

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

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In the matter of	:	
DOCUMENTED LTD,	:	Index No.
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Petitioner,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	
	:	
-v-	:	
	:	
NEW YORK STATE	:	
DEPARTMENT OF LABOR	:	
and	:	
JEROME TRACY in his official capacity as	:	
Foil Appeal Officer	:	
	:	
Respondents.	:	
-----	:	x

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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## INTRODUCTION

This is a dispute about access to records that shed light on an important public issue at the very heart of the Freedom of Information Law<sup>1</sup> (“FOIL”)’s guarantees: how the State is holding companies accountable for exploiting vulnerable workers by breaking the wage and hour laws it put in place. Petitioner Documented Ltd (“Documented”), the owner of Brooklyn-based nonprofit news site *Documented*, brings this Article 78 proceeding to challenge the New York State Department of Labor (“DOL”)’s constructive denial of access to wage and hour records that are clearly public and readily retrievable. The continuing months-long delay in determining whether to grant this December 2019 request flies in the face of FOIL, which provides that “it is incumbent upon the state . . . to extend public accountability *wherever and whenever* feasible.” N.Y. Pub. Off. Law § 84 (emphasis added).

It is indisputable that the requested wage and hour documents are public records subject to disclosure under FOIL because the DOL has previously released the same type of wage and hour records that Documented is requesting.<sup>2</sup> In fact, Documented attached to its FOIL request an excerpt from a previous DOL records release demonstrating that a DOL investigator had conducted the same type of search that Documented requested be done here.<sup>3</sup>

It is no secret that wage theft, the practice of employers failing to pay workers the full wages to which they are legally entitled, is a widespread problem in New York.<sup>4</sup> In recent years, unscrupulous employers stole an estimated \$965 million annually from New York employees.<sup>5</sup> It is crucial that records identifying these employers’ bad actions be made public both to hold them accountable and

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<sup>1</sup> N.Y. Pub. Off. Law § 84 *et seq.*

<sup>2</sup> *See* Pet. ¶ 21; Ex. 3. All references to Ex. Nos. refer to Exhibits attached to the Petition.

<sup>3</sup> *Id.*

<sup>4</sup> David Cooper & Teresa Kroeger, *Employers steal billions from workers’ paychecks each year*, ECONOMIC POLICY INSTITUTE, May 10, 2017, <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>.

<sup>5</sup> *Id.*

to further the DOL's aim of "eradicating wage theft[.]" which DOL Commissioner Roberta Reardon has described as "a goal all of us share."<sup>6</sup>

Consistent with that enforcement goal, the DOL's federal counterpart has dispensed altogether with requiring a FOIA request for this information. Instead, it publicly posts its wage and hour compliance data, including information regarding whether any wage theft violations were found, the back wage amount, the number of employees due back wages, and civil monetary penalties assessed.<sup>7</sup>

The DOL's delay in releasing these records only serves to thwart its enforcement goal, particularly in light of the fact that Documented plans to use these records to create an interactive database of companies in New York that have stolen wages from employees.<sup>8</sup> That database would be accessible both to low-wage workers at particular risk of experiencing wage theft and to those who support a living wage to determine which companies to avoid working for or patronizing.<sup>9</sup>

Documented is constrained to file this lawsuit because its efforts to obtain relief through FOIL's administrative review process have proven fruitless. This Court should order the DOL to promptly grant Documented's FOIL request for the following reasons.

*First*, the DOL failed to comply with the statutory time limitations required in responding to a FOIL request and with its own rules and regulations that it promulgated as required under FOIL. The DOL's position that it has somehow met the mandatory time limitations despite failing to respond to the request within the prescribed timeframe is incorrect as a matter of law and would render the guarantees of FOIL effectively meaningless to requestors who lack the resources to challenge agency denials of public records in court.

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<sup>6</sup> NYS DOL Comm. Roberta Reardon, Budget Testimony, Joint Hearing of the Legislative Fiscal Committee (Feb. 4, 2019), available at <https://nyassembly.gov/write/upload/publichearing/000960/001802.pdf>.

<sup>7</sup> Wage and Hour Compliance Action Data, U.S. DOL, available at [https://enforcedata.dol.gov/views/data\\_summary.php](https://enforcedata.dol.gov/views/data_summary.php) (last accessed Jun. 29, 2020).

<sup>8</sup> See Pet. ¶ 6.

