

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

Index No. 5964-2015

In the Matter of the Application of

BERNARD GOETZ,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Laws and Rules

- against -

**AFFIRMATION
IN SUPPORT**

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
BASIL SEGGOS, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, RUTH L.
EARL, RECORDS ACCESS OFFICER, NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and DEBORAH W. CHRISTIAN,
ASSISTANT COUNSEL, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondents.

-----X

SPENCER SHEEHAN, an attorney duly admitted to practice law before the Courts of
the State of New York, affirms the truth of the following under penalties of perjury:

1. I am an attorney with Sheehan & Associates, P.C., attorneys for Petitioner
Bernard Goetz ("Petitioner") in the above-captioned action, and as such, I am fully familiar
with the facts and circumstances set forth herein.

2. I submit this Affirmation in Support of Petitioner's Reply Memorandum of
Law in Further Support of Petitioner's Application seeking disclosure of certain records
and/or portions thereof pursuant to the Freedom of Information Law ("FOIL"), Public
Officers Law ("POL"), § 84 et seq.

3. In a letter dated October 12, 2015, Petitioner requested certain records from the Records Access Officer with Respondent NYSDEC. Exhibit "A," FOIL request, October 12, 2015.

4. On October 19, 2015, Petitioner received an email from New York DEC Support (newyorkdec@mycusthelp.net) which stated the October 12, 2015 FOIL request had been received and was being processed. Exhibit "B," Email from New York DEC Support, Subject: Open Records Request : : W000359-101915, October 19, 2015.

5. The FOIL request in the letter of October 12, 2015 was given the reference number FOIL #W000359-101915.

6. Five business days following October 19, 2015 was October 26, 2015.

7. Respondents had not complied with POL § 89(3)(a) by October 26, 2015.

8. On November 9, 2015, Petitioner appealed the denial of FOIL #W000359-101915. Exhibit "C," Appeal of DEC denial of FOIL #W000359-101915.

9. On November 16, 2015, Respondent NYSDEC received Petitioner's appeal of the denial of FOIL #W000359-101915. Exhibit "D," Delivery Confirmation of Certified Mail item number 7114 7344 2820 2282 3299.

10. The signature of the person who signed for the acceptance of the appeal appears to be "James Kirk." Exhibit "D."

11. On November 18, 2015 (after respondent NYSDEC received Petitioner's appeal), Respondent Earl indicated that based upon the review of "potentially responsive documents," it was expected that the requested documents would be made available to Petitioner by December 11, 2015. Exhibit "E," Email from New York DEC Support, Subject: Freedom of Information Law Request :: W000359-101915, November 18, 2015.

12. On November 25, 2015, Petitioner received a letter from Respondent Christian acknowledging Petitioner's appeal of the denial of FOIL #W000359-10191521. Exhibit "F," Letter from Respondent Christian to Petitioner, November 25, 2015.

13. On November 25, 2015, Petitioner received documents provided in response to FOIL #W000359-10191521. Exhibit "G," Letter from Respondent Earl to Petitioner, November 25, 2015.

14. Respondent Earl's letter of November 25, 2015 indicated that four (4) responsive records had been located and that three (3) records had been transmitted to Petitioner. Exhibit "G," p.2.

15. Two (2) of the provided records were provided in their entirety while one (1) was subject to redactions.

16. The second responsive document was 16 pages and consisted of a string of emails between various third parties and a representative of Respondent NYSDEC. Exhibit "H," Responsive Document #2 to FOIL #W000359-101915.

17. Responsive Document #2 to FOIL #W000359-101915 was the record which contained redactions.

18. On December 4, 2015, Petitioner sent an email to Respondent Christian and Respondent Earl. Exhibit "I," First Email to Respondent Christian and Respondent Earl, December 4, 2015.

19. This email stated:

I write to you today as a courtesy and to facilitate cooperation. As you are aware, certain portions of the response to W000359 were redacted. The reasons proffered by DEC were, in my opinion, legally inadequate.

W000359 was already appealed by this office following DEC's

denial. Therefore, should our efforts at cooperation fail, the next step will be an Article 78 proceeding.

I offer you the opportunity to provide my office with the unredacted documents contained within DEC's response to W000359 by 5:00 PM today via email. Thank you.

Exhibit "I."

20. Petitioner sent another email to Respondent Christian and Respondent Earl on December 4, 2015 with comments regarding the redacted portions of Responsive Document #2 to FOIL #W000359-101915. Exhibit "J," Second Email to Respondent Christian and Respondent Earl, December 4, 2015.

21. No response was received by Petitioner by 5:00 PM on December 4, 2015.

22. On December 11, 2015, Petitioner received a letter from Respondent Christian. Email "K," Email from Respondent Christian to Petitioner, December 11, 2015.

23. This letter stated it was sent "in response to your second appeal of Department Staff's response to the above referenced Freedom of Information Law ('FOIL') requests." Exhibit "K."

24. The December 11, 2015 letter from Respondent Christian included the withheld record, albeit with minimal redactions, so designated in Respondent Earl's Letter to Petitioner, November 25, 2015. Exhibit "G."

25. As a result of Respondents provision of the withheld record, that portion of the Petition seeking the withheld record has been rendered moot and Petitioner respectfully does not request judicial intervention with respect thereto. Petition, ¶¶ 163 – 167.

26. In response to Respondent Christian's letter of December 11, 2015, Petitioner sent an email to Respondent Christian and Respondent Earl later that day. Exhibit "L," Email

to Respondent Christian and Respondent Earl. December 11, 2015.

27. In Petitioner's email, it stated, "What authority is there for a second appeal? Please provide the statute or regulation which authorizes multiple appeals. There's one appeal." Exhibit "L."

28. On December 23, 2015, Petitioner filed the present Notice of Verified Petition, Verified Petition and Request for Judicial Intervention ("RJ").

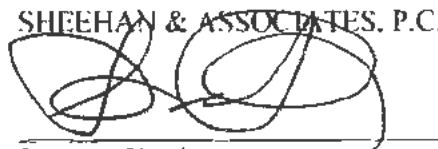
WHEREFORE, based upon the foregoing papers, it is respectfully requested that the Court grant the relief sought by Petitioner in its entirety and deny the motion of Respondents and grant such other and further relief as this Court deems just and proper.

Dated: January 23, 2016
Great Neck, NY

Yours, etc.

SHEEHAN & ASSOCIATES, P.C.

By:

A handwritten signature in black ink, appearing to be "Spencer Sheehan", written over a horizontal line.

Spencer Sheehan
Attorneys for Petitioner
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Tel: (516) 303-0552
Fax: (516) 234-7800
spencer@spencersheehan.com

INDEX NO. 5964-2015
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

BERNARD GOETZ,

Petitioner.

For a Judgment Pursuant to Article 78 of the Civil
Practice Laws and Rules

- AGAINST -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
BASIL SEGGOS, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION, RUTH L. EARL, RECORDS ACCESS
OFFICER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and DEBORAH W. CHRISTIAN, ASSISTANT COUNSEL, NEW
YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

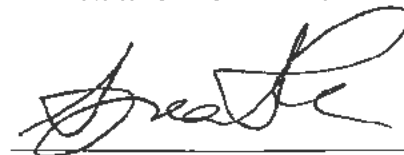
Respondents.

AFFIRMATION IN SUPPORT

Sheehan & Associates, P.C.
Attorneys for Petitioner
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Tel: (516) 303-0552
Fax: (516) 234-7800
spencer@spencersheehan.com

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, and belief, formed after an inquiry reasonable under the circumstances, the contentions contained in the annexed documents are not frivolous.

Dated: January 23, 2016
Great Neck, New York


SPENCER SHEEHAN, ESQ.

EXHIBIT

A

Sheehan & Associates, P.C.

Attorneys at Law
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Telephone: (516) 303-0552
Facsimile: (516) 234-7800
spencer@spencersheehan.com

October 12, 2015

Records Access Officer
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Re: FOIL Request

Dear Records Access Officer:

Pursuant to the provisions of the New York State Public Officers Law § 87 et seq. (Freedom of Information Law or "FOIL"), I hereby request records or portions thereof pertaining to one Bernard Goetz, citizen of the State of New York, County of New York. This office is authorized to make this request as this office represents Bernard Goetz with respect to his interactions with the New York State Department of Environmental Conservation. An affidavit from Bernard Goetz wherein he affirms the authority of this office is annexed hereto.

On behalf of Bernard Goetz, I hereby request records or portions thereof pertaining to the application of Bernard Goetz pursuant to § 11-0515(3) of the New York State Environmental Conservation Law ("ECL") (the "application") to be granted a Class I Wildlife Rehabilitator License:

1. All documents and materials received by DEC from any third-parties between September 1, 2015 and October 12, 2015;¹
2. All incoming and outgoing call logs between DEC and any third-parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and

¹ As used herein, third-parties refers to individuals or entities unaffiliated with DEC and excludes Bernard Goetz and this office.

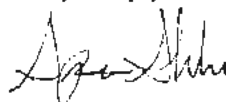
October 12, 2015;

3. Identities of any third-parties, if any, which have contacted DEC with respect to the application of Bernard Goetz between September 1, 2015 and October 12, 2015;
4. Identities of any third-parties, if any, which DEC has contacted, with respect to the application of Bernard Goetz between September 1, 2015 and October 12, 2015;
5. Minutes of any meetings within DEC where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 12, 2015; and
6. Any written correspondence (interoffice memoranda, electronic mail, etc.) between the following employees of DEC – Joseph Pane and Karen Mintzer – relating to the application of Bernard Goetz between September 1, 2015 and October 12, 2015.

This office is aware of, and consents to, any statutory fees which DEC may impose in accordance with the fulfillment of this FOIL request. Upon assembly of any documents, materials and/or other information requested above, your office may transmit said documents, materials and/or information to this office in the following order of preference: (i) electronic mail addressed to spencer@spencersheehan.com, (ii) regular mail addressed to Sheehan & Associates, P.C., 891 Northern Boulevard, Suite 201, Great Neck, NY 11021 and (iii) facsimile, at (516) 234-7800.

If for any reason any portion of this request is denied or not complied with to the extent requested, please state the reasons for this action in writing and provide the name and address of the person or body to whom an appeal should be directed. If you have any questions that might clarify anything presented in this FOIL request, please do not hesitate to contact me. Thank you in advance for your courtesies and cooperation.

Very truly yours,



Spencer Sheehan

Attachments



NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
APPLICATION FOR ACCESS TO RECORDS
(See Instructions on Reverse Side)

TO THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION:

I hereby apply to inspect the following records under the provisions of the Freedom of Information Law:

Address of Facility or Site (if applicable) _____

Spill No. (if applicable) _____ Facility ID No. (if applicable) _____

PBS No. (if applicable) _____

Other: _____

See attached letter.

After inspection, should I desire copies of all or part of the records inspected, I will identify the records to be copied and hereby offer to promptly pay the established fees. (Cost of reproduction or 25¢ per page as applicable). Contact me if cost will exceed \$ N/A.

Name (Print or type) Spencer Sheehan Telephone No. (516) 303-0552 Fax No. (516) 234-7800

Company (if applicable) Sheehan & Associates, P.C. E-Mail Address spencer@spencersheehan.com

Mailing Address 891 Northern Boulevard, Suite 201, Great Neck, NY 11021

Signature _____

Date October 12, 2015

TO APPLICANT:

RECORDS PROVIDED

____ The reproduction costs for the records provided \$ _____

____ Records have been (partially, fully) provided

(If not provided, date when records are expected to be fully provided: _____)

RECORDS NOT AVAILABLE

____ Records cannot be located after a diligent search ____ The Department is not the custodian for records indicated

RECORDS DENIED

I hereby advise that access to the records, or part of the records, has been denied for the reason(s) checked below:

____ Specifically exempt by another statute

____ Unwarranted invasion of privacy

____ Would impair present or imminent contract awards or collective bargaining negotiations

____ Trade secrets

____ Compiled for law enforcement purposes

____ Could endanger life or safety of any other person

____ Inter-agency or intra-agency materials that are not:

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

____ Other exemptions (as applicable)

Records Custodian signature _____

Date: _____

INSTRUCTIONS

TO APPLICANT: (The completion of this form is voluntary; however, it will facilitate access to records you seek.)

1. Please identify the specific records you wish to inspect under the "applicant" portion of this form, sign and date in the appropriate place, and give or mail to the Records Access Officer, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. In the alternative, you may send your request electronically to foil@gw.dec.state.ny.us
2. If after inspection you should desire copies, identify to the Records Custodian the specific records to be copied. Make check or money order payable to the "New York State Department of Environmental Conservation" for copies reproduced by the Department.
3. If you are denied access to records or portions of records, you may submit a written appeal to the FOIL Appeals Officer, Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. Such appeal has to be made within 30 days after the denial. Please attach a copy of this form showing the "Records Denied" portion when filing your appeal. The FOIL Appeals Officer will evaluate the appeal and respond in writing to you within ten (10) business days after receipt of the appeal.

TO DEC RECORDS CUSTODIAN:

1. Conduct search for records:
 - 1a. If records requested for inspection are not in the custody of the Department, advise the applicant if possible as to the identity and location of the proper custodial agency.
 - 1b. If records are found, determine accessibility (in accordance with Public Officers Law Section 87.2)
2. After determination of accessibility:
 - 2a. If accessible—make available to applicant for inspection.
 - 2b. If not accessible—complete "Records Denied" portion of this form, make and retain one copy of completed form, and give original to applicant fully explaining reason for denial.
3. If applicant desires copies—collect total cost from applicant, and make copies (or arrange with applicant to have copies made with outside vendor and applicant pays vendor). Originals must be returned to Department Records Custodian(s).
4. If you are not able to respond to a request within five (5) business days, acknowledge receipt of the request in writing by the fifth business day and estimate when your final response will be made. If a request can not be fulfilled within (20) business days from the date of the acknowledgment letter, you must advise the requester of a date certain for completion of the request.

SPECIAL NOTE

See www.dec.ny.gov/public/373.html for answers to the most commonly asked questions about DEC and the New York State Freedom of Information Law.


AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)


BERNARD GOETZ, being duly sworn subject to the penalties of perjury, deposes and says:

1. I reside at 55 West 14th Street, Apt. 9-P, New York, New York 10011.
2. My date of birth is November 7, 1947.
3. I have authorized Spencer Sheehan, Esq. of Sheehan & Associates, P.C., as my attorney, to communicate on my behalf with the New York State Department of Environmental Conservation for all relevant matters as he deems appropriate.

Dated: New York, New York
October 12, 2015


BERNARD H. GOETZ
55 West 14th Street
Apt. 9-P
New York, NY 10010

On the 12th day of October in the year 2015 before me, the undersigned, a Notary Public in and for said State, personally appeared Bernard H. Goetz, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual executed this instrument.


Notary Public

SARAH E. VADALA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01VA6291705
Qualified In Suffolk County
My Commission Expires December 09, 2017

EXHIBIT

B



Spencer Sheehan <spencer@spencersheehan.com>

Open Records Request :: W000359-101915

New York DEC Support

<newyorkdec@mycusthelp.net>

To: spencer@spencersheehan.com

Mon, Oct 19, 2015 at 1:58

PM

Dear Spencer:

Thank you for your Freedom of Information Law (FOIL) request. Your request has been received and is being processed. Your request was received in this office on 10/19/2015 and given the reference number FOIL #W000359-101915 for tracking purposes.

Record Requested: **records pertaining to the application of Bernard Goetz to be granted a Class 1 Wildlife Rehabilitator License: 1) all documents and materials received by DEC from any third parties between September 1, 2015 and October 12, 2015. 2) All incoming and outgoing logs between DEC and any third parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 2, 2015, etc.**

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the FOIL Center.

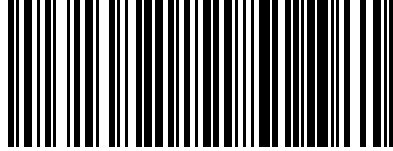
https://mycusthelp.com/NEWYORKDEC/_rs/RequestLogin.aspx

New York State Department of Environmental Conservation, Record Access Office

Track the issue status and respond at: https://mycusthelp.com/NEWYORKDEC/_rs/RequestEdit.aspx?rid=359

EXHIBIT

C



7114 7344 2820 2282 3299

CERTIFIED MAIL

Sheehan & Associates, P.C.
891 Northern Boulevard
Suite 201
Great Neck, NY 11021



0000816734000011

FOIL Appeals Officer
Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Sheehan & Associates, P.C.

Attorneys at Law
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Telephone: (516) 303-0552
Facsimile: (516) 234-7800
spencer@spencersheehan.com

November 9, 2015

FOIL Appeals Officer
Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Re: W000359-101915
W000362-101915
FOIL Appeals

Dear FOIL Appeals Officer:

Please consider this correspondence an appeal of the New York State Department of Environmental Conservation's ("DEC") denial of requests made by this office pursuant to the provisions of the New York State Public Officers Law ("POL") § 87 et seq. (Freedom of Information Law or "FOIL") and relevant regulations of the DEC.

I. Background

In a letter dated October 12, 2015, this office requested records from the DEC in accordance with POL § 87 et seq. FOIL Request #1, annexed hereto as Exhibit "A." FOIL Request #1 was sent via First-Class Mail, Certified Mail, Return Receipt Requested. The Tracking Number assigned by the United States Postal Service ("USPS") was 71147344282022515194. On October 19, 2015, FOIL Request #1 was received by DEC. Electronic Return Receipt for FOIL Request #1, provided by USPS, annexed hereto as Exhibit "B."

In a letter dated October 13, 2015, this office requested records from the DEC in accordance with POL § 87 et seq. FOIL Request #2, annexed hereto as Exhibit "C." FOIL Request #2 was sent via First-Class Mail, Certified Mail, Return Receipt Requested. The Tracking Number assigned by USPS was 71147344282022520471. On October 19, 2015, FOIL Request #2 was

received by DEC. Electronic Return Receipt for FOIL Request #1, provided by USPS, annexed hereto as Exhibit "D."

II. Compliance Requirements of DEC

POL § 89 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") set forth the requirements and procedures for compliance of the DEC with record requests.

POL § 89(3)(a) states that a department subject to the provisions therein, "within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section."

POL § 89(4)(a) states that "Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial."

6 NYCRR 616.5 ("Request for public access to records") provides further guidance as to the responsibilities of DEC in complying with requests for records. 6 NYCRR 616.5(c) states "A response to a request which reasonably describes the record or records sought shall be made within five business days of receipt of the request."

6 NYCRR 616.5(d) states that should the DEC "not provide or deny access to the record sought within five business days of receipt of a request, the department shall furnish a written acknowledgment of receipt and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when the request will be granted or denied."

III. Failure of DEC to Comply with Obligations under Law

A. DEC Response to FOIL Request #1

On or around October 19, 2015, the undersigned received a message through the DEC's FOIL Request System ("FOIL Center"), located on the internet at dec.ny.gov/public/103696.html, pertaining to FOIL Request #1. DEC acknowledgement of FOIL Request #1, annexed hereto as Exhibit "E." The notification stated:

Thank you for your Freedom of Information Law (FOIL) request. Your request has been received and is being processed. Your request was received in this office on 10/19/2015 and given the reference number FOIL #W000359-101915 for tracking

purposes.

The message continued by reciting the records requested, and concluded thusly:

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the FOIL Center.

https://mycusthelp.com/NEWYORKDEC/_rs/RequestLogin.aspx

B. DEC Response to FOIL Request #2

On or around October 19, 2015, the undersigned received a message through the DEC's FOIL Request System ("FOIL Center"), located on the internet at dec.ny.gov/public/103696.html, pertaining to FOIL Request #2. DEC acknowledgement of FOIL Request #2, annexed hereto as Exhibit "F." The notification stated:

Thank you for your Freedom of Information Law (FOIL) request. Your request has been received and is being processed. Your request was received in this office on 10/19/2015 and given the reference number FOIL #W000362-101915 for tracking purposes.

The message continued by reciting the records requested, and concluded thusly:

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the FOIL Center.

https://mycusthelp.com/NEWYORKDEC/_rs/RequestLogin.aspx

C. DEC Responses are Legally Inadequate

October 26, 2015 was the fifth business day from October 19, 2015. By that time, the laws and regulations of the State of New York require that if the DEC has not provided the records requested, it shall "deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied." POL § 89(3)(a).

6 NYCRR 616.5(d) clarifies that if the DEC cannot provide the requested records to the person requesting them within five days, "the department shall furnish a written acknowledgment of receipt and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when the request will be granted or denied." If the actions of the DEC do not

comport with the aforementioned provisions, it “shall constitute a denial of access to records subject to administrative appeal pursuant to section 616.8 of this Part.”

6 NYCRR 616.8 (“Denials of access to records; appeals.”) states that “If the department fails to respond to a request within five business days of receipt of a request, as required in subdivision (a) of this section, such failure shall be deemed a denial of access.” 6 NYCRR 616.8(b). A denial of access may be appealed within 30 days of the denial. 6 NYCRR 616.8(c).

By October 26, 2015, the DEC had failed to furnish the records requested in FOIL Requests #1 and #2. Furthermore, at no time since the receipt of FOIL Requests #1 and #2, has the DEC provided a statement of the approximate date by which a granting or denial of the requests would be made. The only information contained in the DEC’s responses to the requests was a notification that the requests had been received and was being processed. No approximate date for compliance or denial was stated.

IV. Appeal of DEC Denial of FOIL Requests #1 and #2

In accordance with the above-referenced rules and regulations, October 26, 2015 is the date on which the DEC denied FOIL Requests #1 and #2. This appeal is timely since 30 days have not elapsed since October 26, 2015.

The appeal of DEC’s denial of FOIL Requests #1 and #2 is made herein to the FOIL Appeals Officer, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-1500. 6 NYCRR 616.8(d).

6 NYCRR 616.8(e) states that the “time for deciding an appeal by the FOIL Appeals Officer shall commence upon receipt of written appeal identifying the following”:

Date of Request for Records	Location of Request for Records	Records that were Denied	Name of Appellant ¹	Return Address of Appellant
October 19, 2015	Central Office (Albany)	All records requested in FOIL Request #1. Exhibit “A.”	Bernard Goetz	891 Northern Boulevard, Suite 201, Great Neck, NY 11021
October 19, 2015	Central Office (Albany)	All records requested in FOIL Request #2. Exhibit “C.”	Bernard Goetz	891 Northern Boulevard, Suite 201, Great Neck, NY 11021

¹ Appellant is represented by legal counsel through this office. An affidavit of appellant was annexed with FOIL Requests #1 and #2, which authorized this office to make such requests.

Within 10 business days following the receipt of the within appeals of FOIL Requests #1 and #2, the FOIL Appeals Officer shall inform the appellant herein, through his undersigned counsel, of its determination of the appeals. "Failure by the department to conform to this requirement shall constitute a denial of records." 6 NYCRR 618.(g).

IV. Article 78 Proceeding

Should the FOIL Appeals Officer issue a subsequent denial of FOIL Requests #1 and #2, this office will commence a proceeding under Article 78 of the Civil Practice Laws and Rules ("CPLR") for a review of any denial. POL § 89(4)(b). As a result of prevailing in any Article 78 action, this office will seek reasonable attorney's fees and other litigation costs from the DEC that have been reasonably incurred.

V. Conclusion

This office thanks you in advance for your expected compliance with the laws and regulations of the State of New York and the DEC.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Spencer Sheehan', written in a cursive style.

Spencer Sheehan

Enclosures (6)

EXHIBIT A

Sheehan & Associates, P.C.

Attorneys at Law
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Telephone: (516) 303-0552
Facsimile: (516) 234-7800
spencer@spencersheehan.com

October 12, 2015

Records Access Officer
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Re: FOIL Request

Dear Records Access Officer:

Pursuant to the provisions of the New York State Public Officers Law § 87 et seq. (Freedom of Information Law or "FOIL"), I hereby request records or portions thereof pertaining to one Bernard Goetz, citizen of the State of New York, County of New York. This office is authorized to make this request as this office represents Bernard Goetz with respect to his interactions with the New York State Department of Environmental Conservation. An affidavit from Bernard Goetz wherein he affirms the authority of this office is annexed hereto.

On behalf of Bernard Goetz, I hereby request records or portions thereof pertaining to the application of Bernard Goetz pursuant to § 11-0515(3) of the New York State Environmental Conservation Law ("ECL") (the "application") to be granted a Class I Wildlife Rehabilitator License:

1. All documents and materials received by DEC from any third-parties between September 1, 2015 and October 12, 2015;¹
2. All incoming and outgoing call logs between DEC and any third-parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and

¹ As used herein, third-parties refers to individuals or entities unaffiliated with DEC and excludes Bernard Goetz and this office.

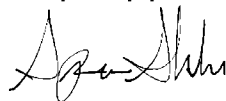
October 12, 2015;

3. Identities of any third-parties, if any, which have contacted DEC with respect to the application of Bernard Goetz between September 1, 2015 and October 12, 2015;
4. Identities of any third-parties, if any, which DEC has contacted, with respect to the application of Bernard Goetz between September 1, 2015 and October 12, 2015;
5. Minutes of any meetings within DEC where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 12, 2015; and
6. Any written correspondence (interoffice memoranda, electronic mail, etc.) between the following employees of DEC – Joseph Pane and Karen Mintzer – relating to the application of Bernard Goetz between September 1, 2015 and October 12, 2015.

This office is aware of, and consents to, any statutory fees which DEC may impose in accordance with the fulfillment of this FOIL request. Upon assembly of any documents, materials and/or other information requested above, your office may transmit said documents, materials and/or information to this office in the following order of preference: (i) electronic mail addressed to spencer@spencersheehan.com, (ii) regular mail addressed to Sheehan & Associates, P.C., 891 Northern Boulevard, Suite 201, Great Neck, NY 11021 and (iii) facsimile, at (516) 234-7800.

If for any reason any portion of this request is denied or not complied with to the extent requested, please state the reasons for this action in writing and provide the name and address of the person or body to whom an appeal should be directed. If you have any questions that might clarify anything presented in this FOIL request, please do not hesitate to contact me. Thank you in advance for your courtesies and cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Spencer Sheehan', written over a horizontal line.

Spencer Sheehan

Attachments

INSTRUCTIONS

TO APPLICANT: (The completion of this form is voluntary; however, it will facilitate access to records you seek.)

1. Please identify the specific records you wish to inspect under the "applicant" portion of this form, sign and date in the appropriate place, and give or mail to the Records Access Officer, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. In the alternative, you may send your request electronically to foil@gw.dec.state.ny.us
2. If after inspection you should desire copies, identify to the Records Custodian the specific records to be copied. Make check or money order payable to the "New York State Department of Environmental Conservation" for copies reproduced by the Department.
3. If you are denied access to records or portions of records, you may submit a written appeal to the FOIL Appeals Officer, Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. Such appeal has to be made within 30 days after the denial. Please attach a copy of this form showing the "Records Denied" portion when filing your appeal. The FOIL Appeals Officer will evaluate the appeal and respond in writing to you within ten (10) business days after receipt of the appeal.

TO DEC RECORDS CUSTODIAN:

1. Conduct search for records:
 - 1a. If records requested for inspection are not in the custody of the Department, advise the applicant if possible as to the identity and location of the proper custodial agency.
 - 1b. If records are found, determine accessibility (in accordance with Public Officers Law Section 87.2)
2. After determination of accessibility:
 - 2a. If accessible—make available to applicant for inspection.
 - 2b. If not accessible—complete "Records Denied" portion of this form, make and retain one copy of completed form, and give original to applicant fully explaining reason for denial.
3. If applicant desires copies—collect total cost from applicant, and make copies (or arrange with applicant to have copies made with outside vendor and applicant pays vendor). Originals must be returned to Department Records Custodian(s).
4. If you are not able to respond to a request within five (5) business days, acknowledge receipt of the request in writing by the fifth business day and estimate when your final response will be made. If a request can not be fulfilled within (20) business days from the date of the acknowledgment letter, you must advise the requester of a date certain for completion of the request.

