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

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In the Matter of the Application of

UPTURN, INC.,

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

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Petitioner,

-against-

Index No. _____

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

.....x

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MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION FOR JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of Upturn, Inc. and the public under the New York Freedom of Information Law ("FOIL"), N.Y. Pub. Off. Law §§ 86, 87, to access records held by the New York City Police Department (the "NYPD") concerning Mobile Device Forensic Tools (MDFTs), which are the means by which law enforcement extracts data from mobile devices.[1] Upturn seeks information relating to the NYPD's use of MDFTs, as well as the Department's policies and procedures governing such use.

Mobile devices frequently contain large stores of sensitive and private information that is irrelevant to any legitimate investigative purpose.[2] Forensic searches of mobile devices are therefore highly invasive, and there is every reason to believe that searches of mobile devices are increasingly common. As Chief Justice Roberts put it in *Riley v. California*, "[t]he sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions." 573 U.S. at 394.

Law enforcement uses MDFTs to extract information from mobile devices seized from suspects. Specifically, law enforcement can use MDFTS to bypass security features and extract nearly all data on a mobile device, including deleted data. As such, MDFTs offer law enforcement extraordinary access to a user's private data, including data that is irrelevant to law enforcement investigations.

[1] Generally speaking, two different kinds of extraction, logical and physical, give different scopes of data access — the latter including deleted data, system-level metadata, and other data normally inaccessible from the device's user interface.

[2] As the Supreme Court recognized five years ago in *Riley v. California*, "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity." 573 U.S. 373 (2014).

MDFTs' impact on mobile device user's privacy rights is an issue of significant public interest. Currently, the public is kept in the dark on how often the NYPD uses MDFTs and what policies and procedures have been issued to preserve the security of user's private data and how those policies and procedures are put into practice to avoid exposure of private data that is not relevant to any proper investigative purpose. As recently as December 5, 2019, the First Department has struck down a warrant authorizing examination of a defendant's cell phone browsing history for six or seven months and "without a time limitation, examination of essentially all the other data on defendant's phones" as overbroad under the Fourth Amendment. *People v. Thompson*, No. 10470, 2019 WL 6573187, at *1 (N.Y. App. Div. 1st Dep't Dec. 5, 2019). Aside from such holdings, the public has little information about the procedural safeguards that govern the NYPD's use of MDFTs. The public is entitled to understand the NYPD's activities and capabilities with respect to MDFTs, and this request seeks to further the public's understanding.

In the interest of advancing the public's understanding of the frequency, scale, and type of use of MDFTs by law enforcement, Petitioner filed a FOIL request with the NYPD on February 13, 2019, to obtain records of use and other documents pertaining to the NYPD's procurement and deployment of MDFTs.

Since Petitioner's initial FOIL request, the NYPD has failed on two occasions to provide adequate support for its incorrect and unlawful withholding of certain documents. Five months after Petitioner submitted its request, the Records Access Officer of the NYPD ("RAO") denied the request in its entirety, stating conclusively – and without reference to any provision of FOIL – that the Records Access unit was unable to locate records responsive to

Petitioner's request. Petitioner timely appealed this determination, arguing that the RAO's sweeping denial was not reasonable.

On August 26, 2019, the Records Access Appeals Officer ("RAAO") of the NYPD denied Petitioner's appeal and withheld an unspecified number of documents, citing – with little to no elaboration – four separate exemptions under FOIL. The RAAO's denial also asserted – with no indication that a diligent (or, indeed, any) search was conducted – that Upturn's request did not "reasonably describe" the records in a manner that could enable a search under FOIL.

The NYPD's repeated refusal to provide documents responsive to the request and apparent adoption of a "sue us" attitude and a dilatory approach with respect to its FOIL obligations has frustrated Petitioner's right to public disclosure and violates both the spirit and the letter of the Public Officer's Law. Accordingly, for the following reasons, Petitioner seeks an Order from this Court directing the NYPD to turn over all of the requested records, none of which are exempt from disclosure under FOIL.

STATEMENT OF FACTS

Upturn is a non-partisan public policy nonprofit organization based in Washington, D.C. Upturn's work focuses on fundamental issues of equity, design, and governance in the use of technology. Through scholarship, research, and advocacy, Upturn seeks to keep the public informed on issues of how technology affects public safety, criminal justice, and economic opportunity. Access to public information – and records produced and maintained by law enforcement in particular – is an essential component of Upturn's mission.

On February 13, 2019, Upturn submitted a FOIL request (the "Upturn Request") to NYPD Records Access Officer Lieutenant Richard Mantellino via email, seeking information about the NYPD's use of MDFTs. *See* Ex. A, Foil Request. For the avoidance of doubt, Upturn

explained in its request that MDFTs, which are commonly understood to refer to tools capable of extracting data from mobile devices, include any software, hardware, process, or service that is capable of (1) extracting any data from a mobile device, (2) recovering deleted files from a mobile device, or (3) bypassing mobile device passwords, locks, or other security features. *See* Ex. A[3] at 2.

