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, INC.,

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

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED ARTICLE 78 PETITION

Petitioner,

-against-

Index No. _____

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION FOR JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of the Surveillance Technology Oversight Project, Inc. ("STOP") and the public under the Freedom of Information Law ("FOIL"), N.Y. Pub. Off. Law §§86, 87, to access New York City Police Department ("NYPD") records concerning Facial Recognition Technology ("FRT"), which is computer vision software capable of identifying a person from a static image or a video source. STOP seeks documents concerning the NYPD's policies and use of FRT and, in particular, concerning the NYPD's use of FRT in the Times Square area of Manhattan.

FRT is an intrusive technology, one that gives police previously unimaginable powers to surveil political protestors and anyone else who enters the public square. It is also a flawed technology with well-documented biases that more frequently misidentifies Black and Latin/X individuals, women, and trans individuals than white men.[1] Despite lawmakers' expressions of concern,[2] widespread calls for regulation,[3] and bans by a growing list of cities,[4] the NYPD asks

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[1] Ex. A, Joy Buolamwini and Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1, 1-15 (2018), Conference on Fairness, Accountability, and Transparency.

[2] *See, e.g.*, Rep. Zoe Lofgren (D-Calif.) made a statement to the Washington Post that the facial-recognition searches marked "a massive, unwarranted intrusion into the privacy rights of Americans by the federal government, done secretly and without authorization by law." Sen. Patrick J. Leahy (D-Vt.) has tweeted "Americans don't expect — and certainly don't consent — to be surveilled just because they get a license or ID card ….This has to stop." Drew Harwell, *Facial-recognition use by federal agencies draws lawmakers' anger*, WASHINGTON POST, July 9, 2019, https://www.washingtonpost.com/technology/2019/07/09/facial-recognition-use-by-federal-agencies-draws-lawmakers-anger/.

[3] *See, e.g.*, *Coalition Letter Calling for a Federal Moratorium on Facial Recognition*, ACLU, June 3, 2019, urging federal moratorium on face recognition for law enforcement and immigration enforcement purposes, https://www.aclu.org/letter/coalition-letter-calling-federal-moratorium-face-recognition.

[4] *See* Ally Jarmanning, *Boston Bans Use Of Facial Recognition Technology. It's The 2nd-Largest City To Do So*, WBUR NEWS, June 24, 2020, https://www.wbur.org/news/2020/06/23/boston-facial-recognition-ban.

for the public's blind trust in how it uses this error-prone technology. Even worse, where the NYPD has been forced to disclose information about its use of FRT in the past, the disclosures have revealed a haphazard array of unreliable procedures, which have only served to underscore the need for public accountability. The secrecy with which the NYPD treats its FRT program is part-and-parcel with the agency's posture towards public accountability and FOIL in general. Rather than treat FOIL requests forthrightly, the NYPD frequently forces the public to seek the court's assistance to obtain information to which the public is clearly entitled under the law. The present dispute is only one example of this pattern of conduct.

Today, there is an ongoing national conversation on policing in the United States. The NYPD's use of previously unimaginable surveillance technologies like FRT is an integral part of that conversation. Time will tell what reforms are required at the NYPD. Yet, we know that misconduct flourishes in the darkness and that sunlight is the best disinfectant. STOP's Petition is filed so that the public can better understand the NYPD's use of FRT and can consider this information as part of the larger conversation on American policing and reform. With the requested information, members of the public will be able to judge for themselves the effectiveness of the NYPD's FRT program and will be able to say whether the NYPD's policies, reflecting an insular agency culture, are permitting unacceptable conduct to go unchecked.

The NYPD is not entitled to evade its disclosure obligation under FOIL and its bases for rejecting STOP's request are unfounded, as explained below. Put simply, the information requested by STOP is relevant, timely, and subject to disclosure under FOIL. The NYPD has not met its duty to comply with FOIL in good faith. Under such circumstances, judicial supervision becomes critical to assuring compliance with FOIL's provisions. *See New York*

Civil Liberties Union v. Suffolk Cty. Police Dep't, 2020 WL 2829706 (Table), at *19-20 (N.Y. Sup. Ct., May 18, 2020) (Ex. M).

