SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent,

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

Index No. 161369/2023

IAS Part 41

Hon. Nicholas W. Moyne, J.S.C.

Motion Sequence No. 002

Petitioner's Reply Memorandum Of Law
In Further Support Of Its Motion To Compel Production

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PRELIMINARY STATEMENT

The Brennan Center's moving papers showed that the NYPD's productions did not comply with FOIL's requirements because the NYPD improperly relied on the privacy exemption and claimed that information was "nonresponsive" in support of redacting most of what it produced. Tacitly acknowledging that its redactions are impossible to justify, the NYPD claims new exemptions from disclosure and contends that its collection of social media posts was in furtherance of counterterrorism efforts that, if disclosed, would endanger lives or reveal investigative techniques. Missing from the NYPD's story is any explanation why, if redacting entire posts from its documents was of such paramount importance, it waited until now to make that claim. As a matter of law, the NYPD waived any exemptions it did not claim earlier, and its new arguments should be treated for what they are: a last-ditch effort to excuse otherwise indefensible redactions that have made it impossible to fully evaluate the documents it has produced.

The NYPD fares no better in justifying the privacy exemption on which it originally relied. Its arguments based on investigative integrity and preservation of confidential sources are a red herring because the privacy exemption does not cover those alleged concerns. The privacy exemption instead concerns the interests of the people whose information will be disclosed. It is meant to protect personal, sensitive matters about which there is "little or no public interest." Contrary to the NYPD's argument, the mere fact that the NYPD investigated someone's social media account is not so sensitive or of such little public concern that the individual's interest in keeping that fact secret outweighs the public interest in learning how the NYPD targets social media speech and utilizes it for monitoring and criminal investigations. The NYPD's own conduct in this case shows this. It produced some posts, while redacting many others. If the simple fact that the NYPD monitored a post generated a protectible interest in keeping it confidential, the

NYPD would have redacted every post that appeared in its production. That it did not can only mean the NYPD had another motive in redacting some social media information but not others. Moreover, the NYPD still does not convincingly explain why withholding entire posts is the only option when more targeted redactions would do. Even worse, the NYPD does not attempt to justify its redactions of allegedly "nonresponsive" information.

Accordingly, the Court should order the NYPD to reproduce the documents and remove any redactions relating, first, to improper privacy claims (though the NYPD may redact, for example, names, addresses, and social security numbers) and, second, to so-called nonresponsiveness. In the alternative, the Court should conduct an *in camera* review of a sample of the records.

ARGUMENT

I. THE NYPD'S CLAIMED PRIVACY EXEMPTION DOES NOT APPLY

The NYPD incorrectly contends that FOIL's privacy exemption applies because disclosure of the redacted social media posts would allegedly threaten ongoing investigations or sources. *See* Opp. 7-8. This argument misconstrues the privacy exemption, which does not protect the NYPD's interests. The exemption instead protects the third parties whose personal information would be disclosed. *See Tri-State Pub. Co., A Div. of Ottaway Newspapers v. City of Port Jervis*, 138 Misc. 2d 147, 151 (Sup. Ct. Orange Cnty. 1988) ("[T]he protection against unwarranted invasion of privacy is provided for the personal benefit and protection of the persons who are the subject party of the information sought to be disclosed."). The question thus is whether disclosure would harm these third parties, not whether it would harm the NYPD.

The NYPD next gets the standard backwards by arguing that the burden is on the Brennan Center to justify disclosure. *See* Opp. 9. To the contrary, the "burden in establishing that the privacy exemption" applies is on the NYPD. *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463

(2007). The NYPD's cited case—*Goodstein v. Shaw*—is in accord. 119 Misc. 2d 400, 401 (Sup. Ct. N.Y. Cnty. 1983) ("The burden of establishing that the requested material is exempt falls on the party opposing the request.").

