

<b>Matter of BuzzFeed, Inc. v Deputy Commr.</b>
2019 NY Slip Op 31743(U)
June 18, 2019
Supreme Court, New York County
Docket Number: 155278/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 59

-----X  
In re Application for a Judgment under  
Article 78 of the Civil Practice Law and  
Rules by BUZZFEED, INC.,

Petitioner,

-against-

Index No.: 155278/2018

DEPUTY COMMISSIONER, TRIALS,  
NEW YORK CITY POLICE DEPARTMENT

Respondent.

-----X

**DEBRA A. JAMES, J.:**

**ORDER**

ADJUDGED that the petition is denied, and the proceeding is  
dismissed, with costs and disbursements to respondents; and it  
is further

ADJUDGED that respondents, having an address at  
\_\_\_\_\_, do recover from petitioner, having an  
address at \_\_\_\_\_, costs and disbursements in the  
amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that  
respondents have execution therefor.

**DECISION**

In this Article 78 proceeding, petitioner Buzzfeed, Inc.  
seeks a judgment declaring that the constitutional right of  
access to court proceedings and records extends to disciplinary  
trials convened by the Deputy Commissioner, Trials of the New

York City Police Department (NYPD) pursuant to Title 38, Chapter 15 of the Rules of the City of New York and that the press and public have a constitutional right of access to transcripts of these disciplinary proceedings. Petitioner is also seeking an order directing respondents Deputy Commissioner, Trials and the NYPD to provide petitioner with immediate access to the complete transcript of the disciplinary proceeding against Officer Shanturah Brathwaite (Brathwaite). In addition, petitioner requests attorneys' fees pursuant to Public Officers Law (POL) § 89 (4) (c).

Respondents answer and oppose the petition, alleging that the First Amendment right of public access does not extend to the disciplinary hearings of members of the NYPD.

For the reasons set forth below, the petition shall be denied. In sum, petitioner has not met its burden to establish that there is a constitutional right of access to NYPD disciplinary proceedings. In addition, petitioner has failed to exhaust its administrative remedies and has not established how it is entitled to circumvent POL § 84, et seq., also known as the Freedom of Information Law (FOIL) and the relevant statutes by alleging a constitutional right of access.

#### **BACKGROUND AND FACTUAL ALLEGATIONS**

Petitioner is a news organization. On April 10, 2018, one of petitioner's investigative reporters, Kendall Taggart

(Taggart), attended part of Brathwaite's NYPD disciplinary hearing. Brathwaite is a police officer with the NYPD who was charged with, among other things, improperly overstating overtime.<sup>1</sup> The disciplinary hearing was held at One Police Plaza, before the NYPD's Deputy Commissioner of Trials. Taggart had missed a portion of the hearing from the day before and was unable to attend the afternoon portion of the current day's proceedings. Prior to leaving, on April 10, 2018, Taggart states that she requested a transcript of the day's court proceedings from both the court reporter and a member of the NYPD press office. However, neither person would allow her to order a copy of the transcript.

On the following day, petitioner sent an email to Rosemarie Maldonado (Maldonado), Deputy Commissioner of Trials, requesting a copy of the transcript of Brathwaite's disciplinary proceeding. The letter noted that petitioner had attended an open and public proceeding, and alleged that it has a constitutionally protected right to access the transcript.

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<sup>1</sup> In January 2018, Brathwaite filed a complaint in federal court alleging a pattern of discrimination by the NYPD based on race and gender: "Upon information and belief, no white or male officer of NYPD has ever faced departmental charges for not working overtime when no evidence has been introduced or deduced to the contrary." Brathwaite's husband had been arrested and his charges were subsequently dismissed. Brathwaite also alleged that the NYPD was angry that his case had been dismissed and retaliated against Brathwaite by filing meritless NYPD disciplinary charges.

