

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

SURVEILLANCE TECHNOLOGY
OVERSIGHT PROJECT, INC.,

Petitioner,

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

– against –

NEW YORK CITY POLICE DEPARTMENT,
and JORDAN S. MAZUR in his official
capacity as Records Access Appeals Officer,

Respondents.

**AMENDED NOTICE OF VERIFIED
PETITION**

Index No. 158227/2020

Hon. Debra A. James, Part 59

Motion Sequence No. 1

PLEASE TAKE NOTICE, that upon the annexed Amended Verified Petition, verified on October 8, 2020; the Affirmation of Jeremy Feigelson, dated October 5, 2020; and the attached exhibits, the undersigned will make application before this Court at 60 Centre Street, New York, NY 10013, Room 130, on November 19, 2020, or as soon thereafter as counsel may be heard, for an order and judgment pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and N.Y. Pub. Off. Law § 89(5)(d):

A. Declaring that the NYPD has improperly denied the Surveillance Technology Oversight Project’s (“S.T.O.P.”) requests pursuant to FOIL;

B. Directing the NYPD to conduct a diligent search for “[a]ny and all . . . memos, audits, [and] reports” from January 9, 2016 through November 26, 2019, between the NYPD and Elucd;

C. Directing the NYPD to conduct a diligent search for “[a]ny and all contracts” between the NYPD and Elucd as well as “[a]ny and all instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc.” in regards to use of any Elucd product from January 9, 2016 through November 26, 2019;

D. Directing the NYPD to produce all requested records with only reasonable redactions;

E. Awarding attorney’s fees in favor of S.T.O.P. and against the NYPD in an amount to be determined at the conclusion of the proceeding; and

F. Granting S.T.O.P. such other and further relief the Court may deem just and proper.

Pursuant to CPLR § 7804(c) you are required, at least five days prior to the return date, to serve upon the undersigned a verified answer and supporting affidavits, if any.

New York County is designated as the venue of this proceeding pursuant to CPLR § 506(b) because New York County is the county in which the determination seeking to be overturned was made.

Dated: New York, New York
October 8, 2020

DEBEVOISE & PLIMPTON LLP

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October 8, 2020

TABLE OF CONTENTS

Preliminary Statement.....1

The Parties5

Jurisdiction and Venue6

Relevant Statutes.....6

Statement of Facts.....7

 I. NYPD’s Relationship with Elucd7

 II. Petitioner’s FOIL Requests and Appeal10

 III. Article 78 Petition12

Legal Standard12

Argument.....14

 I. All Of The Requested Records Are Presumptively Open To The Public And
 Subject To Mandatory Disclosure Under FOIL.....14

 II. The NYPD Has Identified Over 100,000 Responsive Records But Is Withholding
 Them Without Any Proper Legal Basis16

 A. The NYPD Has Not Demonstrated That S.T.O.P.’s Request For
 Communications Is Unduly Burdensome17

 B. The FOIL Exemption For Private Information Does Not Apply18

 C. The FOIL Exemption For Inter- Or Intra-Agency Deliberations Does Not Apply.....19

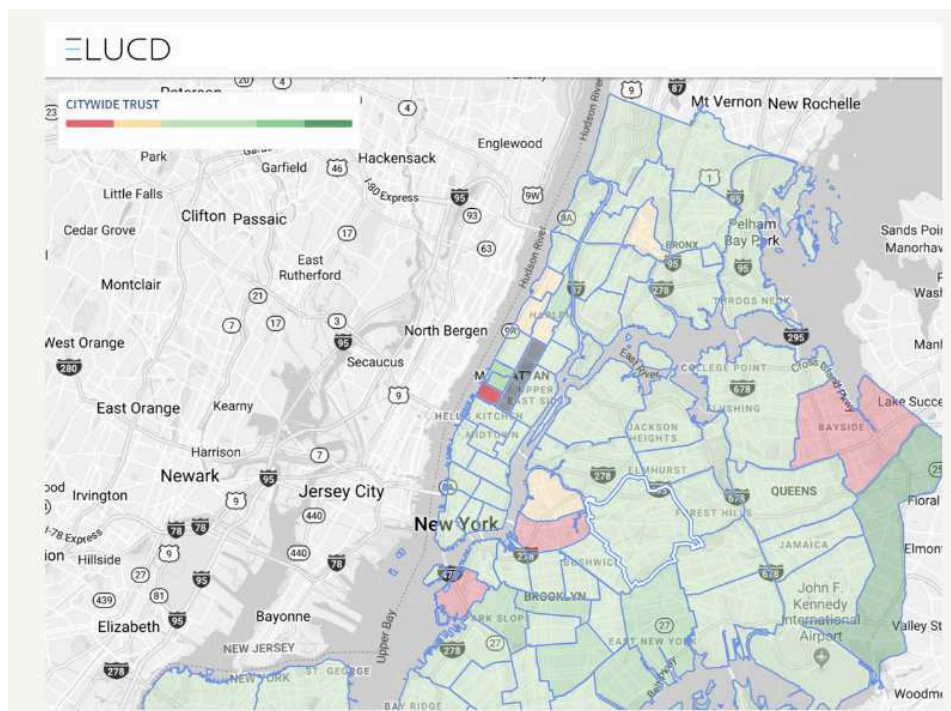
 III. The NYPD Has Failed To Diligently Search For Records Responsive To
 S.T.O.P.’s Requests For Contracts And Elucd Materials20

 IV. The NYPD Has Simply Not Addressed S.T.O.P.’s Request For Memos, Audits,
 And Reports Between The NYPD And Elucd23

Relief Requested.....24

Petitioner Surveillance Technology Oversight Project, Inc. (“S.T.O.P.”), by its attorneys, Debevoise & Plimpton LLP, for its Amended Verified Petition seeking relief against Respondents, hereby alleges as follows:

PRELIMINARY STATEMENT



1. Police–community relations in New York City are a matter of urgent public interest. Since 2016, the New York City Police Department (the “NYPD”) has awarded contracts totaling at least \$3,000,000 in public funds on a “Sentiment Meter” that purports to measure public attitudes toward the NYPD by precinct, yet has told the public almost nothing about this project.

