SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
.....x
In the Matter of the Application of

SURVEILLANCE TECHNOLOGY
OVERSIGHT PROJECT, INC.,

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

REPLY AFFIRMATION IN SUPPORT OF VERIFIED ARTICLE 78 PETITION AND IN OPPOSITION TO RESPONDENT'S CROSS-MOTION TO DISMISS

Petitioner,

-against-

Index No. 155486/20
(Rakower, J.)

NEW YORK CITY POLICE DEPARTMENT,

Respondent.
.....x

JOHN A. NATHANSON, an attorney duly admitted to practice before the courts of this state, affirms under penalty of perjury pursuant to CPLR Rule 2106 that the following statements are true, except for those made upon information and belief, which he believes to be true:

1. I am partner at the law firm of Shearman & Sterling LLP, which represents Petitioner, the Surveillance Technology Oversight Project, Inc. ("STOP"), against Respondent, the New York City Police Department ("NYPD"), in the above captioned proceeding.

2. I submit this affirmation, and the annexed exhibit, on behalf of Petitioner, in support of Petitioner's verified Article 78 petition and in opposition to Respondent's cross-motion to dismiss this proceeding.

3. I have prepared this affirmation upon information and belief, based upon records of the matter maintained by Shearman & Sterling LLP, which I believe to be true and accurate.

PRELIMINARY STATEMENT

4. Respondent, the NYPD, argues that Petitioner, STOP, has not provided enough detail about the NYPD's own facial recognition technology ("FRT") program or the NYPD's own records custodians to allow the agency to identify responsive documents. The public does not know details of the NYPD's FRT program or the nature of its records custodians, while the NYPD obviously knows these things intimately. Yet, despite STOP's efforts to guide the NYPD's search for responsive documents using the little publicly available information that exists, the NYPD, with its superior knowledge, has shrugged its shoulders and proclaimed, "not enough."

5. Over the past year, the NYPD has strung STOP along with offers to work together to collect information responsive to STOP's reasonable and legitimate requests; those offers have only served the NYPD's interest in delay. This petition asks that the NYPD be ordered to produce the requested information concerning its use of FRT in the public square: information that its employees utilize daily, that it is legally obliged to produce, and that the public is entitled to know.

ARGUMENT

I. The NYPD Fails To Show That STOP's FOIL Request Falls Within An Applicable Exemption

6. STOP's Initial Request[1] is a simple, clear demand that the NYPD produce documents regarding its use of FRT in a specific location over a limited period of time. The request's goals are consistent with the New York state legislature's policy of promoting governmental transparency. *Grabell v. N.Y. City Police Dep't*, 996 N.Y.S. 2d 893, 905 (N.Y. Sup. Ct. N.Y. Cnty. 2014) ("the public is vested with an inherent right to know and that official secrecy

[1] "Initial Request" in this memorandum of law shall refer to FOIL Request 2019-056-17831. The NYPD refers to this request as the "October Request." To maintain consistency with its Verified Petition, STOP uses the original nomenclature. Similarly, FOIL Request 2019-056-20622 shall be referred to as "Revised Request" rather than "November Request."

is anathematic to our form of government.") (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). The burden thus falls on the NYPD to demonstrate "that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Time Warner Cable News NY1 v. New York City Police Dep't*, 36 N.Y.S.3d 579, 587 (N.Y. Sup. Ct. N.Y. Cnty. 2016). The NYPD has not met that burden here.

7. The NYPD objects to STOP's Initial Request, *first* because it fails to "reasonably describe[]" the records sought and thus is impermissibly vague, and *second*, because it is unduly burdensome as it would require a search of numerous case files. NYSCEF Doc. No. 36 at ¶¶ 27-28, 39. With respect to vagueness, the NYPD's argument really boils down to its complaint that there are too many case records to search. In other words, the NYPD makes the same error as respondent in *Jewish Press, Inc. v. New York City Dep't of Educ.* in "conflat[ing] the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner's request."[2] 122 N.Y.S.3d 679, 682 (2d Dep't 2020). STOP's Initial Request, however, adequately described the records in terms of subject matter, geographic area and time period to enable a search; that the NYPD must look through many of its own records to identify the sought-after documents does not demonstrate that STOP's description is impermissibly vague. As to the separate burden issue, the NYPD's argument is based on its citation to an artificially inflated number of case files and on the unsupported assertion that an outside vender could not effectively be used to facilitate any search.

