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

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

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ANSWER

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Respondents New York City Police Department ("NYPD") and NYPD Commissioner James P. O'Neill in support of their Verified Answer in this proceeding, in which Petitioner seeks to compel NYPD to produce various records related to the NYPD's predictive policing program.

As discussed more fully below, NYPD had produced to Petitioner approximately 550 pages of responsive records, withholding records created for a law enforcement purpose which, if disclosed (i) would reveal non-routine investigative techniques, (ii) would reveal confidential information, (iii) could endanger the lives and safety of individuals, (iv) would substantially injure a contract vendor's competitive position, or (v) would compromise the safety of NYPD's information technology assets. As NYPD has now produced all non-exempt responsive documents it could locate following a reasonable and diligent search, this proceeding is now moot, and the Verified Petition should be denied.

STATEMENT OF FACTS

A. Procedural History

For a complete statement of material facts, the Court is respectfully referred to Respondents' Verified Answer, sworn to April 7, 2016, and to the accompanying Affidavits of Lori Hernandez, sworn to April 7, 2016, Evan Levine, sworn to April 7, 2016, and Douglas Williamson, sworn to April 7, 2016. A brief summary follows.

By letter dated June 14, 2016, and received by NYPD on June 20, 2016, Petitioner submitted a FOIL request to Respondent NYPD in which it sought the following:

1) **Purchase Records and Agreements:** Any and all records reflecting an agreement for purchase, acquisition, or licensing of, or permission to use, test, or evaluate a predictive policing product or service, including any product or service offered by Palantir Technologies.

2) **Vendor Communication:** Records reflecting any communications with Palantir Technologies, or any other third party vendor concerning Palantir Gotham or other predictive policing products or services, including sales materials and emails relating to those products.

3) **Policies Governing Use:** Any and all policies, procedures, manuals, or guidelines governing the use, testing, or evaluation of Palantir Gotham or other predictive policing products or services, including (but not limited to) policies regarding the retention, sharing, and use of collected data.

4) **Federal Communications:** Records reflecting any communications, contracts, licenses, waivers, grants, or agreements with the National Institute of Justice, Bureau of Justice Assistance, U.S. Department of Justice, or the National Science Foundation concerning the use, testing, or evaluation of Palantir Gotham or other predictive policing products or services.

5) **Information Inputs:** Records regarding what data may be, and/or actually is, used by or supplied to Palantir Gotham or other predictive policing products or systems, as well as any weighting used and all available details about the data.

6) **How it Works:** Records regarding how Palantir Gotham or other predictive policing products or services use the input data to create outputs, the algorithms or machine learning used, the possible or actual outputs, and how NYPD uses the system to make operational decisions.

7) **Past Uses:** Records reflecting the utilization, testing, or evaluation of Palantir Gotham or other 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.

8) **Audits:** Any records of, or communications regarding, audits or internal review of Palantir Gotham, or other predictive policing products or services.

9) **Nondisclosure Agreements:** Any records of, or communications regarding, any agreement that creates nondisclosure or confidentiality obligations governing NYPD contact with a vendor of predictive policing products or services.

(hereinafter, "Petitioner's FOIL request"). *See* Verified Answer ¶ 32.

By letter dated June 27, 2016, NYPD acknowledged that it had received the FOIL request on June 20, 2017. *See* Verified Answer ¶ 33. By letter dated June 29, 2016, NYPD denied Petitioner's FOIL Request. Specifically, NYPD stated that it was denying access to any records pursuant to Public Officers Law § 87(2)(e)(iv) because disclosure of responsive records "would reveal non-routine techniques and procedures." *See* Verified Answer ¶ 34. Petitioner

appealed NYPD's denial of its FOIL request by letter dated July 29, 2016. *See* Verified Answer ¶ 35.