<sup>9</sup> See *id.* ¶ 7.

*Second*, the DOL's delay in granting this request was not reasonable under the circumstances because the records are readily retrievable and clearly public. The agency may desire to keep requests bottled up in limbo for months on end, as it has done here, but the statute does not countenance such a system that rubberstamps unreasonable delays.

*Third*, should Documented substantially prevail in its Article 78 petition, it is entitled to an award of attorney's fees and litigation costs pursuant to FOIL.

## **BACKGROUND AND PROCEDURAL HISTORY**

### **A. Background**

Max Siegelbaum is the co-founding editor of nonprofit news site *Documented* and a senior reporter.<sup>10</sup> *Documented* is devoted to covering New York City's immigrants and policies that affect their lives.<sup>11</sup> Since he co-launched *Documented* in the summer of 2018, the news site has covered high profile cases of wage theft affecting its target readership, including a \$3.1 million settlement on behalf of 88 car workers, and efforts by workers to demand an end to wage theft and a living wage.<sup>12</sup> To further serve its readership, *Documented* determined that it would create an interactive database of companies in the New York area engaged in wage theft, which would draw on New York State Department of Labor wage and hour records.<sup>13</sup>

### **B. The Requests**

On September 9, 2019, Documented sent the DOL a FOIL request for the following documents created between September 9, 2016, and the fulfillment of its request: 1) a full export of

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<sup>10</sup> Pet. ¶ 14.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Oscar Montenegro, *After Eight Years, Car Wash Workers Can Cash Their Final Paychecks*, DOCUMENTED, Sept. 24, 2019, <https://documentedny.com/2019/09/24/after-eight-years-car-wash-workers-can-cash-their-final-paychecks/>; Mazin Sidahmed, *Laundry Workers Demand their Rights*, DOCUMENTED, Aug. 26, 2019, <https://documentedny.com/2019/08/26/early-arrival-attorneys-general-support-drivers-licenses-in-new-york/>.

<sup>13</sup> Pet. ¶ 6.

the Audit and Monetary System case table in a csv file; (2) any manual or workbook that explains terms used in the case table; and (3) every “Recapitulation Sheet” created in that timeframe.<sup>14</sup>

The DOL ultimately responded in November 2019 that it could not locate records based on the information provided, citing N.Y. Pub. Off. Law § 89(3)(a), which states that records must be “reasonably described” by the requestor.<sup>15</sup> The DOL also referred him to its Subject Matter List.<sup>16</sup>

On December 10, 2019, Documented sent the DOL a revised FOIL request that provided more specific details.<sup>17</sup> In that request, it asked the DOL to provide the search results of a query of the Wage and Hour Audit and Monetary System, which according to previous records releases is accessible by DOL investigator Michael Burkard.<sup>18</sup> Documented asked for “records of all cases with the ‘Type’ being ‘Wage Statement/Records/Payment’ or other similar wage and hour disputes” and for the timeframe to start at January 1, 2016 and run until the date the FOIL request is completed. It further asked for the records to be provided in a .csv or .xlsx electronic file. Documented additionally asked for (1) “definitions for every term used in the ‘Type’ and ‘Status’ columns of the Audit and Monetary systems database”; and for (2) “case reports filed with LS072008012931, LS062008012887, and LS062008012919.”<sup>19</sup>

Documented attached to his request as Exhibit A an excerpt from documents released in File No. FL-13-053409158.<sup>20</sup> The excerpt contains search results released after the DOL conducted a query of its Wage and Hour Audit and Monetary System in response to a FOIL request, which is

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<sup>14</sup> See Pet. ¶ 19; Ex. 1.

<sup>15</sup> See Pet. ¶ 20; Ex. 2.

<sup>16</sup> See Ex. 2.

