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.

REPLY BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

Table of Authorities…… ii

Preliminary Statement…… 1

Simple Statement of Background Facts……. 4

The NYPD's Affidavit For Captain Wren……. 7

Relevant Law……. 9

Argument……... 10

Respondents Have Not Met, And Cannot Meet, Their Burden of Demonstrating that the Requested Material Falls Within The §87(2)(e)(I) Exception to FOIL……... 10

A. All relevant judicial proceedings have run their course and there is no *bona fide* ongoing investigation…… 12

B. The requested disclosures pose no risk to any Investigation……..... 16

C. None of the cases cited by the NYPD warrant precluding discovery……... 18

Conclusion……. 20

TABLE OF AUTHORITIES

Cases:	**Pages:**
Adam D. Perlmutter, P.C. v. New York City Police Dept., 2013 N.Y. Misc. LEXIS 4724 (2013)……	10
Bahnken v. New York City Fire Dept., 17 A.D.3d at 228 (1st Dept 2005)……..	2,9
Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986)……....	9
Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462-463 (2007)……...	9
Dilworth v. Westchester County Dept. of Correction, 93 A.D.3d 722, 724, 940 N.Y.S.2d 146 (2nd Dept 2012)……	2,9,15
Estate of Rebello v. Dale, 2014 N.Y. Misc. LEXIS 2444 (S.Ct., Nassau Cty 2014)……..	17
Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979)……	9,18
Gould v. New York City Police Dept., 89 N.Y.2d 267 (1996)…….....	2,9,18
Jones v. Town of Kent, 46 Misc.2d 1227(a) (S.Ct., Putnam Cty. 2015)…….	14
Lesher v. Hynes, 19 N.Y.3d 57, 8, 68, 67 (2012)……..	10,12 16-18
Loevy & Loevy v. New York City Police Department, 139 A.D.3d 59 (1st Dept 2016)……..	19
McGhee v. New York City Police Dept., 52 Misc. 3d 1211(A) (S.Ct., NY Cty., 2016)……	17

Newsday, Inc. v. Empire State Dev. Corp.,
98 N.Y.2d 359 (2002)…… 2,9

Newsday, LLC v. Nassau County Police Dept.,
42 Misc.3d at 1215(A) (S.Ct. Nassau Cty., 2013)……. 2,9

Porco v. Fleischer,
100 A.D.3d 639 (2nd Dept 2012)…… 2

Washington Post Co. v. New York State Ins. Dept.,
61 N.Y.2d 557 (1984)…… 2,9

Whitley v. New York County District Attorney's Office,
101 A.D.3d 455 (1st Dept 2012)…… 18

Statutes:

Article 78……. 8

Public Officers Law ("POL") §87(2)…….. 8,10

§87(2)(b)…… 11

§87(2)(e)(i)…… 8,10, 11,16

§87(2)(e)(iii)……..... 11

§87(2)(e)(iv)……. 11

§87(2)(f)……. 11

Public Officers Law ("POL") §89(4)(b)…….. 17

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 Reply Memorandum of Law in Further Support of its Appeal of each portion of the Decision and Order of the lower court dismissing its request for the production of the Major Case Squad report and files on the homicide of NYPD Patrolman Philip Cardillo.

Preliminary Statement

There is no question that public policy mandates transparency and disclosures from the State with regard to its officers and actions to its citizens under FOIL. There is no question that the NYPD's *modus operandi* is to deny FOIL requests until it is forced to comply. There is no question that this NYPD policy is only exacerbated – as herein – when the information sought has the potential for shedding light on improprieties and questionable activities by the NYPD.

NYPD's opposition to the instant appeal only differs in form – but not substance – from its improper denials of the two instant FOIL requests and the administrative appeals of the initial denials. After these requests were addressed in Court, the NYPD recognized that its baseline baldly conclusory and

unsupportable assertions by an individual with absolutely no personal knowledge of the relevant facts would not be sufficient to pass even *de minimis* scrutiny. However, the subsequent opposition filed by the NYPD is, substantively, no different. The NYPD relies solely on the affidavit of Captain Wren – who relies solely on documents but no first hand knowledge – which ultimately is just a more dressed-up version that still only apes the statutory requirements. It does not provide any "particularized" or "specific" justifications, but rather only regurgitates conclusory language and "speculative assertions" that, absent evidentiary support, are insufficient. *Newsday LLC v. Nassau County Police Dept.*, 42 Misc. 3d 1215(A) (S.Ct. Nassau Cty., 2013); *see also, Matter of Porco v. Fleischer*, 100 A.D.3d 639, 953 N.Y.S.2d 282 (2nd Dept 2012); *Matter of Dilworth v. Westchester County Dept. of Correction*, 93 AD3d 722, 940 N.Y.S.2d 146 (2nd Dept 2012); *Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 463 N.E.2d 604, 475 N.Y.S.2d 263 (1984).

