

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART _____

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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

N.Y. Sup. Ct.
Index No.: _____/21

-against-

**VERIFIED ARTICLE 78
PETITION**

NEW YORK CITY POLICE DEPARTMENT

Respondent.

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Petitioner Surveillance Technology Oversight Project, Inc. (“**S.T.O.P.**”), by and through its attorneys, Weil, Gotshal & Manges LLP, petitions and alleges as follows:

INTRODUCTION

1. Petitioner S.T.O.P. is a public interest, advocacy, and legal services organization that specializes in addressing state and local officials’ growing use of surveillance technologies. To end discriminatory surveillance, S.T.O.P. challenges agency misconduct and crafts privacy-protective policies. S.T.O.P.’s staff has broad experience in anti-surveillance advocacy and public education.

2. Facial recognition is a digital technology that provides a probabilistic assessment of a person’s identification from a static image or a video source. Since 2011, the New York City Police Department (the “**NYPD,**” “**Department,**” or “**Respondent**”) has used facial recognition technology to purportedly “identify suspects whose images have been captured

by cameras,” including when investigating low-level offenses.¹ According to the NYPD, it uses the technology “exclusively to compare images obtained during criminal investigations with lawfully possessed arrest photos.”² The NYPD and its representatives have touted the claimed benefits of the Department’s use of facial recognition technology in various public statements, press releases, and publicly available Department policies³ and patrol guides.⁴

3. Despite the NYPD’s claims regarding the purported benefits of its facial recognition technology, the Department itself has acknowledged the numerous studies finding that the software exhibits significant bias towards people of color, women, and transgender and non-binary individuals.⁵ The Department claims, without substantiation, that 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 by human observers.” Ex. A.

¹ See N.Y. Police Dept., NYPD Questions and Answers: Facial Recognition (the “**NYPD Facial Recognition FAQs**,” attached as **Ex. A** to the Affirmation of Jeremy P. Auster, dated July 8, 2021 (“the Auster Aff.”)); see also *Garbage in, Garbage Out: Face Recognition on Flawed Data*, Georgetown Law, <https://www.law.georgetown.edu/privacy-technology-center/publications/garbage-in-garbage-out-face-recognition-on-flawed-data/> (last visited June 23, 2021).

² See Press Release, N.Y. Police Dept., NYPD Announces Facial Recognition Policy (Mar. 13, 2020), <https://www1.nyc.gov/site/nypd/news/pr0313/press-release---nypd-facial-recognition-policy>.

³ See N.Y. Police Dept., Facial Recognition: Impact And Use Policy (Apr. 11, 2021) (the “**Impact & Use Policy**,” attached as **Ex. B** to the Auster Aff.).

⁴ See N.Y. Police Dept., Patrol Guide: Facial Recognition Technology (Mar. 12, 2020) (the “**Patrol Guide**,” attached as **Ex. C** to the Auster Aff.).

⁵ See Impact & Use Policy at 11 (explaining 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.”).

4. In order to probe the NYPD's public contentions regarding the use and effectiveness of its facial recognition technology, and to provide information to the public about potential errors and misuse, S.T.O.P. submitted a Freedom of Information Law ("FOIL") request to the NYPD on November 23, 2020, seeking records related to the accuracy and bias of the Department's facial recognition technology. On January 29, 2021, the NYPD denied S.T.O.P.'s FOIL request, claiming without explanation that it was "unable to locate records responsive your request based on the information you provided."

5. On February 26, 2021, S.T.O.P. filed an administrative appeal, arguing, among other things, that the NYPD's claim that it was unable to locate responsive records was belied by the fact that there exist numerous responsive and publicly available documents on the Department's own website. S.T.O.P. also argued that the NYPD's denial rested on the alarming and improbable claim that the NYPD has used facial recognition technology for nearly a decade without any internal investigation, analysis, or documentation regarding the efficacy of the technology or its potential for racial and gender bias. On March 10, 2021, the NYPD denied S.T.O.P.'s appeal, claiming that "a diligent search has been conducted for the requested records based on the information provided; however, no records were located."