B. Respondent's Search for Responsive Records

In response, NYPD, through its Records Access Appeals Officer, denied Petitioner's appeal by letter dated August 15, 2016. NYPD denied the appeal on grounds that the requested records were exempt from disclosure pursuant to the following statutory exemptions: N.Y. Pub. Off. Law § 87(2)(i) (disclosure would jeopardize NYPD's capacity to guarantee the security of information technology assets); N.Y Pub. Off. Law § 87(2)(d) (records contain trade secrets and proprietary information whose disclosure would cause substantial injury to the competitive position of the subject commercial enterprise); N.Y. Pub. Off. Law § 87(2)(g) (records contain non-final opinions and recommendations); and N.Y. Pub. Off. Law § 87(2)(e)(iii) (confidential records). The letter stated that other exemptions could apply. *See* Verified Answer ¶ 36. Petitioner then commenced the instant proceeding.

In response to Petitioner's FOIL request, NYPD conducted a thorough and diligent search of the following divisions, which are the only places responsive documents could reasonably be located: Information Technology Bureau, Office of Management Analysis and Planning, and the Office of the Deputy Commissioner of Management and Budget's Contract Administration Unit. *See* Affidavit of Lori Hernandez in Support of Respondents' Verified Answer, sworn to April 7, 2017 ("Hernandez Aff.") at ¶ 9. NYPD certifies that it did not locate any records responsive to FOIL Request numbers 4 and 8. *Id.* at ¶10.

Some responsive records were located, and some of these warranted redactions or withholding pursuant to various FOIL exemptions. Specifically, in response to FOIL Request No. 1, which sought "records reflecting . . . permission to use, test, or evaluate a predictive policing product or service," NYPD located agreements with three vendors—Azavea, Keystats,

and Predpol—whose predictive policing technology the NYPD tested. *Id*. at ¶ 11. In response to FOIL Request No. 2, which sought "records reflecting any communications with . . . any other third party vendor concerning . . . predictive policing products or services," NYPD located email communications with the same vendors with whom agreements were identified in response to FOIL Request No. 1. *Id*. at ¶ 12. In response to FOIL Request No. 3, which sought "policies, procedures, manuals, or guidelines governing the use, testing or evaluation of . . . predictive policing products or services," NYPD located its Public Security Privacy Guidelines. *Id*. at ¶ 13.

In response to FOIL Request No. 5, which sought "records regarding what data may be, and/or actually is, used by or supplied to . . . predictive policing products or systems, as well as any weighting used and all available details about the data," NYPD located an article authored by Evan S. Levine, NYPD's Assistant Commissioner of Data Analytics, as well as written and electronic notes maintained by Assistant Commissioner Levine. Hernandez Aff. at ¶ 14. In response to FOIL Request No. 6, which sought "records regarding how . . . predictive policing products or services use the input data to create outputs, the algorithms or machine learning used, the possible or actual outputs, and how NYPD uses the system to make operational decisions," NYPD located the same records responsive to FOIL Request No. 5. *Id.* at ¶ 15.

In response to FOIL Request No. 7, which sought "records reflecting the . . . testing or evaluation of . . . predictive policing products or services," NYPD located draft presentations concerning the performance of the three vendors whose technology the NYPD tested, and results of test predictions made by those vendors during their trial period with the NYPD. Hernandez Aff. at ¶ 16. In response to FOIL Request No. 9, which sought "any records of, or communications regarding, any agreement that creates nondisclosure or confidentiality

obligations governing NYPD contact with a vendor of predictive policing products or services," NYPD located nondisclosure agreements with the three vendors whose predictive policing technology NYPD tested. *Id*. at ¶ 17.

C. Disclosure, Redaction, or Withholding of Responsive Records

NYPD has disclosed portions of email correspondence with the vendors as responsive to FOIL Request No. 2. Personal information was redacted because disclosure would constitute an unwarranted invasion of personal privacy. Other portions of these communications were redacted or responsive emails were withheld in their entirety because the records constituted trade secrets and/or because disclosure would cause substantial injury to the competitive position of the vendor. Hernandez Aff. at ¶19.

NYPD has disclosed to the Petitioner the vendor agreements responsive to FOIL Request No. 1; portions of email correspondence with those vendors as responsive to FOIL Request No. 2; the Public Security Privacy Guidelines responsive to FOIL Request No. 3; a copy of E.S. Levine, Jessica Tisch, Anthony Tasso, Michael Joy (2017) The New York City Police Department's Domain Awareness System. Interfaces in response to FOIL Requests No. 5 and 6; nondisclosure agreements with Azavea, Keystats, and Predpol in response to FOIL request No. 9. *Id*. at ¶¶ 18, 20.

