

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter Of	:
	:
The application of	:
	:
ROBERT LOSCALZO,	:
	:
Petitioner,	:
	:
For a Judgment Pursuant to Article 78	:
Of the Civil Practice Law and Rules	:
	:
-against-	:
	:
NEW YORK CITY DEPARTMENT OF CITYWIDE	:
ADMINISTRATIVE SERVICES; EDNA WELLS	:
HANDY, as Commissioner of the New York City	:
Department of Citywide Administrative Services,	:
	:
Respondents.	:
-----X	

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK:

Petitioner, Robert LoScalzo, for his Verified Petition herein pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), alleges as follows:

PRELIMINARY STATEMENT

1. This Article 78 proceeding pursuant to the New York State Freedom of Information Law ("FOIL"), Public Officers Law ("POL") § 84 et seq., seeks to vindicate my right to access records pertaining to the controversial relocation of a public artwork – a colossal statue named *Triumph of Civic Virtue* – from the public location in Queens where it had been displayed for seven decades, to the private Green-Wood Cemetery in Brooklyn, by Respondent New York City Department of Citywide Administrative Services ("DCAS").

2. In response to my records access request (the "FOIL Request;" copy annexed hereto as Exhibit A) made pursuant to FOIL, Respondents have produced only some of the records sought, and have denied access to records of external communications between representatives of DCAS or any other involved City agency and representatives of Green-Wood Cemetery pertaining to the relocation of *Triumph of Civic Virtue*, and records of external communications between representatives of DCAS or any other involved City agency and representatives of contractor firms regarding services pertaining to such relocation. A copy of DCAS's final administrative determination (the "DCAS Final Administrative Determination Letter") is annexed hereto as Exhibit B.

3. Respondents assert that the records to which they have denied access are exempt from disclosure pursuant to POL § 87(2)(a) as subject to attorney-client privilege, and pursuant to POL § 87(2)(g) as inter-agency or intra-agency materials. That is not the case, however. All or some of the withheld records are not exempt from disclosure on the bases cited by Respondents.

4. The New York State Committee on Open Government ("COG"), the state entity responsible for overseeing and advising with regard to FOIL, has produced an advisory opinion (the "COG Advisory Opinion;" copy annexed hereto as Exhibit C) that supports my contention that all or some of the records to which DCAS has denied access are not exempt from disclosure pursuant to the statutory disclosure exemptions cited by DCAS.

5. The refusal of DCAS to produce certain non-exempt external communications, including email communications and attachments thereto, between DCAS or any other City agency and Green-Wood Cemetery or contractors involved in relocating *Triumph of Civic Virtue*, continues a pattern of secrecy associated with the statue's relocation and repeatedly complained of by elected and local officials as documented below, that has prevented public

participation, thwarted public accountability, and obstructed "[th]e people's right to know the process of governmental decision-making" that "is basic to our society" and is a purpose of FOIL. POL § 84.

6. In addition to finally denying access to records of external communications on the basis of inapplicable disclosure exemptions, Respondents also initially failed to respond to my FOIL Request (Exhibit A) in a manner consistent with the requirements of FOIL; failed to respond to my FOIL Appeal in a manner consistent with the requirements of FOIL; and attempted to disregard my FOIL Appeal while producing a limited number of additional records – all **without** informing me of any denial of access to records or of any statutory basis to justify such denial until I enquired further.

7. Having exhausted my administrative remedies, I now ask the Court to (a) review the final administrative determination of Respondents (Exhibit B), denying access to records requested by my FOIL Request (Exhibit A) pertaining to the controversial relocation of *Triumph of Civic Virtue* from Queens to the private Green-Wood Cemetery in Brooklyn, including an *in camera* review by the Court of the records to which Respondents have denied access, to determine whether any such records or portions thereof are not exempt from disclosure pursuant to FOIL; (b) in the event that the Court determines that any records or portions thereof to which Respondents have denied access are not exempt from disclosure pursuant to FOIL, then (i) annul Respondents' determination denying access to such records and (ii) order Respondents to produce to me all such records and portions thereof that are responsive to my FOIL Request (Exhibit A) that are not exempt from disclosure pursuant to FOIL, and to produce the records in commonly-readable electronic form (e.g., Adobe Portable Document Format (PDF) on CD-R disc) as I hereby request pursuant to POL § 87(5)(a); (c) in the event that Respondents assert that

they do not possess or cannot find any record demanded by me after diligent search, order Respondents to so certify, pursuant to POL § 89(3)(a), in writing, and to do so separately for each distinct type of record described within each paragraph of the FOIL Request that is labeled (a), (b), (c) or (d); (d) order Respondents to inform me, prior to generating any expense, if the cost to produce the records in the electronic form requested would exceed the \$30.00 USD limit pre-approved by me within the FOIL Request (Exhibit A), so that I may decide whether to inspect the records in lieu of obtaining duplicates, as explained within the FOIL Request; (e) award my litigation costs, expenses, disbursements and attorney's fees in this proceeding as authorized by statute when, as here, the agency had no reasonable basis for denying access or the agency failed to respond to a FOIL request or appeal within the statutory time [POL § 89(4)(c)]; and (f) grant such other and further relief as may seem just and proper to the Court.

PARTIES

8. I am an independent investigative/documentary media producer, and media consultant, who resides within the County of Queens.

9. Respondent NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES is an agency of the City of New York, and an agency within the provisions of POL § 86.

10. Respondent EDNA WELLS HANDY is the Commissioner of the New York City Department of Citywide Administrative Services, and has authority over the New York City Department of Citywide Administrative Services.

JURISDICTION AND VENUE

11. This Court has jurisdiction to hear this proceeding based upon Article 78 of the CPLR, POL § 89(4)(b) and 21 NYCRR Part 1401.7(i).

12. Venue is proper in New York County under CPLR 506(b) because, *inter alia*, it is the county: (a) where Respondents have their offices; (b) where the records to which this Petition pertains were requested; (c) in which the key correspondence was received by Respondents; and (d) the actions complained of herein occurred in said county.

