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, INC.,

Petitioner,

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

-against-

NEW YORK CITY POLICE DEPARTMENT,
Respondent.
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AFFIRMATION IN SUPPORT OF CROSS-MOTION TO DISMISS
Index No. 155486/2020
(Rakower, J.)

EMILY B. GOLD, an attorney duly admitted to practice before the courts of this state, affirms under penalty of perjury pursuant to New York Civil Practice Law and Rules ("CPLR") Rule 2106 that the following statements are true except for those made upon information and belief, which she believes to be true:

1. I am an attorney in the office of ERNEST F. HART, Deputy Commissioner, Legal Matters of the New York City Police Department ("NYPD").

2. I submit this affirmation, on behalf of Respondent, in support of the Respondent's cross-motion to dismiss this proceeding on the grounds that (1) this Court lacks subject matter jurisdiction, in part, in that Petitioner has failed to exhaust the available administrative remedies; (2) that the remainder of the petition fails to state a cause of action in that it fails to reasonably describe a record in a manner that leads to retrieval; and (3) that the remainder of the petition fails to state a cause of action because Petitioner's Freedom of Information Law request is unreasonably burdensome. Respondent reserves the right to file a verified answer should the instant cross-motion to dismiss be denied.

3. I have prepared this affirmation upon information and belief, based on information contained in the records on this matter maintained in the ordinary course of business by the NYPD, and based on the information received from other employees of the NYPD, which I believe to be true and accurate.

PRELIMINARY STATEMENT

4. Petitioner brings this proceeding pursuant to CPLR Article 78 and N.Y. Public Officers Law ("POL") § 84 *et seq.*, also known as the Freedom of Information Law ("FOIL"), seeking to compel disclosure of various records concerning the NYPD's use of facial recognition technology ("FRT"). Specifically, Petitioner is seeking information of the NYPD's use of FRT in "the Times Square area." See NYSCEF Doc. No. 22.

5. Petitioner submitted a FOIL request, seeking documents related to FRT in an arbitrarily defined geographic area in Manhattan for a three-year period (2016-2019). After such request was denied, Petitioner submitted an administrative appeal, as well as a second FOIL request, seeking twenty-seven (27) categories of documents for a ten-year period (2009-2019), and not entirely limited by geographic location. The NYPD responded to this second FOIL request with a Record Access Officer determination, as well as issued a final determination in regards to the initial request. Despite not administratively appealing the second request, Petitioner currently seeks judicial review of Respondent's response to both requests. However, in regards to the second request, Petitioner has failed to exhaust the available administrative remedies, and therefore, any portion of the petition addressing this second request is premature, and should be dismissed for lack of subject matter jurisdiction.

6. In regards to the initial FOIL request, as explained fully infra, that request failed to reasonably describe the records sought in a manner that would lead to their retrieval, and was

unreasonably burdensome, necessitating extraordinary efforts not required under FOIL. Accordingly, the petition should be dismissed in its entirety.

FACTUAL BACKGROUND

The October 2019 FOIL Request – FOIL No. 2019-056-17831

7. By Open Records request dated October 8, 2019, Petitioner submitted a request, pursuant to FOIL, for "[a]ny and all records relating to facial recognition in the Times Square area during the last three years," excluding "records related to the NYPD's Facial Identification Section's use of DataWorks Plus software or the collection of images exclusively for use therewith." See Open Records email, dated October 8, 2019, and letter by Albert Fox Cahn dated October 8, 2019, copies of which are annexed hereto as parts of Exhibit "1" (hereinafter "the October Request"). Specifically, Petitioner sought "all agency records including memoranda, correspondence, analyses, interview notes, logs, charts, and other written records as well as records maintained on computers, electronic communications, videotapes, audio recordings, or any other format" for "the portion of Manhattan extending from 40th Street to 48th Street and from 6th Avenue to 8th Avenue." The Open Records Portal confirmed that Petitioner's FOIL request has been successfully submitted that same day. See id.

8. By email dated October 10, 2019, the NYPD's Records Access Officer ("RAO") acknowledged Petitioner's FOIL request, and provided an estimate of when a determination would be made. See Open Records RAO email, dated October 10, 2019, a copy of which is annexed hereto as Exhibit "2."

