

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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APPLICATION OF CAPITAL NEWSPAPERS DIVISION :  
OF HEARST CORPORATION and J. ROBERT PORT, :

Petitioners, :

for a Judgment Under Article 78 of the Civil Practice :  
Law and Rules, :

Index No.:  
RJI No.: 4001-06

- against - :

THE HON. JOSEPH L. BRUNO, in his official capacity :  
as Senate Majority Leader of the NEW YORK STATE :  
SENATE and Temporary President of the Senate, THE :  
HON. SHELDON SILVER, in his official capacity as :  
Assembly Speaker, NEW YORK STATE ASSEMBLY, :  
STEVEN M. BOGGESS, in his official capacity as :  
Secretary of the Senate, and SHARON WALSH, in her :  
official capacity as Assembly Records Access Officer, :

**AFFIRMATION OF**  
**JOAQUIN EZCURRA IN**  
**SUPPORT OF MOTION FOR**  
**LEAVE TO FILE AMICI**  
**CURIAE BRIEF**

Respondents. :  
X

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Joaquin Ezcurra, an attorney admitted to practice in the Courts of the State of  
New York, affirms the following statements to be true under the penalties of perjury  
pursuant to CPLR § 2106.

1. I am an attorney associated with the firm of Morgan, Lewis & Bockius  
LLP, located at 101 Park Avenue, New York, NY 10178. I file this affirmation in  
support of the Motion for Leave to File an Amici Curiae Brief on behalf of the Brennan  
Center for Justice, the Citizens Budget Commission, the Citizens Union of the City of  
New York, Common Cause New York, the League of Women Voters of New York State,  
and the New York Public Interest Research Group (collectively, the “Public Interest  
Amici”). Morgan, Lewis & Bockius is counsel to the Public Interest Amici.

2. The Brennan Center for Justice, a part of the New York University School of Law, has its principal place of business at 161 Avenue of the Americas, 12th Floor, New York, NY 10013-1205. Its mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms.

3. The Citizens Budget Commission, a nonprofit organization, has its principal place of business at One Penn Plaza, Suite 640, New York, NY 10119-0602. Its mission is to influence constructive change in the finances and services of New York City and New York State government. It does so through nonpartisan research and analysis of budget and financial data.

4. The Citizens Union of the City of New York, an independent, nonpartisan organization, has its principal place of business at 299 Broadway, Suite 700, New York, NY 10007-1976. Its mission is to promote good government and political reform in the city and state of New York. Founded in 1897, the Citizens Union for more than a century has served as a watchdog for the public interest and an advocate for the common good. It works to ensure fair elections, clean campaigns, and open, effective government that is accountable to the citizens of New York.

5. Common Cause/New York is the New York affiliate of Common Cause, Inc., a nonpartisan, nonprofit organization which has been engaged for more than 35 years as a “citizens’ lobby” representing the public interest on issues of governmental openness and accountability. Common Cause was instrumental in supporting the adoption of both New York State’s Freedom of Information Law (“FOIL”) and the federal Freedom of Information Act (“FOIA”) and has consistently been engaged both in

defending their application, and in utilizing information gathered through FOIA to publish reports on corruption, the influence of money in politics, and the need to reform electoral and legislative process. Common Cause/New York at present represents over 16,000 participating members residing throughout New York State and has its principal place of business at 155 Avenue of the Americas, 4th Floor, New York, NY 10013-1507.

6. The League of Women Voters of New York State, a nonpartisan political organization, has its principal place of business at 35 Maiden Lane, Albany, NY 12207. “The League of Women Voters of the United States believes that democratic government depends upon the informed and active participation of its citizens at all levels of government. The League further believes that governmental bodies must protect the citizen’s right to know by giving adequate notice of proposed actions, holding open meetings and making public records accessible.” (*Impact On Issues*, 2002-04, p.14, LWVUS). In support of this position, the League of Women Voters of New York State advocated diligently for the passage of New York State’s FOIL and continues to support efforts to enforce such law.

7. The New York Public Interest Research Group (“NYPIRG”), a nonpartisan, nonprofit organization, has its principal place of business at 9 Murray Street, New York, NY 10007 and for more than 25 years has maintained a full time lobbying office in Albany, currently located at 107 Washington Avenue, Albany, NY 12210. It is New York State’s largest student directed research and advocacy nonprofit organization primarily focused on environmental preservation, consumer protection, government reform and public health issues. NYPIRG advocated for passage of the New York’s original Freedom of Information Law in 1974 and its overhaul to substantially strengthen

the law in 1977. NYPIRG has monitored implementation of FOIL at the state and local levels, litigated under FOIL to obtain records in the public's interest and issued reports on FOIL compliance. NYPIRG's most recent FOIL report, *Access Denied: The State of New York Government's Openness* (December 2004), surveyed FOIL compliance by 142 state agencies.