A. The NYPD Understands What Records Are Sought

8. The NYPD denied the Initial Request on the theory that it did not adequately

[2] In other words, the NYPD cannot use burden evidence to suggest that STOP's request does not reasonably describe the requested records. *Jewish Press*, 122 N.Y.S.3d at 682.

describe the records sought. NYSCEF Doc. No. 5. This decision was an error of law, as FOIL simply requires a petitioner to "reasonably describe" the documents to enable the agency to locate the records at issue. *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 826 (3d Dep't 1983) ("The description set forth was sufficiently detailed to *enable the respondent governmental agency to locate the records in question*. Once this requirement was met, the agency could not complain about the nomenclature of the request.") *aff'd as modified*, 61 N.Y.2d 958 (1984) (emphasis added). [3]

9. In this case, STOP described the records that it sought in the Initial Request by providing a description of the subject matter (*i.e.*, FRT records), the geographic area (*i.e.*, Times Square area), and the time period (*i.e.*, from 2016 to 2019).[4] New York courts have upheld this type of three-pronged description as sufficiently detailed.[5] The NYPD's assertion that the FOIL request must concern an "isolated event", a "specific event or individual", or a "specific protest" to enable a diligent search for records is unfounded in the well-established case law.[6] NYSCEF

[3] The NYPD agrees that this rule governs the analysis. NYSCEF Doc. No. 36 at ¶ 27.

[4] To provide more detail and direction, STOP's Initial Request defined "facial recognition" as "computer vision software capable of identifying person from a static image or a video source" and it defined "Times Square area" as "the portion of Manhattan extending from 40th Street to 48th Street and from 6th Avenue to 8th Avenue." NYSCEF Doc. No. 4.

[5] *Logue v. New York City Police Dep't*, 2017 WL 5890766 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 29, 2017) (ordering disclosure of documents related to police efforts to monitor a protest at Grand Central Terminal); *New York Civil Liberties Union v. City of Schenectady*, 814 N.E.2d 437, 438-39 (2004) (petitioner seeking all "[i]ncident reports prepared by police officers pertaining to use of force" which the Court of Appeals upheld in spite of the respondent's protest that "searching the thousands of such documents involved would be burdensome"); *Legal Aid Soc. Of Ne. New York, Inc. v. New York State Dep't of Soc. Servs.*, 195 A.D.2d 150, 150-52 (3d Dep't 1993) (petitioner seeking court documents of fairness hearings "held in Schenectady County"); *see also New York Civil Liberties Union v. Suffolk Cty. Police Dep't*, 127 N.Y.S. 3d 701, at *15 (Table) (N.Y. Sup. Ct. Suffolk Cnty. 2020) (finding that the police department's argument that the petitioner failed to reasonably describe sought-after records regarding "the number of individuals suspected or known to be gang members" to be an attempt "shield everything it does from public scrutiny" and warrants a hearing).

[6] The NYPD misreads *Logue*, 2017 WL 580766 (N.Y. Sup. Ct., Nov. 29, 2017), to argue that the court's civil contempt order was solely directed at a subset of overly redacted documents. NYSCEF Doc. No. 36

Doc. No. 36 at ¶ 35 (citing cases); *Morris v. County of Nassau*, 158 A.D.3d 630, 631 (2d Dep't, 2018) (granting petitioner's request for records generally pertaining to the county's photo speed monitoring system); *New York Civil Liberties Union v. Erie County Sheriff's Office*, 47 Misc.3d 1201(A) (N.Y. Sup. Ct. Erie Cnty. 2015) (upholding a petition requesting, among other things, general policies and guidelines of how the county sheriff used a particular type of electronic surveillance technology).[7]

10. Despite the sufficiency of the Initial Request, STOP took an additional step to clarify that request by providing the NYPD with a copy of the Revised Request during its administrative appeal of the agency's denial; STOP asked the agency to use the Revised Request to forestall any objection the NYPD might have had with respect to the clarity of the Initial Request. NYSCEF Doc. No. 6 at 4. The NYPD simply ignored the clarification and now claims that it had no obligation to consider the Revised Request (notably, the NYPD fails to address whether the Revised Request would cure any supposed ambiguity in the Initial Request). NYSCEF Doc. No. 36 at ¶¶ 24-26.

11. But the NYPD has no answer to the cases STOP cited in its opening brief in which

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at ¶ 34. Instead, the court found that the NYPD also "failed to substantially comply" with the court order to disclose "multimedia records" when it released only a single seventeen-second video and potentially withheld multiple videos from stationary networked cameras in Grand Central Terminal. *Id.* at 3. The court provided that the NYPD could cure the portion of the contempt order associated with multimedia records by producing those within its possession or by submitting an affidavit stating that none existed. *Id.* at 4.