SPECIAL NOTE

See www.dec.ny.gov/public/373.html for answers to the most commonly asked questions about DEC and the New York State Freedom of Information Law.


AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

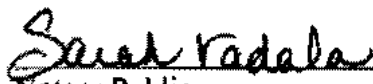
BERNARD GOETZ, being duly sworn subject to the penalties of perjury, deposes and says:

1. I reside at 55 West 14th Street, Apt. 9-P, New York, New York 10011.
2. My date of birth is November 7, 1947.
3. I have authorized Spencer Sheehan, Esq. of Sheehan & Associates, P.C., as my attorney, to communicate on my behalf with the New York State Department of Environmental Conservation for all relevant matters as he deems appropriate.

Dated: New York, New York
October 12, 2015


BERNARD H. GOETZ
55 West 14th Street
Apt. 9-P
New York, NY 10010

On the 12th day of October in the year 2015 before me, the undersigned, a Notary Public in and for said State, personally appeared Bernard H. Goetz, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual executed this instrument.


Notary Public

SARAH E. VADALA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01VA6291705
Qualified in Suffolk County
My Commission Expires December 09, 2017

EXHIBIT B

Date: November 9, 2015

Spencer Sheehan:

The following is in response to your November 9, 2015 request for delivery information on your Certified Mail™ item number 71147344282022515194. The delivery record shows that this item was delivered on October 19, 2015 at 8:18 am in ALBANY, NY 12233. The scanned image of the recipient information is provided below.

Signature of Recipient :

Delivery Section
LARRY BURCH
LARRY BURCH

Address of Recipient :

En Con 12233

Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service

EXHIBIT C

Sheehan & Associates, P.C.

Attorneys at Law
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Telephone: (516) 303-0552
Facsimile: (516) 234-7800
spencer@spencersheehan.com

October 13, 2015

Records Access Officer
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Re: FOIL Request

Dear Records Access Officer:

This office represents Bernard Goetz and makes the requests herein on his behalf. An affidavit from Bernard Goetz wherein he affirms the authority of this office is annexed hereto.

Pursuant to the provisions of the New York State Public Officers Law § 87 et seq. (Freedom of Information Law or "FOIL"), I hereby request the records or portions thereof as indicated:

1. Listing of all individuals within the State of New York who possess an active Class I Wildlife Rehabilitator License;
2. Listing of all individuals within the State of New York who possess an active Class II Wildlife Rehabilitator License;
3. Listing of all individuals within the State of New York who possess an active Assistant Wildlife Rehabilitator License;
4. The locations where all individuals who possess an active Class I Wildlife Rehabilitator License carry out their wildlife rehabilitation operations subject to inspection by personnel employed by the New York State Department of Environmental Conservation pursuant to 6 NYCRR § 184.6(a)(8);

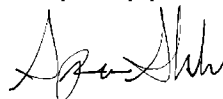
5. The locations where all individuals who possess an active Class II Wildlife Rehabilitator License carry out their wildlife rehabilitation operations subject to inspection by personnel employed by the New York State Department of Environmental Conservation pursuant to 6 NYCRR § 184.6(a)(8); and
6. The locations where all individuals who possess an active Assistant Wildlife Rehabilitator License carry out their wildlife rehabilitation operations subject to inspection by personnel employed by the New York State Department of Environmental Conservation pursuant to 6 NYCRR § 184.6(a)(8).

For considerations of privacy regarding any of the individuals which may be identified herein, it is not necessary that the names of any persons in possession of active Class I, Class II and/or Assistant Wildlife Rehabilitator Licenses be provided together with the location(s) where such individuals carry out their wildlife rehabilitation operations subject to inspection by personnel employed by the New York State Department of Environmental Conservation pursuant to 6 NYCRR § 184.6(a)(8). For example, this request is not seeking the home address information of any individual. In part, this request seeks the address(es) of record for individuals who possess active Class I, Class II and/or Assistant Wildlife Rehabilitator Licenses.

This office is aware of, and consents to, any statutory fees which DEC may impose in accordance with the fulfillment of this FOIL request. Upon assembly of any documents, materials and/or other information requested above, your office may transmit said documents, materials and/or information to this office in the following order of preference: (i) electronic mail addressed to spencer@spencersheehan.com, (ii) regular mail addressed to Sheehan & Associates, P.C., 891 Northern Boulevard, Suite 201, Great Neck, NY 11021 and (iii) facsimile, at (516) 234-7800.

If for any reason any portion of this request is denied or not complied with to the extent requested, please state the reasons for doing so in writing and provide the name and address of the person or body to whom an appeal should be directed. If you have any questions that might clarify anything presented in this request, please do not hesitate to contact me. Thank you in advance for your courtesies and cooperation.

Very truly yours,



Spencer Sheehan

Attachments

INSTRUCTIONS

TO APPLICANT: (The completion of this form is voluntary; however, it will facilitate access to records you seek.)

1. Please identify the specific records you wish to inspect under the "applicant" portion of this form, sign and date in the appropriate place, and give or mail to the Records Access Officer, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. In the alternative, you may send your request electronically to foil@gw.dec.state.ny.us
2. If after inspection you should desire copies, identify to the Records Custodian the specific records to be copied. Make check or money order payable to the "New York State Department of Environmental Conservation" for copies reproduced by the Department.
3. If you are denied access to records or portions of records, you may submit a written appeal to the FOIL Appeals Officer, Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. Such appeal has to be made within 30 days after the denial. Please attach a copy of this form showing the "Records Denied" portion when filing your appeal. The FOIL Appeals Officer will evaluate the appeal and respond in writing to you within ten (10) business days after receipt of the appeal.

TO DEC RECORDS CUSTODIAN:

1. Conduct search for records:
 - 1a. If records requested for inspection are not in the custody of the Department, advise the applicant if possible as to the identity and location of the proper custodial agency.
 - 1b. If records are found, determine accessibility (in accordance with Public Officers Law Section 87.2)
2. After determination of accessibility:
 - 2a. If accessible—make available to applicant for inspection.
 - 2b. If not accessible—complete "Records Denied" portion of this form, make and retain one copy of completed form, and give original to applicant fully explaining reason for denial.
3. If applicant desires copies—collect total cost from applicant, and make copies (or arrange with applicant to have copies made with outside vendor and applicant pays vendor). Originals must be returned to Department Records Custodian(s).
4. If you are not able to respond to a request within five (5) business days, acknowledge receipt of the request in writing by the fifth business day and estimate when your final response will be made. If a request can not be fulfilled within (20) business days from the date of the acknowledgment letter, you must advise the requester of a date certain for completion of the request.

SPECIAL NOTE

See www.dec.ny.gov/public/373.html for answers to the most commonly asked questions about DEC and the New York State Freedom of Information Law.


AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

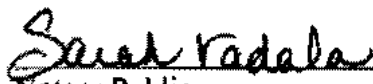
BERNARD GOETZ, being duly sworn subject to the penalties of perjury, deposes and says:

1. I reside at 55 West 14th Street, Apt. 9-P, New York, New York 10011.
2. My date of birth is November 7, 1947.
3. I have authorized Spencer Sheehan, Esq. of Sheehan & Associates, P.C., as my attorney, to communicate on my behalf with the New York State Department of Environmental Conservation for all relevant matters as he deems appropriate.

Dated: New York, New York
October 12, 2015


BERNARD H. GOETZ
55 West 14th Street
Apt. 9-P
New York, NY 10010

On the 12th day of October in the year 2015 before me, the undersigned, a Notary Public in and for said State, personally appeared Bernard H. Goetz, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual executed this instrument.


Notary Public

SARAH E. VADALA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01VA6291705
Qualified in Suffolk County
My Commission Expires December 09, 2017

EXHIBIT D

Date: November 9, 2015

Spencer Sheehan:

The following is in response to your November 9, 2015 request for delivery information on your Certified Mail™ item number 71147344282022520471. The delivery record shows that this item was delivered on October 19, 2015 at 8:18 am in ALBANY, NY 12233. The scanned image of the recipient information is provided below.

Signature of Recipient :

Delivery Section
LARRY BURCH
LARRY BURCH

Address of Recipient :

En Con 12233

Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service

EXHIBIT E

Menu



FOIL Request Main Page

I want to... ▾

Request Type:

Freedom of Information Law Request

Description:

A FOIL request is a request for any "record" under NY's Freedom of Information Law (Article 6 of the Public Officers Law). Section 86 defines a "record" as: "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. NYSDEC maintains records in a variety of forms, or media, such as in hard copy (on paper), as recordings, as photographs, in electronic form, etc.

Contact E-Mail:

spencer@spencersheehan.com

Reference No:

W000359-101915

**Type of Record(s)
Requested:**

License

**Describe the Record(s)
Requested:**

records pertaining to the application of Bernard Goetz to be granted a Class 1 Wildlife Rehabilitator License: 1) all documents and materials received by DEC from any third parties between September 1, 2015 and October 12, 2015. 2) All incoming and outgoing logs between DEC and any third parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 2, 2015, etc.

**NYSDEC Office to which
to submit the request:***

Central Office (Albany) Covers the entire state

- ☐ Region 1: (Long Island) Covers the counties of: Nassau and Suffolk
- ☐ Region 2: (New York City) Covers the counties of: Brooklyn, Bronx, Manhattan, Queens and Staten Island
- ☐ Region 3: (Lower Hudson Valley) Covers the counties of: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester
- ☐ Region 4: (Capital Region/Northern Catskills) Covers the counties of: Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady and Schoharie
- ☐ Region 5: (Eastern Adirondacks/Lake Champlain) Covers the counties of: Clinton, Essex, Franklin, Fulton, Hamilton, Saratoga, Warren and Washington
- ☐ Region 6: (Western Adirondacks/Eastern Lake Ontario) Covers the counties of: Herkimer, Jefferson, Lewis, Oneida and St. Lawrence
- ☐ Region 7: (Central New York) Covers the counties of: Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga and Tompkins
- ☐ Region 8: (Western Finger Lakes) Covers the counties of: Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne and Yates
- ☐ Region 9: (Western New York) Covers the counties of: Allegany, Chautauqua, Cattaraugus, Erie, Niagara and Wyoming counties

If your request pertains to just one Region, select that Region. If your request pertains to more than one Region, select Central Office. If you're unsure which Region your request pertains to, select Central Office. The Department will route your request to the appropriate Region(s)

Preferred Method to Receive Records:

Electronic copies

NYSDEC will use its best efforts to provide records via the method you select. However, in some cases a particular delivery method is not feasible. In such cases NYSDEC will deliver the records via an alternative method

☒ Save

☐ Cancel

New Message

Message History

On 10/19/2015 1:56:39 PM, New York DEC Support wrote:

Dear Spencer:

Thank you for your Freedom of Information Law (FOIL) request. Your request has been received and is being processed. Your request was received in this office on 10/19/2015 and given the reference number FOIL #W000359-101915 for tracking purposes.

Record Requested: records pertaining to the application of Bernard Goetz to be granted a Class 1 Wildlife Rehabilitator License: 1) all documents and materials received by DEC from any third parties between September 1, 2015 and October 12, 2015. 2) All incoming and outgoing logs between DEC and any third parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 2, 2015, etc.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the FOIL Center.

https://mycusthelp.com/NEWYORKDEC/_rs/RequestLogin.aspx

New York State Department of Environmental Conservation, Record Access Office

Track the issue status and respond at: https://mycusthelp.com/NEWYORKDEC/_rs/RequestEdit.aspx?rid=359

On 10/19/2015 1:56:39 PM, New York DEC Support wrote:

Request was created by staff



EXHIBIT F

Menu

[🏠 FOIL Request Main Page](#)[☰ I want to...](#) ▼**Request Type:**

Freedom of Information Law Request

Description:

A FOIL request is a request for any "record" under NY's Freedom of Information Law (Article 6 of the Public Officers Law). Section 86 defines a "record" as: "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. NYSDEC maintains records in a variety of forms, or media, such as in hard copy (on paper), as recordings, as photographs, in electronic form, etc.

Contact E-Mail:

spencer@spencersheehan.com

Reference No:

W000362-101915

**Type of Record(s)
Requested:**

Other

**Describe the Record(s)
Requested:**

listings of all individuals within New York State who possess: 1) an active Class 1 Wildlife Rehabilitator License; 2) active Class II Wildlife Rehabilitator License, 3) active Assistant Wildlife Rehabilitator License, 4) the locations where all individuals who possess active Class 1 Wildlife Rehabilitator License carry out their wildlife rehabilitation operations, etc.

**NYSDEC Office to which
to submit the request:***

Central Office (Albany) Covers the entire state



Region 1: (Long Island) Covers the counties of: Nassau and Suffolk

- ☐ Region 2: (New York City) Covers the counties of: Brooklyn, Bronx, Manhattan, Queens and Staten Island
- ☐ Region 3: (Lower Hudson Valley) Covers the counties of: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester
- ☐ Region 4: (Capital Region/Northern Catskills) Covers the counties of: Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady and Schoharie
- ☐ Region 5: (Eastern Adirondacks/Lake Champlain) Covers the counties of: Clinton, Essex, Franklin, Fulton, Hamilton, Saratoga, Warren and Washington
- ☐ Region 6: (Western Adirondacks/Eastern Lake Ontario) Covers the counties of: Herkimer, Jefferson, Lewis, Oneida and St. Lawrence
- ☐ Region 7: (Central New York) Covers the counties of: Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga and Tompkins
- ☐ Region 8: (Western Finger Lakes) Covers the counties of: Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne and Yates
- ☐ Region 9: (Western New York) Covers the counties of: Allegany, Chautauqua, Cattaraugus, Erie, Niagara and Wyoming counties

If your request pertains to just one Region, select that Region. If your request pertains to more than one Region, select Central Office. If you're unsure which Region your request pertains to, select Central Office. The Department will route your request to the appropriate Region(s)

Preferred Method to Receive Records:

Electronic copies

NYSDEC will use its best efforts to provide records via the method you select. However, in some cases a particular delivery method is not feasible. In such cases NYSDEC will deliver the records via an alternative method

☒ Save

☐ Cancel

New Message

Message History

On 10/19/2015 3:08:12 PM, New York DEC Support wrote:

Dear Spencer:

Thank you for your Freedom of Information Law (FOIL) request. Your request has been received and is being processed. Your request was received in this office on 10/19/2015 and given the reference number FOIL #W000362-101915 for tracking purposes.

