

INDEX NO. 162380/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL BRANCH, PART 56

In the Matter of the Application of

UPTURN, INC.,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

**RESPONDENT'S MEMORANDUM OF LAW IN
SUPPORT OF ITS VERIFIED ANSWER AND
OBJECTIONS IN POINTS OF LAW**

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PRELIMINARY STATEMENT

The New York City Police Department (“NYPD” or the “Respondent”) submits this memorandum of law in support of its verified answer and objections in points of law (the “Answer”).

In this Article 78 proceeding, petitioner Upturn, Inc. seeks records pursuant to the Freedom of Information Law (“FOIL”) of every instance (without time limitation) the respondent New York City Police Department (“NYPD” or the “Respondent”) has used Mobile Device Forensic Tools (“MDFT’s”) as part of its law enforcement work, as well as contracting records and communications with other entities regarding the use of MDFT’s. Despite diligent searching and partial production over the course of this litigation, NYPD has not yet been able to reliably identify every responsive record, while simultaneously confirming that the potential scope of Upturn’s demand would overwhelm NYPD’s FOIL response capacity. Searching, including through the use of an outside vendor, has identified thousands of potentially responsive records thus far, with indications that the pool of potentially responsive records will be in the tens of thousands, each of which will then require substantive record-by-record review to confirm responsiveness prior to redaction and possible production. The request is inconsistent with NYPD’s record tracking and indexing capabilities, and in keeping with established administrative and judicial guidance, is not reasonably specific enough to facilitate production pursuant to FOIL. Even if NYPD were to overcome that hurdle however, extensive redactions would be required consistent with various exemptions authorized by FOIL.

Records reviewed thus far indicate that an abundance of records sought herein contain trade secrets and other commercially sensitive material regarding sensitive investigative techniques, a host of personally identifiable information about victims and witnesses which must be redacted

pursuant to law, and inter- and intra-agency records exempt from production. Accordingly, the petition be denied and this proceeding dismissed.

STATEMENT OF FACTS

The facts of this proceeding are set forth in NYPD's Verified Answer and are briefly summarized below.

Background

In response to the rising use of mobile devices in everyday life – including smartphones, laptop computers, and the like – coupled with a concurrent public interest in electronic privacy, a cat and mouse game has developed between law enforcement officials seeking access to evidence in pursuit of legitimate law enforcement objectives, , and those who favor impenetrable electronic privacy and seek to shield that information from discovery. As mobile device makers and service providers have developed more and more sophisticated privacy tools, law enforcement has sought out tools to fulfill its role in conducting investigations and ensuring public safety. Among these tools are MDFT's, which provide the means by which law enforcement personnel can – through constitutionally permissible avenues such as device owner/user consent or judicial oversight through court orders and warrants – obtain often vital evidence stored on mobile devices. Reports and statements included in the Petitioner's supporting papers by the New York County District Attorney's Office and others indicate both the range of offenses for which mobile device data has proven vital, and the usefulness of such evidence in exonerating the innocent as much as identifying the guilty. The offenses for which mobile device data has proven valuable in investigating has run the gamut from violent through financial crimes, including terrorism and sexually-based offenses.

However, those same exhibits offered by the Petitioner also show that public revelations of MDFT's have resulted in those tools becoming less effective as device makers and providers

become aware of the mechanisms by which particular MDFT's work and develop countermeasures to halt or impede their utility. These changes hinder – sometimes gravely – criminal investigations by NYPD and others, and also cause economic harm to MDFT providers whose business models are harmed by the development of countermeasures to their programs.

Upturn's FOIL Request and NYPD's Administrative Review

Upturn's FOIL Request seeks, without any temporal limit to the scope of records sought, seven categories of records:

1. Purchase records and agreements;
2. "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;
3. Policies regarding the use of MDFT's by NYPD;
4. Communications between NYPD and federal agencies regarding MDFT's;
5. Communications between NYPD and other local, county or regional agencies regarding MDFT's;
6. Communications between NYPD and vendors regarding MDFT's; and
7. Nondisclosure agreements to which NYPD may have been a party, regarding the use of MDFT's.

NYPD initially responded to the FOIL Request and stated that it could not identify responsive records by the criteria Upturn provided. Upturn submitted a timely appeal of that decision and, while questioning NYPD's position regarding the existence of responsive records, did not narrow or refine its request to facilitate more tailored searching by NYPD.