[7] The NYPD further objects to the definition of "record" in STOP's Initial Request because it is "no more specific than FOIL's definition of record." NYSCEF Doc. No. 36 at ¶ 36. The NYPD allege that FOIL's definition of "record" is nothing more than "merely describing broad categories of types of documents" and overly vague itself. *Id*. The NYPD, however, fails to cite a single case that held the description of documents in FOIL's definition is "overbroad and vague." NYSCEF Doc. No. 36 at ¶ 37. To ensure that its request fully complied with the statute, STOP made the reasonable choice of relying on the statutory definition. It would be inappropriate to adopt the NYPD's theory that reliance on FOIL's statutory definition could render a request vague.

courts have considered post-request clarifications when finding a request to "reasonably describe" the records sought. These cases are consistent with the Court of Appeals' practice of considering whether an agency could subjectively identify the records sought *at the time of litigation*. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249-50 (1986). In other words, the NYPD cannot ignore the clarification provided in the Revised Request in now claiming that the Initial Request was too vague. To the Court in *Konigsberg*, an agency admission that it could, as of the time of the litigation, identify the requested documents was sufficient to defeat an argument that the request was too vague. The Court did not inquire into what facts allowed the agency to identify the documents or when it had first been able to do so; that the agency could do so was enough.

12. *Reclaim the Records* does not support the NYPD's assertion that it can ignore clarifications—in this case the Revised Request—provided during the administrative appeals process. *Reclaim the Records v. New York State Dep't of Health*, 128 N.Y.S.3d 303 (3d Dep't 2020). In *Reclaim the Records*, the Court noted that petitioners had not told the Appeals Officer that the new information provided "was intended to be treated as a … *clarification of the original request*." *Id.* at 308 (emphasis added). The Court noted that this was "significant[]" because a request to treat new information as a clarification of a prior request "could, in turn, have resulted in a new determination by respondent, and if necessary, a new administrative appeal." *Id*. In other words, had the petitioners in *Reclaim the Records* offered the new information expressly as a clarification of the original request, the agency would have had to make a new determination on the now-clarified initial request. Here, STOP expressly told the NYPD Appeals Officer that the Revised Request should be used to clarify the Initial Request. *See* NYSCEF Doc. No. 6 at 4 ("If the agency does not wish to meet and confer, STOP requests that the appended Revised Request be used in this appeal to resolve any purported ambiguities in the [Initial] Request."). The fact

that the NYPD ignored the clarification and did not provide a new determination on the clarified Initial Request—an obvious effort to stick its head in the sand and keep it there—was therefore arbitrary and capricious.

13. And, more importantly, the NYPD *admits that it has located many of the records* that STOP seeks within the Enterprise Case Management System ("ECMS"), a digital system that is searchable by precinct. NYSCEF Doc. No. 36 at ¶¶ 30-32; *see* NYSCEF Doc. No. 7 at ¶16.[8] The NYPD notes that only two precincts[9] cover portions of the Times Square area. NYSCEF Doc. No. 36 at ¶ 30. The NYPD further states that the ECMS can be "searched based on the precinct in which an event occurred." NYSCEF Doc. No. 36 at ¶ 31. In other words, at least some of the records sought by STOP regarding FRT are located within the case files of these two precincts. The NYPD's admission that it can locate responsive records, under the NYPD's own cited authority, should end its vagueness objection. *See Mitchell v. Slade*, 173 A.D.2d 226, 227 (1st Dep't 1991) (FOIL request must describe the document "so that they can be located."). Instead, the NYPD argues that even though many FRT-related records are at hand, it must undertake a manual review of the search results of the two precincts within ECMS to identify which cases pertain to FRT's use in the Times Square area. In essence—contrary to it conclusory claim that the Initial Request was overly vague—the NYPD understands what STOP is seeking and where it can be found; its real problem, apparently, is the alleged burden of sorting the case files.

[8] The NYPD's Affirmation in Support of Cross-Motion to Dismiss (NYSCEF Doc. No. 36) focuses almost exclusively on the Revised Request's ask for records from the NYPD's ECMS system. The NYPD does not substantively address the ease with which it could satisfy STOP's requests for other types of FRT-related documents, such as agreements with other agencies, audits reports and official directives and policies. *See* NYSCEF Doc. Nos. 4, 7.

