SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

HOWARD I. SMITH,

Petitioner,

-against-

THE NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL and FORMER ATTORNEY GENERAL OF THE STATE OF NEW YORK ELIOT SPITZER,

Respondents.

For an Order and Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

Index No. 3670-08
(Cahill, J.S.C.)

REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE AMENDED VERIFIED PETITION

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PRELIMINARY STATEMENT

Petitioner Howard I. Smith has reversed himself on a number of key points since he filed his Supplemental Notice of Petition and Amended Verified Petition ("the Petition") against Respondent Eliot Spitzer, the former Attorney General of the State of New York, just two months ago. Rather than seeking records from Mr. Spitzer as originally demanded in his Supplemental Notice of Petition dated January 8, 2014, Petitioner now concedes that he cannot and does not seek records from Mr. Spitzer. Petitioner admits that he only seeks records under the Freedom of Information Law, Article 6 of the Public Officers Law ("FOIL"), from the New York State Office of the Attorney General ("OAG"). Having conceded that no records are sought or obtainable from Mr. Spitzer in this Article 78 proceeding, Petitioner is left to argue that FOIL requires the OAG to commence a separate lawsuit against Mr. Spitzer – a former agency employee, now private citizen – under the Tweed Law to obtain records that Petitioner himself concededly may not obtain directly from Mr. Spitzer. This proposal is beyond bizarre: it envisions a world in which a well-heeled requester of documents can use the courts to compel a state agency to obtain documents from a private individual, and then produce them under the guise of a "FOIL response." This proposal violates the FOIL principle that an agency must only disclose records that it possesses. Pub. Officers Law § 89. When it enacted FOIL, and in the decades since, the Legislature never envisioned such an outcome, and no court has ever countenanced so extreme and invasive an interpretation of FOIL.

What Petitioner characterizes as a "loophole," which prevents him from obtaining records that he speculates are held by Mr. Spitzer, Pet.'s Br. at 4, is in fact the heart of FOIL: it is a disclosure statute to allow citizens to obtain records *from public agencies*. Neither FOIL nor its Article 78 enforcement mechanism is a discovery device for a disgruntled defendant charged with fraud to obtain "discovery" from a private individual. Petitioner's essentially frivolous

request that the OAG use the Tweed Law to obtain records from a former agency employee is not transformed into one with legal merit simply because he has had the enormous resources to pursue this FOIL litigation for six years with lawyers available to file any conceivable pleading, no matter how ill-supported. When one strips away the *ad hominem* attacks against Mr. Spitzer, Petitioner's opposition brief amounts to little more than a concession that he has no claims against Mr. Spitzer and can obtain no documents from him, and an admission that what Petitioner actually seeks is to obtain "discovery" from Mr. Spitzer. Of course, no such "discovery" is permissible. The Petition against Mr. Spitzer should be dismissed with prejudice.

ARGUMENT

I. PETITIONER CONCEDES THAT HE HAS NO CLAIMS AGAINST MR. SPITZER AND THAT HE SEEKS NO RECORDS FROM MR. SPITZER, MANDATING DISMISSAL OF MR. SPITZER FROM THIS ACTION

Petitioner makes a number of critical concessions in his opposition brief. Petitioner concedes that: he does not seek any relief or any remedy directly from Mr. Spitzer, there is no cause of action under FOIL against private individuals, he does not seek records from Mr. Spitzer, and private citizens have no obligations under FOIL.[1] Because FOIL does not compel anything from Mr. Spitzer himself, and Petitioner admittedly seeks no relief or remedy from Mr. Spitzer, Petitioner cannot obtain records from him in this proceeding. That ends the matter: the Petition against Mr. Spitzer must be dismissed.

In opposition, Petitioner represents that it was simply his own sloppy drafting that caused him to state in his pleadings of two months ago that he sought documents from Mr.

[1] Although Petitioner is forced to admit that he cannot obtain documents from a private citizen using FOIL, he simultaneously argues that he will try to seek those documents from Mr. Spitzer via "discovery" in this proceeding. This request to conduct "discovery" from Mr. Spitzer is equally misplaced as his original attempt to seek documents from Mr. Spitzer pursuant to FOIL. See infra at II(a).

