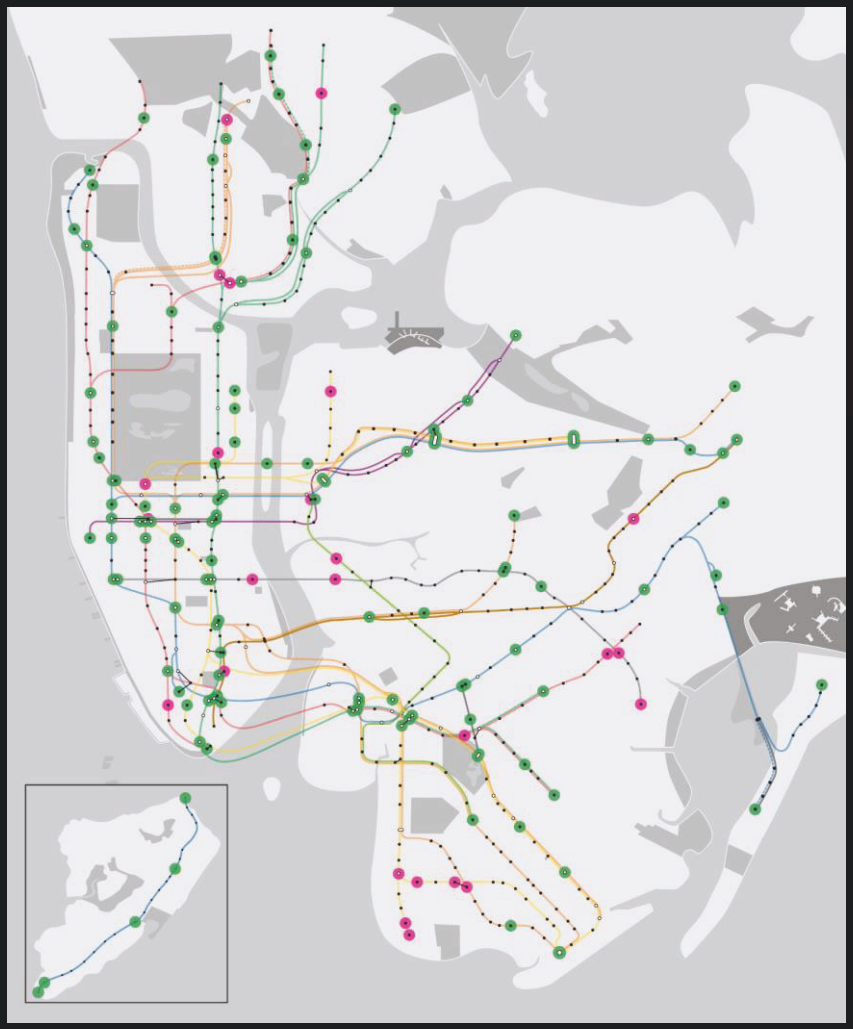
EXHIBIT A

Systemwide Station Accessibility Analysis

Overview Briefing

Compliance Coordination Committee Meeting

June 25, 2018



Accessible Stations: Current and in Progress

- **143** accessible stations:
  - **118** current
  - **25** in progress
- Serving **48%** of ridership

Current

In Progress

ADA System-Wide Study

- Evaluation underway of non-accessible **stations**
- Goal is to **complete study of all stations by the end of next year**
- Informing the selection of **new stations for 2020-24 and subsequent capital programs**
- **Evaluating the cost and complexity of** making each station accessible

Consultant Teams

- Package 1 & Facilitator – Stantec/di+D
- Package 2 - HDR
- Package 3 - WSP
- Package 4 - Urbahn

Study Strategy

- **Mobilize multiple consultant teams under guidance of a lead facilitator reporting to NYCT management team**
- **Apply consistent methodology**
- **Stakeholder input**
- **Report progress quarterly**

SCHEDULE

ADA System Wide Study - 350 Stations

		2018												2019											
		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
		Q1			Q2			Q3			Q4			Q1			Q2			Q3			Q4			
Phase		Phase 1						Phase 2						Phase 3												
Phase 1 - 54 Stations																										
Stantec	Planned	41 Stations Studies Completed																								
	Completed						41																			41
WSP / In House	Planned	13 Stations Studies Completed																								
	Completed						13																			13
Phase 2 - 101 Stations																										
Stantec	Planned							9 Stations			10 Stations			10 Stations												
PACKAGE 1	Completed							0	0	0	0	0	0													0
HDR	Planned							8 Stations			8 Sations			6 Stations												
PACKAGE 2	Completed							0	0	0	0	0	0													0
WSP	Planned							8 Stations			9 Stations			9 Stations												
PACKAGE 3	Completed							0	0	0	0	0	0													0
URBAHN	Planned							8 Stations			8 Stations			8 Stations												
PACKAGE 4	Completed							0	0	0	0	0	0													0
Phase 3 - 195 Stations																										
Consultant 1	Planned													8 Stations		8 Stations		8 Stations		8 Stations		9 Stations		8 Stations		
	Completed													0	0	0	0	0	0	0	0	0	0	0	0	0
Consultant 2	Planned													8 Stations		8 Stations		8 Stations		8 Stations		9 Stations		8 Stations		
	Completed													0	0	0	0	0	0	0	0	0	0	0	0	0
Consultant 3	Planned													8 Stations		8 Stations		8 Stations		8 Stations		9 Stations		8 Stations		
	Completed													0	0	0	0	0	0	0	0	0	0	0	0	0
Consultant 4	Planned													8 Stations		8 Stations		8 Stations		8 Stations		8 Stations		8 Stations		
	Completed													0	0	0	0	0	0	0	0	0	0	0	0	0
Total Completed							54	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	54

Progress Reporting

Weekly to NYCT

Quarterly to MTA Board Working Group

Template will be provided

SYSTEMWIDE STATION ACCESSIBILITY ANALYSIS

Progress Report - 6/15/2018

Station	Division/Line	Service	Boro	Station Type	Accessibility Solution - Station Elements (Qty)			Known Complexities										Cost*	Level of Difficulty* **	Notes
								Constructability**	Major Utility Relocation	Underpinning Structures	Deep Excavation	Property Acquisition	Historic/ Landmarks	Parks Alienation	Traffic/Ped. Impacts	Station Closure				
					Elevators	Ramps	Stairs	Technical				Logistical								
Transfer Complex 59th Street Lexington Ave	BMT/Bwy IRT/Lex	N,R,W 4,5,6	M M	Sub Sub	4	0	2	x	x	x	x	x			x			$50-$100M	🔴	Deep excavation in middle of E60th Street required.
86th Street	BMT/4th Ave	R	BK	Sub	2	1	3		x						x			$30-$50M	🟢	
Avenue U	BMT/Brighton	Q	BK	Fil	2	0	0					x						$30-$50M	🟢	Small (350 sf) property acquisition required.

Analysis Process

DATA ACQUISITION AND FIELD SURVEY

- **NYCT archive search & other available data, field recon**
- **Utilities**

ANALYSIS/CHALLENGES

- **Accessible route**
- **Real estate acquisition**
- **MAJOR UTILITIES, CONSTRUCTIBILITY, IMPACT TO RTO**

Analysis Process

DRAFT CONCEPTS – REVIEW BY WORK GROUP

- **Stations, ADA Compliance, Ops Planning, CPB, CPM/Architecture**
- **Architectural layout only (no engineering drawings)**

WORK GROUP APPROVAL – FINAL DATABASE INPUT

- **Drawings**
- **Cost Estimate**
- **Station Data**

PRINT REPORTS

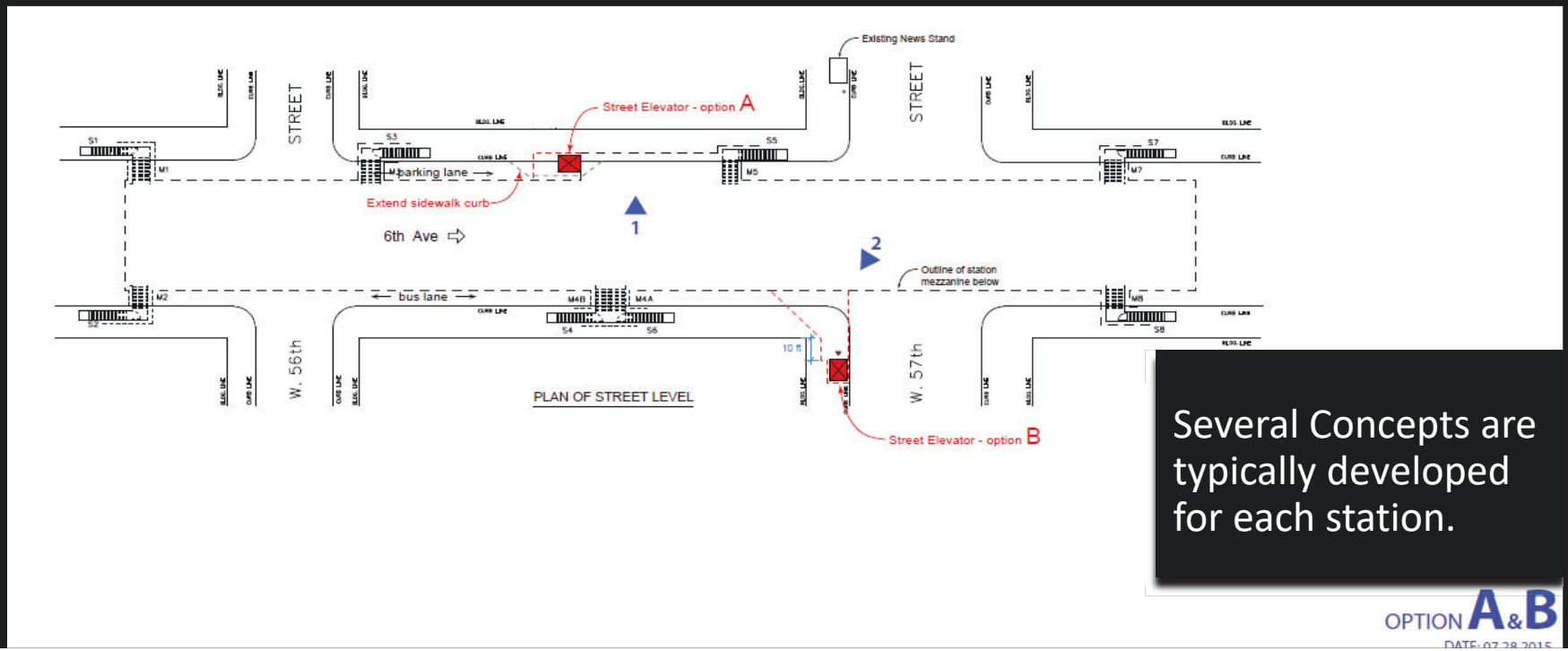
Station Analysis – Considerations and Constraints

- **Street Level**
  - **10’ setback from building corner**
  - **18” from curb**
  - **8’ sidewalk clearance to buildings**
- **Mezzanine Level**
  - **Visibility to agent booth**
  - **Location and size of elevator machine rooms**

Station Analysis – Considerations and Constraints

- **Platform Level**
  - **Platform curvature**
  - **Clearance to platform edge**
  - **Accessible path and clearances**
- **Other Considerations**
  - **Circulation**
  - **Transfer complexes**
  - **Branching points**
  - **Intermodal transfers**
  - **Neighborhood context**

Station Analysis – Multiple Options are Developed

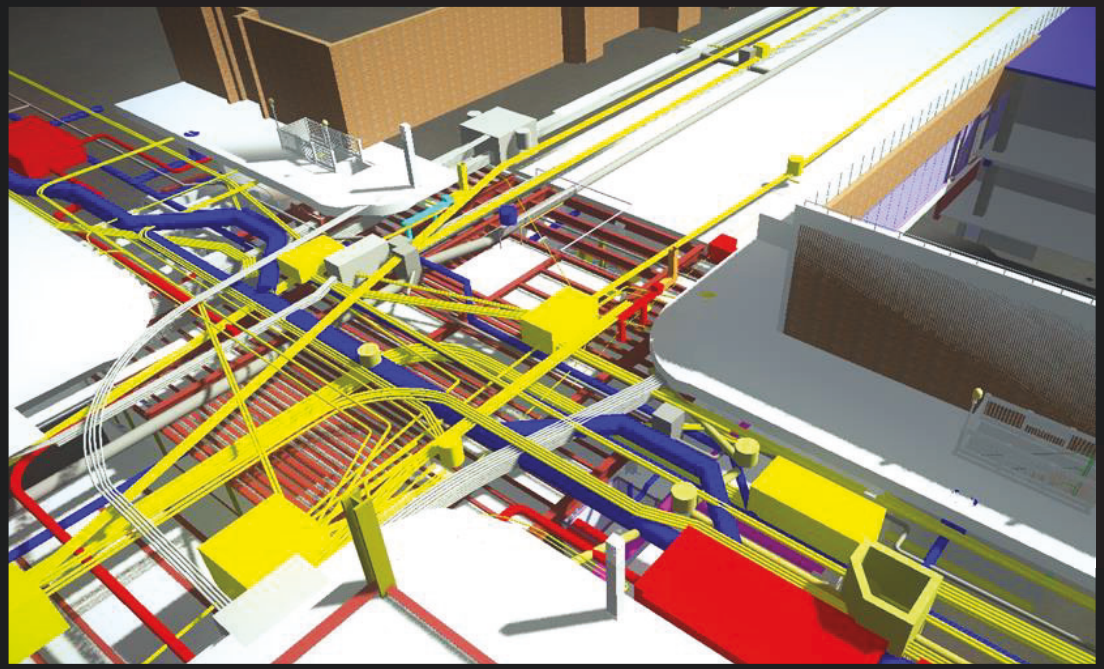


Several Concepts are typically developed for each station.

Station Analysis – Study Goal

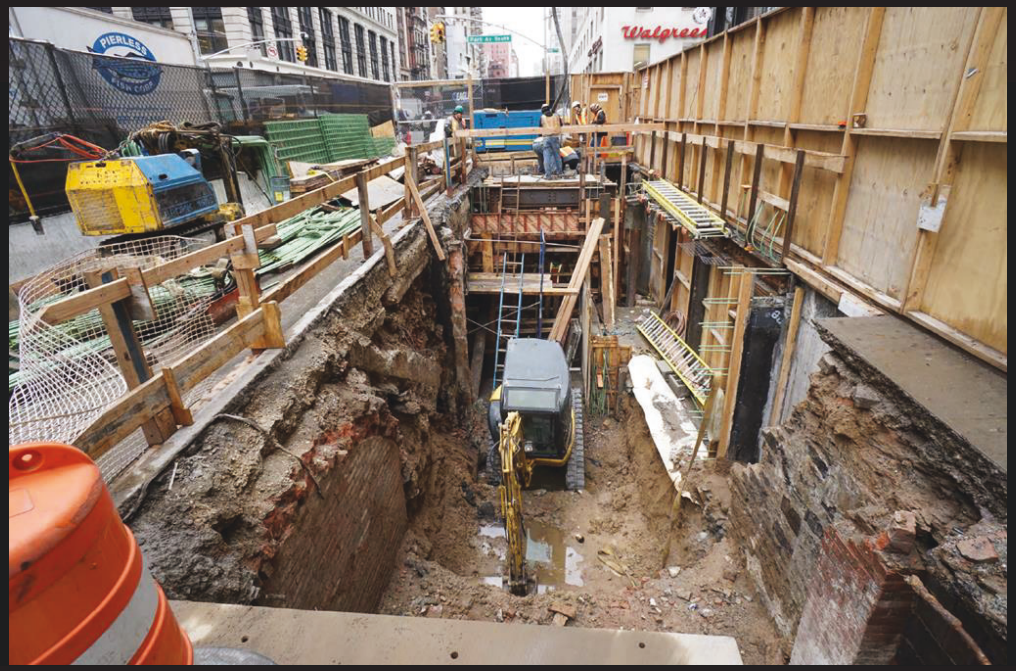
Identify Best Solution!