9. By email dated October 19, 2020, the RAO denied Petitioner's request, and informed Petitioner that their "request does not reasonably describe a record in a manner that

would enable a search to be conducted" by the NYPD. See Open Records RAO email, dated October 19, 2019, a copy of which is annexed hereto as Exhibit "3."

10. By email and letter dated November 18, 2019, Petitioner appealed the RAO's determination. See email and letter by Samuel P. Vitello, without attachments, dated November 19, 2019, a copy of which is annexed hereto as Exhibit "4." In the appeal, Petitioner indicated that an allegedly more specific FOIL request had been submitted; that a copy was being submitted with the appeal; and it could be used to clarify any ambiguities in the October Request. Id.

11. By letter dated November 19, 2019, the NYPD's Records Access Appeals Officer ("Appeals Officer") denied Petitioner's appeal, and stated that the request failed to reasonably describe "any actual records maintained by this agency." See letter by Sergeant Jordan S. Mazur, dated November 19, 2019, a copy of which is annexed hereto as Exhibit "5." The Appeals Officer explained that "[t]he NYPD does not maintain a database that shows the location of each Facial Identification Section (FIS) search" and "cases are not maintained in a manner that can be narrowed to a general vicinity (i.e., 40th Street to 48th Street from 6th Avenue to 8th Avenue), [so] an additional manual review would need to be conducted of any records located in order to determine whether those cases fell within the arbitrary boundaries described in [the] request . . . [E]ven if a search could be conducted of the thousands of cases maintained by not only Precinct Detective Squads, but by various specialized units as well; in the event the agency could locate all FIS requests, each of those would then need to be reviewed to determine whether the FIS request was made for a location within the arbitrary boundaries identified in [the] request." Id.

The November FOIL Request – FOIL No. 2019-056-20622

12. By Open Records request dated November 18, 2019, Petitioner requested twenty-seven (27) categories of records relating to the NYPD's use of FRT. See Open Records email

dated November 18, 2019, and letter by Luke Taeschler, copies of which are annexed hereto as parts of Exhibit "6" (hereinafter "the November Request"). Unlike Petitioner's October Request, which was limited to the three years and a defined geographic location, the November Request sought almost 11 years of documents, from as far back as 2009; and twenty-one (21) of the categories in the November Request were not geographically limited, as the entire October Request was. See id.

13. By email dated November 20, 2019, the NYPD's RAO acknowledged receipt of the November Request, and provided an estimate of when a determination would be issued. See Open Records RAO email, dated November 20, 2019, a copy of which is annexed hereto as Exhibit "7."

14. By email dated April 3, 2020, the NYPD's RAO responded to Petitioner's November Request, and provided Petitioner with responsive, non-exempt documents, specifically, a Patrol Guide Procedure regarding FRT. See Open Records RAO email, dated April 3, 2020, a copy of which is annexed hereto as Exhibit "8." Petitioner was informed that the remainder of the request was being denied on various grounds, including that the request did not reasonably describe records to "enable a search to be conducted;" that the requested records would "reveal non-routine techniques and procedures," pursuant to POL § 87(2)(e)(iv); that the records are "inter-agency or intra-agency materials," pursuant to POL § 87(2)(g); that retrieval of the records would require "extraordinary efforts not required under FOIL;" and that the records contain "attorney-client privileged communications and are therefore exempt from disclosure under New York Civil Practice Law and Procedure Section 4503," pursuant to POL § 87(2)(a). Id. The RAO informed Petitioner of its right to appeal the decision within thirty (30) days, and where such an appeal could be directed. Id. A check of the list of FOIL appeals received in the

ordinary course of business of the NYPD shows that Respondent did not receive an appeal for the RAO's determination on the November FOIL request.

The Instant Article 78 Proceeding

15. On July 18, 2020, Petitioner commenced this proceeding pursuant to CPLR Article 78 by filing a Request for Judicial Intervention, Verified Petition, and supporting papers, seeking relief as to Respondent's denial of both the October and the November Requests. See NYSCEF Docs. No. 1-27.

PETITIONER HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES AS TO THE NOVEMBER REQUEST

16. Pursuant to CPLR § 7801, a proceeding under Article 78 "shall not be used to challenge a determination which is not final or can be adequately reviewed by the appeal to a court or to some other body or officer." It is also well established 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). 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.