Law enforcement use of MDFTs occurs when law enforcement seeks to gain access to private, secured, or deleted data. MDFTs may not be required to perform a search of a cell phone for specific files where, for instance, law enforcement has the phone's passcode and can search for specific data manually, like a recent photo. But MDFTs are required where law enforcement is barred from accessing sensitive evidence, either by a phone's normal security features. Similarly, MDFTs are also necessary in much more mundane, routine instances: for example, cases law when enforcement wants a forensically sound image and extraction of a mobile device's data. MDFTs can access private data that is hidden from the user interface, and even deleted data. In cases where an MDFT is used, there is a high risk that law enforcement will view sensitive private data that is irrelevant to the investigation. For this reason, it is imperative that the public have more information regarding the rules that govern the protection of private data from invasion by law enforcement investigation and how such procedures are implemented in cases that involve MDFT use. Accordingly, Upturn filed its FOIL request in the interest of shedding light on how law enforcement use MDFTs to achieve investigative objectives while maintaining basic protections of citizens' privacy rights. [4]

Public information confirms the existence of the records sought in the Upturn Request.

[3] All Exhibits cited in this Memorandum are attached to the Verified Petition.
[4] Upturn sent 100 records requests to state and local law enforcement agencies as part of a broader project regarding the use of mobile device forensic tools.

For instance, the NYPD has stated publicly that gaining access to mobile device forensic data has increasingly been of key concern to the Department's law enforcement activities. Former NYPD Commissioner James O'Neill has publicly written that "it is critically important" that the NYPD have access to an individual's "digital history, and encrypted communications." Ex. F. Moreover, United States Attorney General William Barr has spoken of the need for law enforcement to gain access to encrypted consumer-to-consumer communications. *See* Ex. E. Other law enforcement officials have written extensively about the law enforcement need to access encrypted or otherwise inaccessible mobile data. *See* Exs. G, H.

Moreover, court records indicate that NYPD officers have used MDFTs to execute search warrants seeking digital evidence on mobile devices. *See, e.g.*, *People v. Frederick*, 52 Misc. 3d 648, 650-51 (N.Y. Sup. Ct. 2016). As noted in *Frederick*, in May 2015 NYPD, "Detective Michael Rakebrandt submitted an affidavit in Support of a Search Warrant, seeking authorization to search electronic data on the cell phone and SIM card recovered from defendant." *Id.* at 649. This warrant authorized the search and seizure of "text messages, phone numbers, voice messages, call records, call history, stored telephone numbers, outgoing and incoming calls, contact information, addresses, pages and any other electronic information, photo images, video images or data otherwise contained within the cellphone" – which is exactly what MDFTs are designed to do. *Id.* at 650. Additionally, in that case, defense counsel received "a copy of the data retrieved pursuant to the warrant." *Id*.

In *Russell,* NYPD Police Officer Andrew Weiss was granted a warrant that allowed law enforcement agents "to search all of the data stored on the [defendant's phone] without limitation." *People v. Russell,* 61 Misc. 3d 1216(A), 2018 N.Y. Slip Op. 51541(U), at *2 (N.Y. Sup. Ct. Kings Cty. 2018). These circumstances similarly indicate that a MDFT must have been

used to execute this search. Additionally, in *English*, Officer Jonathan Reifer searched "the contents of the [defendant's] seized cellphone utilizing forensic software that extracts data from cellphones and converts it into a format readable to a layperson." *People v. English,* 52 Misc. 3d 318, 320 (N.Y. Sup. Ct. Bronx Cty. 2016). In *Watkins*, NYPD Sergeant Joseph Cruzado obtained a warrant "authoriz[ing] the downloading of all data contained in the cellular telephone . . . in order to locate the specific applications and files." *People v. Watkins*, 46 Misc. 3d 207, 210 (N.Y. Sup. Ct. Kings Cty. 2014). Again, these circumstances similarly indicate that a MDFT must have been used to execute this search. Locating data from specific applications is a publicly understood capability of multiple MDFT vendors identified in Upturn's Request, such as Cellebrite.[5]

MDFTs are built and designed to serve exactly the law enforcement needs that former Commissioners O'Neill has publicly referenced, and public information suggests that law enforcement engages in widespread use of MDFTs throughout the country. For example, publicly available information accessed through New York City's Comptroller's Office indicates that the NYPD has spent hundreds of thousands of dollars on MDFT equipment and training from providers like Cellebrite, Magnet Forensics, MSAB, and more.[6] In fact, Upturn has received hundreds of documents in response to similar MDFT records requests from dozens of other major law enforcement agencies, including those in Los Angeles (CA), Houston (TX), Dallas (TX), Phoenix (AZ), Miami-Dade (FL), Seattle (WA), and many others, including the Manhattan District Attorney's Office (NY). In each instance, the responding agency had no

[5] *See* Cellebrite, *Supporting new extraction methods and devices* (Feb. 13, 2019), https://www.cellebrite.com/en/productupdates/supporting-new-extraction-methods-and-devices/ (regarding "selective extraction" capability).
[6] Specifically, these records can be accessed through www.checkbooknyc.com.

difficulty complying with nearly identical requests from Upturn, which calls into question the validity of the NYPD's rejections of the Upturn Request here. Upturn has learned from public records disclosed by the Manhattan District Attorney's Office that the NYPD has communicated with the Manhattan District Attorney's Office regarding the purchases of various Cellebrite technologies designed for law enforcement agencies. Despite public knowledge about the NYPD's use of MDFTs – particularly MDFTs manufactured by Cellebrite – the public lacks information about the total costs involved with, and the procedures governing, the NYPD's use of MDFTs. Without this information, the public is unable to understand the amount and type of usage of MDFTs by the NYPD.

