

Index No. 152641/2023

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

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In the Matter of

SURVEILLANCE TECHNOLOGY OVERSIGHT  
PROJECT,

Petitioner,

-against-

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

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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**MEMORANDUM OF LAW IN SUPPORT OF  
CROSS-MOTION TO DISMISS AND EXHIBITS**

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## PRELIMINARY STATEMENT

Petitioner brings this proceeding pursuant to CPLR Article 78 and Public Officers Law (“POL”) § 84, et seq., also known as the Freedom of Information Law (“FOIL”), seeking review of the NYPD’s response to ten (10) separate FOIL requests; and review of the NYPD’s practice in responding to FOIL requests, generally. As discussed more fully below, however, this proceeding is premature as Petitioner has not been denied access to requested records in a final agency determination in any of their ten challenged FOIL requests. Accordingly, Petitioner has failed to exhaust its administrative remedies prior to the commencement of this proceeding. Since Petitioner cannot demonstrate that the condition precedent to instituting an Article 78 proceeding required by POL § 89(4)(b), namely that there has been a final denial by the agency in an administrative appeal proceeding, has been satisfied, the Court lacks subject matter jurisdiction and this matter should be dismissed.

Petitioner’s statistical compilations, allegedly obtained from NYC Open Records website,<sup>1</sup> indicates Respondent routinely fulfills its obligation, pursuant to POL § 89(3), to acknowledge FOIL requests within five business days and then provide a date for an anticipated determination, to grant or deny a request. As there is no factual support for Petitioner’s challenge to NYPD’s responses to FOIL requests, this claim, too, should be dismissed.

Based on the foregoing, Respondent’s cross-motion should be granted and the Petition should be dismissed in its entirety.

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<sup>1</sup> Respondents review indicates slightly smaller numbers received and remaining open but nonetheless, Respondent will reference the information cited by Petitioner as the percentages are comparable. 2019 (23,367 submitted and 687 open), 2020 (19,020 submitted and 1,792 open), 2021 (19,175 submitted and 3045 open) and 2022 (24,059 submitted and 5,672 open).

## FACTUAL BACKGROUND

### **Petitioner's FOIL Requests**

#### I. FOIL Requests 2022-056-20074, 20075, 20072, and 20077

By Open Records requests dated November 2, 2022, Petitioner submitted four requests, seeking documents related to the NYPD's use of CLEAR and PeopleMap; Internet Attribution Management Infrastructure; Lexis Nexis Accruint; and Social Network Analysis Tools ("the November Requests"). See Affirmation in Support of Cross Motion to Dismiss ("Gold Affirmation") at ¶¶ 8. The NYPD's Records Access Officer ("RAO") timely acknowledged receipt of these requests, and indicated that a response could be expected on or about March 24, 2023, amounting to approximately 94 business days, and indicating that additional extensive delays may last up to one year, due to issues caused by the COVID-19 pandemic. See id. at ¶ 9.

A mere *twelve business days* after the FOIL requests were submitted, Petitioner submitted, via email dated November 18, 2022, purported appeals to the Records Access Appeals Officer ("Appeals Officer") of each of the four aforementioned requests, claiming constructive denial of the FOIL requests. See Gold Affirmation at ¶ 10. In response, the Appeals Officer informed Petitioner that each purported appeal was premature because the RAO had not yet issued a determination on the requests, and had complied with the statutory duty to acknowledge the request within five business days and provide an approximate date for a full response. See Gold Affirmation at ¶ 11. The Appeals Officer further explained that the estimated RAO response date of March 24, 2023, was based on "the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether materials fall within one of the exceptions to disclosure." Id. Finally, the Appeals Officer noted that the RAO responses were still pending. Id.

On April 10, 2023, due to the continued diligent search, the RAO extended its anticipated response time for each of these requests to August 2, 2023. See Gold Affirmation at Exhibit “1.”

