

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

PEOPLE FOR THE ETHICAL TREATMENT OF  
ANIMALS, INC.,

Petitioner,

v.

THE STATE UNIVERSITY OF NEW YORK AT  
STONY BROOK,

Respondent.

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

Index No.

**VERIFIED PETITION**

**PRELIMINARY STATEMENT**

1. Petitioner People for the Ethical Treatment of Animals, Inc. ("PETA"), a non-profit, tax-exempt organization dedicated to the protection of animals, brings this Article 78 proceeding to compel Respondent State University of New York at Stony Brook ("SBU") to provide unredacted copies of records in response to PETA's request under the New York Freedom of Information Law ("FOIL"). Pub. Off. Law §§ 84 *et seq.*

2. FOIL creates a broad right of access to records held by state agencies like SBU. In order to ensure transparency and accountability in government, FOIL mandates that, upon request by a member of the public, an agency must disclose records within its possession unless the agency carries a burden of proving that the records fall squarely within one of FOIL's enumerated exemptions.

3. Through its faculty members, SBU, a publicly funded research institution within the State University of New York (“SUNY”) university system, conducts experimentation on live animals. PETA requested copies of a specific research protocol approved by SBU’s Institutional Animal Care and Use Committee, veterinary care and medical records of all rabbits used in that protocol, and other protocols for which Dr. Craig Evinger, a faculty member of SBU’s Department of Neurobiology and Behavior, was either a principal investigator or co-investigator (the “Requested Records”).

4. The use of animals in laboratory experiments is a matter of public concern and debate. The Requested Records are of significant public interest because they will shed further light on several citations that SBU received under the federal Animal Welfare Act. The Requested Records will assist the public in monitoring SBU’s compliance with animal welfare law in its taxpayer-funded programs.

5. In response to PETA’s FOIL request, SBU provided heavily redacted copies of the Requested Records, stating in bare and conclusory fashion that three FOIL exemptions apply to the redacted materials. First, SBU cited the exemption that protects from disclosure records that are “trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” N.Y. Pub. Off. Law § 87(2)(d). Second, SBU cited the exemption that protects records that, if disclosed, “could endanger the life or safety of any person.” N.Y. Pub. Off. Law § 87(2)(f). Third, SBU cited the exemption permitting the withholding of materials that “would constitute an unwarranted invasion of personal privacy” as defined by law. N.Y. Pub. Off. Law § 87(2)(b). For the reasons set forth in PETA’s Memorandum of Law in Support of this Petition, none of these exemptions

support withholding the redacted information, and SBU has not met its burden that the redacted materials are squarely within the claimed exemptions.

6. Following an administrative appeal denied by SBU's FOIL Appeals Officer, PETA brings this Petition for disclosure of the redacted information, excluding the names and contact information of SBU staff.<sup>1</sup> PETA has exhausted its administrative remedies.

### **PARTIES**

7. Petitioner is a Virginia non-stock corporation and a federally registered 501(c)(3) tax-exempt charitable organization dedicated to the protection of animals.

8. Respondent SBU is a public university within the SUNY system and is subject to Article 6 of the New York Public Officers Law.

### **VENUE**

9. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in Suffolk County, the judicial district in which the principal office of SBU is located.

### **FACTS**

#### **A. Rules and Regulations Governing SBU's Animal Research**

10. SBU must comply with rules and regulations promulgated pursuant to the Animal Welfare Act before it may begin live-animal testing using the university's facilities. *See generally* 7 U.S.C. § 2143(a). Specifically, the Animal Welfare Act requires that research institutions such as SBU establish an Institutional Animal Care and Use Committee ("IACUC") to oversee the specific care and use of animals in laboratory experiments conducted under the auspices of such institutions. *See generally* 9 C.F.R. § 2.31 (2013) (regulations under the Animal

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<sup>1</sup> PETA does not concede that names and public contact information are properly deemed exempted under the FOIL. Rather, PETA is not seeking such information.

Welfare Act governing IACUC membership, functions, and scope of authority to review activities involving animals). Before beginning any experiments involving live animals, SBU employees must draft and submit experimental protocols to the university's IACUC for formal review and they may not begin work before receiving IACUC approval. *See id.* § 2.31(d)(4).