Accordingly, in light of the NYPD's widespread use of MDFTs, its stated need to use such technologies, and the public's significant interest in the transparency of law enforcement's use of MDFTs, Upturn submitted its February 13, 2019 FOIL request, seeking: (1) purchase records and agreements, (2) records of use, (3) policies governing use, (4) federal communications, (5) intrastate or regional communications, (6) vendor communications, and (7) nondisclosure agreements.

Five months after Upturn submitted its FOIL request, the NYPD denied Upturn's request in an email dated July 19, 2019. *See* Ex. B, FOIL Response. The sole basis for the denial was that NYPD was "unable to locate records responsive to your request based on the information you provided." *Id.*

On August 16, 2019, Upturn appealed NYPD's denial of its records request. *See* Ex. C. On August 26, 2019, NYPD summarily denied Upturn's appeal, stating that Upturn's record request "does not reasonably describe a record in a manner that could enable a search in accordance with POL §89(3)" and that the requested records were exempt from disclosure under

four separate exemptions: P.O.L. §§ 87(2)(c), 87(2)(d), 87(2)(g), and 87(2)(e)(iv). Ex. D. As with its initial denial, the NYPD made no attempt at a particularized showing as to how each of the listed exemptions applied to the various documents called for by each of the separate categories of records sought by the Upturn Request.

ARGUMENT

After exhausting available administrative remedies, "a person denied access to a record in an appeal determination . . . may bring a proceeding for review" of the agency's determination under Article 78 of the New York Civil Practice Law and Rules. N.Y. Pub. Off. Law § 89(4)(b) (McKinney 2019); *see also Murphy v. N.Y. State Educ. Dep't, Office of Prof'l Discipline*, 148 A.D.2d 160, 164 (1st Dep't 1989) (noting that a petitioner must exhaust administrative remedies before seeking judicial relief for a FOIL Request). This proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1)).

Petitioner has met the threshold for filing an Article 78 petition in New York Supreme Court because Petitioner has exhausted the administrative review process. The NYPD issued a determination on Petitioner's FOIL Request on July 19, 2019. Ex. B, Initial FOIL Determination. On August 16, 2019, Petitioner timely filed an administrative appeal challenging the Department's Determination Letter. Ex. C, Upturn's FOIL Appeal. In response, the NYPD sent Petitioner an Appeal Determination on August 26, 2019, which exhausted the administrative review process. Ex. D, Appeal Determination. Petitioner timely filed its petition on December 23, 2019, less than four months after the agency's decision became final and binding.

I. The NYPD Has Not Met Its Burden in Withholding the Requested Records.

A. FOIL is designed to maximize public access to government documents and exemptions are narrowly interpreted.

The RAAO's decision to withhold records responsive to the Upturn Request is contrary to law and not justified by the record. FOIL is premised on the fundamental principle that "'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" Grabell v. N.Y. City Police Dep't, 47 Misc. 3d 203, 208 (N.Y. Sup. Ct. N.Y. Cty. 2014) (quoting Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986)). FOIL was enacted to "provide the public with a means of access to governmental records in order to encourage public awareness . . . and to discourage official secrecy." In re Newsday, Inc. v. Sise, 71 N.Y.2d 146, 150 (1987). New York courts have therefore routinely held that "FOIL is to be liberally construed," id., and there is a presumption that records maintained by public agencies must be disclosed to the public. See Grabell, 47 Misc. 3d at 208-09; see also Capital Newspapers Div. of Hearst Corp., 67 N.Y.2d at 555 (FOIL "expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies."); Gould v. N.Y. City Police Dep't, 89 N.Y.2d 267, 274 (1996) ("To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public."); M. Farbman & Sons, Inc. v. N.Y. City Health & Hosps. Corp., 62 N.Y.2d 75, 79 (1984) ("FOIL implements the legislative declaration that 'government is the public's business', and imposes a broad standard of open disclosure upon agencies of the government." (citation omitted)).

Accordingly, New York public agencies must provide records requested through FOIL, unless certain limited exemptions apply. These exemptions are carefully circumscribed, and "'[are] narrowly interpreted so that the public is granted maximum access to the records of government.'" *Grabell*, 47 Misc. 3d at 208 (citation omitted). The Court of Appeals has made clear that "[a]ll government records are thus presumptively open for public inspection and

copying," *Gould*, 89 N.Y.2d at 274, and police records are no exception. *See N.Y. Civil Liberties Union v. N.Y. City Police Dep't*, Index No. 115928/09, 2011 WL 675562, slip op. at 11 (N.Y. Sup. Ct. N.Y. Cty. Feb. 14, 2011) ("All government documents, including police records, are presumptively available for 'public inspection and copying' . . . ."). Thus, under *Gould* and other Court of Appeals precedent, Petitioner Upturn has a clear right under FOIL to the NYPD records sought in the Upturn Request.