## II. FOIL Requests 2022-056-23655, 23654, 23652, 23653, and 23650<sup>2</sup>

By Open Records requests, dated December 22, 2022, Petitioner submitted five requests, pursuant to FOIL, seeking documents related to the NYPD’s “expenditures on facial recognition;” emails with Clearview AI, Inc.; records related the NYPD’s product trials; and emails with specified terms from 18 listed domains (“the December Requests”). See Gold Affirmation at ¶ 13. The NYPD’s RAO timely acknowledged receipt of each these requests, and informed Petitioner that a response could be expected “on or about Wednesday, May 10, 2023,” amounting to approximately 92 business days. See Gold Affirmation at ¶ 14.

Just *thirty four business days* after the FOIL requests were made, Petitioner submitted, via email dated February 14, 2023, purported appeals to the Appeals Officer claiming each of the aforementioned five requests had been constructively denied. See Gold Affirmation at ¶ 15. By letters and emails dated February 16, 2023, the Appeals Officer informed Petitioner that each appeal was premature because the RAO had not yet issued a determination on his requests, and had complied with the statutory duty to acknowledge the request within five business days and provide an approximate date for a full response. See Gold Affirmation at ¶ 16. The Appeals Officer further explained that the estimated RAO response date of March 24, 2023, was based on “the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether materials fall within one of the

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<sup>2</sup> It should be noted that in the causes of action listed in the Verified Petition, FOIL Request 2022-056-23655 is listed twice, first at paragraph 56, then again at paragraph 60. As FOIL Request 2022-056-23650 is addressed in Petitioner’s exhibits, it is similarly addressed here. See Verified Petition as NYSCEF Doc. No. 1.

exceptions to disclosure.” Id. Finally, the Appeals Officer noted that the RAO response was still pending. Id.

On May 2, 2023, due to the continued diligent searches, the RAO extended its anticipated response time for each request to August 2, 2023. See Gold Affirmation at Exhibit “2.”

### III. FOIL Request 2023-056-01856

By Open Records request, dated January 25, 2023, Petitioner submitted a request, pursuant to FOIL, seeking documents related to the recording of attendees of a Drake concert at the Apollo Theater on January 21, 2023. See Gold Affirmation at ¶ 18. By email dated January 31, 2023, the NYPD’s RAO acknowledged receipt of Petitioner’s request and informed Petitioner that a response could be expected “on or about Friday, June 9, 2023,” amounting to approximately 90 business days. See Gold Affirmation at ¶ 19.

Just *thirteen business days* after the FOIL request, Petitioner submitted, via email dated February 14, 2023, a purported appeal to the Appeals Officer claiming constructive denial of this FOIL request. See Gold Affirmation at ¶ 20. By letter and email dated February 16, 2023, the Appeals Officer informed Petitioner that his appeal was premature because the RAO had not yet issued a determination on his request, and had complied with the statutory duty to acknowledge the request within five business days and provide an approximate date for a full response. See Gold Affirmation at ¶ 21. The Appeals Officer further explained that the estimated RAO response date of March 24, 2023, was based on “the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether materials fall within one of the exceptions to disclosure.” Id. Finally, the Appeals Officer noted that the RAO response was still pending. Id.

On June 6, 2023, due to the continued diligent search, the RAO extended its anticipated response time to August 2, 2023. See Gold Affirmation at Exhibit “3.”

## **ARGUMENT**

### **POINT I**

#### **PETITIONER FAILED TO EXHAUST MANDATORY ADMINISTRATIVE REMEDIES**

POL § 89(4)(b) confers subject matter jurisdiction in a CPLR Article 78 proceeding brought pursuant to FOIL only *after* a request for records has been made and denied, and then further denied upon a timely administrative appeal. See POL § 89(4)(b).

It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law. This doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference...and affording the agency the opportunity...to prepare a record reflective of its 'expertise and judgment.