Commonly Encountered Challenges



Utility Relocations

Commonly Encountered Challenges



Excavations, building underpinning, neighborhood impacts

Commonly Encountered Challenges

Property Acquisition

Commonly Encountered Challenges

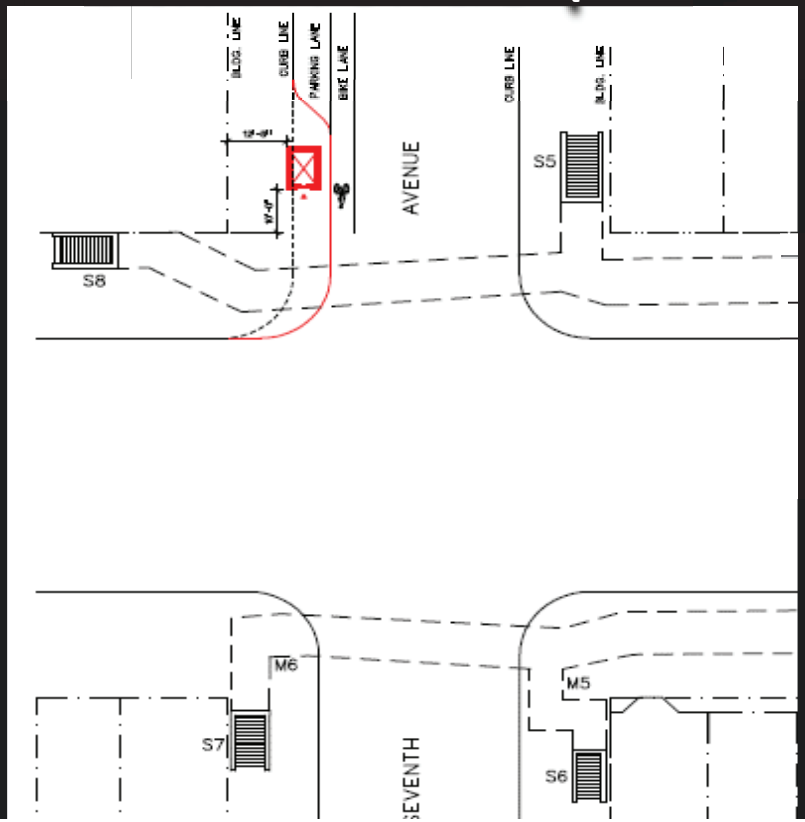
Impacts to Service

Case Study – 7th Avenue (F G -Line Brooklyn)

Below ground station constructed in 1933

Platform level consists of two island platforms

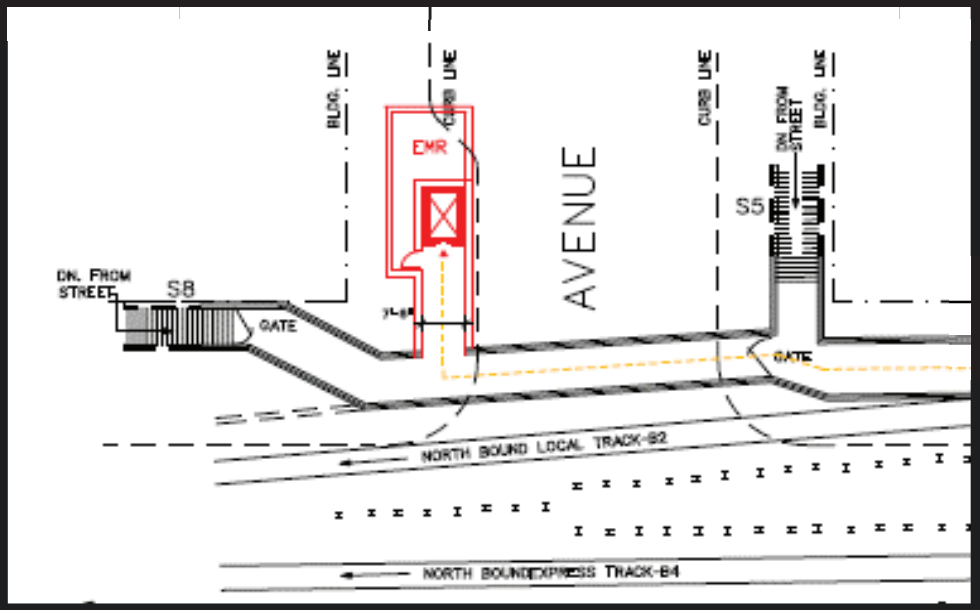
Case Study – 7th Avenue (F G -Line Brooklyn)



Street Level

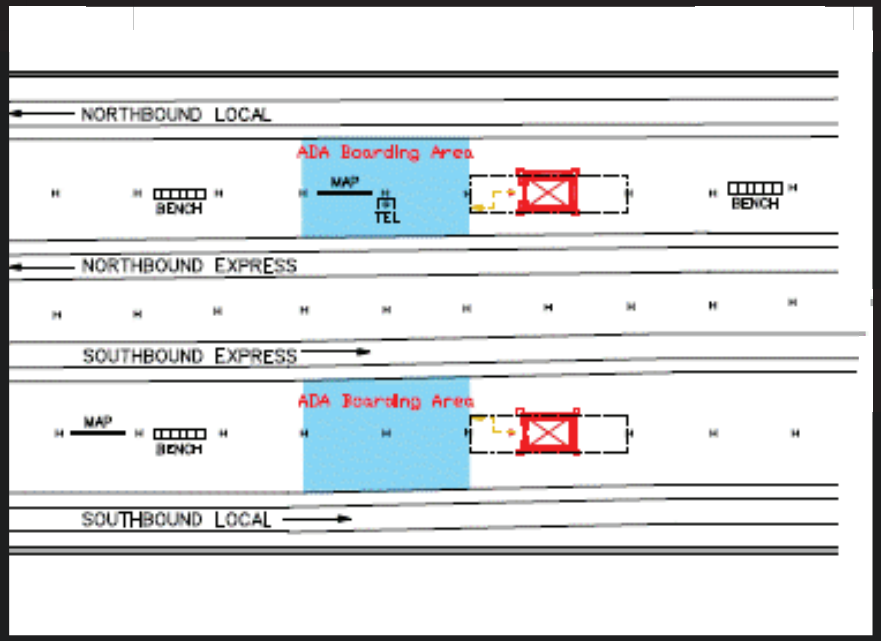
Curb bump-out (DOT approval)

Case Study – 7th Avenue (F G -Line Brooklyn)



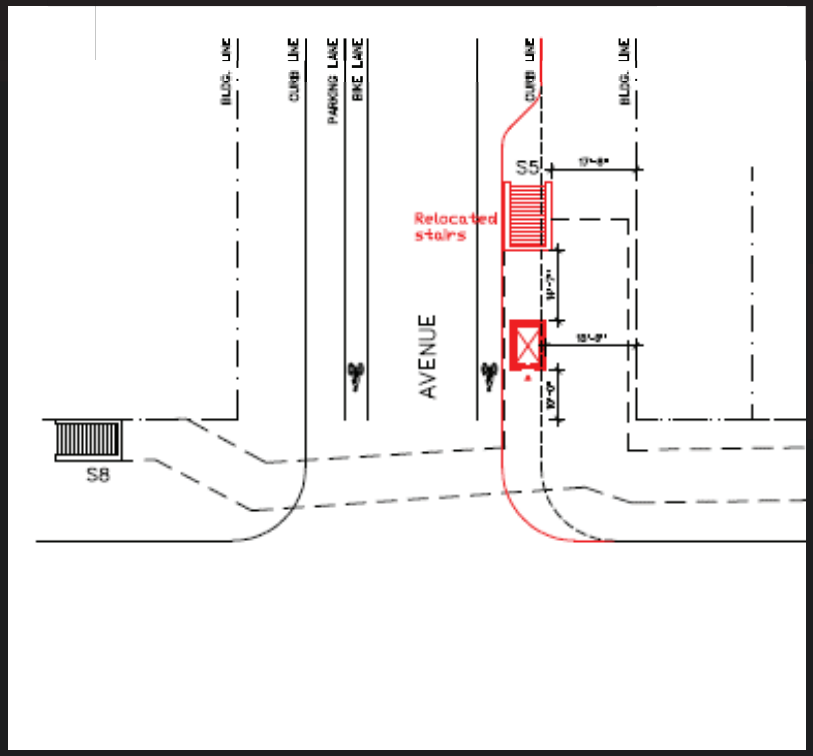
Mezzanine Level

Case Study – 7th Avenue (F G -Line Brooklyn)



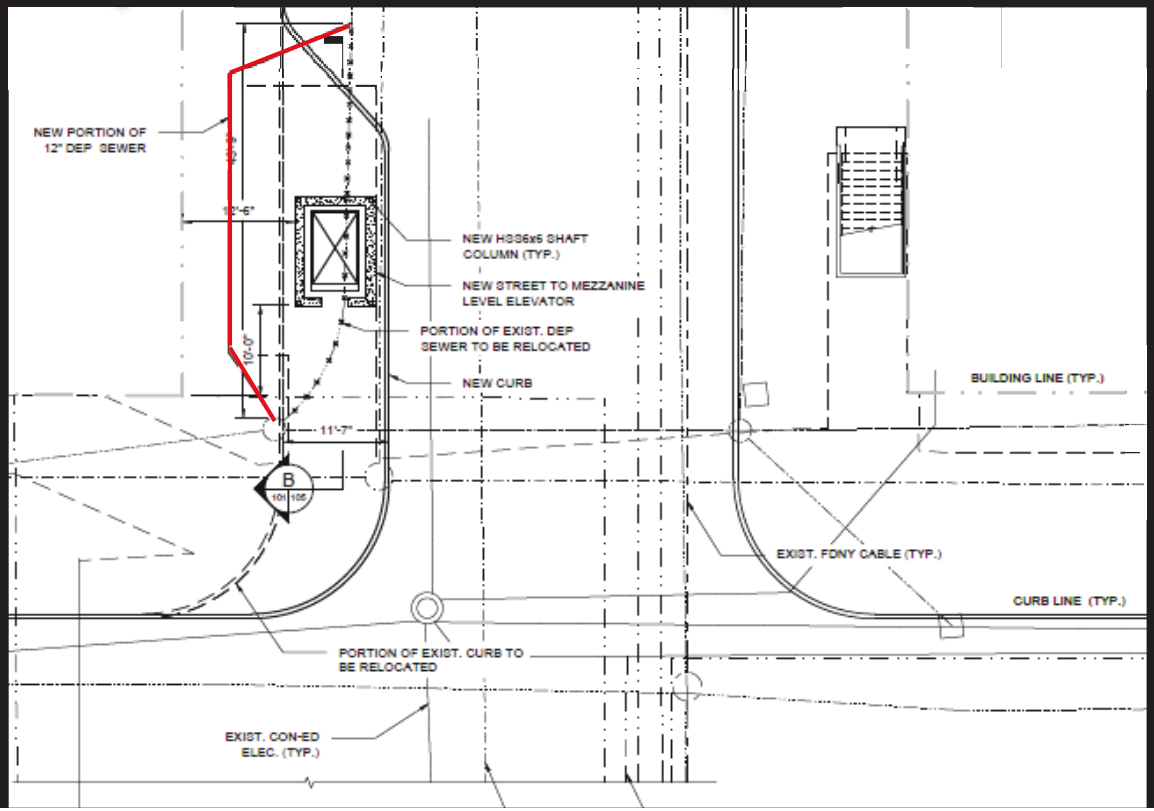
Platform Level

Case Study – 7th Avenue (F G -Line Brooklyn)



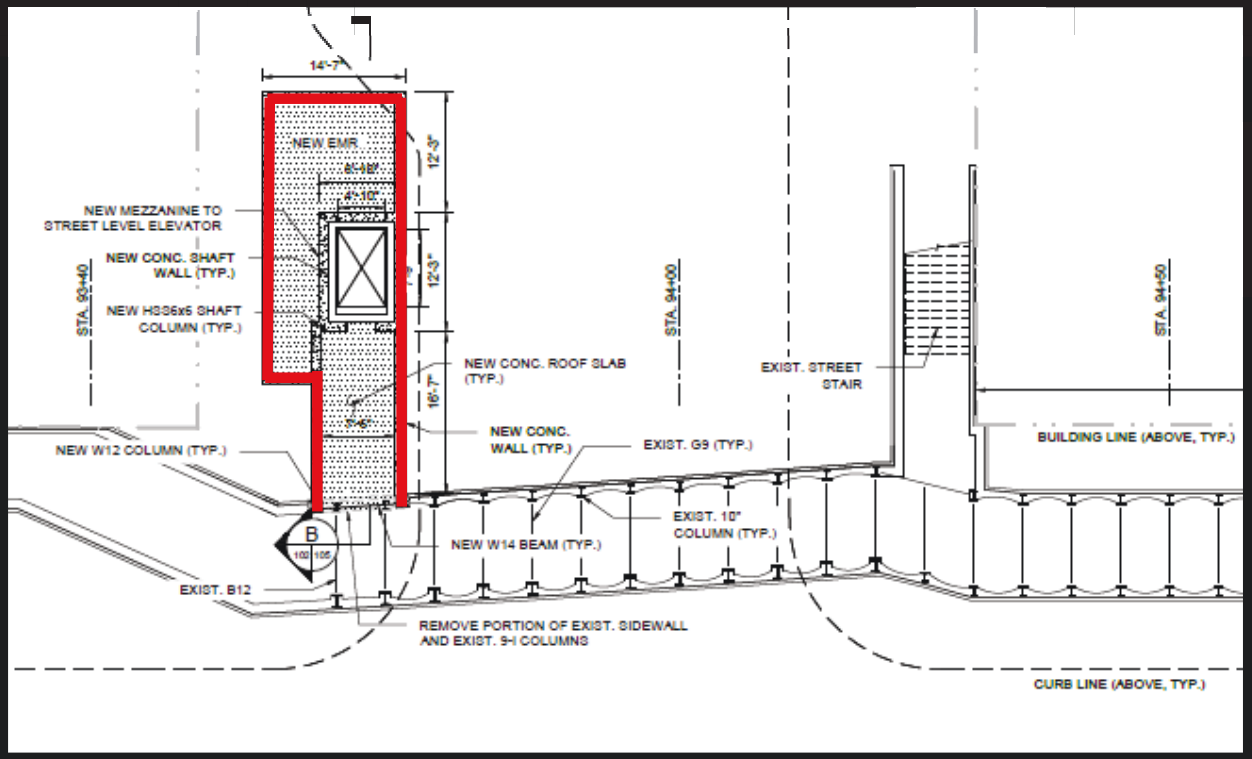
Street Level (Scheme B)

Case Study – 7th Avenue (F G -Line Brooklyn)



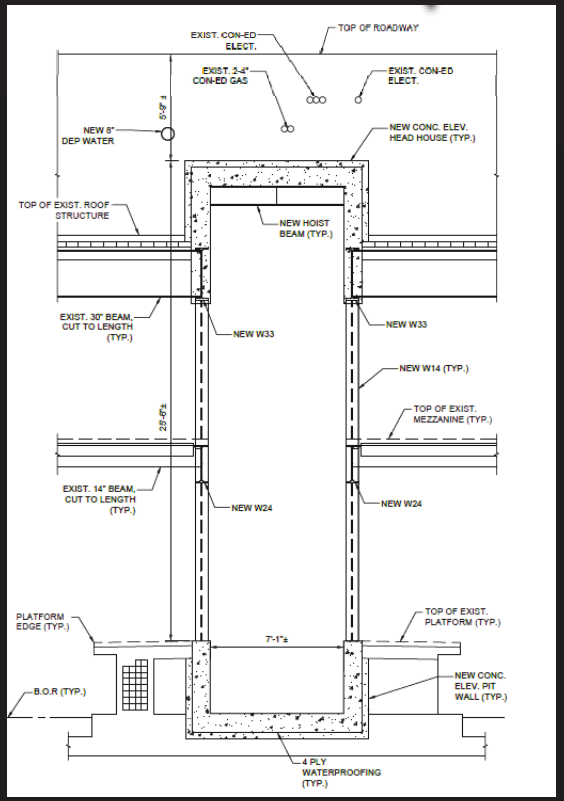
Street Level - Utilities

Case Study – 7th Avenue (F G -Line Brooklyn)



Mezzanine Expansion

Case Study – 7th Avenue (F G -Line Brooklyn)



Cross Section Platform Elevator

- ***Raise station roof***
- ***Modify mezzanine and platform structure***

Proposed Criteria

1. System-wide coverage
2. Transfer points and terminals
3. Proximity to major activity centers
4. Ridership
5. Demographics
6. Cost / complexity

Proposed Criteria

1. System-wide coverage

- Reduce large gaps between accessible stations to achieve more uniform coverage
- Example: Woodhaven Boulevard on the Jamaica line

2. Transfer points and terminals

- Improve connectivity by making the busiest subway transfer complexes accessible
- Also address major bus transfer points, such as terminal stations

3. Proximity to major activity centers

- For example, access to hospitals is a longstanding community priority
- Other types of activity centers are still being evaluated

Proposed Criteria

4. Ridership

- "Tiebreaker" to select from among possible alternatives for system-wide coverage

5. Demographics

- Demographic data, including Access-A-Ride origins and destinations, also being evaluated
- Correlates with major activity centers

6. Cost/complexity

- Conceptual costs from System-wide Study will inform the selection of stations

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 17

- X

CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK, a nonprofit organization; BROOKLYN CENTER FOR INDEPENDENCE OF THE DISABLED, a nonprofit organization; BRONX INDEPENDENT LIVING SERVICES, a nonprofit organization; HARLEM INDEPENDENT LIVING CENTER, a nonprofit organization; DISABLED IN ACTION OF METROPOLITAN NEW YORK, a nonprofit organization; NEW YORK STATEWIDE SENIOR ACTION COUNSEL, a nonprofit organization; SASHA BLAIR-GOLDENSOHN, an individual; CHRIS PANGILINAN, an individual; and DUSTIN JONES, an individual, on behalf of themselves and all others similarly situated

Plaintiffs,

- against -

INDEX NUMBER: 153765/2017

METROPOLITAN TRANSPORTATION AUTHORITY, a public benefit corporation, VERONIQUE HAKIM, in her official capacity as interim executive director of the Metropolitan Transit Authority, NEW YORK CITY TRANSIT AUTHORITY, a public benefit corporation, DARRYL C. IRICK, in his official capacity as acting president of the New York City Transit Authority, and THE CITY OF NEW YORK,

Defendants.