Because Upturn is presumptively entitled to review the requested records, the "'burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption.'" *Gould*, 89 N.Y.2d at 275 (citation omitted). The NYPD cannot deny FOIL requests simply by reciting FOIL exemptions without elaboration. Rather, a state agency must identify with particularity and specificity the basis upon which it relies on a FOIL exemption. *See Gould*, 89 N.Y.2d at 275 ("[B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government."); *see also Fink*, 47 N.Y.2d at 571; *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007).

B. Upturn reasonably described the records sought

1. NYPD's initial decision was facially inadequate

The Upturn Request sought, among other things, "[a]ny and all records describing the [NYPD's] use of MDFTs" and, in particular, records of individual instances of use for investigations that are (1) closed, or (2) currently pending appeal or other judicial proceedings related to prosecution. Ex. A at 2.

The NYPD's initial response – which came four months after the applicable statutory deadline for response – stated only that the NYPD was "unable to locate records responsive to [Upturn's] request based on the information [Upturn] provided." Ex. B. Citing no provision of

or statutory exemption under FOIL, this opaque response frustrates Upturn's right to public information and is representative of the NYPD's failure to fulfill its statutory obligations.

When an agency "inform[s] a person requesting records that the request or portion of the request does not reasonably describe the records sought," the agency must also "include[e] direction, to the extent possible, that would enable that person to request records reasonably described." 21 NYCRR § 1401.5(c)(1).[7] Here, the NYPD did not do so. The NYPD's failure to articulate more specifically the reasons for its denial is especially troublesome where, as here, Upturn could have remedied any purported defects in its request if the NYPD specified what those defects were. Its failure to do so denied Upturn its statutory right to access material subject to FOIL, and denied Upturn the right to a meaningful appeal. The NYPD's failure to fulfill its statutory obligations, and its apparent adoption of the "sue us" attitude in relation to FOIL requests, frustrates legislative intent to foster open government. *See N.Y. Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011).

2. NYPD's Appeal Determination undermines its initial decision, and fails to set forth a legally sufficient basis for withholding the requested records

NYPD denied Upturn's appeal with respect to this particular request, contending that it did not reasonably describe the records sought under Public Officers Law § 89(3). Notably, insofar as NYPD's appeal determination recognizes the existence of the requested documents, it undermines NYPD's initial decision which indicated that no responsive records could be located.

NYPD's appeal determination is also legally insufficient. To satisfy the reasonable description requirement, a FOIL request need not "'specifically designat[e]'" the records sought. *M. Farbman & Sons, Inc*, 62 N.Y.2d at 82 (holding that FOIL requests need not meet the

[7] 21 NYCRR § 1401.5(c)(1) is applicable to Article 78 proceedings. *See Gajadhar v. N.Y. Police Dep't*, 61 Misc. 3d 1218(A) (N.Y. Sup. Ct. N.Y. Cty. 2018).

stringent requirement under CPLR 3120 that documents be "specifically designat[ed]."). Rather, a request reasonably describes the records sought under Public Officers Law § 89(3) if it enables the agency to locate the records in question. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 (1986).

Here, the NYPD is clearly able to locate the records in question based on the Upturn Request. Indeed, the NYPD's appeal decision indicates that MDFT software "is accessible by *detectives assigned to certain specialized units*" (emphasis added), that the software is "regularly used in the course of an investigation when necessary," and that each detective "*details the use in a Complaint Follow-Up Report* ('DD5') specific to the complaint number being investigated" (emphasis added). Ex. D at 2.

NYPD contends that these DD5 records are nevertheless exempt from disclosure because they have not yet separated DD5 records reflecting MDFT software use from DD5 records that do not reflect such use, nor have they catalogued the same in a database or log. *Id.* They further contend that doing so now would "require extraordinary efforts" involving "dozens of detectives" reviewing "thousands of cases." *Id.*

This is likely an exaggeration of the burden the NYPD faces in responding to the Upturn Request. The NYPD could simply review a very small sampling of those DD5s to determine what language therein would be unique to DD5s that reflect MDFT use. The unique language search could then be run across the universe of DD5s to isolate responsive documents. This would require a fraction of the effort described by the NYPD. Moreover, the specificity of Upturn's request is a distinct issue unrelated to the administrative burden of responding to the request. As the court noted in *Stein*, "[i]nasmuch as petitioner's request clearly described the subject matter of the materials sought, the administrative burden of reviewing this

correspondence for relevance fails to establish that the request is insufficiently descriptive." *Stein v. New York State Dep't of Transp.*, 25 A.D.3d 846, 848 (3d Dep't 2006).

As to the NYPD's administrative burden argument itself, it is legally insufficient. As the court noted in *Kirsh* and *Konisburg*, "respondents 'cannot evade the broad disclosure provisions of [the] statute . . . *upon the naked allegation that the request will require review of thousands of records*.'" *Kirsch v. Bd. of Educ. of Williamsville Cent. Sch. Dist.*, 152 A.D.3d 1218, 1219 (4th Dep't 2017) (emphasis added) (quoting *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 (1986)). The NYPD's administrative burden argument is also premised on the NYPD's unwillingness to fulfill its FOIL obligations with respect to the Upturn Request. The NYPD claims that responding to Upturns request "would require a search of every individual case file maintained by dozens of detectives, for thousands of cases." This is not necessarily so. The NYPD run an electronic search using a narrow set of search terms to find information regarding MDFT use in each case file – but it apparently declined to do in response to the Upturn Request.

