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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF MADEIROS,

Appellant,

-against-

No. 90

NEW YORK STATE EDUCATION DEPARTMENT,

Respondent.

20 Eagle Street
Albany, New York
September 5, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL F. FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The final matter on this
2 afternoon's calendar is appeal number 90, Matter of
3 Madeiros v. New York State Education Department.

4 Counsel.

5 MS. NEIDL: Good afternoon, Your Honors. May it
6 please the court, Cynthia Neidl for FOIL petitioner Pamela
7 Madeiros. May I reserve two minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: You may.

9 MS. NEIDL: Thank you. This appeal raises
10 several important issues concerning the interpretation of
11 the law enforcement exemption under FOIL and the
12 application of that exemption to agency audit procedures
13 used in conducting routine fiscal audits. In affirming
14 nondisclosure, the courts below broadly construed the law
15 enforcement exemption in favor of nondisclosure and
16 conflated subparts (i) and (iv) of the exemption. The
17 decisions conflict with well-established principles
18 frequently cited by this court, including that FOIL
19 exemptions that are to be narrowly construed, the agency
20 has the burden of demonstrating that the records fall
21 squarely within an exemption, and the agency must
22 articulate a particularized and specific justification for
23 nondisclosure.

24 JUDGE STEIN: Would - - - would you agree that,
25 substantively, what we have to decide - - - there may be

1 some other issues, but - - - here is first, whether the
2 records were compiled for law enforcement purposes, and
3 then second, whether either subdivision (i) or subdivision
4 (iv) apply, correct?

5 MS. NEIDL: Exactly.

6 JUDGE STEIN: Okay.

7 MS. NEIDL: And I - - - and I - - -

8 JUDGE STEIN: So - - - so I want to start with
9 asking you about what compiled for law enforcement purposes
10 means. And - - - and I guess stack it a little bit with it
11 seems to me that the - - - that the federal - - - under
12 federal law that encompasses civil and regulatory law
13 enforcement. Our Committee on Open Government has opined
14 that it is that broad, and - - - and as I look at the
15 statute as a whole, you know, we - - - we have some
16 provisions that refer explicitly to criminal investigations
17 and others that don't. And of course, that general
18 provision doesn't. So do you agree that this, at least,
19 falls within that broad category? And if not, why not?

20 MS. NEIDL: Well, we don't take the position that
21 it only applies to criminal proceedings, but it - - -
22 compiled for law enforcement purposes is a term of art, and
23 law enforcement purposes, as the ordinary person would
24 understand that, is some sort of enforcement proceeding.
25 Agencies every day - - -

1 JUDGE STEIN: Well, for the purpose of - - -

2 MS. NEIDL: - - - go about enforcing - - -

3 JUDGE STEIN: - - - making sure that people are
4 complying with the law.

5 MS. NEIDL: Well, I think - - - I think all
6 agencies do that as a matter of course in everything that
7 they do. I think if you were just to say, as the Third
8 Department, did that the Agency compiled it with law
9 enforcement purposes in mind, I would submit that every
10 record within every agency is probably avail - - - is
11 probably compiled for law enforcement purposes because
12 agencies are acting with law enforcement in mind.

13 JUDGE WILSON: So if you're taking a look at the
14 Greenberg Traurig website for the client advisory written
15 by Ms. Madeiros that says, "A law was enacted in 2013
16 directing the New York State Office of the State
17 Comptroller to audit the expenses of every program
18 provider, special education services. The comptroller has
19 also directed to refer any findings of fraud, abuse, or
20 other conduct constituting a crime to the appropriate
21 agency, including the district attorney." So she has a
22 view that there's some law enforcement purpose involved
23 here, no?

