

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-

Index No. \_\_\_\_\_

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

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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Dated: December 15, 2016  
New York, NY

## PRELIMINARY STATEMENT

Petitioner, Brennan Center for Justice at New York University School of Law (the “Brennan Center”), respectfully submits this memorandum of law in support of its seeking review under Article 78 of the denial by respondent, New York City Police Department (“NYPD”), of the Brennan Center’s request under the Freedom of Information Law (“FOIL”) (Pub. Off. Law § 84 *et seq.*) for public records relating to the NYPD’s use of predictive policing technology.

Since at least 2015, the NYPD has made clear that it has entered “into the predictive policing phase in the evolution of policing” and would be contracting with several vendors in order to develop advanced algorithmic techniques for predicting where crimes are likely to occur, based on historical crime data and other information.<sup>1</sup> While the NYPD has touted the extraordinary potential of predictive policing techniques, those techniques raise serious public concerns, including the possibility that faulty or inherently biased data inputs result in policing strategies that perpetuate historical biases. In light of this danger, the public has a strong interest in understanding how the NYPD’s predictive policing technologies are employed, and on what data they are based.

Seeking to advance that interest, the Brennan Center filed a request with the NYPD under FOIL on June 14, 2016. The request delineated nine separate categories of public records relating to predictive policing technology, including (but not limited to) policies governing use of that technology, data inputs employed, information about how the technology works, communications

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<sup>1</sup> “Mayor de Blasio, Police Commissioner Bratton Announce CompStat 2.0,” February 23, 2016, *available at* <http://www1.nyc.gov/office-of-the-mayor/news/199-16/transcript-mayor-de-blasio-police-commissioner-bratton-compstat-2-0#/0> (last accessed December 14, 2016); Al Baker, “Bratton Says He Won’t Lead Police Through a Second de Blasio Term,” N.Y. Times, July 23, 2015, *available at* <http://www.nytimes.com/2015/07/24/nyregion/bratton-says-he-wont-lead-police-through-a-second-de-blasio-term.html> (last accessed December 14, 2016); Laura Nahmias and Miranda Neubauer, “NYPD testing crime-forecast software,” Politico New York, July 8, 2015, *available at* <http://www.politico.com/states/new-york/city-hall/story/2015/07/nypd-testing-crime-forecast-software-090820> (last accessed December 14, 2016).

about the technology, the costs of the technology, and agreements governing use of the technology. All nine categories of the request were immediately and summarily denied by the NYPD. The NYPD cited a single statutory exemption under FOIL as the basis for its decision, and made no effort to explain with any particularity why or how that exemption applied to each of the Brennan Center's nine requested categories. When the Brennan Center appealed, the NYPD denied the appeal, citing four additional statutory exemptions (and noting "[o]ther exemptions under FOIL also may apply"), but providing no coherent statement as to why those exemptions were applicable to *any* of the records the Brennan Center had requested, let alone *all* of them.

The NYPD's denials of the Brennan Center's FOIL request fail to meet the bare minimum legal requirements for an adequate response under FOIL. Indeed, the denials are a quintessential example of the type of response "merely parrot[ing]" the statutory rule that have been repeatedly deemed insufficient by courts in New York. *W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 893 N.Y.S.2d 825, 827 (2009). For this reason alone, the denial of the Brennan Center's request reflects a clear error of law.

Moreover, even accepting the NYPD's denial at face value, none of the stated exemptions applies to the nine categories of records that were sought:

- *First*, the information sought would not reveal non-routine criminal investigative techniques that would give criminals an advantage. Rather, the materials sought are more akin to information about routine police procedures, like fingerprinting tests. Moreover, it is difficult to discern how a criminal could meaningfully tailor his or her conduct to avoid detection by a predictive policing algorithm that analyzes dynamic historical crime data.