The NYPD also falls short of its burden to show that any privacy interest outweighs the public interest in disclosure. The redacted records were publicly-available social media posts—and, in some cases, public articles. Unlike in the case of a witness cooperating with a police investigation, there is no suggestion that any of the redacted information was provided to the NYPD under an expectation of confidentiality. *See Laveck v. Vill. Bd. of Trs. of Vill. of Lansing*, 145 A.D.3d 1168, 1170 (3d Dep't 2016) (granting request for information about members of hunting program because "respondent offered no proof that participants in the program had any expectation that their identities would remain strictly confidential."). The NYPD also does not provide any support for its suggestion that social media users would be at risk of harm if their information were disclosed, making this case entirely distinguishable from the NYPD's cases about convicted murderers trying to use FOIL to find witnesses who helped the police. *See Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875 (1st Dep't 2011), *aff'd*, 20 N.Y.3d 1028 (2013); *see also Exoneration Initiative v. New York City Police Dep't*, 114 A.D.3d 436, 438 (1st Dep't 2014) (similar); *Johnson v. Hynes*, 264 A.D.2d 777, 777 (2d Dep't 1999) (similar).

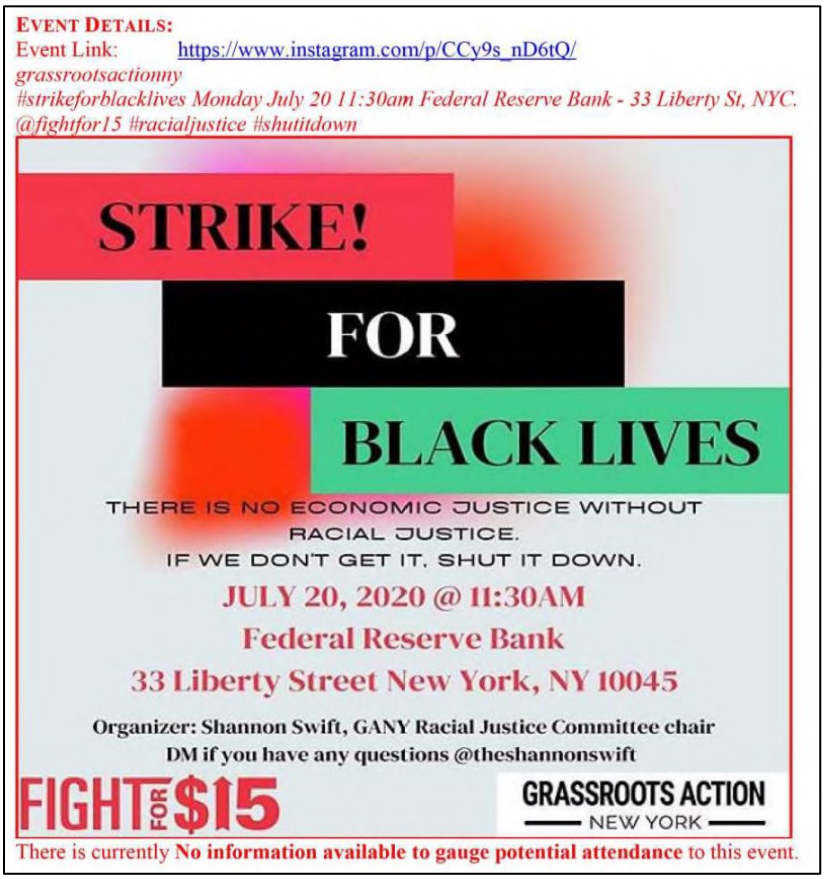
The NYPD's only argument is that people have a reputational interest in keeping confidential the fact that they were suspected of a crime. *See* Opp. 7. Yet, contrary to the NYPD's argument, there is no blanket prohibition against the "release of unsubstantiated allegations," such as an investigation that does not lead to a prosecution. *New York C.L. Union v. City of Syracuse*, 210 A.D.3d 1401, 1404 (4th Dep't 2022). If the opposite were true, the NYPD could refuse virtually all disclosure by sweeping the information under the umbrella of "investigation." The

NYPD's claim, moreover, finds no support in its cited authorities. *Leibowitz v. Safir*, unlike here, concerned CPL 160.50, which requires that records of people arrested but not prosecuted be sealed. 251 A.D.2d 581, 582 (2d Dep't 1998). Likewise, the unique privacy interest at stake in *Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't* was the risk that disclosing the targets of a post-9/11 joint surveillance effort between the NYPD and CIA would associate innocent Muslim residents with radical terrorists and subject them to public persecution. 125 A.D.3d 531, 532 (1st Dep't 2015). Here, by contrast, the information being sought is not the identities of those the NYPD has surveilled. It is the *viewpoints* the NYPD has potentially criminalized. The types of *speech* the NYPD has targeted are simply not the sort of "sensitive matters in which there is little or no public interest" that fall within the privacy exemption. *New York Times Co. v. City of New York Off. of Mayor*, 194 A.D.3d 157, 165 (1st Dep't 2021).