On April 18, 2018, petitioner received a letter from Richard Mantellino (Mantellino), Records Access Officer (RAO) of the FOIL unit. Mantellino advised petitioner that its request to access certain record under FOIL had been received and that the request was assigned to an employee in the FOIL unit. The letter stated in relevant part:

"Before a determination can be rendered, further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located. I estimate that this review will be completed, and a determination issued, within ninety business days of this letter.

"This is not a denial of the records you requested. Should your request be denied in whole or in part, you will be then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer."

After receiving this letter from the FOIL unit, petitioner emailed Larry Byrne (Byrne), Deputy Commissioner for Legal Matters, advising him that the request was made pursuant to its rights under the First Amendment, not pursuant to FOIL. The letter indicates that petitioner and Taggart "clearly assert their rights under the First Amendment right of access to judicial proceedings, which provide greater protections to the public's right to know than FOIL. As a matter of law, our constitutional right of access exists independently of and extends beyond any rights under FOIL." Id. exhibit 4 at 2 (emphasis in original).

Petitioner again received the same letter from FOIL in response to its most recent email. Petitioner sent another email to Maldonado, who advised petitioner to contact the NYPD's legal bureau. Petitioner then corresponded again with Byrne, "seek[ing] confirmation that it is the position of the Department that BuzzFeed's request for access on constitutional grounds will be treated as a statutory FOIL request." Id. exhibit 9 at 1. After not receiving a response, petitioner again emailed Byrne the following: "You appear to refuse to acknowledge the constitutional nature of our request, and accordingly we construe your lack of response as a final determination on our constitutional access request." Id. exhibit 10 at 1.

After respondents failed to respond to petitioner's "constitutional access" request to the transcript, petitioner commenced this article 78 petition.

In the petition, petitioner provides an overview of the NYPD disciplinary process. It states, in relevant part, that to initiate disciplinary proceedings against a NYPD officer, the NYPD must serve the officer with charges and specifications. 38 RCNY § 15-03 (a). The charges "shall include a brief statement of the disciplinary matters to be adjudicated. . . . [and] shall identify the contract provision, law, policy, regulation or rule that was allegedly violated." 38 RCNY § 15-03 (a). The

officer is entitled to a hearing and has the right to be represented by counsel. During the hearing, the parties are entitled to present witnesses and documentary evidence. Similar to other administrative hearings, hearsay is admissible, and "[c]ompliance with the technical rules of evidence shall not be required." 38 RCNY § 15-04 (e) (1). In general, the disciplinary "hearings shall be open to the public . . . ." 38 RCNY § 15-04 (g). "Hearings shall be stenographically recorded. A copy of the transcript of record, or any part thereof, shall be made available to any party to the Hearing for a reasonable cost upon request." 38 RCNY § 15-04 (i).

At the conclusion of the hearing, the Deputy Commission of Trials prepares a draft report and recommendation. This report is provided to the parties and they are able to submit comments. After reviewing the comments, the Deputy Commissioner of Trials finalizes the report and recommendation, which is sent to the Police Commissioner, along with the transcript, exhibits and comments submitted. 38 RCNY § 15-06. The Police Commissioner makes the final determination of the appropriate penalty, and "may approve the recommendation or modify the findings or penalty consistent with the record." 38 RCNY § 15-08 (a).

Petitioner maintains that, pursuant to the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 8 of the New York State Constitution, there is a

presumptive constitutional right of access to governmental proceedings, including NYPD disciplinary proceedings.

Petitioner claims that the right of access applies to NYPD disciplinary proceedings because such proceedings satisfy the two-part inquiry involved in determining whether the right of access attaches to adjudicatory proceedings.

First, petitioner alleges that NYPD department trials are open to the public.

Second, public access to these adjudicatory proceedings "plays a significant positive role in the functioning of departmental trials and the government broadly." Petitioner's memo of law at 10 (citations omitted).

Furthermore, if the First Amendment right applies to the proceeding, then it also applies to the transcript of that proceeding.

Petitioner concludes that, as the presumptive right allegedly attaches, the court cannot deny the transcript without, among other things, making specific findings on the record.