[9] The NYPD's repeated reference to 77 precincts is a misdirection that implies a far more challenging search. As the NYPD admits, 75 of the 77 precincts do not cover any portion of the Times Square area described in STOP's Initial Request and are not relevant.

14. As discussed in the next section, the NYPD's burdensomeness objection rings hollow when properly understood in light of the actual scope of STOP's Initial Request. *Infra* I.B.

B. STOP's FOIL Request Is Not Unduly Burdensome

15. Public Officers Law § 89(3)(a) provides that an "agency shall not deny a request on the basis that the request is ***voluminous*** or that locating or reviewing the requested records or providing the requested copies is ***burdensome*** because the agency lacks sufficient staffing." (emphasis added). *See Jewish Press, Inc.*, 122 N.Y.S.3d at 681 (2d Dep't 2020).

16. An agency can only avoid this broad prohibition by "first, establish[ing] that the request is unduly burdensome and, second, establish[ing] that an outside service cannot be utilized to comply with the request." *Time Warner Cable News NY1* 36 N.Y.S.3d at 591-92. Courts in this county have recognized that "generally speaking, an agency will have a difficult time proving that disclosure of electronically stored and easily transferable records will be unduly burdensome." *Id.* at 592. The NYPD's inconvenience and its obvious reluctance to release its FRT records for public scrutiny are not cognizable grounds that would permit the NYPD to avoid its obligations under FOIL.

1. *The NYPD Cannot Show that Compliance with STOP's FOIL Request is Unduly Burdensome.*

17. The NYPD artificially inflates its estimate of the work required to identify ECMS records responsive to STOP's request, and thus undermines its claim that STOP's request is unduly burdensome. *First*, the NYPD argues that, because it cannot simply type the phrase "Times Square area" into its electronic system, the necessary search is too burdensome as it would require the NYPD to conduct a manual review of each ECMS case file regardless of location that included a request for the NYPD's FRT capabilities; the NYPD would then need to determine whether a given case involved the Times Square area as defined in STOP's request. NYSCEF Doc. No. 36 at ¶¶

32, 43-44. As support for its claim that this manual process would be too burdensome, the NYPD references that there are 22,069 cases, each of which would take approximately two minutes to manually review (around 735 hours in total). But that 22,069 figure is a red herring: it relates not to the two relevant precincts but to cases involving the use of FRT by the NYPD's Facial Identification Section ("FIS") from all 77 New York City precincts.[10] Only some small fraction of these cases, therefore, have any connection to the Times Square area that is the subject of STOP's request. NYSCEF Doc. No. 36 at ¶ 45. Indeed, it is telling that the NYPD does not say how many FRT-related cases relate to the two precincts covering the Times Square area, despite having that information at hand, likely because that smaller number would undermine the NYPD's burden argument. NYSCEF Doc. No. 36 at ¶ 45 n.4. Even if the number associated with the two relevant precincts was 10% of the 22,069 cases cited by the NYPD, that would mean that it would take only 73 hours to review all potentially responsive records.[11]

18. *Second*, even assuming that 22,069 is a relevant figure, it includes documents that are explicitly excluded from the Initial Request because they are related to DataWorks Plus software, the NYPD's most widely used FRT surveillance system. Further, STOP's Revised Request also explicitly excluded records produced in response to the order in *Ctr. On Privacy & Tech. v. New York City Police Dep't*. 154060/2017 (N.Y. Sup. Ct. N.Y. Cnty. 2016). The NYPD cannot ignore STOP's effort to reasonably limit its request simply because doing so helps the

[10] FIS is the "primary unit tasked with utilizing FRT" at the NYPD. NYSCEF Doc. No. 36 at ¶ 44.

[11] The NYPD's own description of its systems suggests that it does not need to undertake a manual review at all. The NYPD states that the FIS recordkeeping system tracks the associated complaint number for each FRT submission to FIS, which means that they would have to input the complaint number from their FIS systems into the ECMS over 22,000 times. NYSCEF Doc. No. 36 at ¶ 45. However, the NYPD could simply flip the order of operations and input the complaint number from the two precincts' case files into the FIS recordkeeping system to identify which cases involved the use of FRT. The goal of the exercise is to find the overlap of FRT-related cases and cases involving the Times Square area, and the NYPD has described the least efficient method of identifying that overlap.

NYPD's argument by artificially inflating its burden.