FACTUAL BACKGROUND

13. *Triumph of Civic Virtue* is a 22-ton colossal monument statue dedicated in 1922, commissioned by a New York City Mayor using funds bequeathed to the city. The statue was designed by Frederick William MacMonnies, a well known American sculptor of the Beaux-Arts school, and carved by the Piccirilli brothers, who also created the statute of Abraham Lincoln in the *Lincoln Memorial*. The statue depicts Heracles – as the personification of civic virtue – towering above two Sirens representing vice and corruption. *Triumph of Civic Virtue* originally stood in City Hall Park. In 1941, it was moved to other public property adjacent to Queens Borough Hall overlooking Queens Boulevard, where it remained an asset to Queens on display for the next 71 years until 2012.

14. On July 18, 2012, the *New York Daily News* reported that "[t]he city has hatched a secret plan to move the controversial Triumph of Civic Virtue statue from its current location near Queens Borough Hall in Kew Gardens to Green-Wood Cemetery in Brooklyn." (Colangelo, Lisa L. 2012. Secret plan would move the controversial Civic Virtue statue from Queens to Brooklyn. *New York Daily News*, July 18; copy annexed hereto as Exhibit D.)

15. For the next five months, elected officials and community leaders publicly rallied and objected not only to the potential removal of *Triumph of Civic Virtue* from Queens, but to the "cloak and dagger" secrecy and lack of information or consultation about what was to become of the statue – secrecy allegedly implemented by the City in order to negate opposition

to its controversial plans. The combination of a 22-ton work of art, the symbolic eviction of "civic virtue" from Queens to a graveyard, the City's lack of transparency, plus the exclusion of elected officials and the public, attracted significant media interest. For example:

- Colangelo, Lisa L. 2012. Local leaders charge city snubbing them on possible Triumph of Civic Virtue move. *New York Daily News*, July 25; copy annexed hereto as Exhibit E;
- Colangelo, Lisa L. 2012. No 'Triumph' yet. *New York Daily News*, December 12, p. 38; copy annexed hereto as Exhibit F;
- Barca, Christopher. 2012. Rallying for Virtue. *Queens Courier*, December 13, p. 28; copy annexed hereto as Exhibit G;
- Bockmann, Rich. 2012. Boro Leaders want 'Civic Virtue' to remain in Queens. *Times Ledger*, December 13, p. 10; copy attached hereto as Exhibit H.

16. "Based on the track record of secrecy throughout the process, I really don't doubt that any night now, the city's going to come in the dark and throw a hood over [Triumph of Civic Virtue's] head and throw him into the back of a truck,' [City Council member Peter] Vallone said. 'I'm only half-kidding.'" (Colangelo, Lisa L. 2012. No 'Triumph' yet. *New York Daily News*, December 12, p. 38; Exhibit F.)

17. On December 15, 2012, *Triumph of Civic Virtue* was hoisted onto a truck and driven out of Queens to Brooklyn's Green-Wood Cemetery.

18. On December 10, 2012, amidst news reports of the imminent removal of *Triumph of Civic Virtue* from Queens, I sent the FOIL Request (Exhibit A) to the Records Access Officer at DCAS via United States Postal Service ("USPS") certified mail.

19. The FOIL Request (Exhibit A) seeks the following records that pertain in any way to the relocation or possible relocation of *Triumph of Civic Virtue*:

Communications and records shared with Green-Wood Cemetery:

- (a) All records that constitute and/or memorialize communications, and/or records that were communicated, in either direction, between DCAS and/or any representative thereof and Green-Wood Cemetery and/or any representative thereof, that pertain in any way to *Triumph of Civic Virtue* (including but not limited to the relocation or possible relocation of *Triumph of Civic Virtue* to Green-Wood Cemetery);
- (b) All records that constitute and/or memorialize communications, and/or records that were communicated, in either direction, between any City agency other than DCAS and/or any representative thereof and Green-Wood Cemetery and/or any representative thereof, that pertain in any way to *Triumph of Civic Virtue* (including but not limited to the relocation or possible relocation of *Triumph of Civic Virtue* to Green-Wood Cemetery);

Communications and records shared with contractors:

- (c) All records that constitute and/or memorialize communications, and/or records that were communicated, in either direction, between DCAS and/or any representative thereof and any contractor firm (and/or representative thereof) that was either considered to provide services, or that will actually provide services, that pertain in any way to the relocation or possible relocation of *Triumph of Civic Virtue* to Green-Wood Cemetery;
- (d) All records that constitute and/or memorialize communications, and/or records that were communicated, in either direction, between any City agency other than DCAS and/or any representative thereof and any contractor firm (and/or representative thereof) that was either considered to provide services, or that will actually provide services, that pertain in any way to the relocation or possible relocation of *Triumph of Civic Virtue* to Green-Wood Cemetery.

Records that are responsive to this Request include but are not limited to **email communications and attachments thereto (irrespective of whether DCAS is a sender, recipient, or carbon-copy recipient of such communication)**, Requests for Proposals, budgets, scheduled, memoranda of understanding, agreements, and contracts that pertain in any way to *Triumph of Civic Virtue* and/or its relocation or possible relocation to Green-Wood Cemetery. This Request seeks records that were created, and/or are dated, and/or were communicated, and/or otherwise

came under the purview of DCAS pursuant to FOIL, between January 1, 2010, inclusive, and December 10, 2012, inclusive.

(FOIL Request (emphasis added); Exhibit A.)

20. Additionally, I offered to pay duplication costs for preparation of duplicate records in fulfillment of the FOIL Request up to a maximum amount of \$30.00 USD. I requested to be informed if duplication costs will exceed that limit prior to incurring such costs so I may consider how to proceed, and I reserved the right to inspect records in lieu of obtaining duplicates. (Exhibit A at 3.)