According to petitioner, respondents violated its constitutional right of access to the NYPD disciplinary proceedings when they denied petitioner's request for the transcript and inaccurately converted it to a FOIL request. In a footnote, petitioner indicates that a First Amendment right of

access is constitutional and overrides a FOIL request, which is statutory. Furthermore, the constitutional right of access is contemporaneous, unlike a FOIL request, which would take at least 90 days.

Petitioner is requesting that the court direct respondents to provide petitioner with immediate access to the transcript of Brathwaite's disciplinary proceeding. Petitioner is also seeking a declaration that the constitutional right of access to court proceedings and records extends to all disciplinary trials before the Deputy Commissioner, Trials of the NYPD and that the public and the press have a constitutional right to transcripts of these proceedings. Petitioner is also seeking attorneys' fees pursuant to POL § 89 (4) (c).<sup>2</sup>

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<sup>2</sup>Based on petitioner's constitutional arguments, it is unclear on what basis petitioner seeks attorneys' fees pursuant to FOIL.

Pursuant to POL § 89 (4) (c):

"The court in such a proceeding: (i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access."

In opposition, respondents allege that the petition should be denied, as there is no First Amendment right of public access to transcripts from NYPD disciplinary proceedings. While the public is allowed to attend the disciplinary hearings, there is no statutory authority allowing the public to have access to the transcripts for these proceedings. According to respondents, this "limitation on access demonstrates an administrative intent to maintain the confidentiality of the transcript or record of the disciplinary hearing." Moreover, the decisions stemming from these disciplinary hearings are exempt from disclosure under FOIL.

Respondents argue that petitioner's constitutional rights have not been violated because there is no constitutional right of access to these proceedings. Respondents argue that, as the public is already allowed to attend NYPD disciplinary hearings, petitioner's request for relief declaring that the public has a right to attend these hearings, should be denied as moot.

Respondents allege that NYPD disciplinary hearings can be compared to other professional disciplinary hearings, where courts have held that public access to these proceedings, "and by extension transcripts and records of such hearings," do not play a significant role in these proceedings. While petitioner cites to cases where courts have found that the First Amendment

right of public access applies, these cases did not involve an administrative disciplinary proceeding.

According to respondents, as there is no First Amendment right of public access to the transcript, FOIL provides the appropriate method for requesting access to the NYPD's records. Respondents claim that they properly construed petitioner's transcript request for a transcript as a FOIL request. The NYPD's RAO did not yet issue a final determination on this request. As a result, respondents argue that the petitioner should be dismissed as premature. Furthermore, respondents claim that, even if the FOIL request had been denied, the petition should still be dismissed for failing to exhaust its administrative remedies as it never administratively appealed the denial.

### DISCUSSION

#### Constitutional Right of Access

With respect to the judiciary, there is a "broad constitutional presumption, arising from the First and Sixth Amendments, as applied to the States by the Fourteenth Amendment, that the public is entitled to access to court proceedings. . . . The right of access to proceedings as well as to court records is also firmly grounded in common-law principles." Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V., 28 AD3d 322, 324 (1<sup>st</sup> Dept 2006); compare Newsday, Inc. v Sise,

71 NY2d 146, 153 n 4 (1987) ("In addition, petitioner has no common-law right of access where records, such as these, have not been entered into evidence or filed in court and are, therefore, not public judicial records").

Courts have found that the presumptive First Amendment right of access extends to the records of the court proceedings as "[t]he transcript of a proceeding is so closely related to the ability to attend the proceeding itself that maintaining secrecy is appropriate only if closing the courtroom was appropriate." Newsday LLC v County of Nassau, 730 F3d 156, 165 (2d Cir 2013). The media or press "is not imbued with any special right of access. . . . [and] has no right to information about a trial superior to that of the general public." Courtroom Tel. Network, LLC v State of New York, 5 NY3d 222, 229 (2005) (internal quotation marks and citation omitted).

