

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL BRANCH

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In the Matter of the Application of

UPTURN, INC.,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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Index No. 162380/2019

IAS Part 6

(Hon. Eileen Rakower, J.S.C.)

Motion Seq. No. 1

**VERIFIED ANSWER AND OBJECTIONS IN POINTS OF LAW OF THE
RESPONDENT NEW YORK CITY POLICE DEPARTMENT**

The respondent New York City Police Department (“NYPD” or the “Respondent”), by its attorney, James E. Johnson, Corporation Counsel of the City of New York, as its Answer to the Verified Petition (NYSCEF Document No. 1) respectfully alleges as follows:

1. Denies the allegations set forth in paragraph 1 of the petition, except admits that the petitioner Upturn, Inc. (“Upturn” or the “Petitioner”) purports to proceed as stated therein.
2. Denies the allegations set forth in paragraph 2 of the Petition, except admits that that Upturn submitted a request to NYPD pursuant to the Freedom of Information Law (“FOIL”), and respectfully refers the Court to that request (the “FOIL Request”), annexed to the Petition as Exhibit A (NYSCEF Document No. 2) for a complete and accurate description of its contents.
3. Denies the allegations set forth in paragraph 3 of the Petition, except admits that NYPD responded to the FOIL Request on July 19, 2019 by denying that request (the “FOIL Decision”), and that Upturn submitted a written administrative appeal

- of that denial (the “Upturn Appeal”) on August 16, 2019, and respectfully refers the Court to the FOIL Decision and the Upturn Appeal, annexed to the Petition as Exhibits B and C (NYSCEF Document Nos. 3 and 4 respectively) for a complete and accurate statement of their contents.
4. Denies the allegations set forth in paragraph 4 of the Petition, except admits that NYPD responded to the Upturn Appeal on August 26, 2019 in a written decision denying the appeal (the “Appeal Decision”), and respectfully refers the Court to the Appeal Decision, annexed to the Petition as Exhibit D (NYSCEF Document No. 5), for an accurate description of its contents.
 5. Denies the allegations set forth in paragraph 5 of the Petition.
 6. Denies the allegations set forth in paragraph 6 of the Petition, except admits that Upturn purports to proceed as stated therein.
 7. Denies the allegations set forth in paragraph 7 of the Petition, except admits that Upturn purports to proceed as stated therein.
 8. Admits the allegations set forth in paragraph 8 of the Petition.
 9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of the Petition.
 10. Denies the allegations set forth in paragraph 10 of the Petition, except admits that NYPD is an agency of the City of New York, affirmatively states that NYPD is organized pursuant to Chapter 18 of the New York City Charter (N.Y.C. Charter § 431 *et seq.*), and respectfully refers the Court to the statutes cited therein for a complete and accurate statement of their provisions.
 11. Denies the allegations set forth in paragraph 11 of the Petition, affirmatively states that Mobile Device Forensic Tools (“MDFT’s”) can facilitate a range of

- forensic examinations of mobile devices, and, without admitting the truth thereof, respectfully refers the Court to the text of the source referenced therein for a complete and accurate statement of its contents.
12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Petition, and respectfully refers the Court to the papers and proceedings had in *Center on Privacy & Technology v. New York City Police Department*, New York Co. Index No. 154060/2017 for a complete and accurate statement of their contents.
13. Denies the allegations set forth in paragraph 13 of the Petition, and respectfully refers the Court to the sources cited therein for a complete and accurate statement of their contents.
14. Denies the allegations set forth in paragraph 14 of the Petition and, without admitting the truth thereof, respectfully refers the Court to the websites cited therein for complete and accurate statements of their contents.
15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 15 of the Petition, and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents and holdings.
16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 16 of the Petition.
17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 17 of the Petition, and respectfully refers the Court to the case cited therein for a complete and accurate statement of its contents and holding.