STATEMENT OF FACTS

STOP is a 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, STOP seeks to inform the public on how surveillance technology injures individuals' privacy and civil rights and how it fuels racial and other forms of discrimination. It actively campaigns to outlaw surveillance technologies, including FRT.

Access to public information—and records produced and maintained by law enforcement in particular—is an essential component of STOP's mission. On October 8, 2019, STOP submitted FOIL Request 2019-056-17831 ("Initial Request") to the NYPD Records Access Officer, seeking information about the NYPD's use of FRT. Ex. B. The purpose of the request was to understand the NYPD's use of this novel piece of surveillance technology as it related to minority communities and those exercising their right to demonstrate in the public square.

The NYPD flatly denied the Initial Request on October 19, 2019. Ex. C. The NYPD asserted that the Initial Request would "necessitate the creation of a document" and that it did "not reasonably describe a record in a manner that would enable a search to be conducted by the New York City Police Department." *Id.* Despite their legal obligation to do so, upon determining that the Initial Request did not "reasonably describe" the records requested, the NYPD did not provide STOP with "direction, to the extent possible, that would enable [STOP] to request records reasonably described." 21 NYCRR §1401.5(c)(1).

On November 18, 2019, at 8:23 PM, STOP filed a timely administrative appeal with the

NYPD's Records Access Appeals Officer. Ex. D. Also on November 18, 2019, in an effort to remedy the alleged ambiguity in the Initial Request, and despite the NYPD's lack of guidance, STOP submitted FOIL Request 2019-056-20622 ("Revised Request"). The Revised Request identified twenty-seven categories of documents that would be responsive to the Initial Request and used language from earlier FOIL requests that courts had held to be sufficiently detailed. In short, STOP went above and beyond what was procedurally required in order to address the NYPD's concerns. Ex. E.

STOP attached the Revised Request to its administrative appeal of the NYPD's denial of the Initial Request and stated "STOP is willing to meet and confer with the NYPD and to withdraw the [Initial] Request in favor of the Revised Request if appropriate terms can be agreed. *If the agency does not wish to meet and confer, STOP requests that the appended Revised Request be used in this appeal to resolve any purported ambiguities in the [Initial] Request*." Ex. D. (emphasis added).

On November 19, 2019, at 10:20 AM, less than a single day after STOP filed its appeal, the NYPD issued a summary denial of that appeal, without acknowledging receipt of the Revised Request or acknowledging that the Initial Request had been substantially revised to address the alleged ambiguity. Ex. F. The NYPD maintained as its sole bases for denying the Initial Request that it did "not reasonably describe any actual records maintained by this agency" and "would require extraordinary efforts not required under Public Officers Law Section 89(3)." *Id*. This was the NYPD's final agency action on the Initial Request.

Beginning on March 3, 2020, the NYPD repeatedly held out the possibility of entering into settlement negotiations with STOP, only to disengage each time STOP attempted to discuss substance. *See* Ex. G. On March 18, 2020, the parties entered into a tolling agreement that is still

effective, which described both the Initial Request and the Revised Request as ripe for judicial review and explained that the parties would work together to negotiate the scope of STOP's requests. Ex. H. From April to June, STOP made six entreaties to begin negotiations and the NYPD failed to engage. Ex. G at 1-3. On April 3, 2020, the NYPD issued a denial of the November 18, 2019 Revised Request. Ex. I. Since the Revised Request was properly part of the Initial Request's administrative record, this denial impermissibly attempted to add new grounds for denial that the NYPD did not raise in denying STOP's Initial Request on November 19, 2019.

ARGUMENT

I. STOP's Article 78 Petition is Justiciable

After exhausting available administrative remedies, "a person denied access to a record in an appeal determination . . . may bring a proceeding for review" of the agency's determination under Article 78 of the New York Civil Practice Law and Rules. N.Y. Pub. Off. Law §89(4)(b); *see Murphy v. N.Y. State Educ. Dep't, Office of Prof'l Discipline*, 148 A.D.2d 160, 164 (1st Dep't 1989). The procedure must be commenced within four months of the final agency determination. CPLR 217(1). Courts will permit suits in the absence of a final agency determination where a petitioner's further recourse to the agency would be "futile." *Friedman v. Rice*, 30 N.Y.3d 461, 473 (2017).

