

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BRENNAN CENTER FOR JUSTICE AT
NEW YORK UNIVERSITY SCHOOL OF LAW,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT, and
JAMES P. O'NEILL, in his official capacity as
Commissioner of the New York City Police Department

Respondents,

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

Index No. 160541/2016
IAS Part 12
(Jaffe, J.)

Mot. Seq. No. 001

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED REPLY

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Petitioner, the Brennan Center for Justice at New York University School of Law (the “Brennan Center”), respectfully submits this Memorandum of Law In Support Of Its Verified Reply to the Verified Answer submitted by Respondent, the New York City Police Department (the “NYPD”).

PRELIMINARY STATEMENT

The Brennan Center brought this petition because the NYPD refused to produce a single piece of information in response to its FOIL request. The purpose of the request was to understand the tools the NYPD uses to predict where crimes are likely to occur based on crime data and to evaluate whether the technology is effective and non-discriminatory. To that end, the request sought nine categories of public records: (1) agreements to purchase predictive technology; (2) communications with vendors of predictive technology; (3) the NYPD’s policies governing the use of its predictive model; (4) communications with federal agencies; (5) inputs to the NYPD’s predictive model; (6) information as to how the model works; (7) records reflecting past use and testing of the model; (8) audits and reviews of the model; and (9) nondisclosure agreements with vendors.

The NYPD categorically denied the request, asserting—without explanation—that disclosure would reveal non-routine techniques. On appeal, the NYPD affirmed that denial, pointing to additional exemptions. Then, months after this petition was brought, the NYPD reversed course without explanation and produced some information at the same time that it submitted its Verified Answer. Its belated production was deficient. As shown by its answering papers and the documents it produced, the NYPD did not conduct an adequate search for responsive records and it continues to withhold relevant, non-exempted information.

First, the NYPD’s document collection as to Request Nos. 3 (governing policies), 7 (past use and testing), and 8 (audits) was incomplete. As to records reflecting the past use of the

NYPD's predictive system, including data showing the number of investigations and prosecutions in which predictive policing has been used, the NYPD's papers confirm that it never searched for this information. As to policies governing the predictive model, the NYPD claims that it found only one responsive document—but that document *pre-dates* the creation of the NYPD's predictive system and was not tailored to the capabilities of the predictive policing system. As to audits, the NYPD asserts that nothing exists, and, as to testing, the NYPD is silent. Yet, the NYPD's response (or lack thereof) would mean that the predictive policing system the NYPD has used in the field for several years has never been audited or tested, an unlikely proposition that suggests that relevant records do exist that the NYPD has not produced.

Second, as to Request No. 2 (communications with vendors), the NYPD produced some documents, but it improperly redacted anything of substance from them and is withholding other documents in their entirety. No log was produced, and in its opposition papers, the NYPD provides no "particularized and specific justification" for denying access to these records. Rather, it makes the blanket assertion that every substantive communication it had with the third-party vendors necessarily involved the vendors' commercially sensitive information, thus exempting them as "trade secrets." Not only is this "trade secret" argument overreaching, it is also a red herring because the Brennan Center does not seek information that is proprietary to the third-party vendors. Rather, the Brennan Center seeks information as to how the NYPD communicated its needs, policies, and goals regarding predictive technology, and how the third-party vendors marketed their products in response to the NYPD's requirements—information that is of a public, not proprietary, nature, and that is critical to transparency regarding this powerful technology and its impact on the public. The communications should thus be produced, subject to proper redactions, or, at a minimum, reviewed *in camera*.

Third, in response to Request Nos. 5 (inputs to the model) and 6 (how the model works), the NYPD produced only one document—a public article containing a cursory description of the predictive model. In its papers, it acknowledges that it has withheld the model’s algorithms and code and it contends that disclosure of this information would jeopardize law enforcement efforts. The Brennan Center is doubtful that this risk would come to fruition, since even reproducing the algorithm would not enable a third party to predict where officers will be at all times or even at any given moment; the algorithm doubtless identifies limited areas where officers are directed to spend some fraction of their shift, rather than outlining each officer’s location at every moment. Nevertheless, to avoid this concern, the Brennan Center withdraws its request insofar as it is directed at the model’s algorithms and code.