24 MS. NEIDL: Well, I think that we have to
25 distinguish between the comptroller's audits and the audits

1 at issue in this proceeding. I know the line is blurred by
2 the State's brief, but the comptroller's audits are not at
3 issue here. I can't say what those audits contain, and
4 maybe if the comptroller were FOILED and that case came to
5 this court or the lower courts, the audit - - - the
6 comptroller would be able to justify withholding. But in
7 this case, we are talking about municipalities who are
8 performing the audits. They have no obligation or - - -
9 and they are not directed by either the legislature or SED
10 to refer - - -

11 CHIEF JUDGE DIFIORE: Isn't the concern rooting
12 out waste and fraud and abuse by service providers?

13 MS. NEIDL: Well, I think the record doesn't
14 reflect that. The record reflects that they were going in
15 to determine whether the - - - whether the various programs
16 complied with various policies. But it's very different
17 from a targeted investigation where there is a belief that
18 there is some sort of fraud.

19 JUDGE STEIN: Well, that - - - that - - -

20 MS. NEIDL: This is a first step.

21 JUDGE STEIN: - - - analysis may go to the first
22 - - - the subdivision little (i) exemption, but - - - but
23 I'm not sure that - - - that it's that focused in - - - in
24 the compiled for law enforcement purposes. And it seems to
25 me in response to your earlier statement, that there are

1 lots of records of state agencies that would have to do
2 with protecting the public and - - - and different things
3 that have nothing to do with rooting out fraud and - - -
4 and that sort of thing, which appears to me, from the
5 legislative history, that is what this legislation was
6 intended to do.

7 MS. NEIDL: Well, I think that, again, the line
8 is blurred between what the comptroller's doing as part of
9 his audits and what the agencies are doing.

10 JUDGE STEIN: Well, I'm talking about the
11 legislation that was encouraging the municipalities - - -
12 giving the municipalities the amendments, giving them more
13 of a stake in it, more of a financial stake in it, and - -
14 - and that the purpose of that was because they - - - they
15 were finding that there was more - - - more fraud and - - -
16 and they were looking to root that out.

17 MS. NEIDL: That might have been the purpose of
18 the legislation, but the statute is what - - - how were the
19 records compiled? Were they compiled for law enforcement
20 purposes? And I guess what you're saying is if - - -

21 JUDGE FAHEY: It seems like you're trying to draw
22 - - - draw distinction - - - excuse me - - -

23 MS. NEIDL: Um-hmm.

24 JUDGE FAHEY: - - - between regulatory audits and
25 - - - and law enforcement audits. It seems that that's

1 what you're trying to do, but that doesn't seem to be what
2 the case law says. The - - - the tough case for you is at
3 Fink v. Lefkowitz. I'm sure you're familiar with it. You
4 want to address that?

5 MS. NEIDL: Oh, sure. I would love to address
6 it, and I don't think it is a tough case for me.

7 JUDGE FAHEY: Well, there you go. There you go.

8 MS. NEIDL: In that case - - -

9 JUDGE FAHEY: Go ahead, then.

10 MS. NEIDL: In that case, the agency was a
11 special prosecutor charged with criminal investigations.
12 It involved an investigative manual, not merely audit
13 procedures. The manual was compiled by the special
14 prosecutor to be used in the context of criminal
15 investigations. In that case, only subpart (iv) was
16 involved. That doesn't get to the compiled issue, but it
17 only involved subpart (iv), and subpart (iv) was held
18 applicable to criminal investigatory procedures not routine
19 audit procedures, which is what we have here. The court
20 upheld nondisclosure of detailed specialized methods of
21 conducting a criminal investigation and factors that would
22 alert an investigator that something is awry. I don't
23 think we have that here.

24 JUDGE FAHEY: Well, what if you had here
25 something - - - here you had a blanket denial, right?

1 MS. NEIDL: We did.

2 JUDGE FAHEY: Yeah.

3 MS. NEIDL: Yes.

4 JUDGE FAHEY: And - - - but eventually, there was
5 some materials released. I guess there were five documents
6 in play and some were released. Is that right?