The NYPD has never contended the Upturn Request would require the NYPD to review every file in their possession. Rather, they have contended they would have to review "thousands" of DD5 investigation reports, which is itself likely an exaggeration of the process required, as explained above. The NYPD incorrectly implies that its FOIL obligation is limited to handing over a pre-identified, pre-organized set of documents precisely as maintained in the ordinary course. The process of public disclosure under FOIL will never be that seamless, and this reality does not permit the NYPD to issue a blanket denial of Upturn's request.

Moreover, the Upturn Request was sufficiently narrow and particularized in that it sought individual instances of use of MDFTs, such as case or docket numbers for cases where the NYPD used MDFTs. Ex. A. Courts have held that similar (or even less specific) requests are

sufficient under FOIL. *See, e.g.*, *Pflaum v. Grattan*, 116 A.D.3d 1103, 1104 (3d Dep't 2014) (holding that a request for "'any document that shows that [the attorney] did some kind of work for Columbia County " is reasonably described); *Gomez v. Fischer*, 74 A.D.3d 1399, 1401 (3d Dep't 2010) (holding that a request reasonably described records where petitioner sought "all communications from him received by 'the administration' between September 8, 2008 and September 19, 2008); *Irwin v. Onondaga Cty. Res. Recovery Agency*, 72 A.D.3d 314, 315 (4th Dep't 2010) (holding that a request was reasonably described where petitioner sought "inter alia, to compel disclosure of all of the electronically stored photographs in the possession of respondent Onondaga County Resource Recovery Agency (OCRRA) that were available for use in any OCRRA publication, with the exception of those photographs depicting only OCRRA staff, and any 'associated metadata' with respect to those photographs.").

C. The blanket exemptions cited by the NYPD do not justify the denial of Upturn's request.

The NYPD provided conclusory statements in its denial letters and has failed to meet its burden of establishing that any exemption applies. Having made no mention of these exemptions in its initial response, the NYPD raised these statutory exemptions for the first time in its appeal determination, which squarely conflicts with its initial basis for denial. With little elaboration, the NYPD referenced exemptions by citing and paraphrasing the applicable statutory text of FOIL. It is well-established that a rejection letter providing a naked recitation of FOIL's statutory exceptions is manifestly insufficient. *W. Harlem Bus. Group* 13 N.Y.3d at 884–85.

In particular, the NYPD cited four FOIL exemptions in support of its denial of the Upturn Request. These exemptions apply to information that: (1) could impair present or imminent contract awards; (2) are trade secrets; (3) amounts to inter-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency

policy determinations, or external audits; or (4) reveals criminal investigative techniques or procedures; *see* P.O.L. § 87(2). As discussed below, the NYPD has failed to articulate a sufficient basis for applying any of these exemptions. In this case, the NYPD denied access to the entirety of the requested records and did not opt to redact and produce documents that contain both exempt and non-exempt portions. But "not all of a document is necessarily exempt [merely] because a portion of it would be." *Polansky v. Regan*, 81 A.D.2d 102, 104 (3d Dep't 1981) (citing *Zuckerman v. N.Y. State Bd. of Parole*, 53 A.D.2d 405, 408 (3d Dep't 1976)). As is described below, the NYPD could have opted to redact records in response to each of the categories of records sought in the Upturn Request, but it instead issued a blanket denial based on conclusory allegations. Having taken this all-or-nothing position, the NYPD must show that the entirety of the requested records falls within an exemption – which it has failed to (and almost certainly cannot) do.

For the reasons explained below, the NYPD's reliance on purported exemptions to disclosure is unavailing with respect to each of the categories of requested documents.

1. Disclosing the requested records will not impair imminent contract awards or reveal trade secrets.

The NYPD failed to meet its burden justifying its invocation of the imminent contract award and trade secrets exemptions under FOIL. Despite its obligation to articulate a specific justification for its invocation of the two statutory exemptions, the NYPD simply recited statutory language with no factual support for the claim that these FOIL provisions exempted the requested records from disclosure in its Appeal Determination.

The imminent contract award exemption under P.O.L. § 87(2)(c) primarily protects the interests of an agency in achieving the optimum result in awarding a contract to a supplier of goods or services or in reaching a collective bargaining agreement. *Verizon N.Y., Inc. v.*

Bradbury, 40 A.D.3d 1113, 1115 (2d Dep't 2007) ("*Verizon I*"). Here, the NYPD offered no basis as to why disclosure of the requested records would harm the interests of the agency in awarding contracts to MDFT providers. The NYPD provided no reference to an ongoing competitive bidding situation, as was the case in *Verizon I*, and there is no factual basis to believe the Upturn Request would affect an active bidding situation. Moreover, even if this exemption were applicable to documents pertaining to a contemporaneous competitive bidding situation, it stretches reason to suggest that the exemption would apply to documents pertaining to past competitive bidding situations that have now been completed. Without more, the NYPD's conclusory allegation is an insufficient basis for justifying the exemption. "Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency's burden of proof." *Prof'l Standards Review Council of Am., Inc. v. N.Y. State Dep't of Health*, 193 A.D.2d 937, 939 (3d Dep't 1993).

