SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application of
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT,

Petitioner,

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

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.
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AFFIRMATION IN SUPPORT OF CROSS MOTION TO DISMISS
Index No. 156442/2021
(Edmead, J.)

EMILY B. GOLD, an attorney duly admitted to practice before the courts of this state, affirms under penalty of perjury pursuant to New York Civil Practice Law and Rules ("CPLR") Rule 2106 that the following statements are true except for those made upon information and belief, which he believes to be true:

1. I am an attorney in the office of ERNEST F. HART, Deputy Commissioner, Legal Matters of the New York City Police Department ("NYPD").

2. I submit this affirmation, on behalf of Respondent, in support of the Respondent's cross-motion to dismiss this proceeding on the grounds that (1) a diligent search has been conducted and a determination issued, this petition is moot and academic, and this court therefore lacks subject matter jurisdiction over this proceeding; and (2) Petitioner's request for attorneys' fees and costs is premature. Respondent reserves the right to file a verified answer should the instant cross-motion to dismiss be denied.

3. I have prepared this affirmation upon information and belief, based on information contained in the records on this matter maintained in the ordinary course of business by the NYPD, and based on information received from other employees of the NYPD, which I believe to be true and accurate.

PRELIMINARY STATEMENT

4. Petitioner brings this proceeding pursuant to CPLR Article 78 and N.Y. Public Officers Law ("POL") § 84 *et seq*., also known as the Freedom of Information Law ("FOIL"), seeking to compel disclosure of "any and all records from 1/1/2005 to 11/23/2020 relating to the Accuracy and Bias of the New York City Police Department's Facial Recognition."

5. The NYPD conducted a diligent search for records sought, but no records were located. Thus, inasmuch as Petitioner seeks to compel disclosure of records that do not exist, the relief sought is moot and academic, and this Court therefore lacks subject matter jurisdiction, and the Petition should be dismissed.

FACTUAL BACKGROUND

Petitioner's FOIL request

6. By letter, dated November 23, 2020, Petitioner submitted a FOIL request to Respondent seeking "any and all records from 1/1/2005 to 11/23/2020, relating to the Accuracy and Bias of the New York City Police Department's Facial Recognition." See letter by Albert Fox Cahn, Esq., dated November 23, 2020, a copy of which is annexed hereto as Exhibit "1."

7. By email, dated November 25, 2020, the NYPD's Records Access Officer ("RAO") acknowledged receipt of Petitioner's request via OpenRecords. See Open Records email, dated November 25, 2020, a copy of which is annexed hereto as Exhibit "2."

8. By email, dated January 29, 2021, the RAO informed Petitioner that their request has been closed as the FOIL Unit was unable to locate records responsive to the request. See Open Records email dated January 29, 2021, a copy of which is annexed hereto as Exhibit "3."

9. By email and letter, dated February 26, 2021, Petitioner administratively appealed the RAO determination. See email by Albert Fox Cahn, Esq., dated February 26, 2021, and letter by Albert Fox Cahn, Esq., copies of which are annexed hereto as Exhibit "4."

10. By letter, dated March 10, 2021, the Records Access Appeals Officer ("Appeals Officer") denied Petitioner's appeal, as a diligent search was conducted but yielded no results. See letter by Sergeant Jordan S. Mazur, dated March 10, 2021, a copy of which is annexed hereto as Exhibit "5."

The Instant Article 78 Proceeding

11. On or about July 8, 2021, Petitioner commenced this proceeding, pursuant to CPLR Article 78, by filing a verified petition seeking to compel disclosure of the records sought.

Diligent Search

12. Upon receipt of Petitioner's FOIL request, a diligent search for the records relating to the Accuracy and Bias of the New York City Police Department's Facial Recognition was undertaken by the NYPD's FOIL Unit. On December 3, 2020, Detective Steve Halk, contacted the Facial Identification Section ("FIS"), and inquired as to as to whether that unit was in possession of, or could identify, any records relating to Petitioner's request. Sergeant Eric Dargenio of FIS, informed Detective Halk that the Department does not have records relating to the accuracy and bias of the Department's facial recognition.