2. One of the only publicly available images of the Sentiment Meter is shown above. The NYPD has jointly developed the Sentiment Meter with a private company called Elucid, Inc. (“Elucid”). According to Elucid, the company collected data from more than 250,000 New

Yorkers—including from 44,185 New Yorkers in 2020 alone.¹ This Sentiment Meter divides New York City into precinct sectors and displays the public’s perception of police per precinct. Green indicates a positive change in the public’s perception of the police, and red indicates a negative change. Beyond that, in terms of public understanding, the Sentiment Meter is a \$3,000,000 blank slate. There has been no public disclosure of how data is gathered for this project, how changes in sentiment are calculated, what changes the NYPD makes in its policing practices as a result, or what happens to the personal information of New Yorkers who share their views of the police with the NYPD and Elucd through the Sentiment Meter process.

3. S.T.O.P. has tried to bring public understanding to the Sentiment Meter by requesting documents about it from the NYPD under New York’s Freedom of Information Law (“FOIL”), N.Y. Pub. Off. Law § 84 *et seq.* Despite its clear legal duties under FOIL to (1) conduct a diligent search for the requested documents and (2) actually provide the documents to S.T.O.P., the NYPD has done neither. Its response process has been cursory and legally deficient, and it has not provided S.T.O.P. with a single document. This Petition therefore seeks an order to compel the NYPD to comply with its duties under FOIL.

4. S.T.O.P. is a nonprofit organization that litigates and investigates instances of excessive surveillance by state and local government authorities, works to inform the public of government violations of their privacy rights, and advocates for legislative protections for individual privacy.

¹ *Statement Regarding NYPD Contract*, Elucd, <https://elucd.com/blog/statement-regarding-nypd-contract> (Aug. 14, 2020).

5. Through this petition, S.T.O.P. seeks documents related to the Sentiment Meter that Elucd developed to assist the NYPD in “measuring, tracking, and analyzing critical aspects of public sentiment in real time.”²

6. The Sentiment Meter is used to collect and provide the NYPD with data on how neighborhoods feel about the NYPD. Apart from sparse news reports about Elucd’s Sentiment Meter, the public has very little information on the purposes for which the NYPD has co-developed the tool, what personal data it collects, or how the NYPD uses it in its policing practices.

7. The information requested by S.T.O.P. is necessary for it to fulfill its mission on behalf of the public. Without it, S.T.O.P. cannot, among other things, scrutinize the NYPD’s use of this technology for discriminatory impact on minorities, assess the budgetary decision to spend millions of dollars on developing the technology, and educate the public on a program of police surveillance of which they are likely unaware.

8. Invasive data collection undermines public trust and safety. By creating a heatmap indicating that people in a certain area are distrustful of the police, the NYPD is developing a system that could lead to an increase in unnecessary police stops and interactions, unfair over-policing based on discrimination in these neighborhoods, and the potential for retaliation against people in areas the NYPD, through the Sentiment Meter, deems the enemies of law enforcement—all without any public scrutiny, awareness, or oversight.

9. Another ongoing concern with new policing technologies is the automation of bias. Algorithms and software reliant on machine learning are only as impartial as the humans that design them. For that reason, it is crucial that the public is given the opportunity to

² *About Us*, Elucd, <https://elucd.com/about>.

understand the software and technology that affect policing decisions, including whether these technologies are biased against minorities, women, the disabled, or other vulnerable New Yorkers.

10. The information the NYPD seeks to gather can be integrated and consolidated with existing governmental databases to create an even more invasive window into the daily lives of ordinary citizens. This could result in the re-identification of personal data that was purposely de-identified in the interests of privacy. Given how little the NYPD discloses about the other city, state, or federal agencies with which it shares personal data, it is important for people to have insight into any personal data the NYPD collects and how it is being used or misused.

11. Scrutiny of policing practices in this country today is as important as it has ever been. The purpose of FOIL is to grant the public access to the workings of the government. The public cannot take steps to prevent misconduct or abuse by the NYPD if it does not have access to information on the NYPD's practices.

12. As the ongoing movement for law enforcement reform in the wake of the deaths of George Floyd and so many others at the hands of police shows, it is more important than ever that the public be able to hold police departments accountable for their actions. Neither the movement in this country to overhaul policing practices nor the scrutiny around police funding that movement has sparked can continue if police departments shield their behavior and practices from oversight.³ New Yorkers have a right to know how the NYPD is collecting data about their communities and what it does with that information.