See Watergate II Apts. v. Buffalo Sewer Authority, 46 N.Y.2d 52, 57 (1978) (internal citations omitted). Prior to any determination of the FOIL request by the RAO or a final appeal determination by the Appeals Officer, litigation may not be maintained. See McGriff v. Bratton, 293 A.D.2d 401 (1st Dep't 2002); Almodovar v. Altschuller, 232 A.D.2d 700 (3rd Dep't 1996); Cosgrove v. Klingler, 58 A.D. 910 (3rd Dep't 1977); Babi v. David, 35 A.D.3d 266 (1st Dep't 2006); see also Tinker Street Cinema v. State DOT, 254 A.D.2d 293 (2nd Dep't 1998).

The FOIL process is an administrative process within an administrative agency. Thus, so long as there has not been a final administrative determination which forecloses further avenues of administrative relief, a court lacks subject matter jurisdiction over such proceedings. In the FOIL context, the courts have recognized that administrative remedies are exhausted only after the agency has completed the FOIL request and has rendered a final adverse determination



of any administrative appeal of that request. See Carty v. N.Y. City Police Dep't, 41 A.D.3d 150 (1st Dep't 2007).

In the case at bar, Petitioner commenced this proceeding prior to receiving even an *initial* agency determination from the NYPD's RAO on any of the ten FOIL requests at issue. Despite Petitioner's purported appeal of each FOIL request to the Appeals Officer, such appeals were in reality premature, as no RAO determination had been rendered, and the searches were still ongoing. In fact, Petitioner purportedly appealed and brought litigation *before* the date by which the RAO had anticipated a determination would be issued on any of the ten FOIL requests. Since Petitioner was not denied access to records in a final agency determination prior to commencing this action, they did not meet a mandatory condition precedent to the commencement of an Article 78 proceeding. See Matter of Empire Ctr. for Pub. Policy, Inc. v N.Y.C. Off. of Payroll Admin., 158 A.D.3d 529 (1st Dep't 2018).

Petitioner's argument that it was constructively denied access to the requested records is without merit. Foremost, as detailed at ¶ 24 of the Gold Affirmation, Petitioner's November 2022 requests were submitted to the Department after 20,000 plus additional requests had already been sought by other FOIL requesters in 2022, and so Petitioner's requests would have to be processed after the pending FOIL requests submitted before them. By November 1, 2022, Respondent had at a minimum 7,153 requests still open to process from just 2022 ahead of Petitioner's first four requests. Additionally, by the time Petitioner's December 2022 requests were received by Respondent, another 3,000 FOIL requests were ahead of Petitioner's fifth through ninth FOIL requests. These 3,000 requests would have to be also processed before Petitioner's requests. Therefore, by December 21, 2022, Respondent had at least 8,316 open requests to process before Petitioner's fifth through ninth requests. Given the volume of request

pending before Petitioner's requests, it was reasonable to provide Petitioner an extended response time.

Further, Petitioner requested large, varied, and complex sets of records across ten separate FOIL requests. As none of Petitioner's requests sought only a single document easily retrievable from a single database or source, Petitioner's requests necessitate the RAO to direct diligent searches of computer records and records from varied NYPD units outside of the FOIL Unit. Accordingly, Respondent continues to perform diligent searches for, and review numerous records located for responsiveness to Petitioner's request. The RAO responses to the requests are forthcoming, and should begin to be made on or before the deadlines set in Respondent's emails.

Given the volume of requests already pending with the agency, the number of varied documents, and computer searches required to fulfill Petitioner's requests, an estimated response time of 90 business days is not unreasonable. See Matter of Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 465 (2007) (noting that FOIL does not mandate a "specific time period in which the agency must grant access to the records," and that complying with a request "for an enormous number of records may require substantial time and expense . . . and may not . . . require the [agency] to provide such records in a time other than that which is reasonable in view of the attendant circumstances"); see also Miller v. New York State DOT, 58 A.D.3d 981 (3d Dep't 2009) (finding a three month delay in inspecting responsive documents was reasonable given the circumstances, including volume of responsive documents and their relevance to ongoing projects); Matter of Kirshstein v. David, 2010 N.Y. Misc. LEXIS 1876 at \* 4-5 (Sup. Ct. N.Y. Cnty. Apr. 19, 2010) (finding that FOIL "does not provide for a specific time within which an agency must grant access to records," and noting that such time period "may be dependent on a number of factors, including the volume of the request and the retrieval methods" (quoting Matter

of Data Tree, LLC, 9 N.Y.3d at 465 (2007) (internal quotation marks omitted)).