21. DCAS received the FOIL Request (Exhibit A) on December 11, 2012. (USPS certified mail return receipt within Exhibit A.)

22. DCAS acknowledged the FOIL Request on December 14, 2012. (Copy of acknowledgment annexed hereto as Exhibit I.)

23. DCAS's acknowledgment of the FOIL Request (Exhibit I) fails to comply with POL § 89(3)(a) because it contains no statement of the approximate date when the Request will be granted or denied, and same constitutes a denial of the FOIL Request, which entitled me to appeal. POL § 89(4)(a); 21 NYCRR Part 1401.5(e)(2).

24. After DCAS acknowledged the FOIL Request, DCAS again failed to comply with POL § 89(3)(a) because by its inaction, DCAS extended the timeframe in which to respond to the FOIL Request by more than twenty business days after the date of DCAS's acknowledgment of receipt of the FOIL Request, without DCAS stating, in writing, both the reason for the inability to grant the request within twenty business days and a date certain when the request will be granted in whole or in part, and same constitutes a denial of the FOIL Request, which entitled me to appeal. POL § 89(4)(a); 21 NYCRR Part 1401.5(e)(4); 21 NYCRR Part 1401.5(e)(6).

25. On January 28, 2013, I appealed from the denials of access, by sending the FOIL Appeal (the "FOIL Appeal;" copy annexed hereto as Exhibit J) to the Records Access Appeals Officer at DCAS via USPS certified mail.

26. DCAS received the FOIL Appeal (Exhibit J) on January 30, 2013. (USPS certified mail return receipt within Exhibit J.)

27. DCAS was obligated to respond to the FOIL Appeal (Exhibit J) within ten business days of receiving it by **"fully explain[ing] in writing to the person requesting the record the reasons for further denial, or provid[ing] access to the record sought"** (emphasis added). POL § 89(4)(a).

28. But instead of responding to the FOIL Appeal in any of the ways required by POL § 89(4)(a), the DCAS Records Access Appeals Officer, Russell Ann Nobles, replied via letter dated February 12, 2013 (the "Nobles February 12, 2013 Letter;" copy annexed hereto as Exhibit K) that the FOIL Appeal "is considered moot" because "I am advised by the Records Access Officer that certain records responsive to your request are being made available".

29. Contrary to the above-quoted text of the Nobles February 12, 2013 Letter (Exhibit K), once DCAS had received the FOIL Appeal, DCAS was obligated to respond to it in the ways required by POL § 89(4)(a), within the ten business days specified therein. DCAS was not entitled to circumvent the requirements of POL § 89(4)(a) or to improperly declare the FOIL Appeal moot when it was, in fact, in effect and requiring a valid response.

30. DCAS was obligated to produce all records not exempt from disclosure within ten businesses days of receiving the FOIL Appeal. DCAS was also obligated to fully explain the reasons for further denial of access, if any, within ten business days of receiving the FOIL Appeal.

31. Instead, the DCAS Records Access Officer, Laurie K. Kaye, informed me via letter dated February 12, 2013 (the "Kaye February 12, 2013 Letter;" copy annexed hereto as Exhibit L) that contract documents responsive to the FOIL Request are "now available" upon DCAS's receipt of payment of \$25.50, the cost of reproduction. The Kaye February 12, 2013 Letter (Exhibit L) did **not** inform me that DCAS was denying access to any record, and did **not** cite any statutory disclosure exemption to justify denial of access to any record.

32. As we now know, DCAS did indeed possess additional responsive records – but there was **no** mention of any such record and **no** assertion of any disclosure exemption by DCAS within the ten business days following DCAS's receipt of the FOIL Appeal.

33. Upon receiving the requested payment, DCAS produced contract documents pertaining to the repair and conservation of *Triumph of Civic Virtue* and the fabrication and fit armature for *Triumph of Civic Virtue*.

34. The cover letter dated February 22, 2013 from the DCAS Records Access Officer, Laurie K. Kaye (the "Kaye February 22, 2013 Letter;" copy annexed hereto as Exhibit M) which accompanied the contract documents did **not** inform me that DCAS was denying access to any record, and did **not** cite any statutory authority to justify denial of access to any record.

35. By improperly declaring the FOIL Appeal "moot", having the Records Access Officer produce to me a limited number of records, not informing me that DCAS was denying access to any record and not citing any statutory authority to justify denial of access to any record, it appears that DCAS was attempting to create the false impression that my FOIL Request had been satisfied, while avoiding a confrontation over denial of access and discouraging further enquiry concerning other responsive records that must exist but were not produced.

36. It is inconceivable that *Triumph of Civic Virtue* would be relocated from Queens to Brooklyn without generating other records that are responsive to the FOIL Request beyond the contract documents produced by DCAS – for example, records of **communications** between DCAS or any other City agency and Green-Wood Cemetery, and records of **communications** between DCAS or any other City agency and contractor firms that sought to be or were involved. Therefore, on February 19, 2013 I wrote to the DCAS Records Access Appeals Officer, Russell Ann Nobles, in an "Attempt to Avoid Litigation" pertaining to the FOIL Request (the "LoScalzo February 19, 2013 Letter;" copy annexed hereto as Exhibit N).

37. The LoScalzo February 19, 2013 Letter (Exhibit N) states that "to avoid litigation, DCAS may wish to provide immediate access to all records that are responsive to the Request, and/or cite the statutory authority, if any, to justify the continued denial of access to such records and/or portion(s) thereof", and explains that:

Having created a circumstance which permitted an appeal pursuant to FOIL, and thereafter an Appeal having been duly and legitimately taken, DCAS was obligated to respond substantively to that Appeal, and was bound by the procedures and timeframe set forth within FOIL and within 21 NYCRR Part 1401 to do so. Once the Appeal is in effect, DCAS cannot short-circuit or nullify it; and the partial production of a subset of responsive records by the Records Access Officer during the pendency of the Appeal does not relieve DCAS of its obligation to fully resolve the Appeal vis-à-vis **all** responsive records within the applicable FOIL appeal timeframe.