- X

60 Centre Street
New York, New York
March 5, 2018

BEFORE:

HONORABLE SHLOMO HAGLER, Justice.

APPEARANCES:

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BY: DANIEL BROWN, ESQ.

(Continued on next page.)

APPEARANCES: (Continued)

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MTA NEW YORK CITY TRANSIT
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NEW YORK CITY LAW DEPARTMENT
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New York, New York 10007
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MARGARET BAUMANN
OFFICIAL COURT REPORTER

Proceedings

THE CLERK: Center for Independence of the Disabled, New York, et al., versus Metropolitan Transportation Authority, et al., Index Number 153765 of 2017.

THE COURT: Good morning, everyone, welcome.

I heard the attorneys, City attorneys had a little trouble coming up. I hear we have had a lot of attorneys here.

MR. KERWIN: I apologize for the delay.

THE COURT: Actually, I finished most of the calendar. I appreciate the time you gave me to complete my calendar.

I want to welcome the audience that is here. I know this is an important case to many people, and it shows that people think this subject is significant, and they took the time and effort to come here, and I appreciate that.

Counsel for the defendant, are you ready to proceed with your motion motion to dismiss?

MR. KERWIN: Yes, your Honor.

MR. BOWE: Yes, your Honor.

THE COURT: Counsel, whenever your are ready.

MR. KERWIN: If it please the Court, Jim Kerwin for from the Office of the General Counsel of the New York City Transit Authority representing Defendants Metropolitan Transportation Authority, New York City Transit Authority,

Veronique Hakim and Darryl Irick, the latter two being sued in their official capacities.

In this matter, plaintiffs allege the approach being taken to retrofit subway stations with elevators or other equipment to make them accessible for persons with mobile disabilities.

THE COURT: You are going to have to speak up, and you are going to have to not read so much because everything is being recorded.

There are three issues, and I like to sum up. It is not that hard. You raised three points.

MR. KERWIN: That is correct, your Honor.

THE COURT: One is preemption; two is justiciability; three is a statute of limitations, when does the actual harm accrue to the plaintiffs herein. So let's go through all three aspects, rather than reading.

I'm very familiar with the case. I read all the papers. I read all the cases. As you saw, I just pulled out a couple -- I had about, thanks to you, about three hours this weekend reading cases and the like, and I reviewed it this morning again, and I just reviewed it again because I wanted to make sure I had the cases in front of me.

So I'm familiar with the case law. I read the entire file over the course of the weekend: Thursday,

Friday, Saturday, Sunday. So, it was a very large endeavor, but I want to be prepared, and it is important to me as well to know what the issues are.

I'm not necessarily giving you an answer today as you probably, I don't think, expect me to give you an answer to the question today. It is a very complicated issue on many fronts.

Let's go through first the concept of preemption, and then go to justiciability, and then go to statute of limitations.

MR. KERWIN: Certainly, Your Honor. If you will just indulge me for about one minute.

As you correctly point out, there are three different reasons why the Transit defendants have moved to dismiss. Those reasons have to do with the things like the proper allocation of authority between state and local government. They might seem somewhat technical to some of the audience members here today. I did want to take a moment to say --

THE COURT: I don't mind you saying what you like. I don't like you reading. Oral argument is not reading. It is giving me a flavor of what the issues are. It is heart, soul. It is brings everything together. We have to come to a resolution of this difficult issue.

MR. KERWIN: That's correct.

Proceedings

And I just to point out that by making these arguments we've been charged by the defendants of wanting to disavow any responsibility for making the Transit system more accessible, which is not true. I want to get that out there. I have more to say about that, but I will now move directly on that point.

THE COURT: I will allow you to say anything you want on these legal issues. I don't want you to do it an opening statement. Do so from your heart and brain, rather than from your paper. That is all I ask.

MR. KERWIN: Certainly, your Honor.

Turning to the first reason why the complaint in this matter should be dismissed, the New York State Legislature in Public Authorities Law Section 1266 sub 8 provided that no city shall have jurisdiction over any facility of the MTA or the New York City Transit Authority or any of their activities or operations, except for facilities devoted to non-transit purposes.

Under the plain reading of that statute, the claim in this case is barred.

As we point out in our briefs, to take a simple hypothetical, if the City Council of New York decided to go to the next MTA board meeting and say, While we appreciate the efforts you are making to increase accessibility in this system, it is not fast enough for us. We are hereby passing

a law that you need to comply with the new remedial plan that we are creating to add more elevators to the system.

There is no question that would be barred as an improper exercise of local authority over the Transit Authority under 1266 sub 8.

Plaintiffs do not even mention that in their brief because they realize they don't have a response to it.

The cases that -- actually every time that there has been an attempt similar to that, to apply a local enactment to cover an activity of the MTA or any of its constituent agencies going to a public transportation purpose has unanimously found that the claim was barred.

THE COURT: Give me examples. Because I didn't see too many that you cited.

MR. KERWIN: So, we cited five cases, your Honor. There is The *Village of Tuckahoe* case, where there was -- the MTA was building a construction project for a Metro-North Facility, and the Village attempted to apply its local zoning law to prevent that.

There was the *People vs. Long Island Railroad* case where Suffolk County had an environmental law that said for the protection of its citizens, it didn't want diesel fuel being used in Suffolk County. That was preempted under 1266.8.

People vs. Metro-North, that was a New York City

law being applied in the Bronx for fire safety. Very important topics all, and again that was found to be preempted by 1266(8)

There is the *Penny Port* decision which involved a local anti-smoking law in New York City, which could not be applied to the restaurant in Grand Central Terminal. No matter how important that local law was, it was preempted by 1266(8).

And there is the *CBS Outdoor* case, which is another case where New York City attempted to apply a local law, this time to the outdoor advertising, again preempted by 1266(8).

Every single case that has any relationship to the current case in front of your Honor has found 1266(8) preemption to apply.

THE COURT: Are they, any of those cases appellate cases?

MR. KERWIN: I don't believe they are, Your Honor.

The only cases that have construed 1266(8) that the plaintiffs cite that go in any direction in the opposite way are easily distinguishable. They come from two different contexts. One is in the employment context, where there was the case that it grows out of the case of a Court of Appeals called *Levy vs. New York City Commission on Human Rights*. That case wasn't a 1266(8) case.

Proceedings

THE COURT: First case I have on top of my pile that I read.

MR. KERWIN: That case was actually not a 1266(8) case because the institute didn't cover the Transit Authority at the time, but nonetheless, the reasoning of the case was that as a general matter, while the court agreed that public authorities created by the state should be free from local control in their mission-related activities, in the case of employment practices, the court read those as tangential to the purpose of the Transit Authority. Therefore, there was no reason to oust local jurisdiction over the Transit Authority.

THE COURT: Was it just employment context? Was it the area of discrimination?

MR. KERWIN: It is because it is the employment context, Your Honor.

This is an argument that the plaintiffs have made that we can ignore all. We can ignore the plain meaning of 1266(8) and we can ignore all of the cases holding the preempting local enactment simply because this is characterized by them as a discrimination case. In other words, because the subject matter is important, it must, therefore, override the will of the State legislature when it is enacting 1266(8) determining local jurisdiction.

There are no cases that say anything like that

whatsoever. The reasoning of the employment cases are that employment practices are, in the view of the court, tangential to the mission of the Transit Authority and to public authorities generally, which is clearly not the case when we are talking about this case, which involves an application of local rules, a direct development of subway stations, which are clearly Transit-related facilities.

The other line of cases that they cite involves a couple of cases in the context of premises liability tort actions. That is the *Huerta* case and the *Terranova* case. *Huerta* actually is also not a 1266(8) case. It was decided after the statute was amended in 2000, but the trial I believe happened before that time, and in any event 1266(8) is not mentioned in the opinion, so it is actually not relevant.

The *Terranova* case does proceed on the argument that under centuries of common law that hold when there is a premises liability tort action, a government premises owner is treated in its proprietary capacity, rather than its governmental capacity. The government acts just like any other private landlord would, and that's what that case holds.

Again, that has nothing to do with the case in front of us. The case in front of us involves an application of a local law to what everybody agrees is a

governmental purpose of the MTA and the New York City Transit Authority, that is, the development of Transit profits. So, that is what the cases hold, and that is what the plain language of 1266 holds.

THE COURT: Can I just interrupt for a second because I agree with you *Levy* and there is another case which you left out, *Tang vs. New York City Transit Authority,* and we talked about *Huerta vs. New York City Transit Authority*, they all talk about the concept that there must be compliance with the local law with regard to employment discrimination because it would not interfere with the function and purpose of the Transit Authority.

Why would that case interfere with the purpose and function of the Transit Authority if you provide handicap accessibility to the public?

MR. KERWIN: So, the decisions about where to make investments and on what pace we are going to retrofit a century old subway system and elevators and other things is a very complex set of decisions, and it is one of the main things that the MTA and the New York City Transit Authority have been set up to decide.

THE COURT: But, it is obvious that you have to do it. The question is not that you don't have to do it. The question is how fast it is going to happen.

MR. KERWIN: That is exactly right, your Honor.

This case is about the pace at which those investments are being made, and that is 100 percent the point. You are correct.

The New York City Transit Authority is not subject to, let's say again, to go back to the hypothetical I started with, if the New York City Council said, We don't like the pace that you are proceeding at even though the State of New York has authorized that and the Federal Government has, we think the pace should be faster, that is exactly what 1266(8) says, they do not have jurisdiction to do.

And again, I do agree with Your Honor that this case is not about the Transit Authority trying to take the position that there is nothing that we need to do to improve accessibility to the subway system.

Quite to the contrary. We are highly amenable to improving the accessibility of the public transportation system. It is a century old system. There have been plans in the works for decades, billions of dollars spent and more to be done. We're not saying there isn't more to be done. But what is wrong with this case is plaintiffs are trying to short circuit the process and have this Court decide for everybody.

Make no mistake, these decisions affect everybody, not just customers with disabilities, everybody else. There

are tradeoffs involved.

THE COURT: It affects them in a good way.

MR. KERWIN: I'm sorry.

THE COURT: It affects them in a good way, not a bad way.

MR. KERWIN: There are tradeoffs. If you build a hundred new elevators in the next year, there won't be resources for things like signal upgrades and resources for trains. At least those are the kinds of decisions that are entrusted --

THE COURT: This is a 3211 motion. I don't know that to be the case.

You haven't opened up your pocketbook and shown me where the dollars and cents are, and you cannot do X and Y because of A, B and C.

MR. KERWIN: You are right, Your Honor. This is not -- I'm not asking the Court to make any factual finding. The point is to explain why there is a 1266(8) statute out there that restricts local governments and jurisdiction over these kinds of questions, and not to mention the Transportation Law 15-B. That is what, as a general matter, that the general policy behind having these decisions entrusted to, that is, to the Transit Authority, to the MTA, that sort of thing. That's my response.

Would you like me to go on to the 15-B argument?

Proceedings

THE COURT: Yes please.

MR. KERWIN: As an independent reason, the claim in this case is barred by a couple of enactments of the New York State Legislature embodied now in Transportation Law 15-B. That statute is a comprehensive statute aimed at making the New York City subway system, in fact, the entire public transportation system accessible. It is entitled, The Statute for New York City Accessible Transportation System. It is a highly detailed statute. It has a number of requirements and three major prongs.

It requires the retrofitting of a certain number of subway stations with accessibility features. It also required at the time, it was through now, that the busses and the subway system and the public transportation system become wheelchair accessible, and it also provided for a para transit system.

It is very important just from the face of the statute, it is clear those three things were part of a comprehensive approach to accessibility of public transit in New York City.

We have more than just the statute itself. We have the legislative history materials that have been cited to the Court, which include very clear statements that, in fact, the legislature of New York State was not just saying the policy of the State is improving accessibility at all

all costs. It was recognizing that there are, indeed, tradeoffs, and it was making a compromise between what the plaintiffs seek in this case, a full access alternative and other approaches to accessibility. That is what the legislature of the State of New York has done.

And under every case that we have cited general preemption principle, the field that we are talking about here, that is, investment in subway station accessibility has clearly been preempted by the State legislature.

We also argue there is straight conflict preemption between the provisions of Transportation Law 15-B and the way the plaintiffs seek to apply it.

THE COURT: I want to make clear to the audience there are two distinct portions of preemption:

You have field preemption, which means that some other statute or Federal agency has put into place a mechanism whereby they are interested in that subject.

And then, you have the other part called conflict preemption, which means the laws conflict. It is simple, that one law conflicts with the other.

So there are two types of preemption documents.

Sorry, I wanted to explain what we talking about. You shifted from field preemption to conflict preemption.

MR. KERWIN: And we argue both of those apply in this case. They are independent of each other. We don't

need to spend a lot of time belaboring.

Field preemption is particularly strong. There are not very many cases where you have statements in the legislative record that basically say, here we have rejected it as a legislative body, what the plaintiffs in a particular case are seeking to do. I could talk more about those cases.

THE COURT: Do you have those statutes with you?

You want to read part of it into the record.

MR. KERWIN: From the legislature?

THE COURT: The language which says that preempts the field.

MR. KERWIN: There is a number of different things that are happening in the statute itself. There is the comprehensive character of the legislation, and the fact that it has highly detailed provisions and establishes administrative mechanisms and all that sort of stuff that the case law clearly shows evinces an attempt to preempt. There is preemption provision 15-B sub 7.

And then there is what I have been highlighting is the matter in the legislative history, for just one example, and I've quoted a number of these things in our brief.

Senator Ohrenstein, one of the chief proponents of this bill said in the debate that discussing the adoption in 1984 of the accessible transportation system in New York

City that, quote, "The system that is being created in this bill is a two-part system. One addresses" --

THE COURT: Just read it slowly please.

MR. KERWIN: (Continuing) "One addresses the mainstreaming of the stations of the subway system in the City of New York, and a selected number of key stations will be constructed so as to provide direct access to the subway system by the disabled. This will be at a cost of $50 million over a period of eight years. The key to these subway stations will be the most innovative part of this proposal and probably a historic part of this proposal."

Skipping a little bit:

"A Para Transit System."

Skipping forward:

"The para transit system saves, perhaps, hundreds of millions of dollars which otherwise would have been expended pursuant to the law at this time in order to make all the stations of the system available."

There are other statements in the legislative history that have been quoted in the briefs. They all go the same way.

It is very clear that the State legislature again was not just interested in let's build out accessibility features at all costs. It was making a compromise between that position, that is, the position of the plaintiffs in

this case, and something else.

And that the State did that preempts the field, and means plaintiffs cannot apply the local law of the City of New York to undue the compromise that the State of New York made.

THE COURT: What is the plan of the Transit Authority to make the Transit system more accessible?

MR. KERWIN: It is interesting you ask that, Your Honor.

First of all, there are a number of projects that are currently in the current capital plan that are being planned and constructed as we speak.

There are also a number -- this is all is, by the way, outside of the pleading, but since you've asked -- there are a number of other things, this is all in the public record. There is a study that is being initiated as we speak to look at every single one of the three hundred odd stations that don't currently have elevators, and once and for all figure out what it is that it would take to make those stations accessible, and that is the first part of the planning process to go to the next level.

THE COURT: You are moving in that direction.

MR. KERWIN: We absolutely are.

THE COURT: Is there a timetable for that?

MR. KERWIN: Not to my knowledge, Your Honor.

The new president of the Transit Authority -- by the way, I'm sure a lot of people in this room know this, there is a brand new president of the Transit Authority as of January of this year, who has made making accessibility improvements one of the four pillars of his administration. It is a very exciting time to be working on these issues.

If I may, Your Honor, I guess I could go onto justiciability argument very quickly. I do think that the plaintiffs have done themselves and the Court a disservice by more or less ignoring this argument. It is a serious argument. There are certain kinds of questions that are dedicated to the political branches of government, questions that go to broad things like, for example, large scale public works projects which involve tradeoffs that affect everybody in the State of New York, which is exactly what we are talking about here.

The decisions that the plaintiffs would like to have this Court make for the MTA New York City Transit Authority would affect lots of people as we pointed out a couple of different times. Courts are not set up to make these kinds of decisions as the cases that we cited hold.

The only thing the plaintiffs have said in response to this is that because their case characterizes an anti-discrimination case, therefore, it must be justiciable.

But that's not what the justiciability doctrine

turns on. Justiciability doesn't have anything to do with the character of the claim being asserted. It has to do with the remedy being sought and whether the Plaintiffs are seeking to embroil the judiciary into areas that are reserved to the political branches of government. Okay.

THE COURT: I was a little confused by that argument in one small way. I just don't know what the remedy is.

