delays in processing FOIL requests, DOE has kept this antiquated internal regulation intact without change.

DOE should be well acquainted with complaints about its repeated delays and general mishandling of FOIL requests. In April 2013, Mayor Bill de Blasio, then serving as Public Advocate, issued a report[2] in which he gave the DOE a "D" rating for its handling of FOIL requests in general and an "F" for its response time. Pet. ¶ 89, Ex. 39, at 10. The Mayor made

[1] Since Petitioners filed their administrative appeals, Respondents have granted in part two of the twelve FOIL requests – F#11,479 on May 27, 2016 and F#10,586 on June 17, 2016. Petitioners had to wait 10 and 21 months respectively for responses to both. Pet. ¶¶ 26, 53.

[2] Office of Bill de Blasio, Public Advocate For The City of New York, "Breaking Through Bureaucracy: Evaluating Government Responsiveness to Information Requests in New York City," (April 2013), available at http://metrocosm.com/wp-content/uploads/2015/07/Breaking-Through-Bureaucracy-Evaluating-Government-Responsiveness-to-Information-Requests-in-New-York-City.pdf.

clear in the Report that delays of the sort engaged in by the DOE here should not be countenanced:

> Perhaps the most concerning indicator of agency non-compliance is the rate of "non-determination." One out of every ten FOIL requests had not received even a "yes" or "no" response from agencies six months after the initial request. **Such delays are unacceptable and represent de-facto denials**. . . . While the reasons for non-determination are myriad, **failure to provide an indication of "yes" or "no" six months after receiving a request undermines the spirit of the Freedom of Information Law.**

Pet. ¶ 89, Ex. 39, at 17 (emphasis added). The Mayor himself agreed that delays of even six months "undermine[] the spirit of [FOIL]," and considered such delays "de-facto denials." Yet now that his administration is in power and ultimately in charge of the DOE, delays of even greater length and up to twenty-one months are, according to his DOE, "appropriate" and do not constitute constructive denials. The Court must not permit the DOE to continue undermining the spirit of the FOIL by condoning its unacceptable policy and practice of non-determination for months and years on end.

Accordingly, Petitioners respectfully request that the Court (1) declare Chancellor's Regulation D-110(VIII)(A) invalid; (2) declare that the DOE's practice of sending repeated Form Delay Letters is inherently unreasonable and that determinations in its appeal denial letters that it may continue to deny access to public records because it has re-issued serial unilateral extensions violates its obligations under FOIL; (3) grant Petitioners' Article 78 Petition, finding that the delays constitute constructive denials and that Petitioners have exhausted their administrative remedies, and compel the DOE to produce all disclosable records responsive to their outstanding requests within twenty (20) days of the Court's order; and (4) award Petitioners their costs and fees incurred in obtaining the DOE's belated compliance with their requests for public records, and any such other and further relief as the Court deems just and proper.

FACTUAL BACKGROUND

A. THE REQUESTS

NYP Holdings, Inc. is the publisher of the *New York Post* (the "*Post*"), the oldest continuously published daily newspaper in the United States. Pet. ¶ 12. Susan Edelman, Aaron Short, and Yoav Gonen are investigative reporters at the *Post* who cover, among other topics, education and the New York City Department of Education. Pet. ¶¶ 13-15. They have reported extensively on education spending, teacher pay, misconduct in education, and a host of other topics related to the DOE of significant public interest. Pet. ¶¶ 13-15. Among the various reporting techniques they employ to gather information for dissemination to the public, Ms. Edelman, Mr. Short, and Mr. Gonen submit FOIL requests to the DOE and other agencies on various topics relevant to their reporting.

Between September 2014 and January 2016, Ms. Edelman, Mr. Short, and Mr. Gonen submitted twelve requests on behalf of the *Post* relevant to this Petition. Pet. ¶¶ 3, 7. For each request, DOE Central Records Access Officer & Agency Attorney, Joseph A. Baranello, acknowledged receipt of the request by letter and stated that "a response is currently anticipated by [x date]." Pet. ¶ 3. Not once, however, did the DOE provide a response by the anticipated date, and instead Mr. Baranello sent the following Form Delay Letter:

> This letter concerns the above-referenced Freedom of Information Law (FOIL) request. Pursuant to section VI.B of Chancellor's Regulation D-110, due to the volume and complexity of requests we receive and process, and to determine whether any records or portions thereof will be subject to redactions permitted under Public Officers Law §87(2), additional time is required to respond substantively to your request. Accordingly, a response is currently anticipated by [x date].

Pet. ¶ 4. Since September 2014, Petitioners have received between five (5) and sixteen (16) of these letters for each of the twelve requests. Pet. ¶¶ 40, 86. As a result, Ms. Edelman and Mr. Short have waited for between more than six and twenty-one months for DOE to even provide

them with a response as to whether they will grant or deny their requests. Pet. ¶¶ 7, 26. To date, they have received only partial responses for two of the twelve requests – both after filing an administrative appeal – and they continue to wait for responses for the remaining ten requests.

1. The First Request (F#10,586)

On September 23, 2014, Mr. Short requested from the DOE a list of public school teachers, sorted by school, who have taken between 11 and 20 days off from school in the 2013-2014 school year, and a list of teachers who have taken 20 or more days off (the "First Request"). Pet. ¶ 21, Ex. 1. The DOE sent Mr. Short a letter acknowledging receipt of the request, assigning it FOIL reference number F#10,586, and stating that it anticipated providing a response by October 29, 2014. Pet. ¶ 23, Ex. 2. On October 29, 2014, however, instead of receiving a response to his request, Mr. Short received the first in a series of fourteen (14) identical Form Delay Letters from Mr. Baranello granting DOE unilateral extensions until February 2, 2015, March 31, 2015, April 28, 2015, May 27, 2015, June 24, 2015, September 18, 2015, October 19, 2015, November 17, 2015, December 17, 2015, January 21, 2016, February 19, 2016, March 18, 2016, and finally, April 15, 2016. Pet. ¶ 24, Ex. 3.

At the time Mr. Short and Ms. Edelman filed their administrative appeal on May 18, 2016, the most recent April 15, 2016 deadline set by DOE had passed without receipt of a substantive response or even another Form Delay Letter from Respondent. Pet. ¶ 25. Although DOE ultimately responded to this request in part on June 17, 2016,[3] Mr. Short waited a total of twenty one (21) months to receive a single excel spreadsheet with every teacher's name redacted. Pet. ¶ 26.

[3] As noted below, because DOE took so long to respond to this First Request, the information sought in the request was stale, now two years old. As a result, Petitioners did not appeal this partial denial. Pet. ¶ 27.

2. The Second Request (F#10,764)

On November 20, 2014, Mr. Short requested from the DOE a list or spreadsheet of arrests of DOE employees and the type of crime or non-criminal incident for which they were charged from January 1, 2010 to November 20, 2014 (the "Second Request"). Pet. ¶ 28, Ex. 5. The DOE sent Mr. Short an acknowledgment letter for this request, assigned it FOIL reference number F#10,764, and stated that it anticipated providing a response by December 31, 2014. Pet. ¶ 30, Ex. 6. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent Mr. Short a succession of fourteen (14) Form Delay Letters granting DOE unilateral extensions until February 2, 2015, March 31, 2015, April 28, 2015, May 27, 2015, June 24, 2015, August 20, 2015, September 18, 2015, October 19, 2015, November 17, 2015, December 17, 2015, January 21, 2016, February 19, 2016, March 18, 2016, and finally, April 15, 2016. Pet. ¶ 31, Ex. 7.

As with the First Request, at the time Mr. Short and Ms. Edelman filed their administrative appeal on May 18, 2016, the most recent April 15, 2016 deadline set by DOE had passed without receipt of a substantive response or even another Form Delay Letter from Respondent. Pet. ¶ 32. Then, after Mr. Short and Ms. Edelman filed their administrative appeal and almost two months after the most recent "anticipated date" had passed, DOE sent a fifteenth (15) Form Delay Letter granting itself yet another unilateral extension until July 12, 2016. Pet. ¶ 33, Ex. 7. That deadline has since passed with no further response. As of the date of this Petition, this request has been outstanding for twenty (20) months. Pet. ¶ 34.