7 MS. NEIDL: There were 55 responsive documents.
8 All were subsequently produced after we brought suit, and
9 only - - - less than half of which had redactions.

10 JUDGE FAHEY: I see. So - - -

11 CHIEF JUDGE DIFIORE: Ms. Neidl - - - oh, excuse
12 me, Judge.

13 JUDGE FAHEY: Go ahead. Go ahead.

14 CHIEF JUDGE DIFIORE: No. No. Go ahead.

15 JUDGE FAHEY: No. I just - - - it just - - - so
16 I'm asking you if there - - - if it had not been a blanket
17 denial originally, would we be here?

18 MS. NEIDL: Had there not been a blanket denial -
19 - - and I'm sorry. Had they produced all 55 documents - -
20 -

21 JUDGE FAHEY: Well, some version of it and then
22 usually these are product of negotiation because I - - - I
23 think of that Aurigemma case, and I want both parties to
24 just kind - - - to comment on that. I'm not sure if I'm
25 saying the name correctly. But the standard set in a

1 criminal investigation is relatively narrow. There has to
2 evidence it's reasonably calculated to uncover information
3 for use in a criminal investigation. It's kind of - - -
4 they call it the Genesis rule. And here I think the
5 blanket denial may or may not have led to - - - to this
6 kind of litigation and there may not be a rational solution
7 to the problem. So go ahead. Comment on it then.

8 MS. NEIDL: Well, the - - - what was withheld
9 were the standards of SED, which the SED has never argued
10 were exempt, and all it - - - that at issue - - - that are
11 at issue at this point are these audit procedures that are
12 not criminal. They are routine audit procedures. And I -
13 - - I'm not sure if they had just made certain redaction
14 and produced everything whether the suit would have been
15 brought.

16 JUDGE RIVERA: I'm not really - - - I guess the
17 focus of this - - - well, your argument before was that it
18 can't be compiled for law enforcement purposes because
19 they're routine audits, but I don't really understand that
20 argument. Can't - - - can't a routine audit be also part
21 of a law enforcement procedure?

22 MS. NEIDL: Absolutely. Absolutely. Yes. I - -
23 - I think that - - -

24 JUDGE RIVERA: Why is that not the case here?

25 MS. NEIDL: Well, I - - - I don't know if I made

1 the argument that because they're routine audit procedures.
2 I would like the court to look at how they were compiled.
3 That is what the statute directs. They were compiled by
4 SED as part of its routine oversight. It has directed that
5 municipalities submit its audits so that it - - - it could
6 approve them. That is why SED has them. It wasn't doing
7 it in the context of any enforcement proceeding or in - - -
8 in part of any investigation. So that's - - - with respect
9 to the first and the fourth prong, I would submit that
10 because they are routine audit procedures they don't fit
11 under number four and - - -

12 JUDGE STEIN: But what's the purpose of a - - -
13 of a routine audit procedure? Isn't it to - - - well,
14 there - - - there may be multiple purposes, but isn't one
15 of them to - - - to root out fraud?

16 MS. NEIDL: Well, I think if you look at the
17 record, there's - - - there's no evidence of that in this
18 case. They didn't - - - they did not submit an affidavit
19 from an auditor or an accountant. And there was nothing in
20 the affidavit that was submitted that suggests that that
21 was the purpose of - - -

22 JUDGE RIVERA: But isn't that inherent in - - -
23 in doing an audit? Isn't that what you're trying to do?

24 MS. NEIDL: Regulators do audits all the time.
25 Many state agencies do audits all the time. They - - -

1 they are not investigations, and they are - - - they are
2 ensuring compliance with whatever regulatory scheme it is.