MR. KERWIN: Well, the remedy that they pled, that there will be a judicially enacted remedial plan, which will require the Transit Authority to add accessibility.

THE COURT: That could be ten years, right?

MR. KERWIN: I don't think that makes any difference.

THE COURT: That could be twenty years.

MR. KERWIN: Same thing could have been said in the chief case we cited, *New York City vs. Cuomo* case where the Department of Corrections made a decision to close a prison, and the argument was by some employees that this will violate a law that employers must give their employees a safe workplace.

It wasn't as if courts are without capacity to entertain lawsuits about safe work places. It was about whether the court should get -- it was about the remedy, should the court get embroiled in that very important and

political decision about that.

THE COURT: You're saying if the agency doesn't do it, the courts just shy away, put its head in the sand, and just ignore all the people that can't ride our subways for the last decade or so or decades?

MR. KERWIN: Your Honor, the cases hold that when major decisions like this are entrusted to the political branches of government that is what they need to be -- that's what the forum in which --

THE COURT: The judiciary can't come in and save the day, is that what you are saying?.

MR. KERWIN: This is the justiciability doctrine. There are limits to the judicial power, Your Honor, and this is one of them. I mean you could characterize it --

THE COURT: Issue injunctions all the time. We deal with Mental Hygiene cases with people's liberty. We put people in jail and habeas corpus. We deal with constitutional issues, but we can't deal with an issue of whether or not a person can reasonably go into a subway and get to their location in a normal way?

MR. KERWIN: Sure. And, the Court of Appeals --

THE COURT: Doesn't sound complicated.

MR. KERWIN: But the Court of Appeals says the judiciary lacks capacity, for example, to tell the Department of Correction whether it could open or close a

particular prison. That's what the cases hold. I understand, I understand your point of view, but you have to understand mine.

THE COURT: That is very different. Opening and closing a prison is certainly a governmental function that would be very different than the simple trek of a handicapped individual or even someone with a big carriage who cannot go into a subway because the TA could not find the money or could not find the wherewithal so that a person can navigate our Transit system.

That is very different than the situation that you just talked about. It is the right thing to do. It is not about a prison closing or not closing. Very different, very personal and very significant right that every citizen enjoys. It is just not plain fair.

MR. KERWIN: I understand your point of view, your Honor. I could talk some more about this.

THE COURT: You could continue.

MR. KERWIN: I think actually makes sense to go on to the statute of limitations, unless you have a specific question for me.

THE COURT: I have no question about justiciability.

MR. KERWIN: On statute of limitations, I think the argument is fairly straightforward New York City, the law in

New York City Section 8-502(d) provides that any claim must be commenced within three years after the alleged unlawful discriminatory practice or acts occurred.

We argue that the acts occurred here when the subway stations were opened with stairs and no elevators. It is a clear case law.

THE COURT: You have case law -- I had trouble with that. Actually, that was the one that gave me the most pause because are you saying that, for argument sake, that every single person that is disabled had to have sued when the subways were created?

And you say, let's say in 1953, I think that was the date that you picked in your papers, I don't know why, but in the 1950's or so, everyone that wasn't born yet, would have to have come from the mother's belly and started a case before they were even born.

MR. KERWIN: We do cite some cases, Your Honor, They are not under the New York City Human Rights because there has been no litigation on this.

But under the American With Disabilities Act, we cite you a case from the Ninth Circuit which talks about making a distinction between the alleged discriminatory practice and the continuing effects of that practice. That is the key distinction.

THE COURT: Is that the *Disabled Action of*

Pennsylvania?

MR. KERWIN: No.

THE COURT: Which case did you cite? Just remind me again.

I didn't see any New York State case law you cite.

MR. KERWIN: It is not a New York State case, neither are any of the cases that plaintiffs cite in response.

THE COURT: Correct. The New York City Human Rights Law is liberally interpreted under the Restoration Act. And why would I interpret it so narrowly to say that the accrual would have been when you put a shovel in the ground or when you completed the transportation system so that the accruals for every single subway platform.

So let's say you made that platform in 1953. The accrual would be several years later, one in 1956, one in 1970. So what are you saying, that that would be a thicket of statute of limitations accrual law.

MR. KERWIN: That seems to me what you say is a fairly straightforward and clear statute of limitations regime, which doesn't seem difficult at all to administer, but I will note to you the case, *Garcia vs. Brockway*, 526 F3d 456. Yes, that is a Ninth Circuit case, and it covers the Americans with Disabilities Act, which has similar statutory language on the statute of limitations.

Proceedings

THE COURT: The ADA and New York City Human Rights Law have very different analyses, and *Bennett* and others that came out and the progeny of cases that came after that, Judge Acosta's brilliant decision actually stated the opposite of what you said, and stated that the interpretation of New York City Human Rights Law would be liberally construed, and we will not follow the Federal Law, the ADA, in respect to New York City Human Rights Law.

If there is a way to decide with the aggrieved person under *Bennett* and the progeny of cases that came out and the City Council's intent of the law was to broaden the ambit of those that would be aggrieved by the effects of discrimination whether it be disability or otherwise.

MR. KERWIN: Okay, your Honor, we respectfully disagree with that view, but I understand the Court.

THE COURT: Okay. Have you completed your argument?

MR. KERWIN: I have. Thank you.

THE COURT: Thank you, counsel.

Opposition please.

MS. GOODELL: Good morning, your Honor.

As you could see, this is a civil rights case which challenges the exclusion of hundreds of thousands of people, many of whom are here today.

THE COURT: Not hundreds of thousands.

Proceedings

MR. BROWN: They're in the hallway.

THE COURT: The courtroom is not big enough. Our building is not big enough.

MS. GOODELL: But I do think that the number of named class members that showed up today show the importance of this matter as Your Honor has said.

THE COURT: It is clearly an important issue. I think for everyone here.

I was very grateful that even the Transit Authority realized that the step in the right direction is to make accessibility a very significant priority.

And I was worried when you came in here that they are going to argue that that is not a goal of the Transit Authority. That would have hurt me, and I think that would have hurt our great City, State and Country to even mention those words in a court of law.

MS. GOODELL: Absolutely.

I'm Maia Goodell from Disability Rights Advocate Center, and I'm here with my colleague Emily Seelenfreund who is pending admission, also from the Disability Rights Advocates, and Daniel Brown co-counsel.

So, as Your Honor said, the MTA has three main arguments. But the reality is that no case has ever held what the MTA is urging this Court to hold, which is the MTA has a free pass to violate the New York City Human Rights

Law.

There is no dispute on this motion to dismiss that the complaint alleges a manifest violation of the New York City Human Rights Law, which is the 75 percent exclusion from the system of people with disabilities for whom there are a barrier.

THE COURT: Actually 76.

MS. GOODELL: Actually, 76 percent.

And contrary to what the MTA was suggesting, they do not have any plan ever to get above 70 percent accessibility, and that is really what this case is about.

THE COURT: Is there any system that has hundred percent accessibility?

MS. GOODELL: Absolutely, your Honor.

THE COURT: Which one?

MS. GOODELL: In fact, Washington D.C.

THE COURT: One hundred percent.

MS. GOODELL: One hundred percent accessible.

New York is dead last by several times than any other system in this country, including older systems.

The second largest system in the United States is Chicago. They are 74 percent accessible -- excuse me 67 percent accessible.

THE COURT: So two thirds of the system.

MS. GOODELL: And Boston is 74 percent accessible,

and each of those systems have a plan to get 100 percent accessibility.

THE COURT: You hit it on the head, and I think I was grateful to hear it, I will mention again, the goal is 100 percent accessibility. Are you saying if we reach 75 percent, you still have a cause of action?

MS. GOODELL: At this point, we don't know.

What we know is the complaint alleges a cause of action because there is such extreme exclusion and because there is no plan ever to get to inclusion.

Now, what we are asking is an assessment of the system by experts and a plan to reach accessibility of what the City law requires, which is fully --

THE COURT: Are you arguing that you would have -- that the TA has to expend billions of dollars tomorrow to make it 100 percent accessible?

MS. GOODELL: Absolutely not, your Honor.

What we are asking for is a plan to get to what the City law requires, which is full and equal access on equal terms and conditions.

THE COURT: What if it is ten years later?

MS. GOODELL: It may take time.

We're not saying it won't. That is a question for the experts, and that is a question for the experts later in the case, not on a motion to dismiss.

At this point in the case, it is very premature to speculate about what the remedy is going to require. We know that other systems have done much.

THE COURT: What is the remedy you require?

MS. GOODELL: We are asking for an assessment of the system and a plan to get to full and equal access on equal terms and conditions.

Now, the MTA has an affirmative defense, which is undue hardship under the New York City Human Rights Law. That is an affirmative defense, and they could certainly prove that later in the case with respect to any specific problem or issue or decision. That is the remedy that they have, but that doesn't block this case from going forward.

With respect to preemption, I believe that Your Honor correctly understood that the Public Authorities Law.

THE COURT: Maybe speak up. I see some of the audience members can't hear you.

MS. GOODELL: I'm sorry.

With respect to preemption, under the Public Authorities Law, I believe that Your Honor was correct that the *Levy* case, which is a controlling Court of Appeals case holding for the New York City Human Rights Law, does apply to the MTA. And by the MTA, by the way, I'm referring to all defendants.

The *Levy* case is not different because it involved

employment. The MTA has to employ employees, but discrimination is not a core function of the MTA, and that is true whether they are employing employees to operate their system or building stations to operate their system.

If there is any doubt about that, the First Department, *Huerta* -- *which is H-U-E-R-T-A* -- the First Department *Huerta* case holds that the MTA's operation of an escalator has to conform to local law of general application with respect to safety, so there is no conflict preemption, and there is, obviously, no field preemption for the Public Authorities Law because the Public Authorities Law doesn't touch the field of discrimination.

What about the Transportation Law? The Transportation Law does set a floor.

THE COURT: I'm sorry. I couldn't hear you.

MS. GOODELL: The Transportation Law, which is a 1984 law, amended in 1994, it sets a floor of a minimum number of stations that have to be made accessible. But, as we know, as Your Honor knows, Justice Acosta in the *Williams* case said that the local -- that the City -- that the State law is the floor below which the Human Rights Law cannot fall. It is not a ceiling above which the local law cannot rise.

And that is true here if we look at the wording of the law. The wording of the Public Authorities Law says

"accessible stations shall include the key stations." It doesn't say it is limited to the key stations.

In fact, the MTA admits they made other stations accessible. It doesn't say you can't do that. So there is no conflict, and that is why what they are calling a preemption provision of the Public Authorities Law is inapplicable here because that law -- because that clause simply says that to the extent other laws are inconsistent with that law. It is not inconsistent to make more stations accessible than was envisioned in 1984 or 1994.

With respect to the legislative history, the primary thing that defendants rely on is actually an executive statement. It is a query whether that is even legislative history.

But what the government says is these are the stations that we are going to have a comprehensive plan right now as in the 1994 to rehabilitate first. It says "first." It doesn't say "ever."

THE COURT: Let me just play devil's advocate. In the field preemption doctrine, if there is a comprehensive plan that the State legislature has either specifically delineated or inferred some sort of authority, then normally the courts would defer to the State and the local law would preempt it. How do you address that argument?

MS. GOODELL: Well, what the First Department says

in *Patrolmen's Benevolent Association* is that there has to be an unmistakable intent to preempt the field and that that preemption --

THE COURT: Repeat that again. I didn't hear you.

MS. GOODELL: What the First Department says in the *Patrolmen's Benevolent Association* case --

THE COURT: I'm familiar with the case.

MS. GOODELL: -- is that there has to be an unmistakable legislative intent to preempt the field.

THE COURT: What does that mean "unmistakable?"

MS. GOODELL: What Justice Acosta explains is that normally if the State law is silent, localities can legislate, that is, as he says, is the essence of home rule, right.

So there has to be an unmistakable legislative intent to preempt the field, and that is rare in civil rights cases is what Justice Acosta says in the *Patrolmen's Benevolent Association* case.

This is not that rare case. The cases that defendants cite, those cases involve tenants to block something that the MTA is doing, some specific action that they are trying to take.

This case is like the *New York State Club Association* case, which is a Court of Appeals case, which holds that the New York City Human Rights Law, the same law

at issue here, can be broader than what was envisioned at the State level on the issue of public accommodation.

So, there it had to do with whether clubs were public accommodations. The State defined it more narrowly. The City defined it more broadly. The Court of Appeals said that was fine, there is no unmistakable intent to preempt the field.

THE COURT: So, how do you say that when the actual Transportation Law states that there has to be accessible train stations and designates various subway stations that are key to the transportation of the citizens of the City of New York?

So you are saying it is a broad stroke of legislation. So, since it is not specific as to requiring more stations to be handicap accessible, then there is a lack of an unmistakable right to preemption.

MS. GOODELL: I'm sorry.

It is not unmistakable, in fact, it is not there.

What the law says is key stations, accessible stations shall include those stations, which was a start, a floor.

THE COURT: So they could have said, shall include all stations, but they didn't. They said shall include various key stations. So that is not addressing the field, and that is unmistakable or that is mistakable? I don't

know what that words means, "unmistakable."

To me it means did the legislature create legislation that would show a comprehensive plan for accessibility in the subways.

MS. GOODELL: The Transportation Law actually did expressly preempt one law, which was the Buildings Law, right.

THE COURT: DOB, right.

MS. GOODELL: So, the Transportation Law knew how to preempt it if it had wanted to preempt the local civil rights accessibility law, and it didn't.

THE COURT: The New York City Human Rights Law, I think was not -- are you saying that since it did not specifically state that New York City Human Rights Law was preempted, it is not?

MS. GOODELL: It didn't specifically state New York City Human Rights Law is preempted. It also didn't say a hundred stations is the ceiling, right.

It says, we are going to start there, right. We are going to rehabilitate those first. But it didn't say that no further accessibility was ever envisioned. The field here is antidiscrimination law, and there is no unmistakable intent under the Transportation Law to preempt that field.

And to understand, and this also is a statute of

limitations argument, but to understand the ongoing policy and practice that we are challenging, Paragraphs 91 through 94 of the Complaint explain that the MTA is continually closing down stations, making improvements, making renovations without improving accessibility.

They just announced a nearly $1 billion enhanced station which will close down 33 stations and make zero improvements to accessibility. The field of that discrimination has not been preempted.

With respect to justiciability, I think actually it is best said in the main case that the MTA relies on, which is the *New York State Inspection, Security and Law Enforcement Employees* case, the Court of Appeals said quote:

"It is within the power of this judiciary to disregard the vested right of a specifically protected class of individuals in a fashion recognized by statute."

That is what we are asking for here.

I don't know if your Honor has other questions, about justiciability or preemption. I could move onto the statute of limitations.

THE COURT: Again, to play devil's advocate with respect to justiciability, does the Court really have the authority to set up a plan whereby the New York City Transit Authority makes the subway completely accessible to the public? Has there ever been a case in the State of New York

where a court has done so?

I didn't look very hard, and I don't think there has been.

MS. GOODELL: Well, Your Honor, this is the kind of things the courts do all the time, right, to order systematic relief for a system that is systematically discriminatory. Courts have been doing it since the date of segregation.

THE COURT: I hear that, and courts have interfered, and I hate to use that word, but that is the word that counsel used before. Courts have rightly asserted judicial rule when there was a breakdown in the governmental rule. I think that is fair, and you have seen that throughout the generations and the legal precedent in this country, especially in New York City.

But, has there ever been a case that you could point to in the context of the New York City Transit Authority where a Court has intervened and stated that as a result of the failure to provide handicap accessibility, the court will impose a certain remedy on the New York City Transit Authority?

MS. GOODELL: With respect to New York City, I'm not sure, your Honor.

THE COURT: Any other state? I'm sorry.

MS. GOODELL: It happened in Boston, right. There

was a 2006 case which was resolved in a way that now has the plan to go to 100 percent accessibility.

THE COURT: So, there was a decision by a court or was there a stipulation?

MS. GOODELL: There was a decision by a court I believe followed by a stipulated agreement, settlement agreement.

THE COURT: I hear a stipulated agreement. Was there a decision by a court saying the court has the authority to regulate and direct the right thing to do, which is 100 percent accessibility within a reasonable time?

And I don't remember seeing that case cited by any of the parties.

MS. GOODELL: Right.

THE COURT: What is the Boston case? Do you have a citation for that?

MS. GOODELL: The reality is that case was resolved, your Honor, that is correct.

THE COURT: That I understand. The right thing to do, and I repeated it now I think several times, is to make the New York City Transit Authority 100 percent accessible to all citizens, and all transit goers from the entire international world.

This is an international city, and you could expect that at any point in time that there is a myriad of

non-citizens from all over the world as well as our own proud citizens of New York City that would enjoy 100 percent accessibility. That goal I think is very clear, and I think it was even stated by the New York City Transit Authority.

The question is the timetable. The question is what is the remedy. The question is when will that occur.

MS. GOODELL: I agree. And it is very good to hear that the MTA is starting to study these issues.