Furthermore, the extension of an additional 90 business days to August 2, 2023, is also reasonable given the other units whose responses are required, the number of records that need individualized review to determine responsiveness to the requests, *and then* to determine whether or not they are exempt from disclosure or require redaction. Additionally, Petitioner was informed when the requests were initially made that after-effects from the COVID-19 Pandemic were still in effect, and could cause significant delays.

“Public Officers Law § 89(3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute.” N.Y. Times Co. v. City of N.Y. Police Dep’t, 103 A.D.3d 405, 406-407 (1st Dep’t 2013), lv to appeal denied, 22 N.Y.3d 854 (2013) (internal citation omitted). Accordingly, the First Department has held that a petitioner’s obligation to wait for a final determination is not negated by the administrative agency’s failure to respond to a FOIL request in a “timely fashion.” See Carty, 41 A.D.3d at 150 (citing Matter of Taylor v. New York City Police Dep’t FOIL Unit, 25 A.D.3d 347 (1st Dep’t 2013)). In fact, Petitioner’s Request could be considered constructively denied only if Respondents *failed to respond* within a reasonable time after the anticipated date. See Matter of Kohler-Hausmann v. New York City Police Dep’t, 133 A.D.3d 437, 437 (1<sup>st</sup> Dep’t 2017); Matter of Gajadhar v. New York Police Dep’t, 2018 N.Y. Misc. LEXIS 5078, \* 4 (Sup. Ct. N.Y. Co. Nov. 8, 2018). That was not the case here, as the anticipated time for NYPD’s response has not yet arrived.

Any argument to the contrary has been squarely rejected by the First Department. For example, in Matter of Empire Ctr. for Pub. Policy, Inc. v. N.Y.C. Off. of Payroll Admin., 158

A.D.3d 529, 530 (1<sup>st</sup> Dep't 2018), leave den., 31 N.Y.3d 910 (2018), the First Department explained that the petitioner's administrative appeal was premature where, as here, the agency had advised the petitioner it required additional time to respond. In doing so, the First Department unanimously reversed the holding of the lower court and rejected its finding that "petitioner properly took respondent's multiple, lengthy delays in excess of the time periods delineated under the statute to constitute a constructive denial of the FOIL request." Matter of Empire Ctr. for Pub. Policy, Inc. v. N.Y.C. Off. of Payroll Admin., 2017 N.Y. Misc. LEXIS 263, \* 4 (Sup. Ct. N.Y. Jan. 18, 2017). See Matter of Advocates for Children of N.Y., Inc., 101 A.D.3d at 446 (1<sup>st</sup> Dep't 2012) (finding petitioner's administrative appeal premature, "given that respondents' efforts to respond to the request within the applicable time limitations were ongoing").

These principles are well illustrated by Matter of Gianella v. Port Auth. of N.Y. & N.J., 45 Misc. 3d 1204(A), 2014 N.Y. Misc. LEXIS 4283 (Sup. Ct. N.Y. Co. Sept. 19, 2014). There, the petitioner commenced an Article 78 proceeding seeking disclosure of records responsive to its FOIL request, alleging that its FOIL request had been constructively denied. The court noted that the responding agency provided the petitioner letters on October 25, 2013, November 7, 2013, December 26, 2013, January 29, 2014, February 6, 2014, February 21, 2014, March 19, 2014, April 8, 2014 and May 7, 2014, advising that additional time was required to make a determination. The Court, however, held that "[w]here the [agency] has yet to either grant or deny a FOIL request due to ongoing efforts to determine the accessibility of records, there is no constructive denial." Accordingly, the Court dismissed the petition as premature, explaining that the petitioner had commenced the Article 78 proceeding prior to the agency's final determination. 2014 N.Y. Misc. LEXIS 4283, at \* 2-3. See Matter of Huseman v. New York City Dept of Educ., 2016 N.Y. Misc. LEXIS 1951, \*19-23 (Sup. Ct. N.Y. May 25, 2016) (rejecting argument that

FOIL request was constructively denied, where agency provided several letters extending date by which it would provide a determination).