³ See, e.g., Kristina Sgueglia and Scottie Andrew, *New York Police Department's budget has been slashed by \$1 billion*, CNN (July 1, 2020), <https://www.cnn.com/2020/07/01/us/new-york-budget-nypd-1-billion-cut-trnd/index.html>; Joe Anuta, *In wake of mass protests, NYC*

13. Under New York law, “it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.” N.Y. Pub. Off. Law § 84. The NYPD can readily meet this standard here with respect to S.T.O.P.’s FOIL request and has not demonstrated otherwise. Instead, the NYPD has taken the position that complying with FOIL’s mandate is a burden to be avoided, instead of a duty to the public it serves, and has forced S.T.O.P. to go to court to obtain information that it is entitled to under the law. This Court should direct the NYPD to diligently search for and produce all responsive records.

THE PARTIES

14. Petitioner S.T.O.P. is a registered 501(c)(3) nonprofit organization based in the County of New York whose mission is to end invasive and discriminatory government surveillance. Through its litigation, education, grassroots organizing, and advocacy, S.T.O.P. informs the public on how surveillance technology fuels invasions of privacy, discrimination, and civil rights violations. It also actively campaigns to outlaw surveillance technologies. S.T.O.P. is organized and exists under the laws of Delaware, with its principal office at 40 Rector Street, 9th Floor, New York, NY 10006.

15. Respondent NYPD is the New York City municipal police department tasked with law enforcement, traffic management, public safety, counterterrorism, and emergency response. The NYPD is organized and exists under the New York State Criminal Procedure Law, and NYPD regulations are compiled under Title 38 of the Rules of the City of New York. The

Council approves suite of police reforms, Politico (June 18, 2020), <https://www.politico.com/states/new-york/city-hall/story/2020/06/18/in-wake-of-mass-protests-nyc-council-approves-suite-of-police-reforms-1293758>.

NYPD has its principal offices at 1 Police Plaza Path, New York, NY 10038. The NYPD is a public agency subject to the requirements of FOIL. N.Y. Pub. Off. Law § 84 *et seq.*

16. Respondent Jordan S. Mazur is the Records Access Appeals Officer for the Office of Deputy Commissioner of the NYPD, whose principal office is located in New York, NY. Respondent Mazur is sued in his official capacity only.

JURISDICTION AND VENUE

17. This Court has jurisdiction under section 7801 *et seq.* of the New York Civil Practice Law and Rules (“CPLR”) and section 89(4)(b) of the New York Public Officers Law to review administrative decisions made by the NYPD.

18. This proceeding is timely commenced pursuant to CPLR Section 217(1) and New York Executive Orders 202.8 *et seq.*

19. S.T.O.P. brings this Article 78 proceeding after exhausting its administrative remedies and before the statute of limitations, as tolled by Executive Order 202.8 *et seq.*, expires.

20. Venue lies in this county pursuant to CPLR sections 7804(b) and 506(b) because this proceeding is brought within the judicial district where the NYPD made the determinations complained of and where the principal offices of the NYPD are located.

RELEVANT STATUTES

21. FOIL provides that “[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records.” N.Y. Pub. Off. Law § 87(2). FOIL was enacted to ensure that “[a]ccess to [government] information [is] not [] thwarted by shrouding it with the cloak of secrecy or confidentiality.” *Id.* § 84.

22. FOIL provides only limited exemptions that an agency may rely upon to redact or withhold records otherwise responsive to public record requests. The presumption of openness places the onus of identifying and producing the non-exempt responsive portions of government records on agencies. While agencies *may* choose not to provide certain information that fall under a limited set of exemptions, “where only a portion of a given document is properly exempt, the agency is nonetheless obligated to produce a redacted version that discloses all the non-exempt information.” *Grabell v. N.Y.C. Police Dep’t*, 47 Misc.3d 203, 208 (Sup. Ct. N.Y. Cty 2014), *affirmed as modified*, 139 A.D.3d 477 (1st Dep’t 2016).

23. FOIL further provides that an agency may “certify that it does not have possession of [a requested] record or that such record cannot be found,” but only after the agency conducts a “diligent search.” N.Y. Pub. Off. Law § 89(3)(a). Notably, FOIL expressly states that “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing,” as it is permissible for the agency to “engage an outside professional service” to assist in providing the requested documents. *Id.*

STATEMENT OF FACTS

I. NYPD’s Relationship with Elucd

24. Elucd is a technology start-up that develops technology that purports to measure, track, and analyze aspects of public sentiment in real time, which is then used by organizations to inform their decision-making.⁴

⁴ See *About Us*, Elucd, <https://elucd.com/about>.

25. Elucd states that, in 2016, it began working with the NYPD “with the goal of helping [the NYPD] understand [h]ow different populations feel about the police, and their level of trust in police.”⁵ Elucd and the NYPD co-developed the Sentiment Meter, which tracks the public’s sentiment about the police for each of New York City’s 297 precinct sectors in real time.⁶

26. Elucd has stated that, in working with the NYPD, it has collected data from more than 250,000 New Yorkers, including from more than 44,185 New Yorkers in 2020 alone.⁷

27. According to Elucd, it has worked with over 15 police departments and governments since 2016. Elucd has also expanded into the private sector and works with businesses to help track the sentiment of their employees in real time.⁸

28. Elucd claims that it uses highly targeted digital advertising to “send” surveys to users on a variety of websites and social media platforms, as well as approximately 50,000 smartphone applications. In reality, those surveys appear as pop-ups in apps or on websites that an individual is using or browsing. Elucd further reports that it uses the U.S. Census American Community Service data for demographic statistics on particular locations and adjusts the individual recipients of its surveys to obtain a representative sampling of the population.⁹

⁵ *Id.*

⁶ See Simone Weichselbaum, *Yelp for Cops*, The Marshall Project (July 16, 2018), <https://www.themarshallproject.org/2018/07/16/yelp-for-cops>.