Obviously, the study can be shelved. That's why what my client is asking for is a declaration that accessibility is a legal right.

THE COURT: Okay.

MS. GOODELL: It is not an amenity to be balanced against.

THE COURT: Has there been a case that the court has declared the relief you just requested?

MS. GOODELL: Not to my knowledge, Your Honor. That's what we are looking for Your Honor to do.

THE COURT: I thought so because I could not find one.

MS. GOODELL: The Massachusetts' case, which again was settled, is Daniel Figel vs. MBTA. The case number is 02 CV 11504, District of Massachusetts, it was settled in 2006.

THE COURT: Was there ever a court decision by a

judge that provided for any relief to the plaintiff? Or just a plain settlement at the very outset?

MS. GOODELL: It was settled after some discovery and expert analysis.

THE COURT: So there was no decision by a court.

Settlements are always the best policy, I agree with him.

Why don't you move on.

MS. GOODELL: We do to too.

The statute of limitations, obviously, this is challenging an ongoing policy and practice asking for only injunctive relief against an ongoing --

THE COURT: Repeat that again. I didn't hear you.

MS. GOODELL: This case is challenging an ongoing policy and practice asking for only injunctive relief. So there is no statute of limitations issue.

THE COURT: What injunctive relief are you asking for?

MS. GOODELL: We are asking for a declaration that --

THE COURT: A declaration is not injunction. You are mixing up the two animals.

MS. GOODELL: You are correct, Your Honor. We are asking for a declaration followed by relief. It is a little premature at this point to say exactly what that relief will

look like, but it will involve an assessment to the system and a plan to get to full and equal access.

So, because we are asking for ongoing -- because we are asking for injunctive relief, there is no statute of limitations issue. But Your Honor is correct that the Continuing Violations Doctrine is broader under the New York City Human Rights Law, and Justice Acosta specifically addressed that in the *Williams* case.

I'm not sure if we should be addressing the City's argument.

THE COURT: You are.

You will have your opportunity, and you'll get your last word. Then we will have to break. I have another case after this as well.

MS. GOODELL: The City raised a number of arguments for the first time in their reply, which we would argue in and of itself is improper. The main new argument is what they are called a landlord out of possession and don't have a control. And the case they rely on is the *Robinson* case at page four of their reply brief.

I want to point out to the Court that that case was expressly disapproved in the Court of Appeals in *Coleman vs. City of New York*, 91 NY2d 821, 823 1997. What the court there held is that when a statute makes an owner liable, and there it was a Labor Law, here, it is the New York City

Human Rights Law, where it makes the owner liable, control doesn't matter.

New York has landed last in the country because for decades the MTA has been left unchecked --

THE COURT: Speak up.

MS. GOODELL: -- has been left unchecked to ignore the rights of people with disabilities for whom stairs are a barrier to access the system.

Now is the time to make this a system for all New Yorkers, including people with disabilities and people who will develop disabilities. They deserve their day in court.

Thank you.

THE COURT: Counsel, you get the last word.

MR. BOWE: I have nothing to add, your Honor.

THE COURT: Can you explain that last issue because I don't understand the *Robinson* issue. You argue you are an out-of-possession landlord.

MR. BOWE: We do, Your Honor.

THE COURT: What does this have to do with the accessibility of the -- maybe you are an out-of-possession landlord. You are not putting in those handicap accessible elevators and other devices.

MR. BOWE: First let me say, I apologize, I am not familiar with the review of that case by the Court of Appeals. I can't speak to the holding of that cite in the

Court of Appeals case. We do cite other cases for that very basic well settled --

THE COURT: Tell me the concept. I really didn't pay too much attention to it. Let me hear what you have to say.

MR. BOWE: It is just simply, Your Honor, that the City of New York doesn't, does not have the legal ability to go in and make any changes to facilities; that the City Transit Authority and MTA have full and total jurisdiction.

THE COURT: This is argued only by the City of New York.

MR. BOWE: Correct, your Honor.

THE COURT: Okay. Can you just address the argument by the City of New York here, why we need the City of New York, when we know that the Metropolitan Transit Authority is a separate public corporation?

There is case law that I remember that I have dismissed out cases when there is, for instance, a slip and fall in the Transit Authority System, and they always sue the City of New York, first defense that usually gets dismissed out is the City of New York because they have no authority over the New York City Transit Authority. Pursuant to the Public Authorities Law, they became a separate entity.

So, I'm not saying you wouldn't have full relief

anyhow because, quite frankly, it is the Metropolitan Transit Authority that makes decisions, obviously, with public and political support, but that is a political process, rather than a legal liability issue. So why would the City be liable at all?

MS. GOODELL: Well, the Court of Appeals explained in the *Colon* case is that the Labor Law, the Scaffolding Law there, where it says that an owner is liable because the statute says an owner is liable, it doesn't turn on the common law test of control. It turns on a question of are they the owner, and technically the City of New York is the owner of the subway system.

I would also argue, Your Honor, that the City is a necessary party regardless because full relief in this case will undoubtedly require things like ramps across sidewalks or alterations to historic structures, things that the City would need to approve.

THE COURT: Let me understand what you are saying. You need the City of New York because you want to put ramps on City property, is that what you're saying?

MS. GOODELL: Essentially, the City has fairly broad veto power over a lot of things that happen in public areas. So, if there needs to be a full relief in this case, if there needs to be an elevator built up to a subway or sidewalk or a historic structure that is altered, the City

has to approve that. Well, that's why they are a necessary party in this case.

THE COURT: Okay. I just wanted to understand that last issue.

MR. BOWE: Just to respond, counsel references various other administrative procedures with respect to City property beyond transportation facilities that are governed by a whole host of rules and regulations and procedures. So I'm unclear as to that aspect of counsel's argument that is in support of the need for the City as a necessary party. The City completely disagrees with that and does not feel a justification for that argument has been offered.

And I'd just like to reiterate and underscore, Your Honor, because the City, for example, we note in our papers that the City doesn't have title to even any equipment within transportation facilities, so the City has no legal ability. The Court would, in effect, have to overturn the cited statutes in order for the City to have authority to do what it is that plaintiff is seeking.

THE COURT: Okay. It seems very problematic to require the City of New York to make these changes to the system.

Many, many years ago, there was a movement afoot that actually went into law which separated out the New York City from the Metropolitan Transit Authority to make it a

separate entity. Quite frankly, in terms of notice of claim, in terms of ownership liability, they are separate entities, and that goes all the way up to the Court of Appeals, and I'm not so sure it is necessary to have the City of New York.

Obviously, money, obviously, political power, obviously, the public from the City of New York are important players in the transaction. But, in terms of liability, I'm not so sure the City of New York would have any liability to require a change of this nature in the structure of the Transit system. It doesn't mean that the MTA could not do that. It means that it may have proper parties even without New York City as a defendant in this case.

Is that the reason why we have Motion Sequence Numbers 3 and 4? Because they look alike.

MR. BOWE: Yes, your Honor.

THE COURT: I was just curious.

Any other any further arguments?

MR. KERWIN: Yes, your Honor, may I?

THE COURT: Yes, certainly.

MR. KERWIN: One second.

Going back to Public Authorities Law 1266(8) and Transportation Law 15-B, I heard a lot of general discussion about things, very little discussion about what the statutes

actually say, again, saying that the City of New York lacks jurisdiction over Transit facilities and activities.

I was really interested to hear plaintiff's counsel describe what they would like to have happen in this case, that is, have experts come in and analyze the accessibility of the system, and then create a bunch of procedures that would need to be followed to do that. If the City of New York attempted to do that itself, I think there is no question whatsoever that would be barred under 1266(8). In fact, the City agrees with our position on this, that it is the same thing if the plaintiffs attempt to do that through this lawsuit.

And as far as the general proposition that the system should be made more accessible, not only do we agree with that, but we do not make any arguments, for example, State law could be the subject of a lawsuit potentially, or may be Federal law, I don't know. We haven't been presented with those complaints.

What we have been presented with a complaint that relies only on the New York State Human Rights Law. That is what is preempted. That's what I have to say.

THE COURT: Let me ask you the same question, has there been any lawsuits of this nature anywhere within the State of New York?

MR. KERWIN: Not that I know of.

Proceedings

THE COURT: All right.

MR. BROWN: Your Honor, if I may just say one thing. This discussion about your question about how this happened before, could the Court interfere.

THE COURT: I like the word intervene.

MR. BROWN: Intervene.

THE COURT: They used the word interfere. I like the word intervention.

MR. BROWN: It hasn't happened yet. A case like this hasn't been brought under this very important City law which, as you noted, was amended to make it even broader. So that is no reason that this case shouldn't go forward.

But the argument that the Court would have to intervene-slash-interfere, it is so premature at this point, and I want to give you an example.

If we found out in discovery in this case or in a similar case that the MTA was intentionally discriminating, they were deciding not to build subways in minority neighborhoods, they were deciding specifically not to build elevators where most of the disabled were, of course, the Court could step up and say, That can't happened.

That is why this case is not preempted. It is it is a discrimination case. That is the field that is at issue, not the issue of operating the subways and building and planning.

What we are seeking is entirely consistent with that, and it doesn't contradict it at all. And, of course, the Court has the ability to stop discrimination, and we should have the opportunity to prove that that is what is happening.

Thank you.

MR. KERWIN: Your Honor, if I could just address that for a moment. There are no allegations, obviously, that anybody at the MTA or New York City Transit Authority has been intentionally discriminating against anyone in this case.

And, in fact, obviously, if we were doing that, that would be a violation of both New York State and Federal law, and there is nothing that we have argued that in any way implies that we would not be subject to sanctions for that.

THE COURT: Okay. Thank you, everyone.

I just want to make a closing remark. I was very happy to hear that the Metropolitan Transit Authority understands that need for a hundred percent accessibility. Right now the statistics are that we are dead last in the field of handicap accessibility for an international city like the City of New York. That is deplorable. Twenty-four percent of our subway system is handicap accessible. We rank dead last for such a wealthy and

significant city.

In essence, New York City is the capital of the economic engine of our country. It doesn't befit the City to have such a deplorable system of where someone, just because they can't walk well, just because they have a wheelchair, they are infirm cannot make it through our system the entire way. That is just simply not fair.

What I am going to do is just like what happened in Boston, I am going to hold in abeyance the motions while we sit down and talk. Let's have a settlement conference. We will schedule on another day.

I think the important matter for all the citizens of the City of New York is that we make headway in a reasonable manner so that we reach our goal of 100 percent accessibility in our subway system.

Time is really not on the side people sitting here, citizens of the City of New York. We must do so quickly to address a wrong. I'm not sure if there is a legal premise, but certainly the right thing to do is to get it done.

I understand that there are costs that are attendant to changing the system, but that is money. Money is being spent on our system. Let it be spent wisely on making it fair and reasonable and making it accessible to all New Yorkers. Show that we care, that we are a caring city, and that we are going to address this important issue.

Proceedings

Therefore, this Court will hold the motion in abeyance pending a settlement discussion of all the parties. I require all parties with authority to be present in court on a date that my clerk will give you to come here another date.

Thank you.

The foregoing constitutes the order of the Court.

MR. BROWN: Thank you, your Honor.

(Proceedings recessed.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

_____
MARGARET BAUMANN
OFFICIAL COURT REPORTER

D

Z

EXHIBIT C

DRA
DISABILITY RIGHTS ADVOCATES
A non-profit corporation

California Office
2001 Center Street, 4th Floor
Berkeley, CA 94704-1204
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Fax: (510) 665-8511
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www.dralegal.org

October 29, 2018 *Via Certified Mail*

Denise Fraser
Deputy Executive Assistant General Counsel/Freedom of Information Officer
130 Livingston Plaza, 12th Floor
Brooklyn, NY 11201

Dear Ms. Fraser:

This is a request for public documents pursuant to the New York State Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90. Please email copies of the following records to me at mgoodell@dralegal.org:

1. Documents sufficient to reflect all project scope descriptions or similar information provided to potential contractors for the global accessibility survey ("Accessibility Survey") that the MTA is currently conducting and is referenced in Press Release, Metropolitan Transportation Authority, Funding For Subway Station ADA-Accessibility Approved (Apr. 26, 2018); and NEW YORK CITY TRANSIT, FAST FORWARD: THE PLAN TO MODERNIZE NEW YORK CITY TRANSIT 41 (2018).

2. All documents or information reflecting any work MTA performed to create a request for proposal (RFP) or other documents used to solicit bids from third party contractors to perform any work on the Accessibility Survey.

3. All bids or other documents reflecting proposed work received from third party contractors to perform any work on the Accessibility Survey.

4. All documents or information provided to or received from any third party engaged to perform work on the Accessibility Survey.

5. All documents or information reflecting any work MTA performed in preparing the Accessibility Survey.

6. Copies of the records referenced in the final paragraph on page 2 of the attached letter dated December 4, 2014, from Gricelda Cespedes to John Day.

If any of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for copying all records onto a CD or otherwise reproducing the remainder of the records requested. As a nonprofit civil rights firm with limited resources, we request a fee waiver or discount for any expenses

associated with this request. In the alternative, please notify us if the production of these documents will incur more than $1,000 in costs for our organization.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial and provide me with the name, address, and email address of the person or body to whom an appeal should be directed.

Please contact me at 212-644-8644 if you have any questions about this request.

Sincerely,

Maia Goodell

Encl.: Letter from Gricelda Cespedes to John Day, Dec. 4, 2014.

EXHIBIT D

130 Livingston Street 12th Floor
Brooklyn, NY 11201

New York City Transit

November 05, 2018

Maia Goodell
Disability Rights Advocates
655 Third Avenue, 14th Floor
NEW YORK, NY 10017

Re: Freedom of Information Law
Request No. 23396

Dear Ms. Goodell:

This is to acknowledge receipt of your Freedom of Information Law request dated October 29, 2018, wherein you requested the following:

1. Documents sufficient to reflect all project scope descriptions or similar information provided to potential contractors for the global accessibility survey ("Accessibility Survey") that the MTA is currently conducting and is referenced in Press Release, MTA, Funding for Subway Station ADA- Accessibility Approved (April 26, 2018); New York City Transit, Fast Forward: The Plan to Modernize New York City Transit 41(2018).
2. All documents or information reflecting any work MTA performed to create a RFP or other documents used to solicit bids from third party contractors to perform any work on the Accessibility Survey.
3. All bids or other documents reflecting proposed work received from third party contractors to perform any work on the Accessibility Survey.
4. All documents or information provided to or received from any third party engaged to perform work on the Accessibility Survey
5. All documents or information reflecting any work MTA performed in prepared the Accessibility Survey, etc.
6. Copies of the records referenced in the final paragraph on page 2 of the attached letter dated December 4, 2014 from Gricelda Cespedes to John Day.

Your request has been forwarded to the appropriate department(s) for research.

Please be advised that the NYCT FOIL Unit receives a high volume of requests ranging from a simple request for one document that can be readily located to complex requests for multiple documents, such as records relating to a construction project. Typically, the FOIL Unit requests documents from other departments, which then must locate the documents and forward them for review by the FOIL Unit to determine if they are disclosable under the law. As a result, the time and effort required to complete a response can vary significantly.

NYCT endeavors to complete each request in a time period that is reasonable under the circumstances. A few examples of the types of requests and estimated times for responses are:

A.) Requests for accident reports, Payment and/or Performance Bonds for a particular contract, Board Minutes or other records that can be identified and located by going to one source - one to three months.

B.) Requests requiring research to determine the type of records that may be responsive - six to eight months.

C.) Multiple or voluminous requests seeking to obtain records pertaining to contracts - six months to one year.

We believe that your request falls into the category that usually takes 12 Months to complete. We would expect that our response should be completed by 11/02/2019.

We will notify you if we cannot provide you with responsive records within the aforementioned time.

If you are able to narrow or further specify the records you seek, it may permit the FOIL Unit to complete the process in a shorter time period. Please use the above number when corresponding to advise us of this more narrow request.

The fee for this service is $.25 per page of material provided. NYCT will advise you of the cost as soon as responsive documents are made available to us. Upon receipt of a check or money order to cover the costs of the documents, we will forward those records that are disclosable.

Should it become necessary to inquire further regarding this request, please refer to the above Freedom of Information request number in your correspondence.

Sincerely,

Manpreet Kaur
Deputy FOIL Officer

EXHIBIT E

DISABILITY RIGHTS ADVOCATES
A non-profit corporation

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December 5, 2018

By Hand

Fernando Ferrer
Chairman, Metropolitan Transit Authority
2 Broadway, 4th Floor
New York, NY 10004

Patrick Foye
President, Metropolitan Transit Authority
2 Broadway, 4th Floor
New York, NY 10004

Andy Byford
President, MTA New York City Transit
2 Broadway, 4th Floor
New York, NY 10004

Re: Freedom of Information Law Request No. 23396.

Gentlemen:

We write to appeal the November 5, 2018 response to our October 29, 2018 Freedom of Information Law (FOIL) request, which claims it will take an entire year to produce a small number of identified documents related to a single, discrete project. The request and response are enclosed.