There is no controlling precedent extending the constitutional right of access to NYPD disciplinary trial proceedings. Nonetheless, petitioner believes that the First Amendment entitles it to access the transcript from Brathwaite's administrative hearing. The Court of Appeals has applied the two step inquiry as set forth by the United States Supreme Court in determining whether there is a First Amendment right to access to a professional disciplinary hearing. Johnson Newspaper Corp. v Melino, 77 NY2d 1, 5 (1990). "The test . . .

'includes whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question.'" Id., quoting Press-Enterprise Co. v Superior Ct., 478 US 1, 8 (1986).

In Johnson Newspaper Corp. v Melino, supra, the Court of Appeals held that there was no presumptive federal or state constitutional right of access to the professional disciplinary hearing "involving a dentist, a licensed professional supervised by the Board of Regents under article 130 of the Education Law." Johnson Newspaper Corp. v Melino, 77 NY2d at 4. The Appellate Court had noted that there was no historical basis for open professional disciplinary proceedings, that the public has not played a significant role in licensing or policing professionals and that the public policy of New York does not require public access.

The petitioner in Johnson Newspaper Corp. had argued that the professional disciplinary hearings should be presumptively open, similar to unemployment compensation hearings, which were found presumptively open by the court in Matter of Herald Co. v Weisenberg (59 NY2d 378, 384 [1983]). The Court rejected that comparison, holding, in relevant part, that the underlying governmental policies in the two proceedings were not comparable. In the context of unemployment compensation

hearings, there was "nothing in the statute or regulations indicative of a policy of confidentiality," and the Attorney General and the Commissioner of Labor were "supportive of a policy of public access to such hearings." Johnson Newspaper Corp. v Melino, 77 NY2d at 9. However, in the subject disciplinary proceeding, "the applicable statute manifests a governmental policy of preserving the confidentiality of information pertaining to disciplinary proceedings until a determination has been reached." Id. The Court further noted that "in professional disciplinary proceedings predecisional materials may be withheld under [FOIL]." Id. at 9-10. It addressed the similarity between other professional disciplinary proceedings, noting that the disciplinary hearing transcripts in a probational officer's disciplinary proceeding are exempt from disclosure under FOIL as predecisional matter. The Court "conclude[d] that our statutes and case law reflect a policy of keeping disciplinary proceedings involving licensed professionals confidential until they are finally determined." Id. at 10.

In the instant situation, petitioner argues that the professional disciplinary proceedings addressed by *Johnson Newspaper Corp.*, *supra*, are not comparable, because the NYPD disciplinary trials have been historically open to the public and because openness serves a positive role in the functioning

of these trials. However, caselaw does not support petitioner's "burden of establishing as a matter of law that there is a First Amendment Right right of access to a [NYPD disciplinary] proceeding." Forcucci v Board of Educ. Of Hamburg Cent. Sch. Dist., 151 AD3d 1660, 1661 (4<sup>th</sup> Dept 2017).

On the other hand, while the NYPD disciplinary trial hearing is open to the public, it is similar to other professional disciplinary hearings, in that it is an internal administrative hearing within the agency to discipline one of its professionals. As recently noted by the Court of Appeals, the "disciplinary proceedings are conducted in the NYPD's internal adjudicatory forum." Matter of New York Civ. Liberties Union v New York City Police Dept., 32 NY3d 556, 561 (2018).

In Johnson Newspaper Corp., the Appellate Court explained that the "hearing is not a final determination but merely the first step in a three-part process which might result in disciplinary action. The Hearing Panel makes a report, including a recommendation, to the Regents Review Committee." Johnson Newspaper Corp. v Melino, 151 AD2d 214, 217 (3d Dept 1989), *affd*, 77 NY2d 1 (1990). Here, too, the NYPD disciplinary hearing is the first step in the process that may result in disciplinary action. As set forth in the facts, after reviewing the Deputy of Commissioner of Trial's recommendations, the

parties' comments and the record, the Police Commissioner makes the final determination as to the appropriate penalty.