6. FOIL, and the public oversight of government that it enables, is a dead letter if, as seems to have occurred here, government agencies do not take their requirements seriously, and can simply deny a FOIL request on the basis that no responsive records exists even where the agency's own website includes numerous irrefutably responsive documents (which themselves are highly suggestive of the existence of others).

7. The NYPD's denial of S.T.O.P.'s FOIL request—and refusal to produce, at an absolute minimum, the undeniably responsive and publicly available documents discussed

herein—is a clear violation of FOIL. Accordingly, the Court should order the NYPD to promptly produce responsive documents and to pay S.T.O.P. its reasonable attorneys' fees incurred in preparing this Petition.

RELIEF SOUGHT

8. S.T.O.P. brings this proceeding pursuant to Article 78 of the CPLR requesting that the Court: (1) direct Respondent to provide S.T.O.P. with documents responsive to its November 23, 2020 FOIL request; (2) award S.T.O.P. its reasonable attorneys' fees in an amount to be determined at the conclusion of this proceeding; and (3) grant S.T.O.P. such other and further relief as this Court may deem just and proper.

PARTIES

9. S.T.O.P. is a non-profit advocacy organization and legal services provider that litigates and advocates for privacy and fights excessive local and state surveillance. S.T.O.P. is hosted by the Urban Justice Center. S.T.O.P.'s office is located at 40 Rector Street 9th Floor, New York, New York 10006.

10. Respondent NYPD is a New York public agency responsible for policing New York City. The NYPD is the largest and one of the oldest municipal police departments in the United States, with approximately 36,000 officers and 19,000 civilian employees. The NYPD is headquartered at One Police Plaza, New York, New York, 10038-1497.

JURISDICTION

11. This Court has jurisdiction under Section 7801 et seq. of the CPLR to review administrative decisions made by the NYPD.

VENUE

12. Venue lies in New York County pursuant to CPLR §§ 506(b) and 7804(b) because it is brought within the judicial district where the Respondent NYPD made the determination complained of and where the NYPD's principal office is located.

STATEMENT OF FACTS

13. On November 23, 2020, pursuant to New York's Freedom of Information Law, Public Officers Law §§ 84 to 99, Albert Fox Cahn, ESQ., Executive Director of S.T.O.P., submitted to the NYPD a request for: "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." Auster Aff., **Ex. D** (the "**Request**") at 1. The Request defined "Records," as used therein, to mean "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 Request also defined "Facial Recognition" as "computer vision software capable of identifying person from a static image or a video source." *Id.* Further, the Request defined "Accuracy" as signifying "any metrics or other indicators regarding defects, patches, the error rate, the precision, and/or the exactness of Facial Recognition." *Id.* Finally, the Request defined Bias to mean "any difference in outcome based on a protected characteristic, as defined in N.Y.C. Admin. Code § 8-101, including but not limited heightened or diminished rates of false-positive and false-negative results." *Id.*

14. On November 23, 2021, the NYPD confirmed via email that S.T.O.P.'s Request was successfully submitted. *See* Auster Aff., **Ex. E**.

15. On January 29, 2021, the NYPD informed S.T.O.P. via email that it had denied S.T.O.P.'s request for the following stated reason: "In 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.” Auster Aff., **Ex. F** (the “**FOIL Denial**”).

16. On February 26, 2021, Albert Fox Cahn sent a letter to the NYPD’s FOIL Appeals Officer appealing the FOIL Denial. *See* Auster Aff., **Ex. G** (the “**FOIL Appeal**”). The FOIL Appeal argued that the existence of publicly available materials plainly responsive to the Request—including the NYPD Facial Recognition FAQs, the Patrol Guide, and the Impact & Use Policy—contradict the NYPD’s claim that there exist no records response to the Request and establish a demonstrable factual basis for the falsity of that claim. *Id.* at 3. The FOIL Appeal also argued that those documents, along with the NYPD’s public statements, expansive use of facial recognition technology, “human review” protocols, and detailed record-keeping policies, all cast significant doubt upon the Department’s claim that it was unable to locate responsive records. *Id.* at 2-3.