It is axiomatic that "[d]isclosure provisions must be given an expansive interpretation to meet FOIL's declared purpose of ensuring open government, and exemptions must be narrowly construed." *Matter of Bahnken v. New York City Fire Dept*., 17 A.D.3d 228 (1st Dept 2005); *see also, Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267 (1996); *Matter of Newsday, Inc. v Empire State*

Dev. Corp., 98 N.Y.2d 359 (2002). Ultimately, there is no ongoing active investigation or judicial proceeding that the requested disclosure could or would interfere with. The assertions to the contrary are rank speculation and conclusory statements submitted by the NYPD to continue to do what it has done throughout the sad and prolonged history of this matter: delay, obfuscate and ignore in the hope that interest in what actually happened to Police Officer Cardillo and why the NYPD allowed the investigation of that Officer's murder to be so flawed and the evidence – ultimately obtained virtually in contravention of desires of the NYPD's leadership – so tainted that prosecution of the perpetrator was ineffective.

While it is true that the NYPD's final response herein has more substance than its initial baseless denials of the underlying FOIL requests, it again is only the veneer, not substance, of the response that has changed. The NYPD's last response, including Captain Wren's affidavit, simply regurgitates the relevant standards – whether aping the statute or relevant case law – in conclusory fashion, with true basis or any evidence. It is respectfully requested that the Court look carefully at what the NYPD has actually asserted and recognize those assertions for what they actually are – a fancier version of the same non-compliant, conclusory suppositions that it has asserted in response to Judicial Watch's legitimate FOIL requests.

Simple Statement of Background Facts

Appellant respectfully refers to its initial Memorandum and the Records for a more complete statement of relevant facts – both background from over four decades ago and the recent procedural history. Appellant, however, is compelled to reiterate a few limited facts herein.

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. Despite these circumstances and the ongoing reticence of NYPD Brass, Jurgensen, however, persevered and in or about May 1974, Lewis 17X Dupree ("Dupree") was arrested and indicted for the murder of Phil Cardillo. (Rec. 47,108). 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 2006, as a direct result of communications between Jurgensen and NYPD Commissioner Ray Kelly on the U.S.S. Intrepid, the investigation into the murder of Officer Cardillo was re-opened to confirm the results of the initial investigation

and to answer related inquiries – including 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. 47,108; See July 28, 2006 letter from James D. Harmon, Jr., to Commissioner Kelly and September 26, 2008 correspondence from Jurgensen to Deputy Chief Shea) (Rec. 109,113-22). (Rec. 47,108). Ultimately, the re-opened investigation concluded that the killer was Dupree, the individual acquitted in 1977. (Rec. 48).

Among the items that the NYPD now refuses to provide are files and materials provided to the NYPD by Jurgensen in 2006.[1] 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). 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

[1] Among those items was a copy of the original 911 tape which now, apparently has been lost by the NYPD – just as the original recording was lost by the NYPD. Perhaps, these tapes are not "lost" but just housed in different facilities as Jurgensen learned was the fate of various portions of the original investigatory file. (Rec. 109).

of the Major Case Squad on this matter, as well as several additional meetings involving the Commissioner, the Chief of Detectives and other high-ranking officers of the NYPD. (Rec.48,109-10). Between 2006 and 2012, no new information, no new leads, and no new facts were obtained 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 and that, while recognizing there had been a new investigation, "[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).[2]

[2] Sergeant Murmane's assertions subsequently were re-affirmed to Jurgensen by active NYPD personnel. (Rec. 48-9;109-10).

The NYPD's Affidavit For Captain Wren

The Affidavit of Captain Wren – upon which the NYPD exclusively relies – does not fulfill 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 and is crafted expressly to sway the Court, it does nothing more than make bald, conclusory and unsubstantiated proclamations.