Spitzer. Petitioner now claims that he *never* sought records from Mr. Spitzer.[2] The concession that Petitioner is entitled to no relief from Mr. Spitzer leads to the inescapable conclusion that this proceeding must end, consistent with this Court's December 22, 2009 Opinion and Order. In that decision, this Court, on the basis of "numerous affidavits," held that no records in the OAG's possession appeared to satisfy petitioner's request for records "from or to Eliot Spitzer," and accordingly, "if such records are no longer retained by respondent, no further action could be required" from the OAG. *See* Appendix to Respondent's Memorandum of Law dated March 14, 2014 (Decision and Order dated December 22, 2009). This ruling remains correct today. No further action can be required, and the Court should adhere to its December 22, 2009 Opinion and Order and dismiss the Petition.

A. C.P.L.R. 7802(b) Does Not Permit a FOIL Request to a Private Individual Who Is a Former State Employee

Having repeatedly conceded that he seeks relief only from the OAG, Petitioner nonetheless argues that Mr. Spitzer is an appropriate party to this action under C.P.L.R. 7802(b), "because the agency records at issue here are in his physical possession and because his cooperation would be useful in resolving the dispute." Pet.'s Br. at 3. Petitioner cannot have it both ways. Petitioner's invocation of C.P.L.R. 7802(b) contradicts his claim that he does not seek a remedy against Mr. Spitzer or bring any claims against Mr. Spitzer. In addition, Mr. Spitzer is not a proper party pursuant to C.P.L.R. 7802(b).

First, C.P.L.R. 7802(b) authorizes actions against "[p]ersons whose terms of office have expired" where "necessary to establish substantial justice." It states that a

[2] Similarly, in his own Petition, Petitioner stated that he sought attorneys' fees from Mr. Spitzer. Pet. at p. 20, ¶ B. Petitioner now claims in a footnote that he no longer seeks attorneys' fees from Mr. Spitzer. Pet.'s Br. at 13 n.11. If the Court denies Mr. Spitzer's motion to dismiss the Petition against him, the Court should direct that Petition file a Corrected Notice of Petition and Petition to correct these errors, which create substantial ambiguity and confusion regarding material issues given Petitioner's shifting positions.

proceeding under Article 78 may be maintained against "an officer exercising juridical or quasi-judicial functions, or a member of a body whose term of office has expired." This provision of Article 78 has no application here, by its own terms. Mr. Spitzer is not "an officer who exercises judicial or quasi-judicial functions." Of course, he *was* such an "officer" when he was Attorney General, insofar as that office oversaw the disposition of FOIL requests directed it as a state agency. But he holds no public office today, he has not for several years, and he is not being sued in this proceeding on the basis of any "judicial or quasi-judicial functions" he carried out while he was Attorney General. Moreover, Mr. Spitzer is also not a "member of a body whose term of office has expired." This provision applies to individuals who are former members of boards, commissions, and like "bodies." The Office of the Attorney General of the State of New York is a state-wide constitutional office, *see* N.Y. Const., art. 5, s. 1, and not a "body" under 7802(b).

Second, Petitioner claims that he is not bringing an action against Mr. Spitzer (and concedes that there is no cause of action under FOIL against an individual), but merely joined him as a necessary party so he could "protect any *private* interest that would be affected by this Court's April 30, 2012 Decision order" and to "obtain his cooperation in returning NYAG's misappropriated property." Pet.'s Br. at 5 (emphasis added). Petitioner's focus on Mr. Spitzer's *private* interests – which flows directly from the Third Department's ruling in this case – and the suggestion that Petitioner is using this proceeding to compel Mr. Spitzer's "cooperation" amounts to further concessions that Article 78 does not apply against Mr. Spitzer and that he is not a proper party. Neither of Petitioner's stated objectives is the type of relief that can be obtained in an Article 78 proceeding pursuant to C.P.L.R. 7801 *et seq*. The "*only questions*" that may be raised in an Article 78 proceeding against a body or officer are, in sum

and substance: (i) whether it failed to perform a duty enjoined upon it by law; (ii) whether it proceeded or is about to proceed in excess of jurisdiction; (iii) whether it made a determination in violation of lawful procedure, or affected by an error of law, or that was arbitrary or capricious or an abuse of discretion; (iv) whether a determination as a result of hearing was supported by substantial evidence; or (v) whether a final determination under the state education law was proper. C.P.L.R. 7803 (emphasis added). Petitioner does not raise any of these questions against Mr. Spitzer, and he cannot. Petitioner does not seek review of a determination made by Mr. Spitzer, or to prohibit Mr. Spitzer from any action, or – by his own account – to compel Mr. Spitzer to do anything. Accordingly, Petitioner seeks no relief against Mr. Spitzer that is authorized under Article 78, and Mr. Spitzer is not a proper party.