<sup>17</sup> See Pet. ¶ 21; Ex. 3.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

precisely what Documented is requesting be done here.<sup>21</sup> The excerpt demonstrates that the information Documented is requested is thus clearly public and readily retrievable.<sup>22</sup>

The DOL sent Documented an email on Dec. 16, 2019 acknowledging receipt of this request, assigned it File No. FL-19-0937, and stated that it “will provide a response or status update within 20 business days.”<sup>23</sup>

Documented sent two emails to the DOL in early January 2020 requesting an update as to the status of the request.<sup>24</sup> The DOL failed to respond to either of those emails within 20 business days of its Dec. 16, 2019 acknowledgment of receipt of the request.<sup>25</sup> After more than 20 business days elapsed, the agency sent Documented a letter on January 27, 2020 stating that it “could not complete a response to your FOIL request within 20 business days due to the volume of request currently pending with the Department and our obligation to treat each request equally.”<sup>26</sup> The DOL “estimate[d] that [he] w[ould] receive a response to [his] request prior to April 27, 2020.”<sup>27</sup>

On Feb. 21, 2020, Documented submitted an administrative appeal of the denial of the Dec. 10, 2019 request.<sup>28</sup> Documented argued that the DOL had failed to respond to the requests as required by FOIL and that it was entitled to treat that failure as a constructive denial and ask that the DOL be ordered to produce the requested records.<sup>29</sup>

On Feb. 27, 2020, FOIL Appeal Officer Jerome Tracy issued the DOL’s final response to the administrative appeal.<sup>30</sup> He denied the administrative appeal on the ground that “the Department has met its obligation to inform you of the reason it cannot grant or deny your request within the initial

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<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See Pet. ¶ 22; Ex. 4.

<sup>24</sup> See Pet. ¶ 23; Ex. 5.

<sup>25</sup> See Pet. ¶ 24.

<sup>26</sup> See Pet. ¶ 24; Ex. 6.

<sup>27</sup> See *id.*

<sup>28</sup> See Pet. ¶ 25; Ex. 7.

<sup>29</sup> See *id.*

<sup>30</sup> See Pet. ¶ 26.

time period set forth in the law, and the time it will take to respond to your request.”<sup>31</sup> He cited to the January 27, 2020 response in which the DOL stated that it could not complete its response within 20 business days “due to the volume of requests currently pending with the Department and our obligation to treat each request equally” and that it estimated Documented would receive a response “prior to April 27, 2020.”<sup>32</sup> The DOL’s final response quoted at length from 21 NYCRR § 1401.5 in support of its position that the agency “is not, pursuant to 21 NYCRR 1405.5.e above, guilty of a ‘failure to comply with the lime limitations...’ such that your request may be considered denied.”<sup>33</sup>

Documented has received no further communications from the DOL since the denial of its appeal, including in the months following the purported April 27, 2020 response date.<sup>34</sup>

On March 7, 2020, New York declared a state of emergency due to the outbreak of the coronavirus disease known as Covid-19.<sup>35</sup> The state of emergency went into effect several weeks *after* the DOL failed to meet the time limitations prescribed by FOIL and its delay prior to the coronavirus was already unreasonable due to the clearly public and readily retrievable nature of the requested documents.

On March 20, 2020, Governor Andrew Cuomo signed an executive order tolling “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding . . . including but not limited to . . . the civil practice law and rules . . . or by any other statute, local law, ordinance, order, rule or regulation, or part thereof” for the period from March 20,

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<sup>31</sup> See Pet. ¶ 26; Ex. 8.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See Pet. ¶ 28.

<sup>35</sup> See Exec. Order No. 202, *Declaring a Disaster Emergency In the State of New York* (Mar. 7, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf).

2020 until April 19, 2020.<sup>36</sup> As of the time of filing of the Petition, subsequent executive orders had extended the tolling provision of the March 20, 2020 executive order through July 6, 2020.<sup>37</sup>

Accordingly, Documented timely commences this Article 78 proceeding to challenge the DOL's improper delay and constructive denial of its request.

### ARGUMENT

FOIL was enacted “[t]o promote open government and public accountability,” and the law “imposes a broad duty on government to make its records available to the public.” *Matter of Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 274 (1996) (citing N.Y. Pub. Off. Law § 84). The express policy underlying FOIL is “[t]he people’s right to know the process of governmental decision making and to review the documents and statistics leading to determinations” because “government is the public’s business[.]” N.Y. Pub. Off. Law § 84; *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 579 (1980) (“[I]t is incumbent upon the state and its localities to extend public accountability *wherever and whenever* feasible.”) (quoting N.Y. Pub. Off. Law § 84) (emphasis in original). The DOL’s conduct over the last seven months, largely consisting of inaction and delay, has frustrated these fundamental statutory goals. The Court should thus order that the DOL promptly grant Documented’s FOIL request because (i) the DOL failed to comply with the statutory time limitations required in responding to a FOIL request and with its own rules and regulations that it promulgated as required under FOIL; and (ii) the DOL’s delay in granting this request was not reasonable under the circumstances because the records are readily retrievable and clearly public. Furthermore, should Documented substantially