Even if the identities of social media users raised privacy concerns that outweigh the public interest in disclosure, the NYPD offers no proof that more targeted redactions (of names or faces, for example) would fail to provide a reasonable measure of protection. *See Thomas v. Condon*, 128 A.D.3d 528, 530 (1st Dep't 2015) (holding that privacy exemption did not apply because "information can be redacted"); *Aron L., PLLC v. New York City Fire Dep't*, 191 A.D.3d 664 (2d Dep't 2021) (holding that agency "failed to sustain its burden of proving that the personal privacy exemption applied … since it failed to establish that the identifying details could not be redacted so as to not constitute an unwarranted invasion of personal privacy."). To the extent there is still a risk under this approach that one could, with considerable effort, reverse-engineer a user's identity, the NYPD does not show that this risk is greater here than in any other FOIL dispute where tailored redactions are commonly favored over complete withholdings in spite of the risk. *See New York State Corr. Officers & Police Benevolent Ass'n, Inc. v. New York State Dep't of*

Corr. & Cmty. Supervision, 224 A.D.3d 974, 977 (3d Dep't 2024) (ordering disclosure because "respondent failed to make a sufficient showing as to whether the requested audio tapes and misbehavior report could not be redacted"). Indeed, the NYPD does not explain how more targeted redactions in this case would be any different or uniquely less effective than redactions in other contexts.

Further contradicting the NYPD's arguments about privacy is the fact that the NYPD produced some social media posts without redactions. These include unredacted postings about planned protests and, more importantly, the identity of individual organizers and their email addresses.

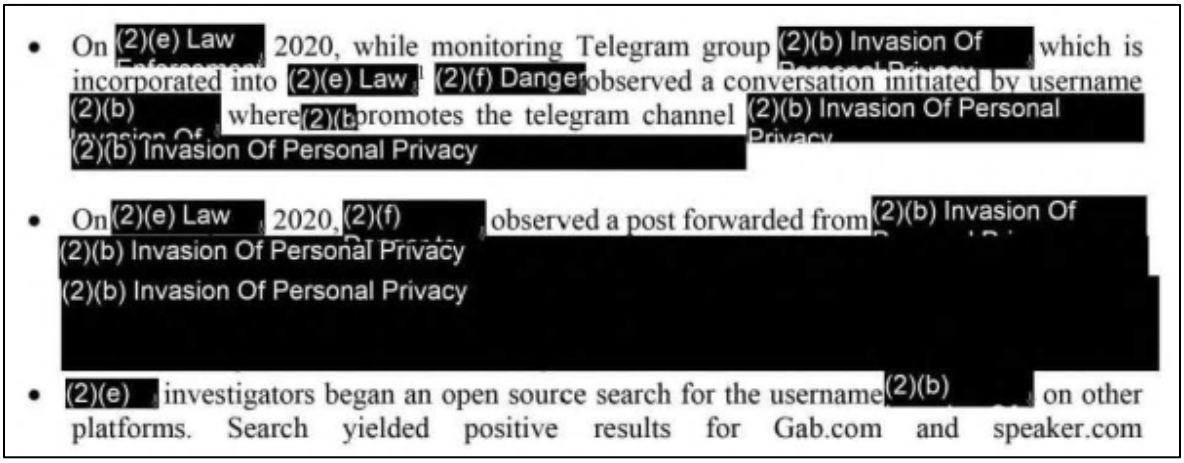


Lee Aff. Ex. 10 (NYPD_FOIL00001211-33), at -215. If disclosure of this information were so damaging, as the NYPD contends (Opp. 8), then the NYPD would have claimed the privacy

exemption in relation to these documents as well. That the NYPD did not means that its reliance on the exemption was either arbitrary or, worse yet, selective, with the NYPD cherry-picking which information to produce. Neither case supports a finding that privacy concerns outweigh the public interest in disclosure. Accordingly, the NYPD should be ordered to re-produce its documents without redactions based on the claimed privacy exemption.

