To be Argued by:
ETHAN LEONARD
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

JUDICIAL WATCH, INC.,

Petitioner-Appellant,

- against -

THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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New York County Clerk's Index No.: 160286/2017

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QUESTIONS PRESENTED

1. Did the lower court err in granting Respondents' Cross-Motion to dimiss?

   ANSWER: Yes, the lower court erred.

2. Did the lower court err in determining that the bare assertion of Captain Wren that the investigation is active and ongoing was sufficient to preclude disclosure under Public Officer Law §87(2)(e)(i)?

   ANSWER: Yes, the lower court erred.

Petitioner/Appellant Judicial Watch, Inc., by and through its undersigned counsel, The Law Offices of Neal Brickman, P.C., located at 420 Lexington Avenue, Suite 2440, New York, New York 10170, respectfully submits this Memorandum of Law in Support of its Appeal of each portion of the Decision and Order of the lower court – issued by the Honorable Verna L. Saunders, J.S.C., decided on May 7, 2018, which was entered with the Clerk of the Court on May 11, 2018 (Rec.6-9), and initially served with Notice of Entry on August 30, 2018 (Rec.10-11) – that denied in material part the Petitioner's Article 78 petition seeking the review of various denials by Respondents of two Freedom of Information Law ("FOIL") requests and the Judgment subsequently signed by the Honorable Verna L. Saunders, J.S.C. (Rec.4-5), which is undated and which was served with Notice of Entry on August 30, 2018 (Rec.10-11). Plaintiff appeals from each and every portion of said Decision and Order and Judgment by which it is aggrieved and specifically the dismissal of its request for the production of the major case Squad report and files on the homicide of NYPD Patrolman Philip Cardillo.[1]

[1] The lower court found that the Respondents/Appellees, the New York Police Department ("NYPD") and the City of New York (the "City") initially improperly denied Appellant's request for the production of the audio tape of the 10-13 "officer in distress" call recorded by the Police Communications Division at 11:41 a.m. on April 14, 1972 and directed that the NYPD pay recompense to Appellant in the amount of $500.00. (Rec. 6-9).

Respectfully, the lower court ignored the pertinent facts and the relevant law. The lower court's opinion should be reversed.

Preliminary Statement

This is a straightforward matter. Judicial Watch made two valid FOIL requests concerning the homicide investigation regarding the shooting death of Patrolman Philip Cardillo which occurred over forty-five (45) years ago. These FOIL requests were summarily denied without proper basis and in clear contravention of applicable law. Thereafter, when Judicial Watch appealed the initial denials, the NYPD made no *bona fide* efforts to comply with its legal obligations in denying these legitimate requests, but rather relied on baldly conclusory and unsupportable assertions – that there was an ongoing and active investigation – by an individual with no personal knowledge of the relevant facts. Judicial Watch was then forced to file an Article 78 proceeding in support of which the highly decorated retired Detective who ultimately led the investigation and caught Patrolman Cardillo's killer in the early 1970 submitted an affidavit. In opposing that filing, the NYPD – as its apparent *modus operandi* – again materially relied on conclusory non-specific assertions which have been repeatedly held to be insufficient to preclude disclosure. Respectfully, the lower court improperly agreed with the NYPD and ignored not only relevant and

dispositive facts, but completely disregarded the applicable case law. Notably, the lower court did not cite to a single case in it opinion or seek to distinguish any of the cases cited by Judicial Watch in its papers.

The lower court let the NYPD do what it wanted: obfuscate and withhold information from the public in violation of FOIL, the existing case law, and the greater good. There is no *bona fide* ongoing or active investigation, much less one that would be at all impacted, hindered, or interfered with if the requested material was to be released.

Statement of Background Facts

The background for the instant requests is one of the saddest and troubling episodes in the history of the NYPD. On April 14, 1972, a 10-13, officer in distress, call was made to 911. The call traced to Mosque Number 7 run by the Nation of Islam located on West 116th Street in Manhattan, New York. In responding to that 10-13 call, several officers were beaten and one officer, Phil Cardillo, was shot inside Mosque Number 7. Patrolman Cardillo dies a few days later from his wound. Although Detective Randy Jurgensen ("Jurgensen"), now retired, was one of many officers at the scene that day, he was not assigned to cover the case until more than one (1) year later in May, 1973. (Rec.46-7).