Record Requested: listings of all individuals within New York State who possess: 1) an active Class 1 Wildlife Rehabilitator License; 2) active Class II Wildlife Rehabilitator License, 3) active Assistant Wildlife Rehabilitator License, 4) the locations where all individuals who possess active Class 1 Wildlife Rehabilitator License carry out their wildlife rehabilitation operations, etc.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the FOIL Center.

https://mycushelp.com/NEWYORKDEC/_rs/RequestLogin.aspx

New York State Department of Environmental Conservation, Record Access Office

Track the issue status and respond at: https://mycushelp.com/NEWYORKDEC/_rs/RequestEdit.aspx?rid=362

On 10/19/2015 3:08:11 PM, New York DEC Support wrote:

Request was created by staff



EXHIBIT

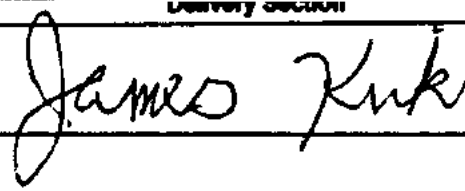
D

Date: November 19, 2015

Spencer Sheehan:

The following is in response to your November 19, 2015 request for delivery information on your Certified Mail™ item number 71147344282022823299. The delivery record shows that this item was delivered on November 16, 2015 at 9:29 am in ALBANY, NY 12238. The scanned image of the recipient information is provided below.

Signature of Recipient :

Delivery Section	
Signature	
Certified Mail	

Address of Recipient :

Delivery Address	12233
------------------	-------

Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service

EXHIBIT

E



Spencer Sheehan <spencer@spencersheehan.com>

Freedom of Information Law Request :: W000359-101915

New York DEC Support

<newyorkdec@mycusthelp.net>

To: spencer@spencersheehan.com

Wed, Nov 18, 2015 at 2:54

PM

--- Please respond above this line ---



P: (518)402-9522 | F:

www.dec.ny.gov

RE: PUBLIC RECORDS REQUEST of 10/19/2015, Reference # W000359-101915

Dear Spencer,

This is regarding your Freedom of Information Law (FOIL) request seeking records records pertaining to the application of Bernard Goetz to be granted a Class 1 Wildlife Rehabilitator License: 1) all documents and materials received by DEC from any third parties between September 1, 2015 and October 12, 2015. 2) All incoming and outgoing logs between DEC and any third parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 2, 2015, etc..

As staff actively work to identify documents responsive to your request, the documents are subject to review to ascertain if any legal privileges may apply.

The volume of potentially responsive documents and the legal review will preclude staff from responding within twenty business days.

Consequently, I expect to make the documents available to you for inspection by **December 11, 2015.**

If you have any questions in the interim, please contact me and refer to FOIL request W000359-101915.

Ruth L. Earl

Records Access Officer, Office of General Counsel

New York State Department of Environmental Conservation

625 Broadway, Albany, NY 12233-1500

P: (518) 402-9522 | F: (518) 402-9018 | access.records@dec.ny.gov

EXHIBIT

F

OFFICE OF GENERAL COUNSEL

New York State Department of Environmental Conservation
625 Broadway, 14th Floor, Albany, New York 12233 1500
Phone: (518) 402-9185 • Fax: (518) 402-9018
www.dce.ny.gov

Via electronic mail only to spencer@spencersheehan.com

November 25, 2015

Spencer Sheehan
Sheehan & Associates, P.C.
891 Northern Boulevard, Suite 201
Great Neck, New York 11021

Re: Freedom of Information Law Requests # W000359-101915 and W000362-10195

Dear Mr. Sheehan:

This is in response to your letter appealing the Department Staff's response to the above referenced Freedom of Information Law ("FOIL") requests for (i) all records between September 1 and October 12 pertaining to an application for a Wildlife Rehabilitator License submitted by your client (W000359-101915) and (ii) records pertaining to individuals who possess various types of Wildlife Rehabilitator Licenses (W000362-10195). The basis of your request for an appeal determination appears to be constructive denial of these FOIL requests.

In response to your request for all records between September 1 and October 12 pertaining to an application for a Wildlife Rehabilitator License submitted by your client, please be advised that Department Staff responded to you on November 25, 2015 via electronic mail and uploaded records that are responsive to your request to the Department's File Transfer Service.

In response to your request for records pertaining to individuals who possess various types of Wildlife Rehabilitator Licenses, Department Staff responded to you on November 10, 2015 via electronic mail with an Excel spreadsheet that is responsive to your request.

Please feel free to contact me if you have not received these records.

Sincerely,



Deborah W. Christian
Assistant Counsel



Department of
Environmental
Conservation

cc: Committee on Open Government w/incoming

ec:	R. Earl	"
	S. Crisafulli	"

EXHIBIT

G

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel

625 Broadway, 14th Floor, Albany, New York 12233-1500

P: (518) 402-9185 | F: (518) 402-9018

www.dec.ny.gov

NOV 25 2015

Via electronic mail only

Mr. Spencer Sheehan spencer@spencersheehan.com
Sheehan & Associates, PC
891 Northern Boulevard, Suite 201
Great Neck, NY 11021

Dear Mr. Sheehan:

This is in response to your Freedom of Information Law (FOIL) request received October 19, 2015, seeking records or portions thereof pertaining to the application of Bernard Goetz pursuant to § 11-0515(3) of the New York State Environmental Conservation Law ("ECL") (the "application") to be granted a Class I Wildlife Rehabilitator License:

1. All documents and materials received by DEC from any third-parties between September 1, 2015 and October 12, 2015;
2. All incoming and outgoing call logs between DEC and any third parties relating to telephone calls where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 12, 2015;
3. Identities of any third-parties, if any, which have contacted DEC with respect to the application of Bernard Goetz between September 1, 2015 and October 12, 2015;
4. Identities of any third-parties, if any, which DEC has contacted, with respect to the application of Bernard Goetz between September 1, 2015 and October 12, 2015;
5. Minutes of any meetings within DEC where the application of Bernard Goetz was mentioned or discussed between September 1, 2015 and October 12, 2015; and
6. Any written correspondence (interoffice memoranda, electronic mail, etc.) between the following employees of DEC-Joseph Pane and Karen Mintzer - relating to the application of Bernard Goetz between September 1, 2015 and October 12, 2015.



Department of
Environmental
Conservation

Responsive records have been uploaded to a File Transfer Service. You will receive an email with the location of the records. Be advised that one record has been produced in redacted format and another withheld in its entirety in accordance with the following provisions of the Public Officers Law (POL):

- POL §87.2(b), as disclosure would constitute an unwarranted invasion of personal privacy;
- POL §87.2(e)(iii), as disclosure would identify a confidential source, and
- POL §87.2(g), as they are inter-agency or intra-agency records which are not statistical or factual tabulations of data, instructions to staff that affect the public, final agency policy or determinations, or external audits.

If you wish, you may appeal the denial of access to this record within thirty days. Please direct any appeal in writing to:

FOIL Appeals Officer
Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

Please reference FOIL W000359-101915 in all future correspondence concerning this request.

Sincerely,



Ruth L. Earl
Records Access Officer

EXHIBIT

H

Stringer, Paul R (DEC)

From: Amy Gould <agould@milfordmgmt.com>
Sent: Tuesday, September 29, 2015 1:25 PM
To: Stringer, Paul R (DEC)
Cc: rholland@bbwg.com; Jaime Romano; Steve Rossi
Subject: FW: here is a picture I took this morning of my crippled squirrel, note her left rear leg is amputated.
Attachments: Photo on 4-7-15 at 8.00 AM #2.jpg

This is an email that Mr. Goetz sent my associate Jaime Romano in April of 2015

From: Jaime Romano
Sent: Tuesday, September 29, 2015 1:16 PM
To: Amy Gould
Subject: FW: here is a picture I took this morning of my crippled squirrel, note her left rear leg is amputated.

From: berniece@aol.com [<mailto:berniece@aol.com>]
Sent: Tuesday, April 07, 2015 8:22 AM
To: Jaime Romano
Subject: here is a picture I took this morning of my crippled squirrel, note her left rear leg is amputated.

You didn't see her yesterday. See attachment



Stringer, Paul R (DEC)

From: Amy Gould <agould@milfordmgmt.com>
Sent: Tuesday, September 29, 2015 1:25 PM
To: Stringer, Paul R (DEC)
Cc: rholland@bbwg.com; Steve Rossi; Jaime Romano
Subject: FW: 9p
Attachments: 20140923_152910.jpg

This is a picture the superintendent took in Mr. Goetz's apartment when the staff had to do a repair in the apartment.

From: Jaime Romano
Sent: Tuesday, September 29, 2015 1:17 PM
To: Amy Gould
Subject: FW: 9p

From: Kenny Centeno
Sent: Tuesday, September 23, 2014 3:30 PM
To: Amy Gould; Jaime Romano
Subject: 9p

Just saw a squirrel in 9P,

Kenneth Centeno
Resident Manager



Stringer, Paul R (DEC)

From: Amy Gould <agould@milfordmgmt.com>
Sent: Tuesday, September 29, 2015 10:48 AM
To: Stringer, Paul R (DEC)
Cc: Steve Rossi; rholland@bbwg.com
Subject: Bernard Goetz
Attachments: FullSizeRender_1.jpg; FullSizeRender_2.jpg; FullSizeRender.jpg

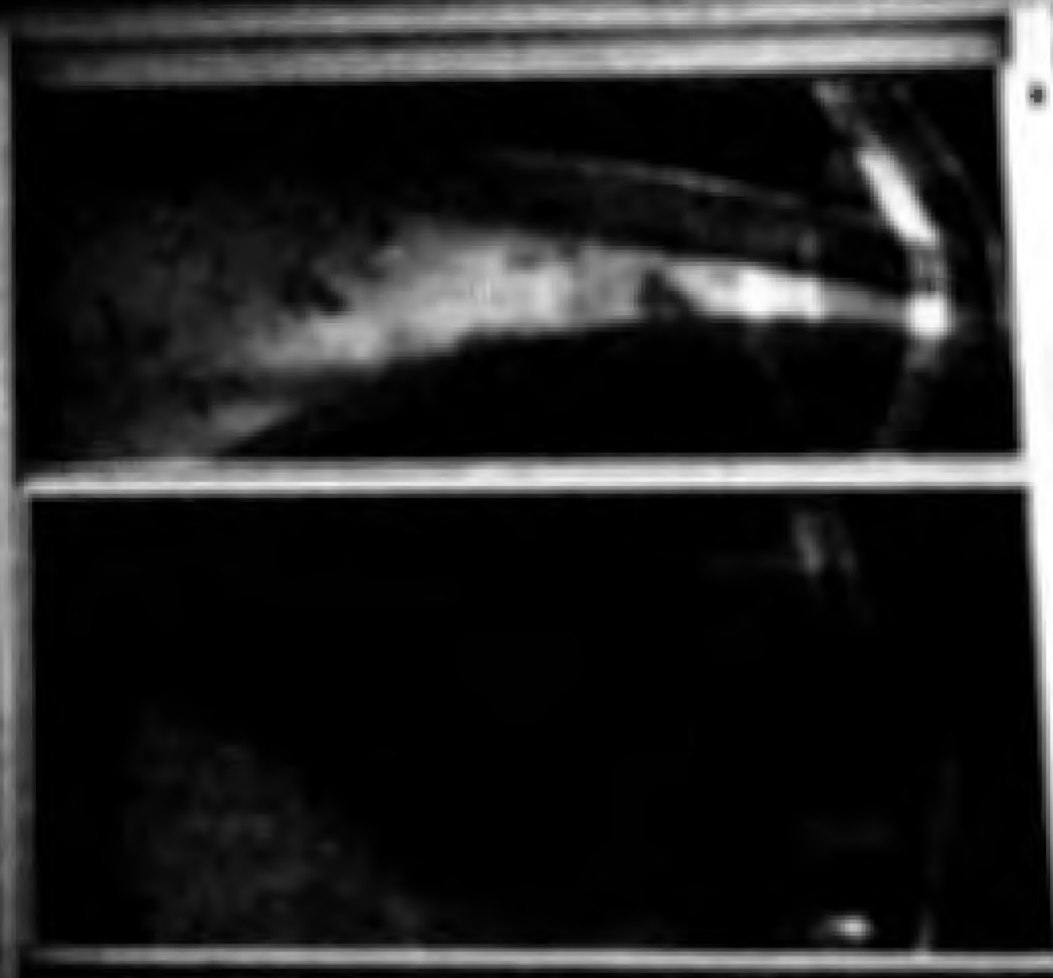
Dear Mr. Stringer:

I am the manager of the Courtney House located at 55 West 14th Street, NYC 10011 where Mr. Goetz resides in apartment #9P. I would like to share some photos of the window of Mr. Goetz's apartment to illustrate the set up he constructed to allow squirrels to enter and exit his unit. You can clearly see the squirrels in his apartment running around the piece of furniture. We are extremely concerned about this practice.

Thank you.

Amy Gould
As Agent for Courtney House LLP







Stringer, Paul R (DEC)

From: Amy Gould <agould@milfordmgmt.com>
Sent: Tuesday, September 29, 2015 11:53 AM
To: Stringer, Paul R (DEC)
Cc: Steve Rossi; rholland@bbwg.com; Jaime Romano
Subject: FW: FW: Squirrel issue
Attachments: IMG_0688.JPG; IMG_0689.JPG; IMG_0690 - Version 2.JPG; IMG_0692.JPG

See email string below

From: [REDACTED]
Sent: Friday, July 24, 2015 9:44 AM
To: Amy Gould
Subject: Re: FW: Squirrel issue

Amy,

Sending along higher resolution images that my friend took on her camera. Hope you have a good weekend!

[REDACTED]

On Mon, Jul 20, 2015 at 11:06 AM, Amy Gould <agould@milfordmgmt.com> wrote:

I completely understand, thanks again for your assistance

From: [REDACTED]
Sent: Sunday, July 19, 2015 4:04 PM
To: Amy Gould
Subject: Re: FW: Squirrel issue

[REDACTED]

On Fri, Jul 17, 2015 at 10:09 AM, Amy Gould <agould@milfordmgmt.com> wrote:

No, right?