The NYPD's assertion that the requested records are properly withheld on the basis of the trade secret exemption is equally unavailing. Public Officers Law Section 87(2)(d) exempts from disclosure records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Although FOIL contains no definition of "trade secret," New York law tracks the definition "trade secret" provided in the Restatement of Torts: "'any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.'" *See Ashland Mgmt. Inc. v. Janien,* 82 N.Y.2d 395, 407 (1993) (citations omitted); *U.S. Reinsurance Corp. v. Humphreys,* 205 A.D.2d 187, 191 (1st Dep't 1994). Given the comprehensive nature of the Upturn Request,

it is clear that, at most, this could only apply to a fraction of the requested material. To the extent that the requested records fall within the definition of trade secrets by, for example, revealing technical details about how MDFT software functions, the NYPD can redact those portions and disclose only records that show the nature and scope of law enforcement intrusions using MDFTs. But the NYPD did not even make an attempt at showing how this exemption applied to the requested records or determining whether exempted portions of responsive records could be appropriately redacted. Furthermore, under the Restatement, "single . . . events in the conduct of business, as, for example, the amount or other terms of a secret bid for a contract," or, by logical extension, the requested records, are not considered trade secrets. RESTATEMENT (FIRST) OF TORTS § 757 cmt. B (Am. Law. Inst. 2019). Here, the purchase records and vendor communications, including contracting and pricing information, cannot be considered "secret" if at least some of this information has been disclosed by other state agencies in response to Upturn's public records requests. *See Verizon N.Y., Inc. v. N.Y. State Pub. Serv. Comm'n,* 137 A.D.3d 66, 72 (3d Dep't 2016) ("*Verizon II*") (stating that whether information is a trade secret involves a factual inquiry "'concerning whether the alleged trade secret is truly secret'".) (quoting *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 738 (3d Dep't 2003).

Furthermore, the NYPD has also failed to meet its burden of showing that the responsive records "would cause substantial injury to the competitive position of the subject enterprise." P.O.L. § 87 (2)(d); *Verizon II*, 137 A.D.3d at 70. Notably, Upturn has received records from law enforcement agencies in response to nearly identical requests without causing substantial injury to the competitive position of an enterprise. Moreover, at a minimum, application of this exemption should be supported by a showing by the commercial enterprise – here, presumably Cellebrite Technologies or other companies from which the NYPD has purchased or leased

MDFTs – that would purportedly be injured. *See Newsday LLC v. Nassau Cty. Police Dep't*, 42 Misc. 3d 1215(A) 2014 N.Y. Slip Op. 50044(U), at *5 (Sup. Ct. Nassau Cty. 2014) ("There is no statement from the unnamed vendor, let alone persuasive evidence, demonstrating how release of the information would cause an injury to its competitive interests. Accordingly, it must be rejected."). The NYPD has offered no such showing.

Furthermore, "the policy behind Public Officers Law § 87(2)(d) is simply 'to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York.'" *Verizon II*, 137 A.D.3d at 71 (citation omitted). Fulfillment of the Upturn Request will not result in deleterious consequences to businesses within the state because Upturn has no reason to use the information it seeks to gain competitive advantage for itself and there is no reason to think that Upturn will disclose information in a way that will advantage a competitor. Where, as here, there is no reasonable expectation that disclosure of the requested records would cause substantial injury to an enterprise's competitive bidding position, the NYPD has no basis to justify its invocation of the trade secrets exemption. *Cf. Prof'l Standards Review Council of Am. Inc. v. N.Y. State Dep't of Health*, 193 A.D.2d at 939 (declining application of the trade secrets exemption where "[t]here is no showing that IPRO, bidding on a public contract, had any reasonable expectation of not having its bid open to the public."). At a minimum, in order to carry its burden that this exception applies to some of the documents and information sought by Upturn, the NYPD should have provided any nondisclosure agreements with any of its MDFT vendors, which were expressly called for by the Upturn Request. It did not (and apparently will not) do so, and accordingly cannot now demonstrate that the exemption for trade secrets or competitively sensitive information applies.

Moreover, the NYPD's blanket invocation of the trade secret exemption sets forth no particularized justification for applying the exemption to the Upturn Request. "While it is true that records containing 'trade secrets . . . which if disclosed would cause substantial injury to the competitive position of the subject enterprise' are exempt from disclosure (Public Officers Law § 87[2][d]), the basis for the exemption must be 'a particularized and specific justification for denying access.'" *Bahnken v. N.Y. City Fire Dep't,* 17 A.D.3d 228, 230 (1st Dep't 2005) (quoting *Capital Newspapers Div. of Hearst Corp.,* 67 N.Y.2d at 566 (1986)). In fact, the NYPD provided no reason as to why the requested records – particularly, the purchase records, vendor communications, and policies governing use – constitute trade secrets.