3 JUDGE RIVERA: These have, in the past, surfaced
4 this fraud. Isn't it - - - isn't it clear than that - - -

5 MS. NEIDL: That's inaccurate.

6 JUDGE RIVERA: - - - that's what was going on
7 here?

8 MS. NEIDL: The - - - the comptroller's audits
9 have revealed that. The munic- - - - there was no evidence
10 that any - - -

11 JUDGE RIVERA: That's what I'm saying is I
12 understand the comptroller's audits have revealed that, but
13 the fact that you then have the benefit, from the
14 government's perspective, of routine audits from which you
15 can draw that data, what - - - why does that then not
16 permit them to argue that it falls under (e).

17 MS. NEIDL: (e), I'm sorry? FOIL?

18 JUDGE RIVERA: Isn't it the fact that they
19 certainly could find out this information through a
20 comptroller's audit but they have another mechanism by
21 which to get this information. Why, then, doesn't it fall
22 within the category of audits - - - information compiled
23 for law enforcement purposes?

24 MS. NEIDL: I think if - - - I think if we put
25 aside whether the documents were compiled for - - - for law

1 enforcement purposes we would get to subpart (i) and (iv).
2 And sub part (iv), for the first time, was raised on - - -
3 on appeal, but (iv) governs criminal procedures. These are
4 clearly not criminal procedures. So the - - - the one
5 exemption that was invoked was subpart (i), and the
6 argument is that because these are techniques, if
7 disclosed, would interfere with the audits.

8 JUDGE RIVERA: Isn't it - - - isn't it possible
9 that a technique or procedure that's used in a civil
10 context can, indeed, be part of a - - - part of criminal
11 investigative techniques or procedures just because a
12 technique - - - here an audit and however they're doing
13 these audits or ones that are also used in the civil
14 context.

15 MS. NEIDL: I would think the - - -

16 JUDGE RIVERA: Does that exclude them?

17 MS. NEIDL: No. I would think that the term
18 criminal has meaning, though. And so in this context - - -
19 I - - - I would submit that there - - - there could be a
20 very different case where there's audit procedures that are
21 regulatory in nature where they're targeted at a specific
22 entity, that those could constitute criminal procedures.
23 But that's not this case. These are routine procedures
24 used for a number of entities. There's nothing in the
25 record that suggests that they were intended to ferret - -

1 - ferret out fraud or any sort of financial misconduct. I
2 would - - - I would submit that - - - that they are not
3 criminal in this case.

4 CHIEF JUDGE DIFIORE: Thank you, Ms. Neidl.

5 MS. NEIDL: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel.

7 MR. LANG: Good afternoon, Your Honors. Jeffrey
8 Lang on behalf of respondent. A provider of these special
9 education services that was defrauding the State would want
10 exactly what the techniques here give you, which is a
11 precise rule of - - -

12 JUDGE STEIN: Well, that may be the case but what
13 we're looking at is how the statute is - - - is drafted and
14 - - - and it - - - it does seem - - - well, first of all,
15 let me ask you. Are you arguing - - - I know the - - - the
16 Appellate Division worked in subdivision (iv). Are you
17 arguing that? Is - - - is that - - -

18 MR. LANG: We - - - we are. Yes.

19 JUDGE STEIN: Then why should we entertain that
20 argument if you didn't argue that below?

21 MR. LANG: Well, no. We did - - - we did argue
22 it below. What we said in our initial FOIL response was
23 that these tech- - - - these - - - if we were to disclose
24 this information, it would interfere with the
25 investigations of compliance.

1 JUDGE STEIN: You never - - - you never used the
2 word criminal.

3 MR. LANG: We - - - no. Well, we did in this
4 sense, which is that it - - - once the Article 78
5 proceeding was - - - was brought, we - - - we have always -
6 - - the Department has always taken the position that these
7 techniques are - - - are protected and they would interfere
8 with investigations precisely because they represent
9 specialized non-routine techniques. And similar audits by
10 the comptroller of the very same industry have resulted in
11 criminal referrals. And - - - and the point - - -

12 JUDGE STEIN: Well, I - - - isn't there a
13 conflating of subdivision (i) and subdivision (iv) going on
14 here? Because let's just start with the criminal
15 investigation. How is this a criminal investigation?