17. On March 10, 2021, the NYPD’s Records Access Appeals Officer, Jordan S. Mazur, sent a letter addressed to Albert Fox Cahn denying the FOIL Appeal. *See* Auster Aff., **Ex. H** (the “**FOIL Appeal Denial**”). According to Mr. Mazur, the FOIL Appeal was denied because “no records were located” after a “diligent search ha[d] been conducted for the requested records based on the information provided.” *Id.* at 1. Mr. Mazur also explained that “an agency cannot produce documents it does not possess or cannot disclose” and that a “Court cannot require respondents to produce documents that they certify they cannot find after a diligent search.” *Id.*

ARGUMENT

RESPONDENT VIOLATED FOIL BY FAILING TO (I) PROPERLY CERTIFY THAT IT CONDUCTED A DILIGENT SEARCH AND (II) PRODUCE DOCUMENTS RESPONSIVE TO S.T.O.P.’S FOIL REQUEST

A. The Purpose and Requirements of FOIL

18. The purpose of FOIL is to ensure transparency in government so that the public has the information necessary to detect and deter abusive government practices. *See, e.g., Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (noting that FOIL “can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, ‘to hold the governors accountable to the governed’”) (citation omitted). FOIL “proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *Fink*, 47 N.Y.2d at 571.

19. Under FOIL “[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of [several specific exemptions].” *Gould v. N.Y.C. Police Dep’t*, 89 N.Y.2d 267, 274-75 (1996); *see also Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980) (“In the absence of specific statutory protection for the requested material, [FOIL] compels disclosure, not concealment.”).

20. An agency must respond to a FOIL request within “five business days of the receipt of a written request for a record reasonably described.” Public Officers Law § 89(3)(a). The agency must either “make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.” *Id.*; *see also Abdur-Rashid v. N.Y.C. Police Dep’t*, 31 N.Y.3d 217, 232-33 (2018) (identifying § 89(3)(a)’s three permissible final responses to a FOIL request: (1) grant the request and disclose documents, (2) certify that the record cannot be found after a diligent search, or (3) deny the request).

21. “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.” Public Officers Law § 89(3)(a).

22. The court “shall assess,” against the agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by a substantially prevailing petitioner where the court finds that the agency had “no reasonable basis for denying access.” *Id.* at § 89(4)(c)(ii).

B. Respondent’s Failure to Comply with FOIL

23. “When an entity is unable to locate documents properly requested under FOIL, the entity is required to certify that it does not have possession of [the requested] record or that such record cannot be found after diligent search.” *Oddone v. Suffolk Cnty. Police Dep’t*, 96 A.D.3d 758, 760-61 (2d Dep’t 2012) (internal quotation marks omitted). While the “statute does not specify the manner in which an agency must certify that documents cannot be located” (*id.*), it is telling that in the instant case, the NYPD does not even feign in its FOIL Denial to have conducted a diligent search.

24. The FOIL Denial instead vaguely explained that the Department was “unable to locate records responsive to [S.T.O.P.’s] request based on the information [] provided.” Ex. F. It did *not* state or certify—contrary to Mr. Mazur’s assertion in his FOIL Appeal Denial—that the records could not be located *after a diligent search*. It is unsurprising that the word “diligent” is nowhere to be found the FOIL Denial, as any diligent (or even cursory) search would have doubtlessly unearthed, at minimum, the various public documents available on the NYPD’s website which are clearly responsive to S.T.O.P.’s request for records related to the “Accuracy” and “Bias” of the NYPD’s “Facial Recognition.” *See, e.g.*, Ex. A (NYPD Facial Recognition FAQs) at 2 (discussing efficacy of facial recognition software and studies showing

it “is less accurate in analyzing the faces of African Americans, Asians, women”); Ex. B (Impact & Use Policy) at 3, 11 (discussing NYPD’s process for evaluating the accuracy of its facial recognition software and mitigating biased use); Ex. C (Patrol Guide) at 2-3 (discussing process for analyzing accuracy of facial recognition results).