3. The Third and Fourth Requests (F#11,061, F#11,068)

On March 4, 2015, Mr. Gonen requested from the DOE a copy of all e-mails sent and received by DOE Press Secretary Devora Kaye on March 3, 2015. (the "Third Request"). Pet. ¶ 35, Ex. 8. Then, on March 6, 2015, Mr. Gonen requested from the DOE a copy of all e-mails

sent and received by Ms. Kaye on March 2, 2015 (the "Fourth Request"). Pet. ¶ 36, Ex. 9. The DOE sent Mr. Gonen a single acknowledgment letter for these two request, assigned them FOIL reference numbers F#11,061 and F#068 respectively, and stated that it anticipated providing a response to both by April 7, 2015. Pet. ¶ 38, Ex. 10. Prior to Mr. Gonen filing his May 24, 2016 administrative appeal, Mr. Baranello sent thirteen (13) Form Delay Letters granting DOE unilateral extensions until May 5, 2015, June 3, 2015, July 1, 2015, July 30, 2015, August 27, 2015, September 25, 2015, October 26, 2015, December 28, 2015, January 26, 2015 [sic], February 26, 2016, March 25, 2016, April 22, 2016, and finally, May 20, 2016. Pet. ¶ 39, Ex. 11. Then, after Mr. Gonen filed his administrative appeal, DOE sent three additional Form Delay Letters for a total of sixteen (16) Form Delay Letters granting itself further unilateral extensions until June 20, 2016, July 19, 2016, and August 16, 2016. Pet. ¶ 40, Ex. 11. As of the date of this Petition, this request has been outstanding for more than seventeen (17) months. Pet. ¶ 41.

4. The Fifth Request (F#11,115)

On March 17, 2015, Mr. Gonen requested from the DOE a breakdown of the reason for/method of departure for each of the 291 educators/staffers in the ATR ("Absent Teacher Reserve") pool that have been "moved" out of the schools system since April 2014, including the teacher's name, location of last teaching assignment, and reason for/method of departure, as well as copies of any related stipulations of settlement or expedited 3020-A hearing reports (the "Fifth Request"). Pet. ¶ 42, Ex. 12.

The DOE sent Mr. Gonen an acknowledgment letter for this request, assigned it FOIL reference number F#11,115, and stated it anticipated providing a response by April 20, 2015.[4] Pet. ¶ 45, Ex. 15. Prior to Mr. Gonen filing his May 24, 2016 administrative appeal, Mr. Baranello sent twelve (12) Form Delay Letters granting DOE unilateral extensions until May 18, 2015, June 16, 2015, July 15, 2015, August 12, 2015, September 10, 2015, October 8, 2015, December 9, 2015, January 12, 2016, March 10, 2016, April 7, 2016, May 5, 2016, and finally, June 3, 2016. Pet. ¶ 46, Ex. 16. Then, after Mr. Gonen filed his administrative appeal, DOE sent three additional Form Delay Letters for a total of fifteen (15) Form Delay Letters granting itself further unilateral extensions until July 1, 2016, August 1, 2016, and August 29, 2016. Pet. ¶ 47, Ex. 16. As of the date of this Petition, this request has been outstanding for just under seventeen (17) months. Pet. ¶ 48.

5. The Sixth Request (F#11,479)

On July 6, 2015, Ms. Edelman requested from the DOE records on the re-scoring of the Regents exams in New York City schools including all records of requests by New York City superintendents and other personnel to re-score the January 2015 Regents exams (the "Sixth Request"). Pet. ¶ 49, Ex. 17. The DOE sent Ms. Edelman an acknowledgment letter for this request, assigned it FOIL reference number F#11,479, and stated that it anticipated providing a response by August 10, 2015. Pet. ¶ 51, Ex. 18. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent seven (7) Form Delay Letters granting DOE unilateral extensions until September 8, 2015, November 4, 2015, December 7, 2015, January 8, 2016, February 8, 2016, March 25, 2016, and finally, May 20, 2016. Pet. ¶ 52, Ex. 19. On May 27, 2016, more than a week after Mr. Short and Ms. Edelman filed their appeal and

[4] On March 20, 2015, Mr. Gonen was able to obtain from the DOE Press Office a chart of ATR exits with sparse detail. Pet. ¶¶ 44, Exs. 13, 14. The DOE's acknowledgment letter referenced Mr. Gonen's procurement of this information, but this information was not obtained through FOIL. Pet. ¶ 45, Ex. 15.

the May 20, 2016 "anticipated date" for DOE to respond had passed, DOE granted the Sixth Request in part, and provided Ms. Edelman with a single excel spreadsheet with three columns redacted. Pet. ¶ 53, Ex. 20. In total, Petitioners waited more than ten (10) months to receive a single excel spreadsheet.[5] Pet. ¶ 53, Ex. 20.

6. The Seventh Request (F#11,571)

On August 12, 2015, Ms. Edelman requested from the DOE copies of reports completed or finalized since January 1, 2014 by the Office of Special Investigation (OSI), which investigates allegations of improper and unlawful behavior, including corporal punishment and verbal abuse against students (the "Seventh Request"). Pet. ¶ 55, Ex. 21. The DOE sent Ms. Edelman an acknowledgment letter for this request, assigned it FOIL reference number F#11,571, and stated that it anticipated providing a response by September 17, 2015. Pet. ¶ 57, Ex. 22. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent eight (8) Form Delay Letters granting DOE unilateral extensions until October 16, 2015, November 16, 2015, December 16, 2015, January 20, 2016, February 18, 2016, April 14, 2016, May 12, 2016, and finally, June 10, 2016. Pet. ¶ 58, Ex. 23. After Mr. Short and Ms. Edelman filed their administrative appeal, DOE sent four additional Form Delay Letters for a total of twelve (12) Form Delay Letters granting itself further extensions until July 11, 2016, July 25, 2016, August 8, 2016, and August 22, 2016. Pet. ¶ 59, Ex. 23. As of the date of this Petition, this request has been outstanding for just under twelve (12) months. Pet. ¶ 60.

7. The Eighth Request (F#11,677)

On October 2, 2015, Mr. Short requested from the DOE payroll records for Renewal School Superintendent Aimee Horowitz and all staff who work with Ms. Horowitz on the

[5] As with the First Request, because DOE took so long to respond to the Sixth Request, the information sought in the request is now stale. As a result, Petitioners did not appeal this partial denial. Pet. ¶ 54.

Renewal School initiative for 2015, or for the 2014-2015 school year (the "Eighth Request"). Pet. ¶ 61, Ex. 24. The DOE sent Mr. Short an acknowledgment letter for this request, assigned it FOIL reference number F#11,677, and stated that it anticipated providing a response by November 9, 2015. Pet. ¶ 63, Ex. 25. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent four (4) Form Delay Letters granting DOE unilateral extensions until December 10, 2015, February 11, 2016, April 8, 2016, and finally, May 6, 2016. Pet. ¶ 64, Ex. 26.

As with the First and Second Requests, at the time Mr. Short and Ms. Edelman filed their administrative appeal on May 18, 2016, the most recent May 6, 2016 deadline set by DOE had passed without receipt of a substantive response or another Form Delay Letter from Respondent. Pet. ¶ 65. Nevertheless, after Mr. Short and Ms. Edelman filed their administrative appeal and a month after the most recent "anticipated date" had passed, DOE sent three additional Form Delay Letters for a total of seven (7) Form Delay Letters granting itself further unilateral extensions until July 5, 2016, August 2, 2016, and August 30, 2016. Pet. ¶ 66, Ex. 26. As of the date of this Petition, this request has been outstanding for more than ten (10) months. Pet. ¶ 67.

8. The Ninth Request (F#11,856)

On December 2, 2015, Ms. Edelman requested from the DOE records of disciplinary action involving school bus drivers and "matrons" or other such aides since December 1, 2014 (the "Ninth Request"). Pet. ¶ 68, Ex. 27. The DOE sent Ms. Edelman an acknowledgment letter for this request, assigned it FOIL reference number F#11,856, and stated that it anticipated providing a response by January 11, 2016. Pet. ¶ 70, Ex. 28. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent five (5) Form Delay Letters granting DOE unilateral extensions until February 9, 2016, March 9, 2016, April 6, 2016, May 4, 2016, and finally, June 2, 2016. Pet. ¶ 71, Ex. 29. Then, after Mr. Short and Ms.

Edelman filed their administrative appeal, DOE sent five additional Form Delay Letters for a total of ten (10) Form Delay Letters granting itself further unilateral extensions until June 30, 2016, July 15, 2016, July 22, 2016, July 29, 2016, and August 12, 2016. Pet. ¶ 72, Ex. 29. As of the date of this Petition, this request has been outstanding for more than eight (8) months. Pet. ¶ 73.

9. The Tenth Request (F#11,858)

Also on December 2, 2015, Ms. Edelman requested from the DOE records detailing weapons found or confiscated in city schools in the 2013-2014 school year, the 2014-2015 school year, and the current school year (the "Tenth Request"). Pet. ¶ 74, Ex. 30. Ms. Edelman had previously requested and been provided with this exact information by DOE for a prior year's reporting. Recognizing that this data is readily available to Respondent, in an effort to expedite processing of her request, Ms. Edelman attached to her request the similar records DOE released to her in March 2012. Pet. ¶ 76, Ex. 31. The DOE sent Ms. Edelman an acknowledgment letter for this request, assigned it FOIL reference number F#11,858, and stated that it anticipated providing a response by January 11, 2016. Pet. ¶ 77, Ex. 32. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent five (5) Form Delay Letters granting DOE unilateral extensions until February 9, 2016, March 9, 2016, April 6, 2016, May 4, 2016, and finally, June 2, 2016. Pet. ¶ 78, Ex. 33. Then, after Mr. Short and Ms. Edelman filed their administrative appeal, DOE sent five additional Form Delay Letters for a total of ten (10) Form Delay Letters granting itself further unilateral extensions until June 30, 2016, July 15, 2016, July 22, 2016, July 29, 2016, and August 12, 2016. Pet. ¶ 79, Ex. 33. As of the date of this Petition, this request has been outstanding for more than eight (8) months. Pet. ¶ 80.

