SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

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 Policy Department,

                                    Respondents.

VERIFIED ANSWER

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

For Judgment Pursuant to Article 78 of the Civil Practice Law
and Rules

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        Respondents, New York City Police Department ("NYPD") and James P. O'Neill, by their attorney, Zachary W. Carter, Corporation Counsel of the City of New York, as and for their Verified Answer to the Verified Petition, dated December 15, 2016, respectfully allege as follows:

        1.   Deny the allegations set forth in paragraph "1" of the Verified Petition, except admit that Petitioner purports to proceed as set forth therein.

        2.   Deny the allegations set forth in paragraph "2" of the Verified Petition, except admit that the City of New York has purchased products from Palantir Technologies.

3.   Deny the allegations set forth in paragraph "3" of the Verified Petition, and respectfully refer the Court to the statutes cited therein for a complete and accurate statement of their contents.

4.   Deny the allegations set forth in paragraph "4" of the Verified Petition, except admit that Petitioner sent a FOIL request, dated June 14, 2016, to the NYPD seeking records.

5.   Deny the allegations set forth in paragraph "5" of the Verified Petition, except admit that NYPD did not produce any records in response to Petitioner's FOIL request, and that Petitioner appealed NYPD's response by letter dated July 29, 2016.

6.   Deny the allegations set forth in paragraph "6" of the Verified Petition, except admit that by letter dated August 15, 2016, the NYPD denied Petitioner's appeal, invoking several FOIL exemptions.

7.   Deny the allegations set forth in paragraph "7" of the Verified Petition, except admit that Petitioner purports to proceed as set forth therein.

8.   Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "8" of the Verified Petition.

9.   Deny the allegations set forth in paragraph "9" of the Verified Petition, except admit that NYPD is an agency of the City of New York, and respectfully refer the Court to the statutes cited therein for a complete and accurate statement of their contents.

10.   Deny the allegations set forth in paragraph "10" of the Verified Petition, except admit that Respondent James P. O'Neill is the Commissioner of the NYPD.

11.   Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph "11" of the Verified Petition, except admit that Respondents

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received a FOIL request from Petitioner, dated June 14, 2016, and respectfully refer the Court to the exhibit cited therein for a complete and accurate statement of its contents.

12. Deny the allegations set forth in paragraph "12" of the Verified Petition, and respectfully refer the Court to the documents cited therein for a complete and accurate statement of their contents.

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "13" of the Verified Petition.

14. Deny the allegations set forth in paragraph "14" of the Verified Petition, and respectfully refer the Court to the exhibit cited therein for a complete and accurate statement of its contents.

15. Deny the allegations set forth in paragraph "15" of the Verified Petition, except admit that the NYPD responded to the Petitioner's FOIL request by letter dated July 29, 2016, that the NYPD did not produce any records in response, and respectfully refer the Court to the exhibit cited therein for a complete and accurate statement of its contents.

16. Deny the allegations set forth in paragraph "16" of the Verified Petition, except admit that Petitioner appealed the NYPD's FOIL decision by letter dated July 29, 2016, and respectfully refer the Court to the exhibit cited in paragraph "16" for a complete and accurate statement of its contents.

17. Deny the allegations set forth in paragraph "17" of the Verified Petition, except admit that NYPD denied Petitioner's appeal by letter dated July 29, 2016, and respectfully refer the Court to the exhibit and statutes cited in paragraph "17" for a complete and accurate statement of their contents.

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18.   Deny the allegations set forth in paragraph "18" of the Verified Petition, except admit that the instant Verified Petition was filed within four months of NYPD's denial of Petitioner's FOIL appeal.

19.   Deny the allegations set forth in paragraph "1"[1] of the Verified Petition, except admit that Petitioner purports to lay venue in this judicial district, and respectfully refer the Court to the statutes cited therein for a complete and accurate statement of their contents.

20.   Admit the allegations set forth in paragraph "2" of the Verified Petition.

21.   Deny the allegations set forth in paragraph "3" of the Verified Petition, and respectfully refer the Court to the statute cited therein for a complete and accurate statement of its contents.

22.   Respondents repeat and reallege each and every response set forth in paragraphs "1" – "21" above, as if fully set forth herein.