A. NYPD's Final Agency Determination Covers the Initial and Revised Requests

The NYPD made its final agency determination on November 19, 2019 when it rejected STOP's administrative appeal. Ex. F. Subsequent to that rejection, STOP and the NYPD executed a tolling agreement on March 18, 2020, which extended STOP's time to challenge the NYPD's final agency determination until July 19, 2020. Ex. H ("Petitioner's time to file an Article 78 proceeding concerning the First and Second FOIL requests are hereby extended to July 19, 2020.").

Thus, this action is timely filed, as STOP has until July 19, 2020 to challenge the NYPD's denial of its FOIL requests.

The NYPD's November 19, 2019 determination concerned the Initial Request but encompassed the Revised Request. During the administrative appeals process preceding that determination, STOP requested that the NYPD consider the Revised Request in order to resolve any perceived ambiguity in the Initial Request, making it a part of the administrative record before the agency. Ex. D.[5] To the extent the Revised Request narrowed and clarified the Initial Request, the NYPD should properly have considered this evidence when it made its final agency determination. *See Lasner & Kubitschek v. NY State Office of Children & Family Servs.*, 103 N.Y.S.3d 743, 746-47 (N.Y. Sup. Ct. 2019) (ordering production despite government's assertion that FOIL petitioner requested material on appeal that was beyond the scope of the initial FOIL request); *Matter of New York Times Co. v. City of New York Police Dep't*, 103 A.D.3d 405, 408 (1st Dep't 2013) (recognizing post-denial information from the FOIL petitioner as part of the administrative record and permitting the FOIL petition to narrow the initial request).[6]

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[5] STOP made clear in its appeal that the appeal should include the Revised Request, so as not to waste the parties' resources and time by initiating a new administrative process to address STOP's clarifications to its request. Specifically, STOP stated that "[i]f the agency does not wish to meet and confer, STOP requests that the appended Revised Request be used in this appeal to resolve any purported ambiguities in the [Initial] Request." Ex. D. The NYPD did not ask STOP to meet and confer before denying STOP's appeal. Nathanson Aff. ¶21.

[6] *See also McCrory v. Vill. of Mamaroneck*, 932 N.Y.S.2d 850, 874 (N.Y. Sup. Ct. 2011) ("…the decisions of the Village Manager … denying petitioner's FOIL application of November 17, 2010, as clarified by petitioner in further correspondence to the Village Manager on January 14, 2011, are annulled."); *Muniz v. Roth*, 620 N.Y.S.2d 700, 702 (N.Y. Sup. Ct. 1994) ("The petitioner's attorney both at motion term and by letter dated August 5, 1994 clarified the FOIL request by confirming, 'what we intend to request is simply all the information within the categories set forth in schedule A of the demand as related only to the fingerprints of Lee Longtin and Daryl Hallock … our intention is to make no demand for information other than that which relates to the two fingerprints.'").

B. Efforts to Seek Further Agency Action Would be Futile

Even if the Revised Request is treated as an entirely new request, it is still justiciable because it would have been futile for STOP to seek further agency action from the NYPD. *Friedman*, 30 N.Y.3d at 473 ("The general rule requiring a party to exhaust administrative remedies before seeking judicial review of an agency's determination need not be followed when resort to an administrative remedy would be futile.") (quoting *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978)) (internal modifications removed). The exhaustion rule is meant to "further the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the work of the agency, and affording the agency the opportunity … to prepare a record reflective of its 'expertise and judgment.'" *Id.* at 474 (quoting *Watergate II Apts.*, 46 N.Y.2d at 57) (internal modifications removed). The rule "is not an inflexible one." *Id.* STOP's request for judicial review is in line with the policy goals of the exhaustion rule and the exceptions to it—to develop an adequate record for judicial review without needlessly creating a "waste of administrative and judicial resources." *See id* at 474-75 ("Those goals would not be served by mechanical application of the rule to petitioner's case.").