16 MR. LANG: Well, it's not a criminal
17 investigation. What we have argued is that these are
18 compiled for law enforcement purposes, and they will
19 interfere with - - - with ongoing law enforcement
20 investigations. Those are the fiscal audits.

21 JUDGE STEIN: But if your - - - if your
22 interpretation is correct, why do you need subdivision
23 (iv)? Wouldn't that all be encompassed under the general
24 (e) subdivision (i)? Doesn't - - -

25 MR. LANG: We think the audit techniques are

1 protected both under (i) and under (iv).

2 JUDGE STEIN: But what would be the purpose of
3 subdivision (iv)? Why would you ever - - - wouldn't it be
4 completely superfluous?

5 MR. LANG: No. Because the - - - I think the
6 legislature wanted to protect investigative techniques
7 under both. But what subdivision (iv) does is for it makes
8 explicit what's implicit in subdivision (i) by emphasizing
9 that criminal investigative techniques are covered, and it
10 also ensures that - - -

11 JUDGE STEIN: But if that was the intention, then
12 they could just say. They could lump it all in one and say
13 criminal, civil, and regulatory.

14 MR. LANG: Well, (i) is general, (iv) is just
15 more specific. (iv) also ensures that when you have
16 criminal investigative techniques and any investigations
17 using those techniques have concluded, that the criminal
18 investigative techniques are - - - are still protected
19 because there's no time limit.

20 JUDGE RIVERA: Right. So you're saying romanette
21 (iv) has an exclusion to the exclusion, which is this
22 routine techniques and procedures.

23 MR. LANG: Right. So it's - - -

24 JUDGE RIVERA: And that - - - that's in part what
25 - - - not only romanette (iv) is specific to criminal

1 investigation and procedures but it includes an exception
2 to the exception, which you wouldn't necessarily collapse
3 and put in romanette (i).

4 MR. LANG: Right. I mean so (iv) is non-routine
5 criminal investigative techniques, and as Your Honor
6 suggested, these are not criminal investigations. These
7 are civil audits. They have a purpose to root out fraud.
8 That's a - - - that's a valid law enforcement purpose.
9 Similar audits by the comptroller of the same industry,
10 which had a pattern of rampant fraud and caused the
11 legislature to amend the - - - start to amend the Education
12 Law in 2013 to strengthen these municipal audits as well as
13 the - - - as the comptroller's audits. So those have - - -
14 those have led to a pattern of fraud, and because the
15 purpose is to detect fraud, they are criminal investigative
16 tech - - - techniques. In other words, the techniques,
17 let's say, the auditors were using in the Fink v. Lefkowitz
18 case, they're same - - - they're the same auditing
19 techniques. I mean they - - - they're both using
20 materiality thresholds to select certain expenses to look
21 at. Of course, at the granular level they're always going
22 to be different.

23 JUDGE RIVERA: Your point is is to what end,
24 right? To what purpose?

25 MR. LANG: Right. And - - - and the purpose

1 here, there are multiple purposes. The purposes, again, to
2 root out fraud in an industry that's been plagued with
3 fraud. But - - - but also, you know, it - - - it could be
4 to bring a - - - if there's no evidence of criminal intent
5 even though there's an expense that can't be substantiated,
6 there could be a civil proceeding. There could be a
7 judicial proceeding, a lawsuit by the Attorney General to
8 recoup money.

9 JUDGE RIVERA: Reactions, yes. Let - - - let me
10 ask you this. Does your reading devolve to every piece of
11 data that a agency collects is now not FOILable?

12 MR. LANG: Not at all, Your Honor.

13 JUDGE RIVERA: Okay. So where is your line? I -
14 - - I understand the line she's trying to draw. Where is
15 your line, then?