⁷ *Statement Regarding NYPD Contract*, Elucd, <https://elucd.com/blog/statement-regarding-nypd-contract> (Aug. 14, 2020).

⁸ See *About Us*, Elucd, <https://elucd.com/about>.

⁹ See *Methodology*, Elucd, <https://elucd.com/methodology>.

29. According to news reports, the Elucd survey contains questions such as: “How safe do you feel in your neighborhood?”; “Do the police in my neighborhood treat local residents with respect?”; and “Do the police in my neighborhood listen and take into account the concerns of local residents?”¹⁰

30. The NYPD reportedly paid Elucd an initial \$2.9 million to develop the Sentiment Meter.¹¹ On January 15, 2020, the NYPD entered into a contract whereby it agreed to pay \$1.39 million to Elucd for each of the next three years. *See* Affirmation of Jeremy Feigelson Ex. 5 (hereinafter, “Feigelson Aff.”). Under the agreement, Elucd agreed to work with the NYPD to implement the Sentiment Meter and integrate the data from the Sentiment Meter into the NYPD’s operations.

31. According to Elucd co-founder and CEO Michael Simon, approximately 10,000 people take Elucd’s survey in New York City each month.¹² The NYPD has released data on its overall trust rating only sparingly and has consistently refused to release data at the neighborhood or precinct level.¹³

32. The NYPD has not been transparent with the public about critical aspects of the Sentiment Meter’s use in policing, including: (i) what data is actually collected from the public

¹⁰ *See* Susan Edelman, ‘How safe do you feel?’ NYPD to spend \$4.1M to survey residents on cellphones, New York Post (Mar. 14, 2020), <https://nypost.com/2020/03/14/how-safe-do-you-feel-nypd-to-spend-4-1m-to-survey-residents-on-cellphones/>.

¹¹ *See id.*

¹² *See* New ‘Sentiment Meter’ Tracks Public Perception of Police Officers, WNYC (July 19, 2018), <https://www.wnycstudios.org/podcasts/takeaway/segments/new-sentiment-meter-tracks-public-perception-police-officers>.

¹³ *See* Susan Edelman, NYPD wasting millions on a ‘sentiment meter’ survey they don’t even use, New York Post (Dec. 14, 2019), <https://nypost.com/2019/12/14/nypd-wasting-millions-on-a-sentiment-meter-survey-they-dont-even-use/>.

through Elucd's technologies; (ii) whether the data collected by Elucd is combined with data from other sources, including geolocation data or social media data; (iii) how the data is actually used to develop a sentiment score, including whether that process relies on machine learning or other tools; (iv) how the NYPD actually uses that data or the resulting sentiment scores to inform its policing practices; (v) whether individuals can be identified from the raw data Elucd collects; and (vi) with which other city, state, or federal agencies the NYPD shares the data.

II. Petitioner's FOIL Requests and Appeal

33. On November 26, 2019, S.T.O.P. submitted to the NYPD a FOIL request for two categories of information, which can be broken down into the following:

Request 1(a) ("Request for Contracts"): Any and all contracts . . . from 1/9/16 through 11/26/19 between the New York City Police Department and Elucd, Inc.

Request 1(b) ("Request for Memos, Audits, and Reports"): Any and all . . . memos, audits, [and] reports . . . from 1/9/16 through 11/26/19 between the New York City Police Department and Elucd, Inc.

Request 1(c) ("Request for Communications"): Any and all . . . communications (including emails) from 1/9/16 through 11/26/19 between the New York City Police Department and Elucd, Inc.

Request 2 ("Request for Elucd Materials"): Any and all instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc. from 1/9/16 through 11/26/19 in regards to the use of any product provided by Elucd, Inc.

See Feigelson Aff. Ex. 1.

34. S.T.O.P. submitted FOIL requests for the same information to the New York City Comptroller's Office (the "Comptroller") and the New York City Mayor's Office of Criminal Justice ("MOCJ"). *See* Feigelson Aff. Exs. 2, 3. MOCJ has not yet submitted a final response to S.T.O.P.'s request. The Comptroller provided S.T.O.P. with a copy of the January 2020 contract between Elucd and the City of New York. *See* Feigelson Aff. Ex. 5.

35. NYPD's Record Access Officer denied in full S.T.O.P.'s FOIL requests on January 13, 2020. *See* Feigelson Aff. Ex. 4. The denial consisted of a single statement that "the production of the records would require extraordinary efforts." *Id.* It did not elaborate further, nor did it cite a specific FOIL exemption as a basis for refusing to disclose the documents.

