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

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| DISABILITY RIGHTS ADVOCATES,<br><br>Petitioner,<br><br>For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules<br><br>-against-<br><br>METROPOLITAN TRANSPORTATION AUTHORITY; NEW YORK CITY TRANSIT AUTHORITY,<br><br>Respondents. | Index No. |

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities

Online (2018), https://reinventalbany.org/wp-content/uploads/2018/10/FOIL-that-Works-MTA-FOIL-Report-October-2018.pdf ..... 4

Dan Rivoli, MTA threatens to cut number of NYC subway stations made accessible to the disabled, N.Y. DAILY NEWS (Feb. 24, 2019), https://www.nydailynews.com/new-york/ny-metro-mta-subway-elevators-accessibility-20190221-story.html ..... 9

David D. Siegel, N.Y. Prac. § 557 (6th ed. 2018). ..... 1

Eli Rosenberg, New York City's Subway System Violates Local and Federal Laws, Disability Groups Say, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/nyregion/new-york-subway-disability-lawsuit.html ..... 3

James Barron, For Disabled Subway Riders, the Biggest Challenge Can Be Getting to the Train, N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/nyregion/disabled-subway-riders-elevators.html ..... 3

Jonathan Wolfe, New York Today: Meet the M.T.A.'s Accessibility Chief, N.Y. TIMES (July 24, 2018), https://www.nytimes.com/2018/07/24/nyregion/new-york-today-meet-the-mtas-accessibility-chief.html ..... 3

Jugal K. Patel, Where the Subway Limits New Yorkers With Disabilities, N.Y. TIMES (Feb. 11, 2019), https://www.nytimes.com/interactive/2019/02/11/nyregion/nyc-subway-access.html ..... 3

Metro. Transp. Auth., Funding for Subway Station ADA-Accessibility Approved (Apr. 26, 2018), http://www.mta.info/news/2018/04/26/funding-subway-station-ada-accessibility-approved ..... 5

Metro. Transp. Auth., MTA Board Action Items 26 (Apr. 25, 2018), http://web.mta.info/mta/news/books/archive/180425_1000_Board.pdf ..... 5, 6, 7

Metro. Transp. Auth., MTA Capital Program 2015-2019 35, 117 (Apr. 25, 2018), http://web.mta.info/capital/pdf/April_2018_Amendment_Approved_Optimized.pdf ..... 8

Metro. Transp. Auth., Q3 2018 Customer Commitment, https://new.mta.info/CustomerCommitment/Q3-2018 ..... 8

Metro. Transp. Auth., Q4 2018 Customer Commitment, https://new.mta.info/CustomerCommitment/Q4-2018 ..... 8, 13

# MEMORANDUM OF LAW

## I. Introduction

This case challenges the cloak of secrecy in which the Metropolitan Transportation Authority ("MTA") seeks to shroud its multi-million dollar "global accessibility survey" ("Survey") of the New York City ("the City") subway system. Violating both the letter and the spirit of the Freedom of Information Law, the MTA has stonewalled repeated requests with boilerplate responses. Without producing a single page, the MTA has last asserted it will need one year to respond— a delay so extreme and unreasonable as to constitute constructive denial in violation of New York Public Officers Law § 84.

The MTA's obstruction is all the more glaring because while shielding its production of the work and findings it is undertaking related to station accessibility, it is simultaneously touting the Survey in an effort to stem public criticism about the vast inaccessibility of the subway system.

Moreover, while Petitioner's original, reasonable request was for the Survey and a few categories of related documents, Petitioner has since further limited its request to an even more narrow subset of easily identifiable documents consisting of (1) the Request(s) for Proposal for the Survey work; (2) contracts with firms engaged in Survey work; and (3) reports of completed station surveys. The MTA's constructive denial is indefensible under the law.