As previously disclosed, a significant percentage of the activity identified by Captain Wren – albeit with no first-hand knowledge of the same, as purportedly demonstrating that an "investigation" is ongoing – are activities that were commenced by either Jurgensen (See Rec. 110 as to the "inter-agency discussion" touted in the Affidavit) or the Appellant (See Rec. 110;120 as to the January 2018 entries and an event to raise awareness of the NYPD's obfuscation and unwillingness to materially respond to the instant FOIL requests) herein. Tellingly, while disparaging the clear testimony of Jurgensen as rank speculation, the NYPD makes not a single factual assertion to refute Jurgensen's sworn statements or even a single explanation for what the other "additions" to the file were, if they were not, in fact, DD5 forms, "green sheets" reflecting non-substantive additions. (Rec. 49). The other contentions related to any ongoing

"investigation" are equally irrelevant and certainly provide no basis for precluding disclosure of documents and information presumptively open to public inspection.

It should be further noted that at each step of these FOIL submissions the NYPD has demonstrated its abject distaste, and disdain, for the requirements of POL §87(2). Its initial reaction, as is typical, constituted a blanket denial. When faced with the internal appeal, the NYPD managed to submit an affidavit from an employee with absolutely no personal knowledge of the facts and still maintained the report, the records, and even the 911 tape – the transcript of which had been publicly released multiple times over the years – were still protected from disclosure. When faced with the underlying Article 78, the NYPD finally produced an affidavit from a somewhat more knowledgeable source, but again not one with personal knowledge. Captain Wren reviewed the files for his information. He, unlike Detective Rodriguez – who did not submit any affidavit – had no first hand knowledge of the underlying facts. Even then, the NYPD could not resist trying to sneak in – albeit completely improperly – additional, new bases aside from §87(2)(e)(i) for their refusal within Captain Wren's affidavit. They try the same thing before this Court (See Respondent's Brief at pp. 9,10, and 15). The Court should not be fooled.

The lower court's decision should be reversed.

Relevant Law

As this Court has noted, "[d]isclosure provisions must be given an expansive interpretation to meet FOIL's declared purpose of ensuring open government, and exemptions must be narrowly construed." *Matter of Bahnken*, 17 A.D.3d at 228; *see also Matter of Gould*, 89 N.Y.2d at 267; *Matter of Newsday, Inc.*, 98 N.Y.2d at 359; *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). To be effective, the exemption must constitute "a particularized and specific justification for denying access." *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986). In this way, mere conclusory or speculative assertions that certain records fall within a statutory exemption are insufficient. Rather, evidentiary support is needed to warrant preclusion. *See e.g., Newsday LLC*, 42 Misc. 3d at 1215(A); *see also, Matter of Dilworth v. Westchester County Dept. of Correction*, 93 A.D.3d at 722; *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).

It has been routinely recognized that vague allegations 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*, 93 A.D.3d at 724; *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

RESPONDENTS HAVE NOT MET, AND CANNOT MEET, THEIR BURDEN OF DEMONSTRATING THAT THE REQUESTED MATERIAL FALLS WITHIN THE §87(2)(e)(i) EXCEPTION TO FOIL

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." Again, despite Respondent's efforts to make it appear that other subsections of §87(2) are applicable or relevant herein, they are not. The only basis for denial below was §87(2)(e)(i), and Respondents cannot now expand the scope of their bases for refusing to provide properly requested and

discoverable documents and information.[3] The sole, even arguably, relevant sections – those that relate to §87(2)(e)(i) – of Captain Wren's affidavit read as follows:

> 14. It is my opinion that as time passes, and a crime becomes more remote in time, witnesses and their associates may feel less hesitation in cooperating with law enforcement. However, disclosure of records in this case has the potential to frustrate the efforts of Detective Rodriguez in gaining information of interest to the investigation.
>
> 15. Further as noted, there are many issues that remain unresolved that relate to the events surrounding Patrolman Cardillo's death. While it is true that Mr. Louis Dupree was acquitted for the murder of Patrolman Cardillo's death [sic], his acquittal does not preclude the trial of another perpetrator for Patrolman Cardillo's death. Disclosure of 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.

Even a cursory review of these statements reveal their improper conclusory and speculative nature. Contrary to the NYPD's current position, there is no *bona fide* ongoing investigation, and certainly not one that would be improperly interfered with as a result of the disclosures sought herein. Ultimately, the NYPD fails to make any demonstration that any of the documents sought would "interfere with law enforcement investigations of judicial proceedings."

