BRENNAN
CENTER
FOR JUSTICE

November 13, 2019

Via Email

Attn: Freedom of Information Law Request

Sgt. Jordan Mazur
Records Access Appeals Officer
Legal Bureau – Civil Section
One Police Plaza, Room 1406
New York, NY 10038
FOILappeals@nypd.org

FOIL Req #: FOIL-2018-056-04655

Re: Appeal of Denial of FOIL Request No. FOIL-2018-056-04655

Dear Sergeant Mazur:

This is an appeal from the New York City Police Department's ("NYPD's") denial of the Freedom of Information Law ("FOIL") request filed by the Brennan Center for Justice at NYU School of Law ("Brennan Center").

On July 5, 2018, the Brennan Center sent a FOIL request (the "Request")[1] to the FOIL Unit of the NYPD seeking information regarding the input data used to generate predictions through the NYPD's predictive policing algorithms. The Request followed on an earlier FOIL request (the "Original Request") submitted by the Brennan Center to the NYPD in June 2016 for records about the development and testing of predictive policing technologies.[2] In the course of good-faith negotiations and litigation over the Original Request, the Brennan Center withdrew one aspect of the Original Request – a request for the code underlying predictive algorithms in use by the NYPD – and narrowed the request in part for input data from a specific period of time, in hopes that this compromise would balance our interest in transparency with the security concerns asserted by the NYPD. Exploiting this attempted compromise, counsel for the NYPD argued in the resulting Article 78 proceeding that the Original Request had not sought historical input data. Counsel for the NYPD further argued that the Brennan Center was "welcome to file a new FOIL

[1] The relevant FOIL request was given File # FOIL-2018-056-04655 by the FOIL Unit (copy attached as Appendix A).

[2] The Original Request was given File # 2016-PL-6946 by the FOIL Unit (copy attached as Appendix B).

request" if we wanted access to the underlying data.[3] Although the Original Request clearly encompassed a request for historical input data,[4] the court ordered the Brennan Center to file a new request for this information.[5] Accordingly, the Brennan Center filed the instant Request on July 5, 2018.

The NYPD has constructively denied this Request. Initially, by letter dated July 12, 2018, the NYPD assigned Detective Halk to review the Request, stating that the review would be completed within 90 business days. We left voice messages for Detective Halk on July 31 and August 2 to discuss the Request, and he returned our calls on August 7, indicating that the Request was still being processed and confirming that the review would be completed in approximately 90 days. On March 21, 2019, after hearing nothing further for several months, we contacted Detective Halk again. On March 28, 2019, Detective Halk informed us that the review would be completed within two weeks. By the end of May 2019, we still had not received a substantive response to the Request, and informed Detective Halk by voice message that we considered the Request to be constructively denied at that point. Detective Halk provided no response.

For the following reasons, we appeal the adequacy of the NYPD's response to the Request. The NYPD has provided no information, explanation, or justification for the lack of a response to the Request. This is plainly insufficient under FOIL, which requires an agency to articulate a particularized and specific justification in denying a request for records.

New York courts have consistently held that FOIL disclosure obligations are to be read broadly. As the New York Court of Appeals stated in *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, "all records of an agency are presumptively available for public inspection" and the "statutory exemptions are narrowly interpreted...."[6] Furthermore, "[w]here an exemption is claimed, the *burden lies with the agency to articulate particularized and specific justification, and to establish that the material requested falls squarely within the ambit of [the] statutory exemptions*."[7] Other cases echo the Court of Appeals in *Farbman. Johnson v. New York City Police Dept.*, for instance, states that "exemptions from disclosure are to be narrowly construed, with the burden resting on the agency to justify the applicability of the exemption upon which it relies."[8]

The NYPD has failed to meet this burden, since it provided no justification for failing to respond to the Request. In the absence of a particularized justification, it is impossible to discern

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[3] *Id.*

[4] *See supra* n. 2 at 3 (Request Nos. 5, 6).

[5] *See* Decision and Judgment, Dec. 27, 2017, at 13 (copy attached as Appendix D).

[6] *Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 79-80 (1984).

[7] *Id.* at 83 (emphasis added, internal citations and quotation marks omitted).

[8] *Johnson v. New York City Police Dep't.*, 257 A.D.2d 343, 346 (N.Y. Sup. Ct. App. Div. 1st Dept. 1999); see also *Matter of Hanig v. State of New York Dep't. of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992).

the NYPD's reason for constructively denying the records requested.[9] We therefore appeal the sufficiency of the NYPD's response. Under New York law, the NYPD has 10 business days to decide this appeal, *see* N.Y. Pub. Off. Law § 89(4)(a), and we look forward to an early and favorable response.

We request that you provide us with documents as they become available rather than waiting to provide a complete set of documents. We also request that you provide us with the documents in electronic format where possible.

Should you have questions, please contact me by telephone at 202-249-7193, via e-mail at levinsonr@brennan.law.nyu.edu, or at the above address.

Very truly yours,

Rachel Levinson-Waldman
Senior Counsel
Liberty and National Security Program

[9] *See supra* text accompanying notes 7-8.