25. In addition, given the Department’s own acknowledgement that numerous studies have found that the software exhibits significant bias towards people of color, women, and transgender and non-binary individuals (*see* Ex. B (Impact & Use Policy) at 11), it is unfathomable that a reasonable search would not have yielded at least some documents concerning these studies. Similarly, if the Department actually has official protocols to prevent misidentification and bias, again, it is inconceivable that the Department has no documents concerning those protocols or their application.

26. Given the absence of any certification that the FOIL Denial was preceded by a diligent search, there is simply no apparent basis for Mr. Mazur’s claim in the FOIL Appeal Denial that the Request was “denied because a diligent search ha[d] been conducted” and no responsive requests were been found. Ex. H; *see Oddone*, 96 A.D.3d at 761 (reversing dismissal of article 78 petition where appeals officer’s conclusory determination that agency conducted a diligent search “was not based on any evidence in the record”).

27. Contrary to the NYPD’s claims, the aforementioned publicly available documents provide a demonstrable factual basis to conclude that records responsive to the Request *do exist* and are within the NYPD’s control. As such, even if the NYPD had properly certified that it conducted a diligent search (it did not), S.T.O.P. is still entitled to a hearing to determine whether the NYPD—which cited no statutory exemption in its FOIL Denial—has failed to abide by its obligations under FOIL to release the requested information. *Oddone*, 96

A.D.3d at 761 (“even where an entity properly certifies that it was unable to locate requested documents after performing a diligent search, the person requesting the documents may nevertheless be entitled to a hearing on the issue where he or she can articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [entity’s] control.” (citations and quotation marks omitted).

28. Courts have found “in a wide variety of situations” that a sufficient factual basis exists to support a petitioner’s “entitlement to a hearing on the issue of whether an agency has improperly failed to release requested information, despite a certification on behalf of the agency that no [] responsive materials exist.” *LatinoJustice PRLDEF v. S. Country Cent. Sch. Dist.*, 2018 NY Slip Op 51440(U), at 4 (Sup. Ct. Suffolk Cnty. 2018). In *LatinoJustice*, the Supreme Court found that it was “inconceivable, and at the very least highly improbable,” that a school district did not have any additional records related to its efforts to address gang-related activity, particularly where public statements, procedure manuals, codes of conduct, and other documents “amply demonstrate[d]” that the school undertook significant efforts to address that very issue. *Id.* at 5; *see also Wagstaffe v. David*, 2010 NY Slip Op 50311(U), at 5 (Sup. Ct. N.Y. Cnty. 2010) (ordering reconsideration of petitioner’s FOIL application where petitioner had “articulated a demonstrable factual basis to support his contention that the requested documents existed and were within the Police Department’s control”) (internal quotation marks omitted).

29. Unlike in *LatinoJustice*, where the school district had produced at least some responsive records, here the NYPD produced nothing, despite the incontrovertible existence of responsive documents on the NYPD’s own website. *See* Exs. A-C. These documents are plainly records “maintained in a computer storage” which the NYPD has the ability to “retrieve or

extract...with reasonable effort.” Public Officers Law § 89(3)(a). As such, the the NYPD was required to produce them. *Id.*

30. Further, similar to *LatinoJustice*, the responsive documents that S.T.O.P. knows exist are highly suggestive of the existence of additional responsive documents. It is “inconceivable, and at the very least highly improbable,” that the NYPD—which has used facial recognition technology for nearly a decade, processed nearly 10,000 requests in 2019 alone, allegedly has in place extensive human review protocols, and maintains a detailed record-keeping policy—does not possess a single document related to the “Accuracy” and “Bias” of its “Facial Recognition.” *LatinoJustice*, 2018 NY Slip Op 51440(U), at 4; Ex. D.

