

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

.....X

In the Matter of the Application of

UPTURN, INC.,

VERIFIED PETITION

For a Judgment Pursuant to Article 78 of the
New York Civil Practice Law and Rules,

Index No. _____

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

.....X

John Nathanson (from Shearman & Sterling LLP) and Albert Fox Cahn (from the Surveillance Technology Oversight Project, Inc.), attorneys for Petitioner Upturn, Inc., respectfully allege the following, based upon a review of the administrative record, information in the public record, and upon information and belief:

INTRODUCTION

1. This Petition, brought pursuant to Article 78 of the Civil Practice Law and Rules, seeks an order to compel the New York City Police Department (the “NYPD”) to disclose, pursuant to the Freedom of Information Law (“FOIL”), certain records in its possession pertaining to the use of mobile device forensic tools (“MDFTs”).

2. On February 13, 2019, Upturn submitted a FOIL request (the “Request”) to NYPD Records Access Officer (“RAO”) seeking records that fall in any one of seven categories of records relating to the NYPD’s acquisition and use of MDFTs, including purchase and use records, contracts, policies, and agreements with other agencies.

3. Five months after Petitioner submitted its request, the RAO denied the request in its entirety with a blanket statement that the NYPD FOIL Unit was unable to locate records responsive to Upturn's request based on the information Upturn provided. Upturn filed a timely administrative appeal of this determination on August 16, 2019, arguing that the RAO's sweeping denial was not reasonable.

4. On August 26, 2019, the Records Access Appeals Officer ("RAAO") denied Upturn's appeal. In its denial, the RAAO cited – with little elaboration – four separate exemptions under FOIL. These specific bases for denial were inconsistent with the NYPD's initial denial, which was nothing more than a blanket statement of denial citing no provision of FOIL. The RAAO's denial also asserted that elements of Upturn's request did not "reasonably describe" the records in a manner that could enable a search under FOIL.

5. The NYPD's denials of Upturn's FOIL requests and subsequent appeals – based on rote recitation of FOIL exemptions – violate both the spirit and the letter of the Public Officer's Law ("P.O.L.").

6. Upturn has exhausted its administrative remedies and now requires judicial relief to compel the NYPD to comply with its legal obligation under FOIL to diligently search for the requested records and to produce any and all records responsive to Upturn's request. The disclosure of these records is critical to informing the public of the types of MDFTs the NYPD uses, how the NYPD deploys MDFTs, what safeguards have been promulgated to ensure that the public's privacy and civil rights are protected, the costs of MDFTs to the public, the contractual terms that govern their use, and what agreements, if any, coordinate MDFT use amongst law enforcement agencies. Production of these records will enhance the ongoing public debate on whether the NYPD's use of such powerful technology is in the public interest.

7. Accordingly, for the following reasons, Petitioner seeks an Order from this Court directing NYPD to turn over all of the requested records, none of which are exempt from disclosure under FOIL.

VENUE

8. Venue lies appropriately in the County of New York because material events in this case took place in New York County, namely: receipt of the initial FOIL request; the initial response to the request; the subsequent appeal; and the appeal determination. *See* C.P.L.R. §§ 7804(b), and 506(b).

PARTIES

9. Upturn, Inc. is a 501(c)(3) nonprofit organization based in Washington, D.C., whose mission is to advance equity and justice in the design, governance, and use of technology. Through its scholarship, research, and advocacy, Upturn seeks to keep the public informed on issues of how digital technology affects public safety, criminal justice, and economic opportunity. It provides academic and policy foundations for reforms to consumer and government privacy laws, particularly for new digital technologies such as MDFTs.

10. The New York City Police Department is a law-enforcement agency administered under New York Administrative Code, Title 14. The NYPD is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 87; *see also* P.O.L. § 86(3).