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<sup>36</sup> See Exec. Order No. 202.8, Continuing Temporary Suspension and Modification of Laws Related to the Disaster Emergency (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>37</sup> See Exec. Order 202.14, *Continuing Temporary Suspension and Modification of Laws Related to the Disaster Emergency* (April 7, 2020), <https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; Exec. Order 202.28, *Continuing Temporary Suspension and Modification of Laws Related to the Disaster Emergency* (May 7, 2020), <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; Exec. Order 202.38, *Continuing Temporary Suspension and Modification of Laws Related to the Disaster Emergency* (June 6, 2020), <https://www.governor.ny.gov/news/no-20238-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

prevail in its Article 78 petition, it is entitled to an award of attorney's fees and litigation costs pursuant to FOIL.

### I. DOL Has Failed to Comply with FOIL's Statutory Time Limitations

"FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987). FOIL's disclosure provisions are not complicated. "When faced with a FOIL request, an agency *must* either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search." *Beechwood Restorative Care Ctr. V. Signor*, 5 N.Y.3d 435, 440-41 (2005) (emphasis added); N.Y. Pub. Off. L. § 89(3)(a).

If an agency cannot make that required disclosure within five business days, it must still acknowledge receipt of the request in writing in that timeframe. N.Y. Pub. Off. L. § 89(3)(a). That written acknowledgement must also include "a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied[.]" *Id.*

The regulations governing FOIL further mandate that the approximate date provided by an agency in its written acknowledgement not only must be reasonable under the circumstances but also "shall not be more than 20 business days after the date of the acknowledgement[.]" 21 NYCRR § 1401.5(c). If the agency knows that circumstances prevent disclosure within 20 business days, it "shall state, in writing, both 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 in whole or in part." N.Y. Pub. Off. Law § 89(3)(a).

"A failure to comply with the time limitations . . . shall constitute a denial of a request that may be appealed." 21 NYCRR § 1401.5(e). The regulations specify that such constructive denials of a request specifically include instances where an agency: (1) "*fails to respond to a request* within a reasonable time

after the approximate date given or *within 20 business days after the date of its acknowledgement of the receipt of a request*"; (2) "*does not grant a request in whole or in part within 20 business days of its acknowledgment of the receipt of a request and fails to provide the reason in writing explaining its inability to do so and a date certain by which the request will be granted in whole or in part*"; or (3) "responds to a request, stating that more than 20 business days is needed to grant or deny the request in whole or in part and provides a date certain within which it will do so, but *such date is unreasonable under the circumstances of the request.*" § 1401.5(e)(4), (6)-(7) (emphasis added). Upon receipt of an appeal, an agency then must meet another obligation in that it "*shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought.*" N.Y. Pub. Off. Law § 89(4)(a) (emphasis added).

In addition to these statutory time limitations, each agency is required to promulgate its own rules and regulations in conformity with FOIL and "pursuant to such general rules and regulations as may be promulgated by the committee on open government." *Id.* § 87(b). The Department of Labor's own rules and regulations impose the following more stringent time limitations on the agency's response to FOIL requests:

If access to the records sought is neither provided nor denied within five business days after receipt of a request, the Department of Labor shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. *If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed.*

12 NYCRR § 700.7(d) (emphasis added).

**A. DOL Failed to Respond Within 20 Business Days After Acknowledgement as Required Under the COOG Regulations**

The DOL failed to respond within the 20 business day timeline mandated by the regulations implemented by the COOG. 21 NYCRR § 1401.5(e)(4). Despite two follow-up letters from

Documented, the DOL delayed in responding until Jan. 27, 2020.<sup>38</sup> Its delayed response means that it likewise failed under the regulations governing FOIL to “grant a request in whole or in part within 20 business days of its acknowledgment . . . and fail[ed] to provide the reason in writing explaining its inability to do so and a date certain by which the request will be granted in whole or in part.” *Id.* § 1401.5(e)(6). These failures constitute a constructive denial that may be appealed. *Id.* § 1401.5(e).

