

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

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HILARY MILLER,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF FINANCIAL
SERVICES, and BENJAMIN M. LAWSKY, in his official
capacity as Superintendent of the New York State Department
of Financial Services,

Index No. 101118/2014
Hon. Joan Lobis

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules.

-----X
**MEMORANDUM OF LAW IN SUPPORT OF STATE
RESPONDENTS' CROSS-MOTION TO DISMISS THE
PETITION**

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Preliminary Statement

Petitioner Hilary Miller ("Petitioner") brings this proceeding pursuant to Article 78 of New York Civil Practice Law and Rules ("CPLR") against respondents the New York State Department of Financial Services (hereinafter "the Department" or "DFS") and Benjamin M. Lawsky, in his official capacity as Superintendent of Financial Services (collectively "State Respondents"), seeking an order: (a) directing State Respondents to provide petitioner with all records responsive to petitioner's June 17, 2014 requests for DFS records pursuant to the New York Freedom of Information Law ("FOIL"); (b) ordering, in the alternative, an *in camera* review of the responsive records in the event that such a review would better inform the Court as

to the content and form of the records requested by petitioner, as well as the need for redactions; and (c) awarding petitioner's attorneys' fees.

This memorandum of law is submitted on behalf of the State Respondents in support of their cross-motion to dismiss the petition. State Respondents' denial was reasonable, neither arbitrary nor capricious, and was performed in full compliance with the State's Public Officers Law ("POL") as the material sought was compiled for law enforcement purposes, is necessary to an on-going investigation and would interfere with such law enforcement investigation if revealed. The materials sought are further protected from disclosure by the intra-agency deliberative exemption.

Statement of Facts

The Court is respectfully referred to the accompanying affirmation of Max Dubin ("Dubin Aff."), sworn to December 3, 2014, for a complete recitation of the facts and circumstances underlying this controversy. However, the following facts are repeated for the convenience of the Court.

A. THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES AND ITS FINANCIAL FRAUDS AND CONSUMER PROTECTION DIVISION

DFS's legislative mandate is: (i) to ensure the safe and sound conduct of the businesses under its supervision; (ii) to protect the public interest; (iii) to prevent unsound destructive competition; (iv) to maintain public confidence in the banking and insurance systems; (v) to protect the interests of depositors, creditors and shareholders; and, (vi) to promote the reduction and elimination of fraud, criminal abuse and unethical conduct by, and with respect to, banking,

insurance and other financial services institutions and their customers. *See* New York Financial Services Law (“FSL”) §102. Dubin Aff., ¶ 4.

The Department’s Financial Fraud and Consumer Protection Division (“FFCPD”) was formed pursuant to FSL § 401 to be “a qualified agency”, as defined in New York Executive Law § 835, that can “enforce the provisions of the [FSL] and article four of the insurance law and article II-B of the banking law.” *See* FSL § 403(c). Qualified agencies have access, and contribute information, to state central data facilities that contain criminal records, fingerprints and photographs, and can access certain sealed records in connection with an investigation. *See* New York Executive Law § 837(6), New York Criminal Procedure Law § 160.58. Dubin Aff., ¶ 5.

Pursuant to the FSL, the jurisdiction of FFCPD includes “[t]he responsibility and power to investigate any specific frauds or misconduct enumerated in the [FSL], the banking law, the insurance law and other laws pursuant to which the superintendent has investigatory or enforcement powers.” FSL § 404(b). FFCPD also has the authority to assist other entities in an investigation involving a violation of law. *Id.* Pursuant to this authority, DFS often shares information with other law enforcement agencies to assist in criminal and civil investigations. Dubin Aff., ¶ 6.

The Superintendent “is authorized to establish within [FFCPD] one or more units designated for the purpose of investigating and preventing fraud and other criminal activity in certain specified areas of the banking, finance and insurance industries” FSL § 403(d). Dubin Aff., ¶ 7. The FSL further authorizes FFCPD to “undertake an investigation” in the “enforcement of relevant statutes and regulations” based on a “reasonable suspicion that a person

or entity has engaged, or is engaging, in fraud or misconduct with respect to the banking law, the insurance law, the provisions of [the FSL] or other laws pursuant to which the superintendent has investigatory or enforcement powers.” FSL § 404(b). Dubin Aff., ¶8.