Pursuant to N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2017), an agency unable to produce the documents within the statutorily required twenty days must provide a written explanation for its inability to do so and state a date certain within a reasonable period by which the agency will grant the request. If the specific date given is unreasonable, a request may be considered to have been constructively denied. See, e.g., N.Y. State Comm. Open Gov't Advisory Op. No. 19034.

A requestor may contest, and New York courts are authorized to review, the reasonableness of the date certain specified by an agency by which it will produce a FOIL determination. Cf., N.Y. State Comm. Open Gov't Advisory Op. No. 17821. Here, the date certain provided by NYCT is not reasonable and constitutes a constructive denial of our FOIL request by means of unreasonable delay, which we hereby appeal pursuant to N.Y. PUB. OFF. LAW § 89(4)(a) (McKinney 2017).

I. MTA'S PROPOSED YEARLONG DELAY IS UNREASONABLE BECAUSE THE REQUESTED RECORDS ARE PUBLIC AND EASILY OBTAINABLE.

The MTA has no rational basis for a year long delay in disclosing records that are public and easily obtainable. See, e.g., N.Y. State Comm. Open Gov't Advisory Op. No. 10833; 11079. The delay is unjustified under the factors outlined in Matter of Linz v. The Police Department of the City of New York, NYLJ, Dec. 17, 2001, at *22, col. 6 (Sup. Ct., N.Y. Cty) (Richter, J.). Linz held that a determination of whether a period is reasonable must consider the volume of the documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Id. The New York State Committee on Open Government has also more broadly construed the factors implicated to include the possibility that other requests have been made. See, e.g., N.Y. State Comm. Open Gov't Advisory Op. No. 8717; 10083; 10525.

The request calls for documents related to the accessibility study that the MTA has touted in a press release. See Press Release, MTA, Funding for Subway Station ADA-Accessibility Approved (April 26, 2018), http://www.mta.info/news/2018/04/26/funding-subway-station-ada-accessibility-approved; MTA, MTA BOARD ACTION ITEMS 26 (Apr. 25, 2018), http://web.mta.info/mta/news/books/pdf/180425_1000_Board.pdf; NEW YORK CITY TRANSIT, FAST FORWARD: THE PLAN TO MODERNIZE NEW YORK CITY TRANSIT 41 (2018), https://www.mta.info/sites/default/files/mtaimgs/fast_forward_the_plan_to_modernize_nyct.pdf. There is no reasonable basis to delay a full year in producing these documents. MTA board meeting minutes reveal that "[t]he contract for the study was awarded late last year to Stantec Engineering and their work is well underway." MTA, MTA BOARD ACTION ITEMS 26 (Apr. 25, 2018), http://web.mta.info/mta/news/books/pdf/180425_1000_Board.pdf.

The request also seeks copies of what appears to be a single document – a record referenced in the final paragraph on page 2 of the attached letter dated December 4, 2014 from MTA chief ADA officer Gricelda Cespedes to Federal Transit Administration Office of Civil Rights ADA team leader John Day. Again, there is no reasonable basis for a one-year delay in producing this document.

Finally, to the extent that any of the requests do impose a burden which is not apparent, the MTA should produce the documents that can be readily identified and produced immediately, and discuss with us any requests that inadvertently sweep too broadly. We are happy to discuss narrowing or other compromises as needed.

II. DRA APPEALS THIS CONSTRUCTIVE DENIAL OF OUR FOIL REQUEST.

If, as DRA has argued, the specific date given is unreasonable, a request may be considered to have been constructively denied. See, e.g., N.Y. State Comm. Open Gov't Advisory Op. No. 19034. Once constructively denied access by NYCT's failure to comply with the time limits for response required by N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2017), DRA must then appeal the denial to the agency head within 30 days as required by N.Y. PUB. OFF. LAW § 89(4)(a) (McKinney 2017). Should NYCT fail to render a determination within 10 business days of the receipt of this appeal, DRA will have exhausted its administrative remedies and may initiate a challenge to the constructive

denial of access under Article 78 of the Civil Practice Rules consistent with Floyd v. McGuire, 452 N.Y.S. 2d 416, 418 (N.Y. App. Ct. 1982). See also N.Y. C.P.L.R. § 7801 et seq. (McKinney 2017).

Given the resource intensive nature of litigation, DRA would prefer to resolve this matter short of Article 78 litigation and requests NYCT appropriately grant our FOIL request. We look forward to favorably resolving this matter in the interest of public transparency.

Should you have any questions about the nature of this appeal or wish to contact me to expedite granting this request, you may reach me at (212) 644-8644.

Sincerely,

Maia Goodell

Encl.: FOIL Request dated October 29, 2018
Response to FOIL Request dated November 5, 2018

cc: Manpreet Kaur
Deputy FOIL Officer
130 Livingstone Plaza, 12th Floor
Brooklyn, NY 11201

James Henly, Esq., James Kerwin, Esq., and Eamonn Foley, Esq.
New York City Transit
2 Broadway
New York, NY 10004

2 Broadway
New York, NY 10004

Carmen Bianco
President

New York City Transit

December 4, 2014

John Day
ADA Team Leader, Office of Civil Rights
Federal Transit Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Mr. Day:

Enclosed please find our responses to the FTA's October 2, 2014 comments on our NYCT Project List matrix submitted September 19, 2014.

The FTA responded to our submission with comments in an additional column "H – FTA Comments." Our responses to FTA's comments are in column "F – MTA Comments" in red lettering. This is a brief outline of our responses:

1. Where the FTA has asked for more information, we have attempted to provide it.
This applies to the following project numbers on the matrix: 36, 37, 38, 39, 40, 41, 42, 90, 95, 96, 112, 115, 116, 117, 118, 119, 120, 123, 124, 125, 126, 128, 129, 133, 148, 149, 150, 151, 152, 153 and 154.

2. Where the FTA has asked for feasibility studies for stations that already have full vertical accessibility or are already scheduled to become fully ADA accessible, we have added the comment "Fully ADA accessible – no feasibility study required."
This applies to the following project numbers: 19, 23, 98, 108, 113, 142 and 143.

3. Where the FTA has asked for feasibility studies for component stair replacement, it is NYCT's position that stair replacement does not trigger a vertical accessibility obligation.
This applies to the following project numbers: 10, 14, 17, 28, 32, 44, 47, 49, 51, 52, 55, 71, 91, 92, 100, 102, 103, 104, 105 and 106; as well as to the component escalator replacement in project number 70.

4. Where the FTA has asked for feasibility studies for stations undergoing renewals that do not include planned vertical access, it is NYCT's position that although each of these projects includes work to the primary function area, the installation of vertical access is not required because it would be disproportionate (i.e., would exceed 20% of the cost) to the overall cost and scope of the work.

This applies to the following project numbers on the matrix: 1, 2, 3, 4, 5, 6, 7, 8, 18, 20, 21, 22, 24, 25, 26, 66, and 75.

5. Where the FTA has asked for feasibility studies for projects that are non-stair component work, we have indicated: "No feasibility study is required."

This is true for the following project numbers: 29, 67 and 82.

Please be advised that in order to facilitate effective long term planning for ADA investments, NYCT is undertaking an "Accessibility Survey" of all remaining stations which lack vertical accessibility. A pilot study of 6-8 typical stations is planned to commence in the second quarter of 2015. From these results, a finalized scope will be developed for a competitive procurement utilizing teams of consultants to survey and provide NYCT with an assessment for each station of the work required to make the station vertically accessible. This data will serve as a planning foundation for prioritizing and categorizing stations that can most efficiently be made vertically accessible.

Sincerely,

G. Cespedes

Gricelda Cespedes, P.E.
Chief, Program Coordination, Compliance and ADA Officer
Capital Program Management
MTA New York City Transit

cc: L. Ford
F. Smith
A. Carr

EXHIBIT F

MTA New York City Transit

Fast Forward:

The Plan to Modernize New York City Transit

Contents

We will deliver on four equal priorities by grounding everything we do in our foundations of Agility & Accountability, Safety, Security & Resiliency, and Customer Service & Communication.

Accelerate Accessibility

Engage & Empower Employees

Priority

Accelerate Accessibility

Accessibility strengthens our transit system, and it's the right thing to do. As a conduit to employment, opportunity, culture and community, transit should give all members of the public a reliable way to travel. An accessible system benefits us all, because at some point, many people will find getting around more challenging — it could be because we use a wheelchair, or have vision or hearing loss, or are elderly and have trouble climbing stairs, or have a cognitive disability, or have a baby in a stroller, or any number of other challenges.

Enhanced training • New sensitivity training for all employees in the next year, with targeted training for station agents, Paratransit and bus operators, and others.

Better information • Enhanced elevator outage and alternate routing information on website, kiosks, email, mobile app and text alerts by end 2018

More direct routes • New Access-A-Ride scheduling and dispatch system by end of 2019

Accessibility Advisor • Executive Accessibility Advisor, reporting directly to the President, hired by end 2018

Accessible stations • 50+ new accessible stations within 5 years, so all subway riders are no more than two stops from an accessible station

Prioritize accessibility

Why? Because for too long people with disabilities have felt that their concerns and needs have not been adequately heard and addressed by our transit system.

Done in 2018

- **Hire an executive-level Accessibility Advisor,** reporting directly to the President, responsible for ensuring accessibility is considered and advanced across our transit system.
- **Engage the accessibility community in critical decisions** including the design of new vehicles, the design of our new fare payment system, and how we evolve the role of station agents outside of booths.
- **Expand training** on working with customers with visible and invisible disabilities. This includes new sensitivity training for all 50,000 NYCT employees to be completed in the next year, and targeted training for station agents, Paratransit operators, platform controllers, and local and express bus operators. There will also be enhanced training for bus operators on the operation of wheelchair lifts.

Commit to a clear plan and timeline for station accessibility

Why? Because the subway should be accessible to everyone. While installing elevators at stations is complicated and expensive, we have a responsibility to make as much of our system accessible as quickly as possible. Our plans in this area build on the work of the MTA Board Work Group on Station Accessibility.

- **Create a prioritized plan** based on a study of all remaining inaccessible stations, using criteria defined in consultation with the accessibility community. The plan will consider the need for property, street and/or sidewalk space for elevator installation.
- **Increase coverage so that all subways customers are no more than 2 stations away from an accessible station** within 5 years.
- **Increase the rate at which elevators are being installed at stations to make them accessible,** from 19 in the current five-year Capital Program to more than 50 in the next 5 year program, with the goal of achieving maximum possible accessibility in 15 years.

Make paratransit responsive

Why? Because our Access-A-Ride customers should be able to expect fast, reliable, friendly service, just like any user of our transit system. Our plans in this area build on the work of the MTA Board Access-A-Ride Work Group.

Foundations

Agility & Accountability

Improved paratransit performance dashboard (p. 58)

New elevator and escalator dashboard (p. 58)

- ◇ **Simplify processes for Access-A-Ride customers,** including reevaluating the application process and reviewing the need for reassessments.
- ◇ **Provide ride-hailing options for eligible Access-A-Ride customers,** expanding on the current pilot program in a cost-efficient manner.
- ◇ **Modernize scheduling and dispatching** of dedicated service and third-party vehicles to enable more direct and flexible routing.

Done in 2018

- ◆ **Launch an accessible, all-in-one MyAAR app** which makes it easy for customers to schedule rides, track vehicles, give feedback and update account information. The app, which is slated for release in summer 2018, was developed in consultation with our AAR customers.
- ◇ **Allow Access-A-Ride vehicles to use bus lanes,** in coordination with the NYC Department of Transportation.

Improve communication for people with disabilities

Why? Because when you have a disability and you take transit, communication can be the difference between a maze of dead ends and a system you can depend on.

Foundations

Customer Service & Communication

Improved accessibility, quality, and consistency of real-time information (p. 72)

Increased use of real-time information screens (p. 72)

- **Provide clear instructions about alternate routes** in the event of an elevator closure, elevator breakdown, or other unexpected barrier to mobility.
- **Improve accuracy and availability of real-time information about elevators and escalators** on our website, in apps, and in digital signage.
- **Provide customer-friendly materials for riders with disabilities,** including clear information about how to use the system and opportunities to practice using bus wheelchair lifts in a safe environment.

Upgrade accessibility features throughout the system

Why? Because accessibility for people with disabilities is about much more than elevators — it's about consistent design that aids mobility for those with mobility devices, vision loss, hearing loss, and cognitive and other invisible disabilities.

Foundations

Customer Service & Communication

Strengthen checks on performance of PA systems (p. 72)

- **Accelerate installation of consistent accessibility features,** including installing tactile strips on platform edges, reducing platform edge gaps, and increasing announcements that are presented both visually and through clear, understandable audio.
- **Consider accessibility in our bus network redesign,** including considering demographics and community needs and working with NYC Department of Transportation on the placement and design of new bus shelters.
- **Revise maintenance practices** to make elevators and wheelchair lifts more reliable.
- **Identify options to redesign fare gates** for improved access, including allowing autogate to accept all fare types and providing wider turnstile/gates.


Exit
Hudson Blvd East
& Buses
via mezzanine
Help
Point

EXHIBIT G

2 Broadway
New York, NY 10004
212 878-7000 Tel

Metropolitan Transportation Authority
State of New York

December 26, 2018

Disability Rights Advocates
655 Third Avenue, 14th Floor
New York, New York 10017-5621

Attn: Maia Goodell

Re: Freedom of Information ("FOIL") Appeal

Dear Ms. Godell:

I am writing in response to your December 5, 2018 FOIL appeal addressed to Fernando Ferrer, acting Chairman of the MTA regarding your October 29, 2018 FOIL request submitted to New York City Transit ("NYCT").

NYCT receives numerous requests on a daily basis. Each request is carefully reviewed by a FOIL Officer who then makes a determination as to the time frame it will take to respond to the request. The acknowledgement letter you received sets forth an estimate of the time it will take to gather and review documents which are sought by your specific FOIL request, and is based on the parameters of your request.

Your FOIL appeal is therefore premature at this time. NYCT will provide a response to you on a rolling basis, as documents become available.

We now consider this FOIL appeal closed.

Very truly yours,

Harris Berenson
Deputy General Counsel

cc: Committee on Open Government

EXHIBIT H

From: Maia Goodell
To: Murphy, Theresa
Subject: RE: NYCTA - FOIL Request No. 23396
Date: Wednesday, March 27, 2019 11:37:00 AM

Theresa,

We appreciate your getting in touch, and we agree that we would like to resolve this matter. However, we are very concerned about the lack of substantive response even two weeks after our call with you. At that time, you said we would be receiving documents "shortly," but we have heard nothing further and received no documents. Indeed, it has been almost five months since our request, and we have yet to receive a single responsive document, a date certain by which we will receive any documents, or any written assertion of privilege or other concern that would interfere with production of any of the requested documents.

Nevertheless, as previously noted in my letter of March 7, we have already agreed to a narrowing of the request to: (1) the Request(s) for Proposal for the Survey work; (2) contracts with firms engaged in Survey work; (3) reports of completed station surveys, of which the MTA apparently has more than 150.

In order to understand the MTA's response and thereby evaluate whether we can resolve this matter without an Article 78 Petition, we request a written update (1) identifying with specificity the documents or categories of documents you plan to produce, (2) the date you plan to produce them (with a beginning and end date if on a rolling basis), (3) identifying any categories of documents you believe are privileged and the basis for the privilege claim; and (3) setting forth any other concerns or requests to further narrow the requests.

We hope we can look forward to productive discussion. However, failing to receive a response with the level of specificity described above by April 10, we will have no choice but to seek Court intervention.

Thank you,
Maia

From: Murphy, Theresa <Theresa.Brennan-Murphy@nyct.com>
Sent: Wednesday, March 20, 2019 12:24 PM
To: Maia Goodell <mgoodell@dralegal.org>
Subject: RE: NYCTA - FOIL Request No. 23396

Maia,
Last week we received additional procurement records for each of the chosen bidders/contractors for the Station ADA Analysis – while reviewing the packages to prepare for production in FOIL, questions arose for us re: whether the documents forwarded are complete and final copies etc. The FOIL department is part of the Law Department not the operating divisions where the documents

needed to respond to FOIL are stored/maintained. We have to work with our operating divisions to obtain the appropriate responsive documents.

As we discussed on the phone last week, I have stepped in to assist, and to every extent possible, expedite this process (including the review and preparation of the documents to be produced). While we are working on getting the final procurement documents you requested, we are also in the process of gathering and preparing copies of some of the available analyses/surveys for production in accordance with F.O.I.L. We plan to begin the rolling production on those shortly.

I do not believe that commencing an Article 78 Petition will benefit either party in this regard. I will continue to be your contact with respect to this FOIL and will be happy to keep you up to date on the progress.

Theresa Brennan Murphy
Executive Assistant General Counsel
New York City Transit Authority
130 Livingston Street – 12th Floor
Brooklyn, New York 11201
Tel. (718) 694-3901

From: Maia Goodell [mailto:mgoodell@dralegal.org]
Sent: Tuesday, March 19, 2019 3:34 PM
To: Murphy, Theresa <Theresa.Brennan-Murphy@nyct.com>
Subject: RE: NYCTA - FOIL Request No. 23396

Theresa,

I am just following up on our conversation of last week. I believe you told us some documents were being produced within a few days. We haven't received anything yet – has something been sent?