FACTS

Background on Mobile Device Forensic Tools

11. MDFTs extract data from mobile devices, and can often circumvent a device's encryption and other security features. Additionally, MDFTs can enable law enforcement to access data normally inaccessible from the device's user interface, including deleted data and

system-level metadata, which refers to information about a piece of data including when it was created, and who created it. These capabilities have been the subject of broad public debate. For instance, United States Attorney General William Barr recently gave a speech criticizing technology companies for deploying user-controlled encryption, stating that law enforcement is most concerned with gaining access to “consumer-to-consumer communications, consumer devices, and data storage.” United States Department of Justice, *Attorney General William P. Barr Delivers Remarks at the Lawful Access Summit* (Oct. 4, 2019), available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-lawful-access-summit> (Exhibit E).

12. In fact, law enforcement use of digital forensics technologies such as MDFTs – and the NYPD’s use of such technologies in particular – has been the subject of a growing public debate over both the costs to the public and the overarching public interest in safeguarding law enforcement use of such technologies. For instance, in *Center on Privacy & Technology v. New York City Police Department*, 154060/2017 (N.Y. Sup. Ct. 2016) the NYPD and Georgetown University Law Center engaged in a multi-year FOIL litigation regarding disclosure of records pertaining to the NYPD’s use of facial recognition technology. That request, which sought information regarding law enforcement’s use of investigative technology that is distinct from MDFTs at issue here, resulted in this Court finding against the NYPD and forcing disclosure of large volumes of information pertaining to the NYPD’s use of facial recognition technology.

13. Public records confirm the existence of at least some of the records sought in the Request for information regarding the NYPD’s use of MDFTs. The NYPD states publicly on its website that its Computer Crimes Squad detectives “perform forensic examinations of digital and multimedia devices to develop evidence related to crimes.” *Detectives*, New York Police

Department (2019), available at

<https://www1.nyc.gov/site/nypd/bureaus/investigative/detectives.page>. Additionally, the NYPD has stated publicly that gaining access to mobile device forensic data has increasingly been of key concern to the Department's law enforcement activities. For instance, NYPD Commissioner James O'Neill has written prominently about law enforcement's intention to gain access to all forms of mobile device data, including an individual's "digital history, and encrypted communications." James O'Neill, *Commissioner O'Neill: We need Congress, Trump to Help Police Foil Terror Attacks on NYC*, NY Daily News (Dec. 12, 2017), available at <http://www.nydailynews.com/new-york/top-congress-nypd-stop-terrorists-article-1.3694403> (Exhibit F).

14. Moreover, law enforcement officials have written extensively about their intention to access encrypted mobile device data. *See, e.g.*, Manhattan District Attorney, *Smartphone Encryption and Public Safety* (Oct. 2019), available at <https://www.manhattanda.org/wp-content/uploads/2019/10/2019-Report-on-Smartphone-Encryption-and-Public-Safety.pdf> (Exhibit G); Manhattan District Attorney, *Smartphone Encryption and Public Safety* (Nov. 2018), available at <https://www.manhattanda.org/wp-content/uploads/2018/11/2018-Report-of-the-Manhattan-District-Attorney27s-Office-on-Smartphone-En....pdf> (Exhibit H).

15. New York state court records also indicate that NYPD officers have used MDFTs to execute search warrants seeking digital evidence on mobile devices. For example, in *People v. Frederick*, 33 N.Y.S.3d 881, 882 (N.Y. Sup. Ct. 2016), the NYPD executed a search warrant, seeking authorization to search electronic data on a cell phone and SIM card recovered from defendant. In *People v. Russell*, 61 Misc. 3d 1216(A) (N.Y. Sup. Ct. 2018), the NYPD Police

executed a warrant that allowed law enforcement agents to search all of the data stored on the defendant's cell phone without limitation. Additionally, in *People v. English*, 32 N.Y.S.3d 837 (N.Y. Sup. Ct. 2016), the NYPD searched the contents of a defendant's cell phone using forensic software. And in *People v. Watkins*, 46 Misc. 3d 207 (N.Y. Sup. Ct. 2014), the NYPD obtained a warrant authorizing the downloading of all data on the defendant's cell phone. In each of these cases, the circumstances surrounding the warrants and concomitant searches indicate that a MDFT must have been used to gather mobile forensic evidence.