23.   Admit the allegations set forth in paragraph "5" of the Verified Petition.

24.   Deny the allegations set forth in paragraph "6" of the Verified Petition.

25.   Deny the allegations set forth in paragraph "7" of the Verified Petition, and respectfully refer the Court to the statutes comprising the FOIL laws for a complete and accurate statement of their contents.

26.   Deny the allegations set forth in paragraph "8" of the Verified Petition.

27.   Deny the allegations set forth in paragraph "9" of the Verified Petition.

28.   Deny the allegations set forth in paragraph "10" of the Petition.

29.   Deny the allegations set forth in paragraph "11" of the Petition, except admit that Petitioner has exhausted its administrative remedies.

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[1] The Verified Petition ceases numbering paragraphs sequentially and, instead, starts anew with a designated paragraph "1." The Verified Answer will continue to be numbered sequentially, and will retain the Verified Petition's numbering only in the content of its response.

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30.   Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "12" of the Verified Petition.

31.   Deny the allegations set forth in paragraph "13" of the Verified Petition.

AS AND FOR A STATEMENT OF PERTINENT AND MATERIAL FACTS, RESPONDENTS RESPECTFULLY ALLEGE:

A.   Background and Procedural History

32.   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

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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 Petition, sworn to December 14, 2016 ("Petition") at Exh. "A."

33. By letter dated June 27, 2016, NYPD acknowledged that it had received Petitioner's FOIL request on June 20, 2016. The letter further informed Petitioner that the request had been assigned to a P.O. Halk, provided the Officer's phone number, and stated that the NYPD estimated that its review of the request, search for responsive records, and analysis of the applicability of any exemptions would take approximately ninety days. A copy of this letter is annexed hereto as Exhibit "1."

34. 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 Petition at Exh. "B."

35. Petitioner appealed NYPD's denial of its FOIL request by letter dated July 29, 2016. See Petition at Exh. "C."

36. 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 Petition at Exh. "D."

37. Petitioner then commenced the instant proceeding by filing a Verified Petition on December 15, 2016 to appeal NYPD's denial of its FOIL request.

B.   Responsive Documents

38. 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.

39. After its thorough and diligent search, NYPD now certifies that it did not locate any records responsive to FOIL Request numbers 4 and 8. *Id.* at ¶ 10.

40. 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.

41. 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.

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42.   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.

43.   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. *Id.* at ¶ 14.

44.   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.

45.   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. *Id.* at ¶ 16.

46.   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.

47.   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.   *Id.* at ¶19.

48.   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.

49.   The NYPD withheld (i) written and electronic notes maintained by Assistant Commissioner Evan S. 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"). *Id.* at ¶ 21.

C.   NYPD Properly Designated the Levine Documents as Exempt from Disclosure

50.   Evan Levine is the Assistant Commissioner of Data Analytics at the NYPD. *See* Affidavit of Evan Levine, sworn to on April 7, 2017 ("Levine Aff.") at ¶ 1. He is responsible for integrating analytic and operations research techniques into the NYPD's policing techniques, which includes developing the NYPD's predictive policing program. *Id.* at ¶¶ 1, 5.

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51.   Predictive policing is a tool to aid police decision making. Members of the NYPD can use the predictive policing tool to make predictions as to when and where certain crimes are likely to occur. *Id.* at ¶ 4.

52.   Mr. Levine, in consultation with other NYPD employees, developed the predictive policing program currently utilized by the NYPD since 2015 and utilized to date. Mr. Levine, in consultation with other NYPD employees, wrote the computer code that reads these and analyzes the data sources used in the program, and developed the algorithms that are applied to that analysis to make a prediction of where crime is likely to occur. The NYPD has not purchased, nor does it use predictive policing products or services of Palantir or any third party vendor. *Id.* at ¶ 5.

53.   The predictive policing system is available to NYPD Commanding Officers in Patrol Precincts, Transit Districts, and housing Bureau's Police Service Areas. The purpose of this system is to inform decisions as to where to effectively deploy manpower in order to prevent crime and apprehend perpetrators of crime. *Id.* at ¶ 9.

54.   The public disclosure of this information as it pertains 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. *Id.* at ¶10.

55.   A criminal armed with such information would be able to avoid detection by avoiding those locations while committing crimes. Furthermore, disclosing information that reveals deployment of NYPD personnel to the public and, therefore, potentially to individuals who seek to harm law enforcement officers, could jeopardize the lives and safety of the officers being deployed.