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[3] By way of example only, Respondents, through Wren, submit that disclosure is unwarranted as it might identify witnesses (§87(2)(e)(iii)); reveal criminal investigative techniques (§87(2)(e)(iv); jeopardize the safety of witnesses (§87(2)(f)); invade personal rights (§87(2)(b)). (*See e.g.* Respondent's Brief at pp. 9, 10, and 15)

A. All relevant judicial proceedings have run their course and there is no *bona fide* ongoing investigation.

Just as the Court in *Lesher* recognized that a renewed FOIL request might have a different result given that the extradition process had been completed during the litigation of the initial FOIL request (*Matter of Lesher v. Hynes*, 19 N.Y.3d at 68), there is no legitimate basis to withhold the requested documents herein as there is no *bona fide* ongoing investigation.

In the instant matter, it is now clear that a majority of the actions being taken by the NYPD with regard to the purported ongoing investigation are actually just reactions to the efforts of Jurgensen and Judicial Watch to obtain the relevant records and get information as to the background surrounding Officer Cardillo's murder and the procedural abominations that were effected directly thereafter and make them available to the public. It is undisputed that there never would have been a re-opened investigation or any assignment to the Major Case Squad of the Cardillo matter absent Jurgensen's actions in 2006.

The NYPD, relying solely on Captain Wren's affidavit, makes three arguments as to why Appellant is incorrect about the *bona fide* nature of the "investigation."

First, it relates what Captain Wren believes Detective Rodriguez has done in

furtherance of this investigation, including reporting on the activities of Mssrs. Morrison and Jurgensen – albeit without using their names – and his future, undated "**plans** to widen the scope of interviews he pursues, to include additional individuals who **may** provide **potential** leads." (Emphasis added).[4] The fact that NYPD's assigned detective – after being in charge of the case for well over three (3) years at that juncture (well over 4 now) – only now has "plans" to seek out folks that "may" result in "potential" leads properly reflects the actual state of affairs: there is no active and ongoing investigation. Rather, there is an after-the-fact conjured up justification for the denial of a reasoned and lawful discovery request concerning the NYPD's malfeasance that it simply does not want to make public for its own improper reasons. In rejecting a similar argument – namely that a DNA hit was still possible, even though the police had done nothing to seek such a DNA hit on a cold case involving a rape – the court in *Jones* correctly determined that there was no need for the Petitioner therein "...to wait for the lightning strike, a winning lottery ticket, or some other unusual confluence of events" before obtaining the documents sought. While the NYPD has dressed up their arguments with more sophistication, they ultimately remain insufficient

[4] Appellant respectfully refers to his initial Appellate Brief for addition refutations of the ongoing and active "investigation." (pp. 10-11, 17-20).

"[s]tatutory phrases unsupported by specific facts tailored to the specific case." *Jones v. Town of Kent*, 46 Misc.2d 1227(a) (S.Ct., Putnam Cty. 2015). It has been forty-seven (47) years since Patrolman Cardillo was murdered. It has been well over forty (40) years since the individual believed to have perpetrated this crime was acquitted. It has been over ten (10) years since the NYPD re-opened the investigation into Patrolman Cardillo's murder. It has been over seven (7) years since the NYPD's own Deputy Commission stated on the record that the case was closed, that there had been a renewed investigation, but that "[i]t did not turn up any useful information." At the time of the FOIL requests, it had been over three (3) years since Detective Rodriguez was placed in charge of the "investigation." The real issue concerns the cover-up of Patrolman Cardillo's murder, the obstacles placed in the way of any legitimate timely investigation, and the involvement of the FBI (Rec. 113-7). The NYPD has certainly not raised any genuine contention that Mr. Dupree did not shoot and kill Patrolman Cardillo in 1972. There is no genuine ongoing investigation.

Second, the NYPD asserts that Jurgensen knows nothing except what he was told by Murmane in early 2015 and that the then Major Case Squad leader did not know what he was talking about when he told Jurgensen that the re-investigation was closed, as Detective Rodriguez had been assigned to the case.

This raises a conundrum for the NYPD. If Murmane's statements are not to be given credence, why should Captain Wren's statements be given any credence either, given his similar position within the Major Case Squad as Murmane. Additionally, and not actually disputed by the NYPD, Jurgensen was personally involved with the re-investigation throughout the period when it was active. Moreover, a significant amount of the data in the files was prepared by Jurgensen, created under his watch, or physically re-provided by Jurgensen to the NYPD in 2006 and thereafter. The NYPD's further contention that Appellant has provided no evidence at this time that a significant portion of the records – especially those predating 2006 – were already made public, improperly attempts to shift the burden to Appellant from the NYPD. It is the NYPD's burden to provide evidentiary support for its position that the requested documents are not subject to disclosure.[5] *See e.g., Matter of Dilworth*, 93 A.D.3d at 722.