Even though the model’s algorithms and code are no longer at issue, there are other relevant, non-exempt records about the model that should be produced, namely the crime data (or inputs) that are used in the model and the predictions (or outputs) that were made in the past. This information is important to a public understanding of whether the NYPD’s actions on the basis of its predictive technology are non-discriminatory and correlate to unbiased data. Although the dynamic nature of the model should render even recent information relatively stale, to avoid any potential concerns of interference with law enforcement efforts, the Brennan Center believes an appropriate order would be for the disclosure of information from the time the predictive model was put in use (in 2015) until six months prior to the date of the Court’s order, which would limit disclosure to historical data and older predictions. Because the model is dynamic and constantly changing, according to the NYPD, this type of historical information would not threaten law enforcement efforts.

Fourth, as to all Requests, the NYPD failed to collect documents from its Counterterrorism Bureau. Although the NYPD claims that it searched three other units for relevant records, it does not explain why these particular units were selected other than to assert in conclusory fashion that they were the only places that had responsive information. The NYPD's documents, however, show that the predictive policing model was incorporated into an already-existing "Domain Awareness System" (or "DAS"), a tool that has been used by the Counterterrorism Bureau since 2008. The Counterterrorism Bureau is thus a natural place to search for information about the model, and the NYPD should be required to search it.¹

Finally, the Brennan Center is entitled to reasonable attorney's fees and costs. As the NYPD's belated production shows, the NYPD had no reasonable basis to withhold records from the outset. Its initial determination to deny the request was also superficial at best, merely parroting the language of the statute. Moreover, the Brennan Center has already "substantially prevailed" for purposes of a fee award because the NYPD produced records only after the Brennan Center brought this petition. This is more than a sufficient basis under New York law for an award. Tellingly, although the NYPD opposes an award of expenses, it has no explanation why it could not have provided a substantive response to the FOIL request before this petition was filed.

For these reasons, the requested disclosures should be ordered, and the Brennan Center should be awarded its attorney's fees and costs under FOIL.

¹ In light of the NYPD's production and certifications in response to this petition, the Brennan Center no longer seeks Article 78 review of Requests 1 (records reflecting vendor agreements), 4 (communications with federal agencies regarding predictive policing), and 9 (records reflecting nondisclosure agreements).

ARGUMENT

I. THE NYPD SHOULD BE REQUIRED TO PRODUCE RECORDS REGARDING ITS MODEL'S POLICIES, PAST USES, AND TESTING

Request Nos. 3, 7, and 8 sought the policies and procedures governing the NYPD's predictive policing model, its past uses, including data showing the number of investigations and prosecutions in which predictive policing has been used, and information relating to any audits or testing of the model. The NYPD does not contend that this information is exempted from disclosure; rather, it asserts that it has satisfied its obligations under FOIL. *See* NYPD Mem. at 3-5. This claim is outright wrong as to Request No. 7 and facially implausible as to the others.

With respect to Request No. 7, the NYPD's papers confirm that its search was inadequate. That Request sought records reflecting the NYPD's "utilization, testing, or evaluation" of predictive technology, including data showing the number of investigations and prosecutions in which predictive policing has been used. The NYPD's papers show, however, that its search was limited only to a subset of the requested information. Specifically, the NYPD collected only those documents relating to "testing or evaluation" while ignoring records relating to the model's "utilization" or the number of investigations and prosecutions in which predictive technology has been used. *See* NYPD Mem. at 4 (showing that collection was limited to "records reflecting the ... testing or evaluation of ... predictive policing products or services") (ellipses in original) (quoting Hernandez Aff. ¶ 16, which in turn purports to quote Request No. 7). As a result, it appears that the NYPD did not conduct a thorough search in response to Request No. 7, and it should be required to conduct a proper search directed at the full scope of the request.