B. PAYDAY LENDING INVESTIGATION

In response to consumer complaints concerning high-interest payday loans, the Superintendent launched an investigation, led by FFCPD, into the online payday lending industry in February 2013. Payday loans are short-term, small-dollar loans, typically structured as an advance on a consumer’s next paycheck or other income source. To date, the Department’s investigation has focused primarily on online lenders who attempt to circumvent New York’s usury laws¹ by offering payday loans to New York consumers over the Internet. Dubin Aff., ¶ 9.

While payday loans are marketed as being intended for short-term emergencies, they often trap consumers in a vicious cycle of long-term debt because of the misleading repayment structures and exorbitant interest rates. Consumers often believe that their payments apply to the repayment of *principal*, but later learn that their payments only apply to *interest* for several months. They pay such high amounts in finance charges that it becomes difficult, and sometimes impossible, for them to ever repay the loans.² Dubin Aff., ¶ 11.

¹ Under New York General Obligations Law § 5-501 and New York Banking Law § 14-a, it constitutes civil usury for unlicensed lenders, such as online payday lenders, to make loans or forbearances in amounts under \$250,000 with interest rates exceeding 16 percent per annum. Under New York Penal Law §§ 190.40 and 190.42, charging, taking or receiving money for a loan with an interest rate exceeding 25 percent per annum in New York is criminal usury.

² In one complaint reviewed by DFS, a consumer residing in Buffalo, New York took out a \$400 payday loan online in April 2013. After months of having biweekly payments automatically debited from her bank account, she realized that she had already repaid \$620, almost none of which had been applied to pay off the loan principal. The interest rate on her loan was 782%. When she tried to stop the automatic debits after learning that her loan was illegal, the

C. INVESTIGATION FINDINGS

Through its investigation to date, DFS learned that a typical prospective New York borrower finds offers for payday loans online and either applies for a loan directly on a payday lender's website or fills out an application with a lead generator who then sells the prospective borrower's application to a lender. To complete an application, a prospective borrower provides their address and bank account information and authorizes the online payday lender to electronically withdraw funds directly from their bank account when payments are due. The borrower then signs the loan agreement electronically. Dubin Aff., ¶ 13. The online payday lender subsequently authorizes the bank where it maintains its merchant bank account, referred to as an Originating Depository Financial Institution ("ODFI"), to transmit the loan proceeds to the borrower's bank account. The borrower's bank is called the Receiving Depository Financial Institution ("RDFI"). Dubin Aff., ¶ 14.

In most cases, the borrower receives the payday loan proceeds when the ODFI sends the funds to the borrower's bank account by issuing a credit to the borrower's account via the electronic payments network called the Automated Clearing House ("ACH") network.³ A private, self-regulatory association called NACHA is primarily responsible for regulating the ACH network. Dubin Aff., ¶ 16. When payday loan re-payments are due, the ODFI withdraws funds from the borrower's bank account maintained by the RDFI by issuing a debit instruction over the

lender continued debiting her account until her only recourse was to close her bank account to stop the debits. This is but one of the many cases where New York consumers have been harmed by a payday loan. Dubin Aff., ¶ 11.

³ While ACH transactions appear to be the primary means by which online payday lenders provide loan proceeds to, and obtain loan repayments from New York consumers' bank accounts, some payday lenders may also disburse loan funds and receive payments through debit card networks or may collect payments through remotely created checks.

ACH network. The ODFI then deposits the loan payment funds into the payday lender's bank account. Dubin Aff., ¶ 17.

The ACH network transmits only limited information to the RDFI when processing debits and credits – including information identifying the ODFI, coding that can identify the originating lender, the amount of money to be transferred, and the borrower's account number – but not the full terms of the loan, such as the interest rate. Thus, the ACH network's current configuration does not provide RDFIs with sufficient information to determine whether an ACH transfer is part of an illegal transaction to deposit or collect on a usurious loan. Dubin Aff., ¶ 18.

