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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

David Varoli, Records Access Appeals Officer
The New York City Department of Design and Construction
30-30 Thomson Avenue, 4th Floor
Long Island City, NY 11101

Re: *Freedom of Information Law (FOIL) Request:*
APPEAL of FREEDOM OF INFORMATION LAW REQUEST DETERMINATION
2021-0016

Dear Mr. Varoli:

PRELIMINARY STATEMENT

Appellants, Pat Arnow, Fannie Ip, Lucy Koteen, Harriet Hirshorn and the East River Park Action Inc. hereby appeal the determination in the above referenced Freedom of Information response dated February 11, 2021. The rationale for the wholesale redaction of major portions of the released documents is conclusory, merely restates the language in the statute, and is devoid of any factual basis. The City's response is patently statutorily defective and unlawful. The City's response violates the most fundamental principles of the Public Officers Law and ignores decades of judicial interpretation.

The City's determination to release the heavily redacted *Value – Engineering – Study - Preliminary Report* and the *Elevated – Park – Alternative – Feasibility – Analysis* as set forth herein, violated the public's right to know. The agency determination was both arbitrary and capricious and has denied the public critical information relating to the expenditure of more than \$1 Billion of taxpayer money involving a matter of grave public urgency.

FACTUAL BACKGROUND

In October 2015, the City of New York formally commenced a major policy initiative to address the storm and climate flood hazard vulnerability for a 2.4 mile stretch of Manhattan's

East River Waterfront. This policy initiative was urgent and imperative in the wake of Superstorm Sandy and followed years of public consultation concerning proper designs and methodologies in relation to the project's impact on neighborhood character and the environment. The public agencies of the City of New York continued what was to be a purportedly inclusive and public review process. The State of New York and Federal government are also involved in this project, as funding and reviewing entities. Permits must be provided for the commencement of this project by all levels of government.

Implementation of the project involves innumerable public agencies at the Federal, State and City level. The project was and remains subject to the National Environmental Policy Act ("NEPA"), the State Environmental Quality Review Act ("SEQRA"), and city regulations set forth in the City Environmental Quality Review ("CEQR"). The project also went through a multi-layer review process governed by the *New York City Charter* in the Uniform Land Use Review Process ("ULURP"). ULURP began public review with a referral to the local Community Board in 2015. From 2015 until the Fall of 2018, the City regularly engaged the local community in design and project consultation. Disturbingly, years of consultation and review by the community, was cast aside in the project's final iteration. This process has frayed trust in government and public agencies because of the drastic change in plan design done without community consultation. This drastic change ignored input from the very community that desperately needs government to provide protection for their lives and homes. The importance of the FOIL request in this case is beyond dispute. The requested documents relate to the rationale that led the City of New York to torpedo years of public consultation. The concealment of the requested documents serves to aggravate and accentuate the City's misguided attempt to change direction without public consultation.

The project was approved through the ULURP process, after review by the Community Board, the Borough Board, The New York and City Planning Commission, and the New York City Council in November 2019. The problem, as highlighted in this FOIL request, is that during the Community Board review process, a different project was vetted and discussed. The final project design, therefore pulled the rug out from under the entire public participation aspect of ULURP. The reason for this change in policy must now be disclosed by the City, otherwise the entire process defies democracy and renders the safeguards of ULURP to be a nullity.

After extensive public commentary and public participation, which vetted various design alternatives, an alternative devoid of public support or meaningful participation, was approved by the City of New York in October 2018. The alternative selected by the City of New York calls for the destruction and demolition of the East River Park for a period of at least five (5) years. The alternative selected by the City of New York would raise the majority of the East River Park eight (8) to nine (9) feet above its current elevation and would locate the flood protection system below grade. The alternative selected includes a full reconstruction and reconfiguration of the East River Park's underground sewer and water infrastructure. Hazardous materials would disturb subsurface natural resources. Contaminants could be disturbed during excavation. Noise and vibration would generate toxic emissions impacting on public open space and the health of the community residents. The loss of open space would severely impact upon the Lower East Side community and will be disproportionately felt by lower income residents, people of color, and people residing in public housing. 20% of all residents in the impacted

community are living in poverty. The deleterious effects of the selected design alternative are overwhelming, too numerous to mention in this appeal, however the decision-making process has been shrouded in secrecy and concealed from the public.

In or about September 2018, the City of New York announced that the adoption of the selected alternative, followed a **value engineering study** performed earlier in that year by Strategic Value Solutions, Inc. (“Strategic”). Strategic is a private consulting agency. Strategic’s pecuniary interest or connection to the recommended alternative has not been disclosed. The public is unaware of the identity of the individuals that participated in the study. This information is of course, critically important. The taxpayers will be spending over \$1 Billion in this project. The selected alternative is much more expensive than the alternatives reviewed by the community. This study undertaken in secrecy, devoid of public attention or open meetings, was completed in April of 2018. Remarkably, the City at first, denied the very existence of a published report. After an alleged search of City records, the report was located. However, when the report was released, it was so redacted as to be incomprehensible.

This crucial and determining public document is being inexplicably covered up by the City of New York. The documents belatedly released on February 11, 2021 were so heavily redacted as to be useless in promoting transparency. Vital information concerning the methodology of the study, the participants in the study, the rationale for the study’s conclusion have all been unlawfully relegated to secrecy. The City of New York has rendered the public disclosure requirements of FOIL to be a nullity. This is particularly disturbing because the project affects one of the major issues of our time, namely climate change and natural disasters, and will cost the taxpayers of New York City over \$1 Billion.

