

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

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**ERIKA LEFEVRE & ALAIN
LEFEVRE,**

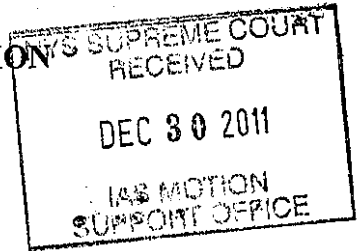
PETITIONERS,

Index Number 11-114645

-against-

**NEW YORK POLICE
DEPARTMENT,**

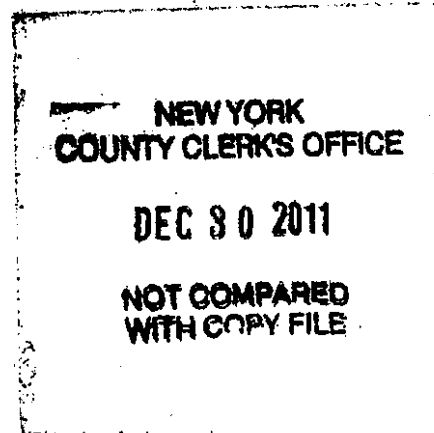
**NOTICE OF PETITION
PURSUANT TO
CPLR ARTICLE 78**



RESPONDENT.

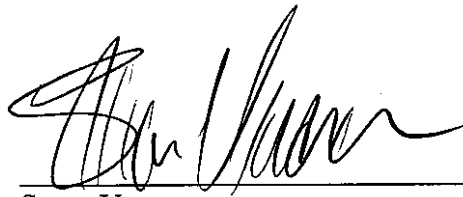
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PLEASE TAKE NOTICE that, upon the ANNEXED Verified Petition of Erika & Alain Lefevre dated December 30, 2011, together with the Affidavit of Paula Segal, dated December 30, 2011, with attached exhibits, Petitioners Erika & Alain Lefevre will move this Court, at 9:30 AM on the 23rd of January, 2012, at the Courthouse located at 60 Centre Street, New York, New York, in the Motion Support Courtroom, Room 130, or as soon thereafter as counsel can be heard, for an order and judgment pursuant to CPLR Article 78 for the relief demanded in the Petition.



PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 7804, Respondent's answer and supporting affidavits, if any, are required to be served **by hand** upon the undersigned by January 18, 2012, and Petitioner's reply and supporting affidavits, if any, will be served **by hand** on January 22, 2012.

Dated: New York, NY
December 30, 2011



Steve Vaccaro
Of Counsel
Rankin & Taylor
350 Broadway, Suite 700
New York, NY 10013
212-226-4507

Counsel for Petitioners Erika & Alain Lefevre

To:

New York Police Department
One Police Plaza
New York, NY 10038

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

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ERIKA LEFEVRE, ALAIN
LEFEVRE,

PETITIONERS,

Index Number 11-114645

against

NEW YORK CITY
POLICE DEPARTMENT,

**VERIFIED PETITION PURSUANT TO
ARTICLE 78 OF THE NEW YORK
CIVIL PRACTICE LAW AND RULES**

RESPONDENT.

-----X

Steve Vaccaro
Of Counsel
Rankin & Taylor
350 Broadway, Suite 701
New York, NY 10013
212-226-4507

Counsel for Petitioners

Summary

1. Petitioners Erika and Alain Lefevre (the “Lefevres”) seek an order directing disclosure of public records concerning the death of their son Mathieu Lefevre (“Lefevre”) by the Respondent New York Police Department (“NYPD”), pursuant to the New York Freedom of Information Law (“FOIL”), New York Public Officers Law Section 84, *et seq.*

2. NYPD admits that it possesses records requested by the Lefevres, but has stonewalled for nearly two months, refusing to disclose those records without a valid justification. The two grounds advanced by NYPD for withholding the records are completely lacking in merit.

3. **First**, NYPD asserts that it can withhold *all* records concerning Lefevre’s death, so long as its investigation of his death is still open. That is incorrect. FOIL exempts from disclosure only records the release of which would *interfere* with an ongoing investigation. NYPD does not suggest *even the possibility* of such interference.

4. **Second**, NYPD asserts that release of records concerning Lefevre’s death would jeopardize an impartial trial or adjudication. But NYPD has already announced there will be no criminal charges related to Lefevre’s death. Absent criminal charges, there is no right to a trial by jury, and therefore no chance of a tainted adjudication.

5. The Lefevres seek only to learn the truth about the death of their son. NYPD’s stated reasons for hiding the truth from the Lefevres plainly lack merit. NYPD should be ordered to disclose the records sought by the Lefevres, and to pay the Lefevres’ reasonable attorneys fees and costs.

