

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

-----X  
**STREETS BLOG,**

PETITIONER,

-against-

Index Number

107276/11

**CITY UNIVERSITY  
OF NEW YORK,**

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

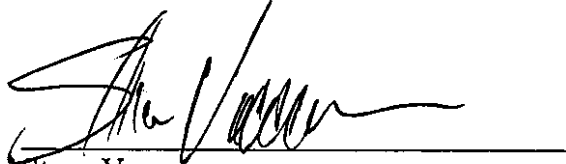
RESPONDENT.

-----X

**PLEASE TAKE NOTICE** that, upon the ANNEXED Verified Petition of Streetsblog dated June 21, 2011, together with the Affidavit of Steve Vaccaro, dated June 21, 2011, with attached exhibits, Petitioner Streetsblog will move this Court, at 9:30 AM on the 19th of July, 2011, 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 July 14, 2011, and Petitioner's reply and supporting affidavits, if  
any, will be served **by hand** on July 18, 2011.

Dated: New York, NY  
June 21, 2011

A handwritten signature in black ink, appearing to read "Steve Vaccaro", written over a horizontal line.

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

*Counsel for Petitioner Streetsblog*

To:

City University of New York  
535 East 80<sup>th</sup> Street  
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SUPREME COURT OF THE STATE OF NEW YORK  
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STREETS BLOG,

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CITY UNIVERSITY  
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Index Number

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**Verified Petition Pursuant to Article 78  
of the New York Civil Practice Law  
and Rules**

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

*Counsel for Petitioner Streetsblog*

## Summary

1. Petitioner Streetsblog seeks an order directing disclosure of certain of Respondent City University of New York's ("CUNY's") emails pursuant to the Freedom of Information Law ("FOIL"). CUNY admits the emails are "records" subject to FOIL, but has withheld them, claiming they are "personal communications" of public officials and therefore exempt from disclosure. CUNY's proposed "personal communication" exemption has no basis in the Public Officer's Law, and must be rejected.

2. CUNY cannot rely on the statutory FOIL exemption for "information of a personal nature . . . not relevant to the work of [an] agency," the disclosure of which would cause "economic or personal hardship." N.Y. Pub. Off. § 89(2)(b)(iv).

3. Exemptions under Section 89 must be supported with "particularized and specific" affidavit evidence, which CUNY cannot supply due to the inherently public and non-sensitive nature of the withheld emails. Examples of the withheld emails demonstrate that many were widely distributed to elected officials and others, and few if any contain personal information of the sort Section 89 was intended to protect.

4. Section 89(2)(b)(iv) also does not apply because the emails are "relevant to the work of [CUNY]." The emails reflect and memorialize the routine abuse of CUNY's resources and imprimatur by three high-ranking CUNY officials — Vice-Chancellor Iris Weinshall, Dean Louise Hainline, and Professor Micha Tomkiewicz — in the pursuit of a private political agenda concerning the street on which they live.

5. Because the public interest in disclosure of the emails far outweighs any privacy interests at stake, disclosure should be granted.

## Background

6. Streetsblog's FOIL Requests. This proceeding arises from three FOIL requests made by Streetsblog to CUNY. Streetsblog is a project of the Open Planning Project, a nonprofit corporation formed under Section 501(c)(3) of the United States Tax Code. Streetsblog publishes news and opinion concerning transportation issues at [www.streetsblog.org](http://www.streetsblog.org).

7. On March 25, 2011, Streetsblog sent a FOIL request to Dave Fields, designated Records Access Officer for CUNY Central Office. See Letter from Steve Vaccaro to Dave Fields (Mar. 25, 2011), attached as Exhibit A to the Affidavit of Steve Vaccaro ("Vaccaro Aff."), filed herewith. This request (the "Weinshall Request") sought disclosure of (1) records received, sent, created or reviewed by CUNY Vice-Chancellor Iris Weinshall ("Weinshall") regarding the redesign of Prospect Park West ("PPW"), the roadway bordering the western perimeter of Brooklyn's Prospect Park, and (2) communications between Weinshall and a number of specified persons. See id. at 1-3.

8. Weinshall is a member of the organization Neighbors for Better Bike Lanes ("NBBL"), which opposes the redesign of PPW. Vaccaro Aff. ¶ 3 & Ex B, at 2. NBBL has sued the New York City Department of Transportation in New York Supreme Court to prevent the redesign of PPW. Vaccaro Aff. ¶ 4 & Ex. C. NBBL's suit, and advocacy by other organizations that support the PPW redesign, have been extensively covered in the print and electronic media. Vaccaro Aff. ¶ 5 & Exs. D1-D8.

9. Weinshall in particular has received prominent media attention for her role in opposing the redesign of PPW. See, e.g., Vaccaro Aff. Exs. D1, D2, D4. Not only is

she an outspoken critic the redesign (Vaccaro Aff. ¶ 6 Exs. B, E), but she also is a former New York City Commissioner of Transportation (Vaccaro Aff. Ex. F) who has taken the unusual step of publicly opposing the policies of her successor under the same administration. Weinshall's notoriety is further magnified by her marriage to United States Senator Charles "Chuck" Schumer. Vaccaro Aff. Ex. F.