The NYPD withheld (i) written and electronic notes maintained by Assistant Commissioner Levine responsive to FOIL Request No. 5 ("Levine Documents"); (ii) portions of emails or entire emails from Azavea, Keystats, and Predpol to the NYPD ("Vendor Emails"); and (iii) all predictive policing vendor test results, and NYPD draft presentations and memoranda concerning those results ("Vendor Results"). Hernandez Aff. at ¶ 21. These withholdings—and the redactions described above—were proper for the reasons set forth below.

ARGUMENT

POINT I

DISCLOSURE OF THE VENDORS' PREDICTION RESULTS COULD SUBSTANTIALLY INJURE THEIR COMPETITIVE POSITION

Pursuant to Public Officers Law §87(2)(d), an agency may withhold 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. . . .

Notably, the exemption is disjunctive – that is, a party asserting this exemption need only show that information constitutes a trade secret or that disclosure would substantially injure its competitive position. Matter of Verizon N.Y. Inc. v New York State Pub. Serv. Commn., 991 N.Y.S.2d 841 (Sup. Ct. Albany Co. 2014)(so concluding after an exhaustive analysis, and holding that "Once a document has been found to be a trade secret under Public Officers Law § 87(2)(d), the analysis ends.")

The Supreme Court of the United States has adopted the definition of a "trade secret" found in the Restatement (First) of Torts:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers"

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474-75 (1973)(quoting Restatement of Torts, § 757, comment b (1939)). Thus, "the subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). See Matter of Hearst Corp. v. State of New York, 24 Misc. 3d 611, 630 n.13 (Sup. Ct. Albany Co. 2009)(courts in New York generally follow section 757 of the Restatement (First) of Torts in determining whether business information qualifies as a trade secret).

Factors to be considered in determining whether information constitutes a trade secret include:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (see Wiener v Lazard Freres & Co., 241 A.D.2d 114, 123-124 (1998); see also Restatement of Torts [1939], Section 757, comment b).

New York Regional Interconnect Inc. v. Oneida County Industrial Devel. Corp., 2007 NY Slip Op 52567(U), 21 Misc. 3d 1118(A); 2007 N.Y. Misc. LEXIS 9006 (Sup. Ct. N.Y. Co. 2007).

There can be no real doubt that Azavea, Keystats, and PredPol's (collectively, the "Vendors") proprietary information relating to algorithms and predictive policing technology developed as the result of their own research and development -- including the specifications, operations, capabilities and limitations of that technology and systems – constitute trade secrets. See Belth v. Insurance Dep't of New York, 95 Misc. 2d 18, 20 (Sup. Ct. N.Y. Co. 1977) ("Certainly a computer program, developed by Equitable and not known to anyone else, is a trade secret; as are the particular mathematical models and assumptions used here.").

Additionally, in discussing the Contract with NYPD, it was the Vendors' expectation and understanding that NYPD and its employees would keep the Vendors' trade secrets—including their products' performance in the 45-day trial--strictly confidential. See Williams Aff. at ¶ 3.

Even if the Vendors' technology and performance in the trial were somehow not deemed trade secrets, it is clear that disclosure of such would cause substantial injury to their competitive position, warranting redaction or complete withholding of such information.

Here, the leading case is Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 N.Y.2d 410 (1995). There, the Court of Appeals adopted the standard enunciated by the DC Circuit Court of Appeals in analyzing a comparable provision in the federal Freedom of information Act ("FOIA"):

> whether "substantial competitive harm" exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here. Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise

Id. at 420 (citing Worthington Compressors v Costle, 662 F.2d 45, 51 (D.C. Cir. 1981). The Court quoted the Worthington court further:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is

> released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.

Id. The Court of Appeals concluded its analysis stating that "[t]he reasoning underlying these considerations is consistent with the policy behind [POL §87(2)(d)] -- to protect businesses from the deleterious consequences of disclosing confidential commercial information . . . " Id.

