

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

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CENTER FOR CONSTITUTIONAL RIGHTS and  
JOYCE McMILLAN,

**VERIFIED PETITION**

Petitioners,

NEW YORK CITY ADMINISTRATION FOR  
CHILDREN’S SERVICES and THE CITY OF NEW  
YORK,

Index No. \_\_\_\_\_

Respondents.

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I, David B. Rankin and Katherine ‘Q’ Adams, of Beldock Levine & Hoffman, LLP, attorneys duly licensed to practice law in the Courts of the State of New York, hereby verify and affirm, under the penalties of perjury, the following is true and correct:

**PRELIMINARY STATEMENT**

1. I am counsel for the petitioners, the Center for Constitutional Rights and Joyce McMillan, and as such, I am familiar with the facts and procedural history of this action.
2. Pursuant to the Freedom of Information Law (“FOIL”) and Article 78 of the New York Civil Law and Rules, the undersigned, petitioner Center for Constitutional Rights (“CCR”) and petitioner Joyce McMillan, seeks an order directing respondent the New York City Administration for Children’s Services (“ACS”) to produce communications and records related to the surveillance and firing of Ms. Joyce McMillan from the company Sinergia, an ACS contractor, in December of 2020.
3. CCR is a 501(c)(3) not-for-profit organization that works with communities under threat to fight for justice and liberation through litigation, advocacy, and strategic communications.

Since 1966, they have taken on oppressive systems of power, including structural racism, gender oppression, economic inequity, and governmental overreach. <https://ccrjustice.org/>

4. Ms. McMillan is a former part-time employee of the ACS contractor Sinergia. As has been reported, following a Facebook post by Ms. McMillan criticizing an ACS practice, ACS demanded that Sinergia fire Ms. McMillan. ACS threatened to end one of its contracts with Sinergia if ACS did not do so. On January 22, 2021, Sinergia fired Ms. McMillan as demanded by ACS. ACS then reversed itself, and Sinergia rehired Ms. McMillan on or about January 25, 2021.

5. Petitioner CCR submitted a FOIL request to the Records Access Officer of ACS, seeking production of a number of records related to the events of Ms. McMillan's firing and subsequent rehiring. After substantial delay, ACS partially denied CCR's request and produced only 16 partially-redacted emails.

6. In partially denying CCR's request, ACS purported the records requested to be exempt from disclosure under FOIL on the bases of invasion of personal privacy (Pub. Off. § 87(2)(b)); inter-agency and/or intra-agency memoranda (Pub. Off. § 87(2)(g)); and information technology (Pub. Off. § 87(2)(i)).

7. CCR appealed, challenging the exemptions claimed by ACS and the adequacy of its search. ACS denied the appeal in part and produced an additional 7 files.

8. As Petitioners have exhausted all administrative remedies, Petitioners respectfully request the Court order respondent to produce all responsive records in accordance with FOIL and the guidance of the State of New York Department of State ("DOS") Committee on Open Government ("COOG").

### JURISDICTION AND VENUE

9. This proceeding pursuant to Article 78 of the Civil Practice Law and Rules is the proper mechanism for seeking judicial review of a state agency's determination with respect to a FOIL request. N.Y. Pub. Off. § 89(4)(b).
10. Respondent ACS is an agency of respondent City of New York subject to FOIL.
11. The undersigned has exhausted respondent ACS's internal process for FOIL appeals, and the instant petition has been filed within the four-month period thereafter specified in C.P.L.R. § 217(1).
12. Respondent ACS has their central offices located in the County of New York. Venue therefore is proper in this Court. C.P.L.R. §§ 7804(a), and 506(b).