10. In addition to the Weinshall Request, on March 28, 2011, Streetsblog sent two FOIL requests to Pamela Pollack, designated Records Access Officer for Brooklyn College, a CUNY institution. Vaccaro Aff. Exs. G, H. These requests (the "Hainline Request" and the "Tomkiewicz Request") sought disclosure of records regarding the redesign of PPW as well as communications with certain specified persons that had been received, sent, created or reviewed by Brooklyn College Dean Louise Hainline ("Hainline") or her husband, Brooklyn College Professor Micha Tomkiewicz ("Tomkiewicz"). See Vaccaro Aff. Ex. G, at 1-3, Vaccaro Aff. Ex. H, at 1-3.

11. Hainline is the President of NBBL (id. Ex. C, at caption), and like Weinshall, has received extensive media attention for her outspoken opposition to the PPW redesign. See Vaccaro Aff. Exs. I1-15.

12. CUNY's Denial of Streetsblog's FOIL Requests. CUNY denied the Weinshall and Hainline Requests in their entirety, and denied the Tomkiewicz Request in large part.

13. The letter denying the Weinshall Request stated that CUNY would not disclose the records found within the scope of the Request because they were "private e-mails not related to CUNY." Vaccaro Aff. Ex J, at 1-2.

14. The letter denying the Hainline Request stated that CUNY would not disclose the records found within the scope of the Request because they “are not related in any way to Dr. Hainline’s position at Brooklyn College,” making them “personal and not subject to disclosure under Section 87 of the Freedom of Information Law.” Vaccaro Aff. Ex. K. The letter denying in large part the Tomkiewicz Request rested on the same rationale as that stated in support of the Hainline denial. Vaccaro Aff. Ex. L.

15. The portion of the Tomkiewicz Request that CUNY granted concerned four emails between Tomkiewicz and Eric McClure (“McClure”). See id. at attachments. McClure is the co-founder of Park Slope Neighbors (“PSN”), one of the organizations that support the redesign of PPW. See Vaccaro Aff. ¶ 14 & Ex. D8. PSN conducted a radar-gun survey to measure the effects of the PPW redesign on motor vehicle speeds and pedestrian safety. Vaccaro Aff. Ex. M. In the four disclosed Tomkiewicz-McClure emails, Tomkiewicz asks McClure to provide him with PSN’s radar survey data, giving the impression that his interest in the data is purely academic:

Hi Eric,

Can I have the raw data of your Park Slope Neighbors Radar-Gun Study? The topic of competing transportation interests within a local community is a popular research topic of my students. Reliable data are precious.

Thanks,

Micha

Vaccaro Aff. Ex. L at attachment (email from Tomkiewicz to McClure (Aug. 21, 2010)).

16. In none of his emails to McClure did Tomkiewicz disclose that his wife, Hainline, is President of NBBL and opposes the redesign of PPW supported by PSN and McClure. See id.

17. Streetsblog's Appeals from CUNY's Denials. Pursuant to CUNY's internal appeal procedure, Streetsblog appealed the denials of the Weinshall, Hainline and Tomkiewicz FOIL Requests in letters to Frederick Schaffer ("Schaffer"), CUNY Senior Vice-Chancellor for Legal Affairs, dated April 25, April 29 and April 29, 2011, respectively. Vaccaro Aff. Exs. N, O, P. Streetsblog's internal appeals each were initiated no more than four days after the denial of its FOIL Requests, within the 30 day period allotted under CUNY's appeal procedures. See Vaccaro Aff. Ex. Q ¶ 4(c).

18. In a letter determining Streetsblog's internal appeal from denial of the Request, Schaffer confirmed that the Weinshall emails are "records . . . maintained by a public body subject to FOIL." Vaccaro Aff. Ex. R, at 2. Schaffer opined, however, that the emails were exempt from disclosure because they were "sent and received in [Weinshall's] capacity as a private citizen engaged in civic activity and under circumstances in which they were clearly not intended for public distribution." Id. Schaffer added that "most of [the Weinshall emails] are among other persons with copies to Ms. Weinshall." Id.

19. Schaffer concluded that the Weinshall emails should be exempt from disclosure, to avoid causing Weinshall "economic or personal hardship". Id. (citing N.Y. Pub. Off. § 89(2)(b)(iv)). Schaffer did not explain how disclosure could cause such hardship. See id. Schaffer also did not respond to Streetsblog's proposal, in its internal

appeal letter, that the Weinshall emails be disclosed with the personal matter redacted.

See Vaccaro Aff. Ex. N.

20. In a subsequent letter determining Streetsblog's internal appeals from the denial of the Hainline and Tomkiewicz Requests, Schaffer approved the release of the four Tomkiewicz-McClure emails, based on a finding that they "were maintained by Professor Tomkiewicz in his official capacity and were directly related to CUNY business." Vaccaro Aff. Ex. S., at 1 n.1. Schaffer confirmed the denial of the Hainline and Tomkiewicz internal appeals, on grounds essentially identical to those CUNY relied upon in denying the Weinshall internal appeal. See id.

#### **Jurisdiction and Venue**

21. This proceeding pursuant to Article 78 of the 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). CUNY concedes that it is a state agency subject to the FOIL. Vaccaro Aff. Ex. R, at 2. Streetsblog has exhausted CUNY's internal appeals process and the instant petition has been filed within the four month period thereafter specified in CPLR § 217(1). See supra ¶¶ 17-20.

22. The decisions by CUNY to deny Streetsblog's FOIL requests were made by Schaffer at CUNY's Central Office, located at 535 East 80th Street in New York County, which also serves as CUNY's principal place of business. Venue therefore is proper in this Court. N.Y. C.P.L.R. §§ 7804(a), 506(b).

