

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

AMNESTY INTERNATIONAL USA,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT

Respondent,

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

Index No. \_\_\_\_\_

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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## **PRELIMINARY STATEMENT**

This Article 78 proceeding seeks to vindicate Amnesty International USA (“AI USA”) and the public’s rights under the Freedom of Information Law (“FOIL”), [N.Y. Pub. Off. Law § 87](#), to access New York City Police Department (the “NYPD”) records about certain surveillance technologies available to the NYPD for deployment during last year’s historic protests against police violence.

Specifically, AI USA requested records from NYPD on September 15, 2020 concerning the procurement, functionality, and use of Facial Recognition Technology (“FRT”), drones, gait recognition, cell-site simulators, and ambient sound recording devices (collectively, “Surveillance Technologies”) from March 1, 2020 through September 1, 2020 (the “Request”). These tools give the NYPD previously-unimagined potential to track and chill free assembly, freedom of worship, and nearly every other aspect of life. Federal, state, and local law enforcement agencies across the country have used Surveillance Technologies to track Black Lives Matter protests following last year’s demonstrations against the police murder of George Floyd and killing of Breonna Taylor (“BLM Protests”). Media and civil society groups have already documented NYPD’s use of drones, video analytics, and Automated License Plate Readers, including to track and monitor protestors during the BLM Protests.<sup>1</sup> Alarming, given the NYPD’s reluctance to reveal its deployment of the Surveillance Technologies, it is impossible to know if other Surveillance Technologies were deployed at BLM Protests or for other speech-chilling purpose absent its

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<sup>1</sup> See, e.g., Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. TIMES (Jun. 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html>; Ángel Díaz, *New York City Police Department Surveillance Technology*, BRENNAN CENTER (Oct. 4, 2019), <https://www.brennancenter.org/our-work/research-reports/new-york-city-police-department-surveillance-technology>.

compliance with the Request.<sup>2</sup> The time period of the Request (March 1, 2020 through September 1, 2020) is designed to focus in on the period immediately before and during these historic protests.

As background for the Surveillance Technologies: FRT is computer vision software that purports to identify a person from a photograph or a video by comparing their facial geometry to a database of individuals; drones include both unmanned aerial vehicles (“UAVs”) and ground-based robotics; gait recognition is computer vision software that purports to identify a person from a video clip by comparing their walking stride to a database of individuals; cell-site simulators—also known as “IMSI Catchers” or “sting-rays”—are government operated cellular transceivers that can track the location and communications of nearby electronic devices; ambient sound recordings include, but not limited to, audio recordings extracted from ShotSpotter, a purported gunshot detection system that uses hundreds, possibly thousands, of microphones across New York City. The Request seeks correspondence related to the procurement of Surveillance Technologies and information about related support to the NYPD from the New York Police Foundation, Inc. (the “Foundation”). Surveillance Technologies—both individually and collectively—raise human rights and civil rights questions that are central to not only AI USA’s globally recognized mission to protect people’s human rights wherever justice, freedom, truth, and dignity are denied, but to the statutory purpose of FOIL.

FOIL codifies New York State’s commitment to governmental transparency and the enduring belief that misconduct flourishes in the darkness and that sunlight is the best disinfectant. Given the threat that Surveillance Technologies potentially pose to New Yorkers and the core tenets of a democratic society, the need for FOIL compliance here is only further heightened.

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<sup>2</sup> Sisitzky & Schaefer, *The NYPD Published Its Arsenal of Surveillance Tech. Here’s What We Learned*, NYCLU (Feb. 24, 2021), <https://www.nyclu.org/en/news/nypd-published-its-arsenal-surveillance-tech-heres-what-we-learned>.

Compelling the NYPD's compliance with the Request will empower New Yorkers to better understand how Surveillance Technologies shape the way our city is policed and surveilled at a moment when policing policy is of historic significance.

Sadly, rather than seeking to uphold New York's FOIL law, the NYPD seeks to evade even the most minimal compliance obligations and has *refused to produce even a single document*. Each of the agency's asserted bases for rejecting AI USA's request cannot withstand scrutiny.

*First*, the NYPD has refused to produce documents primarily based on an assertion of burden, claiming, for instance, it cannot run keyword searches for the identified names of the companies known to sell the Surveillance Technologies. But, as detailed below, the *NYPD appears to have done just that in response to prior FOIL requests* and there is no apparent reason it cannot do so here. The NYPD's purported burden and inability to locate records specified in AI USA's request thus ring hollow.