II. THE NYPD WAIVED UNASSERTED EXEMPTIONS BY FAILING TO INVOKE THEM IN ITS PRODUCTION

The NYPD cannot now invoke exemptions it failed to assert when producing its documents. FOIL requires agencies to identify the "particularized and specific" basis for withholding responsive information. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996). Implicit in that requirement is that the NYPD cannot *secretly* assert other exemptions without telling the requestor, only to raise them once its original exemptions were challenged. The NYPD deliberately annotated each redaction it made to show which exemption it was asserting—sometimes doing so by parsing all the way to particular words in a sentence, and asserting one exemption to one part of the sentence, and another to a different part of the sentence. *See* NYSCEF 59 (NYPD_FOIL00000344), excerpted below.

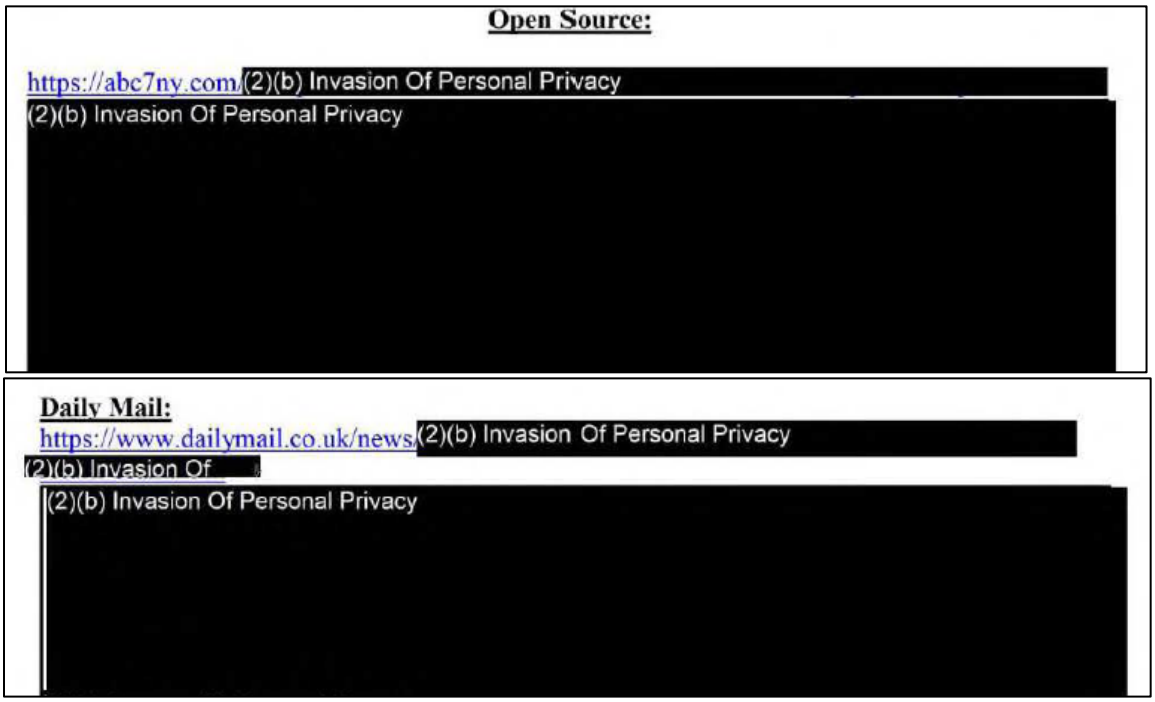


Now, for the first time in response to the Brennan Center's motion, the NYPD argues that every single assertion of the privacy exemption under Public Officer Law § 87(2)(b) is also covered by up to four other exemptions: § 87(2)(f) (danger to life); § 87(2)(e)(iv) (non-routine investigative techniques); § 87(2)(e)(iii) (confidential sources); or § 87(2)(g) (deliberative process). An agency cannot withhold documents under one exemption, then claim additional exemptions for the first time in litigation when its original basis proves insufficient. Such gamesmanship undermines FOIL's purpose and its requirement that agencies provide specific justifications for withholding records.