From: Robert Holland [mailto:RHolland@BBWG.COM]
Sent: Friday, July 17, 2015 9:34 AM
To: Amy Gould
Subject: RE: Squirrel issue

Thanks. We're set down to go out to Part X for trial on September 25. Is [REDACTED] willing to testify?

Robert T. Holland

Partner

Belkin Burden Wenig & Goldman, LLP

270 Madison Avenue

New York, NY 10016

Tel: 212-867-4466 (Ext. 355)

Fax: 212-297-1859

E-mail: rholland@bbwg.com

Web: www.bbwg.com



Belkin Burden Wenig & Goldman, LLP
ATTORNEYS AT LAW

From: Amy Gould [<mailto:agould@milfordmgt.com>]
Sent: Friday, July 17, 2015 9:31 AM
To: Robert Holland
Subject: FW: Squirrel issue

From: [REDACTED]
Sent: Friday, July 17, 2015 9:28 AM
To: Amy Gould
Cc: Jaime Romano
Subject: Re: Squirrel issue

Amy,

I saw the squirrel again just a few minutes ago. My friend was able to capture the squirrel on camera. See attached. These are copies of her images. I can send clearer images over if that would be helpful.

Thanks,
[REDACTED]

On Mon, Jul 13, 2015 at 11:41 AM, Amy Gould <agould@milfordmgmt.com> wrote:

Thank you for your email, we have sent it to our attorney. Please be advised that the two towers are separate; the one you live in is in a separate tower, the only part of the two buildings that is contiguous is the lobby connecting the two buildings.

From: [REDACTED]
Sent: Monday, July 13, 2015 11:28 AM
To: Amy Gould
Subject: Squirrel Issue

Amy,

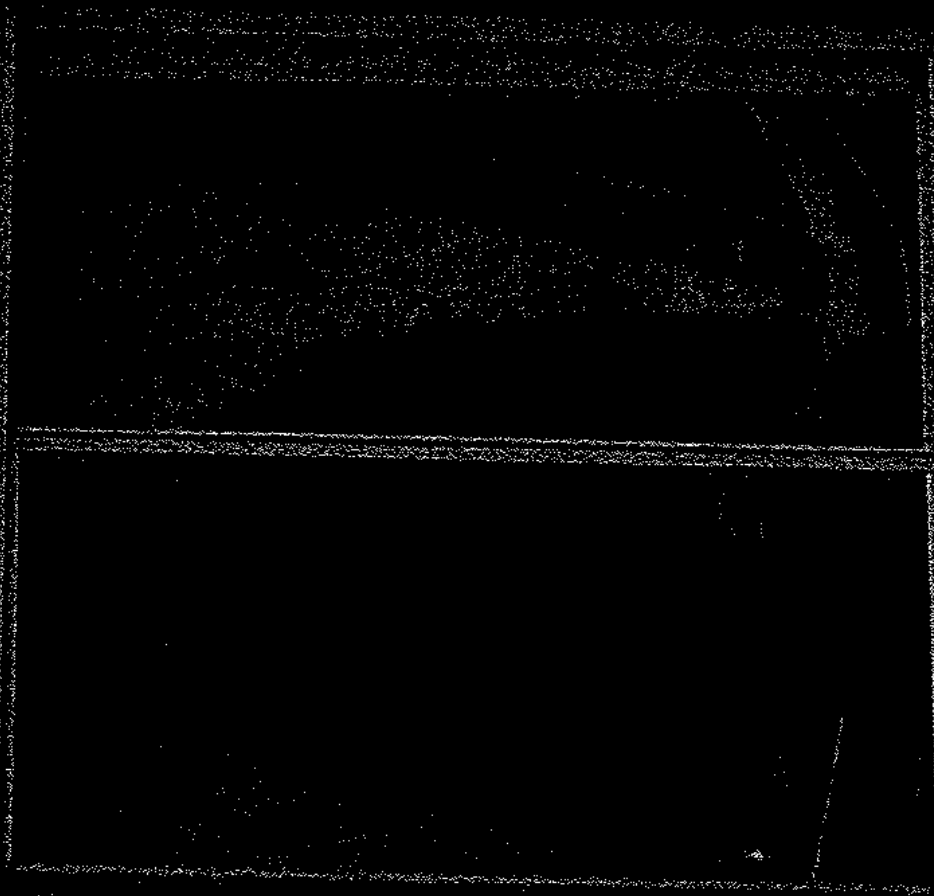
I'm a tenant of the 9th floor at Courtney House (front building) and yesterday a friend and I spotted a large squirrel climbing up and down a piece of stained glass that is on the window ledge in an apartment across the courtyard. I could not believe my eyes. I thought - "maybe it's a cat, maybe it's even a ferret," but after seeing it make over 5 loops of the piece of stained glass, we can both confirm that it was absolutely a squirrel.

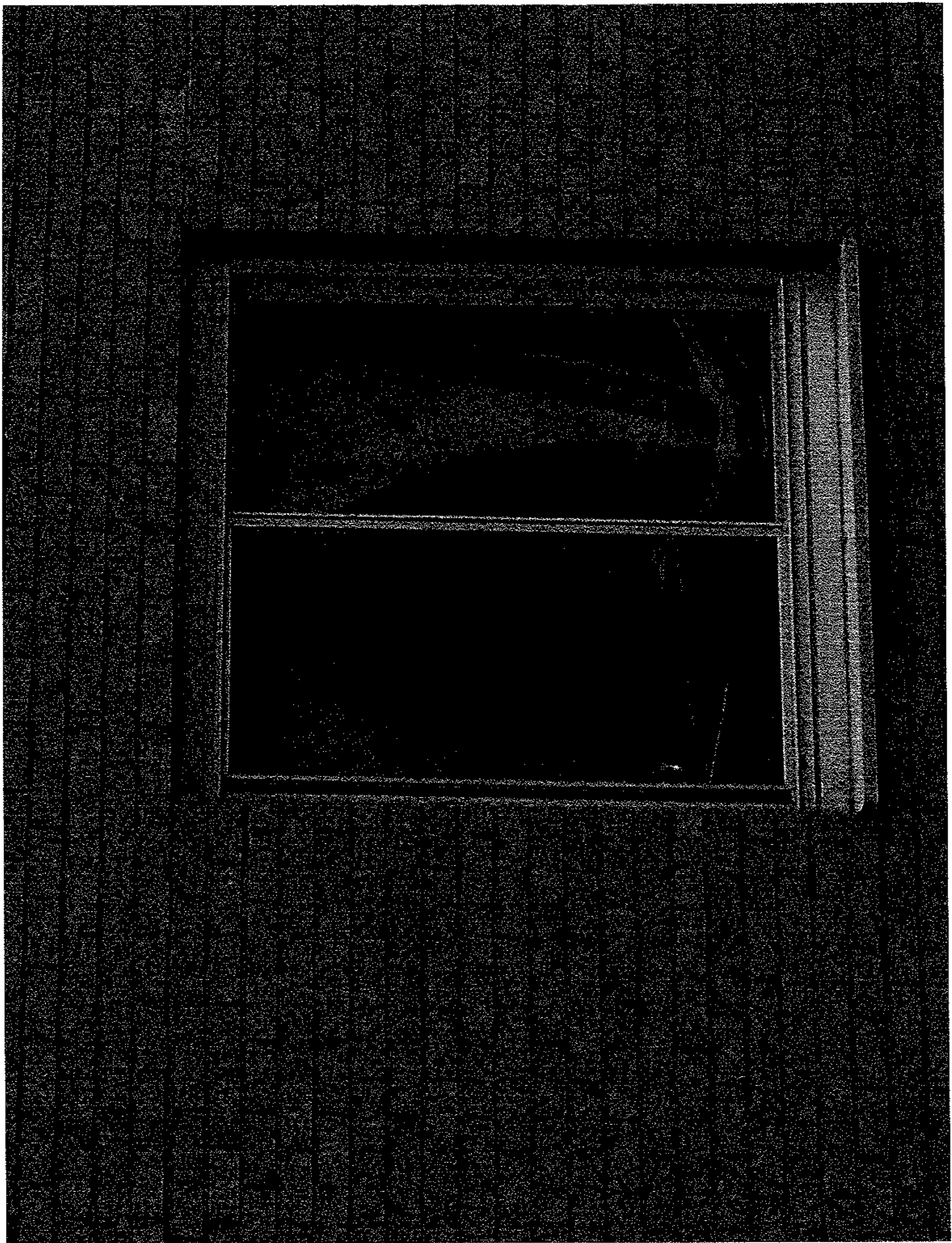
My friend and I immediately called the front desk to let them know what was happening. They said they would let management know and that management would deal with it.

I pay a lot of money to live in Courtney House, and just recently moved in. Had I known about this situation, I would never have picked this building. It is unfair to tenants that we should have to see squirrels climbing in the windows of neighboring apartments. It's disgusting and disturbing, and we shouldn't have to put up with this.

Please let me know if I can provide any additional information. I appreciate your efforts to resolve the situation.

This message contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive for the addressee), you may not use, copy, or disclose to anyone the message or any information contained in the message. If you have received the message in error, please advise the sender by reply e-mail or reply to info@bbwg.com , and delete the message.









EXHIBIT

I



Spencer Sheehan <spencer@spencersheehan.com>

foil request w000359 & w000362

Spencer Sheehan <spencer@spencersheehan.com>

Fri, Dec 4, 2015 at 10:49 AM

To: dwchrist@gw.dec.state.ny.us, access.records@dec.ny.gov, ruthlearl@aol.com

Dear Ms. Christian,

This is Spencer Sheehan, the attorney to whom you wrote the attached letter. This correspondence is in connection with FOIL request W000359 made by this office.

I write to you today as a courtesy and to facilitate cooperation. As you are aware, certain portions of the response to W000359 were redacted. The reasons proffered by DEC were, in my opinion, legally inadequate.

W000359 was already appealed by this office following DEC's denial. Therefore, should our efforts at cooperation fail, the next step will be an Article 78 proceeding.

I offer you the opportunity to provide my office with the unredacted documents contained within DEC's response to W000359 by 5:00 PM today via email. Thank you.

Very truly yours,

Spencer Sheehan

----- Forwarded message -----

From: <co-ogc-mx511-2@dec.state.ny.us>

Date: 2015-11-25 15:23 GMT-05:00

Subject: foil request w000359 & w000362

To: sencrr@sunserver3.dec.state.ny.us, spencer@spencersheehan.com

—

Spencer Sheehan, Esq.

Sheehan & Associates, P.C.

891 Northern Blvd

Suite 201

Great Neck, NY 11021

Office: (516) 303-0552

Mobile: (516) 236-6456

Facsimile: (516) 234-7800

spencer@spencersheehan.comspencersheehan.com

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.



image2015-11-25-152326.pdf

1/22/2016

Sheehan & Associates, P.C. Mail - foil request w000359 & w000362

276K

EXHIBIT

J



Spencer Sheehan <spencer@spencersheehan.com>

foil request w000359 & w000362

Spencer Sheehan <spencer@spencersheehan.com>

Fri, Dec 4, 2015 at 2:24 PM

To: dwchrist@gw.dec.state.ny.us, access.records@dec.ny.gov, ruthlearl@aol.com

Dear Ms. Christian,

With respect to the redacted portions of the emails sent by the management company of Mr. Goetz's building and the attorneys for the management company who corresponded with DEC, any attorney-client privilege of Belkin Burden was waived by the transmission to DEC of those emails in an unredacted format. It is not the role of the DEC to assert attorney-client privilege for private law firms who transmit documents to DEC to be used for DEC's purposes. If DEC wants to litigate on behalf of Belkin Burden, that is fine but not the best use of taxpayer money. Thank you.

Spencer

[Quoted text hidden]

EXHIBIT

K

OFFICE OF GENERAL COUNSEL

New York State Department of Environmental Conservation
625 Broadway, 14th Floor, Albany, New York 12233-1500
Phone: (518) 402-9185 • Fax: (518) 402-9018
www.dec.ny.gov

Via electronic mail only to spencer@spencersheehan.com

December 11, 2015

Spencer Sheehan
Sheehan & Associates, P.C.
891 Northern Boulevard, Suite 201
Great Neck, New York 11021

Re: Freedom of Information Law Requests # W000359-101915 and W000362-10195

Dear Mr. Sheehan:

This is in response to your second appeal of Department Staff's response to the above referenced Freedom of Information Law ("FOIL") requests for (i) records between September 1 and October 12 pertaining to an application for a Wildlife Rehabilitator License submitted by your client (W000359-101915) and (ii) records pertaining to individuals who possess various types of Wildlife Rehabilitator Licenses (W000362-10195). The basis of your initial requests for appeal determinations appeared to be constructive denial of these FOIL requests.

Department Staff performed a diligent search for potentially responsive records and responded to your request for records pertaining to individuals who possess various types of Wildlife Rehabilitator Licenses (W000362-10195) on November 10, 2015 via electronic mail with an Excel spreadsheet containing data responsive to your request. All responsive records were provided to you at that time.

Department Staff performed a diligent search for potentially responsive records and responded to your request for all records between September 1 and October 12 pertaining to an application for a Wildlife Rehabilitator License submitted by your client (W000359-101915) on November 25, 2015 via electronic mail. Department Staff informed you that one record was being provided with redactions and access to one record was being denied in its entirety in accordance with various exemptions from disclosure authorized by the Public Officers Law ("POL"). The statutory exemptions cited were POL §87.2(b) for certain records if disclosure would constitute an unwarranted invasion of personal privacy; POL §87.2(e)(iii) for certain records that could identify a confidential source; and POL §87(2)(g) for certain intra-agency/inter-agency records.

