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COURT OF APPEALS

STATE OF NEW YORK

EMPIRE CENTER FOR NEW YORK STATE POLICY,

Appellant,

-against-

No. 77

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,

Respondent.

EMPIRE CENTER FOR NEW YORK STATE POLICY,

Appellant,

-against-

No. 78

TEACHERS' RETIREMENT SYSTEM OF THE
CITY OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York 12207
March 26, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 77 and 78.

2 Counselor, would you like any rebuttal

3 time?

4 MS. SMITH: Three minutes, please, Your

5 Honor.

6 CHIEF JUDGE LIPPMAN: How much?

7 MS. SMITH: Three minutes, please.

8 CHIEF JUDGE LIPPMAN: Three minutes. You

9 have it. Go ahead.

10 MS. SMITH: Thank you. Good afternoon,

11 Your Honors. My name is Alia Smith, and I represent

12 the Empire Center, an organization dedicated to

13 informing the public about the operations of

14 government.

15 This case is about whether State agencies

16 can reverse course, after nearly thirty years, and

17 reinterpret a provision of FOIL in a way that makes

18 no sense.

19 JUDGE READ: Why did they reverse course,

20 by the way, do you know?

21 MS. SMITH: Why did they reverse course?

22 JUDGE READ: Yeah, why did they rever - - -

23 because apparently they were giving out the names for

24 a long period of time, and then in 2009, or

25 something, they changed.

1 MS. SMITH: That's correct, Your Honor. In
2 2010, the Police Pension Fund decided to stop giving
3 the names, and there's no particular reason given in
4 the record why they - - - why they changed course.

5 JUDGE READ: Okay.

6 JUDGE GRAFFEO: What infor - - -

7 JUDGE READ: Because I couldn't find a
8 reason; I just wondered if there was one.

9 JUDGE GRAFFEO: What information is your
10 organization specifically looking for that they
11 didn't receive? Just the names, or you want
12 information beyond the names?

13 MS. SMITH: The - - - the agencies, the
14 Teachers' Retirement Systems, have provided other
15 information apart from the names. What's at issue in
16 this case is just the names to go along with the
17 other data that's been - - -

18 CHIEF JUDGE LIPPMAN: Why couldn't you
19 fulfill your purpose without getting the names? Why
20 are the names so critical?

21 MS. SMITH: The names are critical because
22 the underlying purpose of FOIL is to expose the
23 actions of government, but also to enable citizens to
24 expose fraud and waste and investigate - - -

25 CHIEF JUDGE LIPPMAN: But the numbers do

1 tell you a story, right, without the names?

2 MS. SMITH: The numbers tell you a story,
3 but it's an incomplete story, and it's a story that
4 could be more meaningfully and usefully told with the
5 names.

6 JUDGE SMITH: You want to be able to tell
7 the story of the guy who's getting a million and a
8 half dollars of public money in pensions.

9 MS. SMITH: That's correct.

10 JUDGE SMITH: Put a name to the story.

11 MS. SMITH: That's correct. You know - - -

12 JUDGE SMITH: Because it attracts more
13 attention, it's more interesting.

14 MS. SMITH: Well, and because the Empire
15 Center's mission is to expose how government funds
16 are being spent.

17 CHIEF JUDGE LIPPMAN: Well, I assume you
18 want to expose it and you want to solve the problem,
19 right, cure what's happening?

20 MS. SMITH: I do believe that is an aim of
21 the Empire Center.

22 CHIEF JUDGE LIPPMAN: I mean, that is your
23 ultimate aim, right?

24 JUDGE READ: Well, I would expect, too,
25 that if you're entitled to it, it doesn't matter what

1 you want to do with it, particularly, as long as it's
2 not illegal.

3 MS. SMITH: Well, it's true, Your Honor,
4 that for the most part, under FOIL, the purposes of
5 getting information is not relevant. However the - -
6 -

7 CHIEF JUDGE LIPPMAN: Tell us why you're
8 entitled to it under the statute.

9 MS. SMITH: With pleasure, Your Honor.

10 CHIEF JUDGE LIPPMAN: The difference,
11 particularly, between retiree and beneficiary.

12 MS. SMITH: Correct. There - - - there's
13 two provisions of the same - - - there's two clauses
14 of the same provision of FOIL.

15 CHIEF JUDGE LIPPMAN: Right.

16 MS. SMITH: The first one says, "Nothing in
17 this article shall require the disclosure of a home
18 address of an officer or employee, former officer or
19 employee, or retiree of a public employees'
20 retirement system." The very next clause says, "Nor
21 shall anything in this article require the disclosure
22 of the name or home address of a beneficiary of a
23 public employees' retirement system."

24 And so reading those two clauses, in
25 conjunction with each other, it's clear that retiree,

1 in the first clause, means all retirees drawing
2 public pensions, and beneficiary means those
3 designated to receive benefits in the event of death.

4 JUDGE PIGOTT: Well, it's either redundant
5 or they mean different things.

6 MS. SMITH: It - - - and rules of statutory
7 construction, Your Honor, suggest that you can't
8 interpret a statute in such a way as - - -

9 JUDGE GRAFFEO: You're saying - - -

10 MS. SMITH: - - - to make one provision
11 redundant.

12 JUDGE GRAFFEO: You're saying the term
13 beneficiary does not encompass the retirees?

14 MS. SMITH: Correct. The retirees, on the
15 one hand, are the actual former government servants
16 drawing public pensions, and the - - -

17 CHIEF JUDGE LIPPMAN: Why, in a common
18 sense look at that statute, wouldn't we include
19 someone who's receiving a pension as a beneficiary?

