EXHIBIT 4

MAZUR, JORDAN

From: Albert Fox Cahn <Albert@stopspying.org>
Sent: Friday, February 26, 2021 2:28 PM
To: FOIL APPEALS
Cc: John Clayton
Subject: FOIL-2020-056-17390 - Appeal
Attachments: 2021-02-26_Facial Recognition FOIL Appeal FINAL.pdf

Dear FOIL Appeals Officer:

Please find attached an appeal from the New York City Police Department's January 29, 2021 denial of the Surveillance Technology Oversight Project, Inc.'s Freedom of Information Law request 2020-056-17390, which was submitted to the Department on November 23, 2020.

Sincerely,
Albert Fox Cahn

STOP
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT

Albert Fox Cahn, Esq.
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Pronouns: he/his/him

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STOP
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February 26, 2021

Legal Bureau — FOIL Unit
One Police Plaza, Room 110-C
New York, NY 10038
foilappeals@nypd.org
Via email

Re: Administrative Appeal of Denial of FOIL Request 2020-056-17390

Dear FOIL Appeals Officer:

This is an appeal from the New York City Police Department's ("NYPD's" or "the Department's") January 29, 2021 denial (the "Denial") of the Surveillance Technology Oversight Project, Inc.'s ("S.T.O.P.'s") Freedom of Information Law ("FOIL") request 2020-056-17390 (the "Request"), which was submitted to the Department on November 23, 2020.

The Request sought copies of any and all records from January 1, 2005 to November 23, 2020 relating to the accuracy and bias of the NYPD's use of Facial Recognition. The Request included the following specific parameters:

> Records, as used herein, includes, but is not limited to, all agency records including memoranda, correspondence, analyses, interview notes, logs, charts, and other written records as well as records maintained on computers, electronic communications, videotapes, audio recordings, or any other format.
>
> Accuracy, as used herein, signifies any metrics or other indicators regarding defects, patches, the error rate, the precision, and/or the exactness of Facial Recognition.
>
> Bias, as used herein, means any difference in outcome based on a protected characteristic, as defined in N.Y.C. Admin. Code § 8-101, including but not limited [to] heightened or diminished rates of false-positive and false-negative results.
>
> Facial Recognition is defined as computer vision software capable of identifying [a] person from a static image or a video source.

The Request further asked that, in the event the Request was denied, the Department provide a written explanation for the denial including a reference to the specific statutory exemptions relied upon.

Attached please find a copy of the Request as Exhibit A and a copy of an email acknowledging receipt of the Request by the NYPD on November 25, 2020 as Exhibit B.

In its one-sentence Denial dated January 29, 2021, attached as Exhibit C, the NYPD informed S.T.O.P. Executive Director, Albert Fox Cahn, "[i]n regard to the document(s) which you requested, this unit is unable to locate records responsive to your request based on the information you provided."

S.T.O.P. hereby appeals the Denial. The Denial rests on the alarming claim that the NYPD has used Facial Recognition for nearly a decade without any investigation of whether the technology works or is discriminatory. Not only is such a claim deeply alarming, it contradicts numerous public statements from the Department in defense of its Facial Recognition program.[1]

As an initial matter, it is beyond doubt that the NYPD used Facial Recognition extensively during the time period delineated in the Request. The Department has admitted to using Facial Recognition since 2011[2]; it processed 9,850 requests to use the technology in 2019 alone.[3] The Department's former Commissioner wrote an op-ed in 2019 touting Facial Recognition's "invaluable contributions" to the NYPD's investigations.[4]

At the same time, the NYPD has acknowledged public concerns related to the accuracy of Facial Recognition, which has been shown by numerous studies to exhibit significant bias toward people of color and women.[5] The Department claims its official protocols, which require "human review" of Facial Recognition queries and results, help "prevent misidentification" and ensure that "erroneous software matches can be swiftly corrected."[6] These protocols further direct investigators to retain and electronically log "all records of facial recognition searches, including … case number, reason each search was requested, details, and search results."[7] These policies not only contradict the Denial's claim that the Department has no responsive records, these policies <u>are</u> responsive records that should have been produced.