(Exhibit N at 2-3.)

38. The DCAS Records Access Appeals Officer, Russell Ann Nobles, responded via letter dated March 1, 2013 (the "DCAS Final Administrative Determination Letter;" Exhibit B), not postmarked until March 4, 2013, informing me that "additional records responsive to your request have been identified", and enclosing copies of a "Loan Agreement" between DCAS and the Green-Wood Historic Fund Incorporated; a presentation to the Public Design Commission of

the City of New York pertaining to the transfer of *Triumph of Civic Virtue* to Green-Wood Cemetery; and the Public Design Commission's approval certificate pertaining to the transfer of *Triumph of Civic Virtue* to Green-Wood Cemetery.

39. In addition, for the first and only time during DCAS's processing of the FOIL Request and FOIL Appeal, the DCAS Final Administrative Determination Letter (Exhibit B) explicitly and finally denies access to responsive records, by stating:

Other than the Loan Agreement, the presentation materials and approval certificate, there are no other records of this agency related to this matter now subject to disclosure under FOIL. Any records of communications with Green-Wood Cemetery pertaining to the possible relocation of "Triumph of Civic Virtue" or with any contractor firms regarding services related to such relocation are exempt from disclosure under FOIL pursuant to Section 87 (2)(a) and (g) of the Public Officers Law as, respectively, subject to attorney-client privilege or constituting pre-decisional, deliberative material which, unlike the Loan Agreement itself, does not reflect a final decision or determination.

This is the final administrative determination by this agency on your FOIL request.

(Emphasis added; Exhibit B.)

40. The final administrative determination of DCAS to deny access to requested records, expressed within the DCAS Final Administrative Determination Letter (Exhibit B) dated March 1, 2013 and postmarked March 4, 2013, entitles me to bring this Article 78 proceeding. POL § 89(4)(b); 21 NYCRR Part 1401.7(f); 21 NYCRR Part 1401.7(i). "A final denial of access to a requested record, as provided for in subdivision (g) of this section, shall be subject to court review, as provided for in article 78 of the Civil Practice Laws and Rules." 21 NYCRR Part 1401.7(i).

41. As DCAS did not assert that any responsive records are exempt from disclosure pursuant to POL § 87(2)(a) and POL § 87(2)(g) until its final administrative determination (as opposed to so asserting at the outset, in response to the FOIL Request), there was no opportunity

for me to present any information to DCAS refuting the alleged applicability of those disclosure exemptions to the records at issue, prior to DCAS rendering its final administrative determination. This proceeding is the opportunity for me to present such information.

42. DCAS has produced some documents in response to the FOIL Request (Exhibit A), but has improperly denied access to records of **communications** by which the relocation of *Triumph of Civic Virtue* from Queens to Green-Wood Cemetery was initiated, planned and carried out.

43. Among the records that are responsive to the FOIL Request (Exhibit A) but that have not been produced by DCAS are records that constitute and/or memorialize communications – including but not limited to **email communications and attachments thereto** (irrespective of whether DCAS is a sender, recipient, or carbon-copy recipient of such communication) – in either direction, between DCAS and/or any representative thereof, or any other City agency and/or any representative thereof, and (a) Green-Wood Cemetery and/or any representative thereof; and (b) any contractor firm (and/or representative thereof) that was either considered to provide services, or that did actually provide services, that pertain in any way to the relocation or possible relocation of *Triumph of Civic Virtue* to Green-Wood Cemetery.

44. Without limiting the scope of the FOIL Request (Exhibit A), which encompasses communications with representatives of Green-Wood Cemetery and with representatives of **all** such contractor firms, the contractor firms are known to include:

(a) Surroundart, the firm responsible for providing all labor, materials, tools and transportation necessary for the design and fabrication of a custom steel armature with structural welds to cradle and support *Triumph of Civic Virtue* for its relocation from Queens to Brooklyn. It is inconceivable that Surroundart would have performed all of the required services, including

being present when *Triumph of Civic Virtue* was relocated on December 15, 2012, without prior communications pertaining to the statue and to coordinate the work, but no record of such communications has been produced by DCAS.

(b) Kreilick Conservation, LLC, the firm responsible for providing all labor, materials and equipment necessary for the conservation of *Triumph of Civic Virtue*, including erecting scaffolding to permit complete examination of the surface of the statue, cleaning the statue of bird droppings, bolting in place or wrapping weak areas in collaboration with fine art riggers before the statue is moved, complete treatment of the statue and sealing of all cracks to prevent water penetration, and preparation of reports. It is inconceivable that Kreilick Conservation, LLC would have performed all of the required services, including being present when *Triumph of Civic Virtue* was relocated on December 15, 2012, without prior communications pertaining to the statue and to coordinate the work, but no record of such communications has been produced by DCAS.

(c) The Objects Conservation Studio, LLC, whose Sarah Nunberg examined *Triumph of Civic Virtue* on October 12, 2012 and authored a seven-page illustrated "Condition Report". This vendor would not have done so without prior communications pertaining to the statue, but no record of such communications has been produced by DCAS. No contract pertaining to this work has been produced by DCAS.

(d) Michael Morris, Sculpture and Architecture Conservator, who examined *Triumph of Civic Virtue* on a date unknown and authored a four-page illustrated "Fracture Mapping and General Condition Assessment". This vendor would not have done so without prior communications pertaining to the statue, but no record of such communications has been produced by DCAS. No contract pertaining to this work has been produced by DCAS.