## Basis for Relief

### I. CUNY is obligated to disclose the records sought by Streetsblog.

23. “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).

24. 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).

25. 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).

26. 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)).

27. Under this statutory definition, the emails kept in Weinshall's, Hainline's and Tomkiewicz's CUNY email accounts are "records" subject to FOIL, regardless of the purposes, functions or capacities of those individuals in sending or receiving the emails.

28. CUNY emphasizes that Weinshall, Hainline and Tomkiewicz may "not [have] intended [them] for public distribution," or may have "sent and received [them] in each of their capacities as private citizens engaged in civic activity." Vaccaro Aff. Ex. R, at 2; Vaccaro Aff. Ex. S, at 2. But these intentions, purposes and capacities are irrelevant to the FOIL analysis.

29. The Court of Appeals long ago faced the very arguments CUNY makes here regarding the status of "personal communications" under FOIL, and rejected them. In Capital Newspapers v. Whalen, a FOIL request was made for the records of the former Mayor of Albany, Erastus Corning, which included official records of government activity intermingled with Corning's personal letters. Whalen, 69 N.Y.2d 246, 248-49, 513 N.Y.S.2d 367, 368-69 (1987). The respondents refused to disclose Corning's personal letters, on the ground that they "were not written or received by Corning in his capacity as mayor" and therefore were beyond the scope of FOIL. Id. at 250, 513 N.Y.S.2d at 369.

30. The Whalen Court rejected the notion that public officials' personal letters were categorically shielded from disclosure under FOIL. The Court concluded that the

theoretical boundary between an ‘official’ and a ‘personal’ communication is far too blurred in practice to provide a workable standard for disclosure:

FOIL's scope is not to be limited based on the purpose for which the document was produced or the function to which it relates. Such a limitation would be difficult to define . . . because of the expanding boundaries of governmental activity and because in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons.

Id. at 253, 513 N.Y.S.2d at 371 (internal quotations and citations omitted).

31. The Whalen Court held that personal letters intermingled with official government files “kept” or “held” by a governmental entity are “records” subject to disclosure under the FOIL. Id. at 248, 513 N.Y.S.2d at 368. Though the Court did not address the potential exemption of the letters based on privacy concerns, see id. at 253-54, 513 N.Y.S.2d at 371, Whalen makes clear that CUNY’s arguments based on the “intentions” that the emails remain “private,” and the supposedly non-governmental “capacity” in which the emails were sent or received, must be disregarded.

## II. Disclosure would not cause an unwarranted invasion of privacy.

32. CUNY seeks to justify withholding the Weinshall, Hainline and Tomkiewicz emails based on a statutory FOIL exemption intended to prevent an “unwarranted invasion of personal privacy.” In particular, CUNY relies upon the exemption for

information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it.

N.Y. Pub. Off. § 89(2)(b)(iv).

33. To prevail, CUNY must present a “particularized and detailed justification” that the records in question fall squarely within the statutory exemption, based upon affidavit or other evidence. See Section II.A below. CUNY cannot justify application of Section 89(2)(b)(iv), because it cannot establish that disclosure of the emails would cause hardship. See Section II.B below. CUNY’s reliance on Section 89(2)(b)(iv) is also unavailing because the emails are relevant to CUNY’s work. See Section II.C below. Even under the Section 89(2) balancing test, in which the public’s right of access is weighed against the relevant privacy interests, disclosure still is warranted. See Section II.D below.

**A. Section 89(2)(b)(iv) requires proof of hardship and irrelevance to agency work with particularized, specific evidence.**

34. 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). “[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).

35. To establish the exemption specified in Section 89(2)(b)(iv) of the Public Officers Law, CUNY must show that “the disclosure would result in personal *and* economic hardship to the subject party and that such information is not relevant to the work of the agency maintaining it.” Buffalo News v. Buffalo Mun. Housing Auth., 163 A.D.2d 830, 831, 558 N.Y.S.2d 364, 365 (App. Div. 4<sup>th</sup> Dep’t 1990) (emphasis in original).<sup>1</sup>

36. In applying Section 89(2)(b)(iv), courts repeatedly have held that a conclusory assertion of hardship is insufficient. For example, in Burns, the Court denied application of the exemption “because [respondent’s] assertion that he will suffer ‘economic or personal hardship’ if the ‘Lost Time Report’ is released to the newspaper is conclusory and not supported by any facts.” 67 N.Y.2d at 570, 505 N.Y.S.2d at 581.<sup>2</sup>

37. Nor will the argument of counsel carry respondent’s burden under Section 89(2)(b)(iv). Courts refuse to grant the exemption unless the requisite “particularized and specific” justification is supported by evidence in the record or an affidavit. A “conclusory statement [of hardship] in [a respondent’s] memorandum, unsupported by

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<sup>1</sup> See also Matter of Gannett Co. v. County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4<sup>th</sup> Dep’t 1977) (“It is clear that both clauses [of Pub. Off. § 89(2)(b)(iv)] must be applicable in order to make the section operative), aff’d, 45 N.Y.2d 954, 411 N.Y.S.2d 557 (1978).