Even as to "testing or evaluation," the NYPD's search appears to have been incomplete. It claims that the only documents it located on this subject are documents concerning the

performance of third-party products. The NYPD makes no mention of documents relating to the testing of the its own model, but it seems improbable that these records do not exist. The NYPD's response would mean that the NYPD has never tested the predictive model that its officers have used in the field for the past several years. Aside from being questionable, this proposition is inconsistent with other information the NYPD has produced. In particular, the NYPD produced an article authored by Evan S. Levine, among others, containing a description of the NYPD's predictive policing system. Mr. Levine is the Assistant Commissioner responsible for developing the NYPD's predictive algorithms. *See* Levine Aff. ¶¶ 1, 5-7.² In the article, Mr. Levine presented "success rates" for the predictive system, which suggests that the NYPD has tracked and "tested" its model. *See* Levine Art. at 7-8.³ The Brennan Center accordingly requests that the NYPD be required to conduct its search as to "testing or evaluation" records again, or to certify that it has not tested its proprietary predictive policing model.

For this same reason, it seems highly unlikely that there are no documents reflecting any audit of the model, as the NYPD claims in response to Request No. 8. Although the NYPD certifies that it did not locate any records, this claim is inconsistent with a document it produced entitled "Public Security Privacy Guidelines." These Guidelines concern the DAS, a suite of analytics tools that today includes the predictive policing system. *See* Levine Art. at 2, 4. Under the Guidelines, the NYPD is required to create an "immutable audit log" reflecting where and

² The "Levine Aff." refers to the Affidavit of Evan Levine in support of the NYPD's Verified Answer [Doc. No. 22].

³ The "Levine Article" is entitled *The New York City Police Department's Domain Awareness System*, Interfaces, January 18, 2017. The article is attached as Exhibit F to the supporting declaration of Ellison Merkel (the "Merkel Declaration").

when DAS data is accessed and to “conduct[] periodic reviews of [these] logs.” Guidelines at 7.⁴ Because the NYPD’s predictive model is incorporated into the DAS, the Guidelines require the NYPD to maintain “audit logs” as to the model’s use. Unless the NYPD means to say that it has not complied with the terms of the Guidelines, its certification that no audit records exist is suspect. *See Baez v. Brown*, 124 A.D.3d 881, 884 (2d Dep’t 2015) (finding statement that “nothing in the case file met [the petitioner’s] description of these items ... did not constitute an adequate certification”) (omitting internal quotation marks); *De Fabritis v. McMahon*, 301 A.D.2d 892, 894 (3d Dep’t 2003) (finding affirmation that “[t]here are three State Police reports that are responsive to petitioner’s request” did not provide “the requisite certification” that no other records existed) (omitting internal quotation marks).

Finally, with respect to policies and procedures requested in Request No. 3, the NYPD claims the Guidelines document was the only responsive record it located. The Guidelines, however, were published in 2009, *six years before* the NYPD even rolled out its predictive policing program. *See generally* Guidelines (bearing date stamp of Apr. 2, 2009). As a result, the Guidelines concern the DAS before it was expanded to include predictive technology. Back then, the DAS was a “technology deployed in public spaces as part of the counterterrorism program of the NYPD’s Counterterrorism Bureau.” Guidelines at 2. According to the Guidelines, DAS’s purpose was “to monitor public areas and public activities,” such as through CCTVs. *Id.* at 3.

The predictive policing system, by contrast, is not a “monitoring” tool that is “deployed in public spaces.” Rather, it is an addition to the DAS that uses historical information “to make predictions as to when and where certain crimes are more likely to occur.” Levine Aff. ¶ 4.

⁴ The Guidelines are attached as Exhibit G to the Merkel Declaration.

Moreover, whereas the DAS appears to have originated as a “counterterrorism tool,” the predictive model is not limited to that goal but is instead intended to serve more generalized public safety and law enforcement purposes and “is available to all NYPD Commanding Officers in Patrol Precincts, Transit Districts and Housing Bureau’s Police Service Areas.” *Id.* at ¶ 9. Given the length of time that has elapsed since the Guidelines were issued, and the evident significant changes to the NYPD’s use of technology since then, it is reasonable to conclude that they are not the only policies relating to the NYPD’s predictive model.

In light of this, the NYPD needs to produce responsive “audit,” “testing,” “evaluation,” and “utilization” information, including data as to the number of investigations and prosecutions in which the model has been used. If the NYPD does not undertake audits, testing, or evaluation of its predictive model, it should make a complete and proper certification to that effect. The NYPD must also produce all relevant policies, procedures, manuals, and guidelines.