20 MS. SMITH: When you look - - -

21 CHIEF JUDGE LIPPMAN: Putting aside right
22 now rules of statutory construction. I mean, isn't
23 it - - - isn't that the general meaning, that
24 beneficiary means, you know, a pensioner?

25 MS. SMITH: It's - - - it's impossible to

1 look at it in a vacuum when you've got this interest
2 - - -

3 CHIEF JUDGE LIPPMAN: There is no common
4 meaning, is that what you're saying?

5 MS. SMITH: Oh, no, there is a common
6 meaning. I think that - - - that most of you would
7 have to agree that if you're talking about someone
8 who is the beneficiary of a retirement system, that
9 would be the person designated to receive benefits in
10 the - - - in the event of death, espec - - -

11 CHIEF JUDGE LIPPMAN: I don't think most of
12 us would have to agree; we might or we might not, but
13 it's obviously a close question.

14 MS. SMITH: Well - - -

15 CHIEF JUDGE LIPPMAN: So tell us why your
16 interpretation is better than the obvious, you know,
17 other interpretation. And I'm sure they feel that
18 it's just as clear to them the way they interpret the
19 provision.

20 MS. SMITH: Well, let me answer that in two
21 ways, Your Honor.

22 CHIEF JUDGE LIPPMAN: Sure.

23 MS. SMITH: First, as we discussed earlier,
24 all principles of statutory construction suggest that
25 you have to interpret a statute in a way that doesn't

1 make one term superfluous, which that definition
2 does. The second is - - -

3 CHIEF JUDGE LIPPMAN: Well, you're saying
4 that, but it could be - - - as Judge Pigott said, it
5 could be two different meanings of two different
6 terms.

7 MS. SMITH: There's - - - there's no way to
8 interpret the statute that doesn't - - - sorry; let
9 me rephrase.

10 JUDGE SMITH: I think your point is that
11 nobody would say retirees you can't give the - - -
12 you give the names; beneficiaries you don't, if
13 beneficiaries included retirees.

14 MS. SMITH: That's correct, Your Honor.
15 The - - - the way that - - - that the funds are
16 interpreting the statute, beneficiary and retiree
17 mean the same thing. And I don't think the
18 legislature would have used different terms to mean
19 the same thing.

20 CHIEF JUDGE LIPPMAN: What in the
21 legislative history supports your position?

22 MS. SMITH: The legislative history,
23 honestly, Your - - - Your Honor, is relatively
24 neutral. It uses the same phrases that the final
25 legislation actually used, names and addresses for

1 beneficiaries and names for retirees - - - I'm sorry,
2 just addresses for retirees. But just - - -

3 CHIEF JUDGE LIPPMAN: What, from a policy
4 perspective, is wrong with their interpretation of
5 the - - - the two different meanings? Why wouldn't
6 that be a logical scheme that the legislature might
7 devise?

8 MS. SMITH: To answer that question, you
9 have to look to the underlying policies of FOIL
10 itself. This court, and the FOIL statute itself, has
11 made repeatedly clear that its intention is to open
12 the government and to provide maximum access to data,
13 and that in the event of an ambiguity, which I don't
14 think there is here, but even in the - - - if there
15 were, a tie goes to disclosure. In other words, if
16 there's any doubt about whether the meaning of a
17 statute should permit disclosure or should - - -

18 CHIEF JUDGE LIPPMAN: Well, assuming you're
19 right as to the policy benefits or the - - - that
20 it's a better policy to be transparent and to get as
21 much information out to the public, and that's the
22 general definition or the general purpose attributed
23 to FOIL, still you would have to resort to statutory
24 construction; if it's clear one way or the other or
25 more clear, assuming that it's a close issue, you

1 still have to go with what the statute says, right?

2 MS. SMITH: You absolutely have to go with
3 what the statute says, and I'd also like to point out

4 - - -

5 CHIEF JUDGE LIPPMAN: Even if the overall
6 policy is disclosure is the better course.

7 MS. SMITH: The overall policy is
8 disclosure is the better course, and - - - and
9 numerous FOIL cases have said that when interpreting
10 FOIL as a statute you need to bear that in mind.

11 I also want to point out that for nearly
12 thirty years the statute has been interpreted one
13 way. There wasn't seen to be any ambiguity in it
14 whatsoever, that agencies disclosed this information,
15 the Committee on Open Government, which is the
16 committee tasked with interpreting FOIL and giving
17 guidance to the court and others - - -

18 CHIEF JUDGE LIPPMAN: Yeah, but you have
19 court cases, though, that are interpreted the way
20 your adversary provides, right?

21 MS. SMITH: I disagree, Your Honor.
22 There's one court - - - up until this recent - - -

23 CHIEF JUDGE LIPPMAN: Our court? What does

24 - - -

25 MS. SMITH: Your court - - -

1 CHIEF JUDGE LIPPMAN: What do you make of
2 our - - - of our case law on it?

3 MS. SMITH: Your 1983 case in Veterans
4 (sic) Police. That case came up right after this
5 statute was enacted. The request for information by
6 the Veterans Police Association was to allow the
7 Veterans Police to solicit retirees of the police
8 pension fund.