The Appellate Court in Johnson Newspaper Corp., supra, further noted that the Office of Professional Discipline's "hearing and attendant hearing transcripts are predecisional matter," which may be withheld under FOIL. Id. at 217. In the instant situation, the hearing transcript requested by petitioner, only a part of the preliminary step in the disciplinary proceeding, is also predecisional matter. Courts have specifically held that, after receiving a FOIL request, the transcript of a probationary officer's disciplinary hearing was exempt from disclosure as it consisted of predecisional memoranda. Sinicropi v County of Nassau, 76 AD2d 832, 833 (2d Dept 1980). "These materials are predecisional intra-agency memoranda that are not reflective of final agency policy or determinations and, as such, are exempt from disclosure." Id.

Accordingly, similar to other agency disciplinary proceedings, the NYPD retains the autonomy to make decisions about disclosing materials.

As with other professional disciplinary hearings, the public has not "played a significant role in the licensing or policing of professionals. This has generally been left to the expertise of the [NYPD]." Johnson Newspaper Corp. v Melino, 151 AD2d at 216. Although the NYPD has permitted members of the

public access to its disciplinary proceedings, there is no indication that, contrary to judicial proceedings, the Legislature demands public access to these proceedings, and by extension, the transcripts of these proceedings. Courts have found that "[w]hether [police disciplinary] hearings should be conducted in public or private - - and there are persuasive arguments both ways - - is a policy decision for the Legislature, not the courts, to make." Matter of Doe v City of Schenectady, 84 AD3d 1455, 1459 (3d Dept 2011).

Recently, the Court in Matter of New York Civ. Liberties Union, supra, considered, and rejected, the argument that, as the information was publicly disclosed at the disciplinary hearing, it could not be withheld from the public. "Section 50-a's mandatory confidentiality provision is also unaffected by the 'crucial fact' that NYPD disciplinary hearings are open to the public. . . . the fact that 'some information' in a record has, at some time, been 'publicly disclosed' does not automatically surrender its confidentiality." (Wilson, J., dissenting opinion on other grounds at 32 NY3d 592 n 3.)<sup>3</sup>

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<sup>3</sup> The Court held that, in connection to a FOIL request, regardless of the fact that the hearing is public, the NYPD was not compelled to disclose "documents generated in connection with disciplinary hearings." It ruled that the documents were exempt under Public Officers Law § 87 (2) (a), which states that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." The records were covered as personnel records under Civil Rights Law

The Court noted that the New York Civil Liberties Union (NYCLU) advanced several policy arguments, including that “[p]ublic access to NYPD disciplinary decisions . . . is critical to maintaining public confidence in the integrity of the police force . . . .” Id. at 566. Nonetheless, the Court explained that the Legislature enacted policies to shield the personnel records, and that it would not “second-guess the Legislature’s determination . . . .” Id. The Court continued that, pursuant to the Legislative intent, records specifically exempted under FOIL could not be compelled, even with redacting identifying personal information. Id. at 569.

Other courts too, have rejected policy and public interest arguments, as contrary to the Legislative intent of allowing the NYPD to control what material they deem to be confidential. For example, in a recent case, petitioner submitted a FOIL request to the New York City Civilian Complaint Review Board (CCRB), seeking to obtain a police officer’s records that contained CCRB complaints and outcomes generated during the police disciplinary

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§ 50-a. “Civil Rights Law § 50-a prevents release of sensitive personnel records that could be used in litigation for the purpose of harassing or embarrassing officers. Documents pertaining to misconduct or rules violations by an officer are the very sort of record which, the legislative history reveals, was intended to be kept confidential.” 2018 NY LEXIS 3479, \*7-8 (internal quotation marks and citation omitted).

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process.<sup>4</sup> Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 150 AD3d 13, 15 (1<sup>st</sup> Dept 2017). The CCRB denied the request and the court denied the petition to compel disclosure. In relevant part, the court found that these records could be used by superiors to evaluate the police officer's performance towards continued employment and that they would be considered personnel records, exempt from FOIL disclosure. The Court noted Legislature's prerogative, "to shield the personnel records of these officers . . . ." Id. at 20 (internal quotation marks and citations omitted). The court noted that petitioner's "policy and public interest arguments" regarding the matter as a public concern, "have been found to be inconsistent with the legislative history . . . ." Id. at 26.