First, the NYPD's course of conduct over several months demonstrated that it would not be willing to consider STOP's Revised Request under any circumstances. STOP asked the NYPD on November 18, 2019 to discuss substituting the Revised Request for the Initial Request. Ex. D. The NYPD ignored that suggestion. Nathanson Aff. ¶21. In a good faith effort to resolve the NYPD's concerns, STOP asked the agency to use the Revised Request to clarify any ambiguity in the Initial Request. Ex. D. The NYPD did not do so. Ex. F. When STOP threatened to sue, the NYPD agreed to negotiate but subsequently became unresponsive. Ex. G at 9. When STOP threatened to sue again, the NYPD agreed to enter into a tolling agreement. *Id.* at 5; Ex. H. The

NYPD again became unresponsive. Ex. G at 1-3. Only after months of this back and forth did the NYPD even formally respond to the Revised Request, suggesting that STOP should repeat the agency appeals process. Ex. I. The principle of exhaustion does not require petitioners to submit themselves to an agency's strategic games.

Second, considering the Revised Request along with the Initial Request would be the most efficient use of judicial resources. The Initial Request is unquestionably ripe for review, and STOP has a clear right to relief before this Court. The Revised Request was part of the administrative record before the NYPD when it made its final agency determination on the Initial Request. This Court expends no more resources by reviewing the Revised Request along with the Initial Request.

II. NYPD's FOIL Determination was an Error of Law and Arbitrary and Capricious

Article 78 proceedings can be used to challenge a final agency determination made under FOIL where the determination was "….affected by an error of law or was arbitrary and capricious or an abuse of discussion…." CPLR 7803(3); *see Wagstaffe v. David*, 26 Misc.3d 1229(A), at *2-3 (N.Y. Sup. Ct., Feb. 22, 2010) (Ex. J). The NYPD's determination to deny the Initial Request, as clarified, was both affected by an error of law and was arbitrary and capricious.

A. NYPD's FOIL Determination was an Error of Law

Courts reviewing agency determinations for errors of law "need not accord any deference to the agency's determination." *Verizon New York Inc. v. New York State Pub. Serv. Comm'n*, 991 N.Y.S.2d 841, 849 (N.Y. Sup. Ct. 2014) (quoting *Belmonte v. Snashall*, 813 N.E.2d 621, 624 (N.Y. 2004)). The relevant statute, Public Officers Law §89(3), specifies that agencies subject to FOIL must respond to *any* "written request for a record reasonably described" and that they "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...."

On November 19, 2020, The NYPD issued its final agency determination as to STOP's Initial Request, finding that it did not reasonably describe requested records, despite STOP's incorporation of the Revised Request to provide even more detail and clarity to the Initial Request. The NYPD also claimed that any such documents, if they could be identified, would be burdensome to collect and produce. Ex. F. These were the NYPD's sole legal bases for denying the Initial Request. It was an error of law for the NYPD to rely on either of these bases for its determination.

1. FOIL Represents Strong State Policy in Favor of Public Transparency

The NYPD's denial of the Initial Request, as clarified, violates New York State's strong public policy in favor of public transparency. FOIL is premised on the fundamental principle that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Grabell v. N.Y. City Police Dep't*, 996 N.Y.S. 2d 893, 905 (N.Y. Sup. Ct. 2014) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). New York State enacted the law to "provide the public with a means of access to governmental records in order to encourage public awareness … and to discourage official secrecy." *In re Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 (1987). New York State courts have therefore routinely held that "FOIL is to be liberally construed," *id*., and there is a presumption that records maintained by public agencies must be disclosed to the public. *See Capital Newspapers Div. of Hearst Corp*., 496 N.E.2d 665, 667 (N.Y. 1986) (FOIL "expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies."); *Gould v. N.Y. City Police Dep't*, 675 N.E.2d 808, 811 (N.Y. 1996) ("To promote open government and

public accountability, the FOIL imposes a broad duty on government to make its records available to the public."); *M. Farbman & Sons, Inc. v. N.Y. City Health & Hosps. Corp*., 464 N.E.2d 437, 439 (N.Y. 1984) ("FOIL implements the legislative declaration that 'government is the public's business', and imposes a broad standard of open disclosure upon agencies of the government.") (internal citation omitted).