17. In the FOIL context, POL § 89(4)(b) confers subject matter jurisdiction in an 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 Carty v. New York City Police Dep't, 41 A.D.3d 150 (1st Dep't 2006); see also Tellier v. New York City Police

Dep't, 267 A.D.2d 91 (1st Dep't 1999); Moussa v. State, 91 A.D.2d (4th Dep't 1982); Almodovar v. Altschuller, 232 A.D.2d 700 (3d Dep't 1996); Cosgrove v. Klinger, 58 A.D. 910 (3d Dep't 1977). The FOIL process is an administrative process within an administrative agency, and so long as there has not been a final adverse administrative determination which forecloses further avenues of administrative relief, a court lacks subject matter jurisdiction over such administrative proceedings. See Babi v. David, 35 A.D.3d 266 (1st Dep't 2006).

There is no Final Agency Determination on the November Request

18. Here, the November Request was never administratively appealed. Therefore, Petitioner was never denied access to records in a final agency determination, a condition precedent to the institution 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), lv to appeal denied, 31 N.Y.3d 910 (2018) (finding a premature appeal insufficient to ground and Article 78 proceeding when the agency issued subsequent record access officer determination). Petitioner's failure to administratively appeal extinguished the right to current judicial review. See Jamison v. Tesler, 300 A.D.2d 194 (1st Dep't 2002) (affirming the dismissal of the petition holding that petitioner was required to exhaust the administrative remedies by filing an administrative appeal within 30 days of the response to his FOIL request where review of the FOIL file indicated that no appeal was taken).

19. The absence of a final agency determination deprives the Court of jurisdiction over this proceeding. See CPLR § 7801(1); Matter of Committee to Save the Beacon Theater v. City of New York, 146 A.D.2d 397 (1st Dept. 1989). The Court of Appeals has held that:

> [a] petitioner who seeks article 78 review of a determination must commence the proceeding "within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). An administrative determination becomes "final and binding" when two requirements are met:

> completeness (finality) of the determination and exhaustion of administrative remedies. **"First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action** or by steps available to the complaining party."

See Walton v. New York State Dep't of Correctional Servs., 8 N.Y.3d 186, 194-95 (2007) (internal citations omitted and emphasis added).

An Administrative Appeal of the November Request Would Not Have Been Futile

20. Here, Petitioner incorrectly claims that it is not required to exhaust its administrative remedies. See NYSCEF Doc. 22, Petitioner's Memorandum of Law at p. 10. However, a petitioner may only exhaust administrative remedies without availing itself of all final agency reviews in only the limited situation where "resort to an administrative remedy would be futile." See Watergate II Apartments, 46 N.Y.2d at 57.

21. An administrative appeal is futile where it is clear that seeking further administrative relief would be unsuccessful. See Matter of Friedman v. Rice, 30 N.Y.3d 461, 473-74 (2017) (quoting Watergate II Apts, 46 N.Y.2d at 57) (internal quotations marks omitted), (finding that the responding agency made it clear that an administrative appeal would be unsuccessful, as the agency informed petitioner that the documents sought would only be shared with an Advisory Panel, whose members "had sworn an oath of confidentiality and were operating 'as an extension of [the prosecutor's] office'").

22. This is not the case here. Petitioner's October Request was denied by the RAO for being not reasonably described and overly burdensome; these grounds were upheld by the Appeals Officer. See Exhibit "3;" Exhibit "5." However, in response to the November Request, Petitioner received a starkly different response: Petitioner was provided with the relevant Patrol Guide procedure, and informed the remainder of their request was being withheld for various

exemptions. See Exhibit "8." While the RAO claimed, in part, a portion of the November Request was not reasonably described and that portions of the request required extraordinary efforts, similar to the RAO response to the October Request, several additional grounds were also included: records were being withheld to prevent the release of attorney-client materials; prevent the release of non-routine law enforcement techniques; and prevent the release of inter- and/or intra-agency materials. See id.