10. The Eleventh Request (F#11,894)

On December 16, 2015, Mr. Short requested from the DOE attendance records for all DOE principals in the 2013-2014 school year, 2014-2015 school year, and in 2015 between September 9, 2015 and December 15, 2015 (the "Eleventh Request"). Pet. ¶ 81, Ex. 34. The DOE sent Mr. Short an acknowledgment letter for this request, assigned it FOIL reference number F#11,894, and stated that it anticipated providing a response by January 26, 2016. Pet. ¶ 83, Ex. 35. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent two (2) Form Delay Letters granting DOE unilateral extensions until March 23, 2016 and April 20, 2016. Pet. ¶ 84, Ex. 36.

As with the First, Second and Eighth Requests, at the time Mr. Short and Ms. Edelman filed their administrative appeal on May 18, 2016, the most recent April 20, 2016 deadline set by DOE had passed without receipt of a substantive response or another Form Delay Letter from Respondent. Pet. ¶ 85. Nevertheless, after Mr. Short and Ms. Edelman filed their administrative appeal and a month after the most recent "anticipated date" had passed, DOE sent three additional Form Delay Letters for a total of five (5) Form Delay Letters granting itself further unilateral extensions until June 16, 2016, July 15, 2016, and August 12, 2016. Pet. ¶ 86, Ex. 36. As of the date of this Petition, this request has been outstanding for more than seven (7) months. Pet. ¶ 87.

11. The Twelfth Request (F#12,015)

On January 25, 2016, Ms. Edelman requested from the DOE records of all procurement card (P-card) expenses by DOE personnel since August 21, 2014 (the "Twelfth Request"). Pet. ¶ 88, Ex. 37. As with the Tenth Request, Ms. Edelman had previously requested and been provided with this exact information for the period from September 1, 2013 to August 21, 2014. Again, in an effort to expedite the processing of her request, Ms. Edelman attached to her request

DOE's response to her prior request. Pet. ¶ 90, Ex. 38. The DOE sent Ms. Edelman an acknowledgment letter for this request, assigned it FOIL reference number F#12,015, and stated that it anticipated providing a response by February 26, 2016. Pet. ¶ 91, Ex. 39. Prior to Mr. Short and Ms. Edelman filing their May 18, 2016 administrative appeal, Mr. Baranello sent three (3) Form Delay Letters granting DOE unilateral extensions until March 25, 2016, April 22, 2016, and May 20, 2016. Pet. ¶ 92, Ex. 40. Then, after Mr. Short and Ms. Edelman filed their administrative appeal, DOE sent six additional Form Delay Letters for a total of nine (9) Form Delay Letters granting itself further unilateral extensions until June 20, 2016, July 19, 2016, July 26, 2016, August 2, 2016, August 8, 2016, and August 15, 2016. Pet. ¶ 93, Ex. 40. As of the date of this Petition, this request has been outstanding for more than six (6) months. Pet. ¶ 94.

B. THE APPEAL AND DENIAL

As of May 2016, Petitioners had yet to receive a substantive response to any of the twelve FOIL requests that form the substance of this Petition/Complaint. Pet. ¶ 98. All requests had then been outstanding between four (4) and twenty (20) months at that time. Pet. ¶ 7. Furthermore, Petitioners had made multiple efforts to obtain a response from DOE to no avail. *See*, *e.g.*, Pet. ¶¶ 95-97, Exs. 41-43.

Accordingly, on May 18, 2016, Mr. Short and Ms. Edelman deemed their requests constructively denied under N.Y. Pub. Off. Law § 89, and timely submitted an administrative appeal of the constructive denials of each of their nine FOIL requests (the First, Second, Eighth, and Eleventh for Mr. Short, and the Sixth, Seventh, Ninth, Tenth, and Twelfth for Ms. Edelman). Pet. ¶ 99, Ex. 44.

By letter dated June 6, 2016 from DOE First Deputy General Counsel Judy Nathan, the DOE denied Mr. Short's and Ms. Edelman's administrative appeal out of hand (the "June 6 Denial Letter"). The DOE held that Mr. Short's and Ms. Edelman's requests had not been

constructively denied because "according to Chancellor's Regulation D-110(VIII)(A), a request may be deemed constructively denied only where a requestor 'is neither granted nor denied access to records within the time limits set forth above [in section (VI)] or in the acknowledgment letter *or any extension letter(s)…*' (emphasis added)." Further, DOE observed that Mr. Baranello had "properly determined that additional time was required" to respond because "the total number of requests as well as the extensive and voluminous nature of some of the items requested" and that "review and redaction of the requested records . . . are time-consuming." Pet. ¶ 100, Ex. 45.

Ms. Nathan also held that the Sixth Request was moot because on May 27, 2016, a week after the most recent "approximate date" for DOE to respond had passed, and more than ten (10) months after she filed her initial request, Ms. Edelman received a response from Respondent, granting in part her request. Ms. Edelman was provided with a single excel spreadsheet with three columns redacted. Pet. ¶ 101, Exs. 20, 45. Although Ms. Nathan denied Mr. Short's and Ms. Edelman's appeal, she directed DOE to respond to Petitioners' requests "as expeditiously as possible."[6] Pet. ¶ 102, Ex. 45. Despite Ms. Nathan's admonition, seven of these nine requests remain without decision.

Similarly, on May 24, 2016, Mr. Gonen deemed his requests constructively denied under N.Y. Pub. Off. Law § 89, and timely submitted two administrative appeals of the constructive denials of the Third, Fourth, and Fifth FOIL requests. Pet. ¶ 103, Exs. 46, 47. By letter dated June 8, 2016, Ms. Nathan of the DOE denied Mr. Gonen's administrative appeal on the same

[6] On June 17, 2016, a month after Mr. Short's and Ms. Edelman's appeal was filed, more than two months after the most recent "anticipated date" for DOE to respond had passed, Mr. Short received a response from DOE, granting the First Request in part. *See* Pet. ¶ 26. As Petitioners opted not to administratively appeal the final decision on the First Request, it is moot as it pertains to this Article 78 proceeding. However, both the First and Sixth Requests remain relevant for the purposes of Petitioners' Declaratory Judgment Action.

grounds as Mr. Short's and Ms. Edelman's appeal. Pet. ¶ 104, Ex. 48. All three of these requests also remain outstanding.

Accordingly, Petitioners commence this hybrid proceeding to challenge under Article 78 the DOE's improper delays and constructive denials of the ten outstanding Requests, and to request a declaration under N.Y.C.P.L.R. § 3001 that Chancellor's Regulation D-110(VIII)(A) is invalid and that DOE's excessive delays are unreasonable under the circumstances of the requests.

ARGUMENT

I. CHANCELLOR'S REGULATION D-110(VIII)(A) IS INVALID BECAUSE IT IS INCONSISTENT WITH THE PLAIN LANGUAGE AND INTENT OF FOIL AND ITS IMPLEMENTING REGULATIONS

The Court of Appeals has long held that "[t]he Legislature may authorize an administrative agency 'to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation.'" *Matter of Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 608, 883 N.Y.S.2d 755 (2009) (quoting *Matter of Med. Soc'y. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 865, 768 N.Y.S.2d 423 (2003)). In practice, this has meant that "an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes." *Rivera*, 12 N.Y.3d at 608 (quoting *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 N.Y.3d 249, 254, 778 N.Y.S.2d 412 (2004)). Nevertheless, such "an agency cannot promulgate rules or regulations that contravene the will of the Legislature" or the express terms of the authorizing statute. *Weiss v. City of New York*, 95 N.Y.2d 1, 4–5, 709 N.Y.S.2d 878 (2000).

In ascertaining whether a regulation is consistent with its governing statute, a Court's interpretation of a statute is a "pure question[] of law, and [accordingly,] no deference is

accorded the agency's determination." *Matter of Madison–Oneida Bd. of Coop. Educ. Servs. v. Mills*, 4 N.Y.3d 51, 59, 790 N.Y.S.2d 619 (2004). "[I]f [a] regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight." *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454 (1980); *cf. Weiss*, 95 N.Y.2d at 5, 709 N.Y.S.2d 878 (striking down an administrative agency's regulation for expanding liability in a manner inconsistent with New York State Labor Law); *Finger Lakes Racing Ass'n. v. N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471, 480–481, 410 N.Y.S.2d 268 (1978) (striking down an administrative agency's regulation for being in "direct conflict" with the statute). Any other result would impermissibly allow an administrative agency to invade the legislative province and usurp legislative authority. *See Matter of Gross v. New York City Alcoholic Beverage Control Bd.*, 7 N.Y.2d 531, 537–539, 200 N.Y.S.2d 12 (1960).