The Court need not consider these newfound exemptions, because the NYPD has waived them. Judicial review of a FOIL determination "is limited to the grounds invoked by the agency." *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 74-75 (2017) (denying invocation of FOIL exemption where "[t]he Department did not make any contemporaneous claim that the requested materials constituted non-routine 'criminal investigative techniques'" in its administrative decision on producing documents). New York law requires that "FOIL is to be liberally construed and its exemptions narrowly interpreted." *Matter of Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252 (1987). To allow the NYPD to now raise exemptions it deliberately chose not to assert when it produced the documents "would be contrary to [Court of Appeals] precedent, as well as to the spirit and purpose of FOIL." *Barry v. O'Neill*, 185 A.D.3d 503, 505 (1st Dep't 2020) (denying invocation of the law enforcement exemption as outside the scope of the NYPD's administrative decision on producing documents).

Moreover, the NYPD's assertion that *all* the material it redacted for privacy reasons is *also* covered by its patchwork of now-asserted exemptions, including life and safety, proves exactly why FOIL has a particularization requirement. For example, the NYPD does not explain whether

or why there would be a "life and safety" threat, or risk to "investigative technique," or "confidential source," or "deliberative process" resulting from disclosing which "ABC News 7" and "Daily Mail UK" articles officers were reading in 2020. *See* NYSCEF 58 (NYPD_FOIL000001155) at -162-63, excerpted below.



The NYPD's choice of redactions was not an accident. *See* NYSCEF 65 (Milanese Aff.) at ¶¶ 7-8 (affirming that the NYPD went through multiple layers of review to ensure the correct exemption was asserted). The Court should not let the NYPD play a shell game here. The NYPD specifically invoked the privacy exemption with respect to myriad blacked-out parts of responsive documents. The Court should consider only the privacy exemption that the NYPD actually invoked, not the post-hoc rationalizations it now offers.

III. THE NYPD'S ALTERNATIVE EXEMPTION CLAIMS FAIL ON THE MERITS

Even if the Court considers the NYPD's newly asserted exemptions, none can transform public social media posts into secret government files. As explained below, the redactions en

masse do not meet the standard for these exemptions, and the NYPD's attempt to invoke every exemption to apply to all the documents only highlights the weakness of its position.

A. Life and Safety, § 87(2)(f)

The exemption in § 87(2)(f) protects against identifiable threats, not generalized concerns about terrorism. Courts require agencies to articulate how disclosure would create a genuine possibility of physical harm to identifiable persons. Here, the NYPD offers only speculation that someone might use "AI-assisted tracing" to identify posters and then might harm them for their posts that are already publicly available on the internet. The NYPD's concerns about the life and safety of officers, witnesses, and confidential informants similarly do not add up. The Brennan Center does not seek personal identifying information of officers, witnesses, or confidential informants, and the NYPD has no explanation—or even speculation—as to how those identities would be ascertained from revealing the content of public posts.

The NYPD's reliance on general crime statistics and terrorism concerns cannot justify blanket redactions of public social media posts about Black Lives Matter protests and political activism. If accepted, this logic would exempt virtually all law enforcement information on political monitoring from disclosure, as New York City will always face some level of criminal threat. New York's Freedom of Information Law does not countenance or authorize that kind of blanket exception to open government.

Moreover, the NYPD's argument for the "life and safety" exemption fails to distinguish between information the Brennan Center has repeatedly said it does not seek and information that is not highly sensitive. For example, the NYPD implies that it would have to unredact "names," "contact details," "the birthdate[s] of subjects" and "NYSID numbers"—personally identifiable information that the Brennan Center is not seeking—along with the "links and screenshots of webpages, chats, forums, messages, [and] posts" that are made publicly to express political speech,

which the Brennan Center actually seeks. *See* Opp. 11; *cf*. Br. 12 ("In contrast to personally identifiable information like names and addresses—of which the Brennan Center does not seek to compel disclosure—the NYPD should not be permitted to … redact in their entirety the social media posts the NYPD has aggregated, public news articles, or other information that provides important context for the NYPD's use and tracking of social media.").