Petitioner cites only two cases to support his contention that Mr. Spitzer is a proper party pursuant to C.P.L.R. 7802(b). Neither case relates to FOIL at all, and neither supports Petitioner's proposition, even inferentially. In the first case, *Rox v. Doherty*, 284 N.Y. 550 (1940), a dismissed police detective brought an Article 78 proceeding against the former Commissioner of Public Safety for the City of Saratoga Springs for the purpose of reviewing the Commissioner's determination dismissing the petitioner from his position. There, the decision for review was a decision issued by the former office holder. Here, Petitioner does not seek review of *any* determination made by Mr. Spitzer; the FOIL Request upon which this proceeding is based was issued after Mr. Spitzer ceased being Attorney General. The only determination at issue here is the one made by OAG concerning Petitioner's 2007 FOIL request. Thus, *Rox v. Doherty* provides no support for naming Mr. Spitzer as a party.

Similarly, in *Duquette v. Town of Peru Town Board*, 18 Misc. 3d 174 (Sup. Ct. Clinton Cnty. 2007), the court addressed claims in an Article 78 proceeding brought to annul a

town board resolution providing for indemnification and defense of town employees in civil actions pursuant to Public Officers Law § 18. The respondent argued that four town councilpersons who subsequently received defenses under the resolution were necessary parties to the action, even though they had not been joined prior to the expiration of the statute of limitations. The court found that, while it technically possessed jurisdiction over the town councilpersons under C.P.LR. 1001, exercising such jurisdiction would lead to the "distinctly impractical" outcome of joining parties who would promptly move to dismiss the petition as time-barred. *Id.* at 176. This case provides no support for permitting Mr. Spitzer to be named as a respondent in this proceeding. If anything, it supports dismissing the Petition because it is time-barred. *See infra,* Part III.

II. FOIL DOES NOT EXTEND TO RECORDS HELD BY A FORMER EMPLOYEE OF THE AGENCY

Petitioner's argument that, for purposes of FOIL, there is no difference between records in the possession of current agency employees and those held by former agency employees is deeply misplaced. The statute is clear: what constitutes an "agency record" subject to FOIL turns on the issue of possession, not content. Pub. Officers Law § 86(4) ("record" means "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever"). The Court of Appeals has recognized that documents held by an agency – even where those documents were personal in nature – are subject to disclosure under FOIL, but documents in the possession of a former office holder's personal estate are not, even if such documents relate to state business. *Capital Newspapers v. Whalen*, 69 N.Y.2d 246 (1987).

The FOIL statute and the case law interpreting it make clear that records held by private citizens are not subject to FOIL. While in some cases agencies have accessed the

personal email accounts of current agency employees in order to respond to public disclosure requests,[3] there not one case or decision exists in which a public agency reached out and obtained personal emails from a *former* employee to in order to respond to a disclosure request. Records remain subject to disclosure after the employee who generated them has left the agency only if the records continue to be held by the agency. Every case relied upon by Petitioner supports that proposition. In particular, in *McLeod v. Parnell*, 286 P.3d 509 (Alaska 2012), *reh'g denied* (Dec. 18, 2012), the personal emails at issue were requested by a citizen and obtained from then-Governor Sarah Palin by the state agency while she was in office – not seven years after she had left office, as Petitioner proposes here. *Id*. at 516.

Had Petitioner requested the records while Mr. Spitzer was Attorney General, the question would be different because the records would be still be held by a current agency employee. But Petitioner chose not to submit a FOIL request while Mr. Spitzer was in office. For tactical reasons known only to him, Petitioner chose to serve his FOIL request upon the OAG seven months after Mr. Spitzer left that office. Accordingly, any documents or materials in Mr. Spitzer's personal possession at that time, not being in the possession or under the control of the OAG, were not and are not subject to FOIL. Any other result would mean that each and every former government employee would be compelled to act as a government warehouse, having a permanent obligation to retain and provide any personal email potentially related to their government service. It is an outcome the Legislature never envisioned and that common sense renders untenable.