ODFIs are primarily responsible for ensuring that their customers, including payday lenders, comply with the NACHA Rules. *See* NACHA Operating Rules & Guidelines: A Complete Guide to the Rules Concerning the ACH Network, OR §§ 2.2.1.1; 2.2.1.2; 2.2.2 (2013). Merchants, such as payday lenders, contractually agree with the ODFIs not to originate entries that violate the laws of the United States. *See id.* § 2.2.1.1(b), (c); 2.2.1.2(b), (c); 2.2.2.1; 2.3.1. NACHA Rules also require that ODFIs represent and warrant that ACH debits are properly authorized. *See id.* §§ 2.4.1.1. An ACH debit is not authorized if it is to collect on a loan that is void under law. *See id.* §§ 2.3.2.3; 8.49. Since usurious loans are illegal and void under New York law, authorizations to collect on such loans through the ACH network do not constitute valid authorizations under NACHA Rules and should not be processed by banks. Dubin Aff., ¶ 19; Exhibit A.

In addition to the ACH network, payday lenders also transact payday loan activity with consumers through debit networks, such as the Visa and MasterCard networks. Merchant payday lenders who transmit funds via debit card must work with their banks, known in the debit

network as “Acquiring Financial Institutions,” to process debit card transactions through the debit card networks. Acquiring Financial Institutions that participate in the debit card networks are prohibited from transmitting illegal debit card transactions.⁴ Dubin Aff., ¶ 21.

D. CEASE-AND-DESIST LETTERS

In early 2013, DFS began gathering evidence of lenders offering and making usurious payday loans to New York consumers. On August 5, 2013, the Superintendent sent cease-and-desist letters to 35 online payday lenders about which DFS had evidence of offering and making loans to New York consumers at interest rates far exceeding both New York’s statutory civil and criminal usury caps. These letters directed the online payday lenders to stop offering and originating illegal payday loans in New York and requested written confirmation that the lenders had stopped soliciting and providing such loans to New York consumers. Dubin Aff., ¶ 21; Exhibit D. On April 29, 2014, the Superintendent sent cease-and-desist letters to 20 additional online payday lenders that were lending to New Yorkers at interest rates well in excess of both New York’s civil and criminal usury laws. Dubin Aff., ¶ 22; Exhibit E.

On June 16, 2014 Governor Andrew Cuomo announced the creation of DFS’s Database which contains information about payday lending companies that have been subject to DFS actions based on evidence of illegal online payday lending to New York consumers. Dubin Aff., ¶ 23.

⁴ Acquiring Financial Institutions in the Visa network “must comply with applicable laws or regulations and a Transaction must be legal in both the Cardholder’s jurisdiction and the Merchant Outlet’s jurisdiction.” (Visa International Operating Regulations ID#: 151013-010410-000038 (October 15, 2013)). Selected Excerpts from Visa Debit Network Rules are attached as Exhibit B. Acquiring Financial Institutions that participate in the MasterCard network that are notified that a merchant is processing illegal transactions and do not promptly cause the illegal transactions to cease are subject to certain remedial action including assessments. (MasterCard Rules, Rule 5.11.7 (May 15, 2014)). See Selected Excerpts from MasterCard Debit Network Rules. Dubin Aff., Exhibit C.

E. PAYDAY LENDER DATABASE

As part of the continuing investigation into illegal payday lending, DFS's Database can be used by banks and other financial institutions participating in the ACH network and other electronic payment networks, including debit networks, to help stop illegal payday lending to New York consumers. Dubin Aff., ¶ 24. While banks and other financial institutions have certain responsibilities relating to illegal or unauthorized transactions that pass through accounts maintained at their institutions, the electronic payment systems do not identify, on their face, electronic payment transactions associated with illegal payday lending. Consequently, illegal electronic funds transactions made to New York consumers' bank accounts in connection with usurious loans can go undetected in the absence of the additional information. Despite this information gap, as discussed above, ODFIs, RDFIs, and Acquiring Financial Institutions have responsibilities to prevent the processing of illegal transactions through their payment networks. DFS decided, therefore, that its investigation into illegal payday lending should include a database containing certain critical information regarding payday lenders and their illegal consumer loan activity. This database could assist the Department in its investigation, as well as banks and other financial institutions in meeting their ongoing due diligence obligations to identify and prevent illegal payday lender transactions, and to protect consumers from abusive financial practices. Dubin Aff., ¶ 25.