23. Here, the situation is similar to Matter of Major v. Beach, 182 A.D.3d 941 (3d Dep't 2020), where the agency issued a determination after an appeal of a constructive denial, and commencement of an Article 78 proceeding. In response to the agency determination rendered, petitioner wrote a letter, clarifying part of his initial FOIL request; Court found that this letter for clarification was actually an amended FOIL request, and that the petitioner failed to exhaust his administrative remedies in regards to that request, as the agency had not yet responded. See Major, 182 A.D.3d 941, 942. After the agency responded to this amended request, petitioner attempted to renew the Article 78 proceeding, and it was found that, as the record did not demonstrate "that petitioner availed himself of the opportunity to pursue an administrative appeal . . . the motion for reconsideration" was properly denied. Id. at 943. Accordingly, the circumstances here are distinguishable from Friedman, supra, where the responding agency made it clear, in its response to petitioner's initial FOIL request, that the documents would only be released to a specific Advisory Panel, that was acting as an extension of the District Attorney's office. Friedman, 30 N.Y.S.3d at 473-74. Here, however, Petitioner's November Request received a drastically different response from the RAO than the October Request did, including grounds not yet considered by the Appeals Officer in regards to the October Request, as they

related to documents not requested from the RAO in the October Request. Accordingly, it cannot be said that pursuing an administrative appeal would be futile.

The Appeals Officers' Final Determination on the October Request Could not Address the New November Request

24. In the present proceeding, Petitioner incorrectly argues that the NYPD's Appeals Officer's determination in response to Petitioner's October Request encompassed the November Request because Petitioner "requested that the NYPD consider the [November] Request in order to resolve any perceived ambiguity in the [October] Request, making it a part of the administrative record before the agency." See NYSCEF Doc. No. 22 at p. 6. However, the Appeals Officer's authority in rendering a final determination is limited to a review of the determination made by the RAO. Accordingly, the Appeals Officer cannot render a determination as to documents not initially requested from the RAO. See Matter of Reclaim the Records v. New York State Dep't of Health, 185 A.D.3d 1268, 1272 (3d Dep't 2020) (stating that "the purpose of an administrative appeal from a denial of a FOIL request is to challenge the correctness of 'such denial,'" and therefore, "new document descriptions that are provided for the first time in an administrative appeal are not pertinent to the correctness of the original denial.").

25. Here, the November Request could not, in fact, be considered by the Appeals Officer, as it broadly expanded upon the October Request. The October Request sought only documents relating to FRT in the Times Square area, as arbitrarily defined by Petitioner, and only for a three-year period. See Exhibit "1." However, the November Request sought information from the Times Square for an almost eleven-year period, and therefore included a much larger portion of documents on which the RAO did not render a decision for the October Request. See Exhibit "6." Additionally, the November Request sought twenty-one (21) categories of documents, and not limited to the Times Square area, while the October Request was so

geographically limited, in its entirety, again presenting a large portion of documents on which the RAO did not render a decision

26. Accordingly, Petitioner has failed to exhaust the available administrative remedies in regards to the November Request, and the petition, insofar as it seeks relief for documents sought under the November Request, must be dismissed for lack of subject matter jurisdiction.

PETITIONER'S OCTOBER REQUEST FAILED TO REASONABLY DESCRIBE A REQUEST IN A MANNER THAT COULD ENABLE RESPONDENT TO LOCATE THE REQUESTED RECORDS

27. Petitioner has failed to state a claim upon which relief may be granted under FOIL as Petitioner has failed to describe records in a manner that could enable retrieval. Pursuant to POL § 89(3), an individual requesting records under FOIL must ensure that the "documents [are] 'reasonably described' . . . to enable the agency to locate the records in question." See Mitchell v. Slade, 173 A.D.2d 226, 227 (1st Dep't 1991), lv denied, 78 N.Y.2d 863 (1991); Timmons v. Records Access Officer, 271 A.D.2d 320 (1st Dep't 2000). When a petitioner fails to supply information to distinguish the requested records from the entire agency records, the FOIL request is properly denied. See Roque v. Kings County Dist. Attorney's Office, 12 A.D.3d 374, 375 (2d Dep't 2004) (dismissing the petition for failure to supply dates of birth, addresses, or other identifying information for witnesses' records).