DOE's Chancellor's Regulation D-110(VIII)(A) is inconsistent with the express terms of the FOIL and the Implementing Regulations, as it grants DOE unlimited discretion to respond or not respond to the FOIL requests it wants, when it wants, and for whatever reason it wants. In so doing, it strips requesters of their right to seek administrative and judicial review of the reasonableness of the DOE's delays in responding to requests so long as DOE adheres to its own arbitrary and changing deadlines. This regulation usurps the authority of the State Legislature and creates a system for the DOE far more restrictive and prone to agency abuse than envisioned by the State Legislature or the Committee on Open Government. *See* Pub. Off. Law § 87(1)(b) (requiring each agency promulgate their own rules and regulations in conformity with FOIL and with the Committee's Implementing Regulations). Accordingly, the Court must deem this regulation invalid.

A. The FOIL And Its Implementing Regulations Do Not Permit Agencies To Grant Themselves Repeated Extensions Of Time To Respond To Requests

In enacting the FOIL, the New York State Legislature declared that "government is the public's business" and expressly found that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions." *S. Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 931, 25 N.Y.S.3d 303, 304 (2d Dep't 2016) (citing N.Y. Pub. Off. Law § 84). Consistent with these findings, the FOIL provides the public "with a means of access to government records in order to encourage public awareness . . . and to discourage official secrecy." *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150, 524 N.Y.S.2d 35 (1987). The FOIL law imposes "a broad duty on government to make its records available to the public," *Matter of Tuck-It-Away Assocs., LP v. Empire State Dev. Corp.*, 54 A.D.3d 154, 162, 861 N.Y.S.2d 51 (1st Dep't 2008), and its disclosure provisions must be "liberally construed" to ensure that "the public is granted maximum access to the records of government." *Newsday*, 71 N.Y.2d at 150.

Central to ensuring the government is "responsive and responsible to the public" are the provisions of FOIL that govern the time and manner in which agencies must respond to FOIL requests. Those provisions require that within five (5) business days of receiving a request for records, an agency must take one of three actions:

(1) "make such record available to the person requesting it,"

(2) "deny such request in writing," or

(3) "furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied."

N.Y. Pub. Off. Law § 89(3)(a). Stated differently, if an agency is unable to grant or deny a request within five days, it must send an acknowledgment letter to the requester with a reasonable approximate date that it will grant or deny the request.

Likewise, pursuant to its statutory mandate, the Committee on Open Government (the "Committee") has promulgated regulations interpreting and implementing FOIL (the "Implementing Regulations"). These Implementing Regulations have the force of law and apply to all state and city agencies including the DOE. Pub. Off. Law § 87(1) (requiring the Committee promulgate "general rules and regulations . . . in conformity with [FOIL]" and that agencies adopt rules in conformity with FOIL and the Committee's regulations); 21 N.Y.C.R.R. 1401.1(b) ("No agency regulations shall be more restrictive than this Part."). In the event that an agency chooses to furnish an acknowledgement letter instead of granting or denying a request within five business days, the Implementing Regulations require that the letter include either:

> (1) an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request that shall not be more than 20 business days after the date of acknowledgment, or
>
> (2) if it is known that circumstances prevent disclosure within 20 business days from the date of such acknowledgement, a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part.

21 N.Y.C.R.R. § 1401.5(c)(3). In other words, the Implementing Regulations require the DOE to include in its acknowledgment letter an approximate date not more than 20 business days after the acknowledgment, or, if beyond 20 days, a date certain. These regulations do not set a specific timeframe within which an agency must grant or deny a request for documents. *See generally Matter of New York Times Co. v. City of N.Y. Police Dep't*, 103 A.D.3d 405, 406-407, 959 N.Y.S.2d 171 (1st Dep't 2013) (holding regulations that establish an "absolute time period" to respond to FOIL requests are invalid under the statute). Rather, they give the agency immense

discretion to set a date certain that is *reasonable under the circumstances of the request.* This discretion, however, requires that the agency make a meaningful up-front consideration of the time it anticipates will be needed to determine whether to grant or deny the request and issue a firm date for that response.

In the event an agency fails to determine whether to grant or deny a request within a reasonable time period, both FOIL and the Implementing Regulations make clear that it constitutes an appealable denial – *i.e.*, a "constructive denial." N.Y. Pub. Off. Law § 89(4)(a) ("Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial."); 21 N.Y.C.R.R. § 1401.5(e) ("failure to comply with the time limitations … shall constitute a denial of a request that may be appealed").

B. Chancellor's Regulation D-110(VIII)(A) Unlawfully Permits DOE To Endlessly Delay Its Time To Respond To FOIL Requests And Abrogates Requesters' Right To Appeal

The DOE's internal regulations governing its compliance with FOIL are in direct conflict with the will of the State Legislature and the express terms of the FOIL and the Implementing Regulations. Chancellor's Regulation D-110(VIII)(A) provides in relevant part:

> A requester who is neither granted nor denied access to records within the time limits set forth above or in the acknowledgment letter or any extension letter(s) may consider the request constructively denied and may appeal such denial in accordance with the procedures set forth below.

Chancellor's Regulation D-110(VIII)(A) (emphasis added). By its very terms, this provision purports to (1) authorize DOE to send multiple extension letters in conflict with Section 89(3)(a) and the Implementing Regulations, and (2) excise the "constructive denial" provisions from Section 89(4)(a) and the Implementing Regulations. Section D-110(VIII)(A) is plainly contrary to the language and purposes of FOIL and must be declared invalid.

With its use of the phrase "extension letter(s)," Section D-110(VIII)(A) inexplicably grants DOE authority found nowhere in the FOIL or Implementing Regulations. Section 89(3)(a) authorizes an agency to send one letter – the acknowledgment letter – setting its time to grant or deny a request. N.Y. Pub. Off. Law § 89(3)(a). Likewise, the Implementing Regulations authorize only a single letter to grant or deny a request, requiring that that letter contain "a date certain," for when the request will be granted or denied if outside of 20 days. 21 N.Y.C.R.R. § 1401.5(c)(3). Neither the FOIL nor its Implementing Regulations contain any provision authorizing an agency to take repeated unilateral extensions for when it will grant or deny a request, and the DOE has no authority to grant itself such a right.

The plain language of the statute lends support to this interpretation. Section 89(3)(a) uses the singular – "*a* statement of *the* approximate date" and "*a* date certain" – when referring to the time for the agency to respond. N.Y. Pub. Off. Law § 89(3)(a); 21 N.Y.C.R.R. § 1401.5(c). The Court must not discount the language chosen by the Legislature – indeed, "the clearest indicator of legislative intent is the statutory text," and courts must "giv[e] effect to the plain meaning thereof." *People v. Golo*, 26 N.Y.3d 358, 361, 44 N.E.3d 185, 187 (2015). This is especially true considering that FOIL must be liberally construed in favor of the public's right of access. *Newsday*, 71 N.Y.2d at 150.

The Committee on Open Government, which is explicitly authorized by FOIL to issue advisory opinions interpreting the statute, *see* N.Y. Pub. Off. Law § 89(1)(b), has also confirmed this understanding time and again.[7] Comm. On Open Gov't Advisory Opinion to Jeremy Chase (July 19, 2016) ("[T]he agency is not permitted to establish the right to repeated extensions via regulation, where such right does not exist in statute or in the Committee's own regulations.")

[7] While "advisory opinions from the Committee on Open Government are not binding authority," they "may be considered to be persuasive based on the strength of their reasoning and analysis." *TJS of N.Y., Inc. v. N.Y. State Dep't of Taxation & Fin.*, 89 A.D.3d 239, 242 n.1, 932 N.Y.S.2d 243 (3d Dep't 2011).