36. S.T.O.P. appealed this denial on February 3, 2020. *See* Feigelson Aff. Ex. 6.

37. The very next day, on February 4, 2020, NYPD's Records Access Appeals Officer issued a determination denying S.T.O.P.'s administrative appeal. *See* Feigelson Aff. Ex. 7. The NYPD Appeals Officer made the following determinations:

- (a) **Request for Contracts:** With regard to S.T.O.P.'s request for "[a]ny and all contracts" between the NYPD and Elucd, the NYPD denied the request on the basis that "a diligent search has been conducted . . . [and] no records were located." Feigelson Aff. Ex. 7, at 1.
- (b) **Request for Memos, Audits, and Reports:** The NYPD did not address S.T.O.P.'s request for "memos, audits, [and] reports."
- (c) **Request for Communications:** With regard to S.T.O.P.'s request for "[a]ny and all . . . communications (including emails) . . . between the New York City Police Department and Elucd, Inc.," the NYPD stated that it had identified 122,540 responsive emails between the two parties for the requested time period. Feigelson Aff. Ex. 7, at 1. Though it made no such claim in its initial response, dated January 13, 2020, the NYPD Record Access Appeals Officer's denial of S.T.O.P.'s appeal claimed that there were multiple FOIL exemptions applicable to these responsive documents and that "reviewing each of [the responsive] communications and subsequently applying any relevant exemptions to those

records would require extraordinary efforts that are not required by FOIL.”

Feigelson Aff. Ex. 7, at 2. The Record Access Appeals Officer cited two FOIL exemptions to justify the NYPD’s failure to review or produce these documents.

First, the NYPD stated that a number of responsive documents “contain[ed] personally identifying information, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Feigelson Aff. Ex. 7, at 2; *see* N.Y. Pub. Off. Law § 87(2)(b). Second, the Record Access Appeals Officer asserted that many of the records “are exempt pursuant to POL § 87(2)(g) in that they contain deliberative inter-agency or intra-agency records.” Feigelson Aff. Ex. 7, at 2.

- (d) **Request for Elucid Materials:** With regard to S.T.O.P.’s Request for Elucid Materials, the Record Access Appeals Officer claimed that “a diligent search ha[d] been conducted,” but “no records were located *other than the [communications identified in response to Request 1].*” Feigelson Aff. Ex. 7, at 3 (emphasis added).

III. Article 78 Petition

38. S.T.O.P. has exhausted its administrative remedies. Pursuant to CPLR Article 78, S.T.O.P. now seeks to challenge the NYPD’s adverse and erroneous determination that the documents sought by S.T.O.P. are not subject to public disclosure under FOIL.

LEGAL STANDARD

39. New York’s FOIL is meant to safeguard “[t]he people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations.” N.Y. Pub. Off. Law § 84. “The statute is based on the policy that the public is

vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *Abdur-Rashid v. New York City Police Dep’t*, 31 N.Y.3d 217, 224–25 (2018) (citing *In re Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). While an agency may, in certain circumstances, deny access to certain portions of responsive records, “the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption, which exemptions are to be narrowly construed. This showing requires the entity resisting disclosure to articulate a particularized and specific justification for denying access.” *Baez v. Brown*, 124 A.D.3d 881, 882-83 (2d Dep’t 2015) (internal citation and quotation marks omitted).

40. “Given that the Court generally presumes all records are open and statutory exemptions to FOIL requests are to be construed narrowly,” the standard of review of an agency’s denial of a FOIL request is “more stringent than the general standard applicable to most Article 78 petitions.” *N.Y. Times Co. v. City of N.Y. Office of the Mayor*, 66 Misc.3d 1209(A), 2020 N.Y. Slip Op. 50035(U), *2 (Sup. Ct., N.Y. Cty 2020). “When reviewing the denial of a FOIL request, a court must . . . presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure.” *N.Y. Comm. for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 158 (1st Dep’t 2010).

41. With regard to claims that requests are overly burdensome or voluminous, “Public Officers Law § 89(3)(a) clearly states that an agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis.” *South Shore Press, Inc. v. Havermeyer*, No. 356762010, 2011 WL 13100223, *2, (Suffolk Cnty., June 9, 2011).

ARGUMENT

42. FOIL is clear that “the government is the public’s business and that the public . . . should have access to the records of government.” N.Y. Pub. Off. Law § 84. The NYPD has completely failed to meet its basic obligations for transparency and openness under the law. *See* Section I below. With regard to S.T.O.P.’s Request for Communications, the NYPD has admitted that it has found responsive records but refuses to review and produce them because it asserts, without sufficient substantiation, that doing so would be “unduly burdensome” and that the circumstances “would not allow the Department to employ an outside service.” Feigelson Aff. Ex. 7, at 2. This is insufficient and impermissible under FOIL. If the NYPD does not want to do the work necessary to determine which documents are exempt and which are not, it can simply produce all responsive documents as is. *See* Section II below. Further, before the government may deny a request under FOIL, a diligent search for the requested documents must actually be conducted. The circumstances indicate that with regard to the Request for Contracts, the Request for Memos, Audits, and Reports, and the Request for Elucid Materials, the NYPD did not perform such a search. *See* Section III below.

I. All Of The Requested Records Are Presumptively Open To The Public And Subject To Mandatory Disclosure Under FOIL

43. All of the records S.T.O.P. seeks are exactly the kind that FOIL makes open to public inspection. FOIL functions to decrease government secrecy and increase public oversight. Oversight is of particular importance with regard to the activities of law enforcement, especially given the ongoing nationwide crisis in police–community relations and protests for police reform. “One of FOIL’s salient features is its capacity to expose ‘abuses on the part of the government; in short, to hold the governors accountable to the governed.’” *Friedman v. Rice*, 30 N.Y.3d 461,

475 (2017) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The duty of law enforcement is to protect and serve the community in which it sits. Ultimately, law enforcement is meant to be *accountable to the people*. By gathering, rating, and color-coding people's perceptions of the police, the NYPD seeks instead to hold the people accountable to law enforcement.