<sup>2</sup> See also Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police, 218 A.D.2d 494, 499, 641 N.Y.S.2d 411, 415 (App. Div. 3<sup>rd</sup> Dep’t 1996) (“[R]espondent has offered nothing but conclusory allegations to substantiate its claim that the disclosure of this information would result in economic or personal hardship to its civilian employees.”); Buffalo News v. Buffalo Mun. Housing Auth., 163 A.D.2d 830, 831, 558 N.Y.S.2d 364, 365 (App. Div. 4<sup>th</sup> Dep’t 1990) (“[R]espondent’s claim that disclosure would result in economic or personal hardship to the former employees is a conclusory assertion unsupported by any factual basis and is therefore insufficient to bring the material within that exemption.”); Buffalo Broadcasting Co., Inc. v. New York State Dept. of Correctional Servs., 155 A.D.2d 106, 112, 552 N.Y.S.2d 712, 715 (App. Div. 3<sup>rd</sup> Dep’t 1990) (“conclusory allegations” insufficient basis for applying exemption); Hopkins v. City of Buffalo, 107 A.D.2d 1028, 1029, 486 N.Y.S.2d 514, 515 (App. Div. 4<sup>th</sup> Dep’t 1985) (“The City offered only conclusory allegations that . . . disclosure would result in economic or personal hardship. Such allegations are insufficient to meet the City’s burden of proof.”) (internal citation omitted).

the record or an affidavit setting forth essential facts, is insufficient.” Pennington v. Calabrese, 2002 WL 31885409, \*2 (N.Y. Sup. Ct. Erie Cty. 2002) (attached hereto as Exhibit 1).<sup>3</sup>

**B. CUNY cannot demonstrate hardship.**

38. CUNY cannot justify nondisclosure under Section 89(2)(b)(iv), because its own description of the withheld emails — as well as examples of the withheld emails obtained by Streetsblog through other means, discussed below — demonstrate that they do not contain sensitive, personal information the disclosure of which could cause personal hardship. As CUNY admits, the emails reflect Weinshall, Hainline and Tomkiewicz engaged in “*civic*,” not *private* discussion. Vaccaro Aff. Ex. R, at 2 (emphasis added); Vaccaro Aff. Ex. S, at 2 (emphasis added). Moreover, “most of [the emails] are among other persons with copies to Ms. Weinshall[, or to Hainline or Tomkiewicz].” Id. Sensitive, private information concerning these three individuals would not be contained in such emails, because of the risk that the emails could be forwarded to unintended recipients.

39. Several of the Withheld Emails Contains No Personal Information. One of the withheld emails was in fact forwarded to Streetsblog, and it contains nothing worthy of protection under Section 89(2)(b)(iv). On October 10, 2010, Tomkiewicz sent to

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<sup>3</sup> See also Planned Parenthood of Westchester, Inc. v. Town Bd. of Greenburgh 154 Misc.2d 971, 975, 587 N.Y.S.2d 461, 463 (N.Y. Sup. Ct. Westchester Cty. 1992) (“[R]espondents submit mere conclusory statements to the Court. No affidavit has been submitted from any of the 43 subject individuals explaining how disclosure would cause personal hardship.”) (internal citation omitted); New York Times Co. v. City of New York Fire Dep’t, 4 N.Y.3d 477, 489, 796 N.Y.S.2d 302, 308-09 (2005) (giving no credit to assertions that participants in 9/11 oral history project were assured their statements would be kept confidential, absent evidence in the record of such assurances).

several persons an email forwarding and commenting upon a letter criticizing the PPW redesign, written by Norman Steisel (“Steisel”) on behalf of NBBL to New York City Deputy Mayor for Operations Steven Goldsmith and cc’d to numerous other city officials. See Vaccaro Aff. Ex. T, at 2. Within hours, Tomkiewicz’s email had been forwarded to McClure, a co-founder of PSN and a staunch supporter of the PPW redesign. See id. By the time McClure received it, Steisel’s letter had been circulated to at least 40 people. It came to McClure with the following recommendation: “I believe this letter sent by Norman Steisel sums up what a lot of people in Park Slope believe and are thinking.” Id.

40. This Tomkiewicz-Steisel email contains no personal information that could lead to hardship if disclosed. It is a candid attempt to lobby public officials, forwarded along with incidental commentary by various persons, including Tomkiewicz, none of which suggests that the email should be treated as confidential. See id.

41. Indeed, the persons forwarding the Tomkiewicz-Steisel email appear to be proselytizing, recommending the email as “what a lot of people in Park Slope believe” to a broader and broader audience.

42. Given this widespread, purposeful dissemination of the email by the authors themselves, there is no justification for denying disclosure pursuant to the FOIL. All of the withheld emails that were similarly used to lobby public officials or proselytize members of the community should be disclosed. Cf. Planned Parenthood of Westchester, Inc. v. Town Bd. of Greenburgh 154 Misc. 2d 971, 975, 587 N.Y.S.2d 461, 463 (N.Y. Sup. Ct. Westchester Cty. 1992) (denying exemption under Section 89(2)(b)(iv) to

risk of identity theft and unwanted contact from third parties. See Goyer v. New York State Dep't of Env. Conservation, 12 Misc. 3d 261, 273-74, 813 N.Y.S.2d 628, 638-9 (Sup. Ct. Albany Cty. 2005).