[3] *See, e.g., Democratic Nat'l Comm. v. U.S. Dep't of Justice*, 539 F. Supp. 2d 363 (D.D.C. 2008); *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 21 n.20 (D.D.C. 2004); *Burton v. Mann*, 74 Va. Cir. 471 (Va. Cir. Ct. 2008); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008–Ohio–4788, 894 N.E.2d 686 (2008); *McLeod v. Parnell*, 286 P.3d 509 (Alaska 2012), *reh'g denied* (Dec. 18, 2012).

As predicted, Petitioner again relies on *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of the State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995), which holds that an agency may be compelled to produce records that it does not physically possess if those records are held by an agent on its behalf and for the agency's benefit. This is uncontroversial, and it supports the proposition that requests cover current agency employees and not former ones. In *Encore*, the external custodian was an agent of the State University of New York ("SUNY") and served pursuant to a contract by which its sole function was to provide services to SUNY and for SUNY's benefit. *Id.* at 414-15. Here, there is no legal, contractual, or agency relationship between the OAG and Mr. Spitzer, and thus *Encore* is simply inapplicable. Whatever agency or contractual relationship Mr. Spitzer had to the OAG ended when he left that office on December 31, 2006.

It is eminently logical that an agency is required to obtain records from its current employees – those who are its agents, subject to its rules and regulations, and within its current control – but not from former employees, who may be physically removed from the agency, have no legal or contractual relationship with it, and no obligation to comply with the its requests. Otherwise, under Petitioner's reasoning, an agency could be required to obtain emails from the personal email accounts of employees who worked for the agency decades ago, even if there had been no contact or relationship between the agency and the employee for those ensuing decades. This is certainly an absurd and unworkable result. The distinction between requiring an agency to produce documents in the possession of current employees, but not former employees, also makes sense because there is simply no mechanism by which an agency can reach out and obtain documents from someone who no longer works there. While Petitioner argues that OAG must "reclaim this property from Mr. Spitzer according to the Tweed Law," this is nothing more than

jargon, since OAG has explicitly stated that it lacks the authority or intention to do so. Petitioner's grandiose attempt to use this Court's power to compel OAG to obtain documents on his behalf cannot be countenanced.

Mr. Spitzer has no existing legal relationship or affiliation with OAG. He is a former employee. He is also a private citizen. He does not hold records "by, with or for" OAG, *see* Pub. Officers Law § 86(4), whose employ he left in 2006.

A. Petitioner May Not Circumvent FOIL By Seeking From a Private Individual "Discovery" of the Same Documents Petitioner Requested From the Agency

Petitioner suggests that the Court "should order discovery and subpoena records from Mr. Spitzer." This discovery would purportedly address whether Mr. Spitzer used personal email accounts to conduct agency business during his tenure as Attorney General. Petitioner states that such subpoenas for records may be issued pursuant to C.P.L.R. 408. Petitioner may not misuse an Article 78 proceeding to reach out and obtain documents not possessed by the agency through "discovery" of third-parties. The Court should reject Petitioner's bid to circumvent FOIL by conducting discovery of a private party for the records he properly may obtain only from the agency via FOIL.

Petitioner relies upon only one case in support of his proposal that the Court should order discovery and "subpoena relevant records" from Mr. Spitzer. *See, e.g.*, Pet.'s Br. at 3. In *Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175 (D.D.C. 2013), an action pursuant to the federal Freedom of Information Act ("FOIA"), the parties were the Environmental Protection Agency ("EPA") and a non-profit law firm, Landmark Legal Foundation. *Landmark* did not involve discovery from a former employee of the very records sought from the agency in the FOIA request itself, as Petitioner proposes here. Rather, the EPA moved for summary judgment that its search for documents in response to the law firm's FOIA request was adequate. The

court denied that motion, finding that fact issues regarding the EPA's search precluded summary judgment. In that case, the court was troubled by evidence that the EPA had acted in "bad faith" when it interpreted the law firm's FOIA request and "purposefully excluded the top leaders of the EPA from the search" for responsive documents. *Id*. at 184. The court ordered limited discovery *as to the adequacy of the EPA's search* for responsive documents. *Landmark* provides no support for what Petitioner urges in this case. *Landmark* did not authorize or involve discovery against a private individual or former employee, and it did not allow a document requester to use a discovery device to find or obtain documents not otherwise reached by FOIA, outside of the agency's possession. It allowed discovery only against the agency itself regarding the adequacy of its search in response to the FOIA request. Here, there is no claim that the OAG's search was inadequate or in bad faith; to the contrary, this Court has already reviewed "numerous affidavits" and concluded that the OAG's search was appropriate.