POL §87.2(b) provides that records or portions thereof that "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision



Department of
Environmental
Conservation

two of section eighty-nine for this article" may be exempted from access. POL §89.2(b)(iv) defines an unwarranted invasion of personal privacy as including "disclosure of information of a personal nature when disclosure would result in...personal hardship to the subject party and such information is not relevant to the work of the agency ...maintaining it." Here, the names and contact information of individuals who are not public employees were redacted. The rest of the record was released in its entirety. Your email of December 4 indicates that "any attorney-client privilege of Belkin Benton was waived by the transmission to DEC of those emails in an unredacted format." The redactions were not made pursuant to any assertion of attorney client privilege but rather to protect the privacy of a third party who is not associated with either the private law firm or its client. This is consistent with and authorized by POL §87.2(b).

POL §87.2(g) provides that certain inter-agency and intra-agency materials are exempted from disclosure “to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers.” (*Matter of Sea Crest Constr. Corp. v. Stubing*, 82 AD2d 546; *Xerox Corp. v. Town of Webster*, 65 NY2d 131). “The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” (*The New York Times Co. v. City of New York Fire Department*, 4 NY3d 477). “Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of statistical or factual tabulations or data. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” (see *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 AD2d 825; *Matter of Miracle Mile Assocs. v. Yudelson*, 68 AD2d 176).

The record that was withheld pursuant to the exemption for intra-agency materials is largely "objective information" rather than "an exchange of opinions, advice and criticism." I have enclosed that record with redactions for those portions consisting of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making."

This determination is a final agency action. In accordance with POL §89(4)(b), you may obtain judicial review of this determination by bringing a proceeding pursuant to Article 78 of the Civil Practice Law and Rules.

Sincerely,

Sincerely,


Deborah W. Christian
Assistant Counsel

cc: Committee on Open Government w/incoming
R. Earl
S. Crisafulli



New York State Department of Environmental Conservation

MEMORANDUM

TO: Paul Stringer
FROM: Joseph Pane /s/
SUBJECT: Wildlife Rehabilitator Interview 10/8/15
DATE: October 16, 2015

Bernard Goetz
55 West 14 th Street, Apt 9
New York, New York 10011

Attendees: Bernard Goetz, Spencer Sheehan esq.
Joseph Pane, Karen Mintzer, esq.

The interview lasted about one hour. Mr. Goetz spoke at length on some topics while providing a simple yes/no for other questions. He avoided answering some question _____

Mr. Goetz spoke at length about the feeding of sick squirrels that exhibited conditions such as dehydration, lethargy or weakness. He recommended several types of food should be provided based upon the animals clinical signs. He strongly recommended against the sole use of commercially available pet food products. He recommended adding items such as eggs to the commercial products. It was obvious that he had experimented on many squirrels in order to compile the various recommendations. In discussing this topic, he avoided providing information on the acquisition of the animal or the holding location.

Mr. Goetz was asked about what animals he was interested in rehabilitating. He expressed no interest in birds, raccoons or possums. When queried about possums he said they were too aggressive to handle. He had difficulty in removing the animal from a cage because it attempted to bite him. He summarized the topic by saying he was only interested in squirrels. He also said that his neighborhood was his prime feeding location. Mr Goetz explained that the urban habitat does not offer sufficient food for squirrel survival. Consequently, he feeds squirrels and recommended that others do also.

Mr Goetz is portrayed in a recent internet video where he was followed through his neighborhood by the reporter while he was feeding a squirrel on his shoulders and talking about the animal and its needs. At the end of the tape he is observed placing the animal in a pet carrier

<http://thenewyorksquirrel.blogspot.com/2012/03/bernie-goetz-and-creme-puff.html>

Mr. Goetz was asked specifically about a squirrel with an amputated leg identified in a veterinarian health certificate dated 4/4/15. He acknowledged that he possessed the animal but he stated that he could not recall what happened to it, and acknowledged that he had possessed another squirrel which subsequently died. He provided no other information. It is obvious from the discussions that Mr Goetz would not euthanize a non-releasable squirrel.

Mr. Goetz was asked about appropriate caging for an animal. He described a typical wire box cage and a cardboard box with bedding. Mr Goetz described placing a squirrel in a location where it can move about and enter or leave the cardboard box at will. A cardboard box is not a functional cage. Mr Goetz's landlord charged him with allowing a squirrel to roam free in his apartment. The Landowner's agents had observed the cardboard box setup.

Mr. Goetz was asked what education or training did he possessed. He stated that he had an engineering degree. When asked specifically if he had taken any biology or animal science courses he said no. When asked about his current occupation he described it as internet sales of electrical equipment. Mr. Goetz did not ask if educational opportunities exist for rehabilitators (it is common in these interviews that the individual asks about training or networking opportunities). He did express an interest in serving as a resource for other licensed wildlife rehabilitators.

6NYCRR Part 184.1 (a) States that the proper care of distressed wildlife requires specific knowledge and facilities not possessed by the general public. The purpose of this Part is to establish a specially trained group of individuals.....care of injured and debilitated wildlife so that such wildlife may be returned to the wild.

The application by Mr.Goetz for a Wildlife Rehabilitation License Mr Goetz did not deny possession of a squirrel, lacking a leg and having a severe back injury that should have been humanely euthanized. Mr. Goetz has actively treated squirrels as pets. He advocates feeding. He has been accused of trapping healthy squirrels for personal possession. Mr. Goetz has collected squirrels and trained them as pet animals. This is documented in the internet video. Lastly, he maintains the squirrels in an unsafe condition in his apartment. Mr Goetz is the subject of an eviction proceeding due to possession of animals and an unsanitary condition in his apartment.

cc J. Therrian

EXHIBIT

L



Spencer Sheehan <spencer@spencersheehan.com>

eScan**Spencer Sheehan** <spencer@spencersheehan.com>

Fri, Dec 11, 2015 at 6:21 PM

To: co-ogc-mx511-2@dec.state.ny.us, "dec.sm.Access.Records" <access.records@dec.ny.gov>, ruthlearl@aol.com

What authority is there for a second appeal? Please provide the statute or regulation which authorizes multiple appeals. There's one appeal.

2015-12-11 18:18 GMT-05:00 <co-ogc-mx511-2@dec.state.ny.us>:

—

Spencer Sheehan, Esq.
Sheehan & Associates, P.C.
891 Northern Blvd
Suite 201
Great Neck, NY 11021
Office: (516) 303-0552
Mobile: (516) 236-6456
Facsimile: (516) 234-7800
spencer@spencersheehan.com
spencersheehan.com

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X Index No. 5964-2015

In the Matter of the Application of

BERNARD GOETZ,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Laws and Rules

- against -

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
BASIL SEGGOS, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, RUTH L.
EARL, RECORDS ACCESS OFFICER, NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and DEBORAH W. CHRISTIAN,
ASSISTANT COUNSEL, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Return Date: January 25, 2016

Respondents.

-----X

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF PETITIONER'S APPLICATION
AND IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

SHEEHAN & ASSOCIATES, P.C.
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Tel: (516) 303-0502

Attorneys for Petitioner

Table of Contents

Table of Authorities	4
I. Preliminary Statement.....	6
II. Procedural History	6
III. Procedural Arguments	7
A. POINT I – Contrary to Respondents’ Assertions, FOIL #W000359-101915 was Constructively Denied	7
1. Obligations of Respondent NYSDEC with Respect to POL § 89.....	7
2. Respondent NYSDEC Failed to Comply with POL § 89	9
B. POINT II – The Responsive Documents Provided to Petitioner on November 25, 2015 Were a Result of Petitioner’s Appeal of November 9, 2015	11
1. Respondents’ Contentions that the Responsive Documents Provided to Petitioner on November 25, 2015 Were Directed to Petitioner’s Initial Request (FOIL #W000359-101915) Cannot be Sustained	11
2. Even If the Responsive Documents Provided to Petitioner on November 25, 2015 are Deemed to be in Response to Petitioner’s Initial Request, Respondents Still Failed to Timely Respond to Petitioner’s Appeal.....	12
C. POINT III – Respondents’ Claim That Petitioner Failed to Exhaust Administrative Remedies With Respect to Appealing a “Final Agency Decision” is Erroneous.....	13
1. Respondent Christian Acknowledged Petitioner’s Appeal of the Denial of FOIL #W000359-101915	13
2. Respondents Cannot Claim that the December 11, 2015 Decision was the Relevant “Final Agency Determination” Since It Failed to do So Prior to the Commencement of this Action	14
IV. Substantive Arguments	15
A. POINT I – The Explanation(s) Provided in Response to Petitioner’s Appeal of the Constructive Denial of FOIL #W000359-101915 Were and Continue to be Deficient	15

B. POINT II – This Court Should Not Consider the Post-Hoc Rationalizations for the Redactions Provided by Respondent Christian in the letter of December 11, 2015	17
C. POINT III – POL § 87(2)(b) is Not Applicable to the Redacted Record	17
1. The Redacted Portions of Responsive Document #2 to FOIL #W000359-101915 Were Not Directed to any Government Entity	18
2. Respondents Fail to Show How the Second Prong of POL § 89(2)(b)(iv) is Satisfied, Thereby Estopping It From Relying on the First Prong	18
3. POL § 87(2)(b) is Intended to Apply to Natural Persons	19
4. The Individual Whose Name and Email Address was Redacted – Christie Cunningham McNeil – No Longer Resides in the Subject Building	20
5. Respondents’ Claim that Privacy Interests of Christie Cunningham McNeil Should be Protected Is Based on Speculation	21
6. Respondents Misstate the Holding of <i>NYSUT v. Brighter Choice</i>	22
D. POINT IV – Petitioner’s Request for Metadata Should be Granted	23
V. Conclusion	24

Table of Authorities

Cases

<i>In the Matter of Bierenbaum v. Goord</i> , 13 A.D.3d 945, 787 N.Y.S.2d 438 (App. Div. 3d Dep’t 2004)	17
<i>Matter of Aronsky v. Bd. of Educ.</i> , 75 N.Y.2d 997, 1000-1001, 557 N.Y.S.2d 267, 556 N.E.2d 1074 (1990).....	17
<i>Matter of Dobranski v. Houper</i> , 154 A.D.2d 736, 737, 546 N.Y.S.2d 180 (App. Div. 3d Dep’t 1989)	21
<i>Matter of Floyd v. McGuire</i> , 87 A.D.2d 388, 390, 452 N.Y.S.2d 416 (App. Div. 1st Dep’t 1982)	13
<i>Matter of Irwin v. Onondaga</i> , 72 A.D.3d 314, 320, 895 N.Y.S.2d 262 (App. Div. 4th Dep’t 2010)	24
<i>Matter of Newsday v. New York State Dept. of Health</i> , 1991 WL 285624 (Albany County Sup. Ct.), at *2.....	20
<i>Matter of Newton v. Police Dep’t of City of New York</i> , 183 A.D.2d 621, 624, 585 N.Y.S.2d 5 (App. Div. 1st Dep’t 1992)	13
<i>Matter of Prof’l Standards Review Council of Am., Inc. v. New York State Dep’t of Health</i> , 193 A.D.2d 937, 939, 597 N.Y.S.2d 829 (App. Div. 3d Dep’t 1993)	16
<i>Matter of Scherbyn v. Boces</i> , 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 573 N.E.2d 562 (1991).....	16
<i>NYSUT v. Brighter Choice</i> , 15 N.Y.3d 560, 915 N.Y.S.2d 194, 940 N.E.2d 899 (2010)	22, 23
<i>Rifle Clubs v. Police Dept.</i> , 73 N.Y.2d 92, 97, 538 N.Y.S.2d 226, 535 N.E.2d 279 (1989) ..	19, 23
<i>Scanlan v. Buffalo Sch.</i> , 687 N.E.2d 1334, 90 N.Y.2d 662, 674, 665 N.Y.S.2d 51 (1997).....	15

Statutes

1977 N.Y. Laws ch. 933, Freedom of Information Law.....	23
POL § 87(2)(b).....	17, 19
POL § 89.....	8
POL § 89(2)(b)(iii).....	23
POL § 89(2)(b)(iv).....	19
POL § 89(3)(a).....	8, 9, 12
POL § 89(4)(a).....	8, 12, 13

Other Authorities

FOIL Advisory Opinion, Committee on Open Government, 16051, June 28, 2006.....	18
--------------------------------------------------------------------------------	----

Rules

6 NYCRR.....	8
6 NYCRR 616.5(d).....	8, 9
6 NYCRR 616.8.....	9
6 NYCRR 616.8(b).....	10
6 NYCRR 616.8(c).....	10

Treatises

Patrick J. Borchers & David L. Markell, <u>New York State Administrative Procedure & Practice</u> , § 8.6 (1998).....	15
---------------------------------------------------------------------------------------------------------------------------	----

I. Preliminary Statement

Petitioner Bernard Goetz (“Petitioner”) commenced this Article 78 proceeding seeking disclosure of records pursuant to the Freedom of Information Law (“FOIL”), Public Officers Law (“POL”), § 84 et seq., on December 23, 2015.

Prior to the commencement of this action, Petitioner corresponded with Respondent Christian and Respondent Earl pertaining to the two records sought in the Petition.

In response to Petitioner, Respondent Christian provided one of the two records sought in the Petition. As a result, that portion of the Petition seeking the record withheld in its entirety is rendered moot.

II. Procedural History

Petitioner refers to the Affirmation of Spencer Sheehan (“Sheehan Affirmation”) for a review of the procedural history of this action.

In a good faith attempt to conserve the scarce judicial resources of this Court, Petitioner communicated with Respondent Christian and Respondent Earl prior to the commencement of this action. As indicated in that correspondence, Petitioner stated that the proffered reasons for withholding of the records were inadequate and stated that if the documents were not provided by a date and time certain, Petitioner would have no choice but to bring this Petition.

On or around January 20, 2016, New York State Department of Environmental Conservation (“Respondent NYSDEC”), Basil Seggos, Acting Commissioner, New York State Department of Environmental Conservation (“NYSDEC”) (“Respondent Seggos”), Ruth L. Earl, Records Access Officer, NYSDEC (“Respondent Earl”) and Deborah W. Christian, Assistant

Counsel, NYSDEC (“Respondent Christian”) (collectively, “Respondents”) filed and served opposition papers to Petitioner’s application.

The Petition sought disclosure of two (2) records or portions thereof. The FOIL request which is the subject of the present Petition was given the reference number “FOIL #W000359-101915.”

