

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

NATHAN FEIST,

Petitioner,

For a Judgement Pursuant to Article 78 of the  
Civil Practice Law and Rules

-against-

CITY OF BUFFALO and BUFFALO POLICE  
DEPARTMENT,

Respondents.

Index No. \_\_\_\_\_

**VERIFIED PETITION**

**PRELIMINARY STATEMENT**

1. Petitioner seeks relief from this Court to vindicate the right of public access to records of the City of Buffalo and the Buffalo Police Department, pursuant to the State of New York’s Freedom of Information Law (“FOIL”).

2. Petitioner was erroneously denied access to public records by the City of Buffalo and BPD.

3. Having exhausted administrative remedies, Petitioner now seeks judicial relief to compel Respondents to produce responsive records.

4. Petitioner also seeks an award of court fees in consideration of Petitioner’s pro se representation, Respondents’ failure to comply with FOIL, and the fact that the relief sought is in the public interest.

**VENUE**

5. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in Erie County, in the judicial district in which the Respondents took the actions challenged here, and where the offices of the Respondents are located.

**PARTIES**

6. Petitioner NATHAN FEIST is a paralegal who resides in Buffalo, New York and who regularly files FOIL requests as part of his commitment to accountability and transparency in local government.

7. Respondent City of Buffalo is a public agency subject to the requirements of FOIL, New York State Public Officers Law §§ 84 - 90.

8. Respondent Buffalo Police Department (“BPD”) is a public agency subject to the requirements of FOIL, New York State Public Officers Law §§ 84 - 90.

**FACTUAL BACKGROUND**

9. On September 3, 2022, WIVB News published the story “Buffalo family gets free trip to Disney courtesy of Buffalo Police Department.” The story reported that “this family was picked because they are an example of a good family.” (*See*, September 3, 2022 WIVB News Article, attached hereto as “Exhibit A”).

10. On September 4, 2022, Petitioner filed a FOIL request with Respondent BPD seeking all records related to the selection process for awarding the free trip, correspondence with members of the public, records of the trip’s funding, and records of any approvals for the expenditure. (*See*, FOIL Request, attached hereto as “Exhibit B”).

11. On September 27, 2022, Respondent BPD denied the request, stating that its “search revealed only inter-agency materials and agreements that are exempt from disclosure

pursuant to FOIL (id. at 87[2][g]).” (See, FOIL Request Denial E-mail Chain, attached as “Exhibit C”).

12. Petitioner did not request inter-agency materials.

13. Petitioner requested correspondence with members of the public and intra-agency materials containing objective information.

14. On September 28, 2022, Petitioner wrote to the New York State Committee on Open Government to request an advisory opinion on BPD’s denial of the request. (See, E-mail Chain with the Committee on Open Government, attached hereto as “Exhibit D”).

15. On September 30, 2022, the New York State Committee on Open Government replied and suggested requesting a certification for records that were not found, pursuant to New York State Public Officers Law § 89(3)(a), to learn if all the records Petitioner requested were withheld or if some were not found. (See, E-mail Chain with the Committee on Open Government, attached hereto as “Exhibit D”).

16. On October 5, 2022, Petitioner e-mailed BPD’s FOIL Division requesting certification pursuant to Public Officers Law § 89(3)(a). (See, FOIL Request Denial E-mail Chain, attached hereto as “Exhibit C”).

17. On October 17, 2022, Petitioner called BPD’s FOIL Division, having received no response to his October 5 e-mail. The FOIL officer who answered Petitioner’s call stated that BPD will provide no further information and hung up the phone when Petitioner explained that BPD is required to provide a certification pursuant to Public Officers Law § 89(3)(a) if “it does not have possession of such record or that such record cannot be found after diligent search.”

18. On October 20, 2022, Petitioner appealed the denial of his FOIL request with Respondent City of Buffalo. (See, October 20, 2022 FOIL Appeal, attached hereto as “Exhibit E”).

19. On November 3, 2022, Respondent City of Buffalo denied Petitioner's appeal for the reason that the free trip award, now referred to as "a raffle of a trip," was "voluntarily organized and privately funded." (*See*, November 3, 2022 FOIL Appeal Denial, attached hereto as "Exhibit F").

20. Having exhausted administrative remedies, Petitioner files this Article 78 proceeding seeking immediate production of responsive documents.

### LEGAL ANALYSIS

21. The courts of this state have held that *de novo* review is the appropriate standard to apply in an Article 78 proceeding involving FOIL. *See, e.g., Matter of Industrial Liaison Comm. v. Williams*, 72 N.Y.2d 137 (1988); *Harvey v. Hynes*, 174 Misc. 2d 174, 178-179 (Sup. Ct. Kings Co. 1997).

22. When reviewing the denial of a FOIL request, courts must "presume that all records of a public agency are open to public inspection and copying and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure." *See, Matter of New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 158 (2010); *see also, e.g., New York State Rifle & Pistol Assn., Inc. v. Kelly*, 55 A.D.3d 222 (1st Dep't 2008); *Matter of James, Hoyer, Newcomer, Smiljanich & Yanchunis P.A. v. State of New York*, 27 Misc. 3d 1223A (Sup. Ct. New York Co. 2010).

23. When an agency restricts access to public records, the agency bears the burden of not only citing a provision of FOIL to justify its determination but also of establishing how, on the facts of the case, each cited exemption applies. *See, e.g., New York State Department of State Committee on Open Government FOIL Advisory Opinion 12027.*

24. BPD's only stated basis for denying Petitioner's FOIL request was the conclusory assertion that BPD's search "revealed only inter-agency materials and agreements that are exempt from disclosure pursuant to FOIL (id. at 87[2][g]). These materials not do [sic] contain any statistics, instructions to staff, final policy determinations, or other disclosable information."