18. Denies the allegations set forth in paragraph 18 of the Petition, except admits that on February 13, 2019, Upturn submitted a request to NYPD for access to certain records and information which NYPD assigned No. 2019-056-02554, and respectfully refers the Court to the FOIL Request annexed to the Petition as Exhibit A (NYSCEF Document No. 2) for an accurate description of its contents.
19. Denies the allegations set forth in paragraph 19 of the Petition, and respectfully refers the Court to the FOIL Request annexed to the Petition as Exhibit A (NYSCEF Document No. 2) for an accurate description of its contents.
20. Denies the allegations set forth in paragraph 20 of the Petition, except admits that that NYPD issued the FOIL Decision on July 19, 2019, and respectfully refers the Court to the FOIL Decision, annexed to the Petition as Exhibit B (NYSCEF Document No. 3), for an accurate description of its contents.
21. Denies the allegations set forth in paragraph 21 of the Petition, except admits that Upturn submitted an administrative appeal of the FOIL Decision on August 16, 2019, and respectfully refers the Court to the Upturn Appeal, annexed to the Petition as Exhibit C (NYSCEF Document No. 4), for an accurate description of its contents.
22. Denies the allegations set forth in paragraph 22 of the Petition, except admits that NYPD issued the Appeal Decision on August 26, 2019, and respectfully refers the Court to the Appeal Decision, annexed to the Petition as Exhibit D (NYSCEF Document No. 5), for an accurate description of its contents.
23. Denies the allegations set forth in paragraph 23 of the Petition, and respectfully refers the Court to the Appeal Decision, annexed to the Petition as Exhibit D (NYSCEF Document No. 5), for an accurate description of its contents.

24. Denies the allegations set forth in paragraph 24 of the Petition, except admits that Upturn purports to proceed as set forth therein.
25. Respectfully re-states and re-alleges each and every response to paragraphs 1 through 24 of the Petition above as if fully re-stated herein in response to the allegations set forth in paragraph 25 of the petition.
26. Denies the allegations set forth in paragraph 26 of the Petition, and respectfully refers the Court to the statute cited therein for a complete and accurate statement of its provisions.
27. Denies the allegations set forth in paragraph 27 of the Petition.
28. Denies the allegations set forth in paragraph 28 of the Petition.
29. Denies the allegations set forth in paragraph 29 of the Petition.
30. Respectfully re-states and re-alleges each and every response to paragraphs 1 through 29 of the Petition above as if fully re-stated herein is response to the allegations set forth in paragraph 30 of the Petition.
31. States that the allegations set forth in paragraph 31 of the Petition are legal conclusions to which no answer is required, and to the extent an answer is required, denies them.
32. Denies the allegations set forth in paragraph 32 of the Petition.
33. Denies the allegations set forth in paragraph 33 of the Petition.
34. Denies the allegations set forth in paragraph 34 of the Petition.

**FOR A STATEMENT OF PERTINENT
AND MATERIAL FACTS,
RESPONDENT RESPECTFULLY
ALLEGES:**

A. Background

35. As detailed in the Petitioner’s exhibits in support of the Petition in this proceeding – exemplified in the subchapter entitled “The Game of Cat and Mouse Continues” at PDF-page 9 of Petitioner’s Exhibit H, filed in this proceeding as NYSCEF Document No. 9 – law enforcement, technology providers and others have been engaged in an alternating ebb and flow of technological advances concerning encryption and user privacy that law enforcement seeks to use to conduct legitimate law enforcement work, while others seek ways of thwarting that work.
36. One of these technological advances has been the development, procurement and use of Mobile Device Forensic Tools (previously defined as “MDFT’s”), which facilitate legally-authorized law enforcement work, often under the supervision of the judiciary through its issuance of judicial orders and warrants or knowing consent.
37. This work includes, for example:
- a. “[O]pen[ing] the cell phones and computers of terrorists,” as “it is critically important that law enforcement, with the appropriate court orders, have access to [suspected terrorists’] devices, digital histories, and encrypted communications,” as noted by then-NYPD Police Commissioner James O’Neill in the opinion article annexed to the Petition as Exhibit F (NYSCEF Document No. 7);
 - b. The investigation of “sexual predation of children,” and a “wide range of [other] criminal activity – from terrorism, to large-scale drug trafficking,