11. The protocols prepared by employees are intended to inform the IACUC of the parameters of the proposed research and must include: (1) identification of the species and approximate number of animals to be used; (2) a rationale for involving animals, and the appropriateness of the species and numbers of animals to be used; (3) a complete description of the proposed use of the animals; (4) a description of the procedures designed to minimize discomfort and pain to the animals; and (5) a description of methods of euthanasia. *See id.* § 2.31(e)(1)-(5).

12. One such protocol, at issue here, was submitted to SBU's IACUC for an experiment titled "Control of Eyelids in Normal and Pathological States." *See Ex. 4.* The principal investigator of the experiment was Craig Evinger.

#### **B. SBU's Citation for Animal Welfare Act Violations and PETA's FOIL Request**

13. On July 6, 2016, the United States Department of Agriculture cited SBU for four Animal Welfare Act violations with respect to this experiment (protocol 714306). *See Ex. 1.*<sup>2</sup> The specific citations included: (1) failing to consider alternatives for the procedure involving the removal of a rabbit's nictitating membrane (i.e., a "painful procedure");<sup>3</sup> (2) removing a rabbit's nictitating membrane without first having this procedure approved by the IACUC; (3) failing to properly monitor the rabbits during the procedures to document that the animals were

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<sup>2</sup> Citations to "Ex. \_\_" refer to Exhibits to this Verified Petition.

<sup>3</sup> A nictitating membrane, often called a third eyelid, is a transparent or translucent eyelid that rabbits can draw across the eye for protection and to moisten it while maintaining vision.

under proper depth of anesthesia and not feeling any pain; and (4) the death of a rabbit following an incident in which the rabbit became wedged between the grill openings of a cage. *See id.*

14. On July 29, 2016, PETA requested from SBU, pursuant to FOIL, the following agency records (the “July Request”):

Copies of the most recent complete protocols approved by Stony Brook University’s Institutional Animal Care and Use Committee (IACUC) for which Craig Evinger . . . was either the Principal Investigator or Co-Investigator for the period of January 1, 2013 to present; a copy of the most recent complete protocol numbered 714306; and copies of all veterinary care and medical records for all of the rabbits used in protocol 714306 for the period of January 1, 2015 to present.

*See Ex. 2.*

15. In response, on October 3, 2016, SBU produced 451 pages of heavily redacted records, including 338 pages of redacted veterinary care and medical records and three extensively redacted research protocols totaling 113 pages. Exs. 4-10 (the redacted materials).

16. From a review of the non-redacted portions of the documents, it appears that SBU redacted, for example, discussions of unanticipated effects on animals, brief project summaries, alternatives to the use of animals, number of animals to be used, experimental procedures, monitoring measures of adverse effects, anesthesia methods, food and water restriction parameters, and euthanasia procedures. *See Exs. 4-10.*

17. SBU stated in its cover letter (“October Cover Letter”) that it redacted the records under three exemptions. The claimed exemptions are as follows:

a) Public Officers Law § 87(2)(d), which exempts records that are “trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained

from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”

b) Public Officers Law § 87(2)(b), which exempts records that “if disclosed would constitute an unwarranted invasion of personal privacy” as defined by the FOIL statute.

c) Public Officers Law § 87(2)(f), which exempts records that “if disclosed could endanger the life or safety of any person.”

18. The October Cover Letter stated the records were redacted “to guard against the disclosure of trade secrets or proprietary information which may cause substantial injury to the competitive position of the facility, investigator(s) and sponsors.” *See* Ex. 3. The October Cover Letter did not explain how the exemption for trade secrets applied to any of the redacted materials. SBU further asserted, without any elaboration, that it was redacting the records “to protect the safety of individuals and their personal privacy.” Ex. 3

19. In response, on October 19, 2016, PETA requested specific justifications for the redactions. *See* Ex. 11. On October 28, 2016, SBU responded that such a request was “appropriate for appeal” and provided no further explanations for invoking the three cited exemptions. *See* Ex. 12.

20. On October 31, 2016, PETA filed a timely appeal of the denial with the SBU FOIL Appeals Officer. *See* Ex. 13. In its appeal, PETA asserted that SBU had failed to meet its burden under FOIL by not articulating a particularized and specific justification for denying access under each stated exemption, as required by law. *See id.* PETA also contested the applicability of each of the three cited exemptions. PETA further clarified that it was not seeking the names and contact information of the employees involved. *Id.*

21. The SBU FOIL Appeals Officer upheld SBU's redactions in a letter dated November 16, 2016. *See* Ex. 14. The FOIL Appeals Officer did not cite any new, specific evidence to support the claimed exemptions.