## II. Relevant Legal Framework

Article 78 has been described as "the vent and window through which light and air expose and refresh the dank milieu of that ubiquitous and indispensable phenomenon of our civilization: the administrative agency." David D. Siegel, N.Y. Prac. § 557 (6th ed. 2018). Taken together with the Freedom of Information Law ("FOIL"), it authorizes this Court to review and overturn agency decisions, like the MTA's actions here, under a more stringent

standard of review than the more lenient "arbitrary and capricious" standard generally applicable to Article 78 review of agency actions. See, e.g., Berger v. New York City Dept. of Health and Mental Hygiene, 137 A.D.3d 904, 906 (2d Dep't 2016); Prall v. New York City Dept. of Corrections, 129 A.D.3d 734, 735 (2d Dep't 2015); New York Committee for Occupational Safety and Health v. Bloomberg, 72 A.D.3d 153, 158 (1st Dep't 2010).

The Freedom of Information Law, Pub. Off. Law § 89(3)(a), has a simple purpose: safeguarding our free society through democratic accountability. The law sets forth specific steps to prevent just the type of evasive delay the MTA has engaged in here: A covered entity must respond within five business days of the receipt of a written request for a record reasonably described. Pub. Off. Law § 89(3)(a). The entity may respond with a written acknowledgement of receipt of the request and a statement of the approximate date by which the entity will grant or deny the request. Id.

However—of critical note here—the proffered date must be reasonable under the circumstances of the request. Id. If the agency decides to grant a request in whole or in part and the circumstances prevent disclosure within twenty days from the date of the acknowledgment of the receipt of the request, the agency must 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. Id.

Any person denied access to a record may, within thirty days, appeal in writing that denial to the head, chief executive, or governing body of the entity or person designated by the head, chief executive or governing body. Pub. Off. Law § 89(4)(a). The entity's officer or designee must respond within ten days of receipt of the appeal by either fully explaining in writing to the person requesting the records the reason for the denial or providing the requested

records. Id. Where, as here, the appeals process fails and the agency continues to deny access, the record seeker has the right to judicial review under Article 78 of the Civil Practice Law and Rules. Pub. Off. Law § 89(4)(b).

## III. Statement of Facts

### A. Background

In 2017, Disability Rights Advocates ("DRA") filed a class action lawsuit in this court against the New York City Transit Authority ("NYCT") and Metropolitan Transportation Authority (collectively "MTA"), as well as New York City for their failure to make the subway system programmatically accessible for persons whose mobility and other disabilities restrict them from using stairs. That case, Center for Independence of the Disabled, New York v. Metro. Transp. Auth., No. 153765-2017, is pending before Justice Hagler. With the filing of that case, other litigation, and media attention, there is increasing public pressure on the MTA to bring the accessibility of the City subway system into step with the requirements of law, and in line with every other system in the country.[1] The MTA has responded with a series of public statements and community meetings claiming it is taking steps to make the New York City subway system accessible. A central feature of the MTA's response has been to tout its "study of all remaining inaccessible stations," which is the subject of this Petition. Ex. F at 41. On June 25, 2018, the

[1] See, e.g., Jugal K. Patel, Where the Subway Limits New Yorkers With Disabilities, N.Y. TIMES (Feb. 11, 2019), https://www.nytimes.com/interactive/2019/02/11/nyregion/nyc-subway-access.html; James Barron, For Disabled Subway Riders, the Biggest Challenge Can Be Getting to the Train, N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/nyregion/disabled-subway-riders-elevators.html; Jonathan Wolfe, New York Today: Meet the M.T.A.'s Accessibility Chief, N.Y. TIMES (July 24, 2018), https://www.nytimes.com/2018/07/24/nyregion/new-york-today-meet-the-mtas-accessibility-chief.html; Eli Rosenberg, New York City's Subway System Violates Local and Federal Laws, Disability Groups Say, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/nyregion/new-york-subway-disability-lawsuit.html.

MTA made a detailed presentation including claims about the Survey to the Compliance Coordination Committee, a body set up to provide oversight of accessibility at the MTA. Ex. A; Transp. L. 15-b.