28. Additionally, case law interpreting the Federal Freedom of Information Act ("FOIA") has long held that a request is not reasonably described when a requester's description cannot lead to retrieval of the documents, as the agency does not index files by the category given, and therefore a responsive search would require an unreasonable exhaustive search of numerous agency files. See National Cable Tel. Assn. v. Federal Communication Commn., 479 F.2d 183, 192 (D.C. Cir. 1973). The Appellate Division, First Department has adopted this reasoning. In

Asian Am. Legal Defense & Educ. Fund v. N.Y. City Police Dep't, 125 A.D.3d 531 (1st Dep't 20105), lv denied, 26 N.Y.3d 919 (2016), the petitioner's FOIL request was found to not reasonably describe a record, as it sought "documents relating to NYPD Intelligence operations concerning unreasonably broad categories, such as any New York City businesses 'frequented' by Middle Easter, South Asian or Muslim persons," and "a complete response to the request would entail searching more than 500,000 documents which, though mostly electronic, are not necessarily searchable by ethnicity, race, or religion."

29. Moreover, "'FOIL does not differentiate between records stored in paper form or those stored in electronic format.' A failure to provide a reasonable description of the records sought may present the same obstacles to an electronic search as it does to a search of paper records, preventing an agency from retrieving a record 'with reasonable effort.'" See Matter of Reclaim the Records, 185 A.D.3d 1273 (citing Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 464 (2007)) (denying petitioner's FOIL request because the agency's indexing limitations and the lack of a reasonable description of the records prevented the agency from using the terms supplied by petitioners to located electronic records).

30. Here, Petitioner incorrectly argues that since the Initial Request was limited by geography, time, and subject matter, it has been reasonably described. See NYSCEF Doc. No. 22 at p. 11. However, this is simply not the case. Firstly, the geographical limits contained in the October Request were arbitrarily defined by Petitioner to encompass "the portion of Manhattan extending from 40th Street to 48th Street and from 6th Avenue to 8th Avenue." See Exhibit "1." The NYPD has 77 Police Precincts throughout the City, which fall into defined, geographical areas; the confines of each precinct are publically available information.[1] Petitioner chose not to

[1] See *Find Your Precinct and Sector*, NYPD (Oct. 5, 2020), https://www1.nyc.gov/site/nypd/bureaus/patrol/find-your-precinct.page.

utilize these set geographic boundaries; instead, as phrased, Petitioner's request encompasses *portions* of two precincts. Further, as phrased, the request seeks *all* records from the Time Square Area, which could include records from various commands outside of the precincts and not geographically defined, but that may have cases which fall within that geographic area.[2]

31. Upon the undersigned's review of NYPD databases, kept in the ordinary course of NYPD business, often NYPD electronic records are organized or can be searched based on the precinct in which an event occurred; the exact location of occurrence; or personal identifying information (e.g. a victim's names, or arrested suspect's name, or complaint number or arrest number). Specifically, the Facial Identification Section ("FIS") records and Detective Bureau investigations of crimes reported to the NYPD are electronically stored in the Enterprise Case Management System ("ECMS"). ECMS does not permit a search by a random geographic area to identify FRT records.

32. Therefore, as explained by the Appeals Officer, because "cases are not maintained in a manner that can be narrowed to a general vicinity (i.e., 40th Street to 48th Street from 6th Avenue to 8th Avenue), an additional manual review would need to be conducted of any records located in order to determine whether those cases fell within the arbitrary boundaries described in [the] request…[and] thousands of cases maintained by not only Precinct Detective Squads, but by various specialized units as well; in the event the agency could locate all FIS requests, each of those would then need to be reviewed to determine whether the FIS request was made for a location within the arbitrary boundaries identified in [the] request." See Exhibit "5." In fact, the

[2] The NYPD contains various specialized commands that operate City-wide, as opposed to being imbedded in a Precinct's geographical area. Records from these units, which may in some instances be divided by borough, would not be stored in a manner that is so specific as to be organized by Precinct of occurrence. Accordingly, all records of each specialized command that operates on a City-wide basis would need to be reviewed to determine whether they were responsive.

number of FIS cases opened in the three-year period sought is 22,069. Because ECMS has no search function that can be used to isolate cases occurring within the arbitrary geographic boundary requested by Petitioner, the only way to identify all applicable cases would be a manual review of all the associated Detective Bureau cases for which images were submitted. As detailed, more fully below, see infra at ¶ 45, just the identification of the relevant investigations would require a little less than 736 hours of agency time. Accordingly, the request, as phrased, does not reasonably describe the requested documents in a manner that can lead to retrieval thereof.