It has since been publicly acknowledged that the initial investigation, along

with the crime scene, were completely compromised and that police procedures were ignored and that civilians, politicians and leadership within the NYPD explicitly condoned and participated in such egregious acts. In summary, based on an agreement brokered between Representative Charles Rangel, Louis Farrakhan of the Nation of Islam ("NOI") and NYPD Deputy Commissioner Benjamin Ward, relevant witnesses were released and not interviewed, the crime scene was scrubbed clean and forever contaminated and virtually every NYPD investigative procedure disregarded. (Rec.47).

In or about May 1974, Lewis 17X Dupree ("Dupree") was arrested and indicted for the murder of Phil Cardillo. Per NYPD policy, the case was closed at that juncture and passed on to the District Attorney's office for trial. The initial trial resulted in a hung jury and the second trial resulted in an acquittal. No judicial action has occurred with regard to Phil Cardillo since March 1977. (Rec. 47).

In 2005 Jurgensen had the opportunity to speak to NYPD Commissioner Ray Kelly on the U.S.S. Intrepid. In the course of that conversation, the matter of Phil Cardillo and the handling of that investigation by NYC and the NYPD came up. (Rec.47). Thereafter, in 2006, the NYPD assigned members of its Major Case Squad to re-open its investigation of Phil Cardillo's murder. From the start,

Jurgensen was part of that renewed investigation, not only because of his intimate knowledge of the history of the matter, but also because it was his actions that led to the re-investigation in the first instance. Despite his retired status, Jurgensen was even given a desk where the other members of the Major Case Squad were situated so as to ensure his active participation in the re-opened inquiry. (Rec.47). The investigation was re-opened to confirm the results of the initial investigation and to answer related inquiries – including those surrounding connections between this matter and the FBI. In the end, there was no question about whether Officer Cardillo's murder had been solved. It had. The re-opened investigation concluded that the killer was Dupree, the individual acquitted in 1977. (Rec.48). The remaining questions concerned the "why", as well as the basis for the improprieties of the NYPD Brass, the Mayor's Office, as well as the involvement, if any, of the FBI with any of the relevant parties. (Rec.108).

At the start of the re-investigation, Jurgensen provided all the relevant files that he had in his possession to the Major Case Squad, as well as a copy of the 911 tape – that the NYPD now claims that it lost, after already having lost the original and any other copies it originally possessed – and a 3-D replica of the crime scene that was recognized in Robert M. Morgenthau's May 3, 1978 correspondence to then NYPD Commissioner Robert McGuire. (Rec.48). To the extent that any of

the case files relate to matters prior to 2006, the information therein has already been disclosed in the public record – whether through the two separate and public trials of Dupree; the various publications on this matter (including Jurgensen's book, "The Circle of Six" that was vetted and approved by the NYPD); or numerous press releases and articles over the intervening years. (Rec.109).

Over the subsequent years Jurgensen continued to work with the NYPD to assist in any way possible to provide evidence that he had, to review existing evidence and to attempt to get answers to questions surrounding Officer Cardillo's murder, including why the Mosque doors -- of a routinely and continually guarded Mosque -- were left open on the morning of April 14, 1972, and what, if any, actions or inactions by the FBI played a role in Officer Cardillo's murder. (See July 28, 2006 letter from James D. Harmon, Jr., to Commissioner Kelly and September 26, 2008 correspondence from me to Deputy Chief Shea) (Rec. 109;113-22). In the course of the re-investigation it became clear that the evidence related to this matter was housed in multiple facilities across New York City. (Rec.109). Throughout the re-investigation, Jurgensen had full access to all case files, evidence and the assigned detectives and was present for over 20 formal meetings of the Major Case Squad on this matter and several additional meetings involving the Commissioner, the Chief of Detectives and other high-ranking

officers of the NYPD. (Rec.48;109-10).

No new information as to Phil Cardillo's murder or of any conspiracy to commit that murder was uncovered at that time. During those years, no new leads and no new facts were ascertained that made anyone believe that any other suspect, aside from Dupree, existed or that any errors had been made in the investigation of the murder from the time that Jurgensen had been placed in charge of that investigation in 1973. (Rec.48). By March 2012, the investigation was done. In fact, on March 19, 2012, Deputy Commissioner Browne advised the New York Daily News that the case was closed. While recognizing that there had been a new investigation, he also acknowledged that "[i]t didn't turn up any useful information." (Rec.48;109).