9 The issue was litigated on privacy grounds,
10 because this statute didn't exist. Shortly before
11 the briefing was completely submitted to this court,
12 the legislature enacted Section 89(7). The fund put
13 in a one-paragraph reply brief saying the statute now
14 governs and you need to dismiss the case. This court
15 then, in a one-page opinion, said yes, the statute -
16 - - statute governs, and therefore, you don't get the
17 information you wanted, which was the names and
18 addresses.

19 JUDGE SMITH: But in fact we - - - on your
20 theory, if we had been a little more careful or a
21 little more precise, we would have said you don't get
22 the addresses; you can have the names.

23 MS. SMITH: Your Honor, I don't think that
24 issue was ever presented to you.

25 JUDGE SMITH: Okay. I understand that

1 point. Nevertheless, it would have been more correct
2 to say you can't get the addresses.

3 MS. SMITH: I think - - - yes, today one
4 might say that. In that case - - -

5 JUDGE READ: Well, could anybody - - -

6 MS. SMITH: - - - however, they were
7 looking - - - I'm sorry.

8 JUDGE READ: The focus of that case was on
9 the addresses, is what you're saying?

10 MS. SMITH: Absolutely. It was clear from
11 the beginning, in the pape - - - from the papers - -
12 -

13 JUDGE SMITH: They wanted to do a mailing.

14 MS. SMITH: They wanted to do a mailing,
15 and so getting just the names wouldn't have been of
16 interest to them. They never asked for just the
17 names. Typically, if you want a portion of what
18 you're asking for, you request redaction from the
19 court.

20 CHIEF JUDGE LIPPMAN: So you think we
21 didn't really mean what we said, or we weren't
22 focusing on - - -

23 MS. SMITH: I think that wasn't the - - -

24 CHIEF JUDGE LIPPMAN: - - - on what we said
25 about the names.

1 JUDGE READ: Or we were asked a different
2 question.

3 MS. SMITH: That's correct. Both correct,
4 yes, Your Honor.

5 JUDGE GRAFFEO: Can you address why there's
6 no privacy concern with the disclosure of names?

7 MS. SMITH: Under 87(2)(b), Your Honor?

8 JUDGE GRAFFEO: Yes.

9 MS. SMITH: Yes, I'd be happy to. This
10 court has rep - - -

11 JUDGE GRAFFEO: Particularly in light of
12 modern technology.

13 MS. SMITH: Yes. This court, and FOIL
14 itself, make clear that lists of names of employees
15 and their salaries have to be made available to the
16 public. That's been reinforced again and again, not
17 only for employees, but for others drawing government
18 money, included licensed veterinarians, applicants
19 for public housing, physicians, people who got
20 parking tickets.

21 In addition, the Committee on Open
22 Government has repeatedly held that this information
23 has to be public. And there has been no case in
24 which this court has ever held that the fact that you
25 can potentially discover addresses with names is

1 sufficient to withhold information under the privacy
2 exemption when there is a public interest in the
3 disclosure of the names - - -

4 JUDGE SMITH: Is it not - - -

5 MS. SMITH: - - - as there is here.

6 JUDGE SMITH: Isn't it true, as I think we
7 were saying a few minutes ago, in fact, part of your
8 purpose in getting these names, frankly, is to
9 embarrass people? You say people deserve to be
10 embarrassed, but nevertheless, to embarrass some
11 people?

12 MS. SMITH: It would be certainly to root
13 our fraud is something that the Empire Center is
14 looking to do.

15 JUDGE SMITH: Or even people who, although
16 not - - - not necessarily crooks, are getting a
17 pension that anybody would think was overgenerous.

18 MS. SMITH: The idea behind the privacy
19 exemption is that the privacy interest must be
20 warranted. And in this case, exposing - - -

21 JUDGE SMITH: So if you say if you're doing
22 something embarrassing, you have no right not to be
23 embarrassed?

24 MS. SMITH: That's correct, Your Honor.

25 CHIEF JUDGE LIPPMAN: What about the

1 federal case on the - - - their FOIA, you know, that
2 says that - - - that the - - - the privacy interests
3 do outweigh the need of the - - - the public to know
4 how taxpayer money is being spent?

5 MS. SMITH: The - - - they cited two
6 federal cases, Your Honor. One was a solicitation
7 case, which I think is in a different category. The
8 other one was the Long case, in which they held that
9 certain - - - the names of certain employees in
10 sensitive occupations could be withheld. And that's
11 also not the case here.

12 And - - - and just to follow up on that,
13 there are a number of State cases which have
14 addressed this exact issue, from other states, where
15 someone has sought the names of retirees drawing
16 public pensions, privacy objections have been
17 asserted, and the courts, over and over again, have
18 said, no, the mere fact that you can theoretically
19 get an address is not enough. That happened very
20 recently, just this year, in Nevada. New Hampshire
21 held the same thing. California - - -

22 CHIEF JUDGE LIPPMAN: So you don't think
23 the privacy interests really outweigh the policy
24 considerations then?

25 MS. SMITH: Absolutely not, especially in

1 light of the fact that there's no evidence in the
2 record, whatsoever, that anyone's privacy has, in
3 fact, been invaded, over the numerous years that this
4 information has been available.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.
6 You'll have your rebuttal. Let's hear from your
7 adversary.