16 MR. LANG: Our line is that when you have a
17 focused and systematic attempt to verify compliance with
18 the law as you have in an audit, when you're auditing the
19 use of public monies, that that clearly falls on the line
20 of being compiled for law enforcement purposes. And if you
21 were to release those techniques, like if you were to
22 release, for example, materiality thresholds, you would be
23 giving the providers the combination to the safe. Agencies
24 - - -

25 JUDGE FAHEY: So how would you draw a distinction

1 between evidence or - - - or an audit that produces
2 material that's reasonably calculated to result in a
3 criminal investigation as opposed to an audit that's
4 reasonably calculated to result in a regulatory action or
5 perhaps a civil lawsuit? How would you draw those
6 distinctions?

7 MR. LANG: Well, I would think a fiscal audit is
8 - - - is a type of audit where you're verifying expenses
9 and expenses of public funds, that that falls on the law
10 enforcement side. But, you know, agent - - - state
11 agencies collect all kinds of information on an ad hoc - -
12 -

13 JUDGE FAHEY: Right. But I guess for here, for
14 our purposes, how do we draw this line? Because if we
15 can't draw a distinction between criminal, regulatory, and
16 civil in some audit practices then it seems we have to
17 either say everything could result in criminal or
18 everything's open.

19 MR. LANG: Well, Your Honor, I just want to - - -

20 JUDGE FAHEY: Those aren't the choices that I
21 think the court would want to make. So how - - -

22 MR. LANG: No. And that - - -

23 JUDGE FAHEY: - - - do we draw the line?

24 MR. LANG: I want to be clear that there's two
25 potentially different questions. One is that are these

1 audits collected for law enforcement purposes that does not
2 require that they result in any type of crime. There is
3 such a thing as civil and regulatory law enforcement, and
4 so they're compiled for law enforcement purposes.

5 JUDGE FAHEY: That's fine but tell me how you
6 draw the line between the civil, the regulatory, and the
7 criminal.

8 MR. LANG: So no. But civil - - - civil and
9 regulatory purposes would count under the statute because
10 it's compiled for law enforcement purposes. The way I
11 would draw the line between subpart (iv), which is the
12 criminal investigative technique, is that if you have a - -
13 - had a technique that is designed to produce information
14 for use in a criminal investigation or a criminal
15 prosecution that that's - - - that is a criminal
16 investigative technique. For example, background check - -
17 - backgrounds check on persons who are applying for jobs.
18 There are probably techniques that, you know, state police
19 or - - - or investigators look at in order to - - - to
20 determine whether or not someone is, you know, correctly
21 saying they - - - they are and have done who - - - who they
22 say they are.

23 That would not be a criminal investigative
24 technique because the chances that anything like that would
25 result in a criminal investigation are so remote that, you

1 know, theoretically it could happen, but it's a remote
2 chance. Whereas when you have a fiscal audit that is
3 trying to verify the expenditure of public funds that are
4 claimed by providers, then that is a criminal investigative
5 technique. The - - - the same types of - - -

6 JUDGE FEINMAN: But I - - - but I think what
7 Judge Fahey's trying to get at is what's the test that you
8 would articulate for putting one in that category and one
9 not in the other.

10 MR. LANG: The - - - the - - -

11 JUDGE FEINMAN: Because it's - - - it's just you
12 know when it's law enforcement when you see it.

13 MR. LANG: Well, the - - - the test for a
14 criminal investigative technique is a - - -

15 JUDGE FEINMAN: I'm not asking for a criminal - -
16 -

17 MR. LANG: Okay.

18 JUDGE FEINMAN: - - - investigative technique.
19 I'm trying to get at what you're calling the civil or
20 regulatory law enforcement purposes.