31. The NYPD’s own Patrol Guide requires its employees to “[r]eview and analyze [facial recognition] results by performing a visual comparison,” to “[p]repare [a match report] and upload to assigned investigator’s ECMS case file,” and to “[r]etain all records of facial recognition searches, including associated FIS case number, reason each search was requested, details, and search results, and upload them into the ECMS case file.” Ex. C at 2-3. Further, the Department’s Impact & Use Policy discusses in great detail its process for establishing and verifying facial recognition matches, and explains that the “NYPD only uses facial recognition algorithms which have been evaluated by the National Institute of Standards and Technology (NIST) for matching efficiency and accuracy, which includes an evaluation of the accuracy of the algorithm across demographics. Algorithms utilized for facial recognition are periodically updated as necessary based on subsequent NIST evaluations.” Ex. B at 4-6, 11. The Department’s public statements also make very clear that it has considered and examined the accuracy and potential bias of its software. *See* Ex. A at 2.

32. It defies reason for the NYPD to suggest that no responsive records exist given its rigorous policies and practices for logging facial recognition results, verifying their accuracy, and even updating the underlying algorithm based on evaluations of its performance. Because responsive and publicly available records clearly do exist, and are highly suggestive of the existence of others, there can be no doubt that the NYPD has failed to satisfy its FOIL obligations.

33. S.T.O.P.'s mission is to "ensure that technological advancements don't come at the expense of age-old rights." *See* About Us, Surveillance Technology Oversight Project. <https://www.stopspying.org/our-vision> (last visited June 23, 2021). It requested records from the NYPD relating to the use of its facial recognition software to ensure that the technology is reliable and not being used in a discriminatory manner or adversely impacting New York's most marginalized communities. This attempt to ascertain whether the NYPD's use of facial recognition software comports with civil liberties is an indisputably proper use of FOIL. But the Court need not, and should not, assess the worthiness of S.T.O.P.'s objective in evaluating this Petition. *See M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984) ("Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request."). The NYPD's blatant shirking of its FOIL obligations violates the public right of access to the requested records and impairs the public interest S.T.O.P. seeks to advance and protect through its FOIL requests.

CAUSE OF ACTION: ARTICLE 78 REVIEW OF IMPROPER FOIL REQUEST DENIAL

1. Petitioner repeats and realleges each and every allegation contained in paragraphs 1 through 33 as if fully set forth herein.

2. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

3. Petitioner has a clear right under Public Officers Law § 87 et seq. to the records requested.

4. Respondent has not produced the information sought by Petitioner's FOIL request or properly certified that responsive records could not be found after a diligent search, as FOIL requires.

5. Petitioner has exhausted its administrative remedies and has no other remedy at law.

PRIOR APPLICATION

6. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

7. WHEREFORE, Petitioner respectfully requests that this Court issue an Order:

- a. directing Respondent to provide Petitioner with documents responsive to its November 23, 2020 FOIL request for "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.";
- b. awarding reasonable attorneys' fees in favor of Petitioner and against Respondent in an amount to be determined at the conclusion of this proceedings;⁶ and

⁶ *Legal Aid Soc'y v. N.Y.S. Dep't of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1121-22 (3rd Dep't 2013) (holding that organization substantially prevailed in proceeding, warranting award of fees and costs)

- c. granting Petitioner such other and further relief as this Court may deem just and proper.

Dated: New York, New York
July 8, 2021

Respectfully Submitted,

By: /s/ David J. Lender
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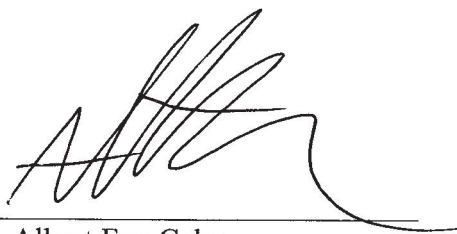
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Albert Fox Cahn, being duly sworn, deposes and says:

I am the Executive Director of the Surveillance Technology Oversight Project, Inc., petitioner in this action. I have reviewed the petition and know the facts set forth therein to be true based on my own knowledge.

Dated: New York, New York
July 7, 2021



Albert Fox Cahn

Sworn to and subscribed before me
this 7th day of July, 2021 in Putnam County, NY

Jeanette M. Kelemen
Notary Public

JEANETTE M. KELEMEN
Notary Public State of New York
Qualified in Dutchess County
Commission Expires on 11/5/2022
Registration No. 01KE6382960