- *Second*, it is unlikely that the requests implicate any protectable trade secret or commercially sensitive information; more pertinent, the FOIL exemption for commercially sensitive information is designed to protect enterprises that have submitted sensitive information to state regulators, not enterprises that have contracted with and accepted substantial payments from government agencies in exchange for their services.
- *Third*, the vast majority of information sought does not reflect any internal deliberations on the part of the NYPD, but rather seeks factual information, final policy documents, and external audit documents, all of which are expressly excepted from FOIL's inter- and intra-agency exemption. Any documents reflecting actual internal deliberations could be redacted or excluded from production.
- *Fourth*, the information requested does not create any threat to the safety of the NYPD's information technology, and any information that could actually facilitate an attack on the NYPD's data could be redacted or excluded from production.
- *Fifth and finally*, there is no indication that any of the information sought could possibly reveal the identity of confidential sources or undercover officers; once again, to the extent there was a responsive document that implicated this information, it could be redacted or excluded from production.

In effect, the NYPD seeks to rely upon the bare fact that the records sought relate to law enforcement technology to shield a wide variety of materials whose release poses no real threat to the NYPD's law enforcement efforts, and in which there is significant public interest. The NYPD's position is tantamount to making any inquiry relating to law enforcement policy decisions

exempt from FOIL and, therefore, exempt from citizens' rights to public records. That is not the law. Accordingly, the Brennan Center respectfully requests this Court grant its Verified Petition.

### **STATEMENT OF FACTS**

The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice and advocates for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms. The Brennan Center is concerned with the dangers that national security policy and law enforcement and domestic counterterrorism policies pose to constitutional liberties. Through scholarship, legislative efforts, and legal advocacy, the Brennan Center's Liberty and National Security Program seeks to keep the public informed of these issues and hold law enforcement agencies accountable to the rule of law. Access to public information—specifically records generated and maintained by law enforcement agencies—is an essential element that enables the Brennan Center to advance its mission.

On June 14, 2016, the Brennan Center sent a FOIL request (the "BCJ Request") to the NYPD's FOIL Unit via certified mail, seeking information about the NYPD's use of predictive policing technology. "Predictive policing" is a term that describes the use of statistics or algorithms to make inferences about the risk of future crime in a particular geographic area or jurisdiction, or involving a particular person. The NYPD has widely advertised its intent to develop and increasingly rely upon predictive policing; in one publication, it notes that "[c]urrent analytic capabilities, for the most part narrowly focused on statistics, are insufficient to support the NYPD's full vision of preventive policing. The NYPD is seeking to develop capabilities,

including predictive policing, pattern analysis, and correlation engines.”<sup>2</sup> The same publication states:

Predictive policing will allow the NYPD to make better data-driven decisions about deployments. The Department has been experimenting with custom-built algorithms that have been shown to be better predictors of crime incidents than traditional hotspot analysis. Drawing on historical data about past crime, including time, date, seasonal patterns, location, and crime type, the algorithms provide precinct and other commanders with an informed guide to emerging crime patterns and the deployment of resources within their respective areas of command. The use of algorithms saves time for human crime analysts who can focus more intently on other types of crime analysis.<sup>3</sup>

The five-year cost of implementing these capabilities, including predictive policing, is estimated at \$45 million.<sup>4</sup> Former NYPD Commissioner William Bratton reported in February 2016 that the NYPD was “into the predictive policing phase in the evolution of policing, and in this department we’re currently experimenting with about three or four different predictive technologies ... [that is,] algorithms that would help us on potentially predicting where a crime may occur at what period of time.”<sup>5</sup>

In furtherance of these goals, the City of New York has purchased a software tool known as “Palantir Gotham,” which is a flexible platform that allows data from multiple sources to be integrated and analyzed, and can be used for predictive policing.<sup>6</sup> Purchase orders show that the

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<sup>2</sup> “Developing the NYPD’s Information Technology,” pp. 6-7 *available at* <http://home.nyc.gov/html/nypd/html/home/POA/pdf/Technology.pdf> (last accessed December 14, 2016).

<sup>3</sup> *Id.* at p. 7.

<sup>4</sup> *Id.*

<sup>5</sup> “Mayor de Blasio, Police Commissioner Bratton Announce CompStat 2.0,” February 23, 2016, *available at* <http://www1.nyc.gov/office-of-the-mayor/news/199-16/transcript-mayor-de-blasio-police-commissioner-bratton-compstat-2-0#0> (last accessed December 14, 2016).

<sup>6</sup> Palantir Gotham, <https://www.palantir.com/palantir-gotham/> (last accessed December 14, 2016).

