



190 South LaSalle Street, Suite 1500  
Chicago, Illinois 60603  
312.263.7668

April 24, 2019

**Via email**

Public Information Officer  
New York Dept. of Civil Service  
pio@cs.ny.gov

Dear PIO,

I am writing under New York's Freedom of Information Law to request the following records:

Electronic Excel or other spreadsheet or data format (such as .csv) of the full name (first, middle or middle initial, last), home zip code, hire date, labor organization, bargaining unit, and payroll deduction type (service fee or labor organization member) of all state employees in the classified service as of June 1, 2018.

If the data is dynamic such that it cannot be provided as of June 1, 2018, then alternatively we request the full name (first, middle or middle initial, last), home zip code, hire date, labor organization, bargaining unit, and payroll deduction selection (if the employee chooses to make a payroll deduction of labor organization membership dues) of all state employees in the classified service as of the date of this request.

We do not intend to use this information for soliciting charitable contributions or selling any product in contravention of NY CLS Pub O 89 (2)(b)(iii). We expect this data is in electronic format, and so though we recognize that we are requesting a large number of records, we expect that providing them should be relatively straightforward. *See Matter of Data Tree, LLC v. Romaine*, 849 N.Y.S.2d 489 (2007).

The principal purpose of this request is to use the information for non-commercial purposes by a non-profit organization, so I request that any fees be waived. If you decline to provide a fee waiver, please alert me if the fee for providing these records exceeds \$100 before processing the request.

Sincerely,

Daniel R. Suhr, Attorney  
Liberty Justice Center  
dsuhr@libertyjusticecenter.org



## Department of Civil Service

**ANDREW M. CUOMO**  
Governor

**LOLA W. BRABHAM**  
Acting Commissioner

May 28, 2019

Daniel Suhr  
[dsuhr@libertyjusticecenter.org](mailto:dsuhr@libertyjusticecenter.org)

**FOIL: 19-47**

Dear Mr. Suhr,

This is to advise you regarding the status of your above referenced Freedom of Information Law request (FOIL). This request still remains under review. Should the Department identify responsive records, we expect to make those records available to you or update you regarding the status of your request by June 25, 2019.

Sincerely,

Public Information Office  
NYS Department of Civil Service



Daniel Suhr &lt;dsuhr@libertyjusticecenter.org&gt;

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**FOIL # 19-47**

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Daniel Suhr <dsuhr@libertyjusticecenter.org>  
To: "cs.sm.Public\_Information\_Office" <PIO@cs.ny.gov>

Thu, May 30, 2019 at 1:02 PM

Dear PIO,

I am in receipt of your letter of May 28 on my FOIL request 19-47.

I filed my request on April 24, 2019. Your agency responded on April 29, 2019, the limit of the five-day acknowledgement window, promising the records by May 28, 2019, the limit of the 20-day window. *But see Cmte. on Open Gov't guidance* ("The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request.").

On May 16, your agency requested that I complete a certification regarding non-commercial use, although I had already stated in my original letter on April 24 that I would not use the information for commercial purposes. I returned that certification to your agency one day later, on May 17.

You now write to inform me that you will provide records or an additional update by June 25, and your only explanation is that my request is "still under review."

I am concerned that this response fails to meet the requirements of New York's Freedom of Information Law (FOIL). Section 89(3)(a) of the FOIL requires that an agency provide records within 20 business days of the acknowledgement, which was May 28. If an agency cannot meet that 20 day mark, the agency must provide "the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted..." A single short sentence in your letter stating that my request is "still under review" hardly constitutes a reason for the agency's inability to grant the request within the statutory timeframe. Nor does it provide a basis for me to evaluate whether the agency's work on the request makes June 25 a reasonable new date for this information to be made available.

My request is straight-forward -- several other states we are studying provided this information weeks ago. We are seeking a basic data-pull that may involve a large number of records but is not technically complicated. *See Matter of Data Tree, LLC v. Romaine*, 849 N.Y.S.2d 489 (2007). This is not an overly voluminous or complicated request that should require an extension. *See Inner City Press v. NYC Dept. of Housing Preservation and Development*, NY Sup. Ct., NY Cty. (1993), [at 10](#).

Please reply with a fuller explanation as to the reasons for the further delay in fulfilling my request and why June 25 is a reasonable timeframe.

Sincerely yours,  
Daniel R. Suhr

[Quoted text hidden]



## Department of Civil Service

ANDREW M. CUOMO  
Governor

LOLA W. BRABHAM  
Acting Commissioner

June 24, 2019

Daniel Suhr

Via electronic mail:

[dsuhr@libertyjusticecenter.org](mailto:dsuhr@libertyjusticecenter.org)

### **RE: Freedom of Information Law (FOIL) #19-47**

Dear Mr. Suhr,

This correspondence is in response to your above referenced Freedom of Information Law (FOIL) request seeking a listing of all classified State employees as of June 1, 2018, with the following information included:

1. Name
2. Home zip code
3. Hire date
4. Labor organization
5. Bargaining unit
6. Payroll deduction type

See the attached document responsive to Part 1 and Parts 3 through 5 of your request. Note that this data is a snapshot of the classified service and select unclassified service employees as of June 1, 2018.