It strains credulity, then, that the Department—despite its expansive use of Facial Recognition, its "human review" protocols, and its detailed record-keeping policy—does not possesses a single record relating to how accurately its Facial Recognition software functions. The

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[1] The Denial also fails to satisfy the statutory requirements of N.Y. Pub. Off. Law § 89(3)(a), which requires an agency that is unable to locate documents properly requested under FOIL to certify that it either "[1] does not have possession of [a requested] record or [2] that such record cannot be found after diligent search." Here, the Denial's cursory explanation fails to specify whether the Department does not possess the requested records or simply cannot locate them. *See Brown v. Baez*, 124 A.D.3d 881, 884 (2d Dept. 2015) (finding a FOIL denial that merely stated that "nothing in the case file met [the petitioner's] description of these items" did not constitute an adequate certification).

[2] *See* N.Y. Police Dept., *NYPD Questions and Answers: Facial Recognition*, https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/facial-recognition.page (last accessed Feb. 16, 2021) [hereinafter NYPD Facial Recognition FAQs].

[3] *Id.*

[4] *See* James O'Neill, *How Facial Recognition Makes You Safe*, N.Y. Times (June 9, 2019), https://www.nytimes.com/2019/06/09/opinion/facial-recognition-police-new-york-city.html.

[5] *See* N.Y. Police Dept., *Facial Recognition: Impact & Use Policy* 7 (Jan. 11, 2021), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/post-act/facial-recognition-nypd-impact-and-use-policy-draft-for-public-comment-01-11-2021.pdf (noting that "studies have found variations in accuracy for some software products in analyzing the faces of African Americans, Asians Americans, women, and groups other than non-white males.").

[6] NYPD Facial Recognition FAQs, *supra* note 2.

[7] N.Y. Police Dept., *Patrol Guide: Facial Recognition Technology* 3 (March 12, 2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/nypd-facial-recognition-patrol-guide.pdf.

NYPD has published metrics related to its use of the technology in the past; its website states the number of requests its Facial Recognition unit received in 2019 and how many possible matches were produced.[8] The existence of responsive records on the Department's own website establishes by itself a "demonstrable factual basis" that the NYPD failed to produce requested documents within its control.[9]

If the Department has no records responsive to the Request, apart from the public materials identified above, it would be a damning admission. Facial Recognition's biases are widely documented,[10] a fact the NYPD itself has acknowledged. The Department has an obligation to ensure the software it employs can perform the function the Department claims. Furthermore, deploying such software without any analysis of racial and gender bias would likely violate arrestees' rights under both the United States and New York Constitutions.

For the reasons set out above, S.T.O.P. respectfully appeals the Denial. As required by §89(4)(a) of FOIL, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within ten business days of the receipt of an appeal. If the Request is denied on appeal, please explain the reasons for the denial fully in writing as required by law. If this appeal is granted, please provide a specific date when we can expect records to be produced.

S.T.O.P. also requests that the NYPD provide it with documents as they become available rather than waiting to provide the complete set only when all documents have been gathered. We also request that you provide S.T.O.P. with the documents in electronic format where possible. Should you have questions, please contact me by telephone at 646-602-5652, or via e-mail at Albert@stopspying.org.

Sincerely,

Albert Fox Cahn, Esq.

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[8] *See* NYPD Facial Recognition FAQs, *supra* note 2 (noting that the Department received 9,850 requests to use Facial Recognition in 2019, leading to 2,510 "possible matches").

[9] *Gould v. N.Y. City Police Dep't.*, 89 N.Y.2d 267, 279 (1996). In addition to these public materials, any data on erroneous Facial Recognition software matches that the NYPD can access "with reasonable effort" by searching within its search records database would also be presumptively subject to disclosure as part of S.T.O.P.'s Request. *See* N.Y. Pub. Off. Law § 89(3)(a) ("When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so."); *Locator Services Group, Ltd. v. Suffolk County Comptroller*, 40 A.D.3d 760, 761 (2d Dept. 2007) (requiring an agency to produce records which can be accessed by performing queries within an existing database).

[10] *See, e.g.*, Patrick Grother, Mei Ngan & Kayee Hanaoka, Nat'l Inst. of Standards & Tech., *Face Recognition Vendor Test (FRVT)* (2019), https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf (finding that many recognition algorithms falsely identified Black and Asian faces 10 to 100 times more than white faces, and falsely identified women up to five times more than men).