Indeed, the MTA has relied on the Survey in this Court. The MTA argued that the Court need not subject the MTA to the strictures of the New York City Human Rights Law's disability provisions inter alia because the MTA is already taking steps to address accessibility through this Survey. See Ex. B at 18 (transcript, March 5, 2018); Mem. of Law in Supp. Defs. Mot. to Dismiss at 8, Center for Independence of the Disabled, New York v. Metro. Transp. Auth., No. 153765-2017 (Sup Ct, NY County, July 7, 2017). DRA has made multiple requests for information related to the Survey, as set forth in more detail below. The requests have been met with stonewalling and delay. Not one document has been made public.[2]

**B. The MTA's Constructive Denial of DRA's October 2018 FOIL Request**

On October 29, 2018, DRA filed a FOIL request asking for records related to the Survey. The request is attached to the accompanying Petition as Exhibit C. The intent of the request was to assess NYCT's claim that the agency is making accessibility one of "four equal priorities" and will "[c]reate a prioritized plan based on a study of all remaining inaccessible stations." Ex. F at 19, 41. On November 5, 2018, NYCT responded to DRA's FOIL request with boilerplate language stating that the agency would require an entire year to respond to DRA's request. While the MTA's response is so generic as to be almost incomprehensible, it appears that the MTA

[2] It bears noting that MTA's obstruction fits a pattern. A recent report by Reinvent Albany finds that MTA and subway system subsidiary NYCT rank as some of the least transparent agencies in the State. Rachael Fauss, Tom Speaker & John Kaehny, Reinvent Albany, FOIL that Works: Increasing MTA Transparency and Accountability By Putting FOIL Online (2018), https://reinventalbany.org/wp-content/uploads/2018/10/FOIL-that-Works-MTA-FOIL-Report-October-2018.pdf.

takes the position that DRA's request is a "multiple or voluminous request[] seeking to obtain records pertaining to contracts" that "usually takes 12 Months to complete." Ex. D.

On December 5, 2018 DRA appealed NYCT's determination that responding to the request for a small number of identified documents related to a single, discrete project would take an entire year on the grounds that it amounted to a constructive denial of the request. Ex. E. In the appeal, DRA restated NYCT's obligation to provide a written statement explaining the agency's inability to respond within the statutorily prescribed twenty days and a reasonable date certain by which the agency would respond to the request. The appeal further advised NYCT that if the date provided by the agency was unreasonable, the request could be considered constructively denied.

In the appeal letter, DRA referred NYCT to four of the agency's own documents to explain why the agency had no reasonable basis for delaying a full year in order to produce the requested records. First, DRA referred NYCT to a set of MTA board meeting minutes that reveal that "[t]he contract for the study was awarded late last year to Stantec Engineering and their work is well underway." Metro. Transp. Auth., MTA Board Action Items at 26 (Apr. 25, 2018), http://web.mta.info/mta/news/books/archive/180425_1000_Board.pdf. Second, DRA identified a press release MTA issued revealing that NYCT President Andy Byford had "previously announced a system-wide study . . . to catalogue and analyze what would need to be done to make the system fully accessible." The purpose of this study is to "help the MTA and stakeholders identify particular stations for inclusion in the next capital program's station elevator projects." Press Release, Metro. Transp. Auth., Funding for Subway Station ADA-Accessibility Approved (Apr. 26, 2018), http://www.mta.info/news/2018/04/26/funding-subway-station-ada-accessibility-approved. Third, DRA directed NYCT to the agency's own strategic

plan for modernizing the subway system, which specifically references the Survey. Ex. F at 41. Fourth, the appeal also referred NYCT to its own description of a "pilot study of 6-8 typical stations" the agency planned in the second quarter of 2015. Ex. E at 5 (December 4, 2014 Letter from MTA Chief of Program Coordination, Compliance and ADA Officer Gricelda Cespedes to Federal Transit Administration ADA Team Leader John Day ("Cespedes-Day Letter"), attached to December 5, 2018 FOIL Request). According to Ms. Cespedes, the pilot study would serve as the basis for scoping a competitive contract for the planned Survey examining the costs and feasibility of making the remaining subway stations in the system accessible. Id. Since the MTA awarded the contract for the Survey in fall of 2017, the pilot study upon which the accessibility study is based is presumably complete and any claims to an exemption based on contracting concerns no longer apply. Metro. Transp. Auth., MTA Board Action Items at 26 (Apr. 25, 2018), http://web.mta.info/mta/news/books/archive/180425_1000_Board.pdf.