City of New York paid Palantir Technologies \$2,514,319 between 2012 and 2014 for “Palantir Gotham” and other unspecified software licenses.<sup>7</sup> The Palantir Law Enforcement program, an implementation of the general Palantir Gotham platform designed for law enforcement agencies, allows police to pull in data from a wide range of sources to manage cases and investigate targets. It also has a “predictive policing” portion that suggests areas where crimes are likely to occur and can help guide the deployment of police resources.<sup>8</sup>

Experts in predictive policing—including those directly involved in developing the technology—have noted that application of the data must be “sensitive to civil rights and surveillance and privacy concerns,” particularly given the current context of policing and racial profiling across the country.<sup>9</sup> Others have acknowledged the profound effects predictive policing may have on basic constitutional freedoms and emphasized the need for outside audit and review of predictive policing technologies to ensure reliability, accuracy and transparency.<sup>10</sup> Observers have further noted that the validity of the programs depends in large part on the data inputs—if the crime data relied upon by policing technologies reflect historical inequities, so too will the results. Indeed, “[t]o evaluate the fairness and efficacy of predictive crime algorithms, they would need to

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<sup>7</sup> Purchase order data comes from SmartProcure, a database of government agency purchase orders. *See* Verified Article 78 Petition, at ¶ 12.

<sup>8</sup> Law Enforcement, Palantir, <https://www.palantir.com/solutions/law-enforcement/> (last accessed December 14, 2016).

<sup>9</sup> Laura Nahmias and Miranda Neubauer, “NYPD testing crime-forecast software,” Politico New York, July 8, 2015.

<sup>10</sup> Andrew Guthrie Ferguson, “Predictive Policing and Reasonable Suspicion,” 62 *Emory L.J.* 259, 316 (2012) *available at* [http://law.emory.edu/elj/\\_documents/volumes/62/2/articles/ferguson.pdf](http://law.emory.edu/elj/_documents/volumes/62/2/articles/ferguson.pdf).

be audited by outside parties.”<sup>11</sup> Thus, “[m]ost important, the use of predictive policing technologies must be transparent—and carefully overseen by vigilant citizens themselves.”<sup>12</sup>

Accordingly, in light of the NYPD’s substantial financial commitment to predictive policing, and stated intent to rely heavily on these technologies, and the public’s significant interest in the transparency of these predictive policing systems, the Brennan Center submitted the BCJ Request, seeking nine categories of public records regarding the NYPD’s predictive policing technology (including, but not limited to, technology supplied by Palantir Technologies): (1) purchase records and agreements; (2) vendor communications; (3) policies governing use; (4) federal communications; (5) information inputs; (6) how it works; (7) past uses; (8) audits; and (9) nondisclosure agreements.

On June 29, 2016, the NYPD denied the BCJ Request in its entirety (the “Denial”), citing the exception to FOIL in Public Officers Law Section 87(2)(e)(iv), and stating summarily that “such information, if disclosed, would reveal non-routine techniques and procedures.”<sup>13</sup> This blanket assertion drew no distinctions between any of the nine categories of documents sought by the BCJ Request.

The Brennan Center appealed from the denial on July 29, 2016 (the “BCJ Appeal”), explaining that the NYPD was required to do more than simply recite the statutory exemption that applied, without making any specific demonstration of its applicability, and arguing that the cited

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<sup>11</sup> Jack Smith IV, “Crime-prediction tool PredPol amplifies racially biased policing, study shows,” Mic.com, Oct. 9, 2016, *available at* <https://mic.com/articles/156286/crime-prediction-tool-pred-pol-only-amplifies-racially-biased-policing-study-shows>.

<sup>12</sup> David Black, “Here comes predictive policing: The next wave of crimefighting technology is being tested in New York City,” New York Daily News, Jan. 24, 2016, *available at* <http://www.nydailynews.com/opinion/david-black-predictive-policing-article-1.2506580> (last accessed December 14, 2016).

<sup>13</sup> Verified Article 78 Petition, at ¶ 11.



exception was in any event inapplicable. The Brennan Center also noted that to the extent the responsive records did contain some information that fell within the cited FOIL exemption, those records were still required to be produced with the exempt information redacted. On August 15, 2016, the NYPD once again summarily denied the BCJ Appeal (the “Appeal Denial”), stating that the requested records were exempt from disclosure under five separate exemptions, Public Officers Law 87(2)(d), 87(2)(e)(iii), 87(2)(e)(iv), 87(2)(g), and 87(2)(i). Once again, the NYPD made no attempt at a particularized showing as to how each of the listed exemptions applied to the variety of documents called for by each of the nine separate categories called for by the BCJ Request.