From: Murphy, Theresa <Theresa.Brennan-Murphy@nyct.com>
Sent: Tuesday, March 12, 2019 7:10 PM
To: Maia Goodell <mgoodell@dralegal.org>
Subject: RE: NYCTA - FOIL Request No. 23396

As do I. Have a nice evening.

From: Maia Goodell [mailto:mgoodell@dralegal.org]

Sent: Tuesday, March 12, 2019 7:09 PM
To: Murphy, Theresa <Theresa.Brennan-Murphy@nyct.com>
Subject: RE: NYCTA - FOIL Request No. 23396

Good to hear from you; we look forward to keeping an open line of communication, as discussed.

Maia Goodell ¦ Disability Rights Advocates
Supervising Attorney
655 Third Avenue, 14th Floor, New York, NY 10017
P 212 644 8644 ¦ F 212 644 8636 ¦ www.dralegal.org

From: Murphy, Theresa <Theresa.Brennan-Murphy@nyct.com>
Sent: Tuesday, March 12, 2019 6:55 PM
To: Maia Goodell <mgoodell@dralegal.org>
Subject: NYCTA - FOIL Request No. 23396

Hi Maia,

It was a pleasure speaking with you today. As we discussed, I am the Acting Head of the FOIL Unit and am working closely with Manpreet Kaur, the FOIL officer assigned to this matter, to respond to your request as quickly as possible. Below you will find my contact information. Please do not hesitate to contact me with any further questions or communications related to this matter.

Theresa Brennan Murphy
Executive Assistant General Counsel
New York City Transit Authority
130 Livingston Street – 12th Floor
Brooklyn, New York 11201
Tel. (718) 694-3901

EXHIBIT I

DRA
DISABILITY RIGHTS ADVOCATES
A non-profit corporation

Home Office
2001 Center Street, Fourth Floor
Berkeley, CA 94704-1204
Telephone: (510) 665-8644
Facsimile: (510) 665-8511
www.dralegal.org

New York Office
675 Third Avenue, Suite 2216
New York, NY 10017
Telephone: (212) 644-8644
Facsimile: (212) 644-8636
www.dralegal.org

September 19, 2017

Via Certified Mail

Denise Fraser
Deputy Executive Assistant General Counsel/Freedom of Information Officer
130 Livingston Plaza, 12th Floor
Brooklyn, NY 11201

Dear Ms. Fraser:

This is a formal request for public documents pursuant to the New York State Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90. Based on this request, please email copies of the following records to me at rrodgers@dralegal.org:

> All "Accessibility Survey" documents for all remaining New York City subway stations which lack vertical accessibility, including all pilot studies and assessments of the work required at each station to make the station vertically accessible.

If any of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for copying all records onto a CD or otherwise reproducing the remainder of the records requested. As a nonprofit civil rights firm with limited resources, we request a fee waiver or discount for any expenses associated with this request. In the alternative, please notify us if the production of these documents will incur significant costs for our organization.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial and provide me with the name, address, and email address of the person or body to whom an appeal should be directed.

Please contact me at 212-644-8644 if you have any questions about this request.

Sincerely,

Rebecca Rodgers

EXHIBIT J

DISABILITY RIGHTS ADVOCATES
A non-profit corporation

Home Office
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New York, NY 10017
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Facsimile: (212) 644-8636
www.dralegal.org

January 3, 2018

Via Certified Mail

Denise Fraser
Deputy Executive Assistant General Counsel/Freedom of Information Officer
130 Livingston Plaza, 12th Floor
Brooklyn, NY 11201

Dear Ms. Fraser:

This is a formal request for public documents pursuant to the New York State Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90. Based on this request, please email copies of the following records to me at rrodgers@dralegal.org:

> All "Accessibility Survey" documents for all remaining New York City subway stations which lack vertical accessibility, including all pilot studies and assessments of the work required at each station to make the station vertically accessible.

This request specifically seeks copies of the records referenced in the final paragraph on page 2 of the attached letter dated December 4, 2014, from Gricelda Cespedes to John Day.

If any of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for copying all records onto a CD or otherwise reproducing the remainder of the records requested. As a nonprofit civil rights firm with limited resources, we request a fee waiver or discount for any expenses associated with this request. In the alternative, please notify us if the production of these documents will incur significant costs for our organization.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial and provide me with the name, address, and email address of the person or body to whom an appeal should be directed.

Please contact me at 212-644-8644 if you have any questions about this request.

Sincerely,

Rebecca Rodgers

Encl.: Letter from Gricelda Cespedes to John Day, Dec. 4, 2014

EXHIBIT K

SUPREME COURT, NEW YORK COUNTY

NYLJ, December 17, 2001

MATTER OF LINZ v. THE POLICE DEPARTMENT OF THE CITY OF NEW YORK — Petitioners bring this Article 78 proceeding seeking to compel respondents to provide records and documents pursuant to Public Officers Law §89, et. seq., which is the NY Freedom of Information Law (FOIL). Petitioners are professors at three different colleges and are engaged in research on sociological/criminal law issues. The data sought by petitioners is fully described in the petition. Basically, petitioners seek a "data disk/CD-ROM" containing information for the period from July 1, 1998 to June 30, 2001 of logged 911 calls leading to dispatch and reported by geographic section (also referred to as CFS-911 calls). Petitioners also seek a copy of the codebook used to interpret the 911 calls and physical sector maps for the five boroughs of New York City.

During June and July of this year, petitioners were in communication with and met with staff in the NY Police Department Management, Analysis & Planning Division regarding this data request. Petitioners claim that based on these conversations and meetings, they believed that the NYPD was going to provide the data, that the preparation of a data disk/CD-ROM containing the requested information was either done or almost done by mid-July, and that the materials would be available for pickup on July 12, 2001. Petitioners further contend that this pickup did not happen because on July 20, 2001, petitioner Larry Heuer was informed that the release of the data was not being approved by senior or supervisory personnel employed by respondents. In his affidavit submitted to this Court, petitioner Heuer contends that Lt. Costello of the NYPD told him that there were "political forces" that were preventing the release of the data.

Respondents have submitted affidavits, including one from Lt. Costello, disputing that petitioners ever were told that a CD-ROM had been compiled or that all the materials were available for pickup. Rather, Lt. Costello contends that any statement he made about the data being on someone's desk referred to the underlying documents and not to any CD-ROM. Furthermore, Lt. Costello contends that he specifically asked petitioner Heuer if he had received approval from a Deputy Commissioner and informed petitioner that the information could not be released without approval from a supervisor.

On July 26, 2001, petitioner Linz made a written FOIL request concerning the materials that are the subject of this litigation. On July 30, 2001, Lt. Daniel Gonzalez of the NYPD Legal Bureau wrote to petitioner Linz stating that a preliminary determination had been made that, if the requested materials were contained in the files of the NYPD, they were at least partly disclosable under FOIL. However, Lt. Gonzalez indicated that the disclosure request could not be granted until the records were located and a review was conducted to determine whether any part of the data was exempt from disclosure under FOIL. Lt. Gonzalez indicated that this process would be completed within 120 days of the letter, which would be November 30, 2001.

On August 8, petitioner Linz wrote to the Records Access Appeal Officer of the NYPD indicating that he believed that his FOIL request had been constructively denied and he was appealing that decision. In that letter, petitioner contends that the 120 day period outlined in Lt. Gonzalez' letter violates FOIL and that the Police Department could not have legitimately needed 120 days since the data had been available for pickup in mid-July.

In September, petitioners filed the instant action seeking an order directing respondents to provide immediate access to the records listed in the FOIL request and also seeking attorneys' fees and other reasonable litigation costs. Respondents filed a cross motion to dismiss contending that this Court lacks jurisdiction since respondents have not yet denied petitioners' request, but merely indicated that they would take 120 days to review the documents. Furthermore, respondents contend that the instant action should be dismissed because petitioners failed to exhaust administrative remedies.

Public Officers Law §89(3) does not set forth the time period for delivery by an agency of documents requested under FOIL. Rather, the statute merely requires that the agency, within five business days of the receipt of a written request, make the record available, deny the request in writing, or furnish a written acknowledgment containing an approximate date when the request will be granted or denied. Respondents contend that this litigation is premature since no challenge was appropriate until the 120 day period requested by the NYPD had passed and a final determination had been made by the agency. This argument, if accepted, would completely insulate from judicial review an agency's decision about the amount of time it needed to respond to FOIL requests. It would also undermine the very purpose of FOIL, which is to promote the public's right to know about the workings of government by allowing access to information kept by government agencies. See generally, Russo v. Nassau County Comm. College, 81 N.Y.2d 690 (1993); Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979).

In the absence of a specific statutory period, this Court concludes that respondents should be given a "reasonable" period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL.[1]

The Court concludes that petitioners had a right to file this Article 78 action seeking to compel respondents to provide these documents. Indeed, it is undisputed that an Article 78 proceeding would be the appropriate vehicle to challenge respondents' actions if they ultimately informed petitioners that they were not going to provide some or all of the requested materials. See In re Alicea v. NYPD, __ A.D.2d __, 731 N.Y.S.2d 19 (1st Dept. 2001); In re New York Public Interest Research Group v. Cohen, 188 Misc.2d 658 (Sup. Ct. N.Y. Cty. 2001). This Court sees no reason to conclude that such a proceeding is inappropriate now simply because respondents, in essence, contend that they are entitled to a "waiting" period of 120 days before petitioners have a right to bring such an action.

In denying respondents' motion to dismiss, this Court recognizes that there may be cases in which a lawsuit, such as the one filed here, might indeed be premature. Certainly, an individual requesting documents under FOIL should give the agency some time to respond to the request before commencing litigation. This Court, however, need not decide what such a period should be since at this point the 120 days originally requested by respondents to answer the FOIL request have now passed.[2] Furthermore, although the factual affidavits submitted to this Court raise some question about whether the data had been fully compiled prior to this litigation, the affidavits also unquestionably establish that petitioners had been working with respondents to identify the specific data for several months prior to the actual commencement of this litigation. Thus, petitioners did not act precipitously, under all the circumstances, in bringing the instant case.

Finally, this Court rejects respondents' claim that the instant action should be dismissed because petitioners failed to exhaust administrative remedies by appealing respondents' FOIL actions. First, petitioners did file an administrative appeal on August 8 by writing to the Record Access Appeals Officer. Furthermore, respondents' argument that petitioners' letter of appeal to the Records Access Officer was premature is simply a reiteration of their position, which this Court finds unpersuasive, that petitioners were not entitled to take any action until the entire 120 day period had passed.

Respondents have requested additional time to answer on the merits in the event this Court denies their motion to dismiss. Although it is difficult to determine what purpose could be served by adjourning the matter for more legal papers, this Court must allow respondents time to file an answer. See Garlick v. Sielaff, 202 A.D.2d 192 (1st Dept. 1994); 230 Tenants Corp. v. Board of Standards and Appeals. 101 A.D.2d 53 (1st Dept. 1984). This Court will permit respondents ten days from the issuance of this decision to file an answer.[3] Furthermore, petitioners' request for attorneys' fees and other litigation costs is held in abeyance pending receipt of respondents' answer, which should also address this issue.

Accordingly, respondents' cross-motion to dismiss is denied. If respondents wish to file an answer, they must do so no later than December 13.

This constitutes the decision and order of the Court.

---

(1) The Appellate Division in Lecker v. NYC Board of Education, 157 A.D.2d 486 (1st Dept. 1990), declared invalid a regulation issued by the Committee on Open Government requiring that record access be granted or denied within ten days of the request. The Lecker opinion did not provide any further guidance on what standard should be used in evaluating the timeliness of an agency's document production.

(2) This case has taken some time to resolve because the Court was attempting to settle the matter and the respondents needed additional time to obtain certain factual affidavits. In particular, respondents had some difficulty contacting certain police officers who had been redeployed to various security details and the family assistance center in the weeks following the September 11 disaster.

(3) Although the Court is not ruling on the merits at this time, the Court reminds respondents that the four months they originally requested has passed and any responding papers should, at this point in the case, inform the Court and petitioners whether and when respondents intend to comply with the FOIL request.

EXHIBIT L

FOIL 19305

November 30, 2015

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Ms.:

We are in receipt of your request for an advisory opinion regarding the manner in which the New York State Office of Children and Family Services (OCFS) responded to your Freedom Information Law request. Please accept our apologies for the delay in response.

By way of background, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(a) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or 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.… If an agency determines to grant a request in whole or in part, and 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."

Accordingly, it has long been advised that when an agency is unable to deny or provide access to records within five business days, it must provide a written response indicating either that it will respond within the next twenty business days, or that it is unable to respond until a certain date, providing both the date and the reasons for requiring additional time. Although we recognize that there are occasions when an agency will require an extension of time beyond that which it initially predicted, there is no provision in the statute for repeated extensions. The agency must, however, indicate the date by which it will respond, based on what is reasonable in consideration of attendant circumstances.

When an agency fails to comply with the time limits, or denies access to records, the Freedom of Information Law permits the applicant to file an administrative appeal, and, if the agency fails to comply with the law on

appeal, judicial review pursuant to Article 78 of the Civil Practice Law and Rules. We note how the legislature chose to distinguish the two types of denials in §89(4)(a), as follows:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought"

and further,

> "Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial."

Because it distinguished between the two types of denials, one in writing and the other due to a failure to respond in a timely manner, it is our opinion that the Legislature intended that there may be two types of appeals. One, from a denial of access in writing based on an exception to rights of access, and another, from a constructive denial of access as a result of the agency's failure to comply with the time limits for response required by §89(3)(a).

As stated above, there is no provision in the statute for repeated extensions. As the agency notified you on four separate occasions that they would need additional time to respond to your FOIL request, we believe it was reasonable for you, upon receipt of the fourth extension notice, to construe this failure to respond as a constructive denial on the part of the agency. While we do not know the volume or complexity of the records which the agency withheld pursuant to their April 21, 2015 determination, it seems likely that the length of time (approximately nine months) that it took to respond to your request was not reasonable. We note, however, that OCFS appropriately afforded you the right to appeal its April 21, 2015 substantive denial of access to records.

In an effort to enhance understanding of and compliance with FOIL, copies of this response will be sent to the agency Records Access Officer.

I hope that I have been of assistance.

Sincerely,

Kristin O'Neill
Assistant Director

cc: OCFS Records Access Officer

EXHIBIT M

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/

January 6, 1993

Mr. Peter W. Sluys
Managing Editor
Community Media Inc.
25 W. Central Avenue, Box 93
Pearl River, N.Y. 10965

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sluys:

I have received your letter of December 24 which pertains to requests for records directed to the Clarkstown School District.

You wrote that you have made several requests which have been characterized by the District as "voluminous", and you asked whether the District "is justified in delaying the release of material...beyond the time set forth in the statute". You also raised a question concerning the number of hours billed to the District by its law firm.

First, it is emphasized that §89(3) of the Freedom of Information Law also states that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v. Federal Communications Commn., 479 F2D 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)(3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your requests, I must admit to being unfamiliar with the record-keeping systems of the District; whether it has the ability to locate and identify the records sought in the manner in which you requested them is unknown to me.

Second, although the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests, it does not include any provision that specifies a period within which records must be disclosed. As indicated in my letter to you of December 30, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibiliity that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Your final question, which involves records of billings by a law firm, was addressed in a previous response. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. John Krause
Warren Berbit

FOIL-AO-f7509
7509

EXHIBIT N

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
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FOIL-AO-17821

September 25, 2009

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter in which you seek an advisory opinion concerning the "time limits set forth in Public Officers Law §89(3)(a) for an agency to respond to a FOIL request." Specifically, you raised the following questions:

> "1. If an agency subsequently amends (*i.e.*, extends) its previously stated 'date certain' by which requested records will be provided, does the agency's failure to provide the requested records by the original 'date certain' constitute an 'effective denial' that is subject to administrative appeal under Public Officers Law §89[4](a)?
>
> 2. Or, must an administrative appeal allege that the newly amended/extended 'date certain' is unreasonable under the circumstances of the request?"

General Counsel to the Office of Temporary and Disability Assistance (OTDA) has contended "[r]ecalculation of the initial 'date certain'" "is reasonable and permissible under the FOIL", and he cited the decision in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001) in support of that contention.

In the circumstance that you described, I believe that to contend that an agency engaged in a constructive denial of access due to a failure to grant access to the records sought in whole or in part by the date certain, an appeal must allege that the date certain is unreasonable.

In this regard, Linz was decided several years prior to the enactment of amendments to the Freedom of Information Law in 2005 that included new provisions concerning the time within which agencies must respond to requests and which, for the first time, referred to or included direction concerning an agency's designation of a "date certain" by which it would determine to grant a request in whole or in part. That being so, I do not believe that the decision rendered in Linz is determinative of the matter.