Please be advised that the Department has withheld certain records responsive Part 2 of this request. Records have been withheld pursuant to the Public Officers Law (POL) §87 2(a), which exempts from disclosure records that may be withheld by state or federal statute. Relevant statutes include POL §87 2(b), which precludes from disclosure release of records which would constitute an unwarranted invasion of personal privacy, and POL §89 7, which protects from disclosure the home addresses of public employees. In addition, Executive Order 183 protects the personal privacy of public employees.

Further, note that the Department does not maintain "payroll deduction type" records. Therefore, the Department has no records responsive Part 6 of your request.

Lastly, be advised that Department of Civil Service records do not include all individuals that may be considered employees of New York State and is a snapshot of employees in the classified service, as cited in the 2018 Workforce Management Report. For example, our records exclude employees of the legislature or court system, and the majority of employees of the State University of New York (SUNY).

To the extent that you interpret this response to be a denial of your FOIL request, appeals of any determinations relating to this FOIL request can be submitted in writing within 30 days to:

Marc Hannibal  
FOIL Appeals Officer  
New York State Department of Civil Service  
Albany, NY 12239

Sincerely,

A handwritten signature in blue ink, appearing to read "Jian Paolucci".

Jian Paolucci  
Records Access Officer



## LIBERTY JUSTICE CENTER

190 S. LaSalle St., Suite 1500 | Chicago, IL 60603 | 312.263.7668

June 25, 2019

Marc Hannibal  
FOIL Appeals Officer  
Department of Civil Service  
Albany, NY 12239

RE: NY DCS FOIL # 19-47

Dear Hearing Officer Hannibal,

I write to timely appeal the Department's determination that it does not have to disclose the home zip codes of state employees, for which it cites as authorities NY CLS Pub O § 89 (2)(b) and 7 and Executive Order 183.

First, NY CLS Pub O § 89 (2)(b) should not apply in this instance because disclosure of home zip code does not constitute an unwarranted invasion of privacy. N.Y. Comm. on Open Gov't, FOIL-Adv. Op.-18959 (Aug. 28, 2012). Moreover, conclusory statements concerning unwarranted invasion of privacy made by a records officer without any detailed analysis are not sufficient to justify withholding records. *Matter of Carnevale v. City of Albany*, 891 N.Y.S.2d 495, 497 (App. Div. 2009).

Second, NY CLS Pub O 89 (7) and Exec. Order 183(B) should not apply because this request is not for the employees' home addresses but only for a distinct sub-part of the address. N.Y. Comm. on Open Gov't, FOIL-Adv. Op.-18959 (Aug. 28, 2012). See *Bauder v. City of Pittsburgh*, Penn. Office of Open Records Final Determination AP 2017-0499, at 9-11 (holding that zip code by itself is not protected under the exception for home address, reasoning that *Gov's Office of Admin. v. Pennsylvanians for Union Reform*, 105 A.3d 61, 69 (Pa. Commw. Ct. 2014), controls when it holds that home county by itself is not part of protected home address).

Directly on point to this situation is *Daily News, L.P. v City of New York Office of Payroll Admin.*, 781 N.Y.S.2d 3 (N.Y. App. Div. 1st Dep't 2004), app. denied, 786 N.Y.S.2d 812 (N.Y. 2004), wherein the court ordered New York City's payroll agency to provide FOIL requester with home zip code of every person employed by the New York City Board of Education.

Finally, specifically as to Executive Order 183, the Governor may not by executive order preempt the public's rights to public information granted by statute. See *Rapp v. Carey*, 44 N.Y.2d 157 (1978) (concerning the authority of executive orders vis-a-vis statutes). If this information is disclosable under the Freedom Of Information Law, then it must be disclosed unless there is a constitutional or statutory bar that prevents it. See *Farbman v. New York City Health and Hospitals Corporation*, 62 N.Y.2d 75, 80 (1984) ("Full disclosure by public agencies is, under FOIL, a public right and in the public interest..."). The identity of the person or group requesting the information or their intended use of the information is irrelevant to the legal analysis as to disclosure or exemption. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986) ("the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions."); *Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 274 (1996) ("access to government records does not depend on the purpose for which the records are sought.").

For all these reasons, we respectfully request that you direct the agency to update its response to include zip code alongside the other information provided.

Very truly yours,

Daniel R. Suhr

dsuhr@libertyjusticecenter.org

**Department of  
Civil Service****ANDREW M. CUOMO**  
Governor  
**LOLA W. BRABHAM**  
Acting Commissioner

July 15, 2019

Daniel R. Suhr, Esq.  
[dsuhr@libertyjusticecenter.org](mailto:dsuhr@libertyjusticecenter.org)  
190 S. LaSalle St. Suite 1500  
Chicago, IL 60603

RE: FOIL No. 19-47

Dear Mr. Suhr:

By correspondence received on June 28, 2018, you have appealed the determination of Jian Paolucci, New York State Department of Civil Service (NYSDCS) Records Access Officer (RAO), regarding the Freedom of Information Law (FOIL; New York State Public Officers Law Art. 6) request referenced above.

