

BRENNAN
CENTER
FOR JUSTICE
TWENTY
YEARS

Brennan Center for Justice
at New York University School of Law

1140 Connecticut Avenue, NW
11th Floor, Suite 1150
Washington, DC 20036
202.249.7190 Fax 202.223.2683
www.brennancenter.org

July 29, 2016

Via Certified Mail

Attn: Freedom of Information Law Request

Jonathan David
Records Access Appeals Officer
New York City Police Department
One Police Plaza, Room 1406
New York, NY 10038

FOIL Req #: 2016-PL-6946

Re: Appeal of Denial of FOIL Request

Dear Officer David:

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 June 14, 2016, the Brennan Center sent a FOIL request (the "Request")¹ to the FOIL Unit of the NYPD seeking information relating to the NYPD's use of predictive policing technology as well as the Department's policies and procedures governing such use.

In a letter dated June 29, 2016,² the NYPD denied access to all of the requested records, citing Public Officer's Law ("POL") Section 87(2)(e)(iv).³ The letter asserted that if the documents were disclosed, they would reveal non-routine techniques and procedures.

¹ The relevant FOIL request was given File # 2016-PL-6946 by the FOIL Unit (copy attached as Appendix A).

We appeal this determination on two grounds. First, the NYPD's recitation of subsections of FOIL is inadequate to meet its burden of particularized and specific justification for nondisclosure of records requested under FOIL. Second, the NYPD's application of the exemption for criminal investigative techniques or procedures to the records sought in the Request is incorrect.

For the following reasons, we hereby appeal both the adequacy of the NYPD's response to the Request and the underlying substance of the response.

I. The NYPD's response to the Request does not meet the requirements of FOIL.

A. *FOIL requires particularized justification for denial of access to records.*

In response to the Request denied, the NYPD simply listed a section of FOIL that purportedly exempts the requested records from disclosure. The NYPD provided no further information, explanation, or justification. Such a response is plainly insufficient under FOIL, which requires an agency to provide more than a bare recitation of statutory exemptions 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...."⁴ 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."⁵ 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."⁶

The NYPD has failed to meet this burden, since it provided no justification for denying the Request beyond citing a section of the FOIL statute. Mere recitation of the FOIL statute is inadequate. In *West Harlem Business Group v. Empire State Development Corp.*, the Court of Appeals stated that the agency's response to a FOIL appeal which "merely parroted the [statutory language] in [its] appeal denial letter.... without more, constituted a failure by [the agency] to fully explain in writing... the reasons for further denial...."⁷ The Court of Appeals also stated, in

² Copy attached as Appendix B.

³ "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed would reveal criminal investigative techniques or procedures, except routine techniques and procedure." N.Y. PBO § 87(2)(e)(iv) (McKinney 2015).

⁴ *Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 79-80 (1984).

⁵ *Id.* at 83 (emphasis added, internal citations and quotation marks omitted).

⁶ *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).

⁷ *West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884-85 (2009).

Church of Scientology v. State, that agencies must do more than merely recite “sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld.”⁸

In *Allen Group, Inc. v. New York State Department of Motor Vehicles*, the Third Department Appellate Division considered a similar agency response that “consisted of an answer setting forth general denials and an affirmative defense which merely stated respondents’ conclusory allegation that [t]he materials sought are exempt from disclosure.”⁹ The Court found that the response “was totally inadequate to permit the conclusion that respondents sustained their burden of showing that the requested material fell within a statutory exemption.”¹⁰ Subsequent cases confirm that the NYPD’s assertion of exemptions to disclosure under FOIL, without more, is equally inadequate.¹¹

Additionally, in denying access to records based on an exemption, the NYPD must identify with particularity what specific exemption applies to any undisclosed record,¹² and to the extent possible, should state the nature of the information redacted.¹³ The NYPD entirely failed to do that here, as it provided no information about undisclosed records.

B. *If an exemption applies to portions of the record, information should be redacted and the remainder of the record provided.*

In issuing a blanket denial for all of the records sought in the Request, the NYPD is overbroad in its assertion of exemptions to FOIL. The New York Court of Appeals in *The New York Times Co. v. City of New York Fire Department*¹⁴ stated that records should “be disclosed to the extent they consist of factual statements or instructions affecting the public, but that they [should] be redacted to eliminate non-factual material.”¹⁵ All of the itemized requests for records herein are for material that is factual in nature.

If the NYPD believes that certain information contained in those documents is exempted from disclosure by FOIL, the proper response is to provide access to the records, with the exempted portions redacted. Because the NYPD has failed to do so, its response does not meet the requirements of FOIL.