33. Secondly, Petitioner maintains that its inclusion of a definition of records —"all agency records including memoranda, correspondence, analyses, interview notes, logs, charts, and other written records as well as records maintained on computers, electronic communications, videotapes, audio records, or any other format"—reasonably describes the records sought. See NYSCEF Doc. No. 22 at p.11. In support of this contention, Petitioner opines that similar requests have been upheld, and cites Logue v. New York City Police Dep't, 2017 N.Y. Misc. LEXIS 4591 (Sup. Ct. N.Y. Cnty. Nov. 27, 2017). However, the cited decision specifically relates to the request for "any and all agency records," which was limited to one specific location for a limited three-month period – Grand Central Terminal - and not, as here, multiple locations within an arbitrarily defined geographic region for a three-year period. Therefore, the Logue holding does not support Petitioner's contention of a reasonable description.

34. Further, while Petitioner maintains that the NYPD was found in contempt "for failure to comply with order to produce documents in response to a Black Lives Matter protestor's request for 'all pictures, videos, audio recordings, data, and metadata' and 'copies of all communications sent or received by your agency . . .,'" it is important to note that the finding of

contempt was related to the agency's production of a specific subset of redacted documents defined by the court, as opposed to a finding that the agency was in contempt for failing to respond to the petitioner's request, as written, as Petitioner implies. See Logue, 2017 N.Y. Misc. LEXIS 4591 at *5, 10-11. The court in Logue ordered respondents to disclose to petitioner "the multimedia records that may be scrubbed in response to item 1 of [petitioner's] FOIL request and . . . the first set and second set of documents responsive to item 4 of Petitioner's FOIL request, redacted to omit identifying information including the names and e-mail addresses of the NYPD undercover officers, their handlers and the base . . ." See Logue, 2017 N.Y. Misc. LEXIS 4591 at *5. After disclosure, Petitioner argued that Respondents failed to comply with this order, which ultimately resulted in the contempt order. See id. Thereafter, respondents clarified its records production and purged the contempt order.

35. Further, the remaining cases Petitioner cites in support of the contention that its request was reasonably described also contain requests related to a specific event or individual, easily facilitating a search for documents in regards to that specific event or individual, rendering these cases uninstructive to the case at bar. See Konisberg v. Coughlin, 68 N.Y.2d 245, 247 (1986) (seeking documents "kept on me and my number of identification" and petitioner supplied the identification number); Pflaum v. Grattan, 116 A.D.3d 1103, 1104 (seeking documents describing the work of a specifically identified individual in specified types of files and for a specific time period); Cromwell v. Ward, 183 A.D.2d 459, 463 (seeking documents relating to the requester's arrest, wherein the request identified officers involved in said arrest and investigation and petitioner identified the specific documents sought). Here, Petitioner seemingly seeks every document related to every instance that FRT was utilized, so long as it falls within the arbitrary geographic area described above; however, FRT is not an isolated event, like a

specific protest, or attributable to a specific individual. Accordingly, the "subject matter" of FRT does not reasonably describe the documents sought.

36. Moreover, Petitioner's definition of records in the Initial Request is no more specific than FOIL's definition of record:

> any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations, or codes.

See POL § 86(4); Exhibit "1." Accordingly, merely describing broad categories of types of documents without providing more specific identifiers to Respondent does not reasonably describe documents sought, as required by POL § 89(3).

37. Here, the request for "[a]ny and all records relating to facial recognition" is overbroad and vague, and, as written, does not enable a search of agency records, as it is unclear what documents Petitioner is even requesting, let alone describe those records to a degree which enables a search to be conducted. See Konisberg, 68 N.Y.2d at 249.

38. Furthermore, the First Department has held that if a requestor fails to meet his burden and does not reasonably describe a record in the first instance, "FOIL does not require the respondent to solicit additional information from petitioner to enable respondent to identify documents possibly responsive to the FOIL request." See Mitchell, supra, at 227. Accordingly, Petitioner has failed to reasonably describe a record in the October Request that could be used to retrieve agency records, and the portion of the petition seeking such relief should be dismissed.