WHY RESPONSIVE RECORDS ARE NOT EXEMPT FROM DISCLOSURE

A. All Or Some Of The Records At Issue Are Not Exempt From Disclosure Pursuant To POL § 87(2)(a) As Subject To Attorney-Client Privilege

45. DCAS has asserted that records of communications between representatives of DCAS or any other involved City agency and representatives of Green-Wood Cemetery pertaining to the relocation of *Triumph of Civic Virtue* (i.e., records described within FOIL Request Items (a) and (b)), and records of communications between representatives of DCAS or any other involved City agency and representatives of contractor firms regarding services pertaining to such relocation (i.e., records described within FOIL Request Items (c) and (d)), are exempt from disclosure pursuant to POL § 87(2)(a), which pertains to records that are specifically exempted from disclosure by state or federal statute, because DCAS claims the records at issue are "subject to attorney-client privilege". (Exhibit B.)

46. Even assuming, *arguendo*, that some of the records at issue were prepared by an attorney on behalf of an agency client, records that are responsive to the FOIL Request (Exhibit A) are those that have been communicated beyond and outside of an agency and disclosed to persons other than an attorney's client, constituting a waiver of attorney-client privilege and of the authority to rely on same to justify denial of access to the requested records.

47. The COG Advisory Opinion (Exhibit C) supports my contention that the records at issue are not exempt from disclosure pursuant to POL § 87(2)(a) as subject to attorney-client privilege. The COG Advisory Opinion (Exhibit C) – in particular, page 3, which discusses attorney-client privilege – is hereby incorporated herein in its entirety by reference, as if fully set forth herein. I emphasize the following conclusion of the COG Advisory Opinion:

In our view, communications between a government attorney and a third party that is not the client, would not be subject to the attorney-client privilege and

would ordinarily be accessible. Any disclosure made to or received from a person other than a client would constitute a waiver of the authority to rely upon those exceptions to rights of access. See Morgan v. NYS Dept. of Environmental Conservation, 9 AD3d 586, 779 NYS2d 643 (3d Dep't 2004). A communication, for example, between a City attorney and a private citizen, or a representative of a private entity, such as a private cemetery or a vendor, could not in our opinion be withheld under the attorney-client privilege.

(Exhibit C at 3.)

48. COG's interpretation of FOIL should be upheld where not "irrational or unreasonable." See Buffalo News Inc. v. Buffalo Enterprise Development Corporation, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991); Miracle Mile Ass'n v. Yudelsohn, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), appeal denied, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979). See Whitehead v. Morgenthau, 146 Misc.2d 733, 552 N.Y.S.2d 518 (Sup. Ct. 1990); Gannett Company v. James, 108 Misc.2d 862, 438 N.Y.S.2d 901, aff'd., 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982).

B. All Or Some Of The Records At Issue Are Not Exempt From Disclosure Pursuant To POL § 87(2)(g) As Inter-Agency Or Intra-Agency Materials

49. DCAS has asserted that records of communications between representatives of DCAS or any other involved City agency and representatives of Green-Wood Cemetery pertaining to the relocation of *Triumph of Civic Virtue*, (i.e., records described within FOIL Request Items (a) and (b)) and records of communications between representatives of DCAS or any other involved City agency and representatives of contractor firms regarding services pertaining to such relocation (i.e., records described within FOIL Request Items (c) and (d)), are exempt from disclosure pursuant to POL § 87(2)(g), which pertains to records that are inter-agency or intra-agency materials which are not (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv)

external audits, including but not limited to audits performed by the comptroller and the federal government, because DCAS claims the records at issue "constitut[e] pre-decisional, deliberative material which ... does not reflect a final decision or determination." (Exhibit B.)

50. To legitimately deny access to records pursuant to POL § 87(2)(g), the records necessarily and fundamentally must be "inter-agency or intra-agency materials" – i.e., records that have not been shared external to or beyond an agency or agencies. By contrast, records that are responsive to the FOIL Request (Exhibit A) are those that **have** been communicated beyond and outside of an agency, and consequently are not exempt from disclosure pursuant to POL § 87(2)(g).

51. The COG Advisory Opinion (Exhibit C) supports my contention that the records at issue are not exempt from disclosure pursuant to POL § 87(2)(g) as inter-agency or intra-agency materials. The COG Advisory Opinion (Exhibit C) is hereby incorporated herein in its entirety by reference, as if fully set forth herein. I emphasize the following portion of the COG Advisory Opinion:

From our perspective, communications in writing, irrespective of their form, between City officers or employees and private entities, such as a private cemetery or a vendor, would not constitute either "inter-agency" or "intra-agency materials" that may be withheld under § 87(2)(g). Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

"... any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In short, an agency is an entity of state or local government in New York. Communications with those outside of government agencies would be neither inter-agency nor intra-agency materials. Because that is so, the exception pertaining to those materials, §87(2)(g), could not properly be asserted as a basis for denying access to communications between City officers or employees and a

private entity or its employees. As stated by the Court of Appeals, that exception pertains to an "internal government exchange" reflective of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (Gould v. New York City Police Department, 89 NY2d 267, 277 [1986]).

In good faith, we note that the intra-agency and inter-agency provision has been extended to records prepared by a **consultant retained** by an agency. In Xerox Corporation v Town of Webster, the Court of Appeals held as follows:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'pre decisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD2d 1048, aff'd 48 NY2d 659). Such material is exempt 'to protect the deliberative process of 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 Const. Corp. v. Stubing, 82 AD2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside **consultants retained** by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. V. Hennessy, 82 AD2d 981, 983)" (Xerox Corporation v. Town of Webster, 65 NY2d 131, 132-133 [1985]).

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which recorded are prepared by the staff of an agency.

When there is no consultant relationship, when an entity is hired to perform a service, and not in a consultative capacity, the exception does not apply. See Town of Waterford v NYS Dept. of Environmental Conservation (18 NY3d 65, 944 NYS2d 429 [2012]).

(Emphases added; Exhibit B at 1-3.)