8 MS. SMITH: Thank you.

9 MR. LANG: Good afternoon, Your Honor.
10 Jeffrey Lang, on behalf of the State - - -

11 CHIEF JUDGE LIPPMAN: Counsel, why isn't -
12 - -

13 MR. LANG: - - - Teachers' Retirement
14 System.

15 CHIEF JUDGE LIPPMAN: - - - why isn't their
16 interpretation of the statute a more logical one?
17 Why wouldn't it - - - they used the two different
18 words "retirees" and "beneficiaries". Why doesn't
19 that make sense in terms of the overall purpose of
20 this legislation?

21 MR. LANG: Well, I don't think it makes
22 sense because the term in the statute is a
23 beneficiary of a public employee - - - employee's
24 retirement system. And so taking that phrase, the
25 natural and ordinary meaning of that phrase is

1 someone who is receiving a pension benefit.

2 JUDGE PIGOTT: Would you concede that they
3 could mean different people?

4 MR. LANG: I'm sorry?

5 JUDGE PIGOTT: Would you concede that they
6 could mean a different - - - different people? In
7 other words, if - - - you know, if I die and my wife
8 is - - - is a beneficiary of my retirement system,
9 the way - - - the way counsel's reading it, you would
10 not be able to get her name, but you would be able to
11 get mine, you know, assuming I'm a retiree, through
12 FOIL.

13 MR. LANG: That - - - well, I think it
14 includes both.

15 JUDGE PIGOTT: No, no, I'm saying, would
16 you concede that there are two different classes of
17 people, one of which could be called beneficiaries
18 and one of which would be called retirees? In other
19 words, my wife would not be a retiree; she'd be a
20 beneficiary of a retirement system.

21 MR. LANG: Oh, certainly.

22 JUDGE PIGOTT: So there are two different -
23 - - there's definitions to those two names that would
24 - - - that could make them separate.

25 MR. LANG: Right. Well, in our - - - in

1 our interpretation of - - - of retiree, I mean, the -
2 - - so the statute says that a former officer or
3 employee or a retiree of a public employee's
4 retirement system, that you don't have to disclose
5 the home address. And, you know, under our
6 interpretation, if you're a former employee or a
7 former officer, once you start receiving a pension
8 benefit, at that point you also become a beneficiary,
9 under the ordinary - - -

10 CHIEF JUDGE LIPPMAN: So in your view - - -

11 MR. LANG: - - - nontechnical - - -

12 CHIEF JUDGE LIPPMAN: - - - there can be
13 retirees who aren't beneficiaries.

14 MR. LANG: I mean, they would be - - -

15 CHIEF JUDGE LIPPMAN: And that's what - - -
16 that's what the one provision - - -

17 MR. LANG: Sure.

18 CHIEF JUDGE LIPPMAN: - - - relate - - -

19 MR. LANG: I mean, they would be a small
20 number. Most retirees - - -

21 JUDGE RIVERA: But then you - - -

22 MR. LANG: - - - would be beneficiaries.

23 JUDGE RIVERA: But then you're not reading
24 as the sentence, right? You're sort of decoupling
25 it, and you're refusing to recognize that they might

1 be mutually exclusive, that there's a purpose to the
2 - - - to the language following the colon - - -
3 semicolon.

4 MR. LANG: Well, no, I - - - I don't
5 actually think that's the case. I mean, I think
6 we're - - - we're saying that - - -

7 JUDGE RIVERA: You're saying just look at
8 the word "beneficiary" as opposed to look at it in
9 this context.

10 MR. LANG: Well, if you just look at the
11 word "beneficiary", the word "beneficiary" is just
12 broader than how petitioner wants to read it, which
13 is - - -

14 JUDGE RIVERA: No, I understand - - -

15 MR. LANG: - - - a contingent beneficiary.

16 JUDGE RIVERA: No, I understand your
17 argument, but I'm saying you're asking us to look at
18 it outside of the context of the provision, which - -
19 -

20 MR. LANG: I - - -

21 JUDGE RIVERA: - - - which strikes me as
22 against the rules of statutory construction.

23 MR. LANG: No, I mean, I - - - I think - -
24 - well, I think the context of the provision is that
25 phrase, beneficiary of a public employee's retirement

1 system. And I think - - -

2 JUDGE RIVERA: As opposed to what's before
3 it, though. So why aren't they mutually exclusive?

4 MR. LANG: Well, I think they're - - - you
5 know, we've proposed a definition of a retiree which
6 - - -

7 JUDGE SMITH: You say there are retirees -
8 - -

9 MR. LANG: - - - doesn't pull - - -

10 JUDGE SMITH: - - - there are retirees who
11 don't get pensions?

12 MR. LANG: There can be retirees who don't
13 get pensions. For example - - -

14 JUDGE SMITH: A few.

15 MR. LANG: A few, if you - - -

16 JUDGE SMITH: And those - - - and those
17 guys - - - those guys, the names can be released?

18 MR. LANG: That's right. And then - - -

19 JUDGE SMITH: Why would anyone - - -

20 JUDGE RIVERA: And - - - yeah.

21 JUDGE SMITH: - - - write a statute to say
22 that?

23 JUDGE RIVERA: Where would the concern be
24 for that group? That's true.

25 MR. LANG: Well - - - well, I mean, the

1 concern would be - - - it has to do with the - - -
2 the privacy concern for a person once you start
3 receiving the pension benefit. So what you - - -

4 JUDGE READ: I guess that's what I want to
5 - - - what would be - - - why would the - - -
6 assuming your interpretation is correct, why would
7 the legislature want to make that distinction? In
8 other words, why is my name disclosable now, but at
9 the point when I retire it wouldn't be? I mean,
10 what's - - - what would be the logical reason why the
11 legislature would want to do that? Do I have more
12 privacy once I become a retiree or a greater
13 interest?