21 MR. LANG: A civil and regulatory - - -

22 JUDGE FEINMAN: Or the audits for law enforcement
23 purposes.

24 MR. LANG: Sure is - - - is a technique that
25 represents a systematic and focused examination or

1 investigation of whether a party is complying with the law.
2 And that's exactly what these fiscal - - -

3 JUDGE FAHEY: But you know - - - See doesn't - -
4 -

5 JUDGE FEINMAN: But isn't that what every audit
6 is?

7 MR. LANG: When - - - when - - - and I would
8 think that many financial audits serve multiple law
9 enforcement purposes and so they are - - - audit
10 techniques, financial fiscal audit techniques, I believe,
11 are techniques that are compiled for law enforcement
12 purposes. They serve multiple law enforcement purposes.

13 JUDGE RIVERA: Isn't - - -

14 MR. LANG: And I believe that's buttressed - - -
15 I'm sorry - - - when you - - -

16 JUDGE RIVERA: Yes. I - - - I get your point
17 about the fiscal, but isn't - - - you get into this
18 difficulty of separating one type of audit from another. I
19 - - - I thought your argument was really that all audits
20 fit under FOIL but all data collection does not fit under
21 this exception.

22 MR. LANG: That's precisely my argument. Yes.

23 JUDGE RIVERA: Okay.

24 MR. LANG: Yes. All types of ad hoc data
25 collection by agencies, not necessarily for law enforcement

1 purpose, even though something could conceivably happen. A
2 much more systematic and focused attempt to verify
3 compliance with the law. It is for - - -

4 JUDGE STEIN: But I'm having a hard - - - a hard
5 time understanding why not every audit, whether it's by
6 municipality ad hoc, whether it's by the comptroller, it
7 doesn't matter who it's by, doesn't have dual purposes. So
8 it might be ultimately to root out fraud or it might just
9 be to preserve the public fisc. So how do we tell the
10 difference? I think - - -

11 MR. LANG: Those are both law enforcement
12 purposes, Your Honor, and so I believe that even if they
13 have dual purposes, not - - - that's not - - - my argument
14 is I - - - yes. They - - - they - - - fiscal audits have
15 multiple purposes.

16 JUDGE STEIN: Okay. Let's - - - let's say we
17 agree with you on that. If we can move into the particular
18 exemptions, how is that interference with the law
19 enforcement investigation? How do we know at what point
20 there's really an investigation, not some potential
21 speculative possible investigation?

22 MR. LANG: Because the - - - two things. One it
23 interferes with investigations or judicial proceedings. It
24 will - - - the - - - the fiscal audits themselves are a
25 type of investigation which is a systematic inquiry into

1 the truth of certain facts. They fit the definition of - -
2 - of an investigation. If you look at the Onondaga's
3 County's description of its audit plan in - - - that's in
4 the record at 75 - - -

5 JUDGE STEIN: So ultimately what you're saying is
6 that this - - - that this whole section should be broadly
7 read when we're talking about public audits of any type?
8 It - - - it just - - - they're abso- - - - anything that -
9 - - that reveals how those audits are conducted is - - - is
10 safe from - - - from public disclosure?

11 MR. LANG: I - - - I would say read in accordance
12 with the natural meaning of the language. And - - -

13 JUDGE STEIN: But doesn't that conflict with what
14 we're supposed to do which is to read the exemptions
15 narrowly?

16 MR. LANG: No, Your Honor. I - - - I believe
17 that you're supposed to read them narrowly but in
18 accordance with their natural meaning. And the natural
19 meaning here is that if you have non-routine audit
20 techniques where you have the type of audit that is aimed
21 at verifying compliance with the law when you're talking
22 about the expenditure of public funds in an industry that
23 has a history of fraud, that those types of investigative
24 audit techniques, that fits within the natural meaning of
25 the statute, because if you give the providers the audit

1 techniques here, then you - - - you are giving them the
2 combination to the - - - to the safe. If you gave them the
3 materiality thresholds, they would be able to structure
4 their expenses so as to come under any limit and - - -
5 because they would know what the audit - - - auditor is
6 looking for in advance.