47. In the handful of cases where protection under Section 89(2)(b)(iv) has been sought for other types of information, courts have considered exempting only information of a sensitive, intimate, or potentially stigmatizing nature. See, e.g., New York Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477, 485, 796 N.Y.S.2d 302, 306 (2005) (exempting under Section 89(2)(b)(iv) the anguished final words of persons in distress calling 911 from Ground Zero on September 11); Buffalo Broadcasting Co. v. New York State Dep't of Corr. Servs., 155 A.D. 2d 106, 112, 552 N.Y.S.2d 712, 715 (App. Div. 3<sup>rd</sup> Dep't 1990) (observing that video depictions of prisoners in "state[s] of undress" could qualify for protection under Section 89(2)(b)(iv)); cf. Investigation Technologies, LLC v. Horn, 2004 WL 2059998, \*3 (Sup. Ct. N.Y. Cty. 2004) (exempting under Section 89(2)(b)(iv) the identifying information of transient detainees in city jail protected under to protect them against "the stigma of jail detention") (attached hereto as Exhibit 2).

48. CUNY's conclusory claims of hardship boil down to nothing more than concern that certain of its high-ranking officials might be embarrassed by the disclosure of correspondence sent and received using their official CUNY email accounts. But as the Appellate Division in Buffalo News recognized, the possibility that disclosure may cause a public employee some embarrassment does not establish personal hardship under

Section 89(2)(b)(iv). Buffalo News v. Buffalo Mun. Housing Auth., 163 A.D.2d 830, 558 N.Y.S.2d 364 (App. Div. 4<sup>th</sup> Dep't 1990).

49. In Buffalo News, the respondent agency withheld public employees' attendance records sought pursuant to FOIL, on the ground that "*the newspaper may use the information to create embarrassing articles.*" Id. at 831, 558 N.Y.S.2d at 365 (emphasis added). Consistent with the rule requiring narrow construction of exemptions to FOIL to ensure maximum access, the Buffalo News court held that the possibility of embarrassment "does not suffice" to establish hardship under Section 89(2)(b)(iv). Id.

50. Streetsblog *repeatedly invited* CUNY to produce the withheld emails with any personal information of the kind traditionally exempted from disclosure under Section 89(2)(b)(iv) redacted. See, e.g., Vaccaro Aff. Ex. A, at 3; Vaccaro Aff. Ex. N. CUNY declined to do so, apparently contending that every word of the withheld emails constitutes sensitive, private information posing a risk of hardship.

51. CUNY's blanket exemption approach is akin to the blanket withholding of personal correspondence rejected in Capital Newspapers v. Whalen, 69 N.Y.2d 246, 249, 513 N.Y.S.2d 367, 368-69 (1987), discussed supra, at 8-9. Whalen precludes the categorical exemption of "personal" correspondence that CUNY espouses. CUNY must justify the redaction of each piece of supposedly "personal" information with particularized and specific evidence establishing how it could cause hardship.

**C. The emails are relevant to CUNY's work.**

52. The emails withheld by CUNY are relevant to its work — and therefore

outside the scope of Section 89(2)(b)(iv)'s exemption — because they reflect the misuse of CUNY's resources and imprimatur by Weinshall, Hainline and Tomkiewicz. As explained in detail below, these high-ranking CUNY officials have made their personal campaign against the PPW redesign relevant to CUNY's work by using their CUNY positions, email accounts, staff, and other resources to wage it. Regardless of whether CUNY is officially involved as an institution in the PPW redesign, these abuses by senior CUNY officials have made the redesign "relevant to [CUNY's] work" within the meaning of Section 89(2)(b)(iv).

53. The Withheld Emails Violate CUNY Policy. The very existence of the withheld emails makes the PPW design relevant to CUNY's work, because they were sent and received in violation of CUNY policy. CUNY limits its employees' use of University email accounts to activities relating to the performance of official duties:

Use of University computer resources is limited to activities relating to the performance by University employees of their duties and responsibilities. For example, *use of University computer resources for private commercial or not-for-profit business purposes, for private advertising of products or services, or for any activity meant solely to foster personal gain, is prohibited.* Similarly, use of University computer resources for *partisan political activity is also prohibited.*

CUNY Manual of Gen. Policy, art. IV, § 4.1(4) (Vaccaro Aff. Ex. W) (emphasis added).<sup>4</sup>

54. Under this policy, the emails of Weinshall, Hainline and Tomkiewicz concerning the PPW redesign either are related to their performance of their official

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<sup>4</sup> While the policy allows "incidental personal use of computer resources" in certain circumstances, see *id.* the routine receipt of emails cc'd by third parties is not "incidental," and there is no evidence that the requisite circumstances were present when the withheld emails were sent or received.

duties, or were sent or received in violation of CUNY policy. In either case, Section 89(2)(b)(iv) cannot apply.

55. Not only does it appear that Weinshall, Hainline and Tomkiewicz routinely sent and received emails concerning the PPW redesign using their CUNY email accounts, but in at least one case Hainline used her account to engage in partisan political activity. In a June 29, 2010 email sent to more than 20 individuals, Hainline opines that New York City Councilmember Levin is “laying low and not taking a position” with respect to the PPW redesign. See email from Micha Tomkiewicz to Jessica Schumer and Lois Carswell (Vaccaro Aff., Ex. Y8), at 2. Hainline directs the recipients of her email to “*remember that at election time.*” Id. (emphasis added). Hainline thus used CUNY resources on at least one occasion to urge others to punish Levin at the ballot box for his failure to support NBBL’s position with respect to the PPW redesign — in violation of CUNY policy.