In early 2015, Detective Sergeant Francis "Buddy" Murnane, who was the Major Case Squad Leader for the re-investigation, specifically re-affirmed to Jurgensen that the re-opened investigation or probe was "over"; that the Major Case Squad's report was "finished"; and that there was no more investigation to be done. (Rec.109-10). That the matter was closed again by the Major Case Squad has been re-affirmed to Jurgensen subsequently by active NYPD personnel with personal knowledge of the events. As Jurgensen was an active part of that re-investigation, he was personally aware that no new evidence had been uncovered

and that the re-investigation came to the same conclusions that Jurgensen, his team and the DA's Offices reached some four (4) decades ago. (Rec.48-9;109-10).

The lower court's decision should be reversed because, *inter alia*, there is clearly no "ongoing and active investigation."

Procedural History

The relevant FOIL requests were made on June 5, 2017 to the NYPD's Record Access Officer, at One Police Plaza - Room 110-c. FOIL Unit - Legal Bureau, New York, New York 10038. The first request -- which was received on June 8, 2017 and assigned FOIL #7627 -- sought "The audio tape of the 10-13 "officer in distress" call recorded by the Police Communications Division at 11:41 a.m. on April 14, 1972." (Rec.20-2). The second request – which was also received on June 8, 2017 and assigned FOIL #7628 – as explained by the NYPD, sought the Major Case Squad report / the investigative file on the homicide of NYPD Patrolman Philip Cardillo. (Rec.23-6). On June 23, 2017, the NYPD denied both FOIL requests at issue. (Rec.82-3). On July 17, 2017 Petitioner timely appealed both denials in separate correspondence. (Rec.27-30). In correspondence dated July 25, 2017, the NYPD denied Petitioner's appeals. (Rec.31-2).

The sole stated basis for the denial was that:

> ...disclosure of the records would interfere with a pending criminal investigation [Public Officer's Law §87(2)(e)(i)]. This statute specifically provides that an agency, "may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings." As of this writing, the criminal investigation into the incident remains active and ongoing. Accordingly, disclosure must be denied as the release of the requested documents would interfere with this pending criminal investigation.

(Rec.31-2). The denial letter went on to discount the representations of retired Detective Randy Jurgensen ("Jurgensen") and misrepresent both the import and relevance of Jurgensen's statements. The letter went on to allege that, "[a]s of this writing, a review of official Department records indicates that the case is still being actively investigated and that numerous updates have been made to the case file since Mr. Jurgensen alleged that the "prove [sic] was over." (Rec.31-2).

Judicial Watch then filed an Order to Show Cause ("OTSC") pursuant to Article 78 and FOIL to obtain the requested documents and information. The NYPD filed opposition to the OTSC re-asserting that a denial was appropriate under POL §87(2)(e)(i) as the records concern an "open, active and ongoing police investigation into the death of Patrolman Cardillo." In their opposition, the NYPD cited no case law that refuted the standards identified in case law set forth by Judicial Watch. (Rec.64-78).

Equally telling, the Affidavit of Captain Wren – upon which the NYPD

exclusively relies – does not fulfil the NYPD's obligations under FOIL sufficient to warrant preclusion. (Rec.85-90). While the Affidavit – albeit in a conclusory fashion – asserts that there is a *bona fide* ongoing investigation, the details of such "investigation" reveal a different story. Initially, many of the additions that have been made to the investigative file since January 2015 are most likely only DD5 forms, "green sheets" reflecting non-substantive additions; including, by way of example, the completion of the Major Case Squad's report, the transmission of the file upstairs and likely the filing of requests for information concerning the same or articles concerning the now-close re-investigation. (Rec.49). Moreover, the other references to ongoing "investigation" in this matter are even more problematic for the NYPD and in no way warrant preclusion of discovery.