The COOG has repeatedly opined that failing to respond within 20 business days after the date of acknowledgement with either (i) a grant; (ii) a denial; or (iii) a reason for delay coupled with a date certain by which the request will be granted in whole or in part constitutes a constructive denial. *See, e.g.*, COOG Advisory Opinion FOIL-AO-19646 (Feb. 16, 2018) (“If an agency fails to respond within five business days, within the twenty-business day extension or by the date certain, the law states that the applicant may consider the request to have been denied and has the right to appeal.”); COOG Advisory Opinion FOIL-AO-19603 (July 26, 2017) (“Although the receipt of your request was acknowledged within the requisite time, as of the date of your letter to this office, more than twenty business days had passed since the acknowledgement. That being so, the City failed to comply with law, and your appeal was proper.”); COOG Advisory Opinion FOIL-AO-19241 (Jan. 29, 2015) (“[I]f any of those deadlines is missed - - if the 20 business day extension has come and gone, or if there is no response by the date certain, the applicant may consider the request to have been denied and may, therefore, appeal the denial.”).<sup>39</sup> While interpretations of FOIL contained in the advisory opinions of the COOG are not binding on courts, courts should defer to them unless those interpretations are irrational or unreasonable. *See, e.g., Miracle Mile Assocs. v. Yudelson*, 68 A.D.2d 176, 181 (4th Dep’t 1979) (“Since the committee is the state agency charged with administering the [FOIL], its interpretation of the statute, if not irrational or unreasonable, should be upheld.”) (citing *Sheehan v.*

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<sup>38</sup> *See* Pct. ¶ 24; Ex. 6.

<sup>39</sup> Affirmation of Heather E. Murray (“Murray Aff.”), Ex. A-C. All references to Exhibit letters A-H refer to Exhibits attached to the Murray Aff.

*City of Binghamton*, 59 A.D.2d 808 (3d Dep't 1977)); *Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep't 1999) (stating courts should defer to opinions of the Committee on Open Government).

The DOL's claim that it complied with the time limitations of FOIL because "[i]t has responded within five days and given to you in writing a rational and reasonable explanation for its inability to grant or deny your request within 20 days" therefore fails because it ignores the 20 day time limitation expressly outlined in the regulations governing FOIL. *See* Ex. 8; 21 NYCRR § 1401.5(e)(4). While the DOL extensively quotes from the regulations in support of its argument that it met the time limitations required by FOIL because it did belatedly respond with "a rational and reasonable explanation for its inability to grant or deny your request within 20 days," it ignores Section e(4) entirely, which plainly states that "fail[ing] to respond to a request . . . *within 20 business days after the date of its acknowledgement of the receipt of a request*" constitutes a constructive denial. *See* Ex. 8; 21 NYCRR § 1401.5(e) & (e)(4).<sup>40</sup>

The DOL's position is contrary to the letter and spirit of FOIL, under which an agency's disclosure obligations must be liberally construed and not, as it did here, interpreted contrary to FOIL's plain language to prevent the reasonableness of an agency's delay from being challenged or to

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<sup>40</sup> The 2005 amendments to FOIL likewise state with respect to the 20-day time period that "[i]f an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both 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 in whole or in part." N.Y. Pub. Off. Law § 89(3)(a). While the First Department has ruled that the 20-day period included in the 2005 amendments "does not require either a grant or a denial of a FOIL request within 20 days of the 5-day 'acknowledgment' notice," that specific issue is not before the Court here. *See New York Times Co. v. City of New York Police Dep't*, 103 A.D.3d 405, 406-07 (1st Dep't 2013). However, the reasoning undergirding that decision that the FOIL statute "mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute" relies on case law that predates the 2005 amendments and necessarily fails to take their effect into account. *Id.* Those amendments "clearly are intended to prohibit agencies from unnecessarily delaying disclosure." *See Murray Aff., Ex. D (COOG Advisory Opinion FOIL-AO-17048 (Mar. 17, 2008))*.

permit an agency to deprive a requestor of a determination on the merits of the request and force it to seek relief in court.

**B. DOL Failed to Grant or Deny Access Within 10 Business Days After Acknowledgement as Required Under Its Own Rules and Regulations**

FOIL mandates that each agency promulgate rules and regulations that are in conformity with FOIL and “pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed.” N.Y. Pub. Off. Law § 87(1)(b).