III. Procedural Arguments

A. POINT I – Contrary to Respondents’ Assertions, FOIL #W000359-101915 was Constructively Denied

The Affirmation of Respondent Christian (“Christian Affirmation”) stated that “There was no constructive denial of Petitioner’s request. Petitioner was notified on October 19, 2015 that DEC had received his request, and he was notified on November 18, 2015 that responses would be provided no later than December 11, 2015.” Christian Affirmation, ¶ 6.

Respondents’ Memorandum of Law (“Respondents MOL”) refers to Petitioner’s appeal of “the purported constructive denial of his FOIL request. Pet. ¶ 20; Pet. Ex. I. Petitioner claimed that because DEC had not furnished all requested records on October 26, 2015, it had constructively denied his FOIL Request.” Respondents MOL, p. 3.

However, respondents apparently failed to closely review Petitioner’s appeal of FOIL #W000359-101915, which states explicitly the basis for respondent NYSDEC’s constructive denial. Exhibit “C,” Appeal of denial of FOIL #W000359-101915, November 9, 2015.

1. Obligations of Respondent NYSDEC with Respect to POL § 89

POL § 89 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) set forth the requirements and procedures for compliance of respondent NYSDEC with record requests.

POL § 89(3)(a) states that a department subject to the provisions therein, “within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.” (emphasis added).

POL § 89(4)(a) states that “Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.” 6 NYCRR 616.5 (“Request for public access to records”) provides further guidance as to the responsibilities of DEC in complying with requests for records. 6 NYCRR 616.5(c) states “A response to a request which reasonably describes the record or records sought shall be made within five business days of receipt of the request.”

6 NYCRR 616.5(d) states that should respondent NYSDEC “not provide or deny access to the record sought within five business days of receipt of a request, the department shall furnish a written acknowledgment of receipt and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when the request will be granted or denied.”

On or around October 19, 2015, the undersigned received a message through respondent NYSDEC’s FOIL Request System (“FOIL Portal”), located on the internet at dec.ny.gov/public/103696.html pertaining to FOIL #W000359-101915. Exhibit “B,” Email from

New York DEC Support, Subject: Open Records Request : : W000359-101915, October 19, 2015.

The notification stated:

Thank you for your Freedom of Information Law (FOIL) request. Your request has been received and is being processed. Your request was received in this office on 10/19/2015 and given the reference number FOIL #W000359-101915 for tracking purposes.

Exhibit "B."

2. Respondent NYSDEC Failed to Comply with POL § 89

October 26, 2015 was the fifth business day from October 19, 2015. By that time, the laws and regulations of the State of New York require that if respondent NYSDEC had not provided the records requested, it shall "deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied." POL § 89(3)(a) (emphasis added).

6 NYCRR 616.5(d) clarifies that if respondent NYSDEC does not provide the requested records to the requester them within five (5) days, "the department shall furnish a written acknowledgment of receipt and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when the request will be granted or denied."

If the actions of respondent NYSDEC failed to comport with the aforementioned provisions, it "shall constitute a denial of access to records subject to administrative appeal pursuant to section 616.8 of this Part."

6 NYCRR 616.8 ("Denials of access to records; appeals.") states that "If the department fails to respond to a request within five business days of receipt of a request, as required in

subdivision (a) of this section, such failure shall be deemed a denial of access.” 6 NYCRR 616.8(b). A denial of access may be appealed within 30 days of the denial. 6 NYCRR 616.8(c).

By October 26, 2015, respondent NYSDEC failed to furnish the records requested in FOIL #W000359-101915. At the time of Petitioner’s appeal of the constructive denial of FOIL #W000359-101915, Respondent NYSDEC had not provided a statement of the approximate date by which a granting or denial of FOIL #W000359-101915 would be made.

The only information contained in Respondent NYSDEC’s responses to the requests was a notification that the requests had been received and were being processed. Notably, the automatic responses do not contain an approximate date by which the records requested will be provided.¹

The reason for Respondents’ constructive denial was due to the boilerplate language contained within the electronic FOIL Portal. The automatic notification which is sent to a requesting party merely indicates that the FOIL request was received and that an email will be sent when the request has been completed. Exhibit “B.”

The undersigned informed Respondent Earl of this deficiency with Respondent NYSDEC’s FOIL portal and respondent Earl acknowledged this was an issue. Respondent Earl even stated in said telephone conversation that she had informed personnel within Respondent NYSDEC that the responsive language would need to be modified. The undersigned was informed that the third-party vendor responsible for the FOIL Portal had or would be alerted to this issue so that it could be remedied.

¹ The consequences of the boilerplate responses provided by the FOIL portal have necessarily been the constructive denial of *every* FOIL request to NYSDEC by *all* requesting parties where full responses were not received by the requesting party within five business days of receipt.

B. POINT II – The Responsive Documents Provided to Petitioner on November 25, 2015 Were a Result of Petitioner’s Appeal of November 9, 2015

1. Respondents’ Contentions that the Responsive Documents Provided to Petitioner on November 25, 2015 Were Directed to Petitioner’s Initial Request (FOIL #W000359-101915) Cannot be Sustained

As established, Petitioner appealed the constructive denial of FOIL #W000359-101915 on November 9, 2015. Exhibit “C.”

On November 25, 2015, Petitioner received a letter from Respondent Christian stating “This is in response to your letter appealing the Department Staff’s response to the above referenced Freedom of Information Law (“FOIL”) requests” (FOIL #W000359-101915). Exhibit “F,” Letter from Respondent Christian to Petitioner, November 25, 2015.

Respondent Christian’s letter stated that “Department Staff responded to you on November 25, 2015 via electronic mail and uploaded records that are responsive to your request.” Exhibit “F.”

Respondent Christian was referring to a letter received from Respondent Earl, dated November 25, 2015. Exhibit “G,” Letter from Respondent Earl to Petitioner, November 25, 2015. However, Respondent Earl’s letter purported to be a response to FOIL #W000359-101915 and not, as respondent Christian’s letter stated, a response to Petitioner’s appeal.

This is evident from respondent Earl’s letter which states “If you wish, you may appeal the denial of access...within thirty days.” Exhibit “G.”

Respondents argue that “Petitioner alleges that he appealed, on November 9, 2015, the purported constructive denial of his FOIL request. Pet. ¶¶ 20, 59. But Petitioner does not allege that he appealed Respondents’ November 25, 2015, responses, as he was required to do.” Respondents’ MOL, p. 5.

Respondents can cite no authority which would have required Petitioner to appeal the responses provided to Petitioner on November 25, 2015. This is because Respondents failed to understand that Petitioner was not required to wait beyond the time required by POL § 89(3)(a) in order to appeal the constructive denial. As a result, Respondents erred by asserting that Petitioner had to appeal the November 25, 2015 decision.

Merely because the November 25, 2015 letters of Respondent Earl and Respondent Christian do not claim to be final agency determinations does not mean that their responses should not be directed to Petitioner's appeal of November 9, 2015. Failing to label or designate the aforementioned letters as final agency determinations cannot change the fact that the time for providing Petitioner a response to FOIL #W000359-101915 had already lapsed.

As such, the responsive documents provided to Petitioner by Respondent Earl on November 25, 2015 were as a result of Petitioner's appeal of November 9, 2015.

2. Even If the Responsive Documents Provided to Petitioner on November 25, 2015 are Deemed to be in Response to Petitioner's Initial Request, Respondents Still Failed to Timely Respond to Petitioner's Appeal

Petitioner's appeal was received by Respondent NYSDEC on November 16, 2015. Exhibit "D," Delivery Confirmation of Certified Mail item number 7114 7344 2820 2282 3299, November 16, 2015.

A response to an appeal is due within ten (10) business days of its receipt and shall either fully explain in writing the reasons for further denial, or provide access to the record sought. POL § 89(4)(a).

Ten (10) business days from November 16, 2015 was December 1, 2015. Assuming *arguendo* that this Court determines that the responsive documents of November 25, 2015 were provided in response to Petitioner's initial FOIL request (FOIL #W000359-101915), there is still

the issue of respondents failing to properly determine Petitioner's appeal by December 1, 2015.

By December 1, 2015, Petitioner had not received any notification from Respondents which contained a statement to the effect of "This is a final agency decision and may be challenged via an Article 78 proceeding." Where a respondent agency fails to comply with the ten (10) day time limit of POL § 89(4)(a) regarding a petitioner's appeal, the consequences of the agency's failure "is that the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy." *Matter of Floyd v. McGuire*, 87 A.D.2d 388, 390, 452 N.Y.S.2d 416 (App. Div. 1st Dep't 1982); *see also* *Matter of Newton v. Police Dep't of City of New York*, 183 A.D.2d 621, 624, 585 N.Y.S.2d 5 (App. Div. 1st Dep't 1992).

C. POINT III – Respondents' Claim That Petitioner Failed to Exhaust Administrative Remedies With Respect to Appealing a "Final Agency Decision" is Erroneous

Respondents have claimed that Petitioner failed to exhaust administrative remedies by failing to appeal the purported "final agency determination" contained in the letter from Respondent Christian, dated December 11, 2015. Affirmation of Helena Lynch ("Lynch Affirmation"), ¶¶ 8, 13.

Respondents emphasize this claim throughout their opposition papers. Respondents' MOL, p. 2 ("Plaintiff's claim that certain information was missing from the second document is not ripe for review, because he did not raise that issue before the agency."), 5-6.

1. Respondent Christian Acknowledged Petitioner's Appeal of the Denial of FOIL #W000359-101915

In contrast to Respondents' claims that Petitioner's request for missing information is not "ripe for review," the documents provided by Respondents belie such a narrative.

Respondent Christian alleges that the December 11, 2015 letter was sent to Petitioner “In an effort to clarify the Department’s November 25, 2015 FOIL response and address the apparent belief of Petitioner’s counsel that he had a pending appeal.” Christian Affirmation, ¶ 12.

Respondent Christian stated Petitioner was informed “that the December 11, 2015 [decision] was a final agency action, and that he could obtain judicial review of the determination in an Article 78 proceeding.” Christian Affirmation, ¶ 15.

A review of the December 11, 2015 letter shows that it begins with “This is in response to your *second* appeal of Department Staff’s response to the above referenced” FOIL requests. Exhibit “K,” Letter from Respondent Christian to Petitioner, December 11, 2015 (emphasis added).

Therefore, the purported “Final Determination Letter” from Respondent Christian of December 11, 2015, acknowledges that Petitioner had *already* appealed the denial of FOIL #W000359-101915. Exhibit “K.”

This is because there cannot be a “second” of anything if there was not a “first” of that same thing.

2. Respondents Cannot Claim that the December 11, 2015 Decision was the Relevant “Final Agency Determination” Since It Failed to do So Prior to the Commencement of this Action

Respondents claim that “The Final Determination Letter [the Letter from Respondent Christian to Petitioner, dated December 11, 2015] is the relevant final agency determination in this proceeding, not the letter from Respondent Christian dated November 25, 2015. The Final Determination Letter notified Petitioner that ‘[t]his determination is a final agency action.’” Respondents’ MOL, p. 6.

The prohibition of post-hoc rationalization is a fundamental tenet of administrative law. Patrick J. Borchers & David L. Markell, New York State Administrative Procedure & Practice, § 8.6 (1998) (noting that an agency is not “free to invent post hoc rationalizations for its decisions”).

Describing the December 11, 2015 letter as a “final agency determination” from which an Article 78 can be commenced does not make it so. This is because post-hoc explanations or rationales, in the context of litigation, are insufficient to justify agency actions retroactively. *See Scanlan v. Buffalo Sch.*, 687 N.E.2d 1334, 90 N.Y.2d 662, 674, 665 N.Y.S.2d 51 (1997) (“judicial review of an administrative determination is limited to the grounds invoked by the administrative body.”) (citations omitted).

At the time of the December 11, 2015 letter from Respondent Christian to Petitioner, it was even the stated position of Respondents that Petitioner had already appealed the denial of FOIL #W000359-101915. Exhibit “K.”

IV. Substantive Arguments

Having addressed the issues surrounding whether or not Petitioner’s appeal, and by extension, this action, are proper, Petitioner now shall address the substantive questions pertaining to the redactions of Responsive Document #2 to FOIL #W000359-101915.

A. POINT I – The Explanation(s) Provided in Response to Petitioner’s Appeal of the Constructive Denial of FOIL #W000359-101915 Were and Continue to be Deficient

The relevant response to Petitioner’s appeal of FOIL #W000359-101915 was the letter of Respondent Earl to Petitioner, dated November 25, 2015. Exhibit “G.”

Respondent Earl addressed the claimed statutory exemptions for the two documents (one which was withheld and another which was subject to redactions) collectively:

Be advised that one record has been produced in redacted format and another withheld in its entirety in accordance with the following provisions of the Public Officers Law (POL):

- POL §87.2(b), as disclosure would constitute an unwarranted invasion of personal privacy;
- POL §87.2(e)(iii), as disclosure would identify a confidential source, and
- POL §87.2(g), as they are inter-agency or intra-agency records which are not statistical or factual tabulations of data, instructions to staff that affect the public, final agency policy or determinations, or external audits.

Exhibit “G,” p. 2.

The above-referenced exemptions were not connected to the withheld document or the redacted document. A fair reading of the above-quoted text may give the impression that the three exemptions invoked were intended to apply to that document which was withheld in its entirety.

Nevertheless, Respondent Earl failed to offer evidentiary proof to support the exemptions claimed. *See Matter of Prof'l Standards Review Council of Am., Inc. v. New York State Dep't of Health*, 193 A.D.2d 937, 939, 597 N.Y.S.2d 829 (App. Div. 3d Dep't 1993) (“Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency’s burden of proof.”).

Judicial review of an agency determination is “limited to the grounds invoked by the agency.” *Matter of Scherbyn v. Boces*, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 573 N.E.2d 562 (1991).

This Court should only review the explanations provided by respondents in the letter from Respondent Earl to Petitioner of November 25, 2015. *See In the Matter of Bierenbaum v. Goord*, 13 A.D.3d 945, 787 N.Y.S.2d 438 (App. Div. 3d Dep’t 2004) (“our review of the denial is limited to the grounds invoked by respondent and [i]f those grounds are inadequate or improper, [we are] powerless to affirm the administrative action by substituting what [we] consider[] to be a more adequate or proper basis.”) (citations and quotations omitted).