The Appellate Division, First Department, has found that a Petitioner's obligation to wait for a final administrative determination is not negated by the administrative agency's failure to respond to a FOIL request in a "timely fashion." Here, there has been a substantial delay. However, because the RAO has not informed Petitioner whether or not it will be granting Petitioner's original record request, he has not been "denied access to a record in an appeal determination." Thus, no final determination has been made on Petitioner's appeal.

Matter of Yonamine v. New York City Police Dep't, 2011 N.Y. Misc. LEXIS 775, \*5 (Sup. Ct. N.Y. Co. Mar. 1, 2011) (citations omitted). Such also is the case here.

Here, the Appeals Officer informed Petitioner of the reasons for the delays in the processing of the FOIL requests. As such reasons are legitimate and reasonable, they do not support a finding that Petitioner has been constructively denied access to the records by Respondent. See NYSCEF Doc. No. 14 – 17, 36.

Based on the foregoing, the entirety of this proceeding is premature, and should be dismissed for lack of subject matter jurisdiction.

## POINT II

### **RESPONDENT'S PROCESSING OF FOIL REQUESTS IS REASONABLE**

Petitioner's argument at Section II of their Memorandum of Law that Respondent engages in a pattern and practice of FOIL obstruction is inaccurate and belied by the very facts presented by Petitioner. See NYSCEF Doc. No. 41. Accordingly, Petitioner's request for a monitor must be denied. It is settled law that POL § 89(3) "does not require a grant or denial of a FOIL request within 20 days of the five-day "acknowledgment" notice... Indeed [POL] § 89(3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were

inconsistent with the statute.” See N.Y. Times Co., 103 A.D.3d 406-407. In N.Y. Times, the First Department declined to find that NYPD’s processing of FOIL requests and appeals are “as a matter of practice untimely and to order [NYPD] to cease this practice.” Id. at 406. In so doing, the First Department relied in part upon its prior holding in Legal Aid Soc’y v. N.Y. City Police Dep’t, 274 A.D.2d 207 (1st Dep’t 2000), which dismissed the petition of four criminal defendants who argued that the NYPD failed to timely respond to their FOIL requests, as their response exceeded the time period outlined in the Rules of the City of New York. See id. In dismissing the petition, the First Department found that the 10-day period of the Rules of the City of New York was inconsistent with the FOIL statute, and therefore, “imposition of [that time period for a response] was improper.” Id. At 215.

In N.Y. Times, the Appellate Division reiterated that a “FOIL requester's statutory remedy for an untimely response or ruling is to deem the response a denial and commence a CPLR article 78 proceeding for review of such denial.” See N.Y. Times at 406 (internal quotation marks and citations omitted). As detailed herein, see supra at p. 11 -13, Petitioner has not been constructively denied, but rather the processing of their requests has been slowed by the large number of additional FOIL requests pending at the time that Petitioner’s requests were submitted; the volume and complexity of Petitioner’s requests; and the need for a diligent search for same in multiple units outside of Respondent’s FOIL Unit.

As to the volume of requests received by Respondent, Petitioner’s own statistical compilations show that Respondent received 85,857 FOIL requests, and processed and closed 86% of those requests, or 73,791 FOIL requests, within the four year period of 2019 through 2022. See NYSCEF Doc. No. 1 at ¶ 34. Those requests would have been completed by granting the record request, denying a request, or a combination of both. Petitioner’s analysis shows that more than

20,000 plus requests were marked with a due date within less than 15 business days, and that number increases to more than 35,000 requests marked with a due date within less than 45 business days from the submission of the request. Only 14% of requests in that four year period remained open in March 2023, with the highest number of remaining open records being from the years closest in time to 2023; less than 3% of FOIL requests that remain open are from 2019, but 26% of requests that remain open are for the year 2022. The fact that only 14% of requests remain open for the four year, despite the very large number of requests received, demonstrates that there cannot be a pattern or practice by Respondent to obscure access to records. Furthermore, Petitioner admits production of records are provided even if the process is delayed by the large volume of requests received each month by Respondent. See NYSCEF Doc. No. 1 at ¶ 38.