To that end, DFS began compiling information gathered during its ongoing investigation into payday lenders which could help banks and other financial institutions identify lenders who were lending illegally to New York consumers, including information that could help financial institutions identify whether payday lenders in the Database are either the institutions' own

customers or are transacting with their consumer accountholders. The Database is, and will continue to be, populated with new information that DFS gathers in its ongoing investigation. As part of this ongoing investigation, DFS staff has engaged, and will continue to engage, in internal deliberations to determine which lenders as well as what critical financial and other information to include in the Database. Dubin Aff., ¶ 26. The Database, as well as all related forms and other documents relating to it are comprised of information that DFS and, in particular, FFCPD in its investigatory and law enforcement capacity, has discovered and/or developed to help identify potentially illegal lenders and transactions. This information in the Database is being updated as DFS's investigation proceeds. Dubin Aff., ¶ 28.

DFS requires banks and other financial institutions participating in the Database to sign a "Payday Lender Database Confidentiality and User Agreement" (the "Agreement"). The Agreement has two primary purposes: (i) to protect the confidentiality of the Database and the information contained therein, and (ii) to prescribe limited, permissible, but not required, uses for the Database. The Agreement requires institutional users to agree to robust confidentiality safeguards and controls, and only institutions that agree to be bound by the Agreement's terms and are approved by DFS can use and access the Database. To date, Bank of America, Citibank, JPMorgan Chase, M&T Bank and Valley National Bank have all executed the Agreement and agreed to use the Database. Dubin Aff., ¶ 27.

The Agreement, the titles of the Database fields, and the information contained therein indicate what data the Department is using to identify illegal payday loan transactions in its ongoing law enforcement investigations. Were the Department required to make public the manner in which its investigators track the lenders, payday lenders could easily make changes to

their financial and operational business practices so as to avoid detection within the electronic payment networks. In doing so, the lenders could avoid scrutiny of their unlawful lending practices by law enforcement agencies like FFCPD, and thereby frustrate FFCPD's current efforts. Dubin Aff., ¶ 29.

The information comprising the Database was developed by attorneys and investigators working at DFS as part of its ongoing investigation into illegal payday lending. The Database was, and continues to be developed and refined through deliberations and communications among DFS staff as information is discovered pursuant to the investigation. Dubin Aff., ¶ 30. In addition, while DFS relies on the information included in the Database for its ongoing investigation of payday lenders, other civil or criminal law enforcement agencies to which DFS may refer cases relating to illegal payday loans may also rely on such information. Dubin Aff., ¶ 31.

F. THE PETITIONER'S REQUEST FOR INFORMATION

In an email dated June 17, 2014, Petitioner made an itemized request for certain documents pursuant to FOIL, POL § 87. Specifically, Petitioner requested copies of the following DFS records: (1) "The database itself (i.e., the list of illegal lenders and/or other data promulgated by DFS that may be queried using the tool)" ("Request 1"); (2) "A working copy of the tool" ("Request 2"); (3) "Documents relating or referring to how lenders were selected for inclusion in the database, including all correspondence and memoranda describing the criteria for inclusion of lenders in the database" ("Request 3"); (4) "All forms, manuals, documentation, flowcharts, source code, and other documents relating to the tool" ("Request 4"); (5) "All policies and procedures relating to the database and/or the tool, including procedures for

updating the database” (“Request 5”); (6) “All agreements entered into to date with banks and with other third parties relating to the database and/or to the tool” (“Request 6”); (7) All contracts and orders placed with third parties relating to the development of the tool” (“Request 7”); and (8) “Documents identifying employees of DFS who were responsible for the development of the tool and/or compilation of the database” (“Request 8”). Dubin Aff., ¶ 33.

On June 18, 2014, DFS wrote to Petitioner to notify him that his FOIL request had been received, and indicated that a response would be completed within twenty business days from the date of this written acknowledgement. Dubin Aff., ¶ 34. On August 4, 2014 Petitioner sent a letter to the DFS FOIL Appeals Officer indicating that, because he had not received a response to his June 17, 2014 FOIL request, he considered the request for records as having been effectively denied. He stated that he was appealing the denial of access to the records he sought. Dubin Aff., ¶ 35.