44. FOIL was designed as “an effective tool for exposing waste, negligence and abuse on the part of government officers” that would “afford[] all citizens the means to obtain information concerning the day-to-day functioning of . . . government.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986).

45. In order to “promote open government and public accountability, FOIL imposes a broad duty on government to make its records available to the public.” *In re Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996). Though FOIL allows for certain enumerated exemptions to this policy, “[a]ll government records are . . . presumptively open for public inspection and copying.” *Id.* These exemptions “are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” *In re N. Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984).

46. In this case, the NYPD has attempted to evade its responsibilities to the public under FOIL by (1) refusing to review responsive records in its possession and produce the non-exempt portions, simply because an unknown number of them *may* contain information that *may* be redacted under certain FOIL exemptions; and (2) failing to acknowledge or diligently search

for responsive records. Such actions not only deviate from the legislature's intentions in enacting FOIL but are also clearly impermissible under the letter of the law.

47. The NYPD's response is insufficient as a matter of law under FOIL, and the agency must be directed to fulfill its legal responsibilities.

II. The NYPD Has Identified Over 100,000 Responsive Records But Is Withholding Them Without Any Proper Legal Basis

48. The NYPD must be directed to produce the communications between the NYPD and Elucid that it identified as responsive to S.T.O.P.'s Request for Communications. Despite identifying over 100,000 emails between the two parties during the relevant time period, the NYPD denied S.T.O.P.'s request on the basis that "reviewing each of those communications and subsequently applying any relevant exemptions to these records would require extraordinary efforts that are not required under FOIL." Feigelson Aff. Ex. 7, at 1-2. What the NYPD calls "extraordinary efforts" are just the basic requirements of the law—to review and disclose responsive government records. *Gould*, 89 N.Y.2d at 274 (FOIL "imposes a broad duty on government to make its records available to the public").

49. An agency "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure." *Schenectady Cty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011). The Supreme Court of New York has held that "generally speaking, an agency will have a difficult time proving that disclosure of electronically stored and easily transferrable records will be unduly burdensome." *Time Warner Cable News NYI v. N.Y. City Police Dep't*, 53 Misc.3d 657, 671 (Sup. Ct., N.Y. Cty 2016). In this case, S.T.O.P. submitted a detailed request for communications between the NYPD and Elucid contained in an electronic format. The NYPD was clearly able to identify the responsive records

with ease by searching for emails between the NYPD and Elucd as well as “any messages containing any reference to ‘Elucd.’” Feigelson Aff. Ex. 7, at 1. The NYPD therefore faces no burden in finding or producing copies of the responsive records. Its only alleged burden stems from complying with FOIL by actually reviewing the records.

50. The NYPD failed to establish that reviewing these records as required by FOIL is anything “extraordinary.” FOIL is unambiguous that “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records . . . is burdensome . . . if the agency may engage an outside professional service.” N.Y. Pub. Off. Law § 89(3)(a). If an agency wants to deny a request under FOIL on the basis that it is too voluminous, it must “first, establish that the request is unduly burdensome and, second, establish that an outside service cannot be utilized to comply with the request.” *Time Warner Cable News NY1*, 53 Misc.3d at 670. The NYPD has established neither.

A. The NYPD Has Not Demonstrated That S.T.O.P.’s Request For Communications Is Unduly Burdensome

51. The NYPD has not even attempted to determine what the burden of redacting responsive records would be and therefore has not established that responding to S.T.O.P.’s Request for Communications would be unduly burdensome. The NYPD may not refuse to review and produce responsive records on the grounds that some number of these emails *may* contain information that *may* be permissible to redact under FOIL. Further, “while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency’s discretion to disclose such records.” *Burns*, 67 N.Y.2d at 567.

52. An entity “claiming an exemption must show that the requested materials falls squarely within the ambit of one of the statutory exemptions and must articulate a particularized and specific justification for denying access.” *In re Leshar v. Hynes*, 80 A.D.3d 611, 612–13 (2d Dep’t 2011) (internal citations and quotations omitted). The NYPD’s conclusory assertions that some unknown quantity of responsive records may fall within exemptions under FOIL are insufficient to establish that these exemptions do in fact apply. *See id.* (an agency must “articulate a particularized and specific justification for denying access” to responsive records).

53. The NYPD has also failed to demonstrate why it could not utilize an outside service to examine responsive communications and make appropriate redactions as FOIL requires. *See* N.Y. Pub. Off. Law § 89(3).

B. The FOIL Exemption For Private Information Does Not Apply

54. The NYPD has not demonstrated that the responsive communications contain information that would be exempt under FOIL’s privacy exemption. Though agencies may redact or withhold responsive records that “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article,” N.Y. Pub. Off. Law § 87(2)(b), the NYPD has only asserted, without support, that “the records contain personally identifying information.” *Feigelson Aff. Ex. 7*, at 2.

55. While certain items of personally identifying information may be redacted under section 89(2), the NYPD must provide an explanation as to what types of information contained in these records is exempt from disclosure under FOIL. The NYPD may not refuse to disclose over 100,000 responsive records on the basis that some of them *might* contain information that could possibly fall into one of FOIL’s limited, enumerated categories of private information.