In your original FOIL request you sought a listing of all classified State employees as of June 1, 2018, with the following information included:

1. Name
2. Home zip code
3. Hire date
4. Labor organization
5. Bargaining unit
6. Payroll deduction type

In its response dated June 24, 2019, the NYSDCS provided records which were responsive to Parts 1, 3, 4 and 5 of your FOIL requests. The RAO noted that the NYSDCS does not maintain any "payroll deduction type" records that would address Part 6 of your request.

Further, the NYSDCS withheld certain records responsive Part 2 of your request. Records were withheld pursuant to the Public Officers Law (POL) §87 (2)(a), which exempts from disclosure records that may be withheld by state or federal statute. Relevant statutes include POL §87 (2)(b), which precludes from disclosure release of records which would constitute an unwarranted invasion of personal privacy, and POL §89(7), which protects from disclosure the home addresses of public employees. In addition, Executive Order (EO) 183 protects the personal privacy of public employees.



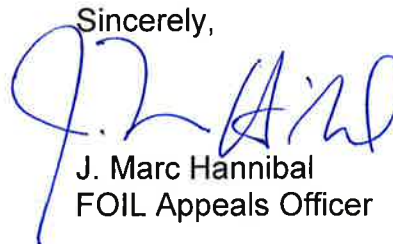
You have appealed the determination of the RAO to withhold the employee home zip code information sought in Part 2 of your request (above). You have not appealed the NYSDCS determination that there are no records responsive to Part 6 of your request.

As NYSDCS FOIL Appeals Officer, I have conducted an independent review of your appellate submission and the NYSDCS' original FOIL response. I have found that the RAO correctly denied access to records responsive to Part 2 for the reasons set forth in the NYSDCS response of June 24, 2019 (referenced above). Employees' home zip codes bear no relation to their positions or official duties. Therefore, release of such information would constitute an unwarranted invasion of personal privacy, and the requested records may properly be withheld pursuant to EO 183, the POL provisions cited above and §§ 96 (1)(c) of the New York State Personal Privacy Protection Law [POL Art. 6-A] (regarding withholding records which, if released, would constitute an unwarranted invasion of personal privacy) and 96 (1)(h) (permitting release of protected personal information regarding data subjects, but only upon advance written assurance to the NYSDCS that the record will be used solely for the purpose of statistical research and reporting, but only if it is to be transferred in a form that does not reveal the identity of any data subject). You had sought the zip code data in a format that would correlate home zip codes with identifiable employees, which therefore makes that record unreleasable under FOIL.

I note that you may submit a new FOIL request to the NYSDCS for New York State employee home addresses sorted by zip code; but in accordance with the provisions of law cited herein, this information will only be provided to you in tabular format as aggregated numbers of employees per zip code (i.e. 30 New York State employees have recorded home addresses within zip code 12xxx, etc.).

This constitutes the final agency determination in this matter. You have the right to appeal this determination in New York State Supreme Court as provided by Article 78 of the New York State Civil Practice Law and Rules.

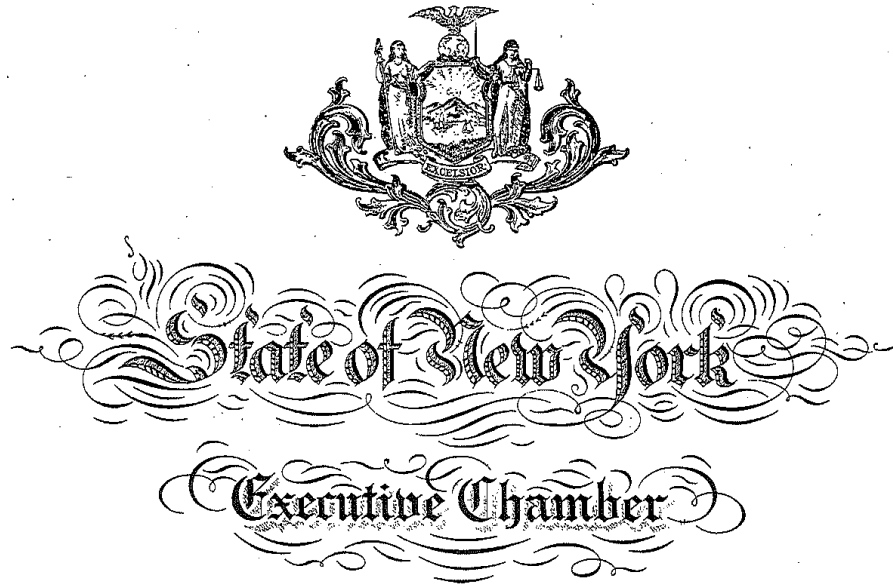
Sincerely,



J. Marc Hannibal  
FOIL Appeals Officer

cc: New York State Committee on Open Government





No. 183

EXECUTIVE ORDER

**PROTECTING THE PERSONAL PRIVACY OF PUBLIC SECTOR WORKERS**

**WHEREAS**, the labor movement was born in New York State more than a century ago, when, in the wake of the Triangle Shirtwaist Factory fire New York became the first state to enact laws protecting workers; and