Background

6. The NYPD's Investigation of Mathieu Lefevre's Death. This proceeding arises from the Lefevres' November 1, 2011 FOIL request (the "Request") seeking disclosure of records concerning the death of Mathieu Lefevre. See Letter from Steve Vaccaro to NYPD Legal Bureau (Nov. 1, 2011), attached as Exhibit A to the Affidavit of Steve Vaccaro ("Vaccaro Aff."), filed herewith. On October 19, 2011, Mathieu Lefevre was struck and killed by a truck driver while bicycling in Brooklyn. See Accident Report, Vaccaro Aff. Ex. B.

7. Detective Gerard Sheehan ("Sheehan") of the NYPD Accident Investigation Squad ("AIS") was assigned to investigate the circumstances of Lefevre's death. Vaccaro Aff. ¶5. In addition to their FOIL Request, the Lefevres and their attorney, Steve Vaccaro ("Vaccaro") have requested information concerning Lefevre's death directly from Sheehan and his supervisor, Sergeant Alessio Bono ("Bono"). Vaccaro Aff. ¶¶5-6 & Ex. C, at 4 (Letter from Vaccaro to Bono (Dec. 19, 2011)).

8. In response to these inquiries, Sheehan and Bono have provided certain information orally. Vaccaro Aff. ¶¶5-6. However the only record disclosed by any NYPD representative in response to these inquiries, or to the Request, has been the accident report, as amended to include the name of the truck driver involved. Vaccaro Aff. Ex. B.

9. Sheehan and Bono both have stated that NYPD's investigation of the Lefevre's death is complete except for review of (a) certain videotape potentially

depicting the fatal crash, and (b) the results of toxicology tests performed on Mathieu's remains. Vaccaro Aff. ¶¶7-8.

10. On information and belief, as of the date of this petition, NYPD personnel have in their possession all videorecordings potentially relevant to the investigation of Lefevre's death. Vaccaro Aff. ¶9.

11. The Lefevres' FOIL Request. In their November 1, 2011 request for information to the NYPD, the Lefevres sought the following public records concerning their son's death:

- (1) All records possessed or maintained by of the Police Department, or of any precinct, unit, or division thereof, concerning, referencing, or pertaining to the above-referenced crash, including without limitation any Accident Investigation Squad Reports, Accident Reports, Motor Vehicle Accident and Mechanism Reports or diagrams, Identification forms, Property Clerk Invoices, vouchers, Complaints or Complaint Reports, Complaint Follow-Up Reports, Follow-Up Control Sheets, Complaint Follow-Up Informationals, Aided Reports, 684 forms, Toxicology Lab Reports, pathology or autopsy reports, or other reports, correspondence or memoranda, photographs, video or audio recordings, summonses, or transcripts of 911 reports or of other oral statements;
- (2) All records associated or created in connection with AIS Case Number 511-25 (Highway Patrol Unit #2), or accident number 2081/complaint number 6785 at the 90th Precinct of the Police Department, including without limitations any notes, memoranda, reports, activity log entries or memo book entries by the investigating officers; and
- (3) All records possessed or maintained by of the Police Department, or of any precinct, unit, or division thereof, concerning any violations,

infractions and/or criminal charges brought or that may be brought, or that were considered, in connection with the above-referenced crash.

12. NYPD's Denial of The Lefevres' FOIL Request. In a letter dated November 9, 2011, NYPD Records Access Officer Michael Cappello ("Cappello") acknowledged receipt of the Request. Vaccaro Aff. Ex. D. Capello's letter stated that NYPD required 20 business days to determine how to respond. See id.

13. In a letter from Cappello dated December 9, 2011, the NYPD set forth its response to the Request, which denied the Request in its entirety. Vaccaro Aff. Ex. E. As justification for the denial, Cappello stated: "The NYPD's investigation of this matter [the death of Lefevre] is ongoing. *As such*, the records you requested are exempt from disclosure pursuant to POL § 87 (2)(e)(i) and (ii)." Id. (emphasis added).¹

14. Under Public Officers Law Subsections 87 (2)(e)(i) and (ii), public records are exempt from disclosure under FOIL if "compiled for law enforcement purposes and . . . , if disclosed, [i] would interfere with law enforcement investigations or judicial proceedings," or [ii] would deprive a person of a right to a fair trial or impartial adjudication."