Moreover, Respondent's acknowledgments forwarded to Petitioner in November 2022, called their attention to the staffing challenges faced by the NYPD's FOIL Unit given the long term effects of the COVID – 19 pandemic and the need to anticipate delays in the processing of its complex requests. See NYSCEF Doc. No. 6 - 9. As of May 22, 2023, the FOIL Unit had eleven (11) investigators assigned. However, two (2) of the investigators are on leave; and two (2) have only been assigned to the FOIL Unit since April of 2023. Therefore, the NYPD has a relatively small staff of investigators handling the unwieldy volume of requests described above.

Lastly, and most importantly to this inquiry, is that Petitioner grossly underestimates how complex FOIL requests, like the ones that they routinely submit, truly are. While some requests, such as those seeking a specific document related to a specific occurrence can be handled easily by the FOIL Investigator themselves, several other types of requests require coordination across various units. Here, none of Petitioner's requests sought a single document from a single database. Accordingly, Petitioner's requests for emails requires coordination with

the NYPD's E-Discovery Unit, which handles e-discovery for the entire Department, not just for FOIL. Further, and as to Petitioner's requests specifically, requests seeking information regarding use and acquisition of technologies require consultation with, at minimum, the Office of the Deputy Commissioner, Management and Budget; and the Office of the Chief of Information Technology. Depending on how the purchase was effectuated, other units may need to be consulted as well. Moreover, in the instance where the requestor, like Petitioner has done in many of the FOIL requests discussed herein, is seeking information regarding a category of technology, the FOIL Investigator must reach out to each unit that does or is likely to use the relevant technology, and seek responsive documents from each unit. As explained in response to Petitioner's purported appeals, see NYSCEF Doc. No. 14 – 17, 36, once the FOIL Investigator receives records from these various units, the documents still need to be reviewed to ensure that they are, in fact, responsive and then determine if any exemptions apply, and if withholding the document or applying redactions is appropriate.

Given the number of FOIL Investigators; the volume of requests received by the NYPD; and the minimum steps necessary outlined here to effectuate a diligent search, the need for sufficient time to respond to a requestor is not surprising. Most telling are the numbers assigned to Petitioner's FOIL requests: 2022-056-20074, 20075, 20072, 20077, 23655, 23653, 23650, 23654, and 23652. Based on the last set of digits, these tracking numbers indicate that that in excess of 20,000 FOIL requests had already been submitted to Respondent's FOIL Unit for processing in 2022 when Petitioner's November FOIL submissions were received; and an additional 3,000 requests were filed ahead of Petitioner's December 2022 requests. Even the request Petitioner made in January of 2023 had over 1,800 requests made ahead of it in just January of 2023 alone. Due to the backlog of pending requests and the continuing accumulation of



requests, the FOIL Unit had thousands of request to address before completing Petitioner's request, any number of them just as complex as the requests Petitioner made. Therefore, it is not surprising that it often takes NYPD at least 90 business days, and often in excess of 90 business days, to respond to a FOIL request and to release any responsive documents that were located.