**WHEREAS**, the labor movement continues to thrive in New York, which today boasts the highest rate of union membership in the country — more than double the national rate;

**WHEREAS**, as the voice of working people, labor built the middle class and advanced the great progressive achievements that we take for granted today — victories such as the Social Security Act, the Fair Labor Standards Act establishing the 40-hour work week, setting a minimum wage and prohibiting child labor, the Equal Pay Act banning gender wage discrimination, and the Occupational Safety and Health Act; and

**WHEREAS**, across New York State and this country, workers' personal information such as their home addresses and cell phone numbers, are being used to attack, harass, and intimidate them; and

**WHEREAS**, although today's decision by the United States Supreme Court in *Janus v AFSCME* attempts to undermine worker safety and privacy, New York State will not subject public sector workers to the abuse of their personal information as part of a campaign to harass and intimidate workers for any reason, including engaging in union activities or looking to unionize.

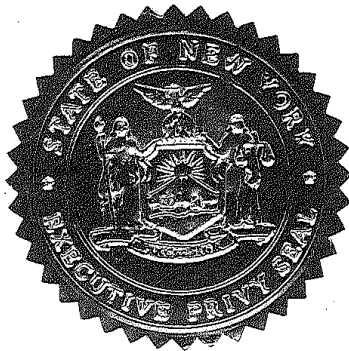
**NOW, THEREFORE, I, ANDREW M. CUOMO**, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order as follows:

**A. Definitions**

"State entity" shall mean (i) all agencies and departments over which the Governor has executive authority, and (ii) all public benefit corporations, public authorities, boards, and commissions, for which the Governor appoints the Chair, the Chief Executive, or the majority of Board members, except for the Port Authority of New York and New Jersey.

## B. Responsibilities of State Entities

No State entity, including any of its officers or employees, shall disclose: (a) the home address(es), personal telephone number(s), personal cell phone number(s), personal e-mail address(es) of a public employee, as the term "public employee" is defined in Article 14 of the Civil Service Law, except (i) to an employee organization that, in accordance with Article 14 of the Civil Service Law, is the certified or recognized bargaining representative of a unit of public employees; (ii) to a bona fide employee organization that, in accordance with Article 14 of the Civil Service Law, is legitimately seeking to be certified or recognized as bargaining representative of a unit of public employees solely for purposes of aiding such employee organization in obtaining certification or recognition; or (iii) to the extent compelled to do so by lawful service of process, subpoena, court order, or as otherwise required by law. This order shall not apply to work-related, publicly available information such as title, salary, and dates of employment.



GIVEN under my hand and the Privy Seal of the  
State in the City of Albany this twenty-  
seventh day of June in the year two  
thousand eighteen.

BY THE GOVERNOR

  
Secretary to the Governor





**State of New York  
Department of State  
Committee on Open Government**

One Commerce Plaza  
99 Washington Ave.  
Albany, New York 12231  
(518) 474-2518  
Fax (518) 474-1927  
<http://www.dos.ny.gov/coog/>

FOIL-AO-18959

August 28, 2012

E-Mail

TO:

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear:

I have received your letter and the materials relating to it concerning a partial denial of access to records by the Office of the State Comptroller. You have sought an advisory opinion concerning the following questions: "First, does the disclosure of the name of a public employee earning credits in the state pension system coupled with his or her home zip code amount to an unwarranted invasion of personal privacy as defined in the Public Officers Law? Second, does the fact that the law (FOIL § 89(7)) allows agencies to withhold 'home addresses' of pensioners mean that agencies may withhold zip codes?"

In its initial response to your request, zip codes contained within a database were withheld on the basis of §§87(2)(b) and 89(2)(b) of FOIL. Your appeal was also denied, and the Records Appeals Officer cited the same provisions, as well as §89(7), which, in his words, "expressly exempts the home addresses of public employees and retirees from mandatory disclosure..." He added that "Common usage suggests that a zip code is inherently part of an individual's home address, which would mean that disclosure of zip codes as you have requested would violate the letter of POL §89(7)", and that "even if zip codes are not considered part of a home address, a disclosure of records combining names with zip codes would necessarily facilitate the capacity to identify an individual's home address using basic internet searches."

In this regard, I offer the following comments.

First, I do not believe that disclosure of home addresses of present or former public employees would "violate" §89(7) of FOIL. That provision states in relevant part that "Nothing in this article *shall require* the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system..." (emphasis mine). While FOIL clearly indicates that home addresses of present or former public employees need not be disclosed, there is nothing in the language of that provision that would prohibit disclosure, nor is there language in §§87(2)(b) or 89(2)(b) specifying that disclosure of home addresses would constitute an unwarranted invasion of personal privacy. To confirm that point, the Appellate Division in Buffalo Teachers Federation v. Buffalo Board of Education [ 156 AD2d 1027 (1990)] determined that the agency could withhold home addresses of its employees, but that it could choose to disclose the addresses. That being so, there is nothing inherently confidential about public employees' home addresses that requires an agency to withhold the addresses.