Based on these principles, the Court found that a college's disclosure to Barnes & Noble's competitor of a booklist compiled by Barnes & Noble for sale at its college bookstore would substantially injure Barnes & Noble's competitive position. Id. at 421. Notably, the respondent was not required to establish actual competitive harm to Barnes & Noble. Rather, "[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown." Id. (quoting Gulf & W. Indus. v United States, 615 F.2d 527, 530 (D.C. Cir 1979)).

As explained in the Williamson Affidavit, competition in the relevant marketplace is fierce, with even small differences leading to a competitive edge. See Williamson Aff. at ¶¶ 6-7. Disclosure of a vendor's performance in a trial—such as the one conducted by the NYPD with the three vendors named above—could greatly influence the vendor's position in the marketplace, either positively or negatively, depending on its performance in the trial. Id. at ¶ 8. Disclosure of the success rates of the vendors' algorithms in predicting incidents of crime based on this limited test run could reveal the capabilities and operations (and potential shortcomings) of the vendors' products, which information competitors could use when contending for customers. Id. at ¶ 9. Public disclosure of any limitations of the Vendors' models would likely hurt the Vendor competitively in the marketplace. Id. at ¶ 10. Thus, disclosure of records

concerning the Vendors' performance in the NYPD trial could likely cause competitive injury. See Matter of Schenectady v. O'Keeffe, 50 A.D.3d 1384, 1386 (3d Dep't 2008).

Based on the foregoing, it is clear that information relating to the Vendors' predictive policing technology and performance on the NYPD trial were properly withheld pursuant to Public Officers Law §87(2)(d) either as trade secrets or because disclosure would substantially injure its competitive position.

POINT II

THE DRAFT DOCUMENT DESCRIBING THE VENDORS' RESULTS IN THE 45-DAY TRIAL WERE PROPERLY WITHHELD AS NON-FINAL, DELIBERATIONAL DOCUMENTS EXEMPT FROM DISCLOSURE UNDER PUBLIC OFFICERS LAW § 87(2)(g)

NYPD's search for responsive records located a draft presentation summarizing the Vendors' performance during the 45-day trial. This record consists of pre-decisional, non-final intra-agency material and, accordingly, is exempt from disclosure pursuant to Public Officers Law § 87(2)(g), which specifically exempts disclosure of:

> [I]nter-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; (iv) external audits, including but not limited to audits performed by the comptroller and the federal government.

The Court of Appeals provided the following useful gloss on the types of materials that fit squarely within the aforementioned exemption: "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker . . . in arriving at his decision.'" Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132 (1985) (citing McAulay v. Bd. of Educ., 61 A.D.2d 1048 (2d Dep't 1978), aff'd 48 N.Y.2d 659 (1979)). Consistent with that

direction, New York state appellate courts routinely and consistently reject requests for disclosure of material that contain "opinions, advice, valuations, deliberations, proposals, policy formulations, conclusions or recommendations" or other subjective material. Kaufman v. N.Y. State Dep't of Envtl. Conservation, 289 A.D.2D 826, 827 (3d Dep't 2001) (finding that that nature of the documents requested contained either opinions, recommendations or policy formulations and thus fell within the intra-agency exemption); Rothenberg v. City Univ. of N.Y., 191 A.D.2d 195, 195 (1st Dep't 1993), app. denied, 81 N.Y.2d 710 (1993) (finding recommendations that were advisory in nature and rendered to aid a decision-maker in reaching a determination were exempt from disclosure); Prof'l Standards Review Council of Am., Inc. v. N.Y. State Dep't of Health, 193 A.D.2d 937, 940 (3d Dep't 1993) (finding subjective comments, opinions, and recommendations of committee members were not required to be disclosed); Rome Sentinel Co. v. City of Rome, 174 A.D.2d 1005, 1005 (4th Dep't 1991) (denying disclosure of an agency report that consisted of an internal review of that agency as it contained only "opinions, advice, evaluations, recommendations and other subjective material"); Town of Oyster Bay v. Williams, 134 A.D.2d 267, 268 (2d Dep't 1987) (records that "consist only of opinions, advice, evaluations, deliberations, proposals, policy formulations, conclusions, or recommendations…fall squarely within the protection of Public Officers Law § 87(2)(g)"); McAulay, 61 A.D.2d 1048 (denying disclosure of documents prepared by a hearing panel as "precisely the kind of predecisional information which is prepared in order to assist the decision making process").