Third, the continued contention that Patrolman Cardillo's murder remains unsolved is a red herring. As set forth above, and side-stepped by the NYPD

[5] Similarly, the NYPD's attempts to discredit Jurgensen by misstating his testimony, asserting he knew nothing of the NYPD's action post 2015, and dismissing his testimony about the actual scope of the NYPD's actions post 2015, miss the point. It is the NYPD's burden to demonstrate that it is deserving of an exception to the general rule. Tellingly, the NYPD never asserts that Jurgensen's purported suppositions are incorrect. Rather, it demands that he prove his beliefs, but steadfastly refuses to provide the documents that would corroborate his statements. The NYPD's circular logic should not prevail on this Court.

herein, there is no dispute within the NYPD that the correct individual was arrested. The unsolved nature of this matter does not primarily concern the actual perpetrator, but the involvement of the NYPD Brass, as well as the FBI, in the botched investigation and the egregious procedural violations following Patrolman Cardillo's murder. 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 – under some speculative "unusual confluence of events". *Jones*, 46 Misc.2d at 1227. 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.[6] 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. <u>The requested disclosures pose no risk to any investigation.</u>

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

[6] The mere fact that Detective Rodriguez's case load also apparently includes the case of Officer Greg Foster and Rocco Laurie – purportedly victims of operatives of the Black Liberation Army in 1972 – does not preclude disclosure in the case of Patrolman Cardillo. The facts of each case are unique and must be considered separately; as should the purported bases for denying the public its right to records on matter of public concern.

disclosure would pose to any future proceedings", much less any nexus between disclosure and the actual occurrence of any potential risks. *Matter of McGhee v. New York City Police Dept.*, 52 Misc. 3d 1211(A), 41 N.Y.S.3d 720 (S.Ct., NY Cty., 2016). Captain Wren's 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 a single firearm. 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 have been identified, nor genuinely considered.

Simply, the purported risks are wholly speculative and based on conclusory statements with no substance, much less the requirement that the NYPD "articulate a factual basis for the exemption" with "evidentiary support." *Estate of Rebello v. Dale*, 2014 N.Y. Misc. LEXIS 2444 (S.Ct., Nassau Cty 2014).

The lower court's determination should be reversed and the matter remanded.

C. None Of The Cases Cited By The NYPD Warrant Precluding Discovery.[7]

None of the cases cited by Respondents warrant a different conclusion. In *Lesher v. Hynes*, not only did the District Attorney's office turn over some documents, but the Court of Appeals ultimately recognized that when there is "...practically speaking, no longer any pending or potential law enforcement investigation or judicial proceeding with which disclosure might interfere," complete production should be made. *Lesher*, 19 N.Y.3d at 68.

In the *Matter of Whitley v. New York County District Attorney's Office,* 101 A.D.3d 455 (1st Dept 2012), the petitioner's criminal appeal was pending and additional subsequent proceedings were imminent: a far cry from the facts of this matter.

In *Gould v. New York City Police Dep't.*, 89 N.Y.2d 267 (1996), the Court directed certain disclosures, rejected a blanket exemption and asserted:

> ...to invoke one of the exemptions of section 87 (2), the agency must articulate "particularized and specific justification" for not disclosing requested documents (Matter of Fink v Lefkowitz, supra, 47 NY2d, at 571). [****16] If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative

[7] Similarly, aside from the issue of redactions, the NYPD does not even attempt to distinguish the various cases submitted in support of disclosure herein as set forth in Appellant's Initial Brief (pp. 25-7).

> documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 133; Matter of Farbman & Sons v New York City Health & Hosps. Corp., supra, 62 NY2d, at 83).[8]

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 case*; no witnesses had been previously publicly identified; no trial had been undertaken; the NYPD had not made any public statements that the arrest and indictment of the sole existing suspect were proper and that the subsequent, re-opened inquiry had not led to any additional facts: each of the above constitute material distinctions from the case now before the Court.

Ultimately, there is simply no basis at this time to legitimately contend that this investigation is open, much less that divulging a several years-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. It is time for the NYPD to share its information and see if justice can finally be served.

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[8] In this case, the lower court did not even conduct an in camera review.

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 2006 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
August 16, 2019

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