Further, there are many instances in which home addresses of many, some of which may be present or former public employees, are accessible to any person. Voter registration lists that identify individuals and their home addresses are accessible under the Election Law, 3-220(1). Similarly, those who own real property, i.e., residences, are identified by name and the location of the property in records required to be disclosed pursuant to §526 of the Real Property Tax Law. In like manner, §89(2)(c)(iv) of FOIL concerning records related to the ownership of real property directs that, "providing copies of such records or group of records shall not be deemed an unwarranted invasion of personal privacy."

**This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.**

NYSCEF DOC. NO. 11

RECEIVED NYSCEF: 10/25/2019

In short, names and home addresses are available to the public in a variety of circumstances, and there is nothing in FOIL directing that home addresses of present or former public employees cannot be disclosed.

Second, the items denied are not home addresses, but rather are zip codes, and in my view, there is a distinction between the two. There have been numerous instances in which it has been advised that zip codes pertaining to government employees and others must be disclosed. For example, although there may be no written opinion dealing with the issue, we have been informed that there are local provisions that require that public employees must reside within the municipality that employs them. While it is clear that residence addresses need not be disclosed, in order to ascertain whether individuals are complying with law and whether the municipality is ensuring compliance, it has been advised that the zip codes of employees must be disclosed. The disclosure of the zip code in that kind of situation is likely to provide the public with information necessary to determine whether there is compliance with law and an avoidance of favoritism, or perhaps lack of compliance or due diligence by the municipality.

Third, as you are aware, when an agency denies access to records, and the denial is challenged via the initiation of an Article 78 proceeding, unlike other such proceedings in which the petitioner has the burden of proving that the agency acted unreasonably or failed to carry out a legal duty, the agency has the burden of proof when the proceeding involves a denial of access under the Freedom of Information Law. The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275(1996)].

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, *supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., *supra*, 62 N.Y.2d, a83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

The issue, in my view, is whether the Office of the State Comptroller can demonstrate that disclosure of zip codes of present or former public employees would constitute an unwarranted invasion of personal privacy. In one of the decisions referenced by the Court of Appeals in Gould, the Court cited Hanig, which focused on the privacy exception, holding that it pertains to items "that would ordinarily and reasonably be regarded as intimate, private information" (id., 112), i.e., as in Hanig, the details of one's medical or health condition. From my perspective, particularly in consideration of statutes that require disclosure of names coupled with home addresses, it is questionable whether it can be demonstrated that disclosure of zip codes could be characterized as "intimate" or, therefore, whether disclosure would rise to the level of an "unwarranted" invasion of personal privacy.

In a decision cited in the denial of the appeal, Daily News v. City of New York Office of Payroll Administration [9 AD 3d 308 (2004)], one of the issues involved portions of records that included the ages of public employees. In short, both the Supreme Court and the Appellate Division determined that the agency did not meet the burden of proof and could not demonstrate to the courts' satisfaction how and why disclosure would result in an unwarranted invasion of personal privacy. In contrast is the decision rendered in Hearst Corporation v. Office of the State Comptroller [882 NYS2d 862 (2009)], which dealt in part with the disclosure of public employees' dates of birth. The court found that disclosure that item, unlike disclosure of their ages, would constitute an unwarranted invasion of privacy. A name and a date of birth, which is akin to a unique identifier, i.e., a social security number, might be used as a link to obtain a variety of other items pertaining to an individual, some of which may be intimate or private. That is likely not so in the case of disclosure of a name and zip code, without more. Again, the names and addresses, as well as zip codes, pertaining to millions of individuals are included in publicly accessible voter lists and real property assessment records.

The courts have found that "speculation" concerning the potentially harmful effect of disclosure sought to be avoided via the assertion of an exception to rights of access is insufficient to justify a denial of access. In Markowitz v. Serio [11 NY3d 43 (2008)], the Court of Appeals determined that the possibility of harm that is "theoretical" is inadequate, and that an agency "cannot merely rest upon a speculative conclusion that disclosure might potentially cause harm" (id., 50). A similar conclusion was reached in a decision in which the issue involved whether disclosure of physicians' names could be used in combination with other items that are accessible as a means of identifying patients within a certain county. Specifically, a database maintained by the State Department of Health is disclosed following the redaction of personally identifying details concerning patients. Among the items disclosed about patients are the month and year of the patient's birth, the patient's zip code and county of residence. The Department concluded that

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of filing, had not been reviewed by the County Clerk. The County Clerk has not yet approved or disapproved this filing. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

NYSCEF DOC. NO. 11

RECEIVED NYSCEF: 10/25/2019

"providing the identity of the patient's physician is the one additional factor that 'could readily permit a third party to deduce logically the identity of a given patient, resulting in a breach of medical confidentiality.'" The court found, however, that "such speculation falls far short of 'articulating a particularized and specific justification for denying access'" [New York Times Co. v. New York State Department of Health, 243 AD2d 158, 160 (1998)].

In that second decision, the issue involved information significantly more intimate and serious than disclosure of a zip code of a present or former public employee, for it focused on the possibility that a patient could be identified as having been treated for a particular medical condition. Even in consideration of that possibility, that disclosure would result in a "breach of medical confidentiality"; speculation concerning the harm that could arise was insufficient to meet the burden of defending secrecy.