- to financial fraud, to human trafficking, transnational gang activity,” as noted in remarks by the Attorney General of the United States annexed to the Petition as Exhibit E (NYSCEF Document No. 6); and
- c. The investigation of “a wide range of criminal cases, from identity theft to homicides, sexual offenses and other violent crimes,” as well as – and just as importantly – the exoneration of innocent individuals suspected or accused of serious crimes, as noted by the New York County District Attorney’s Office (“DANY”) in its November 2018 report entitled Smartphone Encryption and Public Safety, a copy of which was annexed to the Petition as Exhibit H (NYSCEF Document No. 9);
38. Given the changing nature of technology, as noted in the Petitioner’s own exhibits, unfettered discovery and disclosure of law enforcement tools and technology in the modern age of mobile devices has resulted in adaptations by providers and others designed to frustrate legitimate public safety efforts by law enforcement.
39. At least one vendor has sought nondisclosure protection regarding contracting with the City of New York, in a contract, a copy of which will be provided under seal.
40. As noted in the remarks annexed to the Petition as Exhibit E (NYSCEF Document No. 7), “some companies want to deploy end-to-end encryption on consumer products that would completely prevent law enforcement from gaining access to data or communications,” including “when there is probable cause to believe a crime is underway and a judicial magistrate has issued a warrant.”

41. DANY has flatly stated – in its October 2019 report annexed to the Petition as Exhibit G (NYSCEF Document No. 8) – that continued developments by providers to enhance encryption in response to the use of tools including MDFT’s call “into further question the companies’ motives in preventing law enforcement from accessing smartphone data, and the wisdom of making them the gatekeepers of lawful access to such data.”

B. Petitioner’s FOIL Request

42. On or about February 13, 2019, Petitioner submitted the FOIL Request, a copy of which was annexed to the petition as Exhibit A (NYSCEF Document No. 2).

43. In its FOIL Request, the Petitioner sought copies of – without any limitation on the temporal scope of its demand – 7 categories of records:

- a. Purchase records and agreements;
- b. “Any and all records describing [NYPD’s] use of MDFT[’s],” including, among other things, the case numbers of cases in which MDFT’s had been utilized;
- c. Policies regarding the use of MDFT’s by NYPD;
- d. Communications between NYPD and federal agencies regarding MDFT’s;
- e. Communications between NYPD and other local, county or regional agencies regarding MDFT’s;
- f. Communications between NYPD and vendors regarding MDFT’s; and
- g. Nondisclosure agreements to which NYPD may have been a party, regarding the use of MDFT’s

44. NYPD initially denied the FOIL Request by email on July 19, 2019, a copy of which was annexed to the Petition as Exhibit B (NYSCEF Document No. 3) on

the grounds that NYPD was unable to identify responsive records based upon the description Upturn provided.

45. Upturn appealed the FOIL Decision on August 16, 2019. *See* Petitioner's FOIL Appeal, annexed to the Petition as Exhibit C (NYSCEF Document No. 4).

Although that Appeal referenced public reports noting the use of MDFT's and the impact of publicizing their use on investigations, the Petitioner did not clarify the scope of its request.