The purpose of the intra-agency exemption is to permit employees of government agencies to exchange opinions, advice and criticism freely, and "without the chilling prospect of public disclosure." N.Y. Times Co. v. N.Y.C. Fire Dep't, 4 N.Y.3d 477, 488 (2005) (citing

Xerox, 65 N.Y.2d at 132). Pre-decisional material is widely recognized as being exempt from disclosure "to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers." Id. The intra-agency exemption prevents the second-guessing of an agency's decision-making process, which undermines the agency's ability to make sounds and well-reasoned decisions. Accordingly, courts routinely acknowledge that the ability to voice and discuss conflicting views is essential to an agency's ability to candidly assess competing facts and render well-reasoned decisions, and the candor of those assisting in the decision-making process would be impeded if those involved in this process knew their opinions, analyses, and recommendations were exposed to public scrutiny. See Goodstein & West v. O'Rourke, 201 A.D.2d 731 (2d Dep't 1994); One Beekman Place, Inc. v. N.Y.C., 169 A.D.2d 492, 493 (1st Dep't 1991); Sea Crest Constr. Corp. v. Stubing, 82 A.D.2d 546, 549 (2d Dep't 1981); Delaney v. Del Bello, 62 A.D.2d 281, 287-88 (2d Dep't 1978).

Courts have further recognized that pre-decisional, non-final discussion, recommendations, memoranda, and reports are critical to assist agencies in carrying out their functions and are therefore exempt from disclosure. See, e.g., Stein v. N.Y. State Dep't of Transp., 25 A.D.3d 846, 847-48 (3d Dep't 2006); Mothers on the Move v. Messer, 236 A.D.2d 408, 410 (2d Dep't 1997); Kheel v. Ravitch, 93 A.D.2d 422, 427-28 (1st Dep't 1983), aff'd, 62 N.Y.2d 7 (1984).

Here, the record in question was a draft of a presentation that was intended to summarize the performance of each of the three Vendors' during the 45-day trial of their predictive policing technologies. See Hernandez Aff. at ¶16. If it had been finalized, it would have been used to aid the NYPD in deciding which, if any, vendor to work with. This is a

quintessentially pre-decisional, non-final record of the sort that has been found to be exempt from disclosure by the courts. See, e.g. Rothenberg, 191 A.D.2d at 195 (finding recommendations that were advisory in nature and rendered to aid a decision-maker in reaching a determination were exempt from disclosure). This is particularly relevant to the record withheld in this case, as the presentation in question was never even finalized—the only existing record is a non-final draft. This places this particular record squarely within the exemption of § 87(2)(g)(iii), which explicitly exempts from disclosure intra-agency materials "which are not . . . final agency policy or determinations." (emphasis supplied).

It is beyond cavil that a draft version of a document created to aid an agency in making a final decision is exempt from disclosure under §87(2)(g)(iii) and, therefore, Respondent NYPD properly withheld this record.

POINT III

THE RECORDS REQUESTED ARE EXEMPT FROM DISCLOSURE PURSUANT TO POL § 87(2)(e)

Public Officers Law §87(2)(e) permits an agency to deny access to records or portions thereof that, inter alia, "are compiled for law enforcement purposes and which, if disclosed, . . . would;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures[.]"

See Public Officers Law § 87(2)(e).

Petitioner's FOIL Request sought (and the Petition seeks) records pertaining to data, algorithms, weighting, and machine learning used in NYPD's predictive policing.. As

described in the Levine Affidavit, among the responsive records are an article authored by Evan S. Levine, NYPD's Assistant Commissioner of Data Analytics, as well as written and electronic notes maintained by Assistant Commissioner Levine.