The application of the life and safety exemption the NYPD asserts is far broader than the cases it cites—many of which draw exactly the line that the Brennan Center does. For example, in *Bellamy v. New York City Police Dept*., 87 A.D.3d at 875, the petitioner sought unredacted witness statements, specifically seeking the "the names" of witnesses who did not testify at his trial. *Id.* The Court's concern was focused on the petitioner "learning the names" of the witnesses. *Id.* Again, the Brennan Center does not seek this information. In *Exoneration Initiative v. New York City Police Dep't*, 114 A.D.3d at 438-39, the Court refused to "disclos[e] the [witness's] name, address, and telephone number"—but the de-identified statement was already disclosed. In *Dobranski v. Houper*, 154 A.D.2d 736, 738 (3rd Dep't 1989), the Court *allowed* the disclosure of the names of specific inmates because (as here) that information was already publicly available, but withheld other information such as their "identification numbers, dietary requirements, and the name and address of their next of kin." Nor are collections of public posts at all analogous to the New York National Guard's mobilization plans for deployment and security for military training exercises. *See Matter of Connolly v. New York Guard*, 175 A.D.2d 372 (3d Dep't 1991). The NYPD's cases do not support the NYPD's assertion that public posts can be wholly withheld—they support the Brennan Center's position that the records should be produced with redactions to specific identifying information.

B. Investigative Techniques, § 87(2)(e)(iv)

The exemption in § 87(2)(e)(iv) protects non-routine investigative methods whose disclosure would compromise future investigations. Monitoring publicly available social media is not a protected technique—it has become routine police work for which the NYPD's policy states that "no prior authorization is ever required." *See* NYSCEF 52 (2022 NYPD Policy, *Use of Social Media Networks for Investigative Purposes*). Reading posts that the public makes publicly online is simply not analogous to "furnish[ing] the safecracker with the combination to the safe," or disclosing the details of "laboratory examinations." NYPD Opp. 13. It is much closer to another case the NYPD cites, *Matter of Spencer*, which held that "surveillance of places [a person is] known to frequent do[es] not describe nonroutine procedures." *Matter of Spencer v. New York State Police*, 187 A.D.2d 919 (3d Dep't 1992). Moreover, the public is well aware that the NYPD monitors social media—the concern about how it does so is exactly what prompted the Brennan Center to make the FOIL requests here in January 2020.

The NYPD says it is concerned that "[s]ocial media posts that display the types of information that counterintelligence operations deem to be concerning should not be publicly disclosed." Opp. 14. But that concern does not transform the information into a protected "nonroutine" method. As the Court said in *Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 (1979), a "nonroutine" procedure is primarily defined by "whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation." Here, the "conduct" in question is not surviving an audit, as in *Fink*. It is presumptively First Amendment-protected speech: citizens publicly posting messages about protests and other matters of broad concern. The public has a strong interest in knowing exactly what its police force believes is "concerning" political speech, and has a right to know about the police's routine practice of collecting those statements.

C. Confidential Sources, § 87(2)(e)(iii)

The exemption in § 87(2)(e)(iii) protects the identity of individuals who provide information to law enforcement with an expectation of confidentiality. *See Hawkins v. Kurlander*, 98 A.D.2d 14, 17 (4th Dep't 1983) (witness identity protected where they agreed to co-operate with the investigation in exchange for confidentiality), cited Opp. 15. To the extent the NYPD's production includes the names of specific individuals who confidentially alert the police to concerning public statements, the NYPD has clearly marked those with redactions under § 87(2)(e), and the Brennan Center repeats that it does not seek that information. Beyond that, the NYPD does not—and cannot—explain how informant, undercover officer, and cooperating witnesses' identities could plausibly be ascertained merely from revealing the content of *public* posts the NYPD collected.

D. Deliberative Process, § 87(2)(g)

The exemption in § 87(2)(g) protects pre-decisional internal discussions among government officials formulating policy—not the information agencies collect. The primary case the NYPD cites is instructive: in *Gould v. New York City Police Dep't*, 89 N.Y.2d at 276, the NYPD sought to withhold "document[s] on which a police officer 'report[s] additional information concerning a previously recorded complaint'"—that is, like here, a report of facts and observations an officer makes in performing their duties—because the report was "non-final." The Court of Appeals rejected that analysis, and held that such written reports are "factual tabulations or data" to which the deliberative process exemption does not apply. The NYPD cannot withhold tabulations of screenshots, posts, and other facts officers documented under this exemption. The content of social media posts gathered by the NYPD are not "opinions, ideas or advice exchanged as part of the consultative or deliberative process." *Id.* at 277. They are factual information collected from public sources. Even internal NYPD analyses of these posts would need to reflect

actual "deliberations," not mere reporting of observations. The documents here show compiled public information, not protected policy deliberations.