Section 89(3)(a) now states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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...If an agency determines to grant a request in whole or in part, and 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."

There is no language in the statute authorizing a "recalculation" of a date certain referenced by an agency in response to a request.

I point out, however, that the regulations promulgated by the Committee on Open Government (21 NYCRR §1401 *et seq.*) evidence a recognition that an agency may determine, following the acknowledgment of the receipt of a request and an estimate that it can grant a request within twenty additional business days, that the request is more extensive or burdensome than initially believed. In that circumstance, the regulations provide that an agency may recalculate the time for responding, so long as it provides an explanation for the delay and a 'date certain', a self-imposed deadline for response that must be reasonable in consideration of attendant facts and circumstance. Section §1401.5(c)(4), states that an agency must respond in the following manner by:

> "if the receipt of request was acknowledged in writing and included an approximate date when the request would be granted in whole or in part within twenty business days of such acknowledgment, but circumstances prevent disclosure within that time, providing a statement in writing within twenty business days of such acknowledgment stating the reason for the inability to do so 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."

Additionally, §1401.5(e)provides that:

> "A failure to comply with the time limitations described herein shall constitute a denial of a request that may be appealed. Such failure shall include situations in which an agency...
>
> (7) responds to a request, stating that more than twenty business days is needed to grant or deny the request in whole or in part and provides a date certain within which it will do so, **but such date is unreasonable under the circumstances of the request**" (emphasis added).

Although there is no provision in the Freedom of Information Law or the regulations, nor is there any judicial decision of which I am aware, that permits an agency to create or designate an extension of time to grant a request in whole or in part beyond the date certain that it identifies, I believe that the regulations enable an applicant to contest and, therefore, authorize a court to determine, whether the date certain specified by an agency is reasonable in consideration of circumstances relating to a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John P. Bailly, Jr.

FOIL-AO-f17821
17821

EXHIBIT O

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
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June 1, 1999

Ms. CherylAnn Armeno
Coalition for Junkyard Enforcement
P.O. Box 354
Fleischmanns, NY 12430

Hon. Donald E. Kearney
Mayor
Village of Fleischmanns
P.O. Box I-3
Fleischmanns, NY 12430

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated..

Dear Ms. Armeno and Mayor Kearney:

I have received your letters, which are respectively dated May 3 and May 25. In short, Ms. Armeno has complained that Mayor Kearney "has made a regular practice to advise FOIL requests that there will be a normal 30 day period to wait for any information", and advisory opinions have been sent to other residents of the Village of Fleischmanns in which it was suggested that a such a practice is inconsistent with the Freedom of Information Law. In his letter, the Mayor sought an opinion concerning the propriety of an acknowledgement of receipt of a request by the Department of Motor Vehicles (DMV) indicating that "Normally, F.O.I.L. requests can be granted or denied within 30 days" of the date of acknowledgement.

In my view, the situation relating to requests for records of the DMV cannot be compared with or equated to that relating to requests for records of the Village of Fleischmanns. Having conferred with DMV's Records Access Officer, that agency receives thousands of requests per month characterized as "simple" and approximately 100 requests per month characterized as "complex" or "complicated". While I could not locate current figures regarding its population, it is my understanding that the entire population of the Village of Fleischmanns is well under 1,000. Considering the volume of requests and the sizes of the two agencies, again, I do not believe that they can effectively be compared for the purpose of considering their time for responding to requests for records. What may be a reasonable time to respond in one agency may not represent a reasonable time in another. Typically, in a municipality similar in size to the Village of Fleischmanns, the Clerk or other official can locate records within a matter of minutes.

I point out that the notion of reasonableness was stressed in opinions previously rendered at the requests of other residents of the Village. Specifically, it was stated that:

"...although an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or

deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law."

It was also suggested that:

"...in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY2d 575, 579 (1980)].

In sum, due to its size and the number of requests received by DMV, its likely that a delay in disclosure of records of approximately a month is reasonable. For the same reasons, the size of the Village of Fleischmanns and the nature of the requests that have been described to me, it seems that the Village, to comply with law, should be granting access to accessible records within five business days of their receipt of the requests.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Munnelly

FOIL-AO-f11503
11503

EXHIBIT P

IA PART 19

Justice Sherman

BERNSTEIN v. CITY OF NEW YORK—The petitioner brings this Article 78 proceeding seeking a judgment directing the respondent, City of New York, to grant her access to certain records and files maintained by various departments of the respondent, including the Department of Transportation and the Department of Arterial Transportation, concerning, inter alia, maintenance, inspection, complaints and repairs dealing with the F.D.R. Drive.

The petitioner, pursuant to the Freedom of Information Act (Public Officer's Law, Art. 6), sent a letter dated October 20, 1989 to the Arterial Highway Department of the City of New York for certain information, documents, memos, notes, complaint forms, etc. dealing rnith the FDR Drive. The Records Access Officer of the New York City Department of Transportation, in a letter dated November 1, 1989, acknornledged receipt on October 31, 1989 of petitioner's FOIL application and informed petition that said office rnas in the process of gathering the responsive records and that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection. This FOIL application was also assigned a file number.

The petitioner, receiving neither access to the records requested nor denial of her application, sent a follow-up letter, dated December 8, 1989, rnith a copy of her October 20 letter to the Arterial Highway Department. The Records Access Officer, in a responsive letter dated December 29, 1989, acknowledged receipt of petitoner's request on December 19, 1989. This responsive letter was otherwise identical to its November 1, 1989 letter with petitioner being informed that said office was in the process of gathering the responsive records and that it would take a period of time to ascertain whether such documents do exist, and if they did, whether they qualify for inspection. In fact, the petitioner's second letter was treated as if it was petitioner's initial FOIL request and such was also assigned a new file number.

The petitioner also sent letter requests for said records to Corporation Counsel on or about January 29, 1990, and on or about February 28, 1990 to various offices of the Department of Transportation including Bridges Construction, Bridges & Maintenance and Bridge Construction Highway Maintenance. The requests were apparently forwarded by the above offices to the Record Access Officer of the Department of Transportation, as he is the person responsible for coordinating the acquisition of information in response to FOIL requests.

The petitioner has currently neither been granted nor denied access to the requested records. This proceeding seeks a judgment directing respondent to provide petitioner access to the records sought in her FOIL request.

The respondent maintains that this proceeding should be denied and the petition dismissed on the grounds that the information sought by petitioner should be obtained through the discovery devices, provided by CPLR article 31, and also due to petitioner's failure to exhaust all administrative remedies, pursuant to Public Officers Law §89(4)[a].

The petitioner has recently commenced a wrongful death action arising out of the death of her husband who was killed when the underside of a section of the FDR Drive, in the area of East 23rd Street, fell on his car crushing and killing him. The respondent, therefore, argues that the information sought by petitioner is not a proper FOIL request, as the petitioner should seek such disclosure through the discovery devices provided under CPLR article 31.

This argument advanced by respondent is without merit as a party/litigant is not barred from exercising his FOIL rights, as the fact that disclosure may be available to the applicant through other discovery devices does not preclude FOIL relief, if warranted. The mere fact that an applicant is a litigant does not hinder his right as member of the public to utilize the Freedom of Information Act. (See Matter of Faberman v. N.Y. City Health and Hosp. Co., 62 N.Y. 2d 75).

The respondent's next argument is that petitioner has failed to exhaust her administrative remedies and therefore may not seek judicial relief. The respondent contends that petitioner failed to appeal the denial of access to records within 30 days to the agency head as provided for in Public Officers Law §89(4)(a) and, therefore, may not bring this proceeding.

The petitioner alleges that Public Officers Law $89(4)(a) is not applicable as petitioner's FOIL request has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.

While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law $89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request. Additionally, (21 NYCRR §1401.5 subd. [d]) under Requests for public access to records states:

If the agency does not provide or deny access to the record sought within five business days of receipt of a request, the agency shall furnish a written acknowledgment to receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed.

It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head. The next question is whether this petitioner's alleged failure to appeal to the agency head precludes this Article 78 proceeding for either failure to exhaust her administrative remedies or for failure to appeal within the 30-day period provided by Public Officers Law $89 (4)(a).

In Mtr. Robertson (supra at 831), the court found that petitioner's failure to make a timely written appeal to a deemed denial precluded redress to the court due to petitioner's failure to exhaust administrative remedies.

The facts in this present proceeding differ slightly but significantly from the facts in the above case. While the petitioner in Mtr. of Robertson never received any response from the Division of Parole, this petitioner did receive a response which indicated that Record Access Office was attempting to gather the responsive documents.

The acknowledgment letters from the Records Access Officer of the New York City Department of Transportation to this petitioner were statutorily deficient. The applicable section of Public Officers Law 89(3) states:

Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 'of the receipt of such request and a statement of the approximate date when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.

The acknowledgment letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection."

This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal within 10 business days after the date of acknowledgment of receipt of request, as provided (21 NYCRR §1401.5 [d]), this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law 589(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming. It is easy to envision the opposite situation of petitioner filing an appeal within 10 business days and respondent arguing the appeal is premature as there has not yet been a denial of access to the documents.

It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.

Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a). This court will, therefore, grant the petition to the extent of remanding this matter to the proper agency head or appeals officer, who is thereafter directed, within ten business days from receipt of this order with notice of entry thereon, to fully explain in writing to the petitioner the reasons for further denial, or provide access to the records sought. That branch of the petition seeking attorneys' fees is denied as premature.

EXHIBIT Q

SUPREME COURT, NEW YORK COUNTY

NYLJ, DECEMBER 15, 1998

Justice DeGrasse

★ MATTER OF HOUSING WORKS, INC. v. GUILIANI *QDS:22700563*—Petitioner in this Article 78 petition seeks to compel the Office of the Mayor of the City of New York provide it with documents sought pursuant to the state's Freedom of Information Law ("FOIL"). (Police Officers Law §§84 et seq.) Respondents cross-move to dismiss the petition on the ground that petitioner has not exhausted its administrative remedies.

FACTS

The relevant facts are not disputed by the parties.

By letter dated February 18, 1988, Jeanne Bergman, Senior policy analyst for petitioner Housing Works, Inc. ("Housing Works") wrote to respondents seeking, inter alia, copies of a report entitled "Abridged Ethnographic Evaulation and Executive Summary of SRO Harm Reduction Outreach of the Center for AIDS Outreach and Prevention, NDRI" and documents relating to this report (the "FOIL Request").

On February 23, 1998, Laurence Levy, Deputy Counsel to the Mayor, wrote to Housing Works acknowledging its FOIL request. This letter states that "[w]e currently are reviewing the request and we expect to respond within ten days, either producing the requested documents or providing reasons why the requested documents are not available."

Respondents failed to respond to the FOIL request in any manner. On May 7, 1998, Housing Works wrote to respondents noting the lengthy delay and asking that the requested documents be produced "immediately." In response to this letter, Levy or another one of respondents' employee telephoned petitioner and stated that the requested documents were being reviewed and that a response would be forwarded to petitioner "soon."

Respondents still did not respond to the FOIL request. On June 11, 1998, Armen Merjian, Housing Works' senior staff attorney, wrote to Levy to request immediate production. Merjian noted that:

> [i]t is now approaching four months from the date of Ms. Bergman's FOIL request, and from the date that your wrote Ms. Bergman to indicate that you expected to respond to her request within ten days. We sincerely wish to avoid having to litigate this matter. Accordingly, I ask that you call me immediately at the above number to inform me when, in the immediate future, we can expect to receive the requested materials. I am hopeful that we can resolve this amicably and expeditiously.

Respondents did not respond to this letter. On July 7, 1998 Merjian again wrote to Levy, stating that petitioner would treat respondents' lack of response to its request as a denial. "Accordingly," the letter states, "I am hereby writing formally to appeal your decision to deny the FOIL request. . . . If you are not the appropriate individual to decide upon this appeal, i.e. the chief executive or head of your agency, or the person designated by the chief executive to head or hear appeals, please forward this letter immediately to the appropriate individual."

Respondents did not respond to this final letter and petitioner brought this Article 78 proceeding.

DISCUSSION

FOIL mandates that all public agencies provide access to their records subject to certain narrowly drawn exceptions. The statute creates a presumption of openness, stating that "government is the People's business and . . . the public . . . should have access to the records of government in accordance with the provisions of this article." (Public Officers Law §84.) In accordance with this legislative intent, courts have interpreted the statute broadly to allow maximum access to government records. (E.g. Buffalo News Inc. v. Buffalo Enterprise Development Corp., 84 NY2d 488, 492.)

Section 89(3) of FOIL provides that:

> Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied.

Respondents neither complied with the time limits provided in this section, nor with Levy's statement of the approximate date ("within ten days") for a reponse. Instead respondents have kept petitioner waiting for more than nine months for a response. Respondents assert that petitioner already has the report sought by the FOIL Request, and complain that petitioner leaked the report to news organizations thereby compromising in some unspecified way an ongoing investigation by the City's Department of Investigation into abuses at Single Room Occupancy Hotels where persons with AIDS are housed under contracts with the City. However respondents do not base their motion to dismiss on these arguments.

Instead, respondents' sole argument in support of their motion to dismiss is that petitioner did not exhaust its administrative remedy because it directed its final letter to Levy, and not to Dennison Young, the Mayor's counsel and the person designated by the Mayor's Office to hear FOIL appeals.

Particularly after the Mayor's Office ignored its own obligations under FOIL it ill-becomes respondents to rely on this hyper-technical argument. Respondents' argument ignores the fact that petitioner's final letter requests that if Levy is not the final appeals officer he direct the letter to the proper person. This simple request for re-routing the appeal letter is hardly onerous. Indeed, petitioner's initial FOIL request was sent not to Levy but to Colleen Roche, the Mayor's press secretary. Respondents have not argued that the FOIL request was invalid from its inception on this ground. Accordingly respondents' motion to dismiss the petition is denied.

CPLR 7804(f) provides that if a motion to dismiss an Article 78 petition is denied, the court "shall" permit the respondent to answer the petition. Respondents shall serve and file their answer by December 15, 1998. Petitioner shall have until December 30, 1998 to serve and file papers in reply. Petitioner shall also submit to the court on that date a copy of its petition and attached exhibits. The parties shall direct their papers to chambers, 60 Centre Street, Room 521, New York, NY 10007.

Petitioner's request for attorneys' fees pursuant to Public Officers Law §89(c) is held in abeyance pending the submission of the parties' papers.

This constitutes the decision and order of the court.

EXHIBIT R

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/

FOIL-AO-19034

May 6, 2013

E-Mail

TO:

FROM: Camille S. Jobin-Davis, Assistant Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear,

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the State Liquor Authority. Specifically, you question whether the Authority's auto-generated emails, sent in response to every electronic FOIL request, indicating that a response will be forthcoming within 20 business days, are sufficient to meet the time limits for responses required by law. You note that until the automatic email system was implemented, your requests for copies of liquor license applications and any disciplinary actions related to the applicant were typically filled within a few days. A review of all the requests you made in 2012 (18) shows that the Authority granted access to a majority of the requested records the day of the request (8) or the following day (5). In 2012, the longest the Authority took to grant one of your requests that year was 4 days. This is in contrast to this year's experience; while you now receive an automated response within seconds of sending a request, records are provided 18 days later.

As you know, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(a) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or 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..."

It is noted that new language was added to that provision in 2005 stating that:

> "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."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules.

Accordingly, in our opinion, while an immediate automated response would fulfill the legal requirement to acknowledge the receipt of a request within five business days, it may be unreasonable to delay the more substantive response for as long a time as you indicated. We reiterate, when a record is clearly public and readily available, there may be no basis for a delay in providing access. Having received no response to our notification regarding any particular changes in the Authority's ability to respond within time frames previously demonstrated, we are left to surmise that there may be none.

We hope that this is helpful.

CSJ:mm

FOIL-AO-f19034
19034

EXHIBIT S

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
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September 28, 1998

Mr. William V. Camfield
Camfield-Purcell Water Works Inc.
263 Verbeck Avenue
Schaghticoke, NY 12154

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Camfield:

I have received a variety of correspondence from you relating to requests for information directed to the Town of Stillwater and a request for a determination by the New York State Department of Health.

In this regard, it is emphasized at the outset that the jurisdiction of the Committee on Open Government is limited to matters involving rights of access to government records under the Freedom of Information Law. Consequently, other than contacting the person with whom you communicated at the Department of Health to ascertain the status of your request for a determination, the matter is beyond the jurisdiction of this office. Similarly, it is your belief that monies may be owed to you by the Town of Stillwater, and you asked how you may seek return of the money. That issue is unrelated to the functions of this office. To seek general guidance on the subject, it is suggested that you might contact the Office of the State Comptroller.

As the correspondence relates to the Freedom of Information Law, it appears that the issue involves a delay in the disclosure of records by the Town. Here I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer, who in this instance is the Town Clerk, has the duty of coordinating the Town's response to requests for records. It appears that the Clerk has attempted to do so.

With respect to the delay, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no

precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a substantial delay, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for any extended period of time.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Rose Petronis, Town Clerk

FOIL-AO-f11079
11079