Accordingly, petitioner's request seeking a declaration that the First Amendment right of access applies to NYPD departmental trials and transcripts and its additional request for the trial transcript at issue, shall be denied. As demonstrated by caselaw and legislative intent, the NYPD still retains the authority to control access to the records generated

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<sup>4</sup> The CCRB is the New York City agency that receives and investigates complaints made by a member of the public against an officer employed by the NYPD alleging misconduct. . . . The officer against whom the complaint is filed is entitled to a hearing before the NYPD's Deputy Commissioner of Trials or an Assistant Deputy Commissioner. This trial is open to the public." Id. at 17.

in connection to its internal proceedings. It is entitled to decide what records are confidential, and possibly redact confidential material prior to disclosure, or not disclose the material at all. Similarly, in this situation, contrary to a judicial proceeding where the public is entitled access to court proceedings and court records, there is no presumption of access to a NYPD disciplinary proceeding or the resulting transcript.

FOIL

As a result of this decision, the court finds there is no First Amendment right of public access to the NYPD disciplinary trials, and by extension, no right of immediate access to the complete transcripts of these trials. As set forth below, the appropriate method to obtain Brathwaite's transcript is by submitting a FOIL request.

The policy underlying FOIL "is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public." Matter of Johnson v New York City Police Dept., 257 AD2d 343, 346 (1<sup>st</sup> Dept 1999); see also Matter of Abdur-Rashid v New York City Police Dept., 31 NY3d 217, 224-225 (2018) (internal quotation marks and citation omitted) ("The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government"). Government records are presumed to be open to the

public, unless they fall under one of the statutory exemptions listed in POL § 87 (2). Matter of Thomas v New York City Dept. of Educ., 103 AD3d 495, 496 (1<sup>st</sup> Dept 2013). The exemptions are to be "narrowly construed" and the agency has the burden "to demonstrate that the requested material indeed qualifies for exemption." Id. at 496 (internal quotation marks and citation omitted).

"Agency" is defined as "any state or municipal department . . . office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." POL § 86 (4). "Record" is defined as "any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever." (POL) § 86 (4). Thus, the NYPD falls under the definition of agency, and the transcript of the NYPD disciplinary trial falls under the definition of record.

Court records are not subject to FOIL's disclosure requirements. Matter of Newsday, Inc. v Empire State Dev. Corp., 98 NY2d 359, 363 (2002) (internal quotation marks omitted) ("the judiciary is expressly excluded from agency status under FOIL. Therefore, no information ... in any physical form held or kept by a court as such is subject at all to FOIL,

any more so than would records held or kept by a private person or any nongovernmental entity").<sup>5</sup>

"A constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established." Koultukis v Phillips, 285 AD2d 433, 435 (1<sup>st</sup> Dept 2001) (internal quotation marks and citations omitted). While petitioner alleges that respondents violated its constitutional rights by failing to provide it with the transcript, petitioner provides no supporting caselaw negating FOIL as the proper mechanism for requesting this type of agency record. "Here, although [petitioner] used the term 'unconstitutional' in the challenge to the [NYPD] action, the issues raised are more appropriately reviewed first at the administrative level." Id.

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<sup>5</sup>The Supreme Court has addressed the constitutional right of access to government records in connection to the Freedom of Information Act, which parallels FOIL. McBurney v Young, 569 US 221, 223 (2013). "This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA. . . .The Constitution itself is [not] a Freedom of Information Act." Id. (internal quotation marks and citations omitted). The Court further noted that "Virginia law gives citizens and noncitizens alike access to judicial records." Id.