(Pet. ¶ 105, Ex. 49); Comm. on Open Gov't Advisory Opinion to Nairobi Vives (Jan. 13, 2016) ("[T]here is no provision in the statute for repeated extensions") (Pet. ¶ 106, Ex. 50); Comm. on Open Gov't. FOIL-AO-18008 (2010) ("[P]ursuant to § 89(3)(a), an agency cannot engage in one delay after another,"); *see also* Comm. on Open Gov't FOIL-AO-19034 (2013) (observing FOIL's statutory provisions governing the time for response "clearly are intended to prohibit agencies from unnecessarily delaying disclosure."). If an agency could unilaterally decide it can reissue due dates at will under Section D-110(VIII)(A), the rules enshrined in Section 89 of FOIL and the Implementing Regulations would simply serve no purpose at all.[8]

Section D-110(VIII)(A) also unlawfully permits the DOE to extend its response date without any regard to what is reasonable under the circumstances of the request.[9] FOIL's requirement that the date specified in the acknowledgment letter must be "reasonable under the circumstances of the request" would be meaningless if an agency could craft regulations, as DOE has done here, that require it only to set an *aspirational* placeholder date and then recalculate it on a month to month basis. The FOIL requires agencies to evaluate requests upon their receipt and make a meaningful case-by-case initial determination of how long they will actually need to respond. *See Linz v. The Police Dep't of the City of New York*, Supreme Court, N.Y. Cty.,

[8] The only other provision in the Chancellor's Regulation that discusses extension letters permits extension letters only where DOE has determined it will grant a request but cannot *release* records by the date indicated in the acknowledgment letter – *not* where it is unable to grant or deny a request in the first instance. Chancellor's Regulation D-110(VI)(E). While Petitioners and the Committee on Open Government are of the opinion that the time needed to grant or deny a request and the time needed to release records once a decision to grant access to records has been made under Section 89(3)(a) is a distinction without a difference given the realities of FOIL, DOE has taken the position that only the time to release records is subject to the date certain requirement. Chancellor's Regulation D-110(VI)(E) seemingly makes a similar distinction authorizing extension letters in the case of the time needed to release records only. The DOE cannot have it both ways here.

[9] Although other provisions in the Chancellor's Regulation pay lip-service to the "reasonableness" requirement of Section 89(3)(a), *see* Chancellor's Regulation D-110(VI)(A) (requiring DOE must "acknowledge in writing the receipt of such request and state the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied"), Section D-110(VIII)(A) is completely silent as to the reasonableness of extension letter(s) and does not incorporate these other provisions by reference. This silence speaks volumes.

NYLJ, Dec. 17, 2001); *cf*. New York Bill Jacket, 2005 A.B. 6714, Ch. 22 (observing that "the bill codifies current decisional law providing approximate date shall be reasonable under the circumstances). DOE's policy and practice of sending monthly Form Delay Letters with new "anticipated date(s)" demonstrates that the prior "anticipated date(s)" were *entirely arbitrary* and that DOE personnel gave no consideration as to what length of time was reasonable under the circumstances of the request. This is particularly evident where the Form Delay Letters pile up as they have done here and where the amount of time between "anticipated date[s]" of response is the same from letter to letter regardless of the nature of the underlying request, like here. Section D-110(VIII)(A) effectively writes the reasonableness requirement out of the FOIL.[10] This is plainly outside the authority delegated to DOE by the State Legislature.

Of even greater concern is that Section D-110(VIII)(A) effectively insulates DOE from having to respond to FOIL requests for any reason without the specter of judicial review. This directly undermines the structure and purpose of FOIL and the Implementing Regulations, both of which contain constructive denial provisions at the response and administrative appeal levels precisely to ensure that administrative remedies are available when an agency refuses to provide a substantive response. *See* N.Y. Pub. Off. L. § 89(4)(a); 21 N.Y.C.R.R. § 1401.5(c)(3) & (e). If, as Section D-110(VIII)(A) provides, a request is constructively denied *only* when it is neither granted nor denied "within the time limits set forth . . . in . . . any extension letter(s)," then the request is *not* constructively denied if the DOE sends extension letter after extension letter within the time limit set forth in the previous extension letter. This negative inference – which the DOE has drawn here and in other cases challenging excessive delays[11] – creates stark results, and in

[10] On the two occasions when DOE has responded, the modest document production further demonstrates that the "reasonableness" determination was merely *pro forma*. Pet. ¶¶ 26, 53, Ex. 4, 20.

[11] *See, e.g., Huseman v. New York City Dep't of Educ.*, 2016 NY Slip Op 30959(U) (Sup. Ct. N.Y. Cty. May 25, 2016).

essence permits the DOE to ignore requests whether on a whim, to avoid putting in the necessary time to comply, or even to avoid releasing politically sensitive or embarrassing records.

Considering that most FOIL requests from news organizations like the Petitioners are tied to particular time-sensitive, reporting projects, Section D-110(VIII)(A) allows the DOE to simply wait out these requests in the hope that the information contained in the records becomes stale. Indeed, that is exactly what happened with Petitioners' First Request which asked for a list of public school teachers, sorted by school, who have taken between 11 and 20 days off from school in the 2013-2014 school year, and a list of teachers who have taken 20 or more days off. *See* Pet. ¶ 21, Ex. 1. DOE delayed response to the request for twenty-one months before responding in June 2016 with a single excel spreadsheet with the name of every teacher redacted. Pet. ¶¶ 23, 24, 26, Exs. 2-4. By the time Petitioners received information covering the 2013-2014 school year, two full school years had passed rendering the information stale from a newsworthiness perspective (to the extent it was usable at all considering the heavy redactions applied by DOE). Pet. ¶ 27. The same can be said for Petitioners' Sixth Request, which Respondents took ten months to respond to. *See* Pet. ¶¶ 49, 53, 54, Exs. 17-20.

This sort of extended and unreasonable delay in responding to FOIL requests is not only harmful to Petitioners who seek to report the news in a timely fashion, but it is particularly harmful to the People of New York. FOIL was enacted not only to keep the People informed about the workings of their government, but also so that the People, armed with this knowledge, can participate in and effect change in their government. Pub. Off. Law § 84 ("The more open a government is with its citizenry, the greater the understanding and participation of the public in government."). If an agency – particularly one that deals with the education and safety of New York children – can conceal its misconduct, failures, and other embarrassing or politically

fraught information from the People for a half year, a year, or even two years, it deprives the People of their right to informed participation in their government. Indeed, it prevents the People from righting the wrongs in the system that exists to serve them.

Perhaps most damning to the validity of Section D-110(VIII)(A) is that the DOE has failed to amend its regulations following the 2005 Amendments to the FOIL to ensure its conformity with FOIL and the Implementing Regulations. Both FOIL and the Implementing Regulations require that all agencies subject to FOIL "amend existing regulations or adopt new regulations to implement the Freedom of Information Law in conformity with this Part." 21 N.Y.C.R.R. § 1401.1(e); *see also* N.Y. Pub. Off. Law § 87(1)(b) ("Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated . . . pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article").

In 2005, in an effort to "provide necessary clarity and guidance" as well as to "make the process of obtaining responsive documents more efficient and, ultimately, result in a more open and accountable government," the New York State Legislature amended the FOIL by creating specific time limits within which agencies must respond to requests for information. New York Bill Jacket, 2005 A.B. 6714, Ch. 22. Specifically, the State Legislature amended the FOIL in three principle ways. *First*, it amended Section 89(3)(a) to require that the "statement of the approximate date" for granting or denying a request to accompany an agency's acknowledgment letter "shall be reasonable under the circumstances of the request." *Second*, so as to expedite processing of requests an agency has decided to grant in whole or in part, the State Legislature added to Section 89(3)(a) the following:

> If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt

> of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

Pub. Off. Law § 89(3)(a). *Third*, the Legislature added to Section 89(4)(a) the provision which made an agency's failure to conform to Section 89(3)(a) a constructive denial. In response to these 2005 Amendments, the Committee on Open Government amended the Implementing Regulations to conform to the new statutory language governing agencies' time to respond. *See* 21 N.Y.C.R.R. § 1401.5(c)(3) (as amended Dec. 21, 2005). While the DOE has amended the Chancellor's Regulation twice since the 2005 Amendments to FOIL, it has not revised any of the provisions governing the DOE's time to respond to requests or what constitutes a constructive denial, even though the corresponding provisions of the governing statute and Implementing Regulations have changed significantly.[12] It is no small wonder that Chancellor's Regulation D-110 is so out of step with the text of the FOIL and Implementing Regulations.

Although a regulation adopted by an agency "in implementation of the statutory scheme it is empowered to enforce, is to be read, if possible, in a manner consistent with, rather than in opposition to, the governing statute," *see People ex rel. Knowles v. Smith*, 54 N.Y.2d 259, 267, 445 N.Y.S.2d 103, (1981), a court cannot contort statutory language and elide legislative intent *see Matter of Brusco v. Braun*, 199 A.D.2d 27, 32, 605 N.Y.S.2d 13 (1st Dep't 1993), *aff'd*, 84 N.Y.2d 674, 621 N.Y.S.2d 291 (1994). To hold this regulation valid would permit DOE and other agencies to permanently deny a request with impunity: as long as the letters continue to issue, a request is unappealable; as long as there has been no appeal, administrative remedies

[12] Indeed, Section D-110(VIII)(A) is unchanged from the Chancellor's Regulation issued January 9, 2003, and though the relevant sentence of Section D-110(VI)(E) was located at Section (VI)(F) in the 2003 Chancellor's Regulation, it is for all intents and purposes identical. Chancellor's Regulation D-110(VI)(F) (issued Jan. 9, 2003) ("The CFD shall release or deny access to the records requested within the time frame set forth in the acknowledgement letter or the CFD/RAO must send a letter extending the response date.") (emphasis in original).

have not been exhausted and there is no judicial review. This is inconsistent with the FOIL and the intent of the State Legislature. It cannot stand.