RESPONDENT IS NOT REQUIRED TO ENGAGE IN AN UNREASONABLY BURDENSOME PROCESS TO RESPOND TO PETITIONER'S OCTOBER REQUEST

39. Even if this court determines that Petitioner has reasonably described the records in a manner that could lead to their retrieval, Respondent is not required to retrieve the records sought, as courts have held that when the quantity of the records is simply too voluminous, rendering it burdensome to retrieve and disclose them, the agency is not required to produce the records. This is the case here, and Respondent is therefore not obligated to produce the requested records.

40. It is well established that an agency may, under proper circumstances, deny a FOIL request based on an unreasonable burden associated with identifying and producing the requested records. POL Section 89(3)(a) provides that:

> [a]n 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 or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article . . . When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system **with reasonable effort**, it shall be required to do so.

POL Section 89(3)(a) (emphasis added).

41. Based on these provisions, courts have regularly held that an agency need not produce records where doing so causes an unreasonable burden. An agency "relying on the volume of a request" must "first, established that the request is unduly burdensome and, second, establish that an outside service cannot be utilized to comply with the request." See Matter of Time Warner Cable News NY1 v. New York City Police Dep't, 53 Misc. 3d 657, 670 (Sup. Ct. N.Y. Cnty. 2016). In Huseman v. New York City Dep't of Educ., 2016 N.Y .Slip. Op. 30959(U)

(Sup. Ct. N.Y. Cnty. May 25, 2016), the New York County Supreme Court sustained the agency's non-disclosure of records on the basis that it was unreasonably difficult for the agency to disclose the records due to the undue burden and the extraordinary effort required to review the documents, anonymize persons, and redact 2,900 records, amounting to some 676 hours of work. Furthermore, the Court held that an agency is not obligated to hire an outside firm to facilitate retrieval or redaction from a database when it would be impracticable for an outside entity due to lack of sufficient understanding or familiarity with the database, and documents requested, including privacy concerns for persons identified within the records. Id.

42. The Committee on Open Government, tasked with providing advisory opinions on FOIL, also supports the foregoing. In FOIL-AO-18949 (August 20, 2012),[3] a FOIL request was made for approximately 3,000 emails exchanged between two specific individuals. The Committee noted that each of the responsive emails would need to be reviewed to determine the application of the FOIL Exemption. The Committee cited Fisher & Fisher v. Davison, 1988 N.Y. Misc. LEXIS 876, *9 (Sup. Ct. N.Y. Cnty. Sept. 27, 1988), where the court denied a FOIL request because of the extensive demands required of the agency responding to petitioner's request: "Petitioner's actual demand transcends a normal routine request by a taxpayer. It . . . would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already burdened bureaucracy." Id.

43. Here, though Petitioner's request is ambiguous, even the most reasonable interpretation would be for all documents related to requests for the use FRT for events that occurred within the geographical bounds identified by Petitioner for a three-year period. The Department would be required to engage in an unreasonably burdensome and time-consuming

[3] Publically available at: https://docs.dos.ny.gov/coog/ftext/2013/18949.html, and attached hereto as Appendix "A."

process to first retrieve, and then review any records potentially responsive to Petitioner's FOIL request. The Department has divided the City in geographical subsets—precincts—but, despite the precinct map being a publically available resource, Petitioner chose to draw their own geographic lines which do not conform with the pre-established precincts. In fact, as phrased, Petitioner's request encompasses portions of two (2) precincts, but could include documents from any of the Department's 77 precincts, as well as any and all specialized units that operate City-wide. Accordingly, the Department would need to search for every time the use of FRT was requested in the designated three-year period, and then review every responsive file to determine which ones relate to an event that occurred within Petitioner's defined geographic area. Then, the entire case file of each identified case would need to be reviewed to ensure that the responsive records are not otherwise exempt from disclosure.

44. Here, to even identify responsive documents, all requests for FRT would need to be reviewed, to determine whether they and their corresponding case files fall within the Times Square Area. The NYPD's FIS is the primary unit tasked with utilizing FRT. Accordingly, when a detective is handling a case and wishes to utilize FRT, they should submit an image depicting the individual who they are trying to identify. A request is then submitted to FIS for the assigned FIS investigator to run a query comparing the provided image to those photographs stored in the Department's photo repository. The result of this search is a pool of possible matches, which then undergoes visual comparison by the investigator. An FIS supervisor is then required to conduct a final review of the possible match. If the supervisor approves the possible match, such possible match is then sent back to the requesting detective, who is then required to conduct a further investigation to establish probable cause.