Specifically, the inter-agency discussion in 2016 as related by Captain Wren was ultimately the result of communications that Jurgensen had with Commissioner James O'Neill in 2016, when Jurgensen received a Presidential Award for his service. Jurgensen was asked if there was anything new going on, and Jurgensen asserted that he was still awaiting the report he had been promised. The Commissioner said that he would look into the matter. First Deputy Commissioner Tucker and Chief Rodney Harrison were present for that exchange. (Rec.110). Second, the January 2018 entries and references in Captain Wren's

affidavit relate to an event actually hosted by the Society of Professional Investigators at which Micah Morrison, the individual who filed the FOIL requests at issue herein, was to speak about, *inter alia*, the NYPD's propensity for reflexively, and without legitimate basis, denying FOIL and other requests for information. (Rec.110;120). The irony should not be lost on the Court. The other contentions related to any ongoing "investigation" are equally irrelevant and certainly provide no basis for precluding disclosure of presumptively open to public inspection.

Ultimately, however, the lower court relied on these half-truths and concluded that:

> ...while petitioner asserts that it received information from various sources contending that the investigation into Patrolman Cardillo's death had ended, this court has no basis to discredit the sworn statement of Captain Wren...that the investigation is active and ongoing, the report and files requested are not subject to disclosure under POL § 87(2)(e)(i).

(Rec.7). Respectfully, this conclusion is not only in contravention of the facts of this matter, but also – even if the underlying factual premise were accepted to be true - in contravention of the applicable law and the relevant case law that was cited by Judicial Watch and not refuted by either the NYPD or the lower court.

The lower court's decision should be reversed.

Relevant Law

It is beyond question that the Legislature enacted FOIL "to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy." *Matter of Alderson v. New York State College of Agriculture and Life Sciences at Cornell University*, 4 N.Y.3d 225, 230 (2005), *citing Matter of Newsday Inc. v. Sise,* 71 N.Y.2d 146, 150 (1987); *see also, Department of Records and Information Services*, 19 N.Y.3d 373, 379-380 (2012); *Matter of Fappiano v. New York City Police Dept.*, 95 N.Y.2d 738, 746 (2001); *Matter of Gould v. New York City Police Dept*., 89 N.Y.2d 267, 274 (1996). Agency records, such as those maintained by the NYPD, are "presumptively open to public inspection, without regard to need or purpose of the applicant" and FOIL requests are to be "liberally construed" with "its exemptions narrowly interpreted so that the public is granted maximum access to the records of government...." *Matter of Buffalo News, Inc. v. Buffalo Enterprise Development Corporation,* 84 N.Y.2d 488, 492 (1994); *see also, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986) (Court of Appeals cautioned that exemptions must be construed narrowly with the denying agency exclusively carrying "the burden of demonstrating that the requested material falls squarely

within a FOIL exemption by articulating a particularized and specific justification for denying access"); *see also Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-463 (2007) (Admonishing that any statutory exemptions under FOIL must be established with evidentiary support).

Moreover, it has been routinely recognized that vague allegations, attorney affirmations and/or statements by individuals without personal knowledge of the underlying facts are insufficient to provide the requisite "evidentiary support" to sustain a denial of a FOIL request. *Matter of Dilworth v. Westchester County Dept. of Correction*, 93 A.D.3d 722, 724 (2nd Dept 2012); *see also, Matter of Washington Post Co. v. New York State Ins. Co.*, 61 N.Y.2d 557, 567 (1984). Moreover, as here, when there is no *bona fide* ongoing investigation or potential for judicial proceedings, much less a risk of taint of the same through disclosure, denials of FOIL requests must be rejected and the requested documents must be disclosed. *See e.g., Matter of Adam D. Perlmutter, P.C. v. New York City Police Dept.*, 2013 N.Y. Misc. LEXIS 4724, 2013 NY Slip Op 32532(U); see also, *Matter of Lesher v. Hynes*, 19 N.Y.3d 57, 8 (2012).

Argument

Point I

RESPONDENTS HAVE NOT MET, AND CANNOT MEET, THEIR BURDEN OF DEMONSTRATING THAT THE REQUESTED MATERIAL FALLS WITHIN AN EXCEPTION TO FOIL

A. Respondents Have Not Met, And Cannot Meet, Their Burden Under Public Officers Law §87(2)(e)(i).

Respondents' sole basis for denying the instant FOIL requests remains §87(2)(e)(i): namely that the items requested were compiled for law enforcement purposes and "if disclosed would...interfere with law enforcement investigations or judicial proceedings." In opposition to Judicial Watch's Order to Show Cause, the NYPD finally at least acknowledged the need to justify its abject failure to respond substantively to Judicial Watch's FOIL requests.[2] Contrary to the lower court's opinion, it is not sufficient to allege that there is "an active and ongoing investigation."[3] There must be, at a bare minimum, some showing of interference with, or risk to, that investigation. The NYPD abjectly failed to meet even this low bar, and the lower court erred in not holding the NYPD responsible for

[2] While not dispositive, it is noteworthy that the NYPD's initial denials generically cited to the relevant statute without more; were made by an individual with no personal knowledge of the relevant facts or factors; and did not constitute, or even contain, any evidentiary support for the denial whatsoever.