Here, the possibility of harm is, in my opinion, more remote than in the case of disclosure of medical information that might conceivably enable an industrious person to identify a patient and his or her medical problem or condition. If the burden of defending secrecy in that case could not be met, it is difficult to envision how that burden could be met in this instance, particularly in consideration of the factors discussed in the preceding paragraphs.

In an effort to obviate the need to seek judicial review and to resolve the matter, a copy of this response will be sent to the Comptroller's Records Appeals Officer.

I hope that I have been of assistance.

RJF: sb

cc: Harvey Silverstein, Records Appeals Officer

FOIL-AO-18959

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### FINAL DETERMINATION

IN THE MATTER OF

BOB BAUDER AND  
*PITTSBURGH TRIBUNE-REVIEW*,  
Requester

v.

CITY OF PITTSBURGH,  
MUNICIPAL PENSION FUND OFFICE,  
Respondent

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Docket No.: AP 2017-0499

### INTRODUCTION

Bob Bauder, a reporter for the *Pittsburgh Tribune-Review* (collectively “Requester”), submitted a request (“Request”) to the City of Pittsburgh, Municipal Pension Fund Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the names of Office annuitants along with their respective postal zip codes. The Office denied the Request, stating that the names of annuitants were personal identification information and postal zip codes are protected by a constitutional right to privacy. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and the Office is required to take further action as directed.

### FACTUAL BACKGROUND

On January 30, 2017, the Request was filed, seeking the names and postal zip codes of all annuitants drawing a pension from the Office. On March 7, 2017, after extending its time to respond by thirty days, the Office denied the Request, arguing that the names of annuitants are



personal identification information, 65 P.S. § 67.708(b)(6), and that postal zip codes are protected by a constitutional right to privacy in one's home address, *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016).

On March 17, 2017, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On May 24, 2017, the Requester submitted a position statement, reiterating its challenge to the Office's denial. On June 5, 2017, the Office, the Pittsburgh Fireman's Relief and Pension Fund, and the Pittsburgh Policemen's Relief and Pension Fund<sup>2</sup> filed position statements arguing that disclosure of annuitant names would threaten personal security, 65 P.S. § 67.708(b)(1), would reveal disability annuitants' medical status, 65 P.S. § 67.708(b)(5), would reveal the identity of annuitants' spouses and beneficiaries, 65 P.S. § 67.708(b)(6), and would reveal personal financial information, *Id.* In addition, the Office argued that the names of former public employees are not subject to public disclosure, *id.*, and that the names of former public employees and their home addresses are protected by a constitutional right to privacy recognized in *PSEA*.<sup>3</sup>

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<sup>1</sup> In its appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1). The Requester subsequently agreed to allow the OOR until June 30, 2017 to issue a final determination. *Id.*

<sup>2</sup> The Requester filed identical requests and appeals against the fireman's pension fund and the police pension fund. The appeals against these entities were docketed at AP 2017-0301 and AP 2017-0454, respectively. Due to the issues presented being identical, each of these pension funds sought to file position statements in support of each other in each appeal.

<sup>3</sup> In order to permit the parties to pursue potential settlement of this matter, the OOR permitted the record to remain open until June 5, 2017. *See* 65 P.S. § 67.1102(a)(1) (permitting the appeals officer to set a schedule for the parties to submit evidence and argument).



## LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access

shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

**1. The Office has not met its burden of proof that disclosure of annuitant names would threaten personal security**

The Office claims that the release of the names of annuitants would threaten the personal security of the respective annuitants, 65 P.S. § 67.708(b)(1)(ii). Section 708(b)(1) of the RTKL exempts from disclosure records where disclosure “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” *Id.* Under the RTKL, “reasonable likelihood” of “substantial and demonstrable risk” is necessary to trigger the personal security exception. The term, “substantial and demonstrable risk” is not defined in the RTKL. However, construing these terms in accordance with their common and approved usage, 1 Pa.C.S. § 1903(a), the risk of harm must be material, real, and ample. The risk of harm must also be demonstrable, which is defined as being obvious or apparent. *See Swartzwelder v. Butler County*, OOR Dkt. AP 2009-0632, 2009 PA O.O.R.D. LEXIS 129. Mere belief that the release of a record would cause substantial and demonstrable risk of harm is insufficient. *Zachariah v. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

The Office asserts that annuitants are older individuals who are susceptible to financial exploitation, and, therefore, disclosure of annuitant names would allow the criminal element to

prey upon these individuals. In *State Employees Retirement System v. Fultz*, the Commonwealth Court rejected a similar argument, noting that the affidavits “offer[ed] only general and broad sweeping conclusions,” and provided no evidence to demonstrate that disclosure would threaten personal security. 107 A.3d 860 (Pa. Commw. Ct. 2015). Here, like in *Fultz*, the Office’s general and broad-sweeping approach to withhold records of individuals of a certain age, without more concrete evidence of how each individual’s name is exempt from disclosure under Section 708(b)(1)(ii), does not meet the Office’s burden of proof. 65 P.S. § 67.708(a)(1).