The use of discovery in this action would pervert FOIL. It would allow a party aggrieved by an agency's denial of access to records to seek discovery of those same records from a private individual under the auspices of FOIL, which is a disclosure statute that covers only public agencies. Any citizen could serve a FOIL request to an agency for documents generated by a former agency employee, and then join that employee as a "necessary party" to an Article 78 proceeding in order to obtain the documents from the private individual – all for records that were not possessed by the agency. This procedure is not authorized by FOIL or any case interpreting it, and it violates the FOIL principle that an agency must only produce what it has, and nothing more. Petitioner's last-ditch effort to use "discovery" to achieve his ends is nothing more than Petitioner's invention of how he would *like* the statute to work.

Petitioner's request to conduct "discovery" against a private individual in this Article 78 proceeding – in which Petitioner simultaneously pretends *not* to seek documents from Mr. Spitzer – is also yet another effort to do an end-run around Justice Charles E. Ramos's rulings in *People v. Greenberg*, No. 401720/05, 2010 WL 4732745 (N.Y. Sup. Ct., N.Y. Cnty. October 21, 2010), holding that such discovery would be irrelevant in that case, and would apply to an "unpleaded" malicious prosecution claim. If Petitioner had wished to file a malicious prosecution action against Mr. Spitzer, that action would have been the appropriate vehicle in which to seek discovery against Mr. Spitzer. Petitioner brought no such proceeding because he clearly has no such claim, and therefore his attempt to obtain "discovery" from Mr. Spitzer in this Article 78 action is foreclosed. Because Mr. Spitzer is a private person rather than an "agency" subject to FOIL, Petitioner may not use this FOIL proceeding to obtain documents from him.

III. PETITIONER'S UNTIMELY ATTEMPT TO JOIN MR. SPITZER AS A "NECESSARY PARTY" IS BARRED BY THE STATUTE OF LIMITATIONS AND LACHES

Petitioner failed to join Mr. Spitzer as a "necessary party" to this action within four months of the final denial of his request for records that he alleges Mr. Spitzer holds. Instead, Petitioner joined Mr. Spitzer five years (at least) after his request for Mr. Spitzer's personal emails was denied, with this calculation being the most generous available to Mr. Smith. The joinder of Mr. Spitzer as a necessary party was untimely, and he must be dismissed from the action on that separate ground. *See Windy Ridge Farm v. Assessor of Shandaken*, 11 N.Y.3d 725 (2008) (petitioner property owners' failure to join necessary parties – a county and school district – to their Article 78 proceeding against the town assessor prior to the expiration of the four-month limitations period mandated dismissal of the petition).

Petitioner claims that there is no statute of limitations or laches bar here because "Petitioner does not seek relief directly from Mr. Spitzer." Pet.'s Br. at 11. Petitioner also states that he seeks no "remedy directly from Mr. Spitzer." *Id.* at 12. Petitioner repeatedly contradicts this claim when he states that Petitioner intends to seek "discovery" from Mr. Spitzer in this proceeding via court-issued subpoenas. Requesting that the Court order discovery from Mr. Spitzer certainly qualifies as a remedy and relief, insomuch as the documents that Petitioner proposes to subpoena are precisely the same records that he seeks as his relief in this proceeding. In other words, the relief that Petitioner seeks from the OAG is the production of records via FOIL, and the relief that Petitioner apparently seeks from Mr. Spitzer in this Article 78 proceeding is the production of the same records via discovery under the C.P.L.R. The requirement that a necessary party be joined within the four months mandated by C.P.L.R. 217 applies. The statute of limitations has long since expired for Mr. Smith to name Mr. Spitzer as a party in this action.

Petitioner also attempts to excuse his untimely joinder of Mr. Spitzer by claiming that the 2014 Petition relates back to the filing of the initial petition in 2007, seven years ago. Pet.'s Br. at 12 n.10. There is no relation back. The Third Department held that Mr. Spitzer and OAG are not "united in interest" when it ruled last year that Mr. Spitzer's "significant private rights and property cannot be said to be protected by the [OAG]." *Smith v. N.Y. State Office of Attorney Gen.*, 110 A.D.3d 1201, 1203 (3d Dep't 2013). In addition, no "mistake" by Petitioner excuses his failure to timely join Mr. Spitzer if he was a necessary party to the action. Finally, Mr. Spitzer and OAG do not assert the same defenses at this juncture and thus are not united in interest. Petitioner may not avail himself of the benefit of the "relation back" doctrine.