Accordingly, the NYPD's Appeal Determination amounts to a response that is "wholly insufficient" under FOIL. *See Church of Scientology of N.Y. v. State*, 46 N.Y.2d 906, 907–08 (1979). That is, the NYPD has "tendered only references to sections, subdivisions, and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld." *Id.* Such a response "falls short of the showing FOIL requires to establish the applicability of an exemption." *City of Newark v. Law Dep't of N.Y.*, 305 A.D.2d 28, 33-34 (1st Dep't 2003) (holding that an agency withholding "all of the requested records on the basis of a blanket invocation of three statutory exemptions, without enumerating or describing any of the documents withheld and without offering a specific basis for any of the claims of exemption" was improper).

It is well-established under New York State law that a bare invocation of the statutory language of FOIL exemptions cannot justify withholding records under FOIL. *See, e.g.*, *Gould*, 675 N.Y.2d at 274; *W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884–85

(2009). This Court should therefore compel disclosure of the withheld purchase records, vendor agreements, and nondisclosure agreements.

2. Disclosing the requested records will not reveal exempted inter-agency or intra-agency materials.

Public Officers Law Section 87(2)(g) permits exemption of records that "are inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; [or] (iv) external audits, including but not limited to audits performed by the comptroller and the federal government." Whether or not this exemption applies depends on whether or not the materials sought are truly deliberative, "i.e., communications exchanged for discussion purposes not constituting final policy decisions." *Russo v. Nassau Cty. Cmty. Coll.*, 81 N.Y.2d 690, 699 (1993). The purpose of this exemption is to allow "people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." *N.Y. Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 488 (2005).

NYPD's Appeal Determination stated as follows:

> Regarding Item Nos. 4 & 5 for communications between this agency and other federal, local, county or regional agencies regarding MDFTs – specifically, as stated in footnote no. 8 of your February 13, 2019 request, for "communications pertaining to contracts and orders – the appeal is denied *to the extent that any communications are exempt from disclosure* as inter-agency materials which are not: i) statistical or factual tabulations or data; ii) instructions to staff that affect the public; iii) final agency policy or determinations; or, iv) external audits [§87(2)(g)].

Ex. D at 3 (emphasis added).

Here again, a bare recitation of FOIL's statutory exceptions is insufficient to justify withholding records. *W. Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d at 884–85. In this instance, NYPD has not even affirmatively stated that it believes the exemption at § 87(2)(g) is applicable; it states only that "the appeal is denied *to the extent that* any

communications are exempt from disclosure." Ex. D at 3 (emphasis added). This response is puzzling. Namely, the NYPD's use of the phrase "to the extent that" suggests that NYPD performed little to no analysis to determine whether the requested communications are exempt. Instead, the NYPD has apparently theorized that the exemptions apply to the Upturn Request without reviewing any documents before formulating its response. The court should therefore compel the disclosure of these communications as the NYPD has provided no particularized and specific justification for applying this exemption. *See Gould*, 89 N.Y.2d at 275 (noting that public records are presumptively discoverable unless the public agency specifically articulates an applicable exemption).

Even if NYPD had affirmatively asserted this exemption, most if not all of the records sought by the Upturn Request fit squarely within one of the enumerated exceptions to this exemption. The exception for "statistical or factual tabulations or data" has been interpreted very broadly to mean "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Gould*, 653 N.Y.S.2d at 58. Contracts, licenses, waivers, grants or agreements with federal agencies, by their very nature, are objective documents that reflect an agreement reached between two parties. They do not reveal deliberative process concerning how those agreements were reached, the negotiation process involved, or the parties' opinions about the terms therein.

Moreover, P.O.L. 87(g)(2)(iii) requires disclosure of final agency policy or determinations, while exempting pre-decisional memoranda reflecting deliberative process. The documents sought in Upturn's request (such as contracts, licenses, waivers, grants and agreements) constitute final decisional documentation reflecting the culmination of the agency's negotiations and deliberations. Additionally, the communications with other agencies Upturn

sought include contracts, licenses, and other procurement documents, which are instructions to agency staff that affect the taxpaying public. *See N.Y. Civil Liberties Union v. Erie Cty. Sheriff's Office,* 47 Misc. 3d 1201(A) (N.Y. Sup. Ct. Erie Cty. 2015) (declining to apply the intra-agency exemption to purchase orders). As such, the agency communications records requested by Upturn are final agency policy determinations, falling squarely within the statutory exception. P.O.L § 87(2)(g)(ii).

To the extent that any of NYPD's deliberative process is truly captured by any specific portion of a document Upturn has requested, that material can readily be redacted or excluded from production. But under no interpretation of this exemption should all, or even a substantial portion, of the Upturn Request be denied.

3. Disclosing the requested records will not reveal investigative techniques or procedures.

Like the NYPD's denial of the purchase agreements and vendor communications, the NYPD failed to provide a particularized and specific justification for its denial of the policies governing the use of MDFTs. The techniques and procedures exemption is intended to prevent FOIL requests that would "'furnish the safecracker with the combination to the safe.'" *Loevy & Loevy v. N.Y. City Police Dep't*, 46 Misc. 3d 1214(A), 2015 N.Y. Slip Op. 50056(U), at *4 (Sup. Ct. N.Y. Cty. 2015) (quoting *Fink v. Lefkovitz*, 47 N.Y.2d 567, 573 (1979)), *rev'd*, 139 A.D.3d 598 (1st Dep't 2016). It therefore can be "properly invoked only where there is 'a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.'" *Grabell v. N.Y. City Police Dep't*, 47 Misc. 3d 203, 209 (N.Y. Sup. Ct. N.Y. Cty. 2014) (citations omitted).