56. Courts repeatedly have withheld application of Section 89(2)(b)(iv) to records evidencing public employee abuses that take place outside those employees’ official duties, to effectuate the FOIL’s salutary purpose of “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).<sup>5</sup> For the same reason, application of Section 89(2)(b)(iv) should likewise be withheld here.

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<sup>5</sup> 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) (collecting cases in which documents concerning misconduct by public employees was held to fall outside the scope of Section 89(2)(b)(iv)); Capital Newspapers v. City of Albany, 63 A.D.3d 1336, 1338-39 & n.2, 881 N.Y.S.2d 214, 217 & n.2 (App. Div. 3<sup>rd</sup> Dep’t 2009) (directing disclosure of records showing misuse of city’s tax exempt status by public employees for personal use).

57. The Tomkiewicz-McClure Emails Make PPW Relevant to CUNY's Work.

Claiming an academic interest on behalf of his students, Tomkiewicz emailed McClure repeatedly to obtain PSN's data about the effect of the PPW redesign on vehicle speeds (Vaccaro Aff. Ex. L, at attachment) — data useful to Tomkiewicz's wife Hainline, president of PSN adversary NBBL. CUNY apparently credits Tomkiewicz's professed academic motives for obtaining the data, stating that the request was made "in his official capacity" and was "directly related to CUNY business." Vaccaro Aff. Ex. S, at 1 n.1.

58. The "academic" reason for Tomkiewicz's request is belied by the fact that CUNY has disclosed only the four Tomkiewicz-McClure emails, and no other records, in response to the Tomkiewicz Request. That request sought "all records created, reviewed, sent or received by [Tomkiewicz] referencing or concerning [PPW, or] .... concerning the design, redesign or any modification of [PPW], or the traffic conditions or safety conditions on [PPW]." Vaccaro Aff. Ex. H, at 1. If Tomkiewicz forwarded or discussed the PSN data with others by email or in other documents, those records, no less than the emails Tomkiewicz used to procure the data from McClure, are "directly related to CUNY business" and should have been disclosed. Yet CUNY did not even produce the attachment to the McClure email containing the data Tomkiewicz so eagerly sought.

59. The CUNY PSN data did not simply disappear upon arrival in Tomkiewicz' inbox. CUNY's failure to produce that data, and other records concerning it, suggests an attempt to hide the records revealing the actual use to which the data were

put behind the cloak of Tomkiewicz's "civic activity." Vaccaro Aff. Ex. S, at 2.<sup>6</sup>

60. As the Whalen Court observed, the distinction CUNY draws around the four Tomkiewicz-McClure emails is untenable. "[T]here is bound to be considerable crossover between the official and personal communications of a public official." Capital Newspapers v. Whalen, 69 N.Y.2d 246, 253, 513 N.Y.S.2d 367, 371 (1987). CUNY's selective disclosure of the Tomkiewicz-McClure emails ignores this basic principle.

61. CUNY should not be permitted to lend its imprimatur to Tomkiewicz's disingenuous procurement of the PSN PPW data in one moment, and then in the next disavow its relationship with the uses to which the data was put. All of Tomkiewicz's emails and other records concerning PPW must be disclosed because Tomkiewicz's misconduct has made them relevant to the work of CUNY.

62. The Weinshall-Vacca Lobbying Makes PPW Relevant to CUNY's Work. Weinshall has used her CUNY position and resources to pursue NBBL's agenda. On December 9, 2010, New York City Councilmember James "Jimmy" Vacca ("Vacca") convened an "Oversight Hearing on Bicycling in New York City" (the "Bike Hearing"), at which the PPW redesign was a central topic and NBBL members Steisel and Hainline gave extensive statements (the "Bike Hearing"). See Vaccaro Aff. ¶ 26 & Ex. X.

63. As revealed in emails disclosed by the New York City Council to Streetsblog, Weinshall repeatedly attempted to contact Vacca during business hours prior

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<sup>6</sup> Tomkiewicz's wife Hainline had already expressed her interest in McClure's radar survey data before Tomkiewicz set about to procure it. In an August 4, 2010 email, Hainline lamented "Clearly the spectre of Eric McClure taking his speed gun and shooting cars when he so clearly has an agenda as someone with some influence here is just silly." Vaccaro Aff. Ex. Y9, at 2.

to the Bike Hearing — in each case emphasizing her position at CUNY yet keeping her purpose hidden — in a transparent attempt to hasten Vacca’s return call:

- At 2:28 p.m. on Monday November 22, Vacca received an email from one of his staff stating “Iris Weinshall from CUNY called for Jimmy a couple of minutes ago.” Vaccaro Aff., Ex. Y1.
- At 11:00 a.m. on Thursday, December 2, Vacca received an an email from one of his staff stating: “Iris Weinshall, chancellor of construction and management from CUNY wanted to speak with you.” Id. Ex. Y2.
- At 2:47 p.m. on Friday December 3, Shirley Pompura, “Special Assistant” to Weinshall, sent Vacca an email stating “Please call Iris Weinshall, at 212-794-5315; she has been trying to reach you.” Id. Ex. Y3.<sup>7</sup>
- At 3:10 p.m. on Friday, December 3, 2010, Vacca received an email from one of his staff stating “Iris Weinshall called for you. . . . *she would not disclose why she was calling, and just said you knew who she is.*” Id. Ex. Y4 (emphasis added).
- At 3:13 on Friday, December 3, a Vacca staffperson commented as follows on Weinshall’s call of three minutes earlier: “Just as an FYI, she’s a CUNY Trustee, former DoT Commissioner, and [REDACTED] Senator Chuck Schumer’s wife”. Id. Ex. Y5.