15. The Lefevres' Exhaustion of Administrative Appeal Process. Pursuant to NYPD's internal appeal procedure, the Lefevres appealed the denial of their Request to the NYPD's designated Records Access Appeal Officer three days after it was made,

¹ Cappello's letter also asserted that the records sought by the Lefevres contained information to which the privacy exemption referenced in "POL § 87(2)(b) and 89(2)" applies. See Vaccaro Aff. Ex. E. Even if the FOIL privacy exemption applies to personal identifying information of a decedent in public records sought by that decedent's next of kin, that is not a valid ground for withholding, as opposed to producing in redacted form, those records. See Mulgrew v. Board of Educ. of New York, 31 Misc. 3d 296, 302, 919 N.Y.S.2d 786, 790 (Sup. Ct. N.Y. Cty. 2011) (FOIL privacy exemption given effect through production subject to redaction of "personal information such as birth dates and contact information such as email addresses of state employees").

within the thirty-day period allowed to bring such appeals. See Vaccaro Aff. Ex. F (Letter from Vaccaro to Jonathan David, (Dec. 12, 2011)).

16. The Lefevres' appeal letter explained why the exemptions to disclosure under Subsections 87 (2)(e)(i) and (ii) of the Public Officers Law did not apply to the records sought in their Request. See id.

17. The Lefevres' appeal letter was delivered by hand to Mr. David at One Police Plaza on December 12, 2011. The period of ten business days pursuant to Public Officers Law Section 89(4)(a) within which NYPD was required to respond to the Lefevres' appeal letter elapsed on December 27. No response to the Lefevres' appeal letter was received from NYPD through December 30.

18. Pursuant to Public Officers Law Section 89(4)(a), NYPD's failure to respond to the appeal within ten business days constituted a constructive denial of the appeal. This petition pursuant to Article 78 of the New York Civil Practice Law and Rules followed.

Jurisdiction and Venue

19. This proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules is the proper mechanism for seeking judicial review of a state agency's determination with respect to a FOIL request. N.Y. Pub. Off. § 89(4)(b). The Lefevres have exhausted NYPD's internal appeals process and the instant petition has been filed within the four month period thereafter specified in N.Y. Civ. Prac. L. R. § 217(1).

20. The decisions by NYPD to deny the Lefevres' FOIL Request were made at the Police Department Legal Bureau, located at One Police Plaza in New York County, which also serves as the NYPD's principal place of business. Venue therefore is proper in this Court. N.Y. Civ. Prac. L. R. §§ 7804(a), 506(b).

Basis for Relief

I. FOIL mandates disclosure of the public records sought by the Lefevres.

21. The Lefevres bring this proceeding to vindicate their right under the Freedom of Information Law to know the truth about how their son Mathieu died. NYPD's months-long refusal to disclose videotapes, photographs and other public records concerning Mathieu's death is a clear violation of the letter and the spirit of FOIL.

22. "The Freedom of Information Law [New York Public Officers Law Section 84, *et seq.*] expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies." Matter of Capital Newspapers v. Burns, 67 N.Y.2d 562, 565, 505 N.Y.S.2d 576, 578 (1986).

23. The FOIL not only "affords the public the means to attain information concerning the day-to-day functioning of State government," but also assists "in exposing waste, negligence and abuses on the part of government". Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 470 (1979); see also Burns, 67 N.Y.2d at 565, 505 N.Y.S.2d at 578 (same).

24. To further these goals, the FOIL provides that all records kept by a public agency are presumptively open to public inspection and copying unless specifically exempted. New York Civil Liberties Union v. City of Schenectady, 2 N.Y.3d 657, 661, 781 N.Y.S.2d 267, 270 (2004).

25. The definition of “records” subject to FOIL includes “any information kept, held, filed, produced or reproduced by, with or for an agency.” N.Y. Pub. Off. § 86(4). “Significantly, this ‘very broad definition’ is not limited by the purpose for which a document was originated or the function to which it relates.” Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale, 87 N.Y.2d 410, 417, 639 N.Y.S.2d 990, 993 (1995) (quoting Matter of Washington Post Co. v. New York State Ins. Dep’t, 61 N.Y.2d 557, 564, 475 N.Y.S.2d 263, 265 (1984)).

26. Here, the Lefevres seek copies of information kept, held, filed, produced or reproduced by the NYPD concerning the death of their son. These records plainly fit within the broad definition of public records subject to disclosure under FOIL. As set forth below, neither of the grounds advanced by NYPD for denying the Lefevres’ FOIL Request have merit.

II. NYPD has failed to show that any FOIL exemption applies.

27. NYPD has failed to meet its burden to show that the statutory exemptions it invoked in support of its denial of the Lefevres' Request apply.