The MTA denied the appeal on December 26, 2018, again with only difficult-to-understand boilerplate language. The MTA appears to take the position that DRA's "FOIL appeal is . . . premature at this time" and that it would produce documents on a "rolling basis." Ex. G. No further explanation of a schedule and no documents followed that assertion. As a final attempt before filing this petition, DRA sent a letter on March 7, 2019 delineating a limited subclass of easily definable documents: (1) Request(s) for Proposal for the Survey work; (2) contracts with firms engaged in Survey work; and (3) reports of completed station surveys. Theresa Brennan Murphy, Executive Assistant General Counsel for NYCT, responded on March 12, promising to provide at least some documents and a written explanation of the agency's objections. Yet, to date, not a single document has been produced, nor a schedule established

that sets out MTA's "rolling basis." The MTA did not respond to several attempts to follow up. Ex. H.

### C. The MTA Has Stonewalled Two Prior Requests

This is not DRA's first attempt to obtain this information from the MTA. The MTA has been evading public records requests regarding this information for years. In a prior September 19, 2017 application, DRA filed a FOIL request seeking records relating to the Survey referenced in The Cespedes-Day Letter. Ex. I. The MTA responded to that request on September 29, 2017 using virtually identical boilerplate language to that used in the November 5, 2018 response except that the agency said completing the request would require eight months instead of a year, committing to provide a response by May 29, 2018. May 29, 2018 came and went with no documents and no further response.

By that date, the MTA had presumably completed its pilot study and awarded a contract to Stantec Engineering. See Metro. Transp. Auth., MTA Board Action Items at 26 (Apr. 25, 2018), http://web.mta.info/mta/news/books/archive/180425_1000_Board.pdf. The MTA did not produce these or any other documents in response to the September 19, 2017 FOIL. It made no further response. DRA tried again to obtain this information on January 3, 2018. Ex. J. This time, the MTA provided no response at all. Thus, the FOIL request that is the subject of this Petition is the third attempt to seek this information. The MTA has yet to produce a single document.[3]

### D. The MTA Is Spending Billions of Dollars of Public Money, Allegedly for Accessibility, While Hiding Documents that Would Allow Meaningful Review

[3] DRA also pursued the information in settlement discussions that have occurred in its lawsuit in this Court but have been similarly unsuccessful at obtaining any substantive information or documents.

Meanwhile, the MTA is spending at least $200 million public dollars, and potentially billions more, on what it claims to be accessibility work informed by this secret Survey. Metro. Transp. Auth., MTA Capital Program 2015-2019 35, 117 (Apr. 25, 2018), http://web.mta.info/capital/pdf/April_2018_Amendment_Approved_Optimized.pdf. The MTA claims that this Survey is an initial step that will inform the MTA's decisions regarding station accessibility, including, designs, requests for proposal, and construction bidding processes for new elevators, though it is difficult to be certain given the opacity of the MTA's actions. The MTA's "Customer Commitment" report from the fourth quarter of 2018 stated that the MTA had finished 150 of these station studies. Metro. Transp. Auth., Q4 2018 Customer Commitment, https://new.mta.info/CustomerCommitment/Q4-2018 (last visited April 17, 2019). Thus, it appears that the MTA has reports of surveys of 150 of 372 inaccessible stations in the system, none of which have been produced to DRA in response to the FOIL. Indeed, to DRA's knowledge, not one of these 150 studies has ever been made public.

Meanwhile, in the third quarter of 2018, the MTA admitted that it had completed only one of four anticipated elevator installation design projects. Metro. Transp. Auth., Q3 2018 Customer Commitment, https://new.mta.info/CustomerCommitment/Q3-2018 (last visited April 17, 2019). The MTA then abandoned any stated goal for design projects for the fourth quarter. Metro. Transp. Auth., Q4 2018 Customer Commitment, https://new.mta.info/CustomerCommitment/Q4-2018 (last visited April 17, 2019). It thus appears that the MTA is completing designs for only one station per quarter, calling into serious doubt its ability to fulfill its claims that it will complete construction of 50 stations in five years, or two and a half stations per quarter. This doubt is underscored by recent reports that the MTA will not meet its accessibility promises. See Dan Rivoli, MTA threatens to cut number of NYC

subway stations made accessible to the disabled, N.Y. DAILY NEWS (Feb. 24, 2019), https://www.nydailynews.com/new-york/ny-metro-mta-subway-elevators-accessibility-20190221-story.html.