52. COG's interpretation of FOIL should be upheld where not "irrational or unreasonable." See Buffalo News Inc. v. Buffalo Enterprise Development Corporation, 173 A.D.2d 43, 578 N.Y.S.2d 945 (4th Dep't 1991); Miracle Mile Ass'n v. Yudelton, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), appeal denied, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979). See Whitehead v. Morgenthau, 146 Misc.2d 733, 552 N.Y.S.2d 518 (Sup. Ct. 1990); Gannett Company v. James, 108 Misc.2d 862, 438 N.Y.S.2d 901, aff'd., 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982).

53. In consideration of the above, especially the specific language of the decision of the Court of Appeals in Xerox, *supra*, in order for records that are responsive to the FOIL Request (Exhibit A) to be legitimately exempt from disclosure as inter-agency or intra-agency material pursuant to POL § 87(2)(g), Green-Wood Cemetery and contractor firms that were considered to be or were involved in relocating *Triumph of Civic Virtue* would have to be "consultants retained" by an agency. They are not, however.

54. A "consultant" (from Latin: *consultare* "to discuss") is an experienced professional who provides expert knowledge for a fee. He or she works in an advisory capacity only and is usually not accountable for the outcome of a consulting service. (www.businessdictionary.com/definition/consultant.html)

55. To "retain" is to engage the services of, by payment of a preliminary fee. (<http://www.wordreference.com/definition/retained>) Thus, "retained" essentially means "hired".

(i) As Concerns Green-Wood Cemetery

56. Green-Wood Cemetery is not performing as a "consultant" to DCAS or any agency as concerns the relocation of *Triumph of Civic Virtue*. Green-Wood Cemetery is not in the business of providing advice to DCAS or any agency for a consulting fee. Rather, the nature

of the transaction is that DCAS has agreed to loan *Triumph of Civic Virtue* to Green-Wood Cemetery. Nothing within the Loan Agreement executed between DCAS and Green-Wood Cemetery (copy annexed hereto as Exhibit O) suggests any intent that Green-Wood Cemetery be considered a "consultant", and the Loan Agreement does not require any deliverable work product of Green-Wood Cemetery as a "consultant".

57. Moreover, Green-Wood Cemetery has not been "retained" or paid a fee by DCAS or any agency, as concerns the relocation of *Triumph of Civic Virtue*. To the contrary, Green-Wood Cemetery will incur significant costs that will be its own, as it fulfills its obligations pursuant to the Loan Agreement (Exhibit O).

58. As Green-Wood Cemetery is neither a "consultant" to nor "retained" by an agency as concerns the relocation of *Triumph of Civic Virtue*, records of communications between Green-Wood Cemetery and DCAS or any other involved agency (i.e., records described within FOIL Request Items (a) and (b)) are **not** exempt from disclosure as inter-agency or intra-agency materials pursuant to POL § 87(2)(g).

59. Even if the Loan Agreement (Exhibit O) could somehow be construed as requiring Green-Wood Cemetery to perform as a "consultant retained" by DCAS – and it cannot – it is significant that the Loan Agreement was not executed and did not take effect until September 28, 2012. The FOIL Request (Exhibit A), however, encompasses records that came under the purview of DCAS pursuant to FOIL beginning on January 1, 2010. Therefore, the FOIL Request encompasses records of communications between DCAS or any other involved agency and Green-Wood Cemetery for the 33-month period, from January 1, 2010, inclusive, to September 27, 2012, inclusive, **before** DCAS and Green-Wood Cemetery had executed the Loan

Agreement pertaining to *Triumph of Civic Virtue* – a timeframe when there is therefore no basis whatsoever to consider Green-Wood Cemetery a "consultant retained" by DCAS.

**(ii) *As Concerns Contractor Firms That Were Involved
In Relocating Triumph Of Civic Virtue***

60. Such contractor firms, which include but may not be limited to the aforementioned Surroundart, Kreilick Conservation, LLC, The Objects Conservation Studio, LLC and Michael Morris, have not performed as "consultants" to DCAS or any agency as concerns the relocation of *Triumph of Civic Virtue*. Such firms are not in the business of providing advice to DCAS or any agency for a consulting fee. Rather, they have been hired to perform physical services and industrial tasks pertaining to the statue, including providing all labor, materials, tools and transportation necessary for the design and fabrication of a custom steel armature with structural welds to cradle and support *Triumph of Civic Virtue* for its relocation from Queens to Brooklyn (Surroundart); all labor, materials and equipment necessary for the conservation of *Triumph of Civic Virtue*, including erecting scaffolding to permit complete examination of the surface of the statue, cleaning the statue of bird droppings, bolting in place or wrapping weak areas in collaboration with fine art riggers before the statue is moved, complete treatment of the statue and sealing of all cracks to prevent water penetration, and preparation of reports (Kreilick Conservation, LLC); examining *Triumph of Civic Virtue* and authoring an illustrated "Condition Report" (The Objects Conservation Studio, LLC); and examining *Triumph of Civic Virtue* and authoring an illustrated "Fracture Mapping and General Condition Assessment". Nothing within the Request for Proposals or contract documents that have been produced by DCAS in response to the FOIL Request (Exhibit A), which documents pertain to work that Surroundart and Kreilick Conservation, LLC were selected to perform,

suggests any intent that those contractors be considered "consultants", and there is no deliverable work product of those contractors as "consultants".

61. "When there is no consultant relationship, when an entity is hired to **perform a service**, and not in a consultative capacity, the exception [to disclosure pursuant to POL § 87(2)(g)] does not apply. See Town of Waterford v NYS Dept. of Environmental Conservation (18 NY3d 65, 944 NYS2d 429 [2012])." (COG Advisory Opinion (emphasis added); Exhibit C at 3.)

62. Records of communications between contractor firms that were involved in relocating *Triumph of Civic Virtue* and DCAS or any other involved agency (i.e., records described within FOIL Request Items (c) and (d)) are **not** exempt from disclosure as inter-agency or intra-agency materials pursuant to POL § 87(2)(g).