Petitioner's late joinder of Mr. Spitzer is prejudicial. Petitioner claims that he seeks only records from OAG and not from Mr. Spitzer, but this statement is patently untrue since Petitioner seeks to obtain the records from Mr. Spitzer via "discovery" in this action. Petitioner may not tactically delay and wait years to join Mr. Spitzer in this proceeding, despite having known for the past five years that he was seeking records purportedly held by Mr. Spitzer in his personal capacity. To permit this would allow the joinder of a necessary party at literally *any* stage in a litigation – whether years or decades later – without reference to the clear requirement in C.P.L.R. 217 that such joinder occur within four months. Petitioner having long been aware that he sought records purportedly held by Mr. Spitzer, dismissal is required as a matter of law because Petitioner failed to timely join Mr. Spitzer – a failure for which he offers no explanation.

IV. PETITIONER IS NOT FREE TO IGNORE THE PLAIN LANGUAGE OF THE STATUTE AND ASK THE COURT TO SUBSTITUTE A POLICY OF ITS OWN

Petitioner claims that this Court has authority to direct OAG to bring a new action against Mr. Spitzer under the Tweed Law, *see* N.Y. Exec. Law § 63-c(1), for the purpose of obtaining the records that Petitioner seeks under FOIL. Petitioner's suggestion that FOIL requires OAG to initiate a separate legal action against Mr. Spitzer is baseless. Petitioner certainly cites no precedents in its support. Petitioner attempts to impose a regime that neither the Legislature nor the OAG has authorized, and to convert a disclosure statute aimed at public agencies into an investigatory tool by which a private litigant commandeers the powers of the courts to obtain information from his perceived enemies. It is a frightening prospect indeed, and FOIL neither speaks of, nor requires, separate agency proceedings against former employees in order to obtain documents for production in response to FOIL requests served on agencies after the employees have left.

In opposition, Petitioner expresses concern that unless agencies are compelled to institute legal proceedings against former employees via the Tweed Law to obtain documents for FOIL responses, "an official could simply abscond with any embarrassing records after leaving an agency to protect those records from becoming public." Pet.'s Br. at 11. There are several responses to this concern about the impact of contemporary email usage on public access to records under FOIL, none of which involves this Court holding that the agency must sue its former employee under the Tweed Law to obtain his personal emails.

First, an agency could institute rules that prohibit the use of personal email accounts by agency employees, or it could implement a protocol that requires agency employees to turn over any personal emails concerning state business before they leave its employ. Some New York state agencies have done precisely this. Nothing prevents or prevented the OAG from doing the same. *See, e.g.*, Exec. Order No. 42: Establishing An Exec. Chamber Records Mgmt. Policy (Dec. 13, 2010), available at http://www.governor.ny.gov/archive/Paterson/executiveorders/EO42.html (stating that "electronic and digital records are rapidly transforming government records management" and developing a records management policy for electronic records for the Executive Chamber).

Second, the Legislature could amend the FOIL statute to provide for a mechanism by which agencies are required to obtain documents such as personal emails from former employees. It has not done so, notwithstanding ample public discussion of the dispute in this proceeding.

The question of how state agencies in New York should address the use of private email accounts by both current and former public employees for purposes of FOIL is a public policy issue. The resolutions are legislative and rule-making ones; they do not lie with this Court

supplementing FOIL with requirements not found in the statute, as Petitioner urges. Not a single court has ever held that an agency must bring an action against a former employee to retrieve emails, or reach out to former employees to obtain records not in the agency's possession, much less that such action is required under a statute such as FOIL. Whether FOIL should require an agency to make rules to address email usage and retention is "a policy decision for the Legislature, not the courts, to make," *Doe v. City of Schenectady*, 84 A.D.3d 1455, 1459 (3d Dep't 2011), and the Court should decline to impose the requirement that Petitioner urges.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court dismiss the Petition against him, in its entirety, with prejudice.

Dated: March 28, 2014
New York, New York

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