### STANDARD OF REVIEW

13. In an Article 78 proceeding that challenges the denial of a FOIL request, the appropriate standard of review is "whether the denial of the FOIL request was 'affected by an error of law.'" *Matter of Barry v. O'Neill*, 185 A.D.3d 503, 505 (1st Dep't 2020) (quoting C.P.L.R. § 7803(3)).
14. FOIL provides that all records kept by a public agency are presumptively open to public inspection and copying unless specifically exempted by statute. Pub. Off. L. § 87(2); *Matter of New York Civ. Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004).
15. These statutory exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of government." *Matter of Data Tree, LLC*, 9 N.Y.3d 454, 462 (2007) (citation omitted).
16. The agency resisting disclosure must prove entitlement to one of the exceptions, meaning the agency bears the burden to resist production. *Id.*, 9 N.Y.3d at 463; *Matter of Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dep't 1992).

## STATEMENT OF FACTS

17. Joyce McMillan has long been an advocate for parent rights. Currently, she is the executive director of JMacForFamilies, which works to abolish the current punitive child welfare system and to strengthen the systems of support that keep families and communities together.

18. In December of 2020, Ms. McMillan was employed by Sinergia, a not-for-profit organization that works with people with disabilities and their families. Sinergia has a longstanding reputation for working with underserved families, including many with limited English proficiency, who may be homeless or impoverished, or who may be struggling with insecure housing and income, lack of services or discrimination based on ethnicity, language status, immigration status, gender or poverty.<sup>1</sup>

19. On December 23, 2020, Ms. McMillan made a post on Facebook (“the Post”) expressing her disdain that ACS understood themselves to be offering parents the “service” of drug tests.

20. To date, the Post has 28 reactions (indicating one’s Facebook “friend” has interacted with a post by clicking a button such as “like” or “love”), eight comments, and no shares. It did not “go viral,” (a term used to describe a post on social media that reaches many thousands of people outside one’s immediate social circle) and could be characterized as a minor blip in the social media onslaught.

21. According to THE CITY, “A Dec. 28 email from Sinergia head Donald Lash to an ACS disability services program director indicates McMillan was suspended that month. The reason: ‘concerns’ expressed by the director on a phone call to Lash regarding “social media posts by Joyce McMillan,” according to the email, obtained by THE CITY.”<sup>2</sup>

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<sup>1</sup> <https://www.siner giany.org/about/about>

<sup>2</sup> <https://www.thecity.nyc/work/2021/2/11/22277355/nyc-child-welfare-ac-s-fired-over-social-media-posts>

22. On March 3, 2021, CCR sent a FOIL request (the “Request”) to the Records Access Officer of ACS. See Request, Exhibit 1.
23. The request sought several specific items:
- a. All records of communications between ACS and Sinergia as it relates to Joyce McMillan;
  - b. Any and all records of internal communications within ACS regarding Joyce McMillan, including but not limited to those of Yolanda Dillard, Angela Medina-Maddox or other staff within the Developmental Disabilities Unit Office of Child and Family Health;
  - c. Any communications regarding an anti-ACS billboard in East Harlem;<sup>3</sup>
  - d. Any communications referencing the rally in Harlem held on MLK Day;
  - e. Any communications referencing the *Mother Jones* feature story, “Do We Need to Abolish Child Protective Services?”<sup>4</sup>
24. By emails dated April 7, 2021; June 15, 2021; and August 31, 2021, ACS delayed making a determination on CCR’s FOIL request. See Exhibit 2.
25. On September 10, 2021, CCR appealed ACS’s continual delay in responding as a constructive denial of CCR’s request, and not “reasonable” under the N.Y. Pub. Off. L. § 89(3)(a). See Exhibit 3.
26. By letter dated September 27, 2021, ACS denied CCR’s appeal and stated that “ACS is currently reviewing responsive material to this request and will have them uploaded to Open Records no later than October 15, 2021.” See Exhibit 4.
27. On October 29, 2021, ACS responded to CCR’s request, denying it in part and granting it in part. ACS produced 16 partially-redacted emails, with redactions pursuant to Public Officer’s Law section 87(2)(b) (personal privacy exemption); 87(2)(g) (inter-agency and/or intra-agency memoranda exemption) and 87 (2)(i) (information technology exemption), to CCR in response to their FOIL request, and closed the request. See Exhibit 5.