45. A preliminary search of records of FIS records for closings, image rejections, and matches (no matches and possible matches) indicated that, for the requested three-year period, indicated that FIS handled 22,069[4] cases. Accordingly, those 22,069 cases would need to be reviewed to determine whether they are tied to the geographic area defined by Petitioner. This would require taking the associated complaint number; running it through ECMS; locating the associated complaint report; and reviewing the complaint report to determine whether the incident occurred within the geographic area defined by Petitioner. While the review of the complaint reports and determining whether the incident occurred within the arbitrarily defined geographic area would only take about two minutes per case, as there are 22,069 cases, this amounts to just under 736 hours. Based on the typical 35-hour work week, to just determine whether the cases are responsive would take 21 work weeks. This alone renders Petitioner's request burdensome, but the inquiry would not end at this 21 weeks of work. Instead, since the request seeks "any and all records relating to facial recognition," the entire case file of each responsive case would be responsive by the mere use of FRT in the course of the investigation, and would need to be reviewed in its entirety to determine whether the files, or any portions thereof, are exempt from disclosure under FOIL and/or subject to redaction. This would require a more in-depth analysis than determining responsiveness alone.

46. Further, outsourcing the task of retrieving the information to a vendor would be impractical and unreasonable. Any vendor would be limited to the geographic limitations contained within NYPD's ECMS system. Moreover, engaging a vendor for the task of individually reviewing the files would allow the vendor access to sensitive documents that may

[4] A search for the 2 precincts covered in the geographic area arbitrarily defined by Petitioner would produce an under-inclusive number of cases because several Detective Bureau commands are citywide commands such as the Sex Crimes Units and it would be impossible to identify responsive search parameters without a citywide search.

be protected by various statutes protecting the privacy of victims and suspects alike. Detective Bureau files are replete with the names, addresses and other identifying information for crime victims, witnesses and their families along with similar information for suspects, never arrested or charged with any crime, or third parties whose information is retained by nature of their proximity to those persons. In addition, the in-depth details of certain crimes are proscribed from release such as rape or sexual assault investigations.

47. Petitioner's reliance on Matter of Jewish Press, Inc. v. N.Y. City Dep't of Educ., 2019 N.Y. Misc. LEXIS 1133 at *5 (Sup. Ct. N.Y. Cnty. March 1, 2019), rev'd in part, remitted in part, 183 A.D.3d 731 (2d Dep't 2020) is unpersuasive. The Appellate Division, Second Department did not resolve the question of undue burden, and instead held that "the 'issue of burden and/or whether the respondent is able to engage an outside professional service to cull the records sought was not addressed by the Supreme Court," and remitted the matter for further proceedings. Id. At *5-6. However, instead of further examining whether or not retrieving the records would be unduly burdensome, as the Second Department required, the Court granted the petition. This issue is far from resolved, as the City appealed that decision on August 3, 2020, and perfected that appeal on September 11, 2020. See id. at NSYCEF Index No. 524411/2018, Doc. No. 48, Notice of Appeal. Petitioner has filed a Motion to Dismiss the appeal, which has been opposed by the City. A determination on the motion is currently pending.

PETITIONER'S REQUEST FOR ATTORNEYS' FEES AND COSTS IS PREMATURE

48. Pursuant to POL 89(4)(c), a court (i) may award litigation costs to a party if the Court finds that the party "substantially prevailed" in the proceeding and the agency failed to respond to a request or appeal within the statutory time, and (ii) shall assess fees and costs when the party has "substantially prevailed" and the agency had no reasonable basis for denying access.

See POL 89(4)(c). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees. See Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 441 (2005).

49. An award of attorneys' fees and costs may only be granted where there is a finding that Petitioner substantially prevailed. In the instant case, neither party has been adjudicated to be the substantially prevailing party, rendering Petitioner's request for attorneys' fees and costs premature.

WHEREFORE, Respondent respectfully requests that this Court deny the petition in its entirety and dismiss this proceeding, and grant 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.

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