## **ARGUMENT**

### **I. THE NYPD’S DENIAL OF THE BRENNAN CENTER’S REQUEST MERITS ARTICLE 78 REVIEW.**

Under FOIL, “a person denied access to a record in an appeal determination under the provisions” governing appeals “may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.” Pub. Off. Law § 89(4)(b). An action under Article 78 of the New York Civil Practice Law and Rules is proper when “a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” CPLR 7803(3). Such a “proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” CPLR 217(1).

The appropriate standard of review in an Article 78 proceeding with respect to the denial of a FOIL request is “whether the determination ‘was affected by an error of law.’” *Thomas v. Condon*, 128 A.D.3d 528, 529 (N.Y. App. Div. 1st Dep’t 2015) (citing CPLR 7803(3)). Under this standard of review, the NYPD is limited to defending its denial on the “exemption[s] to FOIL ... cited by respondent[] at the administrative level.” *Law Offices of Adam D. Perlmutter, P.C. v.*

*N.Y. City Police Dep't*, 123 A.D.3d 500, 501 (N.Y. App. Div. 1st Dep't 2014). The typical “arbitrary and capricious” standard for Article 78 actions does not apply; “[a] party claiming exemption from disclosure of a particular document requested pursuant to FOIL bears the burden of proving entitlement to the exemption.” *Bahnken v. N.Y. City Fire Dep't*, 17 A.D.3d 228, 229 (N.Y. App. Div. 1st Dep't 2005); *see also Laureano v. Grimes*, 179 A.D.2d 602, 603-04 (N.Y. 1992) (“[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency’s determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable. Rather, the person resisting disclosure must prove entitlement to one of the exceptions.”) (citation omitted).

The Brennan Center properly challenges the NYPD’s determination denying the BCJ Appeal as affected by error of law. The Brennan Center has complied with FOIL and Article 78’s requirements and has brought this proceeding within four months after the NYPD’s determination denying the BCJ Appeal, making this action timely.

## **II. THE NYPD’S DENIAL OF THE BRENNAN CENTER’S REQUEST VIOLATES FOIL.**

The New York Court of Appeals has repeatedly held that FOIL “expresses this State’s strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 505 N.Y.S.2d 576, 578 (1986); *see also Gould v. N.Y. City Police Dep't*, 653 N.Y.S.2d 54, 57 (1996) (“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public.”); *Farbman & Sons, Inc. v. N.Y. City Health & Hosps. Corp.*, 476 N.Y.S.2d 69, 70-71 (1984) (“FOIL implements the legislative declaration that ‘government is the public’s business’, and imposes a broad standard of open

disclosure upon agencies of the government.”) (internal 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 v. Lefkowitz*, 419 N.Y.S.2d 467, 470 (1979). To promote these principles, the Court of Appeals has made clear that “[a]ll government records are thus presumptively open for public inspection and copying.” *Gould*, 653 N.Y.S.2d at 57 (emphasis added).

Police records are no exception. See *N.Y. Civil Liberties Union v. N.Y. City Police Dep’t*, Index No. 115928/09, 2011 WL 675562, slip op. at 11 (N.Y. Sup. Ct. Feb. 14, 2011) (“All government documents, including police records, are presumptively available for public inspection and copying ...”). Indeed, it is well-established that “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” *Gould*, 653 N.Y.S.2d at 57. Accordingly, under *Gould* and other Court of Appeals precedents, Petitioner Brennan Center has a clear right under FOIL to the NYPD records sought in the BCJ Request.