II. THE NYPD SHOULD BE REQUIRED TO PRODUCE ITS COMMUNICATIONS WITH THIRD-PARTY VENDORS

Request No. 2 sought communications between the NYPD and the third-party vendors whose predictive policing products the NYPD considered purchasing at one time. The Request was directed at understanding how the NYPD conveyed its needs, policies, and goals regarding predictive technology, and how the third-party vendors marketed their products in response to the NYPD’s requirements. After this petition was brought, the NYPD produced some emails, but redacted anything of substance from them. It also withheld an unknown number of documents in their entirety. *See* NYPD Mem. at 5. In both cases, when redacting or withholding a document altogether, the NYPD did not provide any log.

To prevail, the NYPD must articulate a “particularized and specific justification” for refusing to produce the requested communications. *W. Harlem Bus. Grp. v. Empire State Dev.*

Corp., 13 N.Y.3d 882, 885 (2009); see *Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008) (“[T]he parties seeking the exemption ... are charged with the burden of proving their entitlement to it ... meaning that they must demonstrate that the reports ‘fall[] squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.’”) (citation omitted); *Gould v. N.Y. City Police Dep’t*, 89 N.Y.2d 267, 275 (1996) (“To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.”) (internal quotation marks omitted).

Rather than provide particularized grounds, the NYPD claims, in sweeping fashion, that every meaningful communication it had with the vendors must have involved the vendors’ competitively sensitive information, thus exempting the communications as “trade secrets” under Public Officers Law Section 87(2)(d). See NYPD Mem. at 6-10. This superficial labelling of all communications as “trade secrets” falls far short of the NYPD’s burden under FOIL because it is nothing more than a “conclusory characterization” of the documents. *W. Harlem*, 13 N.Y.3d at 885; see *Baez*, 124 A.D.3d at 883 (“[S]ince the respondent failed to proffer more than conclusory assertions to support these claims, the Supreme Court erred in determining that the [records officer] met his burden”).

Moreover, although it is probable that some of the requested documents will involve the vendors’ trade secrets, it is impossible that the only topic covered in every communication was the vendors’ proprietary information. Indeed, the NYPD’s papers show that other types of communications exist. For example, one of the NYPD’s affiants, Douglas Williamson, claims he was responsible for liaising with the vendors and “communicat[ing] the Department’s requirements.” Williamson Aff. ¶ 4. These types of communications relating to the NYPD’s

“requirements” are important to a public understanding of whether the NYPD’s design and calibration of predictive technology were either intentionally or inadvertently discriminatory. Moreover, they plainly would not involve the *vendors’* protected trade secrets or otherwise fall within Section 87(2)(d) exemption, and none of the NYPD’s cited cases is to the contrary. And while the NYPD focuses on just those communications relating to the vendors’ technology, it makes no argument that other types of communications are exempt from disclosure. *See* NYPD Mem. at 6-10. The NYPD’s communications with third-party vendors should thus be produced, subject to proper redactions, or, at a minimum, submitted to the Court for *in camera* review.

III. THE NYPD SHOULD BE REQUIRED TO PRODUCE ITS MODEL’S HISTORICAL INPUTS AND OUTPUTS

Requests Nos. 5 and 6 seek information relating to the data used in the NYPD’s model, how the model works, and the model’s past predictions. In response to both Requests, and after this petition was filed, the NYPD produced only one document—a public article describing the model at a high level. *See* NYPD Mem. at 4. Arguing against any further disclosure, the NYPD limits its discussion to the model’s algorithms and code (or notes discussing them), asserting that disclosure of this information is exempted because it would endanger law enforcement efforts by allowing a wrongdoer to replicate the NYPD’s predictions. *See id.* at 13-22.