13. Upon being assigned this case, the Department's Legal Bureau conferred with members of FIS and the Commanding Officer of the Real Time Crime Center ("RTCC")[1] to determine whether documents responsive to Petitioner's request exist. Inspector Janice Holmes, the Commanding Officer of RTCC, confirmed that the Department is not in possession of the records requested by Petitioner. See Affidavit of Inspector Janice Holmes, dated September 9, 2021, a copy of which is annexed hereto as Exhibit "6".

14. Inspector Holmes informed the Legal Bureau that the High Intensity Drug Trafficking Areas ("HIDTA") program provides the Department access to the FRT that they license from DataWorks Inc. See id. at ¶ 3. The DataWorks software which the Department has access to utilizes two facial recognition algorithms, Rank One Computing and NEC Corporation. Id. Inspector Holmes further explained that each FRT match is manually reviewed and utilized to remove erroneous matches provided by the algorithms; a supplementary review is then undertaken by a separate investigator before being provided to the Detective Bureau investigator as a potential lead. See id. at ¶ 5.

15. Additionally, the National Institute of Standards and Technology ("NIST") routinely conducts independent evaluations of FRT algorithms, including those used by the Department. NIST makes their Facial Recognition Vendor Test evaluations available for all to see on their public facing website. See National Institute of Standards and Technology, *Face Recognition Vendor Test (FRVT) Ongoing*, https://www.nist.gov/programs-projects/face-recognition-vendor-test-frvt-ongoing, (last visited Jul. 27, 2021).

16. Finally, Inspector Holmes informed Legal Bureau that, pursuant a diligent search, no documents regarding the accuracy and/or bias of FRT were located, including notes, charts,

[1] The Facial Identification Section is a sub-unit of the Real Time Crime Center.

memoranda, correspondence, analyses, computer records, or recordings, and that the Department does not conduct or take part in studies relating to the accuracy or bias of the FRT it licenses. See id. at ¶ 7 – 8.

17. Accordingly, the undersigned herein certifies that a diligent search was conducted for the requested records, and no records responsive to Petitioner's FOIL request have been located.

I. RESPONDENT PERFORMED A DILIGENT SEARCH FOR THE REQUESTED RECORDS AND NO RECORDS WERE LOCATED, RENDERING THE INSTANT PROCEEDING MOOT AND ACADEMIC

A. RESPONDENT'S COMPLIED WITH FOIL'S DILIGENT SEARCH REQUIREMENT

18. It is beyond dispute that the New York City Police Department is not required to provide Petitioner with documents that it does not possess. See Tarantino v. New York City Police Dept., 136 A.D.3d 598 (1st Dep't 2016); Chaves v. Office of the Dist. Attorney, 93 A.D.3d 532 (1st Dep't 2012); Davidson v. Police Dept., 197 A.D.2d 466, 467 (1st Dep't 1993). An agency's obligations under FOIL are met when it certifies that the requested records cannot be found after a diligent search. See N.Y. Public Officers Law §89(3); see also Yonamine v. New York City Police Dept., 121 A.D.3d 598 (1st Dep't 2014); Carty v. New York City Police Department, 41 A.D.3d 150 (1st Dep't 2007); He'ron v. Office of the District Attorney, Bronx County, 96 A.D.3d 531 (1st Dep't 2012); Covington v. Sultana, 59 A.D.3d 163 (1st Dep't 2009).

19. An agency's certification does not have to follow any specific form or to recite a verbatim sequence of words, nor must it provide a statement from a person with personal knowledge of the search. See Matter of Oddone v. Suffolk County Police Dept., 96 A.D.3d 758 (2d Dep't 2012) (citing Rattley v. New York City Police Department, 96 N.Y.2d 873 (2001)); see also Matter of Daum v. Tessler, 24 A.D.3d 214 (1st Dep't 2005); Alicea v. N.Y. City Police Dep't,

287 A.D.2d 286 (1st Dep't 2001); Grabell v. New York City Police Dept., 139 A.D.3d 477 (1st Dep't 2016).

20. Petitioner unpersuasively claims that Respondent's RAO decision is vague and violates Public Officers Law § 89(3). See Verified Petition at paragraph 23-24. Petitioner's reliance on Oddone is misplaced, as the court therein reiterated that POL "does not specify the manner in which an agency must certify that documents cannot be located, and **'[n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required**.'" 96 A.D.3d 758 (emphasis added) (citing to Rattley, 96 N.Y.2d 873); see also Jewish Press v. Kingsborough Community College, 2021 N.Y. Misc. LEXIS 3136 (Sup. Ct. NY Co. 2021) (finding that an "affirmation from counsel stating that certain documents could not be found despite a 'thorough and diligent search' is sufficient'" to certify a search has been completed).