56. To the extent that any of the responsive communications do contain private information, the NYPD has not sufficiently demonstrated why it cannot produce such records with appropriate redactions.

C. The FOIL Exemption For Inter- Or Intra-Agency Deliberations Does Not Apply

57. The NYPD has not provided enough information to support its assertion that “the records, in many cases, are exempt pursuant to POL § 87(2)(g).” *Feigelson Aff. Ex. 7*, at 2. It is not enough to say without further elaboration, as the NYPD has, that “they contain deliberative inter-agency or intra-agency records.” *Id.* The NYPD must “articulate a particularized and specific justification for denying access,” which it has failed to do. *Leshner*, 80 A.D.3d at 612–13.

58. The purpose of the inter- and intra-agency deliberations exemption “is to ‘permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.’” *Rauh v. de Blasio*, 161 A.D.3d 120, 125 (App. Div. 1st Dep’t 2018). This exemption is not a basis for the NYPD to withhold responsive documents wholesale because an unidentified portion of them *may* contain deliberations.

59. Further, the exemption does not cover communications between the NYPD and Elucd, as Elucd is not an “agency.” *See* N.Y. Pub. Off. Law § 86(3). Should any responsive communications contain any pre-decisional inter- or intra-agency materials that could justifiably be redacted under FOIL, the NYPD must affirmatively explain why those communications must be redacted under section 87(2)(g).

60. To the extent that any of the responsive communications do contain inter- or intra-agency deliberations, as discussed above, the NYPD has not demonstrated why such records cannot be produced with appropriate redactions.

III. The NYPD Has Failed To Diligently Search For Records Responsive To S.T.O.P.'s Requests For Contracts And Elucd Materials

61. The timeline of and context surrounding the NYPD's response clearly indicate that, instead of conducting a "diligent search" for documents responsive to S.T.O.P.'s Request for Contracts and Request for Elucd Materials as required under FOIL, the NYPD issued a rote and formulaic denial. *See* N.Y. Pub. Off. Law § 89(3).

62. Under section 89(3) of the New York Public Officers Law, an agency unable to locate documents requested under FOIL *must* certify that it does not have possession of a requested record or that such record cannot be found but only *after* conducting a diligent search.

63. In its initial response to S.T.O.P.'s requests, the NYPD made no affirmative statement that it had conducted a diligent search. It merely stated that "[t]o the extent that the requested documents may exist," access to them is denied. *See* Feigelson Aff. Ex. 4, at 1. This is not an adequate certification that responsive documents could not be located. *See Associated Gen. Contractors of New York State, LLC v. Dormitory Auth. of the State of New York*, 58 Misc.3d 1208(A), 2017 N.Y. Slip Op. 51947(U), *7 (Sup. Ct., Albany Cty. Oct. 4, 2017) (holding that the statement "to the extent [respondent] has records responsive to your request, the records are being denied pursuant to . . ." was not a certification that documents could not be located). Only in its response to S.T.O.P.'s appeal did the NYPD assert that a diligent search had been conducted for contracts and for "instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc.," but that no records were located. *See* Feigelson Aff. Ex. 7, at 1, 3.

64. This response was written just *one day* after the appeal was made. Given the number of records the NYPD maintains, it strains credulity that the NYPD conducted a "diligent search" for the requested records in the 24-hour period between the submission of S.T.O.P.'s

appeal and the NYPD's subsequent denial. It appears exceedingly unlikely that a diligent search was ever conducted. Rather, the NYPD proceeded with denying S.T.O.P.'s requests outright, without justification.

65. To support its argument that it fulfilled its duty to conduct a diligent search, the NYPD relies upon precedent that is distinguishable from the present case. Feigelson Aff. Ex. 7, at 1. In *Rattley v. New York City Police Dep't.*, the petitioner brought an Article 78 proceeding after receiving no response from the NYPD with regard to its FOIL request. 96 N.Y.2d 873, 874 (2001). The NYPD Records Access Officer responded to the petition, producing several requested documents and certifying that it could not locate others after weeks of searching. *Id.* The Officer informed the petitioner that it was continuing to search for certain requested documents that had not yet been located. *Id.* The court granted the NYPD's motion to dismiss the Article 78 proceeding as moot on the condition that the NYPD notify petitioner within 60 days of the status of the search for the remaining documents, and the Court of Appeals affirmed. *Id.* at 874–75. It is clear from this case that a “diligent search” as required by section 89(3) cannot be conducted within 24 hours and requires much more intensive efforts than were expended by the NYPD here.

66. The NYPD also mischaracterizes the Appellate Division's holding in *Bernstein Family Ltd. P'ship v. Sovereign Partners L.P.*, 66 A.D.3d 1 (1st Dep't 2009). Feigelson Aff. Ex. 7, at 1. The Appellate Division held that “when a request is initially denied but the party thereafter receives the record (or the record does not exist), the party seeking the record has received all that he or she is entitled to under the law” and *does not have the right to a judicial declaration*—in addition to the documents themselves—that the request is or is not one that should be granted. *Id.* at 7–8 (emphasis added). By contrast, S.T.O.P. is not seeking more than

the requested documents—which it has not yet received—and because the NYPD has not conducted a diligent search for the requested documents, S.T.O.P. has not received all that it is entitled to under the law.