NYPD replied in detail to Upturn's appeal, denying the FOIL Request and offering four principal objections (the "Appeal Decision"), namely that:

1. the FOIL Request did not reasonably describe the records sought in a manner consistent with NYPD's record databases and indexes, thus making a response unduly burdensome;
2. the FOIL Request sought records that, in part, would impair contracts, reveal trade secrets, and reveal information that, if disclosed, could cause substantial competitive injury to MDFT providers;
3. the FOIL Request sought, in part, exempt inter-agency communications; and
4. the FOIL Request sought, in part, records which, if disclosed, would interfere with law enforcement investigations by revealing the use and efficacy of MDFT's and give others an opportunity to develop countermeasures to MDFT's available to NYPD.

This litigation followed.

NYPD's Search for Records

While asserting objections to the FOIL Request, NYPD has undertaken efforts during this proceeding – including the use of an outside vendor – to identify and produce records in response to the FOIL Request where possible. Although that effort has resulted in some production to Upturn, that effort has also further illustrated the scope of the problem with the FOIL Request. Because NYPD does not index its investigative records in a manner permitting efficient searching for Upturn's criteria, NYPD and its vendor have been forced to undertake less precise word and phrase searching and the Detective Bureau's Computer Crimes Unit preliminarily has identified approximately 6,000 cases involving the use of MDFT's. As each case may have involved the review of multiple devices, even that imprecise number will likely explode into many more thousands of records – easily in the tens of thousands – each of which may involve multiple pages

of documents, all of which will have to be reviewed page-by-page to confirm responsiveness and screen for likely and substantial redactions. Email searches, which have been made in an attempt to locate communications concerning MDFT's, have thus far identified approximately 12,000 emails (with more searching necessary), each of which requires the same levels of page-by-page review as the thousands of investigative files already identified. Despite the use of a vendor developing and using new programming to assist searching however, NYPD lacks confidence in the numbers of potentially responsive documents, even after good faith efforts to find clarity here. In short, the data being generated by NYPD's searches is imperfect, impossible to correctly refine, and being identified in a manner requiring substantial additional review. Especially given the limitations imposed by the current pandemic, the burden required to search for the records – with the knowledge that the searching is imperfect at the outset – is substantial.

ARGUMENT

POINT I

THE PETITIONER DID NOT ADEQUATELY DESCRIBE THE RECORDS IN A WAY FOR WHICH NYPD CAN REASONABLY SEARCH

In order to manage FOIL requests and prevent agency havoc, courts and the Committee on Open Government – the agency tasked with interpreting and providing guidance on FOIL compliance – have found that “whether or the extent to which a request meets the standard may be dependent on the nature of an agency’s filing, indexing or records retrieval mechanisms.” FOIL Advisory Op. 15048 (N.Y. Comm. on Open Govt. 2004).¹ NYPD’s lived experience in this proceeding establishes that the FOIL Request is not reasonably described for FOIL purposes.

¹ A copy of FOIL Advisory Op. 15048 is filed herewith as an appendix.

Indeed, NYPD has retained outside services in the precise manner contemplated by Public Officers Law § 89(3)(a), and continues working with outside services through this proceeding in an effort to identify potentially responsive records, and searching even with the benefit of that outside assistance is still identifying thousands – likely to become tens of thousands – of potentially responsive records that would then require record-by-records review, followed by substantial and individualized redaction as discussed in Point II. Efforts to comply with the FOIL Request would “bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy,” that is beyond what can be reasonably asked of NYPD. *Fisher & Fisher v. Davison*, 1988 N.Y. Misc. LEXIS 876, *10 (Sup. Ct., New York Co. 1988) (denying Article 78 petition to annul FOIL denial as unduly burdensome). *See also City of New York v. Homeaway.com, Inc.*, 2020 NY Slip Op 31212(U), *15 (Sup. Ct., New York Co.), *pending lv. to renew and reargue*, 2020 N.Y. Misc. LEXIS 4230 (Sup. Ct., New York Co. Aug. 12, 2020) (modifying subpoena duces tecum to annul large-scale search of records in Bawdy House Law investigation where witness “would have to individually review each listing produced by such a search because it does not categorize or track all of the metrics that are included in the definition” provided in subpoena); and *Matter of New York Comm. on Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 161-162 (1st Dept. 2010) (recognizing that the volume of exempted material would create an unreasonable burden on the agency in responding to a FOIL request).² Looking at Upturn’s request for records about the usage of MDFT’s, the burden exemption squarely applies.