28. As a general matter, exemptions to FOIL "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Matter of Capital Newspapers v. Burns, 67 N.Y.2d 562, 565, 505 N.Y.S.2d 576, 578 (1986).

29. "[G]overnment records are 'presumptively open,' statutory exemptions are 'narrowly construed,' and the [agency] must articulate a 'particularized and specific justification for nondisclosure.'" New York Civil Liberties Union v. City of Schenectady, 2 N.Y.3d 657, 661, 781 N.Y.S.2d 267, 270 (2004).

30. Where an agency asserts an exception to the disclosure requirements of FOIL, the agency has the burden to demonstrate that the material sought is exempt from disclosure. Brown v. New York City Police Dept., 264 A.D.2d 558, 560, 694 N.Y.S.2d 385 (1st Dep't 1999).

31. NYPD's denial utterly fails to meet the agency's burden to establish application of an exemption. NYPD merely states that an investigation is "ongoing," and then leaps from this bare fact to the sweeping conclusion that all documents concerning Lefevre's death automatically fall within exemptions intended to prevent *interference* with an investigation or an impartial adjudication.

32. Courts have consistently rejected the “blanket approach” to application of FOIL exemptions advanced by NYPD here, because “[b]lanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” Gould v. New York City Police Dept., 89 N.Y.2d 267, 275, 675 N.E.2d 808, 811 (1996).

33. As explained below, NYPD’s “blanket approach” is cannot be sustained, even when application of a law enforcement exemption set forth in Public Officers Law § 87(2)(e) is at issue.

A. The FOIL exemption to prevent interference with law enforcement investigations does not apply.

34. NYPD cannot show that the disclosure of the records concerning Lefevre’s death would interfere with its investigation, because the investigation is nearly concluded. Sheehan and Bono both admit that NYPD has gathered all of the evidence it intends to gather in the Lefevre investigation. Vaccaro Aff. ¶7 & Ex. C, at 1-2. They further have stated that the only steps left to complete the NYPD’s investigation of Lefevre’s death were (a) review the results of toxicology tests and of certain videotape, and (b) the determination of whether to issue a summons for violation of the traffic laws or rules in connection with Lefevre’s death. See id.

35. There is no basis to conclude that NYPD’s analysis of evidence already gathered, or determination of whether that evidence warrants issuance of a violation, would be interfered with by the public disclosure of that evidence. See Vaccaro Aff. Ex. C, at 4.

36. The court in Lynch v. City of Troy rejected the exact argument NYPD makes here — that the mere existence of an ongoing investigation creates a blanket

exemption to disclosure for records gathered as part of the investigation. Lynch, 33 Misc. 3d 174, 179, 927 N.Y.S.2d 752, 756 (N.Y. Sup. Ct. Rensselaer Cty. 2011).

37. In Lynch, as here, the petitioner sought records concerning the death of her son from police officials before they had closed their investigation of the son's death. Id. at 175. As NYPD asserts here, the police in Lynch asserted that all records gathered in connection with a still-open investigation were exempt under Section 87 (2)(e)(i). Id. at 176.

38. The IAS court in Lynch rejected the blanket exemption urged by the police, holding that each record had to be evaluated individually to determine whether it would interfere with or compromise "prospective police activity" or other prospective aspects of the investigation:

[t]he real question presented [] is whether each and every record within the "open" [] investigation file will interfere with or compromise a "continuing investigative or judicial process." For example, a document that relates to "prospective police activity" may be withheld but documents that simply provide the historical context of an investigation should be disclosed.

Id.

39. The videotapes, photographs, and other records constituting or recording forensic evidence gathered in connection with the Lefevre investigation merely provide historical context for NYPD's determination as to the factors that potentially caused Lefevre's death. Disclosure of those records would not interfere with NYPD's evaluation of or action upon that evidence. Therefore the exemption under Section 87 (2)(e)(i) does not apply.

B. The FOIL exemption to prevent interference with fair and impartial adjudication does not apply.

40. Public disclosure of the records of the Lefevre investigation also would not compromise any person's right to a fair trial or impartial adjudication as contemplated under Section 87 (2)(e)(ii).

41. The narrow FOIL exemption under that section for records "compiled for law enforcement purposes and which, if disclosed, would [] deprive a person of a right to a fair trial or impartial adjudication" only applies where criminal proceedings have been initiated or at least contemplated.

42. For example, in Faulkner v. Del Giacco, the IAS court ruled that statements collected as part of a law enforcement investigation are not exempt under Section 87(2)(e) because "there is no indication in the record that any criminal proceedings have been initiated or are even contemplated." Faulkner, 139 Misc. 2d 790, 794, 529 N.Y.S.2d 255, 257 (N.Y. Sup. Ct. Albany Cty. 1988).