Production of the RFPs, contracts, and Survey reports would allow for informed public scrutiny of this process. The MTA's lack of transparency makes any meaningful examination of its public claims or any meaningful input into the process of the MTA's accessibility work impossible.

## IV. Argument

### A. The Accessibility Survey Is Subject to Disclosure.

Documents requested under FOIL are presumptively subject to disclosure, unless they fall under an enumerated statutory exception.[4] See e.g., Pub. Off. Law § 87(2); Inner City Press/Community on the Move, Inc. v. The New York City Department of Housing Preservation and Development, 1993 N.Y. Misc. LEXIS 439 (Sup Ct, NY County, Nov. 9, 1993). The burden of proving an exemption is on the agency asserting it. Pub. Off. Law § 89(4)(b). Public disclosure laws are liberally construed to allow maximum access and statutory exceptions are narrowly construed. Id. Because the MTA has cited no exemption, the requested Survey records are subject to disclosure.

### B. Constructive Denial Occurs When a Reasonable Date Certain is Not Provided or When an Unreasonable Amount of Time is Requested.

The MTA's attempt to interpose a year-long delay before production of any documents related to the Survey is not "reasonable" under relevant authority and therefore abuses the

[4] Access to the records of a government agency is not affected by the fact that there is pending or potential litigation between the person making the request and the agency. M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp., 62 N.Y.2d 75, 78 (1984).

discretion afforded the agency in responding to FOIL requests. The MTA must grant or deny access within a reasonable time to be acting in compliance with law. Pub. Off. Law § 89(3)(a); Comm. On Open Gov't Advisory O. 7509, Ex. M. New York courts may review the "reasonableness" of an agency opinion about the date certain by which the agency will produce documents. Comm. On Open Gov't Advisory O. 17821, Ex N. In Matter of Linz v. The Police Department of the City of New York, this Court held that petitioners had a right to file an Article 78 action seeking to compel the production of documents pursuant to a FOIL request after respondents had claimed to need 120 days to review and produce the requested documents. N.Y.L.J., Dec. 17, 2001 (Sup Ct, NY County, 2001), Ex. K. The Court explained that the determination of whether a period is reasonable must be made on a case-by-case basis after considering several factors, including the volume of documents and the time involved in locating the materials. Id.

Regulations promulgated by the New York Committee on Open Government enumerate several additional factors to consider whether a period is reasonable. 21 N.Y.C.R.R. 1401.5(d). A FOIL request is constructively denied where an agency has unreasonably delayed granting access to the records requested by seeking repeated extensions to grant the request. See Comm. On Open Gov't Advisory O. 19305, Ex. L (finding a delay of approximately nine months unreasonable); Comm. On Open Gov't Advisory O. 11503, Ex. O (size and number of requests the New York State Department of Motor Vehicles received, numbering thousands of simple and roughly 100 complex requests each month, may justify a delay of roughly one month in responding).

The MTA has provided no plausible explanation why locating and producing these Survey documents necessitates a year-long delay. To the contrary, the MTA has repeatedly

relied on the Survey in public-facing statements and reports—indicating that these documents are not buried in a hidden file cabinet in the MTA's offices, but rather are very much in use and easily locatable. Supra Sec. III(A). The MTA's claim that it will provide documents on a "rolling basis" does nothing to alleviate this unreasonableness as the MTA has provided no production timeline, and indeed has not produced a single Survey document despite years of DRA's repeated requests for this information.

**1.** An Appeal Is Not Premature Because the MTA's Constructive Denial of DRA's Request Leaves DRA with No Other Recourse to Obtain the Survey Documents

It is well established that the MTA may not circumvent judicial review of its compliance with the FOIL law by holding requests indefinitely without response; such an action also amounts to constructive denial and is reviewable. Matter of Linz, N.Y.L.J., Dec. 17, 2001 (Sup Ct, NY County, 2001), Ex. K; see also Bernstein v. City of New York, N.Y.L.J., Nov. 7, 1990 (Sup Ct, NY County, 1990), Ex. P (FOIL response by the City of New York that "neither granted nor denied petitioner's request nor approximated a determination date . . . placed petitioner in a 'Catch 22' position" and amounted to reviewable constructive denial); Matter of Housing Works, Inc. v. Guiliani, N.Y.L.J., Dec. 15, 1998 (Sup Ct, NY County, 1998), Ex. Q (constructive denial reviewable despite "hyper-technical" claim of failure to exhaust).