II. THE DOE HAS CONSTRUCTIVELY DENIED THE REQUESTS BY FAILING TO GRANT OR DENY THE REQUESTS IN A REASONABLE TIME UNDER THE CIRCUMSTANCES OF THE REQUESTS

The DOE's continuing refusal to provide documents or explain its failure to produce them, and its remarkable assertion that it may render its withholdings effectively unreviewable by awarding itself unilateral, *pro forma* "extensions" that relieve it of its statutory obligations to grant or deny Petitioners' requests in a time that is reasonable under the circumstances of the requests, violate the letter and spirit of FOIL and its Implementing Regulations. Worse, these violations have compromised and continue to compromise Petitioners' ability to report on a matter of utmost importance to the people of New York City—the education and safety of its children. The Court must not permit DOE's pattern and practice of unreasonable delay to continue.

A. The DOE's Repeated Delays Are Unreasonable Considering the Circumstances of the Requests

The DOE has thumbed its nose at Petitioners and the FOIL again and again, and instead has hidden behind its own invalid regulations and pretext to deny Petitioners access to records to which they are entitled. As detailed above, instead of providing Petitioners with a reasonable date certain – or even a reasonable approximate date – as is required, the DOE has issued repeated Form Delay Letters that purport to extend its statutory response deadlines on a monthly basis. This, they have done, without any consideration of the reasonableness of their delay as it pertains to each request.

Petitioners recognize that not all of the records requested are at the fingertips of DOE's FOIL officers, ready to be produced on a moment's notice. However, Petitioners have not only

filed this Petition because records have not yet been *produced* to them yet. Petitioners have also filed this Petition because they have been given no reasonable indication of whether or when their requests will even be granted or denied – the first, and indeed, most basic step in replying to a FOIL request. Instead, DOE has sent Form Delay Letters that pick dates at random with no correlation to how long it should reasonably take to grant or deny the request. Indeed, "failure to provide an indication of 'yes' or 'no' six months after receiving a request undermines the spirit of the Freedom of Information Law." Pet. ¶ 107, Ex. 51, at 17. Petitioners' wait has been excessive and inexcusable.

A recent Advisory Opinion by the Committee is instructive. There, an attorney with the law firm of Couch White, LLP requested certain records from Empire State Development ("ESD"). After acknowledging receipt of the request in a timely fashion, ESD sent a series of three e-mails to the requesting attorney over the course of many months unilaterally extending its time to respond, stating that it was processing her request, and providing a date by which it "hopes to have a response." After ESD rejected her appeal from their constructive denial of her request, the requestor sought an advisory opinion from the Committee. After reiterating the general proposition that "there is no provision in the statute for repeated extensions," the Committee observed that it was reasonable after receipt of three separate unilateral extension notices, to construe ESD's failure to determine the requestor's right of access as a constructive denial. *See* Comm. on Open Gov't Advisory Opinion to Nairobi Vives (Jan. 13, 2016) (Pet. ¶ 106, Ex. 50).

The facts here are far starker than the Advisory Opinion. Petitioners have now waited between more than six and twenty months and received between five and sixteen Form Delay Letters for each of the ten pending requests. Pet. ¶ 7. And DOE is required by law to maintain

in its records all of the information Petitioners requested here. N.Y. Comp. Codes R. & Regs. 8 Ch. IV, App. I; Pet. ¶¶ 29, 37, 43, 56, 62, 69, 75, 82, 89. The truth is that Petitioners' outstanding requests are quite straightforward; plainly capable of a "yes" or "no" from DOE – or *at least* a reasonable date of when they can expect a "yes" or "no" – without resort to months or years long delay.

Petitioners' Second Request seeks a list or spreadsheet of arrests of DOE employees and the type of crime or non-criminal incident for which they were charged from January 1, 2010 to November 20, 2014. Pet. ¶ 28, Ex. 5. This request asks for a single document about information that should be maintained and if it is not, that is newsworthy in and of itself. Pet. ¶ 29. The FOIL is clear that agencies are not required to create new records where they previously did not exist. Pub. Off. Law. § 89(3)(a) ("Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity" with specified exceptions inapplicable here). Considering that the DOE either has the document or it does not, there are simply no circumstances where a twenty (20) month delay in determining whether to grant or deny the request could be reasonable under the circumstances of this request. Pet. ¶ 34.

The Third and Fourth Requests together seek a single DOE Press Office employee's sent and received e-mails over a two day period. Pet. ¶¶ 35-36, Exs. 8, 9. Considering the two day period (March 2 and 3, 2015) was from the same week that the requests were made (March 4 and 6, 2015), these e-mails – regardless of their subject matter should have been readily available to the DOE. While some of these e-mails may be subject to one or more statutory exemptions from disclosure, there is no reasonable basis a request for a mere two days' worth of a single employee's e-mails to take more than seventeen months to grant or deny. Pet. ¶ 41. This delay of almost a year and a half is plainly unreasonable under the circumstances of this request.

The Fifth Request seeks copies of any stipulations of settlement or expedited 3020-A hearing reports with any of the 291 educators/staffers in the ATR pool that have been "moved" out of the schools system since April 2014. Pet. ¶ 42, Ex. 12. Based on the information provided by the DOE Press Office, roughly 53 of the 291 staffers have a written settlement agreement, and an additional 21 were terminated involuntarily. Pet. ¶ 44, Ex. 14. While this request does involve some collection and review, considering it took a mere three days for the Press Office to provide Mr. Gonen with the statistics and explanation in its initial response, it is simply inconceivable that it would take almost seventeen months to grant or deny access to the documents that underlie those statistics. Pet. ¶ 48. This delay is patently unreasonable under the circumstances of the request.

The Seventh Request seeks copies of reports completed or finalized by the DOE's Office of Special Investigation over the last two years. Pet. ¶ 55, Ex. 21. These finalized reports, which relate to allegations of improper and unlawful behavior, including corporal punishment and verbal abuse against students, should be readily available to the DOE. Pet. ¶¶ 55-56. Yet Petitioners have been waiting for a "yes" or "no" response to this important request for close to a year. Pet. ¶ 60; *see also* Pet. ¶ 108. This is patently unreasonable given the circumstances of the request for finalized reports.

The Eighth Request asks for payroll records for the Renewal School Superintendent and her staff during 2015. Pet. ¶ 61, Ex. 24. One of the few exceptions to FOIL's rule that agencies do not need to create records to respond to a FOIL request is that every agency is required to create "a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Pub. Off. Law § 87(3)(b). As DOE is required to maintain this record by law, this single record should be readily available to DOE. Pet. ¶ 62. Nevertheless, DOE has

still not granted Petitioners' request ten months after the request was made. Pet. ¶ 67. This or indeed any delay in determining whether to grant or deny this request is, without question, unreasonable.

The Ninth Request seeks records of disciplinary action involving school bus drivers and "matrons" or other such aides since December 1, 2014. Pet. ¶ 68, Ex. 27. While this request no doubt requires coordination with the DOE's Office of Pupil Transportation, it certainly should not take eight months to determine whether DOE is able to grant or deny the request. Pet. ¶ 73. Such a delay is unreasonable.

The Tenth and Twelfth Requests ask DOE to provide records that on their face are easily located and that are clearly subject to disclosure, as DOE has provided this precise information to Ms. Edelman in response to past requests. Pet. ¶¶ 74, 76, 88, 90, Exs. 30-31, 37-38. Further, Ms. Edelman provided DOE's prior responses along with her requests to facilitate DOE's retrieval of the new records. Pet. ¶¶ 76, 90, Exs. 31, 38. Despite knowing it possesses the documents requested, knowing exactly where to find them, and knowing that a satisfactory response involves the production of a single document for each, DOE has still failed to grant or deny the requests six and eight months later. Pet. ¶¶ 76, 80, 90, 94. This length of delay is plainly unreasonable considering the circumstances of the requests.

The Eleventh Request seeks attendance records for DOE principals over two and a half school years. Pet. ¶ 81, Ex. 34. This information is readily available to the DOE, as DOE provided similar information regarding teacher absences in a single excel spreadsheet in response to the First Request just over a month ago. Pet. ¶¶ 26, 82, Ex. 4. Yet Petitioners have waited more than seven months for a response to this request. Pet. ¶ 87. Such a delay in determining whether to grant or deny the request is unreasonable under the circumstances of the request.