[3] Based on the submissions, it is clear that there is no active or ongoing investigation and that the NYPD simply does not want to divulge records that it has a legal obligation to provide.

meeting the relevant legal standard sufficient to preclude disclosure.

Neither Captain Wren's Affidavit, nor the case law cited by the NYPD, provide a legitimate basis to withhold these requested documents. Captain Wren signed an affidavit asserting a myriad of statements that ultimately say very little of substance and certainly do not demonstrate either a *bona fide* ongoing investigation or any "attendant risks that disclosure would pose to any future proceedings" which could not be cured with simple redactions. *See Matter of McGhee*, 2016 N.Y.Misc. LEXIS 2704; *see also, Church of Scientology of N.Y.,* 46 N.Y.2d at 906. The sole specific concern raised by Captain Wren was related to the identity of witnesses, which the Court of Appeals has asserted is not a basis for withholding documents responsive to an otherwise valid FOIL request. *Id.*

1. <u>All relevant judicial proceedings have run their course and there is no *bona fide* ongoing investigation.</u>

As an initial matter, Captain Wren has failed to demonstrate that there, in fact, is a *bona fide* ongoing investigation or that all relevant judicial proceedings have not already run their course. *See e.g., Lesher v. Hynes*, 19 N.Y.3d 57 (2012). In support of his contentions, Captain Wren sets forth various assertions, none of which are dispositive.

a. Captain Wren asserts that "Patrolman Cardillo's murder remains

unsolved." This is not accurate. Officer Cardillo's murder has been solved. It has since been publicly acknowledged that the initial investigation, along with the crime scene, were completely compromised and that police procedures were ignored and that civilians, politicians and leadership within the NYPD explicitly condoned and participated in such egregious acts. In summary, based on an agreement brokered between a State Representative, Louis Farrakhan of the Nation of Islam ("NOI") and NYPD Deputy Commissioner Benjamin Ward, relevant witnesses were released and not interviewed, the crime scene was scrubbed clean and forever contaminated and virtually every NYPD investigative procedure disregarded, as well as the unprecedented separation of officers on the basis of race. It was these documented failures of the NYPD, the Mayor's Office and the improper influence of independent or other political actors that precluded the possibility of a conviction in this matter. The NYPD has publicly admitted, as of 2012, that the revived investigation turned up no new facts. As of 2015, nothing had changed. Nothing in Wren's affidavit asserts that any new facts or leads have developed, just a hypothetical hope that some potential leads could be ascertained – apparently metaphysically. There is no substance to such potential circumstances. There is no new suspect. There has never been, in the 46 year history of the investigation, any other suspect or any genuine suspicion that any

suspect exists aside from the individual who was initially arrested and indicted for Officer Cardillo's murder. As such, all relevant "judicial proceedings have run their course" and the preclusive effect of §87(2)(e)(i) has ceased to apply. *Lesher*, 19 N.Y.3d at 67. Disclosure is warranted on this ground alone.

b. In support of his contention that this is an ongoing *bona fide* investigation, Captain Wren asserts that over the past four (4) years Detective Rodriguez has:

(1) "tracked the whereabouts and locale of witnesses ***who are still alive***" (emphasis added). This would not be impeded by disclosure. These are the same witnesses who have been part of the investigation for over forty (40) years. They were aware of their involvement then, and those facts have not changed. This is not a hallmark of an active ongoing investigation;

(2) "interviewed persons of interest". Without more, such interviews are likely recapitulations of prior interviews or, more likely, as noted below, interviews of individuals with no new revelations or who are simultaneously investigating the "why" and the actions of the government and its agents and employees in the activities leading to the murder of Officer Cardillo and the effective cover-ups within the initial investigations of Officer Cardillo's murder. This certainly does not create an ongoing and active investigation;