Because the Brennan Center is presumptively entitled to review the requested records, the NYPD has the burden to prove that a requested record “falls squarely within the ambit of one of [FOIL’s] statutory exemptions” and is therefore not available for inspection. *Id.* This is not an easy burden to satisfy. The Court of Appeals has held that “[t]o ensure [FOIL’s policy of] maximum access to government documents, the exemptions are to be construed narrowly.” *Id.*

**A. The NYPD Failed to Provide Particularized and Specific Justification for its Withholding of the Requested Records.**

In both its Denial and Appeal Denial, the NYPD provided no substantive explanation of how or why the requested documents were covered by the cited exemptions. Rather, the NYPD simply listed each exemption and repeated the statutory language. New York courts have consistently held that merely repeating the statutory language of an exemption – that is, simply

reciting “sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld” – is insufficient to sustain a denial of request for documents under FOIL. *Church of Scientology v. State*, 46 N.Y.2d 906, 908 (1979); *see also Allen Grp. Inc. v. N.Y. State Dep’t of Motor Vehicles*, 147 A.D.2d 856, 857 (N.Y. App. Div. 3d Dept. 1989); *Urban Justice Ctr. v. N.Y. Police Dep’t*, 2010 WL 3526045, slip op. at 10 (Sept. 1, 2010) (“merely repeating the statutory phrasing of an exemption [is] insufficient to establish the requirement of particularity.”). The NYPD must establish how a requested record falls squarely within an exemption “by articulating a particularized and specific justification for denying access.” *Konigsberg v. Coughlin*, 508 N.Y.S.2d 393, 396 (1986) (quoting *Capital Newspapers*, 505 N.Y.S.2d at 578); *see also Farbman & Sons*, 476 N.Y.S.2d at 73 (“Where an exemption is claimed, the burden lies with the agency to articulate [a] particularized and specific justification, and to establish that the material requested falls squarely within the ambit of [the] statutory exemptions.”) (internal quotations and citation omitted); *Johnson v. N.Y. City Police Dep’t*, 257 A.D.2d 343, 346 (N.Y. App. Div. 1st Dep’t 1999) (“[I]t is necessary that the agency set forth a ‘particularized and specific justification for denying access.’”) (quoting *Capital Newspapers*, 505 N.Y.S.2d at 578). In this case, the NYPD denied access to the entirety of the requested records, refusing to redact and produce documents containing both exempt and non-exempt portions. But “not all of a document is necessarily exempt [merely] because a portion of it would be.” *Polansky v. Regan*, 81 A.D.2d 102, 104 (N.Y. App. Div. 3d Dep’t 1981) (citing *Zuckerman v. N.Y. State Bd. of Parole*, 385 N.Y.S.2d 811, 813 (1976)). Having taken this all-or-nothing position, the NYPD must now prove that the entirety—not simply portions—of the requested records falls within an exemption (or exemptions).

In both the Denial and the Appeal Denial, the NYPD simply cited to the relevant provision of the statutory exemptions and quoted or paraphrased that statutory language. The Court of Appeals has made clear that an agency’s response to a FOIL appeal that “merely parrot[s] the [statutory language] in [its] appeal denial letter.... without more, constitute[s] a failure by [the agency] to fully explain in writing... the reasons for further denial.” *W. Harlem Bus. Grp.*, 893 N.Y.S.2d at 827; *see also* Pub. Off. Law § 89(4)(a) (requiring agency to “fully explain in writing to the person requesting the record the reasons for further denial”). By merely parroting the language of the statutory exemptions, the NYPD clearly failed to provide a specific and particularized explanation of why the requested documents are exempt from disclosure under FOIL. This is especially egregious given the nine specific and varied document categories sought by the Brennan Center. To take just one example, category 1, which requests copies of purchase records and agreements the NYPD may have entered into with vendors of predictive policing software or services, was denied on the exact same basis as category 6, which requests records regarding how the software or services that are the subject of those purchases actually work. The NYPD’s assertion of blanket exemptions is further called into question by the fact that the N.Y.C. Department of Citywide Administrative Services and Department of Information Technology and Telecommunications have already provided copies of contracts and purchase orders between the City of New York and Palantir Technologies over the past five years in response to separate FOIL requests<sup>14</sup>—records which would clearly be responsive to category 1 of the BCJ Request. The

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<sup>14</sup> Freedom of Information Law Request: Palantir – DCAS, MuckRock.com (submitted April 14, 2016), *available at* <https://www.muckrock.com/foi/new-york-city-17/palantir-dcas-25162/> (last accessed December 14, 2016); Freedom of Information Law Request: Palantir – DOITT, MuckRock.com (submitted March 15, 2016), *available at* <https://www.muckrock.com/foi/new-york-city-17/palantir-doitt-24450/> (last accessed December 14, 2016).