The Court no longer needs to decide the issue of the model’s algorithms and code, as the Brennan Center withdraws its petition as to this information. The Brennan Center requests, however, that other, non-exempt information be produced. Namely, the NYPD should be required to produce the *historical* crime data that has been used in the model and the *past* predictions that were made by it, from the time the predictive model was first put into use (in 2015) until six months prior to the date of an order compelling production. This backward-looking information would help to understand whether the NYPD’s actions correlate to data in a

non-discriminatory fashion and the judgments made with respect to the collection of input data, without revealing the model's inner workings or jeopardizing law enforcement efforts (although the Brennan Center reiterates that it does not believe more complete disclosure would jeopardize those efforts). As such, the information is discoverable under FOIL and should be produced. *See Council of Regulated Adult Liquor Licensees v. City of N.Y. Police Dep't*, 300 A.D.2d 17, 18 (1st Dep't 2002) (granting FOIL request where "[t]he documents contain primarily statistical information concerning the law enforcement history of certain nightclubs in a number of precincts in Manhattan over a period of a few months ... [and] the information at issue is now almost two years old"); *Lynch v. City of Troy*, 33 Misc. 3d 174, 179 (Sup. Ct. Rensselaer Cty. 2011) ("[A] document that relates to 'prospective police activity' may be withheld but documents that simply provide the historical context of an investigation should be disclosed.") (citation omitted).

The NYPD failed to produce any data used in the model—historical or current—and did not show any "particularized and specific justification" for withholding the information. *See Lynch*, 33 Misc. 3d at 180 (agency's explanation, "in general terms, how an investigation may be compromised fail[s] to provide the necessary 'particularized and specific justification'") (citation omitted). The records should thus be produced for this reason alone.

Moreover, none of the exemptions on which the NYPD relies to argue against disclosure of the model's algorithms and code applies to the model's inputs and outputs:

First, the model's historical inputs and outputs do not reflect "non-routine techniques" under Public Officers Law Section 87(2)(e). In relying on this exemption, with respect to the model's algorithms and code, the NYPD claimed that its concern is that disclosure would allow someone to "make the same predictions that NYPD personnel make." NYPD Mem. at 17. Yet,

even if disclosure of the code would pose such a risk, disclosure of the inputs and outputs certainly would not. This is because, according to the NYPD, the model's functionality or its "technological brain" turns on its code, not on its inputs or outputs. *Id.* at 21. As a result, the historical crime data and the model's past predictions, on their own and without the algorithms, are useless to duplicating the NYPD's predictions today. Moreover, the information is stale because, according to the NYPD, the model is dynamic and "constantly evolving." *Id.* As the NYPD explains, "[t]he [model's] codes and algorithms are not static," and "predictions change based on new data and the date of a request." Levine Aff. ¶ 6. This means that the model is regularly changing, that historical information from even six months ago should be obsolete (in terms of replicating current predictions), and that there is no concern that the "the safecracker" will be given the "the combination to the safe." NYPD Mem. at 14.⁵

Second, the NYPD refers to another part of Section 87(2)(e), which exempts information that would "identify a confidential source or disclose confidential information relating to a

⁵ In addition, the NYPD's cited cases are distinguishable. In *Grabell v. N.Y. City Police Dep't*, 139 A.D.3d 477, 479 (1st Dep't 2016), and *N.Y. Civ. Liberties Union v. N.Y. City Police Dep't*, 2009 N.Y. Misc. LEXIS 2542, at *10-12 (Sup. Ct. N.Y. Cty. June 26, 2009), the FOIL requests related to ongoing, covert counter-terrorism efforts, such as video surveillance. Unlike there, disclosure in this case would not provide wrongdoers with the means to evade law enforcement. Moreover, according to the NYPD, much of this information is already public in nature. See Levine Aff. ¶ 10 (asserting that "public databases" could be used with the model's algorithms).

The other cases cited by the NYPD also did not involve stale information that posed no threat to law enforcement. See *Fink v. Lefkowitz*, 47 N.Y.2d 567, 573 (1979) ("Chapter V of the Special Prosecutor's manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution."); *Spencer v. N.Y. State Police*, 187 A.D.2d 919, 921 (3d Dep't 1992) ("Petitioner is not entitled to disclosure of portions of the file relating to laboratory examinations of certain items of evidence seized from both the crime scene and elsewhere because scientific evidence, excluding ballistics and fingerprint test ... may properly be exempted from disclosure."); *Urban Justice Ctr. v. N.Y. Police Dep't*, 2010 N.Y. Misc. LEXIS 4258, at *29 (Sup. Ct. N.Y. Cty. Sept. 10, 2011) (exempting disclosure of manual that "discusse[d] step-by-step procedures used by undercover NYPD officers to identify, engage and arrest the suspect violators").