(3) reviewed older records "(those generated during the initial police investigation in 1972 and in the Department's in-depth re-inquiry initiated in 2006)." Even Captain Wren and the NYPD recognize that the investigation had been shut down at some point; otherwise how could there have been a "re-inquiry initiated in 2006". It is a farce to suggest that this matter was not closed and asserting that the investigation is ongoing is nothing more than a face-saving, political act. The NYPD has now conceded as much in its papers herein -- even as it has previously acknowledged in public statements to, *inter alia*, the press;

(4) been in contact with the relatives of Officer Cardillo and in 2016 pursued a single tip. The lack of information, or any specifics, about this single tip -- over a four year span -- speaks volumes about the extent of this ongoing and active investigation;

(5) tracked and observed "public events where Patrolman Cardillo's case is highlighted". The sole event referenced by Captain Wren was an event in 2018 that, although not disclosed by the NYPD, was, in fact, an event hosted by the Society of Professional Investigators at which Micah Morrison, the individual who filed the FOIL requests at issue herein, was to speak about the investigation and the stonewalling of the NYPD. Retired Detective Randy Jurgensen also attended that event. Presumably, if Detective Rodriguez appears in Court in connection

with this Order to Show Cause, the NYPD will assert that such participation is also further evidence of an ongoing and active investigation; and

(6) "made contact [on a single occasion in 2016] with an outside agency in relation to his investigation." Does the NYPD seriously expect this Court to conclude that a single contact with an "outside agency" in a four year span warrants a determination that an investigation is active and ongoing to such an extent that divulging decades old materials could jeopardize that investigation? It is clear that there is no *bona fide* basis to preclude disclosure in this circumstance. Moreover, it is likely that this sole contact with an outside agency in 2016 was actually precipitated by a conversation between Randy Jurgensen and the Police Commissioner in the presence of First Deputy Commissioner Tucker and Chief Rodney Harrison.

As there is no *bona fide* ongoing investigation; as the relevant judicial inquiry has run its course; and the NYPD has acknowledged that the initial inquiry was closed; as the "re-inquiry initiated in 2006" has been publically acknowledged by the NYPD to the press to have turned up no new facts; as the "re-inquiry initiated in 2006" is known personally by Randy Jurgensen not to have ascertained any new facts and to have confirmed the investigation and analysis concerning Officer Cardillo's murder and that the suspect initially arrested and indicted was

the correct suspect; as no new investigation has been commenced in the years subsequent to the NYPD's public assertions in 2012 or since the lead Detectives acknowledged that the "re-inquiry initiated in 2006" was complete[4], there is no basis to withhold the requested documents.

2. The requested disclosures pose no risk to any investigation.

Even assuming the existence of an active and ongoing investigation – which is not the case herein – the NYPD has not demonstrated any "attendant risks that disclosure would pose to any future proceedings", much less any which could not be cured with simple redactions. *See Matter of McGhee*, 2016 N.Y.Misc. LEXIS 2704; *see also, Church of Scientology of N.Y.,* 46 N.Y.2d at 906. This is a dispositive element of the statute that has been blatantly and purposefully ignored by the NYPD and the lower court. Disclosure is warranted on this ground alone.

The first actual risk specifically identified by Captain Wren was his concern about the identification of potential witnesses. As an initial and dispositive matter, this concern could be resolved through redactions as the Court of Appeals has previously determined. *See, Church of Scientology of N.Y.,* 46

[4] That Captain Wren now attests that Detective Rodriguez, after having been in charge of the file for four years and after the filing of the instant action, only now has the intent, at some time in the future, to "widen the scope of the interviews he pursues, to include additional individuals who ***may*** provide ***potential*** leads" is simply, and similarly, insufficient as a matter of law to provide a basis to preclude disclosure requested through FOIL. (Emphasis added).

N.Y.2d at 906. Second, as Captain Wren himself is compelled to admit, the risk of disclosure having any effect on any investigation diminishes over time. In this case decades have past since the sole suspect was arrested, indicted and tried. Third, the risk is also minimized by the fact that a majority of witnesses have already been identified whether through the two separate and public trials of Dupree; the various publications on this matter (including Randy Jurgensen's book, "The Circle of Six" that was vetted and approved by the NYPD); or numerous press releases and articles over the intervening years. This, simply, is not a basis to preclude disclosure.