In sum, Petitioners have not requested anything so complicated or burdensome that would justify the open-ended delays taken by the DOE here to decide in the first instance whether to grant or deny the requests. If DOE thought any of the requests were not reasonably described, it could have informed Petitioners to assist in its search as is required by its internal regulations. Chancellor's Regulation D-110(VI)(A). But DOE never made such a request. Under the standards of the FOIL, the Implementing Regulations, the Committee on Open Government, and even the Mayor, this length and pattern of delays are flagrantly unreasonable and unacceptable and represent de-facto denials. Pet. ¶ 89, Ex. 39, at 10. The DOE's practice thwarts the underlying purpose of FOIL – *i.e.*, to make the government "responsive and responsible to the public." N.Y. Pub. Off. Law § 84.

B. The Form Delay Letters Provide Only Pretextual Reasons For DOE's Dilatory Conduct

In addition to the facially unreasonable length of the delays, the Form Delay Letters themselves fail to offer any colorable reasons for requiring the excessive additional time DOE has taken to respond. The Implementing Regulations are particular in what agencies may consider in setting a reasonable time for determining whether to grant or deny a request:

> agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

21 N.Y.C.R.R. § 1401.5(d). These regulations are intended to serve as a guide to agencies like DOE in making their reasoned determination for how long it will take to grant or deny a request and ultimately produce responsive documents. Here, the Form Delay Letters purport to offer two bases for DOE's continued delay: (1) the "volume and complexity of requests we receive and process", and (2) "to determine whether any records or portions thereof will be subject to

redactions." Pet. ¶ 4. DOE's justifications are nothing more than a pretextual, *pro forma* excuse for not responding to requests in a timely manner.

With respect to the first reason, the "volume and complexity" of other unrelated requests does not authorize an agency to grant itself repeated extensions of time to respond, let alone such excessive extensions as DOE has indulged in here, where the records requested are clearly public and easily located. *See* Pet. ¶ 105, Ex. 49 at 3, Comm. On Open Gov't Advisory Opinion to Jeremy Chase (July 19, 2016) ("That other earlier requests involved records that may be voluminous, difficult to locate, and/or time consuming to review would not, in our view, authorize an agency, as a matter of practice of [sic] policy, to deal with requests solely on the basis of the dates of their receipt."); Pet. ¶ 106, Ex. 50, Comm. on Open Gov't Advisory Opinion to Nairobi Vives (Jan. 13, 2016) (same).

Further, while DOE hangs its hat in its June 6 Denial Letter on the fact that it has provided final determinations to "approximately 30 FOIL requests" submitted to the agency by Mr. Short and Ms. Edelman since January 2014, Pet. ¶ 100, Ex. 45 at 3, this fact has no bearing on DOE's ability or inability to provide a reasonable date – whether a date certain or an approximate date – for when it will grant or deny the outstanding requests. As the regulations make clear, "the number of requests received by the agency," is one factor among many for the DOE to consider "[i]n determining a reasonable time for granting or denying a request" – not a blanket excuse to send an arbitrary holding date month after month. 21 N.Y.C.R.R. § 1401.5(d). DOE knows the number, volume, and complexity of the requests it has in general and is more than capable of incorporating that knowledge into its determination of how long it will reasonably take to grant or deny a particular request and staff accordingly.

The second reason DOE offers for delay – "to determine whether any records or portions thereof will be subject to redactions" – though permissible to consider in determining what constitutes "a reasonable time for granting or denying a request under the circumstances of the request," is not as an excuse for claiming open-ended extensions as DOE does here. 21 N.Y.C.R.R. § 1401.5(d). In any event, the claim that redacting the documents at issue is the reason for the delay demonstrates that DOE either does not take its obligations under FOIL seriously or it is not competently staffed. Indeed, for the two requests that DOE *has* responded to since Petitioners filed their appeal – one after 10 months and one after 21 months – the DOE produced a single excel spreadsheet for each with 2 and 3 columns of the spreadsheets redacted respectively. Pet. ¶¶ 26, 53, Exs. 4, 20. DOE did not create these documents; they were maintained and readily available to it. And the amount of time it took to redact these documents took only as long as it would take to type the word "REDACTED" and paste it into a column of a spreadsheet: a matter of minutes. Pet. ¶¶ 26, 53. Indeed, the Court of Appeals has already told the DOE as much in *Schenectady Cty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46, 958 N.E.2d 1194, 1196 (2011), where it chastised the DOE for its repeated delays and failure to respond to FOIL requests in a timely fashion. Specifically, the Court noted that instead of delaying disclosure for four years as a result of engaging in prolonged litigation, "It seems that an agency sensitive to its FOIL obligations could have furnished petitioner a redacted list with a few hours' effort, and at negligible cost." *Id.* at 46.

In other words, neither of DOE's stated justifications for failing to adhere to FOIL's requirement for a reasonable response time hold any water.

C. The DOE Cannot Insulate Itself From Judicial Review By Disingenuously Claiming It Has Not Constructively Denied The Requests

Despite DOE's unreasonable and dilatory conduct, it insists that requests that have been outstanding for between more than six months and the better part of two years have not been constructively denied because it has continued to send Form Delay Letters that it claims comply with its outdated and invalid internal regulation, discussed above. Pet. ¶¶ 100, 104, Ex. 45, 48. The DOE is wrong. The DOE's failure to determine whether to grant or deny requests within a reasonable time period plainly constitutes a "constructive denial." *Legal Aid Soc'y v. N.Y. State Dep't of Corr. and Comm. Supervision*, 105 A.D.3d 1120, 1121, 962 N.Y.S.2d 773 (3d Dep't 2013). Both the FOIL and its Implementing Regulations are clear in this regard. N.Y. Pub. Off. Law § 89(4)(a); 21 N.Y.C.R.R. § 1401.5(e). DOE's reliance on its antiquated regulation or an inapposite judicial decision[13] does not alter the plain language and meaning of the statute. In an advisory opinion issued following the denial of Petitioners' appeal, the Committee on Open Government made clear that DOE's repeated delays constituted a constructive denial:

> Because the agency notified you on multiple occasions prior to your May 18, 2016 appeal that it would need additional time to grant or deny access based on §87(2) of FOIL, we believe that it was reasonable, upon receipt of the subsequent extension notices, to construe these failures to determine rights of access as constructive denials on the part of the agency.

[13] Instead of comporting its practice with the requirements of FOIL and the Implementing Regulations, DOE claims that unilateral, serial extension letters are not constructive denials and cites the First Department's decision in *Advocates for Children of New York, Inc. v. New York City Dep't of Educ.*, 101 A.D.3d 445, 954 N.Y.S.2d 454 (1st Dep't 2012) as support. But *Advocates for Children* is plainly distinguishable. There, the two FOIL requests at issue requested large swaths of documents and received partial responses to both. Likewise, the delays at issue were both less than nine months in total. *See Advocates for Children of New York, Inc. v. New York City Dept. of Educ.*, 2011 WL 6131086 (Sup. Ct. N.Y. Cty. Nov. 29, 2011). Accordingly, the First Department found only that an administrative appeal was premature where respondents' efforts to respond to the request "within the applicable time limitations" was "ongoing." 101 A.D.3d at 446; *see also Gianella v. Port Auth. of New York and New Jersey*, 998 N.Y.S.2d 306 (Sup. Ct. N.Y. Cty. 2014) (same). Here, however, unless DOE counts its issuance of rote extension letters, DOE cannot reasonably claim that its efforts to respond to Petitioners' requests have been ongoing for between more than 6 and 21 months. Their delays here are wholly unmoored to the specifics of Petitioners' requests and plainly, are nothing more than delay for delay's sake. If anything, *Advocates for Children* and the *Huseman* case discussed below, make clear that DOE is engaged in a pattern and practice of sending these serial Form Delay Letters – and the delays are only getting longer.

Pet. ¶ 105, Ex. 49, Comm. On Open Gov't Advisory Opinion to Jeremy Chase (July 19, 2016). The DOE's claim that it did not constructively deny Petitioners' requests is error and warrants the Court's correction, for it robbed Petitioners of the administrative and judicial review to which they are entitled by statute.

D. Respondents Have Constructively Denied Four of Petitioners' Requests For the Additional Reason That They Have Failed To Respond Within Respondents' Own Time Limits

As explained above, all twelve of the requests have been constructively denied. However, even assuming the Court declines to invalidate the relevant provisions of the Chancellor's Regulation or determines that the DOE's repeated delays were permissible, DOE has constructively denied four of the twelve FOIL requests at issue (the First, Second, Eighth, and Eleventh Requests) under its own interpretation of the Chancellor's Regulation. According to DOE's regulations, a request is constructively denied and appealable when a requester is "neither granted nor denied access to records within the time limits set forth . . . in the acknowledgment letter or any extension letter(s) . . . ." Chancellor's Regulation D-110(VIII)(A). Respondents failed to grant or deny access to the records requested in these requests within the time limits set forth in their own extension letters. *See* Petition ¶¶ 25, 32, 65, 85. Further, Petitioners exhausted their administrative remedies when DOE denied their administrative appeal from the constructive denial of these FOIL requests. *See Kohler-Hausmann v. New York City Police Dep't,* 133 A.D.3d 437, 437, 18 N.Y.S.3d 848 (1st Dep't 2015). Accordingly, even crediting Respondents' own interpretation of Chancellor's Regulation D-110(VIII)(A), these four requests have been constructively denied and Petitioners are entitled to relief.