22. On December 13, 2016, PETA submitted a second FOIL request to SBU for the following records:

All records referencing, reflecting, or relating to alleged or claimed[:] (1) risks of injury posed to the competitive position of SBU and researchers employed by SBU in its animal research laboratories by the disclosure of trade secrets[:]; (2) . . . safety risks posed to SBU employees and students employed in its animal research laboratories, and employees, students, and other people on campus who come into proximity with the laboratories[:; and] (3) . . . personal privacy concerns of SBU employees and students employed in its animal research laboratories.

Ex. 15 (the "December Request").

23. On December 20, 2016, SBU acknowledged the December Request, but did not provide any responsive records, asserting that the request did not "reasonably describe" the records sought and that SBU's indexing system did not allow the agency to search for the requested records. *See* Ex. 16 (the "December Denial").

24. On December 21, 2016, PETA replied to the December Denial stating that it seemed "incongruous . . . that SBU can claim not to know where to look for information concerning perceived threats to the protection of trade secrets, life/safety, and personal privacy when, indeed, it was [SBU] who raised these specific concerns and apparently believes the threats exist." *See* Ex. 17.

#### **BASIS FOR RELIEF**

25. Paragraphs 1 through 24 are reincorporated as if set forth fully herein.

26. Article 78 is the appropriate method for the review of agency determinations concerning FOIL requests. *See* Pub. Off. Law §§ 89(4)(b), (5)(d).

27. Petitioner PETA seeks an order prohibiting the enforcement of the determination by SBU denying Petitioner's July Request with respect to the redacted portions of agency records, with the following exclusion: PETA does not seek to uncover the redactions applied to names and contact information.

28. Petitioner has exhausted its remedies before SBU.

29. Petitioner has a clear right of access to agency records related to research conducted at a state university by a faculty member. Respondent has failed to follow FOIL's broad disclosure mandate, which requires that FOIL be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to governmental records.

30. Respondent has not provided any lawful justification for the partial denial of Petitioner's July Request and has failed to satisfy its burden of proof by demonstrating that the redacted materials fit squarely within the claimed exemptions and are supported by specific and particularized justifications.

31. Respondent lacks a reasonable basis in law for withholding the contested redacted portions of the requested records from Petitioner.

32. The records requested by Petitioner are of significant interest to the general public.

### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner respectfully requests that this Court grant judgment:

(1) prohibiting the enforcement of the determination of Respondent denying Petitioner's FOIL request with respect to the redacted portions of requested IACUC research protocols and



veterinary care and medical records contested by Petitioner, except for those redactions applied to names and contact information;

(2) directing Respondent to provide undreacted copies of the requested IACUC research protocols and veterinary care and medical records sought by Petitioner in the July Request, except for those redactions applied to names and contact information;

(3) awarding attorney's fees and reasonable litigation costs pursuant to Public Officers Law § 89; and

(4) such other and further relief as the Court deems just and proper.

Respectfully submitted,

DATED: March 10, 2017

MILBANK, TWEED, HADLEY & MCCLOY LLP

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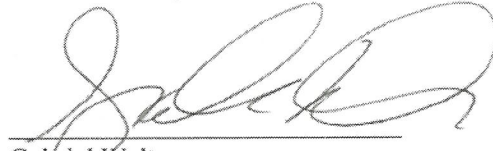
*Attorneys for Petitioner People for the Ethical Treatment of  
Animals, Inc.*

VERIFICATION

STATE OF VIRGINIA ) ss.:  
CITY OF RICHMOND )

Gabriel Walters, being duly sworn, states under penalty of perjury that the following is true:

1. I am Counsel for the PETA Foundation, Inc., and an agent of the Petitioner People for the Ethical Treatment of Animals, Inc. I make this Verification pursuant to CPLR § 3020(d)(3).
2. I have read the attached Verified Petition and know its contents.
3. The statements in the Verified Petition are true to my knowledge, or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

  
\_\_\_\_\_  
Gabriel Walters

Sworn to before me this

10 th day of March, 2017



State of Virginia  
County of Chesterfield  
My Commission Expires December 31, 2018

NOTARY PUBLIC