⁸ *Church of Scientology v. State*, 46 N.Y.2d 906, 907-08 (1979).

⁹ *Allen Group Inc. v. New York State Dep’t. of Motor Vehicles*, 147 A.D.2d 856, 857 (N.Y. Sup. Ct. App. Div. 3rd Dept. 1989) (internal citations and quotation marks omitted).

¹⁰ *Id.*

¹¹ See, e.g., *New York Civil Liberties Union v. New York City Police Dep’t.*, 20 Misc.3d 1108(A) (N.Y. Sup. Ct. 2008) (denying NYPD’s motion to dismiss following FOIL request in which “the NYPD invoked six exemptions but failed to provide any explanation, much less a particularized and specific justification, as to why any of them was applicable...”); *Urban Justice Ctr. v. New York Police Dep’t.*, 2010 WL 3526045 (Apr. 16, 2010) (“Affidavits merely repeating the statutory phrasing of an exemption are insufficient to establish the requirement of particularity.”)

¹² *Cornell Univ. v. City of New York Police Dep’t.*, 152 A.D.2d 515, 544 (N.Y. Sup. Ct. App. Div. 1st Dep’t 1989), *Yonamine v. NYCPD*, 2012 WL 255022 (N.Y. Sup. Ct. Jan. 20, 2012).

¹³ *Yonamine*, *supra* note 12.

¹⁴ *N.Y. Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477 (2005).

¹⁵ *Id.* at 487.

II. The application of FOIL's exemption for information revealing criminal investigative techniques or procedures is incorrect.

The NYPD denied the Request pursuant to POL § 87(2)(e)(iv),¹⁶ which exempts the department from disclosing records that reveal criminal investigative techniques or procedures, except routine techniques and procedures. We appeal this determination on two grounds. First, the NYPD's invocation of the routine technique and procedure exemption is insufficient, as discussed in Part I. Second, the records sought in the Request do not fall within this exemption to FOIL.

A. *Exemption for records revealing criminal investigative techniques or procedures, except routine techniques and procedures.*

In the absence of a particularized justification for invoking the POL § 87(2)(e)(iv) exemption, as described above, it is impossible to discern the NYPD's reason for denying the records requested.¹⁷ We therefore appeal the sufficiency of the NYPD's response.

B. *The records sought in the Request do not fall within this exemption to FOIL.*

The records sought in the Request do not fall within the POL § 87(2)(e)(iv) exemption to FOIL. In determining whether this exemption applies, courts have distinguished between routine and non-routine techniques. In *Fink v. Lefkowitz*,¹⁸ the Court of Appeals held that routine techniques and procedures must be disclosed, and that one indicator of whether a technique was non-routine is whether "disclosure of [the] procedure 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."¹⁹

It is highly unlikely that the information to be disclosed in response to the Request would allow violators to tailor their conduct to evade detection; the types of criminal conduct typically analyzed by predictive policing programs are those that are reported and for which there has been a law enforcement response, meaning that the conduct would likely be detected in any event. Even if it were possible to change one's conduct to avoid detection by a predictive policing algorithm, the dynamic nature of predictive policing analysis is such that it is not clear, as a practical matter, how an individual would do so, since the algorithm could simultaneously change to detect the new behavior. Finally, to the extent that evading detection would involve ceasing to commit crimes, this result would serve the public interest, rather than having an adverse effect.

If the NYPD nonetheless determines that some portion of the requested records would reveal criminal investigative techniques and procedures, that information should be redacted and the remainder of the record disclosed.

¹⁶ *Supra* note 3.

¹⁷ *See supra* text accompanying notes 7-8.

¹⁸ *Fink v. Lefkowitz*, 47 N.Y.2d 567 (1979).

¹⁹ *Id.* at 572.

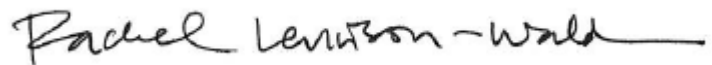
* * *

For the foregoing reasons, we appeal both the sufficiency and the merits of the NYPD's determination of June 29, 2016, that the requested records are exempt from disclosure under POL § 87(2)(e)(iv). 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 Rachel.Levinson.Waldman@nyu.edu, or at the above address.

Very truly yours,

A handwritten signature in black ink that reads "Rachel Levinson-Waldman". The signature is written in a cursive style with a long horizontal line extending to the right.

Rachel Levinson-Waldman
Senior Counsel
Liberty and National Security Program