Following the death of George Floyd in Minneapolis, Minnesota, and the subsequent debate over police reform in New York, NYPD transparency is more important than ever. The Court of Appeals has made clear that "[a]ll government records are … presumptively open for public inspection and copying," *Gould*, 675 N.E.2d at 811, and police records are no exception. *See New York Civil Liberties Union v. New York City Police Dep't*, 2011 WL 675562, at *11 (N.Y. Sup. Ct., Feb. 14, 2011) ("All government documents, including police records, are presumptively available for 'public inspection and copying' . . . .") (Ex. L). Judicial supervision is necessary to assure the NYPD's compliance with FOIL. *See Suffolk Cty. Police Dep't*, 2020 WL 2829706 (Table), at *19-20 (Ex. M).

2. STOP Reasonably Described the Records Requested

To satisfy the reasonable description requirement, a FOIL request need not "specifically designat[e]" the records sought. *M. Farbman & Sons, Inc*, 464 N.E.2d at 441 (holding that FOIL requests need not meet the stringent requirement under CPLR 3120 that documents be "specifically designat[ed]."). Rather, "[i]nasmuch as petitioner's request clearly described the *subject matter* of the materials sought, the administrative burden of reviewing this correspondence for relevance fails to establish that the request is insufficiently descriptive." *Stein v. New York State Dep't of Transp.*, 25 A.D.3d 846, 848 (3d Dep't 2006) (emphasis added). "In order for an agency to deny a FOIL request for overbreadth, the agency must demonstrate that the description is 'insufficient for purposes of locating and identifying the documents sought.'" *Jewish Press, Inc. v. New York City*

Dep't of Educ., 183 A.D.3d 731, 732 (2d Dep't 2020) (quoting *Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 (N.Y. 1986)). "Where the request is sufficiently detailed to enable the agency to locate the records in question, the agency cannot complain about the nomenclature of the request as described." *Id.* (citing *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 826 (3d Dep't 1983)).

The NYPD's November 19, 2019 administrative appeals decision is therefore flatly deficient. Like the respondent in *Konigsberg*, the NYPD uses the requirement that requested records be "reasonably described" as a "device to withhold records" in total. *Konigsberg*, 68 N.Y.2d at 251. The Initial Request asked NYPD to provide "[a]ny and all records relating to facial recognition in the Times Square area during the last three years." Ex. B. It specified that records should include "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." *Id.*

The Initial Request—a general request, limited by geography, time, and subject matter—tracks similar FOIL requests made to the NYPD that have been sustained. *See, e.g.*, *Logue v. New York City Police Dep't*, 2017 WL 5890766 (N.Y. Sup. Ct., Nov. 29, 2017) (ordering civil contempt for NYPD's failure to comply with order to produce documents in response to a Black Lives Matter protestor's request for "all pictures, videos, audio recordings, data, and metadata" and "copies of all communications sent or received by your agency….") (Ex. N).

Like the Initial Request, the request at issue in the *Logue* case was limited by geography ("Grand Central Terminal"), time ("November of 2014 through January of 2015"), and subject matter ("pertaining to protests"). *Id.* at *1-2. Similar phrasing has been held reasonable in other

cases as well.[7] *See Konigsberg*, 68 N.Y.2d at 247 (requesting "any and all files of records kept on me"); *Pflaum v. Grattan*, 116 A.D.3d 1103, 1104 (3d Dep't 2014) (requesting "any document that shows that [the attorney] did some kind of work for Columbia County."); *Cromwell v. Ward*, 183 A.D.2d 459, 463 (1st Dep't 1992) (request for documents related to an incident at a particular location, involving specific officers). If anything, STOP's Initial Request was *narrower* and *more specific* than the FOIL request in *Logue* because, in addition to identifying the categories of documents it was requesting, STOP also identified the categories of documents it specifically *was not* requesting (*i.e.*, "records related to the NYPD's Facial Identification Section's use of DataWorks Plus software"). Ex. B.