DFS responded to Petitioner in writing on August 22, 2014 and stated that due to DFS’s ongoing investigation into civil and criminal illegal payday lending, it was not providing records for Requests 1 through 6 pursuant to POL § 87(2)(e) because the records are being compiled for law enforcement, as well as other purposes, and disclosure would interfere with law enforcement investigations or judicial proceedings. There were no records responsive to Request 7 and in response to Request 8, DFS provided a list of names of employees of DFS who were responsible for the development of the Database. Dubin Aff., ¶ 36. Petitioner filed this Article 78 proceeding seeking to obtain the responsive records that were not provided in response to his FOIL request or, in the alternative, seeking *in camera* review of the responsive records if such review would

better inform the Court of the content and form of the requested records and the need for redaction.

Argument

The denial of Petitioner's FOIL request cannot be disturbed unless it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" CPLR § 7803(3). Petitioner repeatedly described the Database as being a "blacklist." *See* Verified Petition, ¶¶ 11, 15-16. Besides being false, Petitioner's colorful rhetoric distorts the nature of this proceeding. This is an action pursuant to FOIL and the issue before the Court is whether the Database is subject to public disclosure. It is not as the material sought fall squarely within two (2) statutorily created exemptions to disclosure: the law enforcement exemption and the intra-agency deliberative exemption.

As fully explained in the Dubin affirmation, the Database is an informational tool to assist DFS in identifying and ultimately stopping illegal payday lending in New York. DFS's actions in this regard are well within its legislative mandate, which includes promoting the reduction and elimination of fraud, criminal abuse and unethical conduct by, and with respect to, among others, financial institutions and their customers.

As is further explained in the Dubin affirmation, the Database is also an informational tool that can be used by banks to aid them in carrying out their existing obligations to prevent the unlawful use of electronic payment networks. DFS neither requires any financial institution to use the Database nor to take any specific action regarding lenders included in the Database.

While the state legislature established a general policy favoring disclosure under FOIL, this policy is not unfettered. *See Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). For

instance, FOIL permits nondisclosure of records (*see* POL § 87(2)(a)) that were compiled for law enforcement purposes if disclosure would interfere with an investigation or judicial proceeding or deprive a person of a right to a fair trial or impartial adjudication. *See* (POL § 87(2)(e)(i); *In the Matter of the New York Times v. City of New York Fire Department*, 4 N.Y.3d 477, 483-84. Non-disclosure is also permissible for inter- or intra-agency materials which are neither (i) statistical or factual tabulations or data, nor (ii) instructions to staff that affect the public. *Id.* § 87(2)(g); *Matter of New York Times*, 4 N.Y.3d at 484. As demonstrated more fully below, both of these exemptions apply to this case.

POINT I

THE RECORDS SOUGHT WERE COMPILED FOR LAW ENFORCEMENT PURPOSES AND WOULD INTERFERE WITH AN INVESTIGATION IF DISCLOSED

“[T]he purpose of the Freedom of Information Law is **not to enable persons** to use agency records to frustrate pending or threatened investigations nor **to use that information to construct a defense to impede a prosecution.**” *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 (1979) (emphasis added). Thus, FOIL exempts from disclosure records “compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings.” POL § 87(2)(e)(i). The law enforcement exemption applies to the enforcement of civil and administrative law by state agencies. *See Matter of Pride Int’l Realty, LLC v. Daniels*, 4 Misc. 3d 1005(A) (Sup. Ct. N.Y. Cnty. 2004). Its applicability is not limited to criminal justice enforcement agencies, as thus limiting the phrase “‘law enforcement purposes’ . . . could substantially hamper the important responsibilities of

administrative agencies and the New York State Attorney General to enforce civil law and administrative regulations” *Id.*

The documents that Petitioner seeks in his FOIL request were compiled for law enforcement purposes. DFS, and particularly FFCPD in its law enforcement capacity (*see* Dubin Aff. ¶¶ 5-8), discovered and compiled the information in the Database during its ongoing investigation into online payday lending. Dubin Aff., ¶¶ 26, 28, 30. In addition, DFS may refer certain lenders and/or information in the Database to other civil or criminal law enforcement agencies, which would also rely on the Database and the information contained therein for law enforcement purposes. Dubin Aff., ¶¶ 6, 31. The Database and the information it contains can help DFS, and potentially other law enforcement agencies, identify illegal lenders and illegal transactions passing through electronic payment networks, in furtherance of DFS’s ongoing law enforcement efforts. Dubin Aff., ¶ 28. These efforts are well within the Department’s legislative mandate to promote the reduction and elimination of fraud, criminal abuse and unethical conduct by, and with respect to, financial services institutions and their customers. Dubin Aff., ¶ 4.