NYPD's response is facially insufficient, rendering this case a classic example of a "litigation [that] could have been avoided, or significantly limited, had [the agency] in the first instance complied with the dictates of FOIL." *Id.* at 826.

**B. The Exemptions Cited By The NYPD Do Not Apply Here.**

The Denial cited one statutory exemption to FOIL as justification for denying the BCJ Request; Public Officers Law Section 87(2)(e)(iv), which exempts records or portions thereof that "reveal criminal investigative techniques or procedures, except routine techniques or procedures." In addition to 87(2)(e)(iv), the Appeal Denial cited to 87(2)(d) (exempting records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise"), 87(2)(e)(iii) (exempting records or portions thereof that "identify a confidential source or disclose confidential information relating to a criminal investigation"), 87(2)(g) (exempting records or portions thereof that "are inter-agency or intra-agency materials which are not: ... statistical or factual tabulations or data ... [or] instructions to staff that affect the public ... [or] final agency policy or determinations ..."), and 87(2)(i) (exempting records or portions thereof that "if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic

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The Mayor's Office of Contract Services and the N.Y.C. Department of Finance have also provided information related to Palantir purchase orders and contracts in response to FOIL requests. *See* Freedom of Information Law Request: Palantir – Contract Services, MuckRock.com (submitted March 6, 2016), *available at* <https://www.muckrock.com/foi/new-york-city-17/palantir-contract-services-24353/> (last accessed December 14, 2016); Freedom of Information Law Request: Palantir – Department of Finance, MuckRock.com (submitted March 6, 2016), *available at* <https://www.muckrock.com/foi/new-york-city-17/palantir-contract-services-24354/> (last accessed December 14, 2016).

information systems and infrastructures”). For the reasons set forth below, none of these exemptions applies here.

**1. The Exemption For Criminal Investigative Techniques or Procedures Does Not Apply.**

The purpose of Public Officers Law Section 87(2)(e)(iv) is to protect from public disclosure information that would reveal criminal investigative techniques that would give criminals an advantage, or provide “the safecracker with the combination to the safe.” *Fink*, 419 N.Y.S.2d at 471. “Indicative, but not necessarily dispositive, of whether investigative techniques are non[-]routine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.” *Id.* By way of example, fingerprinting and ballistics tests are considered routine and are not exempt from disclosure. *Id.* at 472. Additionally, if the record simply documents complaints or data tabulations, it is not exempt from disclosure. *Beyah v. Goord*, 309 A.D.2d 1049, 1051-52 (N.Y. App. Div. 3d Dep’t 2003).

Here, the predictive policing technologies at issue rely on and analyze “historical data about past crime, including time, date, seasonal patterns, location, and crime type.”<sup>15</sup> The information sought is akin to a data tabulation or a fingerprinting test; it is difficult to imagine how a criminal could manipulate the technique to his or her advantage, rooted as it is in incontrovertible fact. Likewise, documents sought by the BCJ Request, such as policies governing the use of predictive policing technology, purchase and audit records for such technology, or

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<sup>15</sup> “Developing the NYPD’s Information Technology,” pp. 6-7 available at <http://home.nyc.gov/html/nypd/html/home/POA/pdf/Technology.pdf> (last accessed December 14, 2016).

communications regarding non-disclosure agreements, are not easily susceptible to exploitation for criminal purposes, in contrast with, for example, details regarding undercover operations. *Cf.*, *Asian Am. Legal Def. & Educ. Fund v. N.Y. City Police Dep't*, 964 N.Y.S.2d 888, 895 (Sup. Ct. N.Y. Cnty. 2013), *aff'd*, 125 A.D.3d 531 (N.Y. App. Div. 1st Dep't 2015). Accordingly, this exemption is not appropriately applied to the BCJ Request.

## **2. The Exemption For Trade Secrets Does Not Apply.**

Public Officers Law Section 87(2)(e)(iv) exempts from disclosure records that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” At a minimum, application of this exemption should be supported by a showing by the commercial enterprise—here, presumably Palantir Technologies, or any other company from which the NYPD has purchased or leased predictive policing technology—that would purportedly be injured. *See Newsday LLC v. Nassau Cnty. Police Dep't*, 42 Misc. 3d 1215(A), 984 N.Y.S.2d 633, at \*5 (Sup. Ct. Nassau Cnty. 2014) (“There is no statement from the unnamed vendor, let alone persuasive evidence, demonstrating how release of the information would cause an injury to its competitive interests. Accordingly, it must be rejected.”). No such showing has been offered.

