

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.

Index No. 160541/2016

IAS Part 12

(Jaffe, J.)

Mot. Seq. No. 002

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LIMITED
REARGUMENT**

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Dated: February 5, 2018
New York, New York

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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 Motion for Limited Reargument pursuant to Section 2221 of the New York Civil Practice Law and Rules (“CPLR”) regarding the Decision and Order on its Article 78 Petition, Motion Sequence 001, Notice of Entry of which was filed on January 5, 2018.

PRELIMINARY STATEMENT

The Brennan Center brought this Petition because the NYPD refused to produce a single piece of information in response to the Brennan Center’s FOIL request. In a thorough and well-reasoned Decision and Order dated December 22, 2017, the Court granted the Brennan Center’s Petition in part and denied it in part, directing the NYPD to conduct certain additional searches and produce certain material to the Brennan Center, and to produce certain additional material to the Court for in camera review.

This motion for reargument relates to one narrow category of documents that does not appear to fall squarely within any of the holdings in the Court’s Decision and Order. In particular, Request Number 7 of the Brennan Center’s FOIL Petition concerned information reflecting the NYPD’s *utilization* of its predictive policing technology. With respect to that category, the NYPD did not appear to conduct *any* search, nor was any particularized objection to producing such documents lodged. The Brennan Center identified this deficiency in its reply papers (the first time that it became aware of, and thus had an opportunity to challenge, the parameters of the NYPD’s search, which was only conducted after the Brennan Center filed its Article 78 Petition). Although the Court acknowledged the NYPD’s failure to conduct an appropriate search in other areas, for example, ordering that the NYPD conduct a search of its Counterterrorism Unit, the Court’s Order does not appear to address the NYPD’s failure to conduct any search regarding the utilization of its predictive technology. Accordingly, the

Brennan Center respectfully requests that the Court permit very limited reargument on the papers as to this category of documents, and that it direct the NYPD to search for and produce those documents, consistent with the direction that the NYPD search its Counterterrorism Unit.

ARGUMENT

I. THE BRENNAN CENTER'S ORIGINAL PETITION SOUGHT INTERVENTION AS TO THE NYPD'S FAILURE TO SEARCH FOR RECORDS REGARDING UTILIZATION

Request Number 7 of the Brennan Center's FOIL Petition sought "Records reflecting the utilization, testing, or evaluation of ... predictive policing products or services, including records regarding the number of investigations in which predictive policing products or services have been used and the number of those investigations that have resulted in prosecutions or crime prevention." FOIL Request, Dkt. No. 2, at 3. In response to this Request, the NYPD's papers confirmed that its search was inadequate and 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., Dkt. No. 24, 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, the NYPD did not certify that it had conducted any search in response to the "utilization" component of Request Number 7. The Brennan Center pointed out this deficiency in its Reply Memorandum of Law in Support of Its Verified Petition (Dkt. No. 28, at 5).

Records regarding the utilization of predictive policing technology—including not only policies governing that utilization, but specific data regarding the frequency with which such technology is used, the types of crimes for which it has been used, and the rate at which suspects

apprehended as a result of predictive policing technology have been prosecuted—are a critically important element of the Brennan Center’s FOIL request. Moreover, because the NYPD has failed to certify that it conducted a reasonable search (or any search) for records reflecting the *utilization* of predictive policing products and services, this category of documents does not appear to fall within the Court’s Decision and Order regarding documents that had already been subject to a “Diligent Search.” *See* Order at 14. These records also do not appear to be subject to any other directive of the Court within the Decision and Order. Accordingly, the Brennan Center makes this motion for limited reargument to seek clarification of the Court’s Order and to respectfully request that the Court direct the NYPD to conduct a search for these “utilization” records and submit an affidavit as to the search’s results, comparable to the Court’s directive regarding the NYPD’s search of its Counterterrorism Bureau.

II. REARGUMENT IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT WHERE, AS HERE, FACTUAL ARGUMENTS WERE RAISED IN THE PRIOR MOTION BUT MAY HAVE BEEN OVERLOOKED

“A motion for leave to reargue is addressed to the sound discretion of the court and is properly granted upon a showing that the facts and/or law were overlooked or misapprehended by the court in determining the prior motion.” *Cascade Builders Corp. v. Rugar*, 154 A.D.3d 1152, 63 N.Y.S.3d 543, 546 (N.Y. App. Div. 3d Dep’t 2017) (internal citations omitted). “[A] motion for leave to reargue ‘shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.’” *Greenpoint Mortg. v. Spoleti*, 55 Misc. 3d 1202(A), 55 N.Y.S.3d 692, 2017 WL 1143734, at *1 (N.Y. Sup. Ct. 2017) (quoting CPLR 2221(d)(2)).

As shown above, Request Number 7 of the Brennan Center’s FOIL request sought, among other things, documents reflecting the NYPD’s utilization of its predictive policing technology. When the NYPD responded to that FOIL request through its Answer to the Brennan

Center's Petition, it gave no indication that it had considered or searched for such documents as part of its response. The Brennan Center then moved for production, singling out this deficiency in its Reply Memorandum of Law. Dkt. No. 28, at 5. In issuing its well-reasoned and thorough Decision and Order, it appears that the Court did not address this one aspect of the Brennan Center's request. For this limited reason, the Brennan Center requests that the Court exercise its discretion to permit reargument, on the papers, with respect to this narrow category of documents. In the alternative, the Brennan Center respectfully requests that the Court clarify the disposition of the Brennan Center's Petition as it applies to this category.

CONCLUSION

The Court should grant limited reargument on the papers as to the Decision and Order on Motion Sequence No. 001, and order the NYPD to comply with the Brennan Center's Request Number 7 insofar as it requests that the NYPD search for and provide documents regarding the utilization of predictive policing technology.

Dated: February 5, 2018
New York, New York

Respectfully Submitted,

By: /s/ Ellison Ward Merkel

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