The written and electronic notes of Assistant Commissioner Levine and details describing the predictive policing tool created by Asst. Commissioner Levine were properly withheld pursuant to Public Officers Law §87(2)(e)(iv), which permits an agency to withhold access to records which were compiled for a law enforcement purpose and, if disclosed, "would reveal criminal investigative techniques or procedures, except routine techniques and procedures." The leading case on this exemption is Matter of Fink v. Lefkowitz, 47 N.Y.2d 567 (1979), which involved a request for access to a manual prepared by a special prosecutor that investigated nursing homes. There, the Court of Appeals held that:

> The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F.2d 813, 817, cert. den., 409 U.S. 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

47 N.Y.2d at 572. See Spencer v. New York State Police, 187 A.D.2d 919, 920-21 (3d Dep't 1992) ("The purpose of the exemption provided by Public Officers Law § 87(2)(e)(iv) is to prevent violators of the law from being apprised of nonroutine procedures by which law enforcement officials gather information."). Thus, "The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe." Fink, 47 N.Y.2d at 573.

As the Court of Appeals explained, "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine 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 [law enforcement] personnel." Fink, 47 N.Y.2d at 573 (citations omitted). Thus, "[e]ven though a particular procedure may be 'time-tested', it may nevertheless be nonroutine." Spencer, 187 A.D.2d at 921 (citing Fink, 47 N.Y.2d at 572, 573). In applying these criteria, the Third Department found that records relating to the method by which the respondent police department gathered information about petitioner and his accomplices was exempt, "because the disclosure of such information would enable future violators of the law to tailor their conduct to avoid detection by law enforcement personnel." Spencer, 187 A.D.2d at 921.

With technological advances in law enforcement and counter-terrorism, case law has evolved to incorporate new technology within the protections of the law enforcement privilege. In fact, the First Department this year found that details relating to "Z-backscatter vans," which are mobile X-ray units that scan vehicles or buildings for evidence of explosives, drugs and other materials, are protected under both the law enforcement and public safety exemptions. Grabell v NYPD, 139 A.D.3d 477, 479 (1st Dep't 2016). Specifically, the First Department held that records which would reveal the locations in which the NYPD deploys the vans would allow terrorists to infer the inverse, namely locations and times when NYPD does not deploy the equipment and would permit a terrorist to conform his or her conduct accordingly. Grabell, 139 AD3d at 478-9.

In N.Y. Civ. Liberties Union v. N.Y.C. Police Dep't, 2009 N.Y. Misc. LEXIS 2542 (Sup. Ct., N.Y. Co. June 26, 2009), petitioners sought disclosure of documents relating to NYPD's Lower Manhattan Security Initiative ("LMSI"), designed to prevent and defend against terrorist activity in lower Manhattan. There, petitioner sought information "involving the

operational details of the LMSI, such as the types of information to be collected and how the information will be used, shared and stored and for how long." NYPD largely denied the request, arguing that

> disclosure of such details about the development of the system and how it works would limit its effectiveness and increase the risk of terrorist acts in lower Manhattan. . . . and that disclosure of this information, as well as the disclosure of any assessments which have been made about the LMSI or about a similar system used in London, would provide terrorists with insight into how the system works and how detection and surveillance by the LMSI may be avoided.

2009 N.Y. Misc. LEXIS 2542, at * 10-11. Finding the NYPD's argument persuasive, the Court denied access to documents "which show or discuss the LMSI's operational details, such as the types of information to be collected and how the information will be used, shared and stored and for how long." Id. at * 11-12.

Similarly, in Matter of Urban Justice Ctr. v New York Police Dept., 2010 N.Y. Misc. LEXIS 4258, 2010 NY Slip Op 32400U (Sup. Ct. N.Y. Co. Sept. 10, 2011), the Court denied access to a portion of the NYPD's confidential Organized Crime Control Bureau manual regarding techniques use in NYPD's undercover investigations of prostitution. In so doing, the Court held that "undercover operations, even though widely used and time-tested, are nevertheless non-routine. Indeed, detailed specialized methods of conducting an investigation into the activities of a specialized area of criminal enforcement in which, as here, voluntary compliance with the law has been less than exemplary, have been held "non-routine." Thus, the Court held that disclosure would "raise a substantial likelihood that persons engaged in prostitution-related activity would be alert to these techniques and would deliberately tailor their

conduct so as to avoid detection or prosecution, thus, seriously compromising NYPD's future undercover investigations."