The Department of Labor’s own rules and regulations impose the following time limitations on the agency’s response to FOIL requests:

If access to the records sought is neither provided nor denied within five business days after receipt of a request, the Department of Labor shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. *If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed.*

12 NYCRR § 700.7(d).

The Court of Appeals has recognized that the Legislature may, as it has done here, “endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation.” *Gen. Elec. Capital Corp. v. New York State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004). “In so doing, an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes.” *Id.* Indeed, “the rule has the force and effect of law” “where an agency adopts a regulation that is consistent with its enabling legislation and is not ‘so lacking in reason for its promulgation that it is essentially arbitrary.’” *Id.* “Under deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations.” *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020).

Here, the agency has adopted a regulation that goes beyond the text of the legislation, but is not inconsistent with the statutory language itself or its underlying purposes. Indeed, it furthers FOIL's purpose of "extend[ing] public accountability wherever and whenever feasible" by ensuring that "government is responsive and responsible to the public." N.Y. Pub. Off. Law § 84. Therefore, the DOL should be required to follow the regulation.

It is indisputable that the DOL failed to grant or deny access to the requested records "within 10 business days after the date of acknowledgment of receipt" of the request on Dec. 16, 2019 as required under its rules and regulations. *Id.* In its denial of Documented's appeal, the DOL made no reference to this 10-day time limitation in arguing, contrary to the plain language of Section 700.7(d), that the request had not been constructively denied. Pet. ¶ 26; Ex. 8. "However, an agency may not 'depart from a prior policy sub silentio or simply disregard rules that are still on the books[.]'" *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 338 (S.D.N.Y. 2018), *appeal withdrawn sub nom. Planned Parenthood of New York City, Inc. v. United States Dep't of Health & Human Servs.*, No. 18-3361, 2019 WL 5618617 (2d Cir. June 14, 2019) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). That is precisely what the DOL did here in failing to meet the 10 business day time limitation for the grant or denial of a request in its own rules and regulations. That failure thus constitutes a constructive denial requiring the agency to determine the merits of the request.

### **C. No Provision Under FOIL Allows the DOL to Engage in Multiple Delays by Providing Status Updates**

Agencies are required when acknowledging receipt of a request to provide "a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied[.]" N.Y. Pub. Off. Law § 89(3)(a). If it is known when acknowledging receipt "that circumstances prevent disclosure within 20 business days from the date

of such acknowledgment, [an agency should instead] provid[e] a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part.” 21 NYCRR § 1401.5(c). The DOL effectively attempted to hedge its bets here in its acknowledgment by stating that it “will provide a response or status update within 20 business days.” Pet. ¶ 22; Ex. 4. But nothing in the statute or regulations governing FOIL allows an agency to suggest it may provide a mere status update or to engage in one delay or another. Doing so violates the letter and spirit of FOIL.

The [2005 FOIL] 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.” From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, § 84 of the Freedom of Information Law states that “it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*.” Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure.

*See Murray Aff., Ex. D* (emphasis in original). In remanding a case involving a similar attempt by an agency to provide an “open ended” response that “neither granted nor denied petitioner’s request nor approximated a determination date,” a New York court noted “that respondent’s actions and/or inactions placed petitioner in a ‘Catch 22’ position.” *See Bernstein v. City of New York*, N.Y. L.J., Nov. 7, 1990, at 1 (Sup. Ct., N.Y. Cty.).<sup>41</sup>

The DOL engaged in yet another improper delay tactic when it stated in January 2020 that “[w]e estimate that you will receive a response to your request prior to April 27, 2020.”<sup>42</sup> The equivocal language did not, as required, provide Documented with a definitive “date certain, within a reasonable period under the circumstances of the request, when the request *will be granted* in whole or in part.” 21

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<sup>41</sup> *Murray Aff., Ex. E.*

<sup>42</sup> Pet. ¶ 24, Ex. 6.

NYCRR § 1401.5(c) (emphasis added). In the DOL's denial of Documented's appeal, it argued that it had complied with FOIL's mandate to provide a date certain by stating that it would respond to the request prior to April 27, 2020.<sup>43</sup> That supposedly definitive date certain came and went two months ago, however, with no resulting grant of the request by the agency or attempt to extend the time to respond. An agency's failure to meet its own "date certain" is a further violation of FOIL. *See Cobado v. Benziger*, 163 A.D.3d 1103, 1106–07 (3d Dep't 2018) (finding agency failed to comply with statutory time frames where FOIL officer failed to meet "the dates certain she herself specified in her untimely acknowledgements").