LEGAL ANALYSIS

The New York State Freedom of Information Law, codified as Article 6 §§ 84-90 of the Public Officers Law, provides the public with a legal right to broad access of government records. As noted in the statute’s legislative declaration:

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of government actions. The more open the government with its citizenry, the greater the understanding and participation of the public in government.

FOIL generally “requires government agencies to make available for public inspection and copying, all records subject to a number of exemptions.” *See Matter of Harbatkin v. New York City Department of Records and Information Services*, 19 NY 3d 373 (2012). The premise of FOIL is that the public is vested with an inherent right to know and that official secrecy is antithetical to our form of government; *see Matter of Data Tree, LLC v. Romaine*, 9 NY 3d 454 (2007). When an exemption is claimed by the government, the exemptions set forth in the statutes are interpreted narrowly in order to affect the purpose of the statutory scheme. An agency relying on the applicability of an exemption has the burden of establishing that the

documents qualify for the exemption; see *Matter of West Harlem Bus Group v. Empire State Development Corp.*, 13 NY 3d 882 (2009).

Critical to this case, is that the agency must articulate a particularized and specific justification for denying disclosure. An agency cannot merely parrot the words of the statute. The agency must provide a substantive or specific explanation of how or why the requested documents were covered by the cited exemptions. Merely repeating the statutory language of an exemption by citing sections, subdivisions and subparagraphs of the applicable statute, and conclusory characterizations of the records sought to be withheld, is insufficient to sustain a denial of request for documents under FOIL. See *Church of Scientology v. State*, 46 NY 2d 906 (1979). City agencies must establish how a requested record falls squarely within an exemption “by articulating a particularized and specific justification for denying access.” See *Konigsberg v. Coughlin*, 508 N.Y.S. 2d 393 (1986).

In this case, the City of New York claims without factual support, that the requested documents comprises inter-agency or intra-agency materials. The letter merely parrots the language of §87(2)(g) and §87(2)(b). §87(2)(g) states:

- (g) 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;
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

The City merely repeats the language of the statute without providing any guidance as to how the redacted material fits within that description. This conclusory letter issued by various City Agencies renders an appeal an exercise in futility. A reviewing agency or court has no way to determine whether or not this misguided conclusion is supported by facts. An agency is not authorized to throw a protective blanket over all information by casting it in the form of internal memo. See *Miracle Mile Association v. Yudelson*, 68 A.D. 2d 176 (1979). Even if a record is a draft or preliminary, an agency is obliged to review the record for the purpose of disclosing its rationale for secrecy, and disclosure of relevant material. In the case of *Tuck-It-Away Association, L.P. v. Empire State Development Corp.*, 54 A.D. 3d 154 (1st Dept. 2008), the court held that the intra or inter-agency exemption does not attach to a government agency’s communications with a firm hired as a consultant by that agency, see *New York Times Company v. City of New York Fire Department*, 4 NY 3d 477 (2005). In that case, the Court of Appeals held that dispatch calls made over the Fire Department’s internal communication system concerning response to the September 11th terrorist attacks, are disclosable because they consist of factual statements or instructions affecting the public.

There can be no doubt that in this case, the Value Engineering Study represents a critical link in the City’s policy determination. The City has indicated as much in its public pronouncements. The Value Engineering Study is cited by the City as the basis for its policy determination. This is far beyond mere opinions or suggestions. The public has a right to know

how the City's policy determination was formulated, especially given the fact that it's the Value Engineering Study that led to a change in course that obliterated years of public consultation.

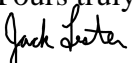
Judge Joan Lobis, in a case remarkably similar to this proceeding, held that a local cable news channel had a right to the City's communication with a private consultant. The reason is very simple. The public relations firm is not part of the Mayor's Office, or any other City Agency. Therefore, it cannot fall under the rubric of an inter or intra-agency communication. This is critically important where an outside agency, which may have a pecuniary interest in a project, is offering advice on how the project should be designed or developed. This type of secrecy is the very problem FOIL and public disclosure seeks to redress. It is an old axiom, but true that *sunlight is the best disinfectant*. In the case of *Rauh, et.al. v. De Blasio; Index No.: 157525/2016*, Judge Lobis states the following:

Here, the Mayor is seeking to apply the inter-agency or intra-agency deliberative privilege to someone who is not part of the Mayor's office or that of any other city agency, and who has not been hired by the Mayor but is merely advising him on an informal basis. Moreover, as in Hernandez, where the deliberative privilege was rejected, Rosen is a private citizen whose private interests may diverge from those of the City in connection with his representation of his private clients, some of whom conduct business which may be impacted by city policies, such as zoning matters. Although respondents claim that none of the withheld documents relate to Rosen's private clients, that does not mean that Rosen and his consulting firm are free from such divergent interests. Clothing informal relationships such as that of Rosen and the Mayor with the inter-agency or intra-agency privilege impermissibly broadens the exception to FOIL, counter to the public interest in transparency in government. (emphasis added)

Finally, the blanket exemption relating to personal privacy, is merely stated. No reason whatsoever is provided. This claim of an exemption must be therefore rejected summarily. The conclusory allegation is statutorily defective.

CONCLUSION

For the foregoing reasons, the New York City determination to redact virtually the entire requested documents, must be reversed.

Yours truly,

Jack L. Lester, Esq.