14 MR. LANG: Well, I think that - - - I think
15 you do, but the - - - and the reason that you do is
16 that before you're not receiving any amount of money,
17 any - - - a pension benefit. Once you start
18 receiving - - -

19 CHIEF JUDGE LIPPMAN: So you say that what
20 they're saying is that if you're receiving a - - - a
21 benefit, you're not protected, but if you're not
22 receiving a benefit you are, because you're not one
23 of those people who - - - who should be subject?
24 What - - - what - - -

25 MR. LANG: I'm sorry, I think it's the opp

1 - - - if you are receiving the benefit - - -

2 CHIEF JUDGE LIPPMAN: Yeah, that's what I'm

3 - - -

4 MR. LANG: - - - then you are protected - -

5 -

6 CHIEF JUDGE LIPPMAN: Right. Why - - -

7 MR. LANG: - - - because you are in fact -

8 - -

9 CHIEF JUDGE LIPPMAN: Why does that - - -

10 why is that - - -

11 JUDGE READ: But I'm not - - -

12 CHIEF JUDGE LIPPMAN: - - - a logical way

13 to look at it?

14 JUDGE READ: But I'm not if I receive a

15 salary? But once I become - - - once I start to

16 receive a benefit, then I am protected - - -

17 MR. LANG: Well, if you - - -

18 JUDGE READ: Or at least my name can't be

19 disclosed. Why - - - why does that - - - what would

20 be the reason for that?

21 CHIEF JUDGE LIPPMAN: In a FOIL statute.

22 JUDGE READ: Yeah.

23 MR. LANG: Right, under - - - so under the

24 FOIL statute, the reason would be if - - - if you are

25 a former employee or if you are a retiree who's not a

1 beneficiary; in other words, if you're a - - - if
2 you've retired but you haven't yet hit the age at
3 which you can obtain a pension benefit, and you're
4 not receiving anything, then you have less of a
5 privacy interest, because the - - - the privacy
6 invasion here is the link between the - - -

7 JUDGE SMITH: But I think the question - -

8 -

9 MR. LANG: - - - name - - -

10 JUDGE SMITH: - - - is what about the guy
11 who's receiving a salary?

12 JUDGE GRAFFEO: Right. The day before I
13 retire - - -

14 MR. LANG: Um-hum.

15 JUDGE GRAFFEO: - - - I'm still an
16 employee.

17 MR. LANG: Right.

18 JUDGE GRAFFEO: My name and salary can be
19 obtained through a FOIL request.

20 MR. LANG: Absolutely.

21 JUDGE GRAFFEO: The next day, I'm retired,
22 I know that your bene - - - I know that your retiree
23 benefit doesn't come right away, but presume the
24 pension comes the next week. You're saying there's a
25 different disclosure standard?

1 MR. LANG: Well, I'm saying there is a
2 different disclosure standard because - - -

3 JUDGE GRAFFEO: And I guess we're - - -

4 MR. LANG: - - - at that point - - -

5 JUDGE GRAFFEO: - - - asking you what's the
6 policy reason to make that distinction.

7 MR. LANG: Well, the policy reason for
8 making the distinction is when you're an active State
9 employee, you're still making government decisions,
10 so there - - - even though there's a privacy
11 invasion, State employees accept that privacy
12 invasion because there are transparency reasons for
13 allowing people to see the salaries of - - -

14 CHIEF JUDGE LIPPMAN: What about the
15 taxpayer's right to know who's receiving a pension
16 and how much they get? Why is that much different
17 than - - - you mean, because now they're not making
18 decisions and therefore they're in a - - - they
19 should be protected as - - -

20 MR. LANG: Right. I mean, that's - - -

21 CHIEF JUDGE LIPPMAN: What's the logic? I
22 guess that's what I - - -

23 MR. LANG: No, that's - - - that's
24 absolutely right. Once they - - - once they stop
25 working for the State and they've completed their

1 State service, at that point, and they're receiving a
2 pension, there is potential harm from releasing the
3 information. I mean, for example, once it's on - - -
4 it's on petitioner's Web site, anyone has access to
5 it. I mean, it can - - - it's another piece of
6 personal information about you, your name and your
7 pension benefit, and your - - - the - - - your date
8 of retirement and so on. If it's out on the
9 Internet, it could be used for identity theft. For
10 example - - -

11 CHIEF JUDGE LIPPMAN: Would you - - -

12 MR. LANG: - - - it could be used - - -

13 CHIEF JUDGE LIPPMAN: Would you agr - - -

14 MR. LANG: - - - by scam artists.

15 CHIEF JUDGE LIPPMAN: Would you agree that
16 overall there's a better public - - - the better
17 public policy argument is that these things should
18 all be open to the public, in the most - - - in the
19 broadest context, that people of the public should
20 know not only who their employees are but who gets
21 pensions and how much, that there could be a salutary
22 public purpose to allowing that to be known? That
23 this organ - - - this particular organization tries
24 to highlight ways in which taxpayers' dollars are
25 abused or taken advanta - - - is it a better public

1 policy argument, or do you challenge that?