E. The Court Should Require The DOE To Promptly Disclose The Improperly Withheld Records

As a result of the DOE's improper delays in responding to Petitioners' FOIL requests, Petitioners' ability to report on issues concerning New York City schools continues to be gravely impacted. Accordingly, Petitioners request that the Court order the DOE to produce all disclosable records responsive to their requests within twenty (20) days of the Court's order.

III. PETITIONERS ARE ENTITLED TO DECLARATORY RELIEF AS THE DOE'S UNLAWFUL CONDUCT IS LIKELY TO REPEAT

The DOE's practice of issuing rote, serial extension letters and refusing to entertain administrative appeals challenging the reasonableness of the period the agency claims to need to process FOIL requests is unlawful and it should be instructed as much.

Article 78 provides for broad remedies, *see* N.Y.C.P.L.R. § 7806 (a judgment under Article 78 "may grant the petitioner the relief to which he is entitled"), and courts have not hesitated to award declaratory relief to Article 78 petitioners where warranted.[14] As this petition is styled as a hybrid petition under Article 78 and N.Y.C.P.L.R. § 3001, this Court is empowered to render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties — that is, a judgment that Chancellor's Regulation D-110(VIII)(A) is invalid, and Petitioners' statutory rights to a meaningful "date certain," timely responses, and to consideration of their administrative appeals by the DOE were violated by the DOE's extension letter practices — "whether or not further relief is or could be claimed." N.Y.C.P.L.R.

[14] *See, e.g.*, *Johnson Newspaper Corp. v. Call*, 115 A.D.2d 335, 495 N.Y.S.2d 813 (4th Dep't 1985) (converting Article 78 proceeding to a declaratory judgment action and declaring that disclosure of a "releasable copy" of reports of offenses prepared by the sheriff's office may not be withheld pursuant to the exemption in FOIL for unwarranted invasion of personal privacy); *Perez v. City Univ. of New York*, 753 N.Y.S.2d 641, 654–55, 195 Misc.2d 16 (Sup. Ct. Bronx Cty. 2002) (declaring that college senate and executive committee are agencies performing governmental functions within the meaning of FOIL and that respondents violated FOIL by voting by secret ballot), *aff'd*, 5 N.Y.3d 522 (2005); *Quick v. Evans*, 455 N.Y.S.2d 918, 919, 116 Misc. 2d 554 (Sup. Ct. N.Y. Cty. 1982) (holding that the Office of Court Administration ("OCA") is subject to FOIL in an Article 78 proceeding seeking "a declaration" that the OCA is subject to FOIL).

§ 3001; *see also* Practice Commentary C3001:14 ("The practitioner [seeking declaratory relief] with a choice between an action and special proceeding would usually do best to opt for the proceeding because of its facile and quick procedure."). Moreover, this Court (Stone, J.) recently concluded that declaratory relief is also available to Article 78 petitioners by hybrid actions and serves the interests of judicial efficiency. *See Price v. New York City Bd. of Educ.*, 16 Misc. 3d 543, 548, 837 N.Y.S.2d 507 (Sup. Ct. N.Y. Co. 2007).

The need for declaratory relief is particularly pressing here considering Respondent's pattern and practice of delaying responses to requests and only responding when legal action is threatened in an effort to moot pending requests. While Petitioners fully expect Respondent to begin responding to their outstanding FOIL requests in earnest now that this Article 78 proceeding has been filed challenging DOE's practices, this proceeding falls within an exception to the mootness doctrine because it "presents a 'substantial or novel [issue], likely to recur and capable of evading review.'" *Hearst Corp. v. City of Albany*, 88 A.D.3d 1130, 1131, 931 N.Y.S.2d 713 (3d Dep't 2011) (alteration in original) (quoting *City of New York v. Maul*, 14 N.Y.3d 499, 507 (2010)). It is likely that the issue presented here will recur in the future, as the DOE maintains that it is entitled to issue serial extension letters, *ad infinitum*, in response to FOIL requests. *See* Pet. ¶ 100, Ex. 45 (denying Petitioners' administrative appeal and stating that their requests were not constructively denied because the extension letters extended the reasonable approximate date by which the requests would be determined); Pet. ¶ 104, Ex. 48 (same); *Laborers' Intern. Union of North America v. New York State Dep't of Transp.*, 280 A.D.2d 66, 69 (3d Dep't 2001) (agency's "longstanding practice" suggests great likelihood of repetition).

Indeed, this was exactly the tactic that Respondents took in *Huseman v. New York City Department of Education*, decided in May of this year. 2016 NY Slip Op 30959(U) (Sup. Ct. N.Y. Cty. May 25, 2016). There, Huseman had three requests outstanding for seven, six, and four months respectively. As soon as Huseman filed her petition, DOE immediately processed two of her requests and promised a response as to the third by a date certain. In its answering briefs, Respondent argued that Huseman's claims were moot so as to thwart Huseman's efforts to get judicial review of its unlawful practices. Although the Court ultimately found that the delays there were reasonable in light of the nature of the requests[15] and that the DOE's efforts to respond to the requests were ongoing, DOE's intentions were crystal clear.

Here, DOE has already begun to imitate its game plan from the *Huseman* case. For example, only after Petitioners filed their appeal – more than ten (10) months and seven (7) Form Delay Letters after filing the Sixth Request – did DOE respond to the Sixth Request. Pet. ¶¶ 52-53, Exs. 19-20. Likewise, eleven days after Petitioners' appeal was denied – twenty one (21) months and fourteen (14) Form Delay Letters after filing the First Request – DOE responded to the First Request. Pet. ¶¶ 24, 26, Exs. 3-4. Moreover, the "anticipated dates" in DOE's Form Delay Letters are now only a week apart for some of the outstanding requests. *See, e.g.*, Pet. ¶¶ 72, 79, 93, Exs. 29, 33, 40. But still, ten requests – all of which have been outstanding far longer and which are far less burdensome than the Huseman's requests – remain unanswered.

The Court must not continue to permit DOE to turn the presumption created by FOIL on its head and permit an agency that issues unjustified monthly extension letters to avoid, at least

[15] The requests in *Huseman* were far more burdensome than Petitioners' requests here, indeed, their requests called for production of all purchase records for schools purchasing any computers or tablets, all complaints by parents for a four year period about specific schools and the action taken by the district to address the complaints, databases related to DOE employee leave, open and closed investigations, copies of all employee settlement agreements, and copies of all email communications related to these requests. *Huseman*, 2016 NY Slip Op 30959(U), at *2-4. None of the requests by Petitioners even approach the volume of records requested by Huseman.

with regard to all requesters who lack the resources to file a lawsuit, its most basic obligation under FOIL: to respond. Accordingly, declaratory relief is necessary here.

IV. PETITIONERS ARE ENTITLED TO AN AWARD OF LEGAL COSTS AND FEES ASSOCIATED WITH COMPELLING COMPLIANCE WITH FOIL

A court, in its discretion, may award FOIL petitioners their legal fees and costs under FOIL, when they prevail on their claim(s) and either: (1) "the agency had no reasonable basis for denying access," *or* (2) "the agency failed to respond to a request or appeal within the statutory time." N.Y. Pub. Off. Law § 89(4)(c)(i) & (ii). The DOE's delays, and its outright refusal to provide credible explanations or satisfy its obligations to afford meaningful administrative review of its continuing constructive denial of Petitioners' requests have no reasonable basis in law. The DOE adopted a policy that left Petitioners without any recourse but this Court despite FOIL's and the Implementing Regulations' detailed provision of administrative remedies. Petitioners respectfully request an award of reasonable attorneys' fees and legal costs in an amount to be determined by the Court.

CONCLUSION

For the foregoing reasons, Petitioners NYP Holdings, Susan Edelman, Aaron Short, and Yoav Gonen respectfully request that this Court (1) declare Chancellor's Regulation D-110(VIII)(A) invalid; (2) declare that the DOE's practice of sending repeated Form Delay Letters is inherently unreasonable and that determinations in its appeal denial letters that it may continue to deny access to public records because it has re-issued serial unilateral extensions violates its obligations under FOIL; (3) grant Petitioners' Article 78 Petition and compel Respondents to produce all disclosable records responsive to their requests within twenty (20) days of the Court's order; and (4) award Petitioners their the costs and fees, together with such other and further relief the Court deems just and proper.

Dated: New York, New York
August 9, 2016

Respectfully submitted,

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