8. As nonprofit organizations that represent the public interest, the Public Interest Amici represent concerned citizens of New York State who wish to see that their duly elected government remains accountable to the people of the State. Through public education and advocacy, the Public Interest Amici work to improve government's responsiveness to the people. To that end, the Public Interest Amici maintain an interest in ensuring openness in government. The Public Interest Amici have therefore moved for leave to file a brief with this Court as *amici curiae*. A copy of the proposed brief is attached hereto as Exhibit A.

9. The Public Interest Amici view the current state of New York State's legislative process as opaque and unresponsive to the people whom the legislators are supposed to serve. These problems are chronicled in the Brennan Center's report on this subject, entitled "The New York State Legislative Process: An Evaluation and Blueprint for Reform."

10. The Public Interest Amici view New York State's FOIL as an essential tool for keeping the legislature accountable to its constituents by ensuring the transparency of the legislative process.

11. If Petitioners' FOIL request in this case were to be denied, the Public Interest Amici are keenly concerned that the legislative process will become more

secretive, fueling public cynicism and disengagement. Legislators will feel free to deny FOIL requests with little concern for their accountability.

12. This shroud of secrecy runs directly against the Public Interest Amici's exhortation for greater openness and accountability of the New York State legislature to the people whom the Public Interest Amici represent.

13. The inability to obtain copies of those legislative records for which FOIL mandates public availability would also hinder the Public Interest Amici's ability to advocate effectively for the type of government that is so desperately needed.

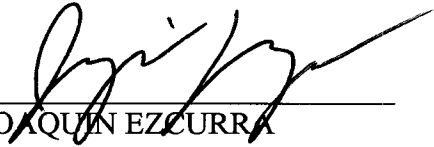
14. The need to maintain an open government that is accountable to the citizens of New York and the ability of organizations such as the Public Interest Amici to advocate for such a government are questions of important public interest that the attached *amici curiae* brief specifically addresses.

15. All parties to this action have consented to the filing of the Public Interest Amici's *amici curiae* brief. The instant motion has the same return date as that of the oral argument in order to allow the *amici curiae* brief to be considered concurrently with Petitioners' action. Because the Public Interest Amici's brief is attached and the return date of this Motion is the same as the date of oral argument in this case, the application will not delay this action.

16. For all of the foregoing reasons and those set forth in the accompanying brief, the Public Interest Amici respectfully request that this Court grant their motion for leave to file an *amici curiae* brief in support of Petitioners' Article 78 Petition for a Judgment Directing Production of Records under FOIL, in order to ensure that New York

State's government remains accountable and responsive to the people of the State of New York.

Dated: New York, New York  
August 3, 2006

By:   
JOAQUIN EZCURRA

# **EXHIBIT A**

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**MEMORANDUM OF LAW OF AMICI CURIAE**

The Brennan Center for Justice, the Citizens Budget Commission, Citizens Union of New York City, Common Cause New York, League of Women Voters of New York State, and New York Public Interest Research Group (collectively, the “Public Interest Amici”) are not-for-profit, nonpartisan organizations dedicated to the notion of a free and just democratic government. An important function of these organizations is to support a government that is open to the people, while safeguarding fundamental democratic freedoms. To that end, the Public Interest Amici hereby submit this brief as *amici curiae* in support of the Petitioners’ Article 78 Petition for a Judgment Directing Production of



Records under Freedom of Information Law (“FOIL”), McKinney’s Public Officer’s Law (“POL”) §§ 84 *et seq.*

## INTRODUCTION

Since its inception, this country’s government has been founded on the notion that it is a government “by the people, for the people.” This principle is basic and grounded in the essence of what it means to be a democracy. A democracy is only as good as the freedom of the people to participate in its government. A government conducted in secrecy, beyond the eyes and ears of the public, is the antithesis to the underpinnings of this nation. The government must be accessible and accountable to the public. The dealings of the people’s elected representatives must not be obscured from view.