64. Weinshall’s repeated attempts to contact Vacca before the Bike Hearing concerned the PPW redesign. The FOIL requests pursuant to which Vacca’s office produced Exhibits Y1-Y5 sought only documents concerning PPW. See Vaccaro Aff. Ex. Y7, at Requests 1-4. Moreover, other FOIL requests made by Streetsblog sought all written communications between Weinshall and Vacca without limitation as to topic (see id. at Request 6), but no such communications were disclosed. Apparently the only business Weinshall had with Vacca was NBBL business.

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<sup>7</sup> The number Ms. Pompura left for Vacca to return the call is Weinshall’s official number as Vice Chancellor at CUNY, not a personal number. See “Welcome/About/Administration,” available at <http://www.cuny.edu/about/administration.html>.

65. Weinshall abused her position at CUNY by attempting to lobby Vacca concerning the PPW redesign in this manner. By identifying herself as a CUNY Vice Chancellor but refusing to state the nature of her business, Weinshall used CUNY's imprimatur as leverage for her private lobbying. She even improperly employed her Personal Assistant Shirley Pompura to support her lobbying efforts. These abuses make the object of Weinshall's lobbying — the PPW redesign — relevant to CUNY's work, and make the evidence of that lobbying — Weinshall's PPW-related emails — subject to disclosure under the FOIL.

66. The Hainline-Weinshall CUNY Recruitment Efforts Make PPW Relevant to CUNY's Work. Emails disclosed to Streetsblog pursuant to other FOIL requests reveal that Hainline and Weinshall attempted to use their CUNY positions to recruit Distinguished Professor Robert "Buzz" Paaswell ("Paaswell") of City College of New York (a CUNY institution) as an expert for NBBL. In a June 29, 2010 email sent by Louise Hainline from her CUNY email account to 21 individuals, including Weinshall's daughter Jessica Schumer and three members of Brooklyn Borough President Marty Markowitz's staff, Hainline summarizes the tasks assigned to various individuals at a NBBL meeting and states: "Louise will work with Iris to find a transportation consultant for this project". Vaccaro Aff. Ex. Y8, at 3, ¶ 4.

67. A subsequent email sent by Hainline using her CUNY email account on August 3, 2010, to a group email distribution entitled "admin-for-better-bike-lanes@googlegroups.com" reveals a plan to enlist Paaswell and his students in a scheme to provide CUNY resources free of charge to NBBL:

I made contact finally with the former head of the Transportation Institute at City College, Distinguished Professor Robert “Buzz” Paaswell. He’s just coming off a stint as acting President of CCNY, so is looking to get back to being a faculty member. Our timing is good. . . . We may or may not get some pro bono help, but Paa[s]well thought he could steer us some, even if he can’t help overtly. . . . Paaswell also said that having objective data collected by people who know how to do this (like some of his students), on counts of pedestrians, bikers, cars, etc. [sic]

Vaccaro Aff. Ex. Y9, at 2-3.

68. Evidently, Dean Hainline has been running NBBL out of her CUNY office. Using her CUNY position, resources and connections, she has solicited other CUNY faculty to provide pro bono transportation expertise and unpaid student labor to serve NBBL’s agenda. Vice-Chancellor Weinshall apparently assisted Hainline with this effort. Meanwhile, Hainline’s husband Tomkiewicz was suing his CUNY students as a rationale for procuring the PSN radar data concerning PPW from McClure. See supra ¶¶ 57-59. The coordinated activities of these three CUNY officials on behalf of NBBL, all accomplished with CUNY resources, cannot be neatly separated from CUNY’s work.

69. Indeed, it appears that Hainline’s activities as President of NBBL directly interfered with her official responsibilities as a Dean. At the conclusion of her August 3 email, in which she recounts various press contacts, recruitment efforts and other work she performed for NBBL while at her office, Hainline declares: “*Now to do the work I didn’t get done today because of the above...*” Vaccaro Aff. Ex. Y9, at 3 (emphasis added).

70. Thus Hainline expressly admits that the NBBL business she conducts from her CUNY office is “relevant to the work of [CUNY]” — because of that business, on at

least one occasion, the work CUNY pays Hainline to perform “*didn’t get done*” as Hainline believed it should. Section 89(2)(b)(4) clearly should not apply to keep secret a private campaign run from a public office that interferes with the performance of the public officeholder’s duties.

**D. The Balance of Interests Favors Disclosure.**

71. Under Section 89 of the Public Officers Law, courts apply a balancing test to determine whether information that does not meet the requirements of an enumerated exemption, such as that in Section 89(2)(b)(iv), would nonetheless cause an unwarranted invasion of privacy if disclosed. This test involves weighing the public’s right of access against the affected individuals’ privacy interests. E.g., *New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 485, 796 N.Y.S.2d 302, 306 (2005). Application of this balancing test yields the same conclusion as stated above: disclosure of the withheld CUNY emails would not constitute an unwarranted invasion of privacy.