67. Despite the NYPD’s certification that it performed a diligent search for a subset of the requested documents, “the person requesting the documents may nevertheless be entitled to hearing on the issue where he or she can articulate a demonstrable factual basis to support the contention that the requested documents existed and were within the entity’s control.” *Oddone v. Suffolk Cnty Police Dep’t*, 96 A.D.3d 758, 761 (2d Dep’t 2012). S.T.O.P. can articulate such a factual basis for concluding that the NYPD did not conduct a diligent search as required by FOIL and failed to fulfill its duty under the law.

68. Further, the NYPD itself has *admitted* that it has found records responsive to S.T.O.P.’s Request for Elucd Materials but has not disclosed them. In its denial, the NYPD states that a diligent search was conducted for the documents sought in Request 2 but that “no responsive records were located *other than the [described] communications.*” Feigelson Aff. Ex. 7, at 3 (emphasis added).

69. The NYPD’s admission clearly indicates that the agency has found responsive records that, under FOIL, must be produced. As discussed in Section II, the NYPD cannot avoid its duty to produce responsive records simply because they are contained in or attached to emails the NYPD does not wish to review.

70. The services to be provided by Elucd under the contract produced by the Comptroller’s Office include “custom data science support,” “tuning of reports and the Elucd platform,” “analytic training to leverage the Elucd Platform,” “desk-side analytical support,” “and monthly report[ing] on survey administration metrics.” Feigelson Aff. Ex. 5, at 2. It would

be improbable and, perhaps, unbelievable, that the NYPD would enter into a multimillion dollar deal with Elucd under which Elucd is to provide the services described, without acquiring any “set of instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc.” that would be responsive to S.T.O.P.’s Request for Elucd Materials.

71. With regard to S.T.O.P.’s Request for Contracts, the contract attached as Exhibit 5 to the Affirmation of Jeremy Feigelson demonstrates the existence of responsive records. Though that contract is technically drafted as between Elucd and the City of New York, we note that the contract is titled as between Elucd and the NYPD, the NYPD is to receive the services under the contract, and the countersigning party is an NYPD employee. S.T.O.P.’s Request for Contracts should be read to encompass any and all agreements that exist between the NYPD and Elucd. This contract certainly is such an agreement. Any communications identified by the NYPD that contain an agreement between Elucd and the NYPD, even if not formally memorialized in an extensive contract, are responsive to S.T.O.P.’s request.

72. Under these circumstances, the NYPD’s unsubstantiated claim that a “diligent search” for the requested contracts has been conducted cannot be accepted, and the agency has not fulfilled its duty under FOIL.

IV. The NYPD Has Simply Not Addressed S.T.O.P.’s Request For Memos, Audits, And Reports Between The NYPD And Elucd

73. In its rush to deny S.T.O.P.’s appeal, the NYPD failed to address S.T.O.P.’s request seeking “memos, audits, [and] reports . . . between the [NYPD] and Elucd.” *See* Feigelson Aff. Ex. 7, at 1, 3.

74. The NYPD has not certified that a diligent search has been conducted for those documents as required by section 89(3) of the New York Public Officers Law. *See Rattley*, 96

N.Y.2d at 875; *see also De Fabritis v. McMahon*, 301 A.D.2d 892, 894 (3d Dep’t 2003) (holding that the respondent in an Article 78 proceeding did not provide the requisite certification where the record lacked any evidence of a statement or certification by respondent that all records had been provided or that a diligent search had been conducted).

75. By failing to make the necessary certification, the NYPD has not fulfilled its statutory duty for this portion of S.T.O.P.’s request.

RELIEF REQUESTED

WHEREFORE Petitioner respectfully requests that this Court issue an order:

- A. Declaring that the NYPD has improperly denied S.T.O.P.’s requests pursuant to FOIL;
- B. Directing the NYPD to conduct a diligent search for “[a]ny and all . . . memos, audits, [and] reports” from January 9, 2016 through November 26, 2019, between the NYPD and Elucd;
- C. Directing the NYPD to conduct a diligent search for “[a]ny and all contracts” between the NYPD and Elucd as well as “[a]ny and all instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc.” in regards to use of any Elucd product from January 9, 2016 through November 26, 2019;
- D. Directing the NYPD to produce all requested records with only reasonable redactions;
- E. Awarding attorney’s fees in favor of S.T.O.P. and against the NYPD in an amount to be determined at the conclusion of the proceeding; and

F. Granting S.T.O.P. such other and further relief the Court may deem just and proper.

Dated: October 8, 2020
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

/s/ Jeremy Feigelson

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VERIFICATION

STATE OF NEW YORK)
 : ss.:
COUNTY OF PUTNAM)

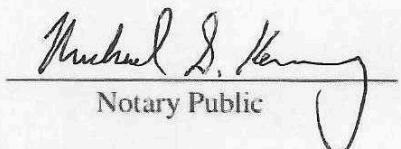
Albert Fox Cahn, being duly sworn, deposes and says:

I am the Executive Director of the Surveillance Technology Oversight Project, Inc. I have read the foregoing Amended Petition in support of an Article 78 application and know the contents to be true and accurate upon personal knowledge, except to the extent allegations therein are made upon information and belief, and as to those allegations, I believe them to be true.



Albert Fox Cahn, Esq.

Sworn to before me by videoconference while the witness was in Putnam County and I was in New York County this 8th day of October, 2020.


Notary Public

MICHAEL S. KENNY
Notary Public, State of New York
No. 01KE6326825
Qualified in New York County
Commission Expires June 29, 2023