7 JUDGE RIVERA: So if I can just - - - because
8 your light is off and with the Chief Judge's permission, if
9 I can just clarify my last point. So - - - so am I
10 understanding you correctly that you're saying audits fit
11 within (e), fiscal audits, in particular would fit within
12 (e)(i) but would still be subject to this narrowing that
13 those fiscal - - - revealing the fiscal audits or data
14 that's collected under the fiscal audits or the procedure
15 interferes with the enforcement investigation? So you've
16 got multiple layers - - -

17 MR. LANG: Yes.

18 JUDGE RIVERA: - - - even if audits appear, on
19 their face from your argument, to fit within this
20 exception. They still might not fit within the exception.
21 The State, in other words, might not be able to invoke this
22 exception.

23 MR. LANG: Well, sure if you had an audit that
24 was aimed at, like, let's say quality assurance - - -

25 JUDGE RIVERA: Yes.

1 MR. LANG: - - - then it may be an - - - it
2 wouldn't fit within the exception.

3 JUDGE RIVERA: Okay.

4 MR. LANG: But if you have an audit that is aimed
5 at verifying public expenditures, that's law enforcement,
6 that's criminal investigative technique.

7 JUDGE RIVERA: As long as it's not interfering
8 with the - - -

9 MR. LANG: And if it's - - -

10 JUDGE RIVERA: - - - investigation. In other
11 words, if it was already public information, you - - - you
12 can take a position it's going to interfere.

13 MR. LANG: Yes. If it was public, it wouldn't
14 interfere.

15 CHIEF JUDGE DIFIORE: Thank you, Mr. Lang.

16 MR. LANG: Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Ms. Neidl.

18 MS. NEIDL: Thank you. Just to address subpart
19 (i), courts require that there be an ongoing pending or
20 foreseeable investigation. The State would say that every
21 audit is an investigation, that on its face is ridiculous.
22 An audit is not necessarily an investigation. An audit
23 could be part of an investigation, but the audit's here and
24 we have to look at the record. These are not
25 investigations. They could lead to an investigation. None

1 of these audits have, though. The comptrollers have.
2 That's a different case.

3 With respect to subpart (iv), that covers
4 criminal investigative procedures. There are not criminal.
5 They weren't drafted by an agency with criminal enforcement
6 function. They were compiled by SED, not as part of its
7 criminal - - - or not part of its criminal enforcement
8 function. They simply do not fall under either prong of
9 the statute.

10 And now if I could just talk about attorneys'
11 fees?

12 CHIEF JUDGE DIFIORE: Please.

13 MS. NEIDL: It's an important issue.

14 CHIEF JUDGE DIFIORE: Yes.

15 MS. NEIDL: In many case - - - many cases, lower
16 court cases, have found that if - - - if documents are
17 produced only as a result of the litigation than the - - -
18 than the petitioner has substantially prevailed. If you
19 look at FOIL when defining substantially prevailed, it - -
20 - it includes where a petitioner gets an order in - - - in
21 his or her favor. It also includes where the agency
22 changes its position as a result of the litigation. That's
23 what happened here. There's no question about it. That
24 the appeal - - -

25 JUDGE STEIN: If you substantially prevail, do we

1 still have to send that back - - - send this back to the
2 lower court to exercise its discretion as to whether and
3 how much to grant?

4 MS. NEIDL: In terms of how much to grant, I
5 would say yes. In terms of whether it should exercise its
6 discretion, I would submit that this court should hold it
7 would be an abuse of discretion under the circumstances of
8 this case not to award attorney's fees. Where suit was
9 brought, where an appeal was denied, all documents were
10 withheld, and they were produced only after - - -

11 CHIEF JUDGE DIFIORE: Was the appeal denied or
12 did they just fail to respond to it?

13 MS. NEIDL: It was constructively denied. They
14 did fail to respond to it.

15 CHIEF JUDGE DIFIORE: Thank you.

16 MS. NEIDL: Thank you.

17 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Madeiros v. New York State Education Department, No. 90 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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