25. The Public Officers Law § 87(2)(g) exemption includes statutory exceptions for "statistical or factual tabulations or data," "instructions to staff that affect the public," and "final agency policy or determinations."

26. The New York State Court of Appeals has held that records or portions thereof containing objective information must be disclosed under Public Officers Law § 87(2)(g)(i).

27. As the Court of Appeals stated in *Gould et al. v. New York City Police Department*, 87 NY2d 267, 276 (1996):

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, *Matter of Scott v. Chief Medical Examiner*, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, *Matter of Farbman & Sons v. New York City Health & Hosp. Corp.*, 62 NY2d 75, 83, supra; *Matter of MacRae v. Dolce*, 130 AD2d 577)..."

28. As the Court of Appeals further stated in *Gould v. New York City Police Department*, 89 NY2d 267, 276, 277 (1996):

“...Although the term ‘factual data’ is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is ‘to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers’ (*Matter of Xerox Corp. v. Town of Webster*, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting *Matter of Sea Crest Constr. Corp. v. Stubing*, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). 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’ (Public Officers Law 87[2][g][i]. 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, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; *Matter of Miracle Mile Assocs. v. Yudelson*, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142).”

29. As the Court of Appeals decided in *Gould v. New York City Police Department*, 89 NY2d 276 (1996):

“Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree.”

30. Petitioner requested records containing objective information and factual data.

31. Petitioner requested intra-agency material falling under the non-exempt categories of factual tabulations or data, instructions to staff that affect the public, and final agency policy or determinations.

32. Petitioner requested records of correspondence with members of the public, which are neither inter- nor intra-agency materials and thus are not subject to Respondents' only cited disclosure exemption, Public Officers Law § 87(2)(g).

33. Respondents did not cite any disclosure exemption that applies to the requested records of correspondence with members of the public, nor did Respondents certify that said records could not be found, pursuant to Public Officers Law § 89(3)(a).

34. Respondents failed to satisfy their burden of establishing how the requested records are subject to any disclosure exemption.

35. The only statements by Respondent City of Buffalo toward satisfying this burden were given in its October 20, 2022 FOIL appeal determination letter, which relied on the irrelevant argument that the free trip award, now referred to as "a raffle of a trip," was "voluntarily organized and privately funded."

36. The notion that the award was voluntarily organized and privately funded does not negate the fact that records requested by Petitioner contain objective information and thus fall under an exception to Respondents' only cited disclosure exemption.

37. The notion that the award was voluntarily organized and privately funded does not exempt from disclosure the requested records of correspondence with members of the public under Respondents' only cited disclosure exemption, nor does it under any other disclosure exemption.

38. The notion that the award was voluntarily organized and privately funded leaves open the possibility that BPD's trip award was publicly organized by members of BPD who volunteered to both organize and award the trip in their official capacity. Indeed, BPD's press conference, the resulting September 3, 2022 news coverage, and the November 3, 2022 FOIL

Appeal Denial's admission that BPD possesses responsive intra-agency material each strongly suggest that the trip was organized and awarded in BPD's official capacity.

39. Respondents have therefore failed to satisfy their burden to establish that materials revealed by BPD's search do not include "instructions to staff that affect the public" or "final agency policy or determinations," as Respondents baselessly claim.

40. Records or portions thereof requested by Petitioner must be disclosed by Respondents, pursuant to FOIL. Respondents' refusal to disclose these public records aggrandizes an appearance of a conflict of interest between Respondents and the recipients of the trip, whom BPD initially claimed were selected merely for being "an example of a good family," and who may have been selected as a personal or political favor.

#### **CAUSE OF ACTION UNDER ARTICLE 78**

41. Petitioner repeats and realleges paragraphs 1 through 40 hereof as if fully set forth herein.

42. Petitioner has complied with all administrative procedures and conditions required to access Respondents' records.

43. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

44. Petitioner has a clear right to records responsive to each item enumerated in his request.

45. There is no basis in law or fact for the Respondents to withhold the requested records.

46. Respondents' denials of Petitioner's FOIL request, of Petitioner's request for certification, and of Petitioner's FOIL appeal were unreasonable, arbitrary, capricious, abuses of



discretion, and contraventions of law, in that the Respondents failed to perform the duties enjoined upon them by FOIL.

47. Petitioner exhausted his administrative remedies when he appealed BPD's denial of his FOIL request.

48. Petitioner has no other remedy at law.

49. This Petition is timely under C.P.L.R. § 217, as it is filed within four months of the City of Buffalo's denial of Petitioner's administrative appeal on November 3, 2022.

**REQUESTED RELIEF**

WHEREFORE, the petitioner seeks judgment:

- 1) Pursuant to C.P.L.R. § 7806, directing Respondents to comply with their duty under FOIL to disclose the records sought by Petitioner in his request dated September 4, 2022;
- 2) Awarding reasonable litigation costs as allowed under New York State Public Officers Law § 89(4)(c); and
- 3) Granting such other relief as the Court deems just and proper.

Respectfully Submitted,

By: /s/ Nathan Feist  
Nathan Feist  
36 Broadway 3B  
Buffalo, NY 14203

DATED: March 2, 2023  
Buffalo, New York

VERIFICATION

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

Nathan Feist, being duly sworn, deposes and says:

1. I am the Petitioner in this proceeding.
2. I have written the foregoing petition and know the contents thereof and, upon information and belief, believe them to be true.

Nathan Feist  
Nathan Feist

Sworn to before me this  
2<sup>nd</sup> day of March, 2023

Sara Loviza  
NOTARY PUBLIC