Moreover, “the policy behind Public Officers Law § 87(2)(d) is simply to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State’s economic development efforts and attract business to New York.” *Verizon N.Y., Inc. v. N.Y. State Pub. Serv. Comm’n*, 137 A.D.3d 66, 71 (N.Y. App. Div. 3d Dep't 2016). Where, as here, any trade secret or competitive information is in the NYPD’s possession not because it was submitted to a state agency carrying out its regulatory function but as a result of the City of New York’s or the NYPD’s purchasing of that commercial enterprise’s goods and



services, this policy concern does not apply. *Cf. Prof'l Standards Review Council of Am. Inc. v. N.Y. State Dep't of Health*, 193 A.D.2d 937, 939 (N.Y. App. Div. 3d Dep't 1993) (“There is no showing that IPRO, bidding on a public contract, had any reasonable expectation of not having its bid open to the public.”). At a minimum, in order to carry its burden that this exception applies to some of the documents and information sought by the Brennan Center, the NYPD should have provided any nondisclosure agreements with any of its predictive policing vendors, which were expressly called for by the BCJ Request. It did not (and apparently will not) do so, and accordingly cannot now demonstrate that the exemption for trade secrets or competitively sensitive information applies.

### **3. The Exemption For Inter- and Intra-Agency Records Does Not Apply.**

Public Officers Law Section 87(2)(e)(iv) exempts from disclosure records that “are inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; [or] (iv) external audits, including but not limited to audits performed by the comptroller and the federal government . . . .” Whether or not this exemption applies depends on whether or not the materials sought are truly deliberative, “i.e. communications exchanged for discussion purposes not constituting final policy decisions.” *Russo v. Nassau Cnty. Cmty. Coll.*, 603 N.Y.S.2d 294, 298 (1993). The exemption is in place to allow “[p]eople within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” *The N.Y. Times Co. v. City of N.Y. Fire Dep't*, 796 N.Y.S.2d 302, 308 (2005).

As an initial matter, most if not all of the records sought by the BCJ Request fit squarely within one of the enumerated exceptions to this exemption. For example, the BCJ Request calls expressly for audits of predictive policing products or services; policies governing use; and information inputs, all of which are facially excepted from exemption. Moreover, the exception

for “statistical or factual tabulations or data” has been interpreted very broadly to mean “objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” *Gould*, 653 N.Y.S.2d at 58. To the extent the NYPD’s deliberative process is truly captured by any of the Brennan Center’s requests, such material can readily be redacted or excluded from production. But, under no interpretation of this exemption should all, or even a substantial portion, of the BCJ Request be denied.

#### **4. The Exemption For Information Management and Security Technology Does Not Apply.**

Public Officers Law Section 87(2)(i) provides that agencies “may deny access to records or portions thereof that ... if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.” The exemption is designed to avoid threats to technology systems and infrastructure from attack, such as “damage to the [information technology] assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency’s electronic data.” *TJS of N.Y., Inc. v. N.Y. State Dep’t of Taxation and Fin.*, 89 A.D.3d 239, 246-47 (N.Y. App. Div. 3d Dep’t 2011).

An agency contending that this exemption applies “clearly require[s] expert proof of how a security breach could occur if the requested data were released”; here, however “none is offered.” *Newsday*, 984 N.Y.S.2d 633, at \*6. The simple fact that the BCJ Request seeks facts about information technology does not render this exemption applicable by *ipse dixit*; rather, the NYPD must make a particularized showing that the information sought would actually subject its information technology to attack. Any sensitive information that could facilitate such attack—such as, by way of example, the location of servers on which the data is kept, or details about how

the program is encrypted or otherwise protected from cyberattack—are not the focus of the BCJ Request and could readily be redacted from the records the Brennan Center actually seeks.