46. NYPD subsequently affirmed the FOIL Decision in the Appeal Decision on August 26, 2019 – annexed to the Petition as Exhibit D (NYSCEF Document No. 5) – in a detailed four-page decision applying longstanding New York FOIL precedent to the FOIL Request's exceptionally broad demands, namely:

- a. That purchase records and agreements, vendor communications and nondisclosure agreements were exempt from FOIL as production would impair present or imminent contract awards for MDFT services or reveal trade secrets regarding MDFT's;
- b. That the Petitioner's request for records regarding the use of MDFT's was not adequately described in a manner that could be effectively searched in NYPD's current record management systems;
- c. That records regarding communications between NYPD and other local, county or regional agencies regarding MDFT's were exempt from FOIL as inter-agency communications as defined by FOIL because they contained information other than statistical or factual tabulations of data, instructions to staff that affect the public, final NYPD determinations, or external audit information; and

d. That records reflecting policies regarding the use of MDFT's were exempt from FOIL as disclosure would reveal non-routine criminal investigative techniques or procedures, as well as trade secrets.

47. This litigation, initiated by the Petitioner, followed.

C. NYPD's Efforts to Disclose Responsive Records

48. Notwithstanding the difficulties in responding to the FOIL Request as detailed in the Appeal Decision, NYPD has undertaken efforts to identify, review, and produce materials.

49. As noted in the Appeal Decision, NYPD's existing indexing capabilities were not designed in a manner that allowed for the type of search required here.

50. Society's interest in effective law enforcement, while not absolute, is nonetheless compelling however, and compels careful review of documents prior to production.

51. That said, NYPD has undertaken substantial efforts to review and potentially produce materials – including retaining its vendor assistance to write special computer code to facilitate searching for records responsive to the FOIL Request.

52. Thus far, NYPD has identified, reviewed and produced records concerning MDFTs, including Legal Bureau guidance, and some contracting information.

53. During the currently-declared states of emergency existing at the local, state and federal level due to the ongoing public health – and resulting fiscal – emergency afflicting the City of New York, these efforts have proved to be at least as burdensome as predicted in the Appeal Decision.

54. Even with the work already undertaken in response to the FOIL Request, the current indexing and searching systems in place for NYPD investigative records –

including systems utilized by the Detective and Internal Affairs Bureaus – are not, as noted previously in the Appeal Decision, capable of effectively screening for potentially responsive worksheets and activity reports (commonly known as DD5 reports) in a manner that permits authoritative searching without undue burden to ensure accuracy because NYPD does not specifically index records by the usage of MDFT's.

55. NYPD's tracking system for worksheets and activity reports are principally organized by individual cases, to facilitate the principal work of NYPD, namely the investigation of crime and apprehension of criminals.
56. While NYPD's indexing also facilitates searches for particular individuals, locations, and the like, that capability is also geared toward identifying patterns and previous contacts.
57. In contrast, the Petitioner's request for records about the usage of MDFT's concerns the utilization of a particular type of investigative tool, the usage of which is not indexed for retrieval by NYPD.
58. Moreover, even when found, DD5's and similar reports and communications documenting the use of MDFT's are activity reports designed to detail investigative progress and developments, rather than reflect final agency determinations or statistical information.
59. Despite these limitations, thus far, NYPD has identified over six thousand (6,000) potentially responsive case records, which may themselves lead to the identification of tens of thousands of other records, each of which could be multiple pages in length.

60. Additionally, NYPD has identified approximately twelve thousand (12,000) emails potentially referencing MDFT's. However, NYPD's search for communications thus far indicates that among the tens of thousands of potentially responsive records possessed by NYPD will be communications with other law enforcement agencies concerning the use of MDFT's all of which will require page-by-page review and likely extensive redaction in the event of any production.
61. That level of searching is beyond the requirements of FOIL.
62. Even if NYPD were able to authoritatively locate and identify every potentially responsive record, the need for extensive review and redaction would remain.
63. The experience of law enforcement generally – and law enforcement in New York specifically – as detailed, again, in the Petitioner's own exhibits – indicates a need for caution in publicizing the details of the manner in which NYPD is able to extract information from mobile devices to slow the “game of cat and mouse” that DANY noted in Petitioner's Exhibit H, whereby companies use available information to defeat this technology and thus impede legitimate law enforcement efforts.
64. Wholesale disclosure of information regarding the procurement and usage of MDFT's would harm current vendors' ability to appropriately perform their contract awards, namely by providing a usable product which could be rendered quickly unusable in the event of public disclosure and the ensuing, and inevitable, development of countermeasures.