21. The Court in Oddone found that the determination of the Appeals Officer was not based on any evidence in the record, as the diligent search certification came from an unnamed source; thus the Respondent failed to demonstrate that the determination was not arbitrary and capricious. However, in the instant case, the Appeals Officer's determination was based on a certification from the RAO himself. Further, the Appeals Officer determination was based on evidence: the NYPD's FOIL Unit contacted FIS, which is the unit that would possess any information relating to facial recognition technology, and were informed that no documents exist which would be responsive to Petitioner's request. On January 29, 2021, the NYPD's RAO informed Petitioner that no documents were located. See Exhibit "3." Accordingly, on March 10, 2021, the Appeals Officer again informed Petitioner that a diligent search was conducted, but no records were located. See Exhibit "5."

22. In addition to this, the Legal Bureau contacted RTCC and FIS, who again confirmed that no documents exist relating to the "Accuracy and Bias of the New York City Police Department's Facial Recognition." See Exhibit "6." Pursuant to the diligent search, the NYPD determined that no such documents existed which are responsive to Petitioner's FOIL request. It is beyond dispute that the NYPD is not required to provide Petitioner with documents that it does not possess. See Davidson, 197 A.D.2d at 467 (1st Dep't 1993). Accordingly, should the Court find the RAO's letter not to be sufficient certification, this attorney's certification satisfies the requirements under POL § 89(3) and renders this proceeding moot.

B. PETITIONER IS NOT ENTITLED TO A HEARING

23. A Petitioner is only entitled to a hearing on the issue of whether documents exist where they can "articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the Police Department's control." See Gould v. New York City Police Dep't, 89 N.Y.2d 267, 272 (1996); see also Oddone, 96 A.D.3d 758; Tarantino, 25 N.Y.S.3d 601, 601 (denying Petitioner's request for a hearing in the absence of any demonstrable factual basis to support its contention that the requested documents . . . were within the Police Department's control."); Yonamine, 121 A.D.3d 598.

24. In its November 23, 2020, FOIL request, Petitioner sought all documents relating to the "Accuracy and Bias of the New York City Police Department's Facial Recognition." See Exhibit "1." In support of its claim that the documents exist, Petitioner points to three publicly available documents which it believes are responsive to its request. The documents are: (1) Facial Recognition: Impact & Use Policy; (2) NYPD Questions and Answers Facial Recognition; and (3) Patrol Guide. These documents are not responsive to Petitioner's FOIL request.

Facial Recognition: Impact & Use Policy

25. On April 11, 2021, *one month after* the Appeals Officer determination was issued, the Department published an eleven-page document entitled: *Facial Recognition: Impact & Use Policy*. This document is not responsive to Petitioner's request, but if it were to be determined to be responsive, it could not have been produced to Petitioner at the time of the RAO determination, or the determination by the Appeals Officer.

26. The Impact & Use Policy was written and published pursuant to the NYPD's obligations under the Public Oversight of Surveillance Technology ("POST") Act, and discusses facial recognition technology generally, including sections on who has access to the technology; when it can be used; and procedural safeguards that are in place. Petitioner points to page 11 of this document as being responsive to their request, as the Department states therein that "[s]ome studies have found variations in accuracy for some software products in analyzing the faces of African Americans, Asian Americans, women, and groups other than non-white males." See NYPD, *Facial Recognition: Impact & Use Policy*, available at https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/facial-recognition-nypd-impact-and-use-policy_4.9.21_final.pdf (last accessed Sept. 8, 2021).

27. The studies which the Department references are not ones undertaken by the Department, but those of outside entities who make their findings publicly available on the internet. Reviewing these publicly available studies assists the Department in coming up with protocols for managing facial recognition, but the Department did not participate in or prepare these reports. Furthermore, the Department does not maintain these reports, and "is not required to print out or make an agency document for every webpage of another entity that is viewed by

employees of the agency." McGee v. Putnam County Assistant Dist. Atty, 192 A.D.3d 1446, 1450 (3rd Dep't 2021); see also Exhibit "6" at ¶ 7 – 8.