**5. The Exemption For Protecting Confidential Sources Does Not Apply.**

Finally, the NYPD has attempted to justify its denial of the BCJ Request by citing to Public Officers Law Section 87(2)(e)(iii), which exempts records that “are compiled for law enforcement purposes and which, if disclosed, would ... identify a confidential source or disclose confidential information.” The purpose of the exemption is to protect the “NYPD’s []ability to protect the identities of undercover officers and informants,” and prevent “the hindrance of recruitment and retention of investigative sources, and the ‘chilling effect’ upon the public’s willingness to report leads or other information of investigative value” that might come from disclosure. *Asian Am. Legal Def. & Educ. Fund*, 964 N.Y.S.2d at 895.

To invoke this exemption, the NYPD generally must show that the information was provided by a confidential source. *See, e.g., Beyah*, 309 A.D.2d at 1052 (“[I]n the absence of an allegation that anyone on the list qualifies as a ‘confidential source’ within the meaning of Public Officers Law § 87 (2) (e) (iii), there is no basis in the record before us to deny disclosure of these documents.”). No such showing has been made here, nor is there a discernible way in which information about predictive policing technologies could be utilized to identify confidential sources or undercover officers. Accordingly, this exemption, like all of the others cited by the NYPD, is inapplicable to the BCJ Request.

**C. If An Exemption Applies To Portions Of A Record, Those Portions Should Be Redacted And The Remainder Of The Record Provided.**

The NYPD’s blanket refusal to provide a single responsive document and its position that all responsive records are entirely exempt is clearly overbroad. New York courts have repeatedly held that the existence of some exempted information within a document does not necessarily

exempt the entire document from disclosure under FOIL. *See, e.g., Schenectady Cnty. Soc’y for Prevention of Cruelty to Animals, Inc. v. Mills*, 935 N.Y.S.2d 279, 281 (2011); *Data Tree, LLC v. Romaine*, 849 N.Y.S.2d 489, 495 (2007). Where information can be reasonably redacted from the requested record, an agency cannot withhold the entire document under FOIL. *Schenectady Cnty. Soc’y for Prevention of Cruelty to Animals*, 935 N.Y.S.2d at 280; *see also Gould*, 653 N.Y.S.2d at 57. Assuming, arguendo, that some of the documents do contain information that properly falls within the ambit of an exemption to FOIL, the NYPD has provided no explanation as to why any of the documents requested cannot be produced with the exempted portions redacted.

### **III. PETITIONERS ARE ENTITLED TO THEIR LEGAL COSTS, INCLUDING ATTORNEY’S FEES**

Petitioner Brennan Center also requests attorney’s fees and reasonable litigation costs under FOIL. Section 89(4)(c) grants a court discretion to award reasonable attorney’s fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute.

The legislature amended Section 89(4)(c) of FOIL in 2006 to “strengthen compliance with [FOIL]” by “creat[ing] a clear deterrent to unreasonable delays and denials of access.” 2006 Legis. Bill Hist. N.Y. S.B. 7011-A. Indeed, as the Court of Appeals in *West Harlem* noted, “litigation could have been avoided, or significantly limited, had [the agency] in the first instance complied with the dictates of FOIL” and provided a substantive response. 893 N.Y.S.2d at 826. Here, the NYPD’s failure to fulfill its statutory duty “compelled [the plaintiffs] to bring suit to obtain either the documents or an explanation of [the NYPD]’s denial, the very information it should have received during the administrative appeals process.” *Id.* at 827; *see also* Pub. Off. Law § 89(4)(a) (requiring agency to “fully explain in writing to the person requesting the record the reasons for further denial”). Any potential litigation here could have been avoided or limited,

if NYPD had reasonably fulfilled its statutory duty and provided the Brennan Center with a substantive response to its initial Request. Moreover, the Brennan Center put NYPD on notice that it had failed to meet its burden to provide particularized and specific justification for its withholding of records from production. In response, the NYPD issued a denial devoid of any substantive explanation or justification with only bare recitations of allegedly applicable FOIL exemptions. Accordingly, an award of attorney's fees and costs is appropriate.

**CONCLUSION**

For the foregoing reasons, the Brennan Center respectfully requests that the Court grant the Verified Petition, enter a judgment directing the NYPD to disclose the documents requested in the BCJ Request, and award the Brennan Center litigation costs and reasonable attorney's fees and such other relief the Court deems necessary and proper.

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Respectfully Submitted,

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