² Alternatively, Public Officers Law § 89(3)(a) also provides a burden shifting provision, passing on the cost of retaining outside professional assistance to requestors. If the Court orders continued review and production, the City is entitled to those costs from Upturn pursuant to Public Officers Law § 89(3)(a) and 43 RCNY § 1-07.

As NYPD noted in the Appeal Decision, the FOIL Request “would require a search of every individual case file maintained by dozens of detectives, for thousands of cases,” creating a substantial and inappropriate burden on NYPD beyond that which FOIL requires. Appeal Decision, at 3. The Court of Appeals endorsed this interpretation of FOIL in *Matter of Schenectady County Society for the Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 45 (2011), in holding that an agency must provide requested records only if redactions could be made “without unreasonable difficulty,” and denying the page-by-page type of review sought here. In *Asian Am. Legal Defense & Educ. Fund v. New York City Police Dept.*, 125 A.D.3d 531(1st Dept. 2015), *lv. denied*, 26 N.Y.3d 919 (2016), the First Department found that the petitioner’s FOIL request did not reasonably describe a record when it sought “documents relating to NYPD Intelligence operations concerning unreasonably broad categories, such as any New York City businesses “frequented” by Middle Eastern, South Asian or Muslim persons” and “a complete response to the request would entail searching more than 500,000 documents which, though mostly electronic, are not necessarily searchable by ethnicity, race or religion.” In short, where the practical ability to identify and review responsive documents to ensure that responsive documents are identified and restricted information found and redacted is limited, the need to err on the side of protecting restricted information controls.

This principle is applicable here. Although locating contracting documents is relatively straightforward, searching investigative records in this manner is not. As detailed in the Answer, NYPD’s subsequent efforts have confirmed that the search and review required here would be *even broader* than the Appeal Decision predicted, very likely pulling NYPD’s FOIL compliance personnel into a veritable rabbit hole of tens of thousands of records requiring individualized review. Unsurprisingly, police officers generate an enormous number of investigative reports and

communications, many of which contain pages of sensitive case information, and not indexed in a manner designed to track instances where a particular investigative tool or technique was used. Indeed, the use of new programming with an outside vendor already touches the outer boundaries of NYPD's obligations under Public Officers Law § 89(3)(a). Notwithstanding "the strong safety and other public policy interests detailed by the City" in *Homeaway*, one justice of the Court found that the burden there simply could not be sustained, in a discrete and known universe of approximately four thousand digitized records, which is itself less than NYPD has already identified in this proceeding, and less than half of NYPD's most conservative estimates. *Homeaway*, at *11.

Especially given the current viral and fiscal calamities currently afflicting the City as detailed in the local, state and federal emergency declarations still in effect, the burdens required here recall *Fisher & Fisher* clearly. The City should not be forced to expend limited resources and staff in what is proving to be a "search through the haystack for a needle, even if they know or surmise that the needle may be there," as, even in good public health and economic times, "agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records." FOIL Advisory Op. No. 18949 (N.Y. Comm. on Open Govt. 2012).³ In these times, the recourse commitment is simply too much, and the Court should dismiss this proceeding.

³ A copy of FOIL Advisory Op. No. 18949 is filed herewith as an appendix.

POINT II**THE PETITIONER SEEKS RECORDS THAT
ARE EXEMPT FROM DISCLOSURE IN
UNREDACTED FORM, WHICH IS
IMPRACTICAL UNDER THE
CIRCUMSTANCES****If Disclosed, the Requested Records Would Reveal Competitively Sensitive Trade Secrets and Hinder Effective Law Enforcement Without Substantial Review and Redaction**

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,” are exempt from FOIL production. Public Officers Law § 87(2)(d). *See also Matter of Verizon New York, Inc. v. New York State Public Service Commn.*, 137 A.D.3d 66, 68 (3d Dept. 2016). A trade secret is “any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *Ashland Mgt. v. Janien*, 82 N.Y.2d 395, 407 (1993). That includes “proprietary and confidential technology and business plans.” *Schroeder v. Pinterest, Inc.*, 133 A.D.3d 12, 27 (1st Dept. 2015). The Petitioner is asking for that here.