## II. DOL's Delay in Granting the Request Was Not Reasonable Under the Circumstances Because the Records Are Readily Retrievable and Clearly Public

The DOL's failure to determine whether to grant or deny the request within a reasonable time period constitutes a "constructive denial." *Legal Aid Soc'y v. N.Y. State Dep't of Corr. and Comm. Supervision*, 105 A.D.3d 1120, 1121 (3d Dep't 2013); N.Y. Pub. Off. Law Sect. 89(4)(a) ("Failure by an agency to conform to the provisions of [Sec. 89(3)] shall constitute a denial."). Factors considered in determining a reasonable time for granting or denying a request include "the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by an agency, and similar factors[.]" 21 NYCRR § 1401.5(d). An agency violates the overriding constraint that FOIL imposes that the date certain an agency provides be reasonable under the circumstances of the request where, as here, the records are readily retrievable and clearly public. *See, e.g.,* COOG Advisory Opinion FOIL-AO-19355 (Jan. 13, 2016) ("[I]t is unreasonable for an agency to delay its response when requested records can be located with facility and are clearly public.").<sup>44</sup>

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<sup>43</sup> Ex. 8.

<sup>44</sup> Murray Aff., Ex. F.

As a threshold matter, the DOL's proffered reason for the need to extend its time to grant the request from January 2020 to April 27, 2020 should be rejected by this Court because the obligation it claimed that it is laboring under does not exist. The DOL stated that it could not complete a response "due to the volume of requests currently pending with the Department and our obligation to treat each request equally."<sup>45</sup> No such obligation to treat each request equally exists under FOIL. To the contrary, the COOG has repeatedly rejected attempts by agencies to create such an obligation for themselves in responding to FOIL requests. *See, e.g.*, Murray Aff., Ex. F ("That other earlier requests involved records that may be voluminous, difficult to locate, and/or time consuming to review would not, in our view, authorize an agency, as a matter of policy, to deal with requests solely on the basis of the dates of their receipt."); COOG Advisory Opinion FOIL-AO-19671 (Jan. 13, 2018) (rejecting claim that volume of requests was a valid reason for delay because "[i]f it is known that the number and nature of requests for records result in ongoing, routine or repeated delays of up to ninety business days following the receipt of requests, an agency in my view would be failing to meet its responsibilities in complying with the law").<sup>46</sup>

The DOL's delay was unreasonable here because the requested wage and hour records are clearly public and readily retrievable for the following reasons.

*First*, the DOL maintains the types of records that Documented requested, according to its Subject Matter List, so it should have no difficulty locating them.<sup>47</sup> Specifically, the Subject Matter List provides that "Wage and Hour Investigation Files" and "Investigator Operations Manuals" are records in the DOL's possession. Documented seeks such wage and hour compliance data pursuant to its request for wage and hour records uncovered through a query of the Audit and Monetary System,

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<sup>45</sup> Pet. ¶ 24, Ex. 6.

<sup>46</sup> Murray Aff., Ex. G.

<sup>47</sup> New York State Department of Labor Subject Matter List, NYS DOL, *available at* <https://www.labor.ny.gov/secure/pdf/subject-matter-list.pdf> (last updated Feb. 1, 2020).

including specific case reports.<sup>48</sup> Documented's request for written definitions for terms used in certain columns of the Audit and Monetary System database, if they exist, likely are housed in the investigator operations manual.<sup>49</sup>

*Second*, the DOL has previously produced the same type of wage and hour records being requested here, which is demonstrated by the FOIL excerpt provided in Exhibit A to Documented's request.<sup>50</sup> Exhibit A on its face reflects "search results of a query of the Wage and Hour Audit and Monetary System," which were requested here.<sup>51</sup>

*Third*, the DOL's federal counterpart already publicly posts its wage and hour compliance data, including information regarding whether any wage theft violations were found, the back wage amount, the number of employees due back wages, and civil monetary penalties assessed.<sup>52</sup> The federal Wage and Hour division also "makes the following materials available: Final opinions made in the adjudication of cases . . . and Administrative staff manuals and instructions to staff (Field Operations Handbook)."<sup>53</sup> Documented seeks the same type of wage and hour compliance data pursuant to its request along with certain specific case reports and written definitions that it expects would be located in an investigator operations manual.<sup>54</sup> New York courts deciding an issue under FOIL routinely look to the interpretation of analogous provisions under the federal Freedom of Information Act ("FOIA") because many FOIL provisions were patterned after FOIA. *See, e.g., Lesber v. Hynes*, 19 N.Y.3d 57, 64 (2012).