The second, and only other, alleged potential risks raised by Captain Wren relate to confidential documents. This concern is equally unavailing. First, and dispositively, this was not a stated basis for the initial denials and cannot be raised now. Second, the documents personal to Officer Cardillo, including his autopsy, are not being sought by Judicial Watch. Third, the remaining, allegedly confidential, documents referenced should have all been made public -- or at least been provided to the DA and Defense counsel -- during the two public trials of Dupree and cannot now legitimately be termed confidential. Again, the initial investigation has been documented and described in detail in a publication by Mr. Jurgensen that was published after being vetted by and gaining the approval of the

NYPD. The subsequent "re-inquiry initiated in 2006" has been publically and voluntarily acknowledged by the NYPD to the public and the press to have turned up no new facts. The divulging of rehashing of prior investigations already made public cannot effect, much less deleteriously effect any investigation, even if one was determined to exist herein. Captain Wren's concerns about generically described reports purportedly in the files that rehash pre-existing discussions, investigations, interviews and the steps originally taken are not "confidential", and even if they were, as stated above, that could not constitute grounds to withhold at this juncture. At most, such a determination would warrant limited redactions.

Ultimately, the sole attempt to identify the "attendant risks that disclosure would pose to any future proceedings" (*Matter of McGhee*, 2016 N.Y.Misc. LEXIS 2704), as required to preclude disclosure, is contained in a single sentence in Captain Wren's five page affidavit: "Disclosure of the records in this case would clearly compromise the potential apprehension of other perpetrators as the documents are replete with police analysis of potential leads, physical evidence and witnesses." Such a conclusory assessment does not meet the NYPD's burden under Public Officers Law §89(4)(b) "to articulate a factual basis for the exemption". *Lesher*, 19 N.Y.3d at 67. This is especially true when the physical evidence has already been presented in open court, the witnesses have been

publicly identified and all probative leads have been run down. Moreover, there is no dispute as to how Officer Cardillo died or that he was murdered through the use of single fire-arm. Further, through the 40+ years that this matter has been investigated -- through both the initial investigation and when the matter was re-opened by the "re-inquiry initiated in 2006" -- no new suspects were identified.

B. None Of The Cases Cited By The NYPD Warrant Precluding Discovery.

None of the cases cited by Respondents warrant a different conclusion. In the *Matter of Deluca v. New York City Police Dept.*, 261 A.D.2d 140 (1st Dept 1999), many documents were turned over pursuant to the relevant FOIL request. Here, the NYPD has turned over no documents. Moreover, in *Deluca*, the additional documents being withheld were withheld on the basis of the fact that the subject of the requested documents had been shot and allegedly suffered substantial brain injuries. As the record was devoid of any information as to the officer's then current medical condition and the proximity in time to the underlying events, the Court agreed that disclosure could await a determination that the officer did not have the capacity to be interviewed or the NYPD re-interviewed the officer. This is not the case before us of a 46 year-old matter which has been acknowledged to have been closed on two separate occasions.

In the *Matter of Gorenitsyn v. Department of Citywide Services*, 2009 Misc,

LEXIS 4007, the court was faced with requests for disclosure stemming from the denial of a plumber's license. In *Gorenitsyn*, the Court determined that the request for documents was moot as the same documents had already been provided to Petitioner through his attorney in a related court proceeding. The FOIL request at issue also involved the documents that were part of the active negotiation, hearings and licensure proceeding that was ongoing. Again, this is not the case before us of a 46 year-old matter which has been acknowledged to have been closed on two separate occasions.

In *Church of Scientology v. State*, 61 A.D.2d 942 (1st Dept 1978), the Appellate Division upheld the lower court's determination that compelled disclosure with limited redactions. This case entirely supports disclosure herein.

In the *Matter of Loevy & Loevy v. New York City Police Department*, 139 A.D.3d 59 (1st Dept 2016), the Appellate Division denied disclosure under specific concerns of witness tampering and enabling the perpetrator to evade detection. Contrary to the instant case, no perpetrator had ever been arrested in the *Loevy*; no witnesses had been previously publicly identified; no trial had been undertaken; the NYPD had not made any public statements that arrest and indictment of the sole existing suspect were proper and that the subsequent, re-opening inquiry had not led to any additional facts: all material distinctions from the case now before

the Court.