As described in the Levine Affidavit, the code and algorithms he developed for the NYPD's predictive policing are used to make predictions as to where and when certain crimes are more likely to occur. See Levine Aff. at ¶ 4. If these records were made public, individuals would be able to apply these algorithms to the public NYPD crime databases to make the same predictions that NYPD personnel make with regard to future crimes and, most significantly, likely future deployment of NYPD personnel. Id. at ¶ 10. These law enforcement tools constitute non-routine law enforcement techniques. Moreover disclosure of such information would allow someone to modify their behavior, or otherwise conduct themselves in a manner which would allow them to defeat or compromise the technology, thereby frustrate the purposes for which such techniques are employed. In short, disclosure of such information would be detrimental to NYPD law enforcement operations, where "the very function to be performed presumes secrecy as to the manner of its performance." Matter of Urban Justice Ctr., 2010 N.Y. Misc. LEXIS 4258, at *30. Accordingly, such information was properly withheld on this basis as well.

Based on the foregoing, NYPD's withholding of information pertaining to its predictive policing algorithms was proper because disclosure would reveal confidential information and non-routine criminal investigative techniques or procedures.

POINT IV

DISCLOSURE OF THE RECORDS COULD ENDANGER INDIVIDUALS

Under Public Officers Law § 87(2)(f) ("life/safety exemption"), an agency may deny access to records or to portions thereof where the information, if disclosed, could endanger

the life or safety of any person. An agency is "not required to prove that a danger to a person's life or safety will occur if the information is made public." Stronza v. Hoke, 148 A.D.2d 900, 900-01 (3d Dep't 1989). Instead, "there need only be a possibility that such information would endanger the lives or safety of individuals." Id. (emphasis added); see also, e.g., 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) (agency need only demonstrate a possibility of endangerment in order to invoke life/safety exemption); Johnson v. New York City Police Dep't, 257 A.D.2d 343, 348-49 (1st Dep't 1999) (holding that certain information, by its very nature, could endanger the lives or safety of individuals if it were to be released in an unredacted form); Flowers v. Sullivan, 149 A.D.2d 287, 297 (2nd Dep't 1989) (finding respondent properly invoked life/safety exemption to disclosure of details of electrical, security and transmission systems of correctional facility where their disclosure might impair the effectiveness of the systems and compromise the safe and successful operation of the prison).

Here, just as in Grabell, Petitioner seeks sensitive records showing details of highly sophisticated technology in use to prevent and thwart major crimes, and to apprehend perpetrators of crimes. As explained in the Levine Affidavit, NYPD utilizes predictive policing to help determine where best to deploy law enforcement officers. However, the effectiveness of the technology, in thwarting crime and apprehending perpetrators who seek to do harm to others, is dependent upon NYPD's ability to keep the details of the technology in its possession confidential. Disclosure of information to the public relating to the weights of the variables in the algorithms, or the computer code itself, would enable an individual knowledgeable in programming to use public databases and make the same predictions that the NYPD's predictive

policing tool makes. This would enable individuals to predict not only crime but also to predict the locations in which officers will be deployed thereby putting the officers at risk of harm.

Finally, while Petitioner may not itself seek such records with any nefarious intent, this does not mitigate in favor of disclosure as intent has no bearing here on the applicability of the public safety exemption. When records are found accessible under FOIL, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records. See, e.g., M. Farbman & Sons. v. New York City Health & Hospitals Corp., 62 N.Y.2d 75, 80 (1984). Thus, disclosure to this Petitioner would require disclosure to a different requestor who may not have such noble intent. It should by now be clear that information that is disclosed to any person could well be published online for all the world to see. See Data Tree, LLC v. Romaine, 36 A.D.3d 804, 806 (2d Dep't), rev'd on other grounds, 9 N.Y.3d 454 (2007) ("In view of the rapid advances in technology, the misuse of that data for purposes unfathomable only a few short years ago is now possible").

As one court pointed out, the internet has no sunset. Bursac v. Suozzi, 22 Misc. 3d 328, 339 (Sup. Ct. Nassau Co. 2008). Once these documents are disclosed and all the details, limitations, and particular vulnerabilities of NYPD's predictive policing program are revealed, there will be no opportunities to retract the information and prevent it from ending up in the hands of criminals.

Based on the foregoing, Respondent properly refused to disclose the records where their disclosure could endanger public safety and law enforcement officers.