16. Upturn has also learned from public records disclosed by the Manhattan District Attorney's Office that the NYPD has communicated with the Manhattan District Attorney's Office regarding the purchases of various MDFTs – particularly those manufactured by a leading vendor named Cellebrite – designed for law enforcement agencies. Despite public knowledge of the NYPD's use of MDFTs, the public lacks information about the total costs and parameters of the NYPD's use of MDFTs.

17. The use of MDFTs by law enforcement is an issue of significant public interest because they implicate the public's civil and privacy rights, including the public's expectations of privacy in their digital communications. As Justice Roberts put it in *Riley v. California*, “[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form.” 573 U.S. 373, 396–97 (2014). It is for precisely this reason that the public is entitled to understand the contours of the NYPD's use of MDFTs.

Upturn's FOIL Request

18. On February 13, 2019, Upturn submitted FOIL request 2019-056-02554 to the NYPD for, *inter alia*, all documents, reports, and records in NYPD's possession pertaining to the NYPD's use of MDFTs use of which is in the public record, as explained above.

19. In the Request, Upturn sought, *inter alia*, the following: (1) purchase records and agreements pertaining to the use of MDFTs, (2) records of use of MDFTs, (3) policies governing use of MDFTs, (4) federal communications regarding the use of MDFTs, (5) intrastate or regional communications regarding the use of MDFTs, (6) vendor communications regarding the use of MDFTs, and (7) nondisclosure agreements regarding the use of MDFTs. A copy of the Request is attached hereto as Exhibit A, and is incorporated by reference herein.

20. On July 19, 2019 – more than five months later – the RAO responded. The RAO denied the Request on the sole basis that the unit was unable to locate records responsive to the request based on the information Upturn provided. A copy of this response is attached hereto as Exhibit B, and is incorporated by reference herein. The NYPD provided no justification and cited no provision of FOIL for its withholding of the records requested by the Request.

21. Upturn appealed the RAO's determination on August 16, 2019, arguing that the RAO's denial of the Request was unlawful, and did not comply with the NYPD's duty to certify it could not locate the records in accordance with POL § 89(3)(a). A copy of Upturn's appeal is attached hereto as Exhibit C, and is incorporated by reference herein.

22. On August 26, 2019, the RAO responded by letter to Upturn's appeal (the "Appeal Determination"), stating in pertinent part:

Your request, pursuant to the Freedom of Information Law, was originally received by the FOIL unit on February 14, 2019 and subsequently denied because the RAO was unable to locate records responsive to your request.

First, to the extent that you seek "purchase records and agreements" (Item No. 1), "vendor communications" (Item No. 6), or "nondisclosure agreements" (Item No.

7) associated with numerous vendors, the appeal is denied because any contracts, communications or nondisclosure agreements associated with Mobile Device Forensic Tools (“MDFT”) utilized by this agency are confidential and are exempt in that disclosure would impair present or imminent contract awards or collective bargaining negotiations [Public Officers Law §87(2)(c)] or reveal trade secrets which would cause substantial injury to the competitive position of the subject enterprise(s) [§87(2)(d)].

Regarding Item No. 2 of your request for records of use, the appeal is denied because the request does not reasonably describe a record in a manner that could enable a search in accordance with POL §89(3). . . .

Regarding Item Nos. 4 & 5 for communications between this agency and other federal, local, county or regional agencies regarding MDFTs – specifically, as stated in footnote no. 8 of your February 13, 2019 request, for “communications pertaining to contracts and orders – the appeal is denied to the extent that any communications are exempt from disclosure as inter-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 [§87(2)(g)].