*Second*, the Request does not implicate any protectable trade secret or competitively sensitive information. The FOIL exemption for commercially sensitive information is designed to protect enterprises that have submitted information to state regulators, not enterprises that have already contracted with and accepted substantial payments from government agencies in exchange for their services. Moreover, many municipalities across the nation now require their police departments to disclose acquisition of surveillance tools from private vendors and the functionality and use of such technologies.<sup>3</sup> Nor has the NYPD made any showing that release of the requested

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<sup>3</sup> See, e.g., Degroff & Cahn, *An Early Assessment of Community Control of Police Surveillance Laws*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (Feb. 10, 2021) <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/602430a5ef89df2ce6894ce1/1612984485653/New+CCOPS+On+The+Beat.pdf>.



information would impair any *specific* third-party vendor's competitive position or imperil any present or imminent government contract.

*Third*, it is hard to imagine how the Request—which primarily seeks documents about the procurement, functionality, and general use of Surveillance Technologies—could interfere with any *specific* pending judicial proceeding or law enforcement investigation against an individual. But to the extent documents compiled for any specific law enforcement proceeding are covered by the Request, they could be redacted or excluded from production.

*Fourth*, for similar reasons, there is no basis for NYPD's wholesale refusal to produce documents based on the assertion that doing so could reveal the identity of confidential sources or undercover officers. Indeed, courts often allow for the disclosure of other surveillance tools (like cellular site simulators). Again, in the unlikely event that might happen, the information could be redacted or excluded from production.

*Fifth*, the information sought would not reveal non-routine criminal investigative techniques that might give criminals an advantage. Rather, the materials sought are more akin to information about policies governing *routine* investigative techniques and procedures during protests. Moreover, the NYPD regularly runs images – captured from what AI's research shows to be likely over 15,000 surveillance cameras – through the FRT software it purchased; in 2019 alone, the NYPD used FRT in over 10,000 cases.<sup>4</sup>

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<sup>4</sup> See *Surveillance city: NYPD can use more than 15,000 cameras to track people using facial recognition in Manhattan, Bronx and Brooklyn*, AMNESTY INTERNATIONAL (Jun. 3, 2021), <https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed>; *S.T.O.P. Condemns NYPD for 22K Facial Recognition Searches*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (Oct. 23, 2020), <https://www.stopspying.org/latest-news/2020/10/23/stop-condemns-nypd-for-22k-facial-recognition-searches>.

*Finally*, the vast majority of information sought does not reflect any internal deliberations on the part of the NYPD, but rather seeks obviously *non-deliberative* documents such as contracts and finalized policy and guidance documents concerning procurement, functionality, and use of Surveillance Technologies. Such types of documents are specifically excepted from FOIL’s inter- and intra-agency exemption. Any documents reflecting actual internal deliberations could be redacted or excluded from production.

For all of these reasons, and as more fully explained herein, AI USA respectfully requests this Court grant its Verified Petition (“Petition”).

### **STATEMENT OF FACTS**

Amnesty International (“AI”) is a non-profit international human rights and advocacy organization based in London, England. AI is the parent organization of two U.K. legal entities: Amnesty International Limited, a London, England–based corporation, and Amnesty International Charity Limited, a London, England–based registered charity. AI USA is AI’s sole United States subsidiary, employing lawyers, researchers, and experts to promote human rights, including many world-leading experts on policing. AI USA’s reports enable intensive advocacy and publicity campaigns, utilizing AI USA’s extensive membership and media contacts.

Public records research is indispensable to AI’s mission.<sup>5</sup> In particular, public records research forms a crucial part of the human rights research and advocacy that AI has conducted

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<sup>5</sup> In addition to the transparency-enhancing goals of FOIL, the right of access to information, like freedom of opinion and expression, is viewed by international communities as an essential human right. The *International Covenant on Civil and Political Rights* published by the United Nations’ Human Rights Committee provides that the right of access to information includes “the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purpose.” UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, ¶18.

around the mass and discriminatory surveillance uses of facial recognition technologies over the last year.<sup>6</sup> On September 15, 2020, AI USA submitted the Request (submission number 2020-056-13681) to the NYPD FOIL Office via the NYPD FOIL website.<sup>7</sup> Petition, Ex. A. The Request sought documents on the procurement, functionality, and use of Surveillance Technologies—including FRT, drones, gait recognition, cell-site simulators, and ambient sound recording devices—from March 1, 2020 to September 1, 2020. The Request further sought all correspondence related to Surveillance Technologies and a list of all items donated to the NYPD from the Foundation between January 1, 2010 – September 1, 2020.