**2. The Office has not met its burden of proof that disclosure of annuitant names would reveal an individual’s medical history**

The Office next argues that certain annuitants are receiving disability pensions, and, therefore, disclosing annuitant names would reveal the medical history of annuitants receiving disability pensions. 65 P.S. § 67.708(b)(5). Section 708(b)(5) of the RTKL exempts from disclosure a “record of an individual’s ... disability status[.]” *Id.* Accepting as true that certain annuitants are receiving a disability pension, the Office has not demonstrated how disclosing the names of all annuitants will specifically identify those receiving disability pensions. In other words, identifying all annuitants without disclosing the type of pension will not reveal an individual’s disability status. Therefore, the Office has failed to meet its burden of proof to withhold annuitant names on the basis of disability status. 65 P.S. § 67.708(a)(1).

**3. The Office has not met its burden of proof that disclosure of annuitant names would reveal personal financial information**

The Office next argues that disclosure of annuitant names would reveal personal financial information. 65 P.S. § 67.708(b)(6)(i). Section 708(b)(6)(i) of the RTKL exempts from disclosure “personal identification information,” including “personal financial information.” *Id.* “Personal financial information” is defined as an “individual’s personal credit, charge or debit

card information; bank account information; bank, credit or financial statements, account or PIN numbers and *other information relating to an individual's personal finances.*" 65 P.S. § 67.102 (emphasis added).

The Office argues that the Commonwealth Court's decision in *Pa. Dep't of Conserv. & Nat. Res. v. Office of Open Records* ("DCNR") stands for the proposition that the names of annuitants may not be disclosed pursuant to Section 708(b)(6)(i); however, the Court expressly limited its holding in that case to "certified payroll records of private employers doing business with Commonwealth agencies[.]" 1 A.3d 929, 942 n.22 (Pa. Commw. Ct. 2010). As this matter does not involve "certified payroll records of private employers doing business with Commonwealth agencies[.]" DCNR has no bearing in this case. Furthermore, in reviewing the definition of "personal financial information" it becomes clear that this exemption allows agencies to withhold *financial* information only. Nothing in the exemption permits an agency to withhold an individual's name. See *Finn et al. v. Borough of East Greenville*, OOR Dkt. AP 2016-0636, 2016 PA O.O.R.D. LEXIS 638 (holding that the names of utility customers are not financial information). Therefore, the Office has not met its burden of proof that annuitant names are personal financial information. 65 P.S. § 67.708(a)(1).

**4. The Office has not met its burden of proof that annuitant names are exempt from disclosure under Section 708(b)(6)**

The Office goes on to argue that the names of annuitants are exempt from disclosure under Section 708(b)(6), which exempts from disclosure certain "personal identification information" such as "a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number." 65 P.S. § 67.708(b)(6)(i). Noticeably absent from the information identified as "personal identification

information” is an individual’s name. The Office argues that Section 708(b)(6)(ii), 65 P.S. § 67.708(b)(6)(ii), exempts from disclosure the names of individuals other than “a public official or an agency employee.” This section provides that “[n]othing in [Section 708(b)(6)] shall preclude the release of the name ... of a public official or an agency employee.” *Id.* The Office’s argument fails because had the General Assembly intended to make all individuals’ names exempt from disclosure other than public officials and employees, the General Assembly could have expressly stated such. Exemptions to disclosure must be narrowly construed, *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), and by not expressly stating that individual names other than public officials and employees are not subject to disclosure, it cannot be said that annuitant names fall within the ambit of Section 708(b)(6). Therefore, the Office has failed to meet its burden of proof that annuitant names are exempt from disclosure under Section 708(b)(6) of the RTKL. 65 P.S. § 67.708(a)(1).

**5. Annuitant names are not subject to a constitutional right to privacy**

The Office next argues that annuitant names are protected by the constitutional right to privacy recognized by the Pennsylvania Supreme Court in *PSEA*, and that annuitant names may not be disclosed unless a public interest in disclosure outweighs the annuitants’ privacy interest. The Pennsylvania Supreme Court, the Commonwealth Court and the OOR have recognized that the names of private citizens are subject to a right to privacy, and disclosable only where the public interest favors disclosure. *Sapp Roofing Co. v. Sheet Metal Workers Int’l Assn*, 552 Pa. 105 (1998); *Hartman v. Dep’t of Conserv. & Nat. Resources*, 892 A.2d 897 (Pa. Commw. Ct. 2005); *Yakim v. Monroeville*, OOR Dkt. AP 2017-0741, 2017 PA O.O.R.D. LEXIS 792; *Lehman v. Northampton Cnty.*, OOR Dkt. AP 2017-0098, 2017 PA O.O.R.D. LEXIS 421. While the names of private citizens are subject to a right to privacy, no court of this Commonwealth or the

OOR have held that the names of public employees or those receiving a public pension are similarly subject to a right of privacy in their name.

Section 708(b)(6)(ii) of the RTKL, 65 P.S. § 67.708(b)(6)(ii), provides, in relevant part, that the names of “public official[s] and agency employee[s]” are subject to disclosure. Thus, it can reasonably be concluded that the General Assembly has determined that the public has an interest in the names of public employees, and, therefore, public employees have no right to privacy in their names. This same rationale applies to annuitants receiving a public pension.