The Respondents, however, by refusing to provide the public with information necessary for a basic understanding of the legislative process, turned all of these principles on their head. Using their legislative positions, the Respondents have defied the fundamental notions of good government, refusing to provide basic information about the manner in which they are spending tens of millions of dollars of public funds. They have effectively elevated their interests above the many, keeping information necessary for a full understanding of the legislative process from the public.

If left unchecked, this refusal by the Respondents means that these duly-elected representatives can dodge requests for key information by the public concerning the spending of public funds. The Public Interest Amici submit that permitting the withholding of such information is out of step with the fundamental notions upon which this nation is founded.

The Public Interest Amici urge the Court to enforce FOIL to achieve two harmonious goals. First, FOIL helps to ensure the accountability of those governing to

the governed. Second, FOIL reduces the possibility of corruption associated with the allocation of public funds. Courts have repeatedly enforced FOIL's terms in an effort to provide the public with information concerning the activities of the public's government. This Court should not undo that effort here.

### **STATEMENT OF INTEREST**

The Public Interest Amici are deeply interested in the conduct of the government, both generally and as it affects the ability of the public to elect its representatives on an informed basis. The Public Interest Amici view the current state of New York State's legislative process as unresponsive to the people whom the legislators are supposed to serve. Affirmation of Joaquin Ezcurra ("Ezcurra Aff.") ¶ 9. As a consequence, the Public Interest Amici believe that FOIL is essential to improving and ensuring the transparency of the legislature's conduct. Ezcurra Aff. ¶ 10.

The Public Interest Amici are concerned about the case before the Court because it deals with the question of whether the legislature has to account for the manner in which it allocates public funds from the so-called "Community Projects Fund" ("CPF"). The Public Interest Amici believe that this question should be answered in the affirmative.

The shroud of secrecy with which the Respondents have conducted themselves in doling out CPF proceeds runs directly against the accountability of the New York State legislature to the people and the interests that the Public Interest Amici represent. Ezcurra Aff. ¶ 12. The need to maintain an open, transparent state government that is responsible to the citizens of New York, and the ability of organizations such as the

Public Interest Amici to advocate for such a government, are questions of important public interest that this brief specifically addresses. *Ezcurra Aff.* ¶ 14.

All parties have consented to the filing of this *amici curiae* brief. *Ezcurra Aff.* ¶ 15. Accordingly, the Public Interest Amici respectfully request that this Court accept this *amici curiae* brief.

## ARGUMENT

### DISCLOSURE OF THE RECORDS AT ISSUE SERVES THE PUBLIC INTEREST.

An informed citizenry is “vital to the functioning of a democratic society.” *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). Disclosure laws are “needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). With that understanding in mind, the New York State legislature enacted FOIL expressly to recognize and protect the people’s right to know the government’s business:

The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

McKinney’s POL § 84 (legislative declaration section). The public has “an inherent right to know” because “secrecy is anathematic to our form of government.” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

Disclosure of the records at issue will inform the citizens of New York of the workings of their elected officials. Exposing the CPF expenditures at issue in this lawsuit to public scrutiny will achieve the dual goals of holding elected officials accountable for their actions and rooting out any corruption that may exist with respect to the CPF

program. FOIL serves both goals, and both goals are now in jeopardy in this case.

**A. Enforcing FOIL Will Hold Elected Representatives Accountable.**

If democracy truly means that the people rule, then public expenditures must reflect the will of the people. New York's elected representatives should make their decisions as to how to spend public money in a manner that reflects the will of their constituents. If they do not, they should be held accountable. Unfortunately, in New York, many spending decisions are decided secretly without any accountability to the public. *Urban Justice Ctr. v. Pataki*, 10 Misc.3d 939, 942 (N.Y. Sup. Ct. 2005) (citing the Brennan Center for Justice, *The New York State Legislative Process: An Evaluation and Blueprint for Reform*). In particular, the spending of the money for the CPF projects at issue reflects not the reasoned deliberations of the Legislature as a whole, but rather the calculated decision of the few, in a process completely shielded from the public. *See* Petitioners' Mem. Law Supp. Petition at 4-5.

In theory, the public has a simple method of ensuring that their elected representatives carry out their will: they can vote out unresponsive incumbents in their next election. However, this check on the legislative process depends in part on the people's ability to know how their money is being spent. When public money is spent in secret, the people have no effective method of ensuring that their elected representatives are spending public money properly in a manner consistent with the electorate's wishes. For this precise reason, the Legislature enacted FOIL to "provide the people with the means to access governmental records, to assure accountability and to thwart secrecy." *Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994). FOIL "permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities."

*Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *see also Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of the State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 416 (1995) (holding that FOIL “permits the electorate to make informed choices regarding governmental activities”).

The Petitioners in this case seek precisely the information necessary for voters to know how their elected representatives are spending public money. The Petitioners seek a description of each project, including the name of the agency that administers the program, sufficient contact information for an individual in charge of the project, the amount of money that the program receives, and the name of the legislator sponsoring the project. This information will directly show the manner in which the people’s representatives are allocating public funds and the priorities of those representatives to their constituents. Armed with this information, the public can make informed decisions about whether or not they agree with their representatives’ positions. Only in this fashion, by informing the public about how their money is being spent and who is spending it, can the public hold their representatives accountable for their spending decisions. Accordingly, the “public’s interest in disclosure and accountability of persons being paid . . . from public funds” necessitates the Petitioners’ access to the information at issue in this case. *Aug v. Nat’l R.R. Passenger Corp.*, 425 F. Supp. 946, 951 (D.D.C. 1976).

**B. Enforcing FOIL Will Deter Corruption.**

The allocation of public funds “carries with it a corollary that the public assure itself the funds are properly paid.” *St. Mary’s Hosp., Inc. v. Califano*, 462 F. Supp. 315, 319 (S.D.Fla. 1978) (compelling disclosure under federal FOIA law). When elected representatives are not held accountable to their constituents, however, they have the

unfettered opportunity to spend money improperly. Here, the secrecy surrounding the process of approval of CPF projects, at worst, promotes corruption, and at best, emphasizes the need for transparency. *See* Affidavit of J. Robert Port (“Port Aff.”) ¶ 9.

Disclosure deters corruption by exposing expenditures to the light of publicity. *Buckley v. Valeo*, 424 U.S. 1, 67 (1974) (upholding disclosure requirements for political campaign contributions). *See also Thomas v. City of New York, Dept. of Hous. Pres. and Dev.*, 12 Misc.3d 547 (N.Y. Sup. Ct. 2006) (ordering disclosure of lists of names to deter corruption in the allocation of Mitchell Lama housing). To that end, FOIL “facilitates exposure of waste, negligence, and abuse.” *Encore Coll. Bookstores*, 87 N.Y.2d at 416. Only by disclosing the names of the relevant legislators and other relevant information can the public detect and deter potential governmental abuse of the CPF program.

The information that the Petitioners seek directly relates to the propriety of state expenditures. With full disclosure of the details of all of the CPF projects, including the names of the legislators sponsoring them, the public can scrutinize the agencies receiving the funds and their connection to the sponsoring legislators. Disclosure of these records will also facilitate the Public Interest Amici’s ability to advocate effectively for needed change in state government. The public can then decide whether these legislators are acting properly.

As Justice Brandeis once said, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” L. Brandeis, *Other People’s Money* 62 (1913). Indeed, an “informed public opinion is the most potent of all restraints upon misgovernment.” *Grosjean v. Amer. Press Co.*, 297 U.S. 233, 250 (1936). Only by ensuring that the people have a right to know the workings of their government can the

people hold their representatives accountable.

**C. Continued Secrecy Will Encourage Corruption.**

The refusal to disclose the requested information reflects an effort to avoid the Legislature's obligations to the public. The reality of this position cannot be disregarded or underestimated. If the Respondents are able to keep secret the information sought by the Petitioners, the reality is that legislators will be able to waste or misuse public money with impunity.

Already, the state spends \$200 million each year on the CPF. If this Court rules that factual information concerning these expenditures is not subject to FOIL disclosure, then the secrecy that exists has the possibility to become epidemic. For those legislators who procure state funds for their favored individuals and causes, they will remain comforted knowing that they will never be held accountable.<sup>1</sup> The public could not have intended such a result.

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<sup>1</sup> For examples of potential conflicts of interest concerning CPF proceeds, *see* Petitioners' Mem. Law Supp. Petition at 5-6.

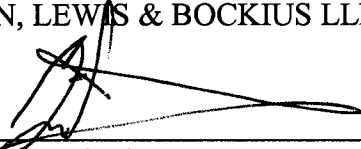
**CONCLUSION**

For the foregoing reasons, the Public Interest Amici respectfully request that this Court grant the Petitioners' petition and order the Respondents to produce all of the records that Petitioners seek.

Dated: August 3, 2006

MORGAN, LEWIS & BOCKIUS LLP

By: \_\_\_\_\_



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