Here, the documents sought by the Upturn Request – namely, policies governing the use of MDFTs – are not likely susceptible to exploitation for criminal purposes, in contrast with, for

example, details regarding undercover operations which are subject to exemption. *Cf. Asian Am. Legal Def. & Educ. Fund v. N.Y. City Police Dep't*, 41 Misc. 3d 471, 477-78 (Sup. Ct. N.Y. Cty. 2013), *aff'd*, 125 A.D.3d 531 (1st Dep't 2015). Moreover, Upturn has filed nearly identical requests with numerous law enforcement agencies who have disclosed responsive documents without any adverse impact to ongoing law enforcement operations. Here, the NYPD gives no reason as to why this exemption is appropriately applied to the Upturn Request. Instead, the Appeal Determination states conclusively that records have been withheld pursuant to P.O.L. § 87(2)(e)(iv) "because disclosure would reveal non-routine criminal investigative techniques or procedures." Ex. D at 3.

This statement does not withstand scrutiny. In its response, the NYPD has not provided any reason to believe that the withheld information could reveal any sensitive criminal investigative technique or procedure. If the NYPD has some legitimate concern that the Upturn Request calls for such information, it has not made any attempt to articulate any reason justifying this concern beyond the invocation of the boilerplate language of the statutory exemption. The NYPD cannot shield documents from FOIL requests by simply reciting the "investigative technique" exemption. *See Jones v. Town of Kent*, 46 Misc. 3d 1227(A), 2015 WL 1187221, at *2 (N.Y. Sup. Ct. Putnam Cty. 2015) (holding that respondent's assertions "that disclosure would . . . interfere with investigative techniques . . . and . . . fall far short of the requirement" where "there is nothing more than the incantation of the words of the statute."). Any other conclusion would allow the NYPD to assert this exemption against any FOIL request for policies governing use of MDFTs or other law enforcement technologies on grounds that they involved some form of "investigative technique." Moreover, the NYPD can redact the documents in accordance with the procedure outlined in *Grabell* if it deems certain portions of the records

requested to be covered by the exemption. In the absence of a particularized and specific justification for invoking Public Officers Law Section 87(2)(e)(iv), however, it is impossible to determine the NYPD's reason for the denial.

II. The NYPD Has Failed to Identify or Describe the Categories of Withheld Information.

FOIL mandates that an agency may not simply withhold documents in their entirety without any substantive explanation. Instead, agencies must identify the nature of the documents for which an exemption has been claimed. Further, where part of a document may be exempt, the agency must nevertheless provide a redacted version containing all non-exempt information. *See Grabell*, 47 Misc. 3d at 208 ("[W]here only a portion of a given document is properly exempt, agency is nonetheless obligated to produce a redacted version that discloses all the non-exempt information."); *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 464 (2007), *see, e.g.*, *Schenectady Cty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011). Where information can be reasonably redacted from the requested record, an agency cannot withhold the entire document under FOIL. *Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals,* 935 N.Y.S.2d at 281; *Data Tree*, 9 N.Y.3d at 466; *see also Gould*,89 N.Y.2d at 275.

The NYPD has neglected to comply with either of these requirements. Its categorical withholding of communications, purchase agreements, nondisclosure agreements, and policies and procedures governing MDFT use, and its limited descriptions of other withheld case files referencing MDFT use, prevents Petitioner from assessing the reasonableness of the NYPD's claims. To the extent certain responsive documents contain information that properly can be withheld, the NYPD should be directed to provide Petitioner with redacted versions of those documents.

III. Upturn is Entitled to Attorney's Fees and Costs

If the Court finds that the NYPD should be compelled to produce the requested documents – and in particular, the records of use – because the NYPD had no reasonable basis for denial, the court should award Upturn attorney's fees and costs under Section 8601 of the New York Civil Practice Law and Rules ("CPLR") and Public Officers Law Section 89(c)(i). Under CPLR Section 8601(a), "a court shall award to a prevailing party . . . fees and other expenses incurred by such party in any civil action brought against the state." Moreover, under Public Officers Law Section 89(4)(c)(i), "[t]he court in such a proceeding [related to access to records] may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and, when the agency had no reasonable basis for denying access." *See Bottom v. Fischer*, 129 A.D.3d 1604, 1605 (4th Dep't 2015) (holding that the Supreme Court abused its discretion by denying reasonable attorney's fees and litigation costs as "respondent had no reasonable basis for its blanket denial of petitioner's [FOIL] request"); *see also N.Y. State Defenders Ass'n v. N.Y. State Police,* 87 A.D.3d 193, 195–96 (3d Dep't 2011).

"The counsel fee provision was first added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that certain agencies have adopted a 'sue us' attitude in relation to providing access to public records, thereby violating the Legislature's intent in enacting FOIL to foster open government." *N.Y. Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011) (finding that the Supreme Court abused its discretion in denying an award of attorney's fees) (quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court compel the NYPD to produce documents responsive to Petitioner's FOIL request. Finally, Petitioner respectfully requests that the Court award the petitioner its reasonable attorneys' fees and litigation costs.

Dated: New York, New York
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Respectfully submitted,

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