POINT V

RECORDS RELATING TO NYPD'S PREDICTIVE POLICING CODE AND ALGORITHMS WAS PROPERLY WITHHELD AS EXEMPT UNDER § 87(2)(i)

Public Officers Law §87(2)(i) ("the technology exemption") permits an agency to withhold records 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." Courts have explained this exemption as "concerned with ensuring the security of information technology assets." Matter of TJS of N.Y. v. New York State Dep't of Taxation & Fin., 89 A.D.3d 239, 243 (3d Dep't 2011). The "expressed legislative intent was to protect against the risks of electronic attack, including damage to the assets themselves . . . ." Id.; see also N.Y. Civ. Liberties Union, 2009 N.Y. Misc. LEXIS 2542 (describing the IT exemption as applying to "documents which contain information that would assist the recipient in invading an agency's computer system").

The Committee on Open Government (the "Committee") has had occasion to apply this exemption to requests for disclosure of computer codes, computer access codes, or thee IP address of a municipality's computer systems. See, e.g., FOIL-AO-18911. FOIL-AO-f15255, FOIL-AO-16311, FOIL-AO-f17236. [1] In these decisions, the Committee has developed

[1] "FOIL establishes the Committee on Open Government…which, among other tasks, is required to furnish advisory opinions to any person or agency." Cnty. of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 191 (2d Cir. 2001) (citing Public Officers Law § 89(1)). "From the perspective of judicial review over agency determinations denying Freedom of Information Law requests, committee advisory opinions carry such weight as results from the strength of the reasoning and analysis they contain, but no more." John P. v. Whalen, 54 N.Y.2d 89, 96 (1981). Copies of all advisory opinions cited in this memorandum of law may be found at http://www.dos.ny.gov/coog/foil_listing/findex.html.

a consistent approach to determining whether disclosure of a given information technology would "jeopardize the security" of that technology, based on the legislative history of the exemption. The Committee has held that if the disclosure of a piece of information technology could allow an individual to access, alter, gain unauthorized access to, or attack a municipal's technology assets, such technology is appropriately withheld under § 87(2)(i). See FOIL-AO-18911 ("Insofar as disclosure of a password or a bank account number could enable a person to gain access to or in any way alter or adversely affect an agency's electronic information or electronic information systems, we believe that it may justifiably be withheld"); FOIL-AO-f15255 ("If indeed disclosure would enable a recipient of the data to print tax bills" the exemption would apply).

As described by Assistant Commissioner Levine, he and other NYPD employees wrote the computer code and algorithms that are currently used in the NYPD's predictive policing efforts. See Levine Aff. at ¶ 5. The algorithms are unique to the NYPD as they are trained on the NYPD's historical experience and depend on data stored in NYPD databases. Id. at ¶¶ 7-8. The variables fed into the algorithms are given different weights, and distinct algorithms and weights are applied to predict different types of crime. Id. at ¶8. In lay terms, the computer code and algorithms are the technological brain of the predictive policing system, constantly learning and evolving as they are applied to data, becoming more and more adept at aiding police officers in directing human and other resources to most effectively address crime. If this information were disclosed, and because there are databases in the public domain that contain data concerning crime in New York City, a civilian programmer could apply the algorithms to that data and make the same predictions that the NYPD makes. Id. at ¶10. The Committee on Open Government opined that disclosure of information technology that would

thus "indicate the most critical systems within the scheme, enabling a targeted attack" militated in favor of finding that the technology was exempt from disclosure. See FOIL-AO-f17236 (concluding that disclosure of an agency's computer IP address would render it uniquely vulnerable to attack and was, therefore, exempt from disclosure.) Just like the IP address served a critical technological function that warranted protection, so too do Assistant Commissioner Levine's computer codes and algorithms, as the disclosure of the information technology would enable the public to think along with the NYPD's deployment decisions, which are some of the most "critical" determinations for the NYPD.

Therefore, Respondent properly withheld records reflecting the computer codes and algorithms used in its predictive policing system.

CONCLUSION

WHEREFORE, Respondents respectfully request that an order and judgment be entered dismissing the Verified Petition and denying the relief requested therein in its entirety, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
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