63. Even if the Request for Proposals or contract documents that have been produced by DCAS in response to the FOIL Request (Exhibit A), which documents pertain to work that Surroundart and Kreilick Conservation, LLC were selected to perform, could somehow be construed as requiring either of those contractors to perform as a "consultant retained" by DCAS – and they cannot – it is significant that Surroundart did not submit its price proposal for the work until October 25, 2012, and DCAS did not issue the associated purchase order until November 13, 2012; and Kreilick Conservation, LLC did not submit its price proposal until October 30, 2012, and DCAS did not issue the associated purchase order until November 13, 2012. The FOIL Request (Exhibit A), however, encompasses records that came under the purview of DCAS pursuant to FOIL beginning on January 1, 2010. Therefore, the FOIL Request encompasses records of communications between DCAS or any other involved agency and the contractors for the approximately 34-month period, from January 1, 2010, inclusive, to

November 12, 2012, inclusive, **before** DCAS issued any purchase order for services to be performed by Surroundart and Kreilick Conservation, LLC, and before those contractors had even submitted price proposals – a timeframe when there is no basis whatsoever to consider either of those contractors a "consultant retained" by DCAS as concerns the relocation of *Triumph of Civic Virtue*. A similar circumstance may apply to contractors The Objects Conservation Studio, LLC and Michael Morris, but no records produced thus far by DCAS provide insight into this.

(iii) As Concerns Contractor Firms That Sought To Be, But Were Not, Involved In Relocating Triumph of Civic Virtue

64. Each such firm (for example, any firm that responded to a Request for Proposals pertaining to the relocation of *Triumph of Civic Virtue* but was not selected to provide services) is neither a "consultant" to nor "retained" by an agency as concerns the relocation of *Triumph of Civic Virtue*. Accordingly, records of communications between any contractor firm that merely sought to be or merely was considered to provide services pertaining to the relocation of *Triumph of Civic Virtue* and DCAS or any other involved agency (records that are responsive to FOIL Request Items (c) and (d)) are **not** exempt from disclosure as inter-agency or intra-agency materials pursuant to POL § 87(2)(g).

DCAS'S BURDEN TO PROVE THAT RECORDS ARE EXEMPT FROM DISCLOSURE

65. In this Article 78 proceeding, Respondents bear the burden of proving that the records to which they have denied access pursuant to POL § 87(2)(a) and POL § 87(2)(g) legitimately fall within the provisions of POL § 87(2). POL § 89(4)(b).

QUESTIONS PRESENTED

66. The questions raised by this Petition, as permitted under CPLR § 7803, are: (a) whether Respondents' determination to deny access to records was made in violation of lawful

procedure, was affected by an error of law or was arbitrary and capricious, based as it was on statutory exemptions that are not applicable to all or some of the records to which DCAS has denied access; and (b) whether Respondents have failed to perform a duty enjoined upon them by law, by not producing to me public records that are subject to disclosure pursuant to FOIL.

67. POL provides that all records held by any agency are available for public inspection and copying unless exempt. POL § 87(2).

68. The records sought by my FOIL Request (Exhibit A) kept or held by, with or for DCAS, are "agency records" as that term is defined by POL § 86(4), and are subject to my right of access pursuant to FOIL.

69. DCAS failed to respond to the FOIL Request (Exhibit A) in a manner consistent with the requirements of FOIL; failed to respond to the FOIL Appeal (Exhibit J) in a manner consistent with the requirements of FOIL; did not inform me within its response (Exhibit K) to the FOIL Appeal or when it produced records (Exhibits L and M) that DCAS was denying access to any record; and ultimately, when pressed further (Exhibit N), determined to deny access (Exhibit B) to records that are responsive to the FOIL Request on the basis of statutory disclosure exemptions that do not apply to all or some of the responsive records – amounting to an arbitrary and capricious decision that was affected by errors of law.

70. By not producing the requested records that are not exempt from disclosure, DCAS has failed to perform a duty enjoined upon it by FOIL. POL § 84 et seq.

71. I have exhausted all of my administrative remedies, and have no other legal recourse available to redress the wrongful denial of my FOIL Request (Exhibit A) and FOIL Appeal (Exhibit J) by Respondents.

FOIL AUTHORIZES THE COURT TO AWARD FEES AND COSTS

72. A court reviewing an agency's denial of access to records "may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed" when, as here, "the agency had no reasonable basis for denying access" or "the agency failed to respond to a request or appeal within the statutory time". POL § 89(4)(c).

73. The fee provision was added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to records must engage in costly litigation to obtain them and that "[c]ertain agencies have adopted a 'sue us' attitude in relation to providing access to records," thereby violating the Legislature's intent in enacting FOIL to foster open government (Assembly Mem in Support, at 1, Bill Jacket, L 1982, ch 73). The provision was subsequently amended and strengthened – by eliminating one requirement and adding another possible basis for recovery – in order to "create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL" (Senate Introducer's Mem in Support, Bill Jacket, L 2006, ch 492, at 5).

74. In this particular matter, fees and other costs incurred by me are eligible to be awarded on all three of the distinct grounds specified within POL § 89(4)(c)(1) and § 89(4)(c)(2), any one of which alone is sufficient to establish eligibility for an award of costs.

A. The Court May Award Fees And Other Costs In This Proceeding Pursuant To POL § 89(4)(c)(1), Because DCAS Had No Reasonable Basis For Denying Access To Requested Records

75. For DCAS to assert that requested records now being withheld are subject to attorney-client privilege, when that is not the case, and to assert that the records also constitute

inter-agency or intra-agency materials, when that is not the case, and then to deny access to the records on those bases, is not reasonable. Indeed, there is no reasonable basis for DCAS to deny access to all of the records that it has withheld in this matter.

B. The Court May Award Fees And Other Costs In This Proceeding Pursuant To POL § 89(4)(c)(2), Because DCAS Failed To Respond To The FOIL Request Within The Statutory Time

76. First, DCAS's acknowledgment (Exhibit I) of the FOIL Request contains no statement of the approximate date when the Request will be granted or denied, and same constitutes a failure to comply with a time limitation. 21 NYCRR 1401.5(e)(2).