Furthermore, public disclosure of the documents that Petitioner seeks would interfere with an ongoing law enforcement investigation. The information gathered for inclusion and contained in the Database, the Database fields, documents relating to the Database, and the Agreement indicate what data DFS uses to identify illegal payday loan transactions in its ongoing investigation. Dubin Aff., ¶ 29. Making any of this information publicly available would therefore interfere with DFS’s investigation because “payday lenders could easily make changes so as to avoid detection” of illegal lending practices by DFS or other law enforcement agencies. Dubin Aff., ¶ 29.

While DFS has been careful not to disclose critical information regarding its payday lending investigation for the reasons discussed, it has publicly disclosed limited information that would not interfere with the investigation, including the identities of all of the lenders against which it has issued cease-and-desist letters relating to illegal payday lending in New York. *See Dubin Aff.*, ¶ ¶ 21-22. However, disclosure of the Database and documents relating to it, including records that contain deliberations regarding which payday lenders that have been subject to DFS action to include in the Database, would reveal DFS's investigative material and analysis, which would impede its ongoing investigation. *See Dubin Aff.* ¶ 30.

In sum, reliance on the law enforcement exemption, which permits the Department to preclude disclosure, is proper here. *Fink*, 47 N.Y.2d at 572. Accordingly, the State Respondents' determination should be upheld.

POINT II

THE RECORDS SOUGHT ARE EXEMPT FROM DISCLOSURE AS ADMINISTRATIVE MATERIALS PRODUCED DURING THE DELIBERATIVE PROCESS

FOIL exempts from disclosure “inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; [or] (iv) external audits” POL § 87(2)(g). The purpose underlying the intra-agency exemption is “to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers.” *In the Matter of Gould v. New York City Police Department*, 89 N.Y.2d 267, 276 (1996).

The intra-agency exemption applies to “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” *In the Matter of Howard I. Smith v. New York State Office of the Attorney General*, 116 A.D.3d 1209, 1210 (3d Dep’t. 2014). Records are to be considered “intra-agency materials” if they represent “predecisional, nonfinal discussions and recommendations by employees within the agency used to assist the decision makers in formulating a determination.” *Id.* at 1212 (court protected from production materials reflecting the process by which the Office of the Attorney General formulated statements and interactions with the press regarding on-going litigation).

The materials in question fall within the intra-agency exemption of Public Officers Law § 87(2)(g). The Database, the information gathered in connection with its creation, the information populating it, and all documents relating to it are intra-agency materials that reflect the Department’s deliberative process. DFS attorneys and investigators have, and continue, to develop and compile information to be included in the Database, including what data fields and lenders should be incorporated therein, “through deliberations and communications among DFS staff as part of” its ongoing payday lending investigation. *Dubin Aff.*, ¶¶ 26, 28-30. Because this information is subject to an exemption from disclosure, the Court should uphold State Respondents’ determination.

POINT III

**PETITIONER IS NOT ENTITLED TO ATTORNEYS' FEES
SINCE THE AGENCY HAD A REASONABLE BASIS FOR DENYING
ACCESS TO THE MATERIALS SOUGHT**

As demonstrated above, DFS' reliance on each of the exemptions discussed is based upon a reasonable reading of the law. Thus, Petitioner is not entitled to any attorneys' fees. *Cf.* POL § 89(4)(c)(i); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 (1979).


CONCLUSION

For the foregoing reasons, State Respondents respectfully request that their decision denying Petitioner's FOIL request be affirmed and the petition be dismissed in its entirety. The materials withheld fall squarely within two (2) statutorily recognized exemptions from FOIL disclosure: the law enforcement exception and the intra-agency deliberative privilege. Further the Department's administrative decision to withhold such materials pursuant to these FOIL exemptions, was neither affected by an error of law, arbitrary and capricious, nor an abuse of discretion.

Dated: December 3, 2014
New York, New York

Respectfully submitted,

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