Further, Petitioner's complaint that Respondent denies access to records on the basis of the FOIL exemptions is not a basis for a monitor. See NYSCEF Doc. No. 1 at ¶ 40. Petitioner's complaint is essentially that Respondent complies with the FOIL statute. Numerous courts have upheld the use of the exemptions by agencies to withhold records for the very exemptions cited by Petitioner. In Timmons v. Records Access Officer, 271 A.D.2d 320 (1st Dep't 2000), the Appellate Division, First Department held that Petitioner must "supply the information required to retrieve the requested documents." In Newton v. District Attorney of Bronx Cnty., 186 A.D.2d 57 (1st Dep't 1992), the First Department found that the Bronx District Attorney was permitted to withhold medical records in its possession, as disclosure of the same would constitute an unwarranted invasion of personal privacy. In Leshner v. Hynes, 19 N.Y.3d 57 (2012), the Court of Appeals found that where an agency identifies categories of records to be withheld, and identifies the generic harm that disclosure would cause, then the agency may withhold such documents to prevent interference with an ongoing investigation or judicial proceeding. In Fink v. Lefkowitz, 47 N.Y.3d 567 (1979), the Court of Appeals upheld the non-disclosure of an agency guide to prevent the "safe cracker" from having the combination to the safe – the non-routine investigative technique – that is, an agency is not required to disclose that which could be used by "violators" to "evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued" by the agency. Id. At 572. In Matter of 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), the First Department

found that documents identifying non-testifying witnesses in a gang-related homicide were properly withheld, as it was demonstrated that disclosure could lead to a “possibility of endangerment.” Bellamy, 87A.D.3d at 875 (quoting Matter of Connolly v. New York Guard, 175 A.D.2d 372 (3d Dep’t 1991)).

Based on the foregoing, it is clear that the NYPD does not have a pattern and practice of delaying FOIL responses; instead, FOIL requests received by the Department are often complex, and require input from varying units throughout the Department, and therefore routinely take time to perform a diligent search. Further, Respondent’s use of the exemptions provided in the POL cannot be the basis of a need for a monitor. Accordingly, Petitioner’s pleading fails to state a cause of action for the request for a monitor based on its incorrect and unsupported claim that Respondent delays the processing of FOIL requests to deter and hide information from the public.

### POINT III

#### **PETITIONER’S REQUEST FOR ATTORNEY’S FEES IS PREMATURE**

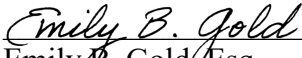
Pursuant to FOIL’s fee-shifting provision, a court may only award reasonable counsel fees and litigation costs to a party if the Court finds the party “substantially prevailed” in the proceeding. See POL 89(4)(c). “A petitioner ‘substantially prevail[s]’ under [POL] § 89(4)(c) when [he or she] ‘receive[s] all the information that [he or she] requested and to which [he or she] is entitled in response to the underlying FOIL litigation.’” See Matter of Competitive Enter. Inst. v. Attorney Gen. of New York, 161 A.D.3d 1283, 1286 (3d Dep’t 2018) (quoting Matter of New York State Defenders Ass’n v. New York State Police, 87 A.D.3d 193, 196 (3d Dep’t 2011)). Here, Petitioner has failed to demonstrate that it has “substantially prevailed.” Thus, it is respectfully submitted that it would be premature to address attorney’s fees and litigation costs at this juncture.

**CONCLUSION**

WHEREFORE, by virtue of the foregoing, Respondent respectfully requests that this court grant its cross-motion, issue an order denying the Verified Petition and dismissing the instant proceeding in its entirety, and granting Respondent such other and further relief as may be just and proper.

The undersigned counsel certifies that, to the best of my knowledge, information and belief, formed after a reasonable inquiry, the presentation of the within litigation papers and of the contentions therein, is not frivolous as defined in subsection (c) of 130-1.1.

DATED: New York, New York  
July 7, 2023

  
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LB4 12/23

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

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In the Matter of the Application of  
SURVEILLANCE TECHNOLOGY OVERSIGHT  
PROJECT,

Petitioner,

-against-

**CERTIFICATE OF  
COMPLIANCE**

Index No. 152641/2023  
(Moyne, J.)

NEW YORK CITY POLICE DEPARTMENT,

Respondents.

For a Judgment under Article 78  
of the Civil Practice Law and Rules

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This affirmation is submitted in compliance with 22 NYCRR Section 202.8-b.

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