The Request delineated specified categories of records pertaining to Surveillance Technologies, including (1) procurement documents (such as purchase contracts) and (2) policies, memoranda and guidance documents concerning the use and functionality of the technologies, such as documents pertaining to the (a) data inputs (*e.g.*, the photographs inputted by NYPD into FRT), (b) the sources of such data (*e.g.*, CCTV cameras, bystander photos, commercial and government databases of photographs); (3) the rationale for NYPD’s deployment of the technologies (*e.g.*, when it is and is not permissible for NYPD to deploy such technologies in connect with protests or other activity); (4) the categorization of use of the results of the technologies (*e.g.*, how the technology purportedly identifies individuals, how to interpret the results of the technology, and how the NYPD uses the results to target or exclude individuals in connection with an NYPD investigation). Petition, Ex. A. The Request identified by name specific companies that are known to sell Surveillance Technologies. *Id.*

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<sup>6</sup> See *Ban the Scan*, AMNESTY INTERNATIONAL, <https://banthescan.amnesty.org/> (last visited July 13, 2021).

<sup>7</sup> See NYC Open Records, <https://a860-openrecords.nyc.gov/> (last visited July 13, 2021).

The Request further sought all correspondence related to Surveillance Technologies and a list of all items donated to the NYPD from the Foundation between January 1, 2010 – September 1, 2020.

On January 29, 2021, the NYPD denied AI USA’s Request in its entirety. Petition, Ex. B. The NYPD’s terse denial invoked, without any explanation, certain exceptions to FOIL, stating summarily that release of the information sought would “reveal non-routine techniques and procedures,” “interfere with law enforcement investigations or judicial proceedings,” “identify confidential source or disclose confidential information relating to a criminal investigation,” and reveal “inter-agency or intra-agency materials not final agency policy or determinations.” *Id.* (citing Public Officers Law Sections 87(2)(e)(iv), 87(2)(e)(i), 87(2)(g)(iii), 87(2)(e)(iii)). These blanket assertions drew no distinction between any of the categories of documents sought by AI USA’s Request.

AI USA appealed the NYPD’s denial on March 1, 2021, explaining that the NYPD was required to do more than simply parrot statutory exemptions without making any specific demonstration of their applicability, and explaining how the cited exemptions were in any event inapplicable. Petition, Ex. C. On March 15, 2021, the NYPD denied the appeal without making any effort to explain how the four exceptions it invoked were applicable. Petition, Ex. D. Instead, NYPD focused its efforts on the assertion that compliance with the Requests was far too burdensome, claiming that, among other things, it could not simply run a search for a “keyword such as ‘Clearview AI,’ [a company that sells FRT],”<sup>8</sup> to locate documents pertaining to the

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<sup>8</sup> Clearview AI was specifically identified in the Request as one of the potential vendors that sell FRT to the NYPD. Clearview AI’s FRT “scrap[s] billions of images of people via the Internet” to generate a data pool to be sold for surveillance purpose, raising serious concerns of privacy rights, potential data breaches, misidentification, and inherent bias from the algorithm. Moore, *Facial Recognition under Scrutiny As Clearview AI’s Practices Ruled Illegal in Canada*,

“negotiation, contracting, procurement, oversight, management, etc., of a specific technology.” Petition, Ex. D at 2. This was not true. As AI USA later learned after the denial of its appeal, the NYPD had apparently searched for and produced certain “Clearview AI” documents in response to a FOIL request from another entity in 2021. Petition, Ex. E; *see also infra* at 11, 12.

NYPD also claimed that it conducted a search for only “contracts with companies identified” in the Request but still denied NYPD’s appeal by invoking, for the first time, Public Officers Law sections 87(2)(c) and 87(2)(d), which protect from disclosure “present and imminent contract award,” “trade secrets,” or otherwise competitively sensitive information of third-party vendors. Petition, Ex. D at 2. Once again, the NYPD made no attempt to particularize how each of the category of document sought could impair the protected interests of any subject enterprise beyond simply recitation of the statutes. *Id.*

## **ARGUMENT**

### **I. THE NYPD’S DENIAL OF AI USA’S REQUEST MERITS ARTICLE 78 REVIEW.**

Under FOIL, “a person denied access to a record in an appeal determination under the provisions” governing appeals “may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.” [Pub. Off. Law § 89\(4\)\(b\)](#). Judicial review under Article 78 of the New York Civil Practice Law and Rules is proper when “a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” [CPLR 7803\(3\)](#). Such a “proceeding against a body or officer

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IFSEC GLOBAL (Feb. 16, 2021), <https://www.ifsecglobal.com/video-surveillance/facial-recognition-under-scrutiny-as-clearview-ais-practices-ruled-illegal-in-canada/>. Concerned by Clearview AI’s mass surveillance program, the Canadian government has recently ruled that the company’s collection of biometric information from its citizens without their knowledge or consent is illegal. *Id.*

must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” CPLR 217(1).