2 MR. LANG: Well, I - - - you have to
3 remember there's a lot of information already out
4 there, the aggregate information as well as each
5 person's individual information. It's just that
6 their name is redacted. And so I would challenge it
7 only to the extent that they say they want the
8 information for - - -

9 JUDGE SMITH: Isn't there a legitimate
10 public interest in being able to take a horrible
11 example of a real person - - - I mean, obviously
12 painful for the person, put his picture and name in
13 the paper and say this guy is getting 287,000 dollars
14 at taxpayer expense and it's an outrage?

15 MR. LANG: Well - - -

16 JUDGE SMITH: Isn't it - - - can't the
17 media legitimately do that, and don't they serve a
18 purpose when they do?

19 MR. LANG: Well, I mean, I'm not denying
20 that there's some purpose to - - - to that. I just
21 think it needs to be balanced against all of the
22 potential harms to the mass of retirees - - -

23 JUDGE PIGOTT: Those harms that you
24 outlined, you know, could happen to any one of us now
25 because we're - - - you know, they can get all of our

1 information, they can do identity theft, they can do
2 - - - so I don't know what happens, you know, the day
3 after Judge - - - Judge Graffeo retires that all of a
4 sudden you say, well, now we're going to protect you
5 from all of that. I mean, I understand - - - I
6 understand your point, but the - - - the argument
7 that you're making that you want to protect retirees
8 from identity theft, I'm not sure that works.

9 JUDGE READ: I guess what you're saying, we
10 take that risk as long as we're drawing a salary?

11 MR. LANG: Right, well - - -

12 JUDGE RIVERA: I would think the State is
13 more concerned when I'm employed for you - - -

14 MR. LANG: Well - - -

15 JUDGE RIVERA: - - - of my identity being
16 stolen.

17 MR. LANG: Well, I think there is that risk
18 when you - - - when you are an employee. But again,
19 because there's the countervailing interest in
20 knowing the - - - the names. But the point is these
21 are people who have spent their entire career in
22 State service.

23 CHIEF JUDGE LIPPMAN: So - - -

24 MR. LANG: I mean, when does it end?

25 CHIEF JUDGE LIPPMAN: So you're argu - - -

1 MR. LANG: You know, the rest have been - -
2 -

3 CHIEF JUDGE LIPPMAN: You're arguing that
4 the purpose of FOIL is met by your interpretation.

5 MR. LANG: Absolutely.

6 CHIEF JUDGE LIPPMAN: I guess you're both
7 arguing that.

8 JUDGE PIGOTT: Just before you go - - - I
9 know your red light's on, but if I did a little
10 grammar work here, we can - - - we can delete about
11 two lines, and we can say, "Nothing in this article
12 shall require the disclosure of the home address of
13 an officer or employee, former officer or employee,
14 or beneficiary of a public employee's retirement
15 system or of an applicant for appointment" et cetera.
16 We can wipe out everything that talks about a retiree
17 of a public employment system, right, because you say
18 beneficiary means that.

19 MR. LANG: That's right. I mean, even - -
20 - even under the statute, the - - - the term retiree
21 is redundant - - -

22 JUDGE PIGOTT: So this is surplus - - -

23 MR. LANG: - - - of a former employee.

24 JUDGE PIGOTT: - - - it's surplusage in the
25 - - - in the statute.

1 MR. LANG: There is surplusage in the
2 statute.

3 CHIEF JUDGE LIPPMAN: Okay, counsel, let's
4 hear from your co-counsel, and we'll go from there.

5 MS. FREEDMAN: Good afternoon, Your Honors.
6 May it please the court. My name is Elizabeth
7 Freedman, and I am appearing for the New York City
8 Teacher's Retirement System.

9 Your Honor, we do agree with the position
10 taken by the State that the names of the retirees, of
11 the beneficiaries here, are exempt from disclosure
12 under FOIL under the plain - - - not only plain - - -

13 CHIEF JUDGE LIPPMAN: You're not saying
14 they must be withheld, right? You're saying they can
15 be.

16 MS. FREEDMAN: They can be withheld,
17 exactly; they're exempt from disclosure.

18 CHIEF JUDGE LIPPMAN: You're saying that
19 they should have the discretion - - -

20 MS. FREEDMAN: Absolutely, Your Honor.

21 CHIEF JUDGE LIPPMAN: - - - as to whether
22 or not to - - -

23 MS. FREEDMAN: Absolutely.

24 JUDGE GRAFFEO: Did you disclose - - -

25 MS. FREEDMAN: Under - - -

1 JUDGE GRAFFEO: - - - this information in
2 previous years?

3 MS. FREEDMAN: Your Honor, it is possible
4 that this information was disclosed in previous
5 years, but certainly estoppel doesn't apply to bind
6 an agency - - -

7 JUDGE GRAFFEO: No, I - - -

8 MS. FREEDMAN: - - - to continue.

9 JUDGE GRAFFEO: - - - was just wondering
10 what policy - - - what aspects of public policy would
11 have caused the change.

12 MS. FREEDMAN: That - - - I think after
13 looking at the law, and certainly this court's
14 decision in Veteran Police Association, I think that
15 decisions were made regarding whether or not this
16 information really did have to be disclosed under
17 FOIL. And I think the legislature made a very clear
18 choice here. And I think the legislature spoke in
19 Section 89, subdivision (7) to exempt - - -

20 JUDGE SMITH: No, but there were - - -

21 MS. FREEDMAN: - - - exactly this
22 information.

23 JUDGE SMITH: During those years, when you
24 were disclosing the information, do you have any
25 anecdotes of a terrible invasion of privacy that

1 happened as a result?