As an initial matter, the express language of Section 708(b)(6)(ii) provides that the names of public officials and employees contained in government records are subject to disclosure. Nothing in the language of Section 708(b)(6)(ii) limits its application to *current* public officials and employees. Because Section 708(b)(6)(ii) also requires disclosure of government payments to public officials and employees, it can be reasonably concluded that a salutary purpose of the RTKL is to inform the public of *who* is receiving government payments. Here, the Office’s annuitants are receiving payments from a municipal government, and, thus, they are the very type of individuals whom the RTKL seeks to disclose to the public. Therefore, the General Assembly can only be said to have concluded that those receiving a government pension have no right to privacy to withhold their name from the public.<sup>4</sup> *See Penn State Univ. v. State Emples. Ret. Bd.*, 935 A.2d 530 (Pa. 2007); *Mergenthaler v. State Employees Ret. Bd.*, 372 A.2d 944 (Pa. Commw. Ct. 1977), confirmed *en banc*, 381 A.2d 1032 (Pa. Commw. Ct. 1978) (finding that the names of state annuitants are subject to disclosure under the RTKL’s predecessor statute).

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<sup>4</sup> The Office notes that certain individuals receiving pension payments from the Office are the surviving spouse or other beneficiary of the original employee/annuitant. The names of these individuals are expressly exempt from disclosure, 65 P.S. § 67.708(b)(6), and, therefore, may be redacted from any records disclosed to the Requester. Notwithstanding the foregoing, however, the name of the original employee/annuitant is subject to disclosure.

**6. Annuitant zip codes are not subject to a constitutional right to privacy**

Finally, the Office also argues that annuitant postal zip codes are protected by the constitutional right to privacy recognized in *PSEA*. Specifically, the Office argues that an annuitant's zip code, when combined with an annuitant's name, is the equivalent of a home address which the Court in *PSEA* expressly held was protected by a right of privacy unless public interest in disclosure outweighed an individual's right to privacy. This is the same argument that the Commonwealth Court rejected when considering whether an individual's county of residence was the equivalent of an individual's home address.

In *Governor's Office of Administration v. Pennsylvanians for Union Reform*, a requester sought the county of residence for certain Commonwealth employees. The Office of Administration denied the request, arguing that a county of residence was a "component part" of a home address, and, therefore, where a home address is exempt from disclosure, so too is the county of residence. The Commonwealth Court rejected this argument, noting that a county is not a "component part" of a home address, and even if it were, "it is indisputable that county of residence is not the same as a home address[.]" 105 A.3d 61, 69 (Pa. Commw. Ct. 2014). The Court went on to add:

Further, it is without question that revealing the county of residence does not provide the same detailed information as a home address. The disclosure of that alleged "component part" alone does not have the same potential impact as publishing of the whole.

*Id.* Thus, *Office of Administration* can be read for the proposition that a "component part," such as a zip code, is not the equivalent of a home address.

Here, without question a zip code is part of a mailing address, and, therefore, a "component part" of a home address, *see Merriam-Webster's Collegiate Dictionary* (11<sup>th</sup> ed. 2004) (defining "address" as "directions for delivery on the outside of an object (as a letter or



package”); however, as with a county of residence, disclosure of a zip code alone “does not provide the same detailed information as a home address.”

The Office argues that when combined with an annuitant’s name, a zip code can allow third parties to determine an annuitant’s home address, particularly with the internet’s search capabilities. The Commonwealth Court rejected an identical argument in *Office of Administration*, where the Office of Administration argued that “county of residence generally narrows, to an unacceptable degree, the search for an individual whose other identifying information is known.” Pertinently, the Court noted:

That properly disclosed public records may enable the [requester] or others, by doing further research, to learn information that is protected from disclosure not generally a sufficient basis to refuse disclosure.... There may be some cases in which the evidence establishes that disclosure of public records which are not facially exempt will necessarily or so easily lead to disclosure of protected information that production of one is tantamount to production of the other, or that disclosure of the one is highly likely to cause the very harm the exemption was designed to prevent.

105 A.3d at 71 (citing *Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012)). The Court went on to note that based on the diversity of size and population of Pennsylvania’s 67 counties, disclosure of an employee’s county of residence could not be “tantamount to production” of the employee’s home address.

Here, even more so than in *Office of Administration*, there are over 42,000 zip codes in the United States, <http://faq.usps.com> (accessed June 22, 2017), ranging from sparsely populated rural areas to the most densely populated urban areas. Furthermore, as in *Office of Administration*, the Office has proffered no evidence beyond its speculation that disclosure of an annuitant’s zip code when combined with disclosure of their name is *highly likely* to lead to the disclosure of the annuitant’s home address. Thus, because a zip code is *not* equivalent to a home

address, *PSEA* is inapposite, and there exists no right to privacy in one's zip code. Therefore, the OOR need not balance whether public interest favors disclosure.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Office is required to disclose the annuitant names and zip codes, subject to the redaction of surviving spouse and other beneficiary names, within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>5</sup> This Final Determination shall be placed on the OOR website: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: June 30, 2017**

/s/ Charles Rees Brown  
CHARLES REES BROWN  
CHIEF COUNSEL

Sent via e-mail to:

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<sup>5</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).