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D.   NYPD Properly Designated Portions of the Vendors Emails as Exempt from Disclosure and Properly Withheld All Records Reflecting Vendors' Results

56.   Before deciding to use the code and algorithm developed internally, the NYPD invited three vendors to demonstrate their policing products during a 45-day trial period. Those vendors were Azavea (a.k.a. HunchLab), Keystats, Inc., and PredPol (collectively, the "Vendors"). 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. Non-disclosure agreements were entered by all Vendors to further assure the confidentiality of the trial. *See* Affidavit of Douglas A. Williamson, sworn to April 7, 2017 ("Williamson Aff.") at ¶ 3.

57.   During the trial, each of the vendors emailed reports to NYPD on a daily basis. These reports reflected the results of vendors' algorithms attempts to predict incidents of certain crimes at certain locations. *Id.* at ¶ 5.

58.   Ultimately, NYPD elected not to use any of the vendors' products for predictive policing. *Id.* at ¶ 10; *see also* Levine Aff. at ¶ 5.

59.   There are not many companies that operate in the predictive policing field, and competition is fierce. Given such fierce competition, even small differences among providers in the quality and capabilities in the products offered (particularly the technology) can give a vendor a competitive advantage in the marketplace. Williamson Aff. at ¶¶ 6-7.

60.   Moreover, 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.

61.   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.

62.   Moreover, public disclosure of limitations of the vendors' products, as well as the opinions of NYPD staff, could discourage potential vendors from demonstrating products to the NYPD in the future, thereby limiting the pool of technology and equipment available to the NYPD. *Id.* at ¶10.

63.   Thus,   records reflecting the performance of the Vendors' technologies and the portions of communications between a Vendor and NYPD that reflect the results of the vendors' 45-day trials have been withheld to protect the vendors' from substantial injury to their competitive position.   Records reflecting the NYPD's evaluation of the Vendors' products and trial results have been withheld for the same reason.

64.   The draft presentation that was creating summarizing NYPD's analysis of the Vendors' trial results was also withheld as it was a non-final document drafted, and never finalized, solely to aid the NYPD in its deliberations to evaluate the Vendors' products. *See* Hernandez Aff. at ¶ 21.

65.   For all these reasons, the Verified Petition should be denied.

AS FOR A FIRST AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE:

66.   Respondent's actions were at all times lawful, proper, reasonable, and inconformity with applicable law.

AS FOR A SECOND AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE:

67.   Respondent has fully complied with its statutory obligations.

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AS FOR A THIRD AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE:

68. Petitioner has not satisfied the statutory requirements for an award of attorneys' fees and, therefore, is not entitled to such an award.

WHEREFORE, Respondents respectfully request that the Verified Petition be denied in its entirety, and that Respondents be awarded such other and further relief this Court deems just and proper.

Dated: New York, New York
             April 7, 2017

                             ZACHARY W. CARTER
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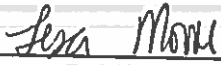## VERIFICATION

STATE OF NEW YORK   )

                            : ss.:

COUNTY OF NEW YORK   )

        LIEUTENANT LORI HERNANDEZ, being duly sworn, states that she is a Deputy Managing Attorney employed by the New York City Police Department; that she has been duly designated by the Police Commissioner of the Police Department of the City of New York, pursuant to Section 1101, subdivision (a) of the New York City Charter, to act on behalf of the Respondents for the purposes of verifying the pleading herein; that she has read the foregoing Verified Answer in <u>Brennan Center for Justice at New York University School of Law v. New York Police Department, et al.</u>, Index No. 160541/2016, and knows the contents thereof to be true, except as to matters alleged herein upon information and belief, and as to those matters she believes them to be true, based upon a review of NYPD records, a review of the documents attached in the Petition, and statements made to her by NYPD and other City employees.

Dated: New York, New York
       April 7, 2017

                                                            LORI HERNANDEZ

Sworn to and subscribed before me
on the 7th day of April 2017

_____
Notary Public

        LESA MOORE
    Notary Public, State of New York
        No. 02MO6174796
     Qualified in Bronx County
   Commission Expires 09/24/2015