NYPD Questions and Answers Facial Recognition

28. The second document which Petitioner points to as responsive is a webpage which provides commonly asked questions and answers regarding the Department's use of facial recognition technology. See NYPD, *NYPD Questions and Answers Facial Recognition Technology*, https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/facial-recognition.page (last accessed Sept. 8, 2021).

29. The section of this document upon which Petitioner relies provides:

> **Have studies shown that some facial recognition software is less accurate in analyzing the faces of African Americans, Asians, women and other groups than of white men?**
>
> Some studies have found variations in accuracy for some software products. The most important federal government study on the subject, however, noted that in "hybrid machine/human systems," matches can be swiftly corrected by human observers. The safeguards built into the NYPD's protocols for managing facial recognition, which provide an immediate human review of the software findings, prevent misidentification. Id. (emphasis added).

30. Again, the Department references studies which were completed by outside entities regarding facial recognition technology generally, and how those studies help shape Department protocols. Moreover, this document does not relate to the accuracy and bias of facial recognition software, and does not establish that the Department has any documents relating to the accuracy and bias of its software.

Patrol Guide 212-129, Facial Recognition Technology

31. The last document which Petitioner asserts is responsive is NYPD Patrol Guide 212-129, Facial Recognition Technology. This publically available procedure outlines the process for NYPD personnel utilizing facial recognition technology, and reflects the safeguards that the

Department has put in place to avoid the risk of impartial and biased law enforcement. See NYPD, Patrol Guide 212-129, Facial Recognition Technology, available at https://www.nyc.gov/assets/nypd/downloads/pdf/nypd-facial-recognition-patrol-guide.pdf (last accessed Sept. 9, 2021). At no point in the procedure does it discuss the "accuracy and bias" of the Department's facial recognition technology, nor does Petitioner point to a section which does. Thus, Petitioner's conclusion that this document is responsive is incorrect.

32. Neither the Facial Recognition: Impact & Use Policy; NYPD Questions and Answers Facial Recognition; nor Patrol Guide 212-129, are responsive to Petitioner's request as they do not discuss the "Accuracy and Bias of the New York City Police Department's Facial Recognition." Additionally, these documents do not establish that the Department is in possession of any documents that pertain to the accuracy and bias of facial recognition technology. Accordingly, Petitioner has failed to "articulate a demonstrable factual basis" to support its claim that the Department is in possession of the documents requested. See Gould, 89 N.Y.2d 267, 272.

II. PETITIONER'S REQUEST FOR ATTORNEYS' FEES AND COSTS IS PREMATURE

33. Pursuant to POL § 89(4)(c), a court (i) may award litigation costs to a party if the Court finds that the party "substantially prevailed" in the proceeding and the agency failed to respond to a request or appeal within the statutory time, and (ii) shall assess fees and costs when the party has "substantially prevailed" and the agency had no reasonable basis for denying access. See POL § 89(4)(c). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees. See Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 441 (2005).

34. An award of attorneys' fees and costs may only be granted where there is a finding that Petitioner has substantially prevailed. In the instant case, neither party has been adjudicated to be the substantially prevailing party, rendering Petitioner's request for attorneys' fees and costs premature.

WHEREFORE, by virtue of the foregoing, Respondent respectfully request that this court grant the cross-motion to dismiss the instant proceeding in its entirety, issue an order denying the petition and dismissing the proceeding, and grant such other and further relief as may be just and proper.

The undersigned counsel certifies that, to the best of my knowledge, information and belief, formed after a reasonable inquiry, the presentation of the within litigation papers and of the contentions therein, is not frivolous as defined in subsection (c) of 130-1.1.

Dated: New York, New York
September 10, 2021

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LENGTH OF PAPERS

I hereby certify pursuant to 22 NYCRR § 202.8-b, Length of Papers, that the foregoing Affirmation in Support of Cross Motion to Dismiss was prepared on a computer using Microsoft Word.

The total number of words in this cross-motion, inclusive of point headings and footnotes, and exclusive of the signature block, is 2,862 words.

Dated: New York, New York
September 10, 2021

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