In Matter of Linz, this Court squarely addressed the claim that the MTA appears to assert here. There, respondent NYPD argued that the litigation was "premature" since the 120-day period requested by the NYPD had not passed and a final determination had not been made by the agency. The MTA made a similar claim here in contending the appeal was "premature." But as the Matter of Linz court points out: "[t]his 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." Matter of Linz, N.Y.L.J., Dec. 17, 2001 (Sup Ct, NY County, 2001), Ex. K. Further,

"[i]t 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." Id. This Court should therefore similarly conclude that petitioners "had a right to file this Article 78 action seeking to compel respondents to provide these documents." Id.

**2.** The Date Certain Proposed by MTA Fails to Satisfy the Reasonableness Factors this Court Enumerated in Linz.

The "reasonableness" of a date certain provided in a FOIL response depends on "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." Id.; Data Tree, LLC v. Romaine, 9 NY3d 454, 465 (2007). Regulations promulgated by the New York Committee on Open Government expanded the set of factors considered under the Matter of Linz reasonableness analysis. 21 N.Y.C.R.R. 1401.5(d). The Committee on Open Government regulations added three factors to the reasonableness inquiry: the complexity of the request, the number of requests received, and a catch-all for other factors. Id. The MTA's one year delay is decidedly unreasonable based on all relevant factors.

**a. The MTA's Boilerplate Recitation of the Linz Factors Falls Far Short of a Case-by-Case Inquiry.**

Here, the MTA's response paid conclusory lip service to the Linz factors but provides no substantive justification for their extraordinary delay and failure to produce a single relevant document. Their response is no more than a bare, boilerplate recitation of an alleged "high volume of requests," which are in some unspecified way "complex," and of the need to "request documents from other [unspecified] departments" which must then take unspecified steps to locate the requested documents, and the need for "the FOIL Unit to determine if they are disclosable under law." Their supposed categorization of DRA's request as "[m]ultiple or

voluminous requests seeking to obtain records pertaining to contracts" which require six months to a year to complete does nothing to cure the deficiency.

The Committee on Open Government has repeatedly condemned such boilerplate responses. In its most relevant advisory opinion on the subject, the Committee has opined that "when a record is clearly public and readily available, there may be no basis for a delay in providing access." Comm. On Open Gov't Advisory O. 19034, Ex. R. Such is the case here.

Moreover, it is a dubious assertion that it will take the MTA months and months to gather documents that it is repeatedly touting to the public. The MTA continues to cite the Survey in reports, press releases, and other public-facing statements in an effort to identify its alleged attempts to improve the accessibility of the subway system. Supra Sec. III(A). It is doubtful that such oft-cited documents are archived in a basement and not readily available. Rather, these documents are likely close at hand and should be produced to DRA in short order.

**b. DRA Requested a Relatively Small Volume of Easily Retrievable Electronic Records.**

DRA's FOIL request is confined to documents created in a short, clearly defined time-period and virtually all records sought will be available electronically. Pub. Off. L. 89(3)(a). See Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 465-466 (2007)); cf., Comm. On Open Gov't Advisory O. 7509, Ex. M; Comm. On Open Gov't Advisory O. 11079, Ex. S. To further simplify the MTA's burden, this petition seeks a narrowed number of easily accessible and identifiable documents. The procurement representative, Remy Martin, could easily retrieve the desired documents, presumably by using the database MTA uses for assembling lists of procurement solicitations and MTA board books. The MTA has also been able to identify and tout to the public 150 station studies in 2018. Metro. Transp. Auth., Q4 2018 Customer Commitment, https://new.mta.info/CustomerCommitment/Q4-2018 (last visited April 17, 2019).

It should therefore have them handy to be able to produce to DRA in response to this FOIL request.

## V. Conclusion

The MTA is violating both the letter and spirit of FOIL, by constructively denying Petitioner's FOIL. Petitioners respectfully move this Court to order MTA to produce the RFPs, contracts, and completed survey reports within 30 days of the Court's order.

Dated: April 22, 2019
New York, New York

Respectfully submitted,

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