

EXHIBIT 7



POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038
FOILAppeals@NYPD.org

February 4, 2020

Lindsay Greyerbiehl
Surveillance Technology Oversight Project
LGreyerbiehl@urbanjustice.org

RE: FREEDOM OF INFORMATION LAW
REQUEST: FOIL-2019-056-21252
Re: Elucd, Inc.

Dear Ms. Greyerbiehl:

This letter is in response to your email dated February 3, 2020, appealing the determination of the Records Access Officer (RAO) made on January 13, 2020 regarding records requested from the New York City Police Department. Your request, pursuant to the Freedom of Information Law, was originally received by the FOIL unit on December 2, 2019 and subsequently denied to the extent that fulfilling the request would require extraordinary efforts not required by Public Officers Law §89(3).

To the extent that you seek “[a]ny and all contracts . . . from 1/9/16 through 11/26/19 between the [NYPD] and Elucd, Inc.”, the appeal is denied because a diligent search has been conducted for the requested records based on the information provided; however, no records were located. The New York Court of Appeals has determined that “[w]hen an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to certify that it does not have possession of a requested record or that such record cannot be found after diligent search . . . Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required” *Raittley v. New York City Police Dept.*, 96 NY2d 873, 875; 730 NYS2d 768 (2001).

Furthermore, in 2009, the Appellate Division held that an agency cannot produce documents it does not possess or cannot disclose and that the Court cannot require respondents to produce documents that they certify they cannot find after a diligent search because petitioner “has received all that he . . . is entitled to under the law” *Bernstein Family Ltd. P’ship v. Sovereign Partners, L.P.*, 66 AD3d 1, 8; 883 NYS2d 201, 206 (1st Dept 2009).

Next, to the extent that you seek “[a]ny and all . . . communications (including emails)” between the NYPD and Elucd, Inc., the appeal is denied because a diligent search was conducted which revealed the presence of 122,540 emails between the two parties for the time period requested and 159,104 communications about the use of any Elucd product (where the search was conducted for any messages containing any reference to “Elucd”). Accordingly, your appeal is

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denied to the extent 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 [see Public Officers Law Section 89(3)].

First, the records contain personally identifying information, the disclosure of which would constitute an unwarranted invasion of personal privacy [§87(2)(b)]. When material is not expressly exempted from disclosure by New York State or federal law, it may be withheld if, on balance, the public's interest in disclosure is outweighed by the individual's interest in privacy. *See, e.g., Matter of Harbatkin v. N.Y. City Dep't of Records and Info. Servs.*, 19 N.Y.3d 373, 380 (2012) ("Even" when none of the categories set forth in §89(2)(b) is applicable, the personal privacy exemption may be properly invoked so long as the privacy interest at stake outweighs the public interest in the disclosure of the information."). "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." *See, Matter of Pennington v. Clark*, 16 A.D.3d 1049, 1051 (4th Dep't 2005).

In addition, the records, in many cases, are exempt pursuant to POL §87(2)(g) in that they contain deliberative inter-agency or intra-agency records that do not contain: i.) statistical or factual tabulations or data; ii.) instructions to staff that affect the public; iii.) final agency policy or determinations; or, iv.) external audits [Public Officers Law §87(2)(g)].

The exemption is intended to protect the deliberative process of government, and to encourage the free exchange of ideas among government policymakers, (*Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 [1993] holding that inter-agency materials are construed to mean "deliberative material" (i.e. communications exchanged for discussion purposes not constituting final policy decisions)); *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 653 N.Y.S.2d 54 [1996]; *New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 796 N.Y.S.2d 302 [2005]. Courts have ruled that "mundane communications" that are "not factual in nature" are exempt from disclosure (*Matter of Tuck-It-Away Assoc., L.P. v. Empire State Dev. Corp.*, 54 AD3d 154, 166 [1st Dept 2008]); whereas, on the other hand, "factual data", which "simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making," is disclosable information that does not fall under this exemption (*Matter of Gould v. New York City Police Dep't.*, 89 NY2d 267, 277 [1996]). Finally, FOIL allows denial of access to predecisional memoranda or other nonfinal recommendations, whether or not action is taken. *Xerox v. Town of Webster*, 65 N.Y.2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985).

Section 89(3) requires 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 or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article." Unfortunately, the unduly burdensome request as currently constituted would not allow for the Department to employ an outside service because the disclosure would require extensive redactions of thousands of records based on the applicability of the various subsections of Public Officers Law Section 87(2) cited above.

In *Matter of Huseman vs. NY DOE*, 2016 NY Slip Op. 30959(U), the Supreme Court of the State of New York held that, “[t]here is a general recognition that agencies need not engage in herculean efforts to respond to a FOIL request, particularly when the agency cannot reasonably hire an outside service to conduct these extensive activities.” In that case, it was determined that the Department of Education could not produce the records sought “without undertaking the extraordinary effort necessary to review each of the approximately 2,900 detailed complaint narratives and their approximately 2,200 associated notes, determine how uncommon the particular mix of special education services described in each record is, and perform the necessary redactions. Given the fact-intensive nature of the redaction required, it is not feasible to hire an outside firm to conduct this work. Under these circumstances, DOE should not be required to disclose the requested detailed narratives, summaries of DOE actions, and their associated ‘notes.’” See *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 466 (2007) (“If such [private] information cannot be reasonably redacted from the electronic records, then such records may not be subject to disclosure under FOIL.”).

Finally, please note that a diligent search was conducted for any “instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc.” related to Elucid, Inc.; however, no responsive records were located other than the communications described above.

You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Respectfully,



Jordan S. Mazur
Sergeant
Records Access Appeals Officer

c: Committee on Open Government