On the other hand, recent caselaw indicates that the transcript of this administrative, not judicial, proceeding is specifically the type of record under FOIL's purview. For example, in Malcolm v New York City Police Dept. (2018 NYLJ LEXIS 2874, \*4 [Sup Ct, NY County, July 31, 2018. Mendez, J.]), petitioners filed a FOIL request "with the NYPD seeking access to 45 items of records with approximately 90 subcategories compiled by Respondent NYPD during the investigation into the [shooting of Ramarley Graham] February 2, 2012 incident." In that case, the NYPD had brought disciplinary charges against Police Officer Richard Haste (Haste) and he was subjected to a NYPD disciplinary hearing. Petitioners attended this hearing. One of the records requested pursuant to FOIL, but not disclosed by respondents, had been the transcript of Haste's NYPD disciplinary trial hearing. In pertinent part, the court granted the petition, and directed respondents to provide petitioners with the transcript. Petitioners were also granted attorneys' fees, pursuant to POL § 89 (4). The court noted the following:

"Document No. 508 is the transcript of the disciplinary hearing of Richard Haste. Respondents failed to show that this transcript of a hearing conducted after there was no indictment is related to the criminal charges against Richard Haste. Document No. 508 is not FOIL exempt under CPL 160.50 and POL 87[2][a]. Document No. 508 is not subject to a blanket FOIL exemption under POL 87[2][e][iii], POL 87 [2][e][iv], POL 87 [2][b] and POL 89 [2], or exempt under Civil Rights Law 50-a and POL 87[2][a].

Respondents arguments of confidentiality or that methods used to investigate police officers would be revealed is unpersuasive given that the hearing was attended by Petitioners."

*Id.* at \*68-69.

It is well settled that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." Town of Oyster Bay v Kirkland, 19 NY3d 1035, 1038 (2012) (internal quotation marks and citation omitted). As explained, the transcript sought by petitioner is considered an agency record, subject to FOIL. Respondents have advised petitioner that they created a FOIL request for the transcript. Petitioner has not yet heard the response and ultimately still may receive a copy. If not, petitioner is required to go through FOIL's administrative appeal process and exhaust its administrative remedies prior to initiating an article 78.

RCNY § 15-04 (i)

Petitioner is seeking a declaration that the constitutional right of access to court proceedings and records applies to NYPD disciplinary trials, convened pursuant to Title 38, Chapter 15 of the RCNY and is seeking immediate access to the complete transcript of Brathwaite's administrative hearing transcript. Pursuant to 38 RCNY § 15-02, "[t]he Deputy Commissioner of Trials shall have jurisdiction over disciplinary matters

adjudicated by the [NYPD]." The rules apply to "pre-hearing, hearing and post-hearing proceedings." As referenced by petitioner, 38 RCNY § 15-04 (i) establishes the procedures for access to the transcripts. "A copy of the transcript of record, or any part thereof, shall be made available to any party to the Hearing for a reasonable cost upon request." 38 RCNY § 15-04 (i).

"[A] fundamental rule of statutory construction is that the Legislature is presumed to mean what it says." McLean v City of Kingston, 57 AD3d 1269, 1271 (3d Dept 2008) (internal quotation marks and citation omitted). Petitioner, who is not a party to the proceeding, is seeking immediate access to the complete transcript. If petitioner were granted immediate access to the transcript and did not have to submit a FOIL request, both FOIL and 38 RCNY § 15-04 (i) would be rendered meaningless.<sup>6</sup> Accordingly, the petition shall be denied for this alternative reason. Petitioner, who is essentially challenging the administrative regulation, has not met the "heavy burden of showing that the regulation is unreasonable and unsupported by any evidence." Matter of Big Apple Food Vendors' Assn. v Street

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<sup>6</sup>Clearly Brathwaite, who is a party to the disciplinary proceeding, would be entitled to receive a copy of the transcript.

Vendor Review Panel, 90 NY2d 402, 408 (1997) (internal quotation marks and citation omitted).

6/18/2019  
DATE

CHECK ONE:  CASE DISPOSED  GRANTED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

*Debra A. James*  
**DEBRA A. JAMES**