65. That risk of product and economic harm to vendors will also harm similar yet-to-be completed contract awards, as the risk of resultant harm from contracting with the City would unduly hinder the City's ability to contract for MDFT's.
66. Redaction – in most cases, substantial redaction of, and total withholding of some –case reports like DD5's will be necessitated by, among other issues:
- a. Personally identifying information, the production of which is an undue invasion of personal privacy, including birthdates, social security numbers, and home addresses of victims and witnesses;
 - b. The names of victims and witnesses that did not testify in public proceedings, and thus subject to long-recognized privacy restrictions shielding against unwarranted invasions of personal privacy and to protect the lives and safety of cooperating victims and witnesses;
 - c. The sealing restrictions imposed through CPL Art. 160, which seal records of criminal investigations and cases that did not result in criminal convictions; and
 - d. The confidentiality limitations imposed through state or federal laws such as Civil Rights Law sec. 50-b, which restricts access to records that could tend to identify a victim of a sexual offense.
67. Other records, including procurement records, will require redaction of, among other things, private financial information such as bank account numbers.
68. Unrestricted disclosure of victim and witness information, especially victim and witness information in criminal investigations, can result in witness retaliation and intimidation, and restricting disclosure is necessary to promote cooperation with law enforcement.

69. The very “cat and mouse” game DANY has identified, and the impact of revelations about the use and efficacy of MDFT’s on the long-term effectiveness of MDFT’s makes information about their use and efficacy subject to trade secret protection to ensure that MDFT providers remain active and effective, and protection as a non-routine investigative technique to ensure those tools are still available to NYPD.

OBJECTIONS IN POINTS OF LAW

70. The petition fails to state a claim upon which relief may be granted.
71. The relief sought by the Petitioner would facilitate the continued and future illegal activity of others, and is thus inequitable.
72. The FOIL Request, as submitted, does not adequately describe the records sought in a manner reasonably compatible with NYPD’s indexing systems, and searches conducted thus far have produced exceedingly broad swathes of records, nearly all of which will require individualized document-by-document review beyond the mandate of FOIL.
73. NYPD’s final administrative decision, as reflected in the Appeal Decision and affected by subsequent production to the Petitioner in the course of this proceeding, was in compliance with FOIL.
74. NYPD’s final administrative decision, as reflected in the Appeal Decision and affected by subsequent production to the Petitioner in the course of this proceeding, was reasonable, and Petitioner is not entitled to an award of attorneys’ fees and costs.

WHEREFORE, for the reasons stated herein, NYPD respectfully requests that the Court dismiss this proceeding, and grant it whatever other, further or different relief the Court deems just and proper.

Dated: New York, NY
September 4, 2020

Respectfully submitted,

JAMES E. JOHNSON
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City of New York
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By: /s/
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VERIFICATION

LESA MOORE, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true under penalty of perjury pursuant to CPLR 2106: that she is an Agency Attorney employed by the Legal Bureau of the Police Department of the City of New York; that the reason why this VERIFICATION is not made by the Police Department Respondents is that your deponent has been duly designated by the Police Commissioner of the Police Department of the City of New York, pursuant to Section 1101, subdivision (a) of the New York City Charter, to act on said Commissioner's behalf for the purpose of verifying the pleadings herein; that she has read the foregoing Verified Answer and the Verified Answer is true except as to matters therein alleged upon information and belief and as to those matters, she believes them to be true, that the source of this information and the basis for her belief are the books and records of the Police Department of the City of New York and other departments of the city government and/or from statements made to her by certain officers or agents of the City of New York.

Dated: New York, New York

September 4, 2020



LESA MOORE