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<sup>3</sup> The billboard read “Some Cops are Called Caseworkers. #AbolishNYCACs.”

<sup>4</sup> Available at: <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/>

28. On November 23, 2021, CCR appealed ACS's denials as well as challenged the adequacy of ACS's search for records responsive to CCR's FOIL request. See Exhibit 6.
29. By letter dated December 10, 2021, the administrative appeal was denied in part and granted in part. See Exhibit 7.
30. In response to this request ACS produced a total of 23 emails. These emails almost entirely relate to incoming communications from media outlets inquiring about what ACS did to Ms. McMillan. These emails are over-redacted, and unresponsive to the request. See Exhibit 8.

### ARGUMENT

#### The Search Conducted by ACS Was Inadequate.

31. Section 89(3) of the Freedom of Information Law provides in part that, if an agency cannot locate responsive records, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."
32. Despite an unsupported claim by ACS that the agency conducted a diligent search in response to Petitioner's Request, *see* Exhibit 4, the search was instead facially inadequate.
33. The inadequacy of the search becomes evident by reviewing ACS's production of 23 emails, which indicate many additional emails are potentially missing: multiple email chains have more than two people copied on them; the majority of emails produced are replies to earlier emails; and a number of emails are inquiries from news reporters to ACS without any additional internal discussion from ACS on how to respond. *See* Exhibit 8. Additionally, a number of the emails indicated that further discussions happened within ACS. *Id.*
34. It is readily apparent that if ACS's search did not produce the records referenced within the produced documents, the search does not reach the standards of diligence required by FOIL, or they were improperly withheld.

The Exemptions Claimed by ACS to Deny Petitioner's Request Were Improper.

35. It is a useful reminder to look at the Court of Appeals' general view of the intent of the Freedom of Information Law in *Gould v. New York City Police Department* (89 N.Y.2d 267, 275 (1996)), stating that:

To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*id.*, 275).

36. The agency resisting disclosure must prove entitlement to one of the exceptions. *Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dep't 1992).

**A. ACS improperly denied petitioner's Request on the basis that the records were considered to be inter-agency and/or intra-agency materials (Pub. Off. § 87(2)(g)).**

37. Pub. Off. § 87(2)(g) provides that an agency may deny access to inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

38. In rejecting the instant records request, respondent ACS incorrectly asserted the requested records were intra or inter-agency memoranda and failed to provide any additional information "articulating a particularized and specific justification for denying access " as required to establish the applicability of an exemption. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986); *DJL Restaurant Corp. v. Department of Bldgs.*, 273 A.D.2d 167 (1st Dep't 2000).

39. Other than the 23 emails produced, ACS issued a blanket denial of Ms. McMillan's request. An agency is not authorized to throw a protective blanket over all information by casting it in the form of an internal memo. *Miracle Mile Ass'n v. Yudelson*, 68 A.D.2d 176, 183 (4th Dep't 1979).

40. The whole text of ACS's justification for withholding emails requested is, "The email communications were of ACS employees' opinions, advice, questions, and discussion. This portion of the appeal as it relates to the withholding of the email communication among ACS employees is denied." Exhibit 7, Pg. 2, Para. 2. Simply asserting the exemption is insufficient. *Johnson v. NY City Police Dept.*, 257 AD2d 343, 345 (1st Dept 1999).

41. Additionally, this is a blanket denial, which is disfavored. *Daily News L.P. v. Teresi*, 275 A.D.2d 812, 814 (3rd Dept 2000); *Matter of New York State Defenders Assn. v. New York State Police*, 87 A.D.3d 193, 197 (3rd Dept 2011).