IV. THE NYPD'S BLANKET "NON-RESPONSIVE" REDACTIONS VIOLATE FOIL'S MANDATE TO DISCLOSE ALL RESPONSIVE PORTIONS

The NYPD's redactions to information that it deems "non-responsive" within documents it has already identified as responsive to the FOIL request violate basic principles of open government. FOIL requires agencies to disclose all non-exempt portions of responsive records. *Castorina v. De Blasio*, 55 N.Y.S.3d 599, 611 (Sup. Ct. Richmond Cnty. 2017); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986) ("FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise *specifically* exempted.") (emphasis added).

The examples in the record are striking. The NYPD produced a "Timeline of Citywide Protest Arrests" stemming from George Floyd protests—clearly responsive to a request about social media monitoring of protests—but redacted the timeline itself as "non-responsive." NYSCEF 60 (NYPD_FOIL00000080) at -087-088. It produced documents with sections titled "Notable Social Media Postings Encouraging Violence and Criminal Activity" but redacted portions of those very sections as "non-responsive." NYSCEF 59 (NYPD_FOIL00000344) at -344, -349. The NYPD's opposition provides no answer to these examples.

This practice is not permissible. Once the NYPD determined these documents were responsive to the Brennan Center's request, it cannot cherry-pick which portions to disclose based on its own view of relevance. The only basis for redaction within a responsive document is a specific statutory exemption, properly invoked and supported.

Nor can the NYPD, only now in litigation, claim that all of its "non-responsive" redactions are also covered by previously un-asserted exemptions. For the same reasons given above in

Part II, the NYPD has waived those exemptions by not asserting them when it produced the documents.

V. IN THE ALTERNATIVE, *IN CAMERA* REVIEW IS WARRANTED GIVEN THE NYPD'S OVERREACHING REDACTIONS

The Court should require the NYPD to reproduce its documents, removing the impermissible "privacy" and "non-responsiveness" redactions, because they are not grounded in law. However, "[i]f the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material." *Gould*, 89 N.Y.2d at 275. The NYPD's conclusory, speculative, and often contradictory justifications are not sufficient to avoid *in camera* review. It claims privacy interests in public posts, safety concerns without specific threats, and intelligence sensitivities regarding information its own policies treat as public. And the NYPD's response to the Brennan Center's motion only underlines why, in the alternative, *in camera* review is appropriate. The Brennan Center challenged the use of privacy and non-responsiveness redactions, and the NYPD in turn asserted that all those redactions are also protected by a mosaic of other exemptions that it did not previously assert. Neither the Brennan Center nor the Court can now know which exemption is meant to apply to which redaction.

Courts conduct review in cases precisely like this, where the agency's exemption claims appear overbroad and the public interest in disclosure is substantial. See *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985). Review of even a sample of documents would reveal whether the NYPD has properly applied FOIL's exemptions or has engaged in excessive redaction to avoid public accountability.

CONCLUSION

The NYPD asks this Court to bless a regime where it can freely monitor citizens' public expression while keeping that monitoring secret from the public. This turns the First Amendment and FOIL on their heads. Public speech does not become private because the government collects it. Political expression does not become a state secret because the police find it concerning.

The Court should order the NYPD to reproduce the documents with only those redactions specifically authorized by law: personal identifiers where genuine privacy interests exist, and information actually exempt under FOIL's narrow statutory exceptions. In the alternative, the Court should conduct *in camera* review to assess the NYPD's claims.

The public has a right to know how its police department monitors political speech. The NYPD's opposition only underscores the importance of vindicating that right.

Dated: June 20, 2025
New York, New York

/s/ Rex Lee

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CERTIFICATE OF COMPLIANCE

This memorandum complies with 22 NYCRR Section 202.8-b and was prepared using Times New Roman, 12-point font, and double line spacing. This memorandum contains 4,091 words (based on the Microsoft Word word-count function), excluding the parts of the memorandum exempted by 22 NYCRR Section 202.8-b.

Dated: June 20, 2025
New York, New York

/s/ Rex Lee
Rex Lee