criminal investigation.” NYPD Mem. at 13 (quoting Public Officers Law § 87(2)(e)(iii)). This exemption is irrelevant. Its purpose is to protect the identities of undercover officers and informants (*see* Brennan Center Mem. at 19), information that the Brennan Center is not seeking, and that the predictive model does not involve. Moreover, as the NYPD admits, the historical data used in its modelling is not even “confidential” but exists in one form or another in “public databases.” Levine Aff. ¶ 10.

Third, Public Officers Law Section 87(2)(i) exempts disclosure that “would assist the recipient in invading an agency’s computer system.” *N.Y. Civ. Liberties Union*, 2009 N.Y. Misc. LEXIS 2542, at *8. In discussing this exemption, the NYPD’s papers show that its concern is not that disclosure would provide a roadmap to hacking the department’s computers. Rather, the NYPD asserts that “a civilian programmer could ... make the same predictions that the NYPD makes.” NYPD Mem. at 21. The NYPD’s reliance on this exemption is thus not really about the security of its information technology systems but instead another way to argue the “non-routine technique” exemption, which as shown earlier does not apply.⁶

Finally, the NYPD’s papers rely for the first time on the “life and safety” exemption under Public Officers Law Section 87(2)(f). *See* NYPD Mem. at 17-19. This exemption should not be considered because it was not a basis of the NYPD’s denial of the FOIL request (or its appeal). *See Karimzada v. O’Mara*, 111 A.D.3d 1088, 1089 (3d Dep’t 2013) (“Courts reviewing administrative determinations may only rely on the grounds invoked by the agency, and if those grounds are improper, the courts may not substitute what they deem a legitimate or more appropriate basis.”). In any event, the “life and safety” exemption is just as inapplicable as the

⁶ Moreover, even if disclosure would reveal server locations, IP addresses, or encryption methods—information that might facilitate a cyberattack but that the Brennan Center does not seek—the NYPD could redact this information.

“non-routine technique” exemption because “life and safety” would only theoretically be threatened if wrongdoers could use the inputs and outputs to replicate the NYPD’s predictions today, which again is not possible given the dynamic nature of the model. Accordingly, the model’s inputs and outputs, from the initiation of the predictive policing system through the date six months prior to this Court’s order, should be produced.

IV. THE NYPD SHOULD BE REQUIRED TO SEARCH ITS COUNTERTERRORISM BUREAU FOR RELEVANT RECORDS

The NYPD claims that it searched for relevant records in three of its divisions: the Information Technology Bureau, the Office of Management Analysis and Planning, and the Office of the Deputy Commissioner of Management and Budget’s Contract Administration Unit. *See* NYPD Mem. at 3. The NYPD does not explain why its search was limited to these three divisions, other than to assert summarily that they were the “only places” that had responsive information. *Id.* The NYPD’s production shows, however, that the Counterterrorism Bureau should also have been searched.

In particular, the Levine Article explains that the predictive system was built into the NYPD’s overall DAS program. *See* Levine Art. at 4, 7-8. Notably, the DAS’s use is not limited to the three divisions the NYPD searched for relevant records. Rather, according to Mr. Levine, “the DAS project began in earnest in 2008 in the NYPD’s Counterterrorism Bureau.” *Id.* at 4. Accordingly, the Counterterrorism Bureau is a natural location for relevant records, and the NYPD should be required to search it.

V. PETITIONERS SHOULD BE AWARDED ATTORNEY'S FEES AND COSTS

Where, as here, an “agency had no reasonable basis for denying access,” a court may award legal fees and costs to a party who “substantially prevailed” in respect of a FOIL request. N.Y. Pub. Off. Law § 89(4)(c).⁷ The facts in this case more than satisfy this standard.