The inadequacy of the NYPD's blanket denial becomes even more glaringly deficient in light of the Revised Request. The Revised Request added additional specificity and listed (i) the names of specific responsive documents maintained by the NYPD (*e.g.* DD-5 records; Chief of Detectives Memos; Operations Orders; Detective Guide Procedures; FIS Submission Summary Report); (ii) the email accounts where responsive documents are likely to be found; (iii) the name of the NYPD data system that is likely to hold responsive materials in an easily searchable form (*i.e.* the Enterprise Case Management System) and the name of the NYPD office most familiar with that system; (iv) the likely authors of responsive materials; (v) the names of NYPD employees who are likely to have easy access to responsive materials; and (vi) the names of agencies with which responsive agreements may have been entered into. Ex. E.

[7] STOP submitted a FOIL request with identical language to the Mayor's Office of Criminal Justice—which after a search—did not locate any responsive records. Ex. O. The Mayor's Office notably did *not* find that STOP's FOIL Request to be insufficiently described, and in fact, the Mayor's Office suggested directing the request to the NYPD. *Id.*

Any suggestion that the Revised Request did not reasonably describe the records requested should be dismissed out of hand. For instance, naming the very documents requested by the names they are given at the agency is necessarily a reasonable description. *Cromwell*, 183 A.D.2d at 463 ("…petitioner did identify the specific documents that he wished to receive. As such, the records were reasonably described by petitioner so that a search could be made by the agency"). Citing the likely authors of documents has also been referenced as an appropriate means of identifying responsive documents. *Id*. ("While it is contended that items 14, 16, 17 and 18 could not be located because of vagueness as to the author of the document and the date and location of the incident, we note that petitioner did provide the names of six police officers who were allegedly involved in the investigation (likely authors) and the date and location of the incident on several occasions"). Requests for all emails between an agency and a specific domain have also been sustained as reasonable. *See Hernandez v. Office of the Mayor of the City of New York*, 2011 WL 6012165, at *1 (N.Y. Sup. Ct., Nov. 23, 2011) (request for "[e]-mail messages sent from or received by any state electronic email accounts assigned to the Office of the Mayor to or from an individual named Cathleen Prunty 'Cathie' Black or e-mail addresses containing the domain hearst.com"). And the NYPD was, in a recent litigation similar to the one here, ordered to respond to a request for agreements between itself and other named organizations. *See Center on Privacy & Technology v. New York City Police Dep't*, 154060/2017 (N.Y. Sup. Ct. 2016).[8]

3. NYPD May Not Claim Burden as a Basis for its Determination

It is well established that an agency "cannot evade [FOIL's] broad disclosure provisions … upon the naked allegation that the request will require review of thousands of records." *Kirsch*

[8] "Facial recognition technology" in the Initial Request overlaps with the definition provided in the *Center on Privacy & Technology v. New York City Police Department*, but it is not coextensive.

v. Bd. of Educ. of Williamsville Cent. Sch. Dist., 152 A.D.3d 1218, 1219–20 (4th Dep't 2017) (quoting *Konigsberg*, 68 NY.2d at 249). Public Officers Law §89(3)(a) says so expressly: "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…." *See Jewish Press, Inc.*, 183 A.D.3d 731, 732 (2d Dep't 2020).

To the extent courts have recognized an exception to Public Officers Law §89(3)(a), the NYPD cannot meet that common law test either. "The statutes and case law … require an agency relying on the volume of a request to, 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 v. New York City Police Dep't*, 36 N.Y.S.3d 579, 591–92 (N.Y. Sup. Ct. 2016). Here, STOP's request does not unduly burden the NYPD and, if there is any burden at all, it is of a type that the NYPD could easily mitigate by utilizing an outside service.

Contrary to the NYPD's claim that any search would necessarily be conducted over "thousands of cases maintained by not only Precinct Detective Squads, but by various specialized units," Ex. F, NYPD testimony in another case indicated that there are only two units that have full access to the agency's FRT system—the Facial Identification Section and the Intelligence Bureau. Ex. P. Other offices at the NYPD may maintain the policy and audit documents that STOP requests, but these kinds of official documents can be easily gathered, and the request does not present the herculean labor that the NYPD's administrative appeal decision suggests.