C. Neither The Lower Court Nor The NYPD Even Attempt To Distinguish The Relevant Case Law From The Facts Of This Case.

Moreover, neither the lower court nor the NYPD has even attempted to distinguish the relevant case law cited by the Petitioner demonstrating that even in cases where the NYPD has filed affidavits as to specific ongoing investigations (that are actually ongoing, as opposed to the investigation at issue herein), FOIL request denials have been rejected and disclosure directed. *See e.g., Matter of Collins v. New York City Police Dept.*, 55 Misc. 3d 1214(A), 58 N.Y.S.3d 873 (S.Ct.NYCty 2017) (After NYPD provided some documents, its attempt to preclude others based on the investigation exemption was rejected despite assertions that case was ongoing and that accomplices were still being sought); *Matter of Fairfield Presidential Associates, LLC v. City of New York*, 2008 N.Y.Misc. LEXIS 9552, 2008 NY Slip Op 33416(U) (S.Ct.NYCty 2008) (Affidavit of Detective based on personal knowledge that the relevant investigation is open and ongoing was rejected even where suspect was never apprehended (contrary to the case at bar) as insufficient as lacking requisite specificity); *see also, Estate of Robello v. Dale*, 2014 NY Misc LEXIS 2444, 2014 NY Slip Op 31424(U) (S.Ct. Nassau 2014) (Court directed disclosure by Nassau

County despite 1 ½ page affidavit from Nassau County Detective asserting an ongoing investigation of a crime committed in 2013).

Ultimately, this is a case where there "is, practically speaking, no longer any pending or potential law enforcement investigation or judicial proceeding with which disclosure might interfere. Public Officers Law §87(2)(e)(i) would not preclude release of the records." *Lesher*, 19 N.Y.3d at 68. The NYPD misreads the Court's decision in Lesher; a practical analysis is required. In this instance, justice, practicality and the applicable law align, and the lower court's decision should be reversed.

While it is understandable that absent a conviction, there is a political interest in not closing a murder case, especially when the deceased is a Police Officer and especially when it has been publically acknowledged that the initial investigation was fatally, and virtually uniquely, flawed as a result of outside political influences and the decisions of the Mayor's office and of the Police Commissioner's Office at the time. However, there is simply no basis at this time to legitimately contend that this investigation is open, much less that divulging a several year-old report or the decades old investigative file would hinder anything (except a continuing FOIL violation on the part of the NYPD), much less an "ongoing" investigation or some fanciful judicial proceeding. The NYPD is

making a mockery of the FOIL laws. Judicial Watch's instant FOIL requests have been denied unlawfully. In the past 47 years the NYPD has arrested one suspect. It has never identified another suspect. In the 47 years after Officer Cardillo's murder it has never even been suggested that another suspect exists. Perhaps it is time for the NYPD to share its information and see if justice can finally be served.

Conclusion

WHEREFORE, it is respectfully requested that an Order be entered

a. reversing the lower court's decision;

b. directing the disclosure of the files and report of the Major Case Squad relevant to the re-investigation commenced in 2016 into the homicide of Patrolman Cardillo;

c. granting Judicial Watch its costs and expenses, including reasonable attorneys' fees; and

d. granting Judicial Watch any such other or further relief as this Court deems fit and proper.

Dated: New York, New York
March 15, 2019

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR Section 600.10(v) the foregoing brief was prepared on a computer using Microsoft Word.

TYPE: A proportionally spaced typeface was used as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

WORD COUNT: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 6,163.

STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York
Appellate Division – First Department

JUDICIAL WATCH, INC.,

Petitioner-Appellant,

- against -

THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,

Respondents-Respondents.

1. The index number of the case in the court below is 160286/2017.

2. The full names of the original parties are set forth above. There have been no changes.

3. This action was commenced in Supreme Court of the State of New York, New York County.

4. The action was commenced on or about November 16, 2017 by filing of a Verified Petition. Issue was joined thereafter.

5. This is a CPLR Article 78 Special Proceeding action.

6. The appeal is from the Decision and Order of the Honorable Verna L. Saunders, dated May 7, 2018 and the relevant Judgment that was entered on August 30, 2018.

7. The appeal is being perfected on a full reproduced record.