The appropriate standard of review in an Article 78 proceeding with respect to the denial of a FOIL request is “whether the determination ‘was affected by an error of law.’” *Thomas v. Condon*, 128 A.D.3d 528, 529 (N.Y. App. Div. 1st Dep’t 2015) (citing CPLR 7803(3)). Under this standard of review, the NYPD is limited to defending its denial on the “exemption[s] to FOIL ... cited by respondent[] at the administrative level.” *Law Offices of Adam D. Perlmutter, P.C. v. N.Y. City Police Dep’t*, 123 A.D.3d 500, 501 (N.Y. App. Div. 1st Dep’t 2014). The typical “arbitrary and capricious” standard for Article 78 actions does not apply; “[a] party claiming exemption from disclosure of a particular document requested pursuant to FOIL bears the burden of proving entitlement to the exemption.” *Bahnken v. N.Y. City Fire Dep’t*, 17 A.D.3d 228, 229 (N.Y. App. Div. 1st Dep’t 2005); *see also Laureano v. Grimes*, 179 A.D.2d 602, 603-04 (N.Y. 1992) (“[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR Article 78 proceedings, i.e., that the agency’s determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable. Rather, the person resisting disclosure must prove entitlement to one of the exceptions.”) (citation omitted).

AI USA properly challenges the NYPD’s denial of its appeal as affected by error of law. AI USA has complied with FOIL and Article 78’s requirements and has brought this proceeding within four months after the NYPD’s determination denying the appeal, making this action timely.

## **II. NYPD’S DENIAL OF AI USA’S REQUEST VIOLATES FOIL.**

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*, 996 N.Y.S. 2d 893, 905 (N.Y. Sup. Ct. 2014) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). The New York Court of Appeals has repeatedly held that 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.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 505 N.Y.S.2d 576, 578 (1986); see also *Gould v. N.Y. City Police Dep’t*, 653 N.Y.S.2d 54, 57 (1996) (“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public”); *Farbman & Sons, Inc. v. N.Y. City Health & Hosps. Corp.*, 476 N.Y.S.2d 69, 70-71 (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.”) (internal citation omitted). To promote these principles, the Court of Appeals has made clear that “[a]ll government records are thus presumptively open for public inspection and copying.” *Gould*, 653 N.Y.S.2d at 57 (emphasis added).

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, at \* 11 (N.Y. Sup. Ct. Feb. 14, 2011) (“All government documents, including police records, are presumptively available for public inspection and copying ...”). Indeed, it is well-established that “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” *Gould*, 653 N.Y.S.2d at 57.

Because AI USA is presumptively entitled to review the requested records, the NYPD has the burden to prove that a requested record “falls squarely within the ambit of one of [FOIL’s] statutory exemptions” and is therefore not available for inspection. *Gould*, 653 N.Y.S.2d at 57. This is not an easy burden to satisfy. The Court of Appeals has held that “[t]o ensure [FOIL’s

policy of] maximum access to government documents, the exemptions are to be narrowly construed.” *Id.*

**A. AI USA Reasonably Described the Records Requested.**

To satisfy the reasonable description requirement, a FOIL request need not “specifically designat[e]” the records sought. *M. Farbman & Sons, Inc. v. N.Y City Health & Hosps. Corp.*’464 *N.E.2d* 437 at 441 (N.Y. 1984). Rather, “[i]nasmuch as petitioner’s request clearly described the *subject matter* of the materials sought,” mere “administrative burden of reviewing” does not “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) (emphasis added). The agency must demonstrate that the description is so insufficient that it cannot locate and identify the documents sought. *Jewish Press, Inc. v. New York City Dep’t of Educ.*, 183 *A.D.3d* 731, 732 (2d Dep’t 2020) (quoting *Matter of Konigsberg v. Coughlin*, 68 *N.Y.2d* 245, 249 (N.Y. 1986)).

Contrary to the NYPD’s conclusory assertion, the Request describes the records sought with specified time periods, subject matter, types of record, and even provides a list of specified vendors. The Request expressly identifies the records sought as pertaining to subject matters such as the NYPD’s procurement, functionality, and use of FRT, gait recognition system, drone surveillance technologies, cell-site simulators, and ambient sound recording devices. Particularly, it identifies that the types of records sought should include “contracts” with vendors; “policy documents, memoranda or guidance”; and “input data,” “source of that data,” “categorization and use of data returned” in the specified surveillance systems. Petition, Ex. A. The Request also identifies a list of specific companies that are known for selling Surveillance Technologies. *Id.*

The NYPD essentially concedes that it understands perfectly what to look for when responding to the Request. In its March 15, 2021 denial of the appeal, the NYPD recognized that



the Request seeks documents concerning the “*negotiation, contracting, procurement, oversight, management, etc., of a specific technology.*” Petition, Ex. D, at 2 (emphasis added).