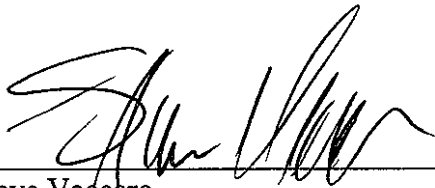
43. Here, the NYPD has already stated that no criminal proceedings will be initiated based on the circumstances of Mathieu's death. See Vaccaro Aff. Ex. C, at 1-2; see also Vaccaro Aff. Ex. G, "The Death of Mathieu Lefevre and the Contradiction of Bloomberg Bike Policy," New York Observer (Oct. 26, 2011) ("The driver, who apparently claims not to have seen or known what was happening, [] will not be charged in Lefevre's death."); Vaccaro Aff. Ex. H "Driver Unaware of Hitting Bike in Fatal Crash," Wall Street Journal (Oct. 26, 2011) ("Police say an investigation has determined that the truck driver did not realize he had hit Mr. Lefevre and no charges will be filed").

44. In the absence of any actual or contemplated criminal proceeding in connection with the death of Matheiu Lefevre, the exemption under Section 87 (2)(e)(ii) does not apply. Faulkner, 139 Misc. 2d at 794, 529 N.Y.S.2d at 257.

Request for Relief

WHEREFORE, Petitioners Erika and Alaine Lefevre respectfully request this Court to (1) enter an order either (a) directing Respondent NYPD to disclose all documents within the scope of the Lefevres' FOIL request, except to the extent of specifically justified redactions; or in the alternative, (b) directing Respondent NYPD to submit for *in camera* inspection copies of all documents within the scope of the Lefevres' FOIL request, for determination by the Court as to the propriety of exempting or disclosing same under the FOIL; and (2) award the Lefevres their reasonable legal fees and expenses incurred in making the instant petition for relief; and (3) award such other and further relief as the Court may deem just and proper.

Dated: New York, NY,
December 30, 2011



Steve Vaccaro
Of Counsel
Rankin & Taylor
350 Broadway, Suite 700
New York, NY 10013
212-226-4507

Counsel for Petitioners Erika & Alain Lefevre


ATTORNEY'S VERIFICATION

I, Steve Vaccaro, an attorney duly admitted to practice before the Courts of the State of New York, affirm the following to be true under the penalties of perjury per N.Y. Civ. Prac. L. R. §§ 3021, 3020(d)(3):

- 1) I am the attorney of record for the Petitioners, Erika Lefevre and Alain Lefevre.
- 2) I have read the annexed Petition and know the contents thereof, and the same are true to my knowledge, except as to those matters asserted based upon information and belief, as to which matters I believe them to be true.

This verification is made by me because Plaintiff does not reside in the County where I maintain my offices.

Dated: New York, NY
 December 30, 2011



Steve Vaccaro

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

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ERIKA LEFEVRE, ALAIN LEFEVRE,

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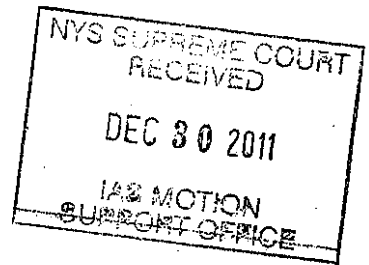
Petitioners,

-v-

**AFFIDAVIT OF SERVICE
ON DEFENDANT CITY OF
NEW YORK**

NEW YORK CITY POLICE DEPARTMENT,

Respondents.
-----x



I, Paula Segal, hereby state and affirm under penalties of perjury:

I am over 18 years of age and am not a party to this action.

On December 30, 2011, at approximately 1:50 p.m., at One Police Plaza, Room 1406, I served a **Petition, Notice of Petition, Request for Judicial Intervention, and supporting Affidavit of Steve Vaccaro** upon **New York City Police Department**, defendant therein named, by delivering and leaving a true copy of the documents with a person of suitable age and discretion, *to wit*, agency attorney Kate Flaherty.

Declarant describes person served as aforesaid to the best of declarant's ability at the time and circumstance of service as follows:

Sex: Female

Race: white

Hair: blonde

Approx Age: 35

Approx. Height: 5'6"

Approx Weight: 150lbs

Dated: New York, New York
December 30, 2011

By: Paula Z. Segal
Paula Z. Segal

Deborah Beth Diamant
DEBORAH BETH DIAMANT

NOTARY PUBLIC-STATE OF NEW YORK
No. 02D16240725
Qualified in Kings County
My Commission Expires May 09, 2015