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<sup>48</sup> Pet. ¶ 21; Ex. 3.

<sup>49</sup> To the extent any requested definitions do not already exist at the agency in written form, Documented withdraws its request for them.

<sup>50</sup> Pet. ¶ 21; Ex. 3.

<sup>51</sup> *Id.*

<sup>52</sup> Wage and Hour Compliance Action Data, U.S. DOL, *available at* [https://enforcedata.dol.gov/views/data\\_summary.php](https://enforcedata.dol.gov/views/data_summary.php) (last accessed Jun. 29, 2020).

<sup>53</sup> Les A. Schneider & J. Larry Stine, *Disclosures under Freedom of Information Act*, 2 Wage and Hour Law § 19:31 (citing 29 C.F.R. § 70.4(a)).

<sup>54</sup> Pet. ¶ 21; Ex. 3.

Because “an agency, to give effect to the intent of the law, must disclose the records that are easy to locate and clearly public ‘whenever feasible,’” the DOL has no valid reason for any further delay in disclosing these clearly public and readily retrievable documents here. *See* COOG Advisory Opinion FOIL-AO-14137 (July 14, 2003).<sup>55</sup>

### III. Documented is Entitled to an Award of Attorney’s Fees and Litigation Costs if It Substantially Prevails

Should Documented “substantially prevail” in this proceeding, this Court should award attorney’s fees and other litigation costs. FOIL provides, in pertinent part, that where (1) a petitioner has “substantially prevailed” in an Article 78 proceeding to obtain the information sought; and (2) “the court finds that the agency had no reasonable basis for denying access,” the court “*shall* assess, against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by [the petitioner.]” N.Y. Pub. Off. Law § 89(4)(c) (emphasis added). The legislature amended FOIL in 2017 to provide for mandatory attorney’s fees in certain instances to “encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding” because “[o]ften, people simply cannot afford to take a government agency to trial to exercise their right to access public information.” *Reiburn v. New York City Dep’t of Parks & Recreation*, 171 A.D.3d 670, 671 (1st Dep’t 2019) (quoting 2017 NY Assembly Bill A2750)). For all the reasons described above, including that the records are clearly public and readily retrievable, the DOL had no reasonable basis for denying access.<sup>56</sup>

A petitioner “substantially prevails” in a FOIL proceeding when it receives all the information that it requested and to which it is entitled in response to the underlying FOIL litigation. *See Cobado*, 163

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<sup>55</sup> Murray Aff., Ex. H.

<sup>56</sup> In the alternative, if the court finds that there was a basis for denying access, the Court should exercise its discretion to grant attorney’s fees and costs under FOIL because, as demonstrated above, “the agency failed to respond to a request . . . within the statutory time.” N.Y. Pub. Off. Law § 89(4)(c).

A.D.3d at 1106. “This does not mean that petitioner received every page of every document sought in its request, but that it obtained the ‘full and only response available pursuant to the statute under the circumstances.’” *Lansner & Kubitschek v. New York State Office of Children & Family Servs.*, 64 Misc. 3d 438, 454 (Sup. Ct., Albany Cty. 2019) (quoting *Matter of Legal Aid Socy.*, 105 A.D.3d at 1122); *see also Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 79 (2017) (awarding fees despite agency’s requested redactions being upheld because “petitioner’s legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request”). Should Documented substantially prevail, thus satisfying the statutory prerequisites for fees, it is entitled to such an award because “a court’s assessment of reasonable counsel fees and litigation costs is mandatory.” *Lansner & Kubitschek*, 64 Misc. 3d at 454–55.

### CONCLUSION

For all of the foregoing reasons, the Petitioner Documented respectfully requests that this Court grant its petition seeking that the Court (1) order the DOL to promptly produce improperly withheld records; (2) award costs and fees incurred in obtaining the DOL’s belated compliance with this request for public records; and (3) grant such other and further relief as the Court deems proper.

Dated: July 6, 2020  
Ithaca, NY

Respectfully submitted,  
**CORNELL LAW SCHOOL  
FIRST AMENDMENT CLINIC**

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