Finally, regarding Item No. 3 of your request for “policies governing use”, the appeal is denied because disclosure would reveal non-routine criminal investigative techniques or procedures [§87(2)(e)(iv)] and could reveal trade secrets [§87(2)(d)].

A copy of this letter is attached hereto as Exhibit D and is incorporated by reference herein.

23. Petitioner has now exhausted all available remedies as required by CPLR § 7801(1). In its August 26, 2019 letter, the NYPD indicated that Petitioner “may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.” Exhibit D.

24. Attorneys for Petitioner now bring this action to seek an Order from the Court directing the NYPD to produce its records forthwith in accordance with FOIL.

FIRST CAUSE OF ACTION

25. Petitioner incorporates each allegation in this Petition into this Cause of Action.

26. Under C.P.L.R. § 7803(1), a mandamus proceeding properly lies when a public administrative agency has failed to perform a duty enjoined upon it by law.

27. The NYPD has sole control over its own records and specifically the records to which Petitioner seeks access.

28. The NYPD's determination to deny Petitioner access to the requested records is, for the aforementioned reasons, a failure to uphold its legal duty under FOIL and the P.O.L.

29. Petitioner has exhausted its administrative remedies and has no adequate remedy at law to obtain the relief sought herein.

SECOND CAUSE OF ACTION

30. Petitioner incorporates each allegation in this Petition into this Cause of Action.

31. Under C.P.L.R. § 7803(3), a mandamus proceeding properly lies when a determination by a public administrative agency was made in violation of lawful procedure or was affected by an error of law or was arbitrary and capricious or an abuse of discretion.

32. The NYPD has sole control over its own records and specifically the records to which Petitioner seeks access.

33. The NYPD's determination to deny Petitioner access to the requested records is, for the aforementioned reasons, a violation of lawful procedure, an error of law, or was arbitrary and capricious.

34. Petitioner has exhausted its administrative remedies and has no adequate remedy at law to obtain the relief sought herein.

REQUEST FOR RELIEF

WHEREFORE, Petitioner now requests that a judgment be entered:

Ordering, adjudging and directing that the NYPD immediately grant access to all the records previously requested by Petitioner under FOIL by Petitioner's February 13, 2019 letter (*i.e.*, the Request);

Declaring that the NYPD's decision to deny access to the requested records was a violation of its legal duty, arbitrary and capricious, an abuse of discretion and erroneous as a matter of law, and should be annulled; and,

Directing the NYPD to produce all requested records in unredacted form and awarding reasonable attorney's fees and costs under P.O.L. § 89 (4)(c), and all other relief that the Court deems just and proper.

Dated: New York, New York
December 23, 2019

Respectfully submitted,

/s/ John Nathanson
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VERIFICATION

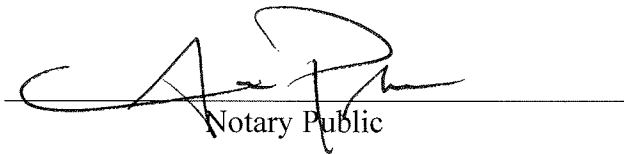
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

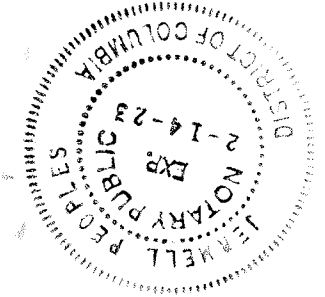
Harlan Yu, Executive Director of Upturn, Inc., Petitioner, do solemnly swear and affirm under penalty of law that I have read the foregoing Petition and know the contents thereof and that the Petition is true to the best of my knowledge, information, and belief.

Dated: Washington, D.C.
December 20, 2019


HARLAN YU

Sworn before me this 20th day of December, 2019


Notary Public



State of DC County of District of Columbia
I appeared and sworn to (or affirmed) before me on this
20th day of December, 2019 by
Harlan Yu proved to me on the basis
of satisfactory evidence to be the person(s) who appeared before me.
My Signature 