2 MS. FREEDMAN: Not to my knowledge, Your
3 Honor, but I do know that in the context of the
4 police department, certainly there would be,
5 certainly, concerns about releasing that information.
6 But the statute doesn't speak only to the police
7 department; it speaks to all public employment - - -
8 employee, retirees, and beneficiaries. And very
9 simple - - -

10 CHIEF JUDGE LIPPMAN: You know, we have
11 seen - - - there have been a lot of media attention
12 to people in the fire department and the police
13 department with pensions that - - - that the
14 contention is they're not appropriate. The world
15 hasn't come to an end, though, right?

16 MS. FREEDMAN: Well, Your Honor, the
17 information that the petitioners seek can certainly
18 been - - - be obtained. In fact, they did get a
19 wealth of information about pension amounts. The
20 only thing that they did not receive; they didn't ask
21 for home addresses.

22 CHIEF JUDGE LIPPMAN: But it's not as - - -
23 but you agree that it's not as graphic if you don't
24 have the individual. It's a - - - it's a more a
25 numbers thing which doesn't really draw a picture of

1 what's going on.

2 MS. FREEDMAN: Well, Your Honor, I would
3 disagree with that. I think that you can certainly
4 draw a picture without linking the name to the amount
5 - - -

6 JUDGE PIGOTT: Let me give you an example.
7 There used to be a comedian on TV who - - - who would
8 do the sports, and he would say I'll give you a
9 partial baseball score, 4 to 3, 6 to 7, 2 to 1. And
10 he'd say, oh, you want to know the - - - you want to
11 know the player - - - the teams too: Yankees,
12 Dodgers, Phillies, and Red Sox. You don't get the
13 information. I mean, you know the scores and you
14 know the teams, but until you can put them together,
15 you don't know what's going on.

16 MS. FREEDMAN: But we have to look at under
17 - - - certainly under the privacy considerations, how
18 relevant is that information to what the petitioners
19 are seeking - - -

20 JUDGE PIGOTT: Suppose the - - -

21 MS. FREEDMAN: - - - to do.

22 JUDGE PIGOTT: Suppose the information
23 showed that - - - we'll use teachers - - - that
24 teachers' pensions are woefully inadequate.

25 MS. FREEDMAN: And they want to publish the

1 amounts that the teachers are getting, that they - -
2 - and they can certainly publish the amounts that the
3 teachers are getting without linking the names under
4 the privacy considerations.

5 JUDGE PIGOTT: No, I mean, why not use the
6 names? Here's a teacher, thirty-five years, and her
7 pension is - - - is 1,700 dollars a year.

8 MS. FREEDMAN: Well, Your Honor, for the
9 very reason that I think that would be an unwarranted
10 invasion of personal privacy because, for one thing,
11 it could be embarrassing and for no reason. You're
12 embarrassing somebody because, look, they've worked
13 all those years and they're not making what other
14 people think they should be making.

15 JUDGE PIGOTT: But on the other hand, if it
16 was extremely generous, and people are worried about
17 pensions in the State of New York, that would be
18 embarrassing too.

19 MS. FREEDMAN: It could be embarrassing,
20 Your Honor, but again, that comes under the violation
21 - - -

22 CHIEF JUDGE LIPPMAN: But don't - - -

23 MS. FREEDMAN: - - - of the invasion of - -
24 -

25 CHIEF JUDGE LIPPMAN: But don't you - - -

1 MS. FREEDMAN: - - - personal privacy.

2 CHIEF JUDGE LIPPMAN: - - - don't you come
3 back to the - - - to your issue? Your argument is
4 really a statutory construction, because from the
5 policy perspective, look at the world we live in
6 today, where pensions are so under a microscope,
7 public pensions, some places, you know, it's - - -
8 it's the enemy, it's the cause of - - - all of the
9 financial troubles in the world come from excessive -
10 - - or at least the financial troubles of government
11 come from excessive pensions. Couldn't you argue
12 that in the modern world, certainly from the policy
13 perspective, that - - - that the public has a right
14 to know, on the one hand, and yet on the other hand,
15 doesn't your argument really come down to if you can
16 demonstrate that that may be the case policy-wise,
17 but when a legislature passed this statute, this is
18 what they meant, and the statutory construction, you
19 know, leads us to that inescapable conclusion.

20 Would you - - - would you - - - I know
21 you've been - - - you've been saying it, but can you
22 seriously argue that in this day and age it's not a
23 salutary public purpose, whether it's too low
24 pensions or too high pensions? And today, again,
25 there's so much attention to the financial troubles

1 of pension - - - pension systems and to abuses in the
2 system. Couldn't - - - on the one hand, isn't that a
3 pretty convincing argument? And on the other hand, I
4 think you certainly, you know, can make a statutory
5 construction argument to balance that. But do you -
6 - - do you really dispute the generally positive
7 nature of - - - of letting the public understand, and
8 see it in a way that they can understand, not just
9 pure numbers?