42. If factual data is incorporated in a pre-decisional document protected under the exemption or if there are instructions to staff that affect the public, those portions must be disclosed. § 87(2)(g)(i); see *Gould*, 89 NY2d at 277; *NY Times Co. v City of NY Off. of the Mayor*, 66 Misc 3d 1209[A], 2020 NY, Slip Op 50035[U], \*4 (Sup Ct NY Co 2020).

43. The exemptions allow an agency to deny the disclosure of *information*, not the disclosure of any documents containing exempt information. If any portion of a withheld document is not covered by any stated exemption, ACS must redact the exempt information and produce the rest of the document. See May 2, 2016 Advisory Opinion, COOG, FOIL-AO-19426 (May 2, 2016) ("FOIL requires that all agency records be made available, except those records 'or portions thereof' that fall within the scope of the exceptions of rights of access appearing in §87(2)").



44. Realistically, ACS, with very little deliberation, made the decision to force a contractor to fire an employee. If there was any deliberation at all, it was how to manage their public image. Any factual recitation about what ACS did is responsive to this request.

45. The Court should direct all responsive emails produced. In the absence of an order of production, *in camera* inspection of responsive materials should be conducted. *Johnson v. NY City Police Dept.*, 257 AD2d 343, 349 (1st Dept 1999) (A decision reflecting the necessary delicate balance between these two competing interests can best be achieved after an *in camera* review of the requested information by the Supreme Court).

#### **Attorneys' Fees**

46. “[T]he counsel fee provision was added in recognition that persons seeking to force an agency to respond to a proper FOIL request must engage in costly litigation, and the statute was recently amended in order to create a clear deterrent to . . . denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.” *Legal Aid Soc. v. New York State Dep’t of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3rd Dep’t 2013) (cleaned up).

47. Under FOIL, trial courts “shall assess” attorneys’ fees if the petitioner “has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.” *Id.*; *Associated Gen. Contractors of New York State, LLC v. N.Y.S. Thruway Auth.*, 173 A.D.3d 1526, 1527 (3rd Dep’t 2019). *See N.Y. Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 339 (3rd Dep’t 2011) (awarding fees where “it was only through the use of the judicial process that petitioner was able to obtain the required disclosure and respondents evinced a clear disregard of the public’s right to open government”).

#### **REQUEST FOR RELIEF**

WHEREFORE, the undersigned petitioner respectfully requests this Court enter an Order directing respondent ACS to diligently search for and produce the requested records; awarding the undersigned legal fees and expenses incurred in making the instant petition for relief; and awarding such other and further relief as the Court may deem just and proper.

Dated: April 11, 2022  
New York, New York

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP



By:

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David B. Rankin  
Katherine 'Q' Adams  
99 Park Avenue, PH/26th Floor  
New York, New York 10016  
t: (212) 277-5825  
e: drankin@blhny.com

To:

The City of New York  
100 Church Street  
New York, New York 10007

New York City Administration for Children's Services  
c/o Janet Stateman, Esq.  
FOIL/Records Access Officer  
150 Williams St., 15<sup>th</sup> Floor  
New York, New York 10038

Supreme Court, State of New York  
County of New York  
Motion Submission Term, Room 130  
60 Centre Street  
New York, New York 10007

**ATTORNEY'S VERIFICATION**

I, David B. Rankin, an attorney duly admitted to practice before the Courts of the State of New York, affirm the following to be true under the penalties of perjury:

I am the attorney of record for the Petitioner.

I have read the annexed Petition and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My beliefs, as to those matters therein not stated upon knowledge, are based upon facts, records, and other pertinent information contained in my files.

This verification is made by me because Petitioner does not reside in the county where I maintain my offices.

Dated: April 11, 2022  
New York, New York

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP



By: \_\_\_\_\_  
David B. Rankin  
99 Park Avenue, PH/26th Floor  
New York, New York 10016  
t: (212) 277-5825  
e: drankin@blhny.com