To the extent the NYPD takes issues with the request's reference to "the Times Square area," geographic requests of this type are routinely found insufficiently burdensome to justify withholding documents. *See Cromwell*, 183 A.D.2d at 463 (production required where petitioner requested documents related to an incident at a particular location, involving specific officers);

Logue, 2017 WL 5890766, at *1, 4 (production required where petitioner requested documents related to NYPD surveillance "in Grand Central Station."); *Urban Justice Center v. New York City Police Dep't*, 2010 WL 3526045, at *4, 8 (N.Y. Sup. Ct., Sept. 1, 2010) (citing NYPD affidavit affirming that the department can search its investigations database by location and date) (Ex. Q). As the court noted in *Stein*, "[i]nasmuch as petitioner's request clearly described the subject matter of the materials sought, the administrative burden of reviewing this correspondence for relevance fails to establish that the request is insufficiently descriptive." 25 A.D.3d at 848. Moreover, NYPD officers use "FIS Notification" DD-5 forms when requesting that photos or videos be analyzed by the Facial Identification Section. STOP understands that these forms indicate the location at which the photos or videos were taken. Such information could easily be used to associate documents with the Times Square area.

If the NYPD faces any burden at all, it is of a type that the agency could easily mitigate by using an outside service. The NYPD's administrative appeal decision states that "… each individual FIS request is logged by the investigating detective for the respective case in which the request is made. Therefore, this agency would need to search through the records generated, at a minimum, for every electronically-maintained case created over a three-year period in order to determine whether a request was made by the detective investigating that particular case for a search by the FIS." Ex. F. This argument is equivalent to the one the NYPD made in *Time Warner Cable News*, to which the court responded: "[t]he NYPD essentially took the position that, having ignored the substantial likelihood that the footage captured would be subject to a FOIL request, it could deny such a request on the basis of having to rely on outdated software. That position is untenable." 36 N.Y.S.3d at 594. Since the NYPD could engage an outside professional service to

help comply with STOP's request, it cannot cite limitations in its own software as a basis for avoiding its obligations under FOIL.

Finally, any claims of burden must necessarily yield to the simple fact that the type of information that STOP is requesting now is only a portion of what the NYPD will soon be required to disclose as a matter of course pursuant to the Public Oversight of Surveillance Technology ("POST") Act, enacted by New York City's elected representatives on July 15, 2020, which requires broad disclosure by the NYPD of information reflecting its use of surveillance technologies including FRT. Ex. R.

B. NYPD's FOIL Determination was Arbitrary and Capricious

An agency action is arbitrary and capricious "when it is taken without sound basis in reason or regard to the facts." *Peckham v. Calogero*, 911 N.E.2d 813, 816 (N.Y. 2009); *see Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of" the federal Administrative Procedures Act). The burden is on the agency to show that their decision was not arbitrary and capricious. *See Oddone v. Suffolk Cty. Police Dep't*, 96 A.D.3d 758, 761 (2d Dep't 2012); *Verizon New York, Inc. v. Mills*, 60 A.D.3d 958, 959-60 (2d Dep't 2009).

Courts find agency FOIL determinations arbitrary and capricious where there is an "absence of any indication in the record that the [challenged] decision had a sound basis in reason, or that before rendering the decision, the [agency] considered the facts" underlying the FOIL request at issue. *Verizon New York, Inc. v. Mills*, 60 A.D.3d 958, 960 (2d Dep't 2009). Evidence that an agency's FOIL appeals officer did not review the record is also relevant to a determination that an agency's action was arbitrary and capricious. *Oddone*, 96 A.D.3d 758 at 761.

Here, the NYPD's process for reviewing STOP's FOIL request suffered from serious flaws. *First*, the NYPD denied STOP's administrative appeal less than two business hours after it was submitted. An agency's overly expeditious determination, relative to the quantity of information it is required to consider, is grounds for a finding that the determination was arbitrary and capricious. *C.f. Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 227 (D.D.C. 2003) ("…it is hard to believe that review of such a substantial volume of material within such a short time frame meets the requirement that the agency take a 'hard look' at the problem").