10 MS. FREEDMAN: Well, Your Honor, I think
11 that the public can understand, by virtue of
12 disclosing the - - - the numbers, the amounts of the
13 pension. I don't think there's any reason to expose
14 the name with the - - -

15 CHIEF JUDGE LIPPMAN: So essentially, you
16 believe the pri - - - aside from whatever arguments
17 you're making about interpreting the statute, that
18 the privacy interests outweigh the - - -

19 MS. FREEDMAN: Absolutely, Your Honor,
20 especially in this - - -

21 CHIEF JUDGE LIPPMAN: - - - the interest of
22 disclosure.

23 MS. FREEDMAN: - - - in this day and age of
24 Internet access and all the possibilities of fraud
25 and harassment, which the legislature did think about

1 - - -

2 CHIEF JUDGE LIPPMAN: So you think the mod

3 - - -

4 MS. FREEDMAN: - - - in drafting the
5 statute.

6 CHIEF JUDGE LIPPMAN: - - - the modern
7 world may cut the other way? You're arguing - - -

8 MS. FREEDMAN: I think the modern world
9 actually supports a more - - - that this would be an
10 unwarranted invasion of personal privacy. This is
11 what the court held in New York State United Teachers
12 v. Brighter Choice, that the names could be withheld
13 from disclosure of current teachers, people who were
14 currently in the charter schools, because it so
15 easily could be linked to a home address. And I
16 think the court does need to take that into
17 consideration, but also the very plain language of
18 not only the violation of privacy statute but also
19 the Public Officers Law, Section 89(7), where the
20 legislature made clear its intent, as this court then
21 correctly interpreted in Veterans Police Association,
22 that the names and the addresses were exempt from
23 disclosure. And that should certainly be upheld;
24 there's no reason to change it now. If anything, the
25 opposite is true; there's even more of a reason to -

1 - -

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MS. FREEDMAN: - - - withhold those names
4 in the disclosure.

5 CHIEF JUDGE LIPPMAN: Thanks, counsel.

6 MS. FREEDMAN: Thank you, Your Honor.

7 CHIEF JUDGE LIPPMAN: Okay, counselor,
8 rebuttal.

9 Counselor, what about the - - - the latest
10 - - - the latter argument that your adversary makes
11 that in the world that we live in today, you know,
12 with the Internet and all these things going all over
13 the place, that it really pushes us towards a view
14 that, gee, maybe it's not such a good idea, in terms
15 of privacy interests. How do you counter that?

16 MS. SMITH: For thirty years, including,
17 you know, the past ten years, in which the Internet
18 has been a presence in all of our lives, this statute
19 has been interpreted the same way, which is to allow
20 the disclosure of names of retirees drawing pensions.
21 And for that entire span, including during the
22 Internet age, there is zero evidence in the record,
23 whether it's as to teachers, police officers, or
24 anyone else, that there has been any significant
25 invasion of privacy, that anyone has been even mailed

1 un - - - unwanted junk mail. There's been - - -
2 there's no evidence at all that there's a privacy
3 interest. And as Your Honor pointed out, there is
4 overwhelming public interest in this, not just to
5 look at the aggregate data, but to root out cases of
6 fraud.

7 CHIEF JUDGE LIPPMAN: Is your argument that
8 if the shoe fits, wear it?

9 MS. SMITH: I'll take that, Your Honor,
10 yes.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MS. SMITH: You know, and - - - you know,
13 Judge Smith talked about embarrassment, as did - - -
14 as did counsel, but be - - - something being
15 embarrassing is not necessarily the same thing as
16 being private. And in any event, the statute is
17 meant to uncover not just things that require public
18 discourse like, you know, whether someone's pension
19 is too high, but to actually uncover fraud. And we -
20 - -

21 CHIEF JUDGE LIPPMAN: Yeah, but you'd agree
22 to that - - - that you could put out the names of
23 somebody who's not - - - didn't do anything wrong,
24 doesn't - - - no kinds of fraud or abuse of the
25 system, and that person maybe doesn't want their - -

1 - their perfectly appropriate pension, name, address
2 to be out there. But what's your answer to that?
3 That - - - that you've gotten a public pension and
4 the taxpayer's entitled to know - - -

5 MS. SMITH: Right. The statute - - -

6 CHIEF JUDGE LIPPMAN: - - - whether you
7 want it or not.

8 MS. SMITH: Right. The statute - - -

9 CHIEF JUDGE LIPPMAN: Now, I'm talking
10 about from a policy - - - protecting privacy
11 interest.

12 MS. SMITH: Right. The - - - although
13 someone may prefer not to have their name - - -

14 CHIEF JUDGE LIPPMAN: That's what I'm
15 asking.

16 MS. SMITH: - - - raised, the policy
17 interest and the public interest in disclosure vastly
18 outweighs that preference. And when you look at the
19 statute, it makes a clear distinction between
20 government servants - - - former government servants
21 and people, you know, drawing public pensions, on the
22 one hand, versus beneficiaries, who never signed up
23 for public service. And the distinctions that have
24 been drawn by the other side don't recognize that
25 that's a fundamental distinction that the legislature

1 was making. That's why public employee's salaries
2 are disclosed.

3 JUDGE SMITH: So your point is that the
4 legislature that wrote the statute basically resolved
5 these policy issues for us, and that's all we need to
6 do; it said names and addresses for one group, names
7 for the other.

8 MS. SMITH: Absolutely, Your Honor, that's
9 exactly right.

10 CHIEF JUDGE LIPPMAN: Okay.

11 MS. SMITH: Thank you.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Empire Center for New York State Policy v. New York State Teachers' Retirement System, No. 77, and Matter of Empire Center for New York State Policy v. Teachers' Retirement System of the City of New York, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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