77. Second, by its inaction, DCAS extended the timeframe in which to respond to the FOIL Request by more than twenty business days after the date of DCAS's acknowledgment of receipt of the FOIL Request, without DCAS stating, in writing, both the reason for the inability to grant the request within twenty business days and a date certain when the request will be granted in whole or in part, and same constitutes a failure to comply with a time limitation. 21 NYCRR 1401.5(e)(4); 21 NYCRR Part 1401.5(e)(6).

78. Therefore, for each reason above, DCAS's acknowledgment (Exhibit I) of the FOIL Request is not consistent with the requirements of FOIL and 21 NYCRR Part 1401, and DCAS did not respond to the FOIL Request in a manner that complies with FOIL within the statutory time.

C. The Court May Award Fees And Other Costs In This Proceeding Pursuant To POL § 89(4)(c)(2), Because DCAS Failed To Respond To The FOIL Appeal Within The Statutory Time

79. DCAS was obligated to respond to the FOIL Appeal (Exhibit J) within ten business days of receiving it by **"fully explain[ing] in writing to the person requesting the**

record the reasons for further denial, or provid[ing] access to the record sought" (emphasis added). POL § 89(4)(a).

80. But instead of responding to the FOIL Appeal in any of the ways required by POL § 89(4)(a), the DCAS Records Access Appeals Officer, Russell Ann Nobles, replied (Exhibit K) that the FOIL Appeal "is considered moot" because "I am advised by the Records Access Officer that certain records responsive to your request are being made available".

81. Contrary to the above-quoted text of the Nobles February 12, 2013 Letter (Exhibit K), once DCAS had received the FOIL Appeal, DCAS was not entitled to circumvent the requirements of POL § 89(4)(a) or to improperly declare the FOIL Appeal moot when it was, in fact, in effect and requiring a valid response.

82. Therefore, DCAS's dismissal (Exhibit K) of the FOIL Appeal is not consistent with the requirements of FOIL, and DCAS did not respond to the FOIL Appeal in a manner that complies with FOIL within the statutory time.

**D. Broad Circumstances In Which A Petitioner "Substantially Prevails"
And Qualifies For An Award Of Fees And Costs**

83. The FOIL fee provision is applicable, even if an agency produces records to a petitioner on a voluntary basis upon the commencement of an Article 78 proceeding without substantial judicial intervention. See New York State Defenders Association v. New York State Police (87 AD3d 193 [2011]).

84. The FOIL fee provision is also applicable, not only when an agency produces records to a petitioner as a consequence of an Article 78 proceeding, but also in the event that the agency provides any other permitted response to the FOIL Request as a consequence of such proceeding, including a certification that the agency does not possess or cannot find requested

records. See Legal Aid Society v. New York State Department of Corrections and Community Supervision (— AD3d —, 2013 NY Slip Op 02307).

85. Significantly, POL § 89(4)(c) pertains not only to attorney's fees, but also to "other litigation costs reasonably incurred" by a petitioner.

NO PRIOR APPLICATIONS

86. No prior application for the relief requested herein has been previously made.

RELIEF SOUGHT

WHEREFORE, I seek to have the Court:

A. Review the final administrative determination of Respondents (Exhibit B), denying access to records requested by my FOIL Request (Exhibit A) pertaining to the controversial relocation of *Triumph of Civic Virtue* from Queens to the private Green-Wood Cemetery in Brooklyn, including an *in camera* review by the Court of the records to which Respondents have denied access, to determine whether any such records or portions thereof are not exempt from disclosure pursuant to FOIL;

B. In the event that the Court determines that any records or portions thereof to which Respondents have denied access are not exempt from disclosure pursuant to FOIL, then (i) annul Respondents' determination denying access to such records and (ii) order Respondents to produce to me all such records and portions thereof that are responsive to my FOIL Request (Exhibit A) that are not exempt from disclosure pursuant to FOIL, and to produce the records in commonly-readable electronic form (e.g., Adobe Portable Document Format (PDF) on CD-R disc) as I hereby request pursuant to POL § 87(5)(a);

C. In the event that Respondents assert that they do not possess or cannot find any record demanded by me after diligent search, order Respondents to so certify, pursuant to POL

§ 89(3)(a), in writing. Each paragraph of the FOIL Request (Exhibit A) that is labeled (a), (b), (c) or (d) pertains to a distinct type of record. Therefore, I request that Respondents certify, separately for each and every distinct type of record described within each aforementioned FOIL Request paragraph, if such is the case, that Respondents do not have possession of such records or that such records cannot be found after diligent search;

D. Order Respondents to inform me, prior to generating any expense, if the cost to produce the records in the electronic form requested would exceed the \$30.00 USD limit pre-approved by me within the FOIL Request (Exhibit A), so that I may decide whether to inspect the records in lieu of obtaining duplicates, as explained within the FOIL Request;

E. Award my litigation costs, expenses, disbursements and attorney's fees in this proceeding as authorized by statute when, as here, the agency had no reasonable basis for denying access or the agency failed to respond to a FOIL request or appeal within the statutory time [POL § 89(4)(c)]; and

F. Grant such other and further relief as may seem just and proper to the Court.

Dated: Queens, New York
June 26, 2013

Respectfully submitted,

By: _____
Robert LoScalzo
Petitioner, *pro se*
169-06 22nd Avenue
Whitestone, New York 11357
Telephone: 718-352-4534

VERIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

Robert LoScalzo, being duly sworn, deposes and says:

I, the undersigned, am the Petitioner in the above-captioned action. I have read the foregoing Petition and know the contents thereof and the same are true to my knowledge, except those matters therein stated to be alleged on information and belief, and to those matters I believe them to be true.

Robert LoScalzo

Sworn to before me this
26th day of June, 2013

NOTARY PUBLIC