In seeking information that would show how and in what circumstances NYPD vendors’ technology may forensically access mobile devices – information that is not public and, when disclosed about previous technology, has rendered various technological tools ineffective – the Petitioner is seeking information that, if disclosed, would harm those vendors’ continued business activity. *See Associated Press v. Fed. Bureau of Investigation*, 265 F. Supp. 3d 82 (D.D.C. 2017) (finding that records of contracting for and usage of MDFT was exempt from Freedom of Information Act). As noted in the Answer, the Petitioner’s own exhibits are replete with corroboration of this very issue, and show that merely redacting highly technical information –

which the Petitioner's memorandum of law seemingly concedes – is not enough.. In one illustrative example detailed in *Forbes* – a business magazine, not a software engineering magazine – Apple, Inc. updated its operating systems to completely counteract a company's MDFT – for which the company charged law enforcement agencies \$15,000 for limited licenses – just seven months after *Forbes* revealed the MDFT's existence.⁴ Information about the existence, abilities and usage of MDFT's has proven to be commercially valuable both to MDFT providers seeking to further their business activities, and device providers who have shown substantial economic interest in seeking to counteract MDFT providers.⁵ The need to protect information to ensure continued business operations is clear and present – and reflected in a contract at issue here

⁴ Thomas Brewster, *Apple Just Killed the 'GrayKey' iPhone Passcode Hack*, *Forbes* (Oct. 24, 2018), available at <https://www.forbes.com/sites/thomasbrewster/2018/10/24/apple-just-killed-the-graykey-iphone-passcode-hack/#102a282b5318> (last accessed Aug. 30, 2020) (discussing efforts by Apple to thwart then-recently revealed MDFT).

⁵ Thomas Brewster, *Mysterious \$15,000 'GrayKey' Promises to Unlock iPhone X for the Feds*, *Forbes* (Mar. 5, 2018), available at <https://www.forbes.com/sites/thomasbrewster/2018/03/05/apple-iphone-x-graykey-hack/#655d34b82950> (discussing rewards of up to \$200,000 from Apple for information about system vulnerabilities exploited by MDFT's).

Beyond the Legislature's clear guidance in Public Officers Law § 87(2)(e), decades of precedent not only establish that the Court's role here is to affirmatively exercise its equitable powers in support of the proper administration of justice and criminal investigation, but also affirmatively caution against using its equitable powers to mandate a result that is distinctly inequitable to society by hindering effective law enforcement for the economic benefit of others. *People v. Teicher*, 90 Misc. 2d 638 644 (Sup. Ct., New York Co. 1977), *affd. for reasons stated below*, 73 A.D.2d 136 (1st Dept. 1980), *affd.*, 52 N.Y.2d 638 (1981) (Supreme Court's "powers include the right to assist in investigation of criminal activity"); and *Weiss v. Herlihy*, 23 A.D. 608, 614 (1st Dept. 1897) (injunction against police inspection properly denied in light of "well settled" rule that "if the rights he asserts, and for the protection of which he asks the interposition of the equitable power of the court, are in themselves essentially illegal or a violation of law, then his prayer will be refused").

itself – and the harm from disclosure significant and real.⁶ Accordingly, information about usage of MDFT’s are shielded by the Public Officers Law § 87(2)(d) exemption.

The Petitioner’s request also asks the Court to order disclosure that government agencies across the country – as noted in the Petitioner’s own supporting papers – have already noted harms law enforcement work. Public Officers Law § 87(2)(e) is specifically crafted to shield records “if their release would enable individuals to frustrate pending or prospective investigations or to use that information to impede a prosecution.” *Matter of Madeiros v. New York State Educ. Dept.*, 133 A.D.3d 962, 965 (3d Dept. 2015) (quoting *Matter of Council of Regulated Adult Liquor Licensees v. City of New York Police Dept.*, 300 A.D.2d 17, 18 (1st Dept. 2002)). Years ago, the Third Department considered – in a fact pattern similar to this – a FOIL request seeking information about the use of developing technology to apprehend criminals, and the court held “because disclosure of...identikit papers and notations might alert prospective criminals to characteristics important in composite artistry and thus encourage them to tailor their appearance to evade detection,” those records could be withheld. *Dobranski v. Houper*, 154 A.D.2d 736, 737 (3d Dept. 1989). The First Department recognized similar concerns in modifying a decision ordering limited production of records about past usage of specialized vans, because “disclosing information about the locations in which NYPD has used the vans in the past, as well as the times and frequency of their deployment,” while not concerning current or future investigations, would allow criminals “to infer the inverse, namely, locations and times when NYPD does not use them,” allowing