19. The precedent the NYPD cites in support of its burden objection does no such thing. The petitioners in *Asian Am. Legal Defense & Educ. Fund v. N.Y. City Police Dep't* sought documents relating to intelligence operations involving any New York City business that was frequented by Middle Eastern, South Asian, or Muslim persons, even though the NYPD's electronic systems were not searchable by ethnicity, race or religion and "no combination of search terms…would yield the universe of responsive documents." 964 N.Y.S.2d 888, 898 (N.Y. Sup. Ct. N.Y. Cnty. 2013). Here, STOP limited its request by geography and the NYPD admits that the ECMS can be filtered by precinct. Neither STOP nor any other member of the public could be expected know the particular filters that the NYPD has available when gathering ECMS records,[12] so there may be additional relevant filters that would further reduce the NYPD's burden. It would offend the public policy in favor of transparency to allow the NYPD to avoid disclosure simply because the public does not have the means to articulate the most efficient way for the NYPD to search its own systems.

20. Nor does *Reclaim the Records* support the NYPD's assertion that an agency does not have to provide records unless a request includes perfectly tailored search terms ready-made to type into an agency's digital system. 128 N.Y.S.3d 303 (3d Dep't 2020). There, petitioners suggested that the agency could search emails of 5,400 employees using a set of very vague search terms. *Id.* at 309. In contrast, STOP's request is for records associated with the use of a specific technology in a limited geographic area—the Times Square area—over a three-year period. STOP's Initial Request is more analogous to *New York Comm. for Occupational Safety & Health*

[12] STOP only named the ECMS system at all (in the Revised Request) after retaining outside counsel who saw the system referenced in the NYPD's production in another judicial proceeding.

v. Bloomberg, in which petitioner sought nine categories of information from the city's worker compensation claims database. 72 A.D.3d 153, 155 (1st Dep't 2010). The agency objected on the ground that the requested information was spread across ten different database units, and that to comply with the petitioner's FOIL request, the agency would need to write new software. *Id.* at 157-58. The Appellate Division held that "[a] simple manipulation of the computer" would not be unduly burdensome and remanded the case back to the Supreme Court to determine whether the petitioner's FOIL request truly required the agency to "creat[e] new software which would not otherwise exist but for the FOIL request." *Id.* at 162 (citing *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 465 (2007)).[13] There is no suggestion that the NYPD needs to write software here; just that it needs to extend effort commensurate with its obligations. The NYPD in fact agrees that it can manipulate the search parameters by entering the two precincts that police the Times Square area in order to identify potentially responsive records. NYSCEF Doc. No. 36 at ¶¶ 30-32.

21. *Finally*, the NYPD ignores STOP's request for policies and other governance documents and limits its response to cases that can be found in the ECMS; STOP presumes that is because the NYPD has no basis for objection to STOP's request for these other records. In any event, retrieving and producing high level governance documents is a minimal burden which the NYPD should not be permitted to avoid simply by failing to address the issue. NYSCEF Doc. No. 4 (seeking, among other things, "memoranda" and "analyses"). The NYPD may even store such

[13] "On this record, it is not possible to conclude whether requiring the City to retrieve and produce the computerized records would be a 'simple manipulation' or a creation of a new document. Mr. Sidhom, who does not purport to have any background in computer programming and does not explain the basis of his knowledge of how the computer system operates, ambiguously states in his affidavit that the City must create new 'commands' and 'formulas.' However, it is unclear whether those things fall within the realm of running programs within the existing software, or creating new software which would not otherwise exist but for the FOIL request. If the former, and the documents can be retrieved with 'reasonable effort,' the City is required to produce them. A hearing is necessary to determine precisely what would be entailed were the City to attempt to retrieve the requested documents from electronic databases." *New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 161–62 (1st Dep't 2010).

policies and procedures in a conveniently accessible location or with a limited number of custodians; to the extent the NYPD has some unexpressed objection to STOP's failure to cite a specific file location in which these policies and procedures reside, it is simply unreasonable and inconsistent with the law to require STOP to correctly guess at NYPD's recordkeeping practices.