72. The public’s interest in disclosure of these emails is great. The redesign of PPW has catalyzed public demonstrations involving hundreds of people (see Vaccaro Aff. Exs. D3, I5), public hearings, a lawsuit to reverse the redesign (see id. Exs. D1, I4 ), and widespread local, national and international publicity (see id. Exs. D1-D8, I1-I 6). There is also significant public interest in exposing abuses by high-ranking public officials such as Vice-Chancellor Weinshall, Dean Hainline and Professor Tomkiewicz. See supra at 16-24.

73. A central argument of advocates for the PPW redesign is that it reflects the culmination of a years-long, community-driven planning process that should not be

derailed by a handful of powerful current and former public officials who appear to have improperly used their clout with government to obtain special treatment. See Ben Fried, “Ten Things NBBL Doesn’t Want You to Know,” Streetsblog (Apr. 26, 2011), <http://www.streetsblog.org/2011/04/26/ten-things-nbbl-doesnt-want-you-to-know>.<sup>8</sup> The withheld emails are the palpable evidence that Weinshall, Hainline and Tomkiewicz have improperly used their positions and resources as CUNY officials to influence governmental outcomes in favor of their private agenda.

74. As a publisher of transportation news to the general public, Streetsblog’s interest in disclosure of the withheld emails should be given added weight. “There is a public interest in making available to a newspaper evidence it has reason to believe will vindicate its right to publish a story concerning the conduct of public officials.” Journal Publishing Co. v. Office of the Special Prosecutor, 131 Misc. 2d 417, 425, 500 N.Y.S.2d 919, 925 (Sup. Ct. N.Y. Cty. 1986).

75. In contrast, the interests of Weinshall, Hainline and Tomkiewicz in keeping private emails they sent from their CUNY accounts are limited and weak, for several reasons:

- First, as public officials, they “have a narrower right and expectation of privacy than average citizens.” Id. at 424, 500 N.Y.S.2d at 924 (citing James v. Gannet Co., 40 N.Y.2d 415, 423, 386 N.Y.S.2d 871, 876-77 (1976). In the case of Weinshall and Hainline, this right and expectation is further narrowed by their extensive public statements concerning the PPW redesign. E.g., Vaccaro Aff. Exs. B, E, I1-I5.

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<sup>8</sup> See also Mem. Of Law in Support of Motion by Richard Bashner and Brad Lander for Leave to File as *Amici Curiae* in Support of Respondents, at 1 (contention by local City Councilmember and Community Board Chair that decision to redesign PPW “may not be the one that [NBBL] would have reached,” but reflects “the opinion held by the majority of community residents” and “substantial and significant participation by the community”), in NBBL et al. v. New York City Dep’t of Transportation, et al., No. 5210/11 (N.Y. Sup. Ct. Kings Cty.) (Vaccaro Aff. Ex. Z).

- Second, they sent and received the withheld emails in violation of CUNY policy, and improperly used the emails, CUNY staff and other resources to do the work of NBBL, in some instances to the neglect of their official CUNY duties (see supra ¶¶ 52-70). By their misconduct they have forfeited any right of privacy they may have had in the emails.
- Third, many of the withheld emails were broadcast widely, with no attempt to maintain confidentiality suggesting an expectation of privacy. See supra, ¶¶ 38-45. This is in addition to the already diminished expectation of privacy inherent in email as a mode of communication.<sup>9</sup>
- Fourth, even with respect to communications that the authors intended to keep confidential, that intention is irrelevant under Whalen (see supra ¶¶ 28-31) — what is relevant is the magnitude of harm caused by disclosure of the emails, which must be greater than mere embarrassment. See supra, ¶¶ 47-49.

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<sup>9</sup> The court in People v. Klapper, 28 Misc.3d 225, 231, 902 N.Y.S.2d 305, 310 - 311 (N.Y. City Crim. Ct. 2010) explained why emails should not be viewed as a confidential medium of communication:

Whereas, some may view emails as tantamount to a postal letter which is afforded some level of privacy, this court finds, in general, emails are more akin to a postcard, as they are less secure and can easily be viewed by a passerby. Moreover, emails are easily intercepted, since the technology of receiving an email message from the sender, requires travel through a network, firewall, and service provider before reaching its final destination, which may have its own network, service provider and firewall. An employee who sends an email, be it personal or work related, from a work computer sends an email that will travel through an employer's central computer, which is commonly stored on the employer's server even after it is received and read. Once stored on the server, an employer can easily scan or read all stored emails or data. The same holds true once the email reaches its destination, as it travels through the internet via an internet service provider. Accordingly, this process diminishes an individual's expectation of privacy in email communications. ( See, Scott v. Beth Israel Medical Ctr., 17 Misc.3d 934, 847 N.Y.S.2d 436 [Sup. Ct., New York County 2007][Court, in a civil matter, held that an employer's "no personal use" email policy, combined with the employer's stated policy allowing for email monitoring, diminished any reasonable expectation of privacy an employee may have regarding computer services.]; see also Smyth v. Pillsbury Co., 914 F.Supp. 97, 100-01 [E.D.Pa. 1996][finding no expectation of privacy in email communications voluntarily made by an employee over the company email system] ).

**VERIFICATION**

I, Ben Fried, affirm the following to be true under the penalties of perjury:

- 1) I am the Editor of Streetsblog and I am authorized to verify the foregoing petition.
- 2) I have read the foregoing petition and know the contents thereof, and the same are true to my knowledge

Dated: New York, NY  
June 21, 2011

  
Ben Fried



DEBORAH BETH DIAMANT  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 02DI6240725  
Qualified in Kings County  
My Commission Expires May 09, 2015