⁶ To the extent that Public Officers Law § 87(2)(d) defines two distinct exemptions, the distinction is immaterial here as the usage information sought here would be shielded by either exemption. *See, e.g., Crawford v. New York City Dept. of Info. Tech & Telecomms.*, 2017 NY Slip Op 30982(U), *28 (Sup. Ct., New York Co. 2017), citing *Matter of Verizon New York*, 137 A.D.3d 66, 68 (3d Dept. 2016) (discussing existence of and dichotomy between exemptions codified at Public Officers Law § 87(2)(d)).

criminals to adapt to them. *Matter of Grabell v. New York City Police Dept.*, 179 A.D.3d 477, 478 (1st Dept. 2016).

As the Petitioner's own exhibits and press accounts show, the risks to effective – and lawful – law enforcement posed by the disclosure sought here are not theoretical. They are real, and NYPD should not be required to actively harm its investigative capabilities in responding to the FOIL Request. While times changed, the same concerns the Third Department saw in *Dobranksi* in facial composite software exist today regarding MDFT's, just as the First Department recognized more recently in *Grabell*. The Petitioner's demand for such records should be denied.

The Requested Records Contain Confidential Information That is Restricted by Law, Disclosure of Which Would Constitute an Unwarranted Invasion of Personal Privacy Absent Redaction, and Redaction is Impractical Given the Scale of the FOIL Request

As noted in the Answer, the search and review NYPD has conducted thus far has revealed that substantial portions of the Records, even if they can be authoritatively located – which is unlikely, as discussed *infra*. – will require extensive redaction for a host of reasons. First, investigative reports concerning matters that resulted in noncriminal dispositions or dispositions in favor of the accused are sealed in almost all circumstances pursuant to CPL Art. 160 and, thus, are exempt from disclosure pursuant to Public Officers Law § 87(2)(a). *Johnson Newspaper Corp. v. Stainkamp*, 61 N.Y.2d 958 (1984).

Second, the requested records – DD5's particularly, and likely, subject to the search issues discussed *infra*.) communications as well – contain the names and personally identifying information of victims and witnesses, including witnesses who did not testify in public hearings and may be shielded pursuant to Public Officers Law § 87(2)(b), (e) and/or (f). *See, e.g., Scarola v. Morgenthau*, 246 A.D.2d 217 (1st Dept. 1998); and *Matter of New York Times Co. v. New York*

City Police Dept., 103 A.D.3d 405 (1st Dept. 2013). Similarly, “impressions, recommendations, or opinions recorded in” DD5’s and similar records are exempt from disclosure. *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277 (1996). Financial information such as bank or other account numbers (in both contracting information seeking MDFT services, as well as information related to underlying criminal investigations of financial and other crimes) regardless of source, is sensitive and may be withheld pursuant to Public Officers Law § 87(2)(i) in addition to subsection (b). FOIL Advisory Op. 13143 (N.Y. Comm. on Open Govt. 2002) (town’s bank statements could be redacted to shield account numbers); and FOIL Advisory Op. 16604 (N.Y. Comm. on Open Govt. 2007) (copy of check may be redacted to shield taxpayer’s bank account number).⁷ Additionally, a sampling of the thousands of emails preliminarily identified thus far revealed communications between NYPD personnel and others within and outside NYPD regarding MDFT’s. Among the potential responsive documents are records of NYPD interaction with other local, state and other law enforcement agencies) that, while responsive to the FOIL Request, are unquestionably exempt from disclosure as disclosure would interfere with law enforcement activities. These are only the immediately and facially applicable exemptions, and as any searching continues, NYPD would need to concurrently evaluate each record individually and assert additional exemptions as allowed by law. *Johnson Newspaper Corp.*, *supra*.

Assuming *arguendo* that additional production continues by choice or order, the issue of extensive redactions remains. NYPD’s obligations to make necessary redactions has not changed in this proceeding, and Upturn has offered little more than conclusions and a bare concession that NYPD could redact records if necessary. NYPD can indeed redact certain records, but the scale of redaction individual documents combined with the sheer scale of material sought here has been

⁷ Copies of FOIL Advisory Ops. 13143 and 16604 are filed herewith as appendices.

