EXHIBIT 5

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

March 10, 2021

Albert Fox Cahn
Surveillance Technology Oversight Project
Albert@stopspying.org

RE: FREEDOM OF INFORMATION LAW REQUEST: FOIL-2020-056-17390
Re: Facial Recognition

Dear Mr. Cahn:

This letter is in response to your email, dated February 26, 2021, appealing the determination issued by the Records Access Officer (RAO) on January 29, 2021 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 November 23, 2020 and subsequently denied because the RAO was unable to locate records responsive to your request.

Your appeal of that determination 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).

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

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Sergeant
Records Access Appeals Officer

c: Committee on Open Government