B. POINT II – This Court Should Not Consider the Post-Hoc Rationalizations for the Redactions Provided by Respondent Christian in the letter of December 11, 2015

With the letter of December 11, 2015 from Respondent Christian to Petitioner, Respondents improperly sought to supplement the explanations for the redactions provided by the letter from Respondent Earl to Petitioner of November 25, 2015. Exhibit “K.”

As a result, this Court should respectfully disregard the subsequent rationalizations for the redactions of Responsive Document #2 to FOIL #W000359-101915, raised for the first time in the letter of December 11, 2015 from Respondent Christian to Petitioner. Exhibit “K”; *see Matter of Aronsky v. Bd. of Educ.*, 75 N.Y.2d 997, 1000-1001, 557 N.Y.S.2d 267, 556 N.E.2d 1074 (1990) (Because “Judicial review of an administrative determination is limited to the grounds invoked by the agency,” a court cannot “sustain the determination by substituting a more appropriate basis now asserted by the Board” to rebut the argument of a petitioner.) (citations omitted).

C. POINT III – POL § 87(2)(b) is Not Applicable to the Redacted Record

The letter of December 11, 2015 from Respondent Christian to Petitioner cited POL § 87(2)(b) as a basis for the redactions made to Responsive Document #2 to FOIL #W000359-

101915. Exhibit “K,” p. 2. Respondents assert a general invasion of privacy against providing the unredacted documents. For the reasons stated below, Respondents’ arguments are unavailing.

1. The Redacted Portions of Responsive Document #2 to FOIL #W000359-101915 Were Not Directed to any Government Entity

The Committee on Open Government of the State of New York has pointed out that “when a member of the public complains to government, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy in conjunction with §§87(2)(b) and 89(2)(a) and (b) of the Freedom of Information Law.” FOIL Advisory Opinion, Committee on Open Government, 16051, June 28, 2006.

Courts have only addressed the issue of the privacy implications which exist when a public citizen complains to a government entity. In the redacted portions of Responsive Document #2 to FOIL #W000359-101915, the writer of one of the redacted emails directed the message to a commercial business, Courtney House, LLC. Exhibit “H.”

2. Respondents Fail to Show How the Second Prong of POL § 89(2)(b)(iv) is Satisfied, Thereby Estopping It From Relying on the First Prong

Responsive Document #2 to FOIL #W000359-101915 consisted of a string of emails between various third parties, associated with the commercial business Courtney House, LLC (a residential apartment building in New York County) and a representative of respondent NYSDEC. Exhibit “H.”

The alleged purpose of these emails was for Courtney House, LLC to notify Respondent NYSDEC of circumstances relating to the presence of one or more animals seen near the apartment of Petitioner.

In order to adequately rely upon POL § 89(2)(b)(iv) to demonstrate that providing the documents without the redactions “would result in economic or personal hardship to the subject party,” Respondents must also indicate that “such information is not relevant to the work of the agency requesting or maintaining it.”

As representatives of Courtney House, LLC sent numerous emails and engaged in several telephone conversations with respondent NYSDEC, it strains belief to assume that the emails in Responsive Document #2 to FOIL #W000359-101915 were “not relevant to the work” of Respondent NYSDEC. For if the emails were not at all relevant, assuredly Respondent NYSDEC would have told the Courtney House, LLC, representatives that such information was not desired and the sending would cease.

3. POL § 87(2)(b) is Intended to Apply to Natural Persons

Consistent judicial decisions have concluded that POL § 87(2)(b), pertaining to the protection of personal privacy, cannot validly be asserted when records identify commercial entities or persons acting in business capacities.

The Court of Appeals, referring to POL § 87(2)(b), described the privacy protections therein as the authority to withhold “certain personal information about private citizens.” *Rifle Clubs v. Police Dept.*, 73 N.Y.2d 92, 97, 538 N.Y.S.2d 226, 535 N.E.2d 279 (1989).

Where records in the possession of an agency pertain to activity which is licensed by the State of New York, the individualized details of certain persons were required to be disclosed.

Matter of Newsday v. New York State Dept. of Health, 1991 WL 285624 (Albany County Sup. Ct.), at *2 (requiring disclosure of performance records of individual cardiac surgeons).

As the Multiple Dwelling Law of New York State regulates housing stock, and Courtney House, LLC is required to comply with the Multiple Dwelling Law, it follows that any individual names present in Responsive Document #2 to FOIL #W000359-101915 should be disclosed.

4. The Individual Whose Name and Email Address was Redacted – Christie Cunningham McNeil – No Longer Resides in the Subject Building

According to Respondents, Christie Cunningham McNeil “apparently resides in the same apartment complex where Petitioner lives.” Respondents’ MOL, p. 12.

Upon information and belief, Christie Cunningham McNeil *previously* resided at the same apartment building as Petitioner, 55 West 14th Street, New York, New York 10001 (Courtney House, LLC).

Upon information and belief, the email address used by Christie Cunningham McNeil to correspond with Courtney House, LLC, was christie.cunningham@gmail.com.

Upon information and belief, Christie Cunningham McNeil resided in the unit designated “Apartment 9-A” within 55 West 14th Street.

Respondents state that the specific “personal hardship” which could be inflicted upon Christie Cunningham McNeil if her name was disclosed was that she might suffer “anxiety or fear of a confrontation with Petitioner or some other disturbance or interference with the right to quiet enjoyment of [his or] her home. See Christian Aff. ¶ 14.” Respondents’ MOL, p. 13.

Upon information and belief, Christie Cunningham McNeil does not presently reside at 55 West 14th Street. It is believed that Christie Cunningham McNeil presently resides at 395 Beacon Street, Apartment 1-B, Boston, Massachusetts, 02116.

Since Christie Cunningham McNeil cannot possibly experience a “disturbance or interference with the right to quiet enjoyment of [his or] her home” or even an interaction with Petitioner since she lives in a different state, Respondents’ proffered reasons for denial are rendered invalid.

5. Respondents’ Claim that Privacy Interests of Christie Cunningham McNeil Should be Protected Is Based on Speculation

Respondents cite to *Matter of Dobranski v. Houper*, 154 A.D.2d 736, 737, 546 N.Y.S.2d 180 (App. Div. 3d Dep’t 1989) for the proposition that in “balancing the competing interests of public access and individual privacy,” Christie Cunningham McNeil’s name and email address (christie.cunningham@gmail.com) should remain redacted. Respondents’ MOL, p. 12.

According to Respondents, “The private interest in non-disclosure of that information [Christie Cunningham McNeil’s name and email, christie.cunningham@gmail.com] is strong.” Respondents’ MOL, p. 12.

Respondents argue that Christie Cunningham McNeil’s name and email address should continue to be withheld since she has a reasonable expectation of privacy. Respondents’ MOL, p. 12; *see also Matter of Dobranski v. Houper*, 154 A.D.2d at 738.

Given that the responsive documents to Petitioner’s FOIL requests are replete with stories about Petitioner published in third-party media outlets, it is incredulous how Christie Cunningham McNeil would not know about Petitioner’s presence within her building.

As Petitioner was once a semi-public figure of alleged notoriety, Respondents would have this Court believe that Christie Cunningham McNeil could reasonably take numerous intrusive photos, attempting to peer into or around Petitioner’s apartment, which purportedly

show the presence of certain animals, and that at all times, her identity would remain confidential.

Since the emails of Christie Cunningham McNeil, sent from christie.cunningham@gmail.com, were provided to respondent NYSDEC by representatives of Courtney House, LLC, in an unredacted format, it is doubtful that she ever had any expectation of privacy.

Nowhere in Responsive Document #2 to FOIL #W000359-101915 is there any request by either “Robert Holland” or any representative of Courtney House, LLC, that Christie Cunningham McNeil’s name and email address be redacted. Exhibit “H.”

As a result, there is no conceivable way that Respondents can adequately rely upon Christie Cunningham McNeil’s expectation of privacy to sustain their refusal to provide the unredacted documents.

6. Respondents Misstate the Holding of *NYSUT v. Brighter Choice*

In support of redaction of the name and email address of Christie Cunningham McNeil (christie.cunningham@gmail.com), Respondents rely upon *NYSUT v. Brighter Choice*, 15 N.Y.3d 560, 915 N.Y.S.2d 194, 940 N.E.2d 899 (2010).

Respondents state that the “Court of Appeals has expressly held that names and contact information of private individuals fall within the personal privacy exception where disclosure of such information would serve no public purpose.” Respondents’ MOL, p. 12; *NYSUT v. Brighter Choice*, 15 N.Y.3d at 564-565.

However, the Court of Appeals’ decision in *NYSUT v. Brighter Choice*, 15 N.Y.3d 560 (2010) ruled against disclosure of the names of respondents’ members since that petitioner clearly sought the individual names for fund-raising purposes. Fund-raising purposes are

explicitly cited as an exemption for an agency to withhold individual names from a requesting party. POL § 89(2)(b)(iii).

In quoting the Court of Appeals in *NYSUT v. Brighter Choice*, 15 N.Y.3d at 564-65 (2010), Respondents conveniently omit the citations and quotations to *Rifle Clubs v. Police Dept.*, 73 N.Y.2d at 97. Respondents' MOL, p. 12.

Examining the original decision in *Rifle Clubs v. Police Dept.*, 73 N.Y.2d at 97, it is instructive what directly follows Respondents' block quote: "Thus, the rights of individuals to be free from unwanted commercial contacts or nonprofit fund-raising efforts – specifically recognized by the Legislature in the exemption at issue here – can be given precedence without undercutting FOIL's purpose."

That somehow, there would have to be a governmental purpose to each and every FOIL request, lest it be denied is contrary to the purpose of FOIL. 1977 N.Y. Laws ch. 933, Freedom of Information Law ("The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.").

D. POINT IV – Petitioner's Request for Metadata Should be Granted

Respondents state that "In his endeavor to explain to the Court the meaning of such terms as 'metadata,' 'PDF,' 'JPEG,' and 'EXIF data,' Petitioner addresses only Responsive Document No. 2, and he neglects to mention what information is purportedly missing from that document." Respondents' MOL, p. 14.

Such a statement is contradicted by the Petition. Petition, ¶ 206 (“Respondents’ failed to provide responsive records in their original format, with accompanying metadata (for the emails themselves and attachments, including PDF and JPG files.”).

To the extent that any relevant FOIL requests of Petitioner requested any records, it is implicit that such a request should include metadata. This is because metadata is “‘secondary information’ not apparent on the face of the document ‘that describes an electronic document’s characteristics, origins, and usage.’” *Matter of Irwin v. Onondaga*, 72 A.D.3d 314, 320, 895 N.Y.S.2d 262 (App. Div. 4th Dep’t 2010) (finding that “system metadata” is a record under FOIL).

Therefore, Petitioner requests that this Court grant its request for the relevant metadata associated with the responsive documents.²

V. Conclusion

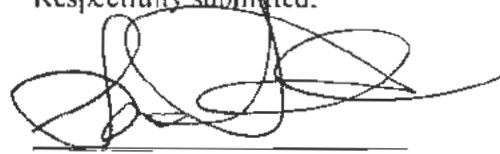
For the foregoing reasons, Petitioner respectfully requests that the Court deny the motion of Respondents and sustain the Petition, in its entirety and grant such other and further relief as this Honorable Court deems just and proper.

² At the very least, Petitioner seeks clear, clean and colored images as opposed to the grainy black and white photos which were provided.

Dated: January 23, 2016
Great Neck, New York

Respectfully submitted.

By:

A handwritten signature in black ink, appearing to be 'Spencer Sheehan', written over a horizontal line.

Spencer Sheehan, Esq.
Sheehan & Associates, P.C.
Attorneys for Petitioner
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Tel: (516) 303-0552

INDEX NO. 5964-2015
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

BERNARD GOETZ,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Laws and Rules

- AGAINST -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
BASIL SEGGOS, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION, RUTH L. EARL, RECORDS ACCESS
OFFICER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and DEBORAH W. CHRISTIAN, ASSISTANT COUNSEL, NEW
YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

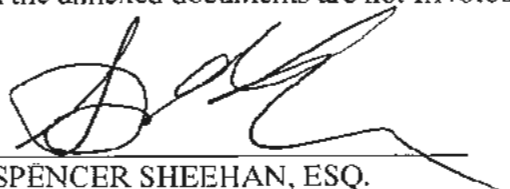
Respondents.

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PETITIONER'S APPLICATION AND IN OPPOSITION
TO RESPONDENTS' MOTION TO DISMISS**

Sheehan & Associates, P.C.
Attorneys for Petitioner
891 Northern Boulevard
Suite 201
Great Neck, NY 11021
Tel: (516) 303-0552
Fax: (516) 234-7800
spencer@spencersheehan.com

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, and belief, formed after an inquiry reasonable under the circumstances, the contentions contained in the annexed documents are not frivolous.

Dated: January 23, 2016
Great Neck, New York


SPENCER SHEEHAN, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
In the Matter of the Application of

Index No. 5964-2015

BERNARD GOETZ,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Laws and Rules

- against -

**AFFIRMATION
OF SERVICE**

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
BASIL SEGGOS, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, RUTH L.
EARL, RECORDS ACCESS OFFICER, NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and DEBORAH W. CHRISTIAN,
ASSISTANT COUNSEL, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondents.
-----X

SPENCER SHEEHAN, an attorney duly admitted to practice law in the State of New York, affirms, pursuant to CPLR § 2106 and subject to the penalties of perjury, that on the 23rd day of January, 2016, I served a true copy of the annexed AFFIRMATION IN SUPPORT, EXHIBITS and REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONER'S APPLICATION AND IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS by mailing the same in a sealed envelope with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address as indicated below and upon information and belief, none of the aforesaid persons is in the military service as defined by the

Act of Congress known as the "Soldiers' and Sailors' Civil Relief Act" of 1940 and in the New York "Soldiers' and Sailors' Civil Relief Act."

Office of the Attorney General of New York
The Capitol
Albany, NY 12224


SPENCER SHEEHAN