A. The NYPD Had “No Reasonable Basis” To Withhold Documents

In determining whether an agency had a reasonable basis for denying a FOIL request, courts consider “whether the agency reasonably claimed the records were exempt from disclosure.” *N.Y. State Defs. Ass’n v. N.Y. State Police*, 87 A.D.3d 193, 195 (3d Dep’t 2011).

Here, the NYPD’s denial of the FOIL request was unreasonable, and its “initial determination was superficial, at best.” *W. Harlem*, 13 N.Y.3d at 885. In denying the request and the appeal, the NYPD “merely parroted” the statutory exemption language, constituting a “failure” to explain the reasons for denial under FOIL. *Id.* at 884-85; *see* Pub. Off. Law § 89(4)(a) (requiring agency to “fully explain in writing ... the reasons for further denial”); Petition, Exs. B (initial denial), D (appeal denial). It is also evident given the NYPD’s belated production of responsive materials that a “good faith” search was not conducted in response to the Brennan Center’s request. *See supra* pp. 5-6 (showing that NYPD did not search for materials regarding “testing” or “utilization”); *Legal Aid Soc’y*, 105 A.D.3d at 1122 (purpose of

⁷ Previously, an award of fees required a showing that the requested records were in the “public interest.” *See* N.Y. Pub. Off. Law § 89(4)(c) (effective May 3, 2005 to Aug. 15, 2006) (“The court in such a proceeding may assess ... reasonable attorney’s fees and other litigation costs ... where the court finds that: (i) the record involved was, in fact, of clearly significant interest to the general public....”). That requirement no longer exists, and was removed 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.” *Legal Aid Soc’y v. N.Y. State Dep’t of Corr. and Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3d Dep’t 2013) (internal quotation marks omitted; alteration in original); *see* N.Y. Pub. Off. Law § 89(4)(c) (effective Mar. 31, 2011) (omitting any “public interest” requirement); *see also* 2006 Sess. Law News of N.Y. Ch. 492 (S. 7011-A) (revising § 89).

cost shifting is to promote government's "good faith" efforts). Similarly, any argument that the NYPD had a reasonable basis to believe all records were exempt is "belied by the virtually immediate release" of responsive records "upon commencement of this proceeding." *N.Y. State Defs. Ass'n*, 87 A.D.3d at 197.

B. The Brennan Center Has "Substantially Prevailed"

To "substantially prevail," it is not necessary for the party seeking disclosure to have obtained a court order compelling production. Rather, a party can "substantially prevail" if, as here, the government agency produces records *or* certifies that no records exist and does so *after* an Article 78 petition has already been commenced. *See Acme Bus Corp. v. Cty. of Suffolk*, 136 A.D.3d 896, 897 (2d Dep't 2016) ("Here, inasmuch as the petitioner eventually received the documents it sought, it 'substantially prevailed' in the case."); *Legal Aid Soc'y*, 105 A.D.3d at 1122 ("The fact that full compliance with the statute was finally achieved in the form of a certification that the requested record could not be found ... does not preclude a petitioner from being found to have substantially prevailed."). This policy exists because "to allow a respondent to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purposes of FOIL's fee-shifting provision." *N.Y. State Defs. Ass'n*, 87 A.D.3d at 195.

Here, regardless of whether the Court grants the Brennan Center's requested relief, the Brennan Center has "substantially prevailed." As a consequence of this petition, the NYPD produced documents in response to seven of the Brennan Center's nine requests, and, as to the remaining two requests, certified that no records existed. If the Brennan Center prevails on its arguments that the NYPD's response was inadequate, then it will have obtained additional or full compliance. If, on the other hand, the Court accepts the NYPD's certification that certain documents do not exist or that its search was thorough, then the Brennan Center still will have

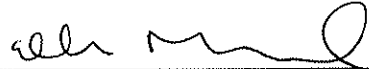
received everything it could have under the FOIL request, and it will have done so only because (and after) it brought this petition. Accordingly, the Court should award the Brennan Center its attorney's fees and costs.

CONCLUSION

The Court should order the NYPD to comply with the Brennan Center's FOIL request, award the Brennan Center its reasonable attorney's fees and costs, and provide such other relief the Court deems necessary and proper.

Dated: May 17, 2017
New York, NY

Respectfully Submitted,

By:  _____

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