Second, the NYPD's administrative appeal decision makes no indication that the FOIL appeals officer even reviewed the clarifying materials that STOP presented him with. *See Lasner*, 103 N.Y.S.3d at 746-47 (finding materials presented for the first time during petitioner's administrative appeal to be part of the administrative record). This lapse is especially serious given the NYPD had already failed in its duty to solicit clarification from STOP following its determination that the Initial Request did not reasonably describe the records requested. 21 NYCRR §1401.5(c)(1) (When an agency "inform[s] a person requesting records that the request or portion of the request does not reasonably describe the records sought," the agency must also "include[e] direction, to the extent possible, that would enable that person to request records reasonably described."). An agency's failure to consider evidence, which was included on the record before it by statutory requirement, is grounds for the finding that the agency's determination was arbitrary and capricious. *See Boone v. New York City Dep't of Educ.*, 38 N.Y.S.3d 711, 718-9 (N.Y. Sup. Ct. 2016) (finding failure to consider factors listed in Correction Law Article 23-A was arbitrary and capricious).

And even if they did consider the Revised Request, the NYPD did not state as much in their final agency determination. Ex. F. The NYPD did not address any of the particulars of the

Revised Request, such as the names of offices that likely held responsive documents, the email addresses associated with officers with access to responsive documents, or the name of the electronic search system that may yield responsive documents. The NYPD's indifference to STOP's good faith effort to clarify any alleged ambiguity in the Initial Request signals the arbitrary and capricious nature of the NYPD's determination. Given the NYPD's burden to show that its action was *not* arbitrary and capricious, these facts must be fatal. *See Oddone*, 96 A.D.3d at 761; *Verizon New York, Inc.*, 60 A.D.3d at 960.

III. STOP is Entitled to Attorney's Fees and Costs

If the Court finds that the NYPD should be compelled to produce the requested documents—and in particular, the records of the use of FRT in the Times Square area—because the NYPD had no reasonable basis for denial, the Court should award STOP attorney's fees and costs under §8601 of the CPLR and Public Officers Law §89(c)(i). Under CPLR §8601(a), "a court shall award to a prevailing party . . . fees and other expenses incurred by such party in any civil action brought against the state." Moreover, under Public Officers Law §89(4)(c)(i)-(ii), "[t]he court in such a proceeding [related to access to records] may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and, when the agency had no reasonable basis for denying access." *See Matter of Acme Bus Corp. v County of Suffolk*, 136 A.D.3d 896, 898 (2d Dep't 2016) (holding that the trial court "improvidently exercised its discretion in denying the petitioner's request for attorney's fees" where "the respondents had no reasonable basis for denying the petitioner's request for access to the records sought", a "circumstance in itself [that] militates in favor of the award of reasonable attorney's fees"); *see also Bottom v. Fischer*, 129 A.D.3d 1604, 1605 (4th Dep't 2015) (holding that the trial court

abused its discretion by denying reasonable attorney's fees and litigation costs as "respondent had no reasonable basis for its blanket denial of petitioner's [FOIL] request"); *N.Y. State Defenders Ass'n v. N.Y. State Police,* 87 A.D.3d 193, 195–96 (3d Dep't 2011).

"The counsel fee provision was first added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that certain agencies have adopted a 'sue us' attitude in relation to providing access to public records, thereby violating the Legislature's intent in enacting FOIL to foster open government." *New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011) (finding that the trial abused its discretion in denying an award of attorney's fees) (quotation marks and citation omitted). The fee provision is designed to create a deterrent for poor agency conduct. *Acme Bus Corp.*, 136 A.D.3d 896, 898 (2d Dep't 2016) ("The award of attorney's fees is intended to 'create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL'") (ultimately quoting Senate Introducer Mem in Support, Bill Jacket, L 2006, ch 492 at 5). An award of fees is appropriate here.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court compel the NYPD to produce documents responsive to Petitioner's Initial Request, as clarified by its Revised Request. Finally, Petitioner respectfully requests that the Court award the Petitioner its reasonable attorneys' fees and litigation costs.

Respectfully submitted,

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