2. *The NYPD Fails to Show that It Could Not Use an Outside Vendor*

22. The NYPD also fails the second prong of FOIL's burden exception and cannot establish that "an outside service cannot be utilized to comply with [STOP's] request." *Time Warner Cable News NY1*, 36 N.Y.S.3d at 591-92. The NYPD insists that it would be "impractical and unreasonable" to use an outside vendor because the records at issue require redaction of personally identifiable information and it would be improper to give a vendor access to unredacted records. NYSCEF Doc. No. 36 at ¶ 46. But the authority that the NYPD cites in support, *Huseman v. New York City Dep't of Educ.*, is inapposite. 2016 WL 3029581 (N.Y. Sup. Ct. N.Y. Cnty., May 25, 2016). In *Huseman*, the petitioner requested detailed narratives about individual students. The Court in that case accepted that the requested narratives would need to be reviewed in detail before they could be released and that all identifiable details would need to be redacted. An outside vendor was inappropriate in that case because only the Department of Education's own staff would have "sufficient familiarity with the DOE school system" to know whether details were identifiable or generic. *Id.* at *5.[14] Here, there is no question as to whether a vendor could understand that names, addresses and other identifying information would require redaction. NYSCEF Doc. No. 36 at ¶ 46.

23. Furthermore, the NYPD uses at least one outside vender, DataWorks Plus, to host

[14] Disclosure of the children's information to a third-party was also restricted by the Family Education Rights and Privacy Act. *Id.* at *1.

its FRT data despite the sensitivity of the information.[15] Any concerns can be resolved, as they routinely are, through an appropriate confidentiality agreement with a trusted vendor. In sum, the NYPD has adopted its familiar intransigent posture with respect to any reasonable solution that could balance its need to carry out law enforcement activities with the public's right to know how its government runs.

II. Appealing the Revised Request Would Have Been Futile

24. Insisting on treating the Revised Request independently, the NYPD also argues that the Revised Request is not itself ripe for adjudication because STOP did not exhaust its administrative remedies. Seeking administrative review is deemed futile where an agency's initial determination has "unequivocally stated [the agency's] long-standing position" against granting petitioner the relief sought and where "nothing indicates that the [initial decision] did not accurately reflect agency policy." *Lehigh Portland Cement Co. v. New York State Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 143 (1995). Under such circumstances, an appeal "hearing officer would be required to follow the established agency policy that petitioner seeks to challenge." *Coleman v. Daines*, 79 A.D.3d 554, 561 (1st Dep't 2010), *aff'd* sub nom. *Coleman ex rel. Coleman v. Daines*, 19 N.Y.3d 1087 (2012). In other words, pursuing such an appeal would be futile if the outcome is foregone.

25. That aptly describes the situation here. The NYPD has a long-standing practice of refusing to disclose information about its FRT program. In a separate FOIL litigation, the NYPD has been fighting to resist the disclosure of FRT-related documents since 2017. NYSCEF Doc.

[15] *See, e.g.*, for the NYPD's usage of an outside vendor to supply and maintain its FRT systems despite exposure to confidential information. Clare Garvie, *Garbage In, Garbage Out: Facial Recognition on Flawed Data, Georgetown Law Center on Privacy & Technology*, May 16, 2019, at n.37, https://www.flawedfacedata.com/.

No. 1 at ¶ 18. The NYPD filed an affirmation in that litigation that expressly stated that the agency considered FRT to be categorically exempt from FOIL as a non-routine investigative technology. Ex. A at ¶¶ 10-11 ("FRT is a specialized, non-routine technology used by [the NYPD] to assist in identification in law enforcement investigations.").[16] Here, when STOP asked the NYPD to informally resolve their dispute regarding the Initial and Revised Requests, the NYPD agreed, and then proceeded to delay any movement towards resolution for months. NYSCEF Doc. No. 1. at ¶¶ 33-35. This context, followed by the NYPD's denial of the Revised Request—based on the same position that it has taken in court, that the FRT information is exempt from disclosure—is sufficient to show that seeking further agency action as to the Revised Request would have been futile. *Compare* NYSCEF Doc. No. 11 *with* Dkt. Ex. A at ¶¶ 10-11.

CONCLUSION

26. For the foregoing reasons, Petitioner respectfully requests that the Court deny the Respondent's cross-motion to dismiss Petitioner's Verified Petition and to grant Petitioner's Verified Article 78 Petition.

DATED: New York, New York
October 19, 2020

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[16] *Matter of Koegel*, 160 A.D.3d 11, 21 (2d Dep't 2018) ("In opposition to a motion pursuant to CPLR 3211(a), a plaintiff may submit affidavits 'to preserve inartfully pleaded, but potentially meritorious claims'"); *Solid Waste Servs., Inc. v. Sferrazza & Keenan, PLLC*, 2008 WL 898771, at *2 (N.Y. Sup. Ct. N.Y. Cnty. 2008) (CPLR 7804).