Unsurprisingly, then, the NYPD does not even attempt to demonstrate how descriptions in the Request are insufficient for it to locate and identify the corresponding records. In sum, NYPD cannot deny AI USA’s Request based on such conclusory (and contradictory) assertions.

**B. The NYPD May Not Claim Burden as a Basis for Its Denial of AI USA’s Request.**

It is well established that an agency “cannot evade [FOIL’s] broad disclosure provisions ... 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, 1219-20 (4th Dep’t 2017) (quoting *Konigsberg*, 68 NY.2d at 249). Public Officers Law § 89(3)(a) expressly prohibits an agency from “deny[ing] 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...” Public Officers Law § 89(3)(a); see also *Jewish Press, Inc. v. New York City Dept. of Educ.*, 183 A.D.3d 731, 732 (2d Dep’t 2020).

AI USA’s Request seeks, at its core, documents concerning the NYPD’s procurement, functionality, and use of Surveillance Technologies that were available for use during a recent period of historic protests against the police. NYPD denied AI USA’s appeal claiming that any search would require it to plough through a “virtual file cabinet” for specific records that are not “maintained or catalogued by this agency.” Petition, Ex. D, at 3. NYPD went so far to assert that it was not possible to search a “keyword such as ‘Clearview AI,’ [a company that sells FRT and which is expressly covered by AI USA’s Request],” to locate documents pertaining to the “negotiation, contracting, procurement, oversight, management, etc., of a specific technology.” *Id.* at 2. But as AI USA only recently learned, *just two weeks before the NYPD made that claim, it*

*produced Clearview AI-related emails in response to another FOIL request.* Petition, Ex. E (Mar. 2, 2021 email from NYPD attaching production of correspondence with Clearview AI). Although the NYPD’s recent production of these Clearview emails could not fully satisfy the Request, it shows that the NYPD’s claims of unreasonable burden and its inability to identify the records was overtly false. That the NYPD can, in fact, identify records related to a specific Surveillance Technology vendor like Clearview AI completely undermines the primary basis for the denial of AI USA’s appeal.

Similarly in 2018, the NYPD was ordered by this Court to produce 173 documents, consisting of nearly 2900 pages documents responsive to a FOIL request seeking records relating to its procurement and policies governing the use of FRT. *See Center on Privacy & Technology v. New York City Police Department, 154060/2017 (Sup. Ct. N.Y. Co.)*. Again, although this production (which has not been made available to AI USA) could not fully satisfy the Request,<sup>9</sup> this prior production undermines the NYPD’s assertion that it is somehow impossible for the agency to produce responsive documents.

Nor is NYPD’s assertion that responding to the Request would require it to “go through the haystack in an effort to locate needles,” Petition, Ex. D, at 2, credible because the core knowledge concerning the procurement, functionality, and use of Surveillance Technology is located in certain central locations. Indeed, the NYPD represented in a prior proceeding that it designated two units with full access to the agency’s FRT: the Facial Identification Section and the Intelligence Bureau. Petition, Ex. F (*Surveillance Technology Oversight Project, Inc., v. New York City Police Department, 155486/2020 (Sup. Ct. N.Y. Co.)* DOC. NO. 18, Exhibit P).

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<sup>9</sup> “Facial recognition technology” in Amnesty’s request overlaps with the definition provided in *Center on Privacy & Technology v. New York City Police Department*, but it is not coextensive.

Documents concerning the other Surveillance Technology documents sought by the Requests are also presumably maintained by a small subset of officers responsible for the respective programs at the NYPD.

**C. The Exemptions Invoked By The NYPD Do Not Apply.**

In its March 15, 2021 denial of AI USA's appeal, the NYPD invoked two statutory exemptions under the Public Officers Law to avoid production in response to the Request: 87(2)(d) (exempting 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"), and 87(2)(c) (exempting records that "if disclosed would impair present or imminent contract awards or collective bargaining negotiations"). And, prior to that, in its initial January 29, 2021 response to the Request, the NYPD invoked four statutory exemption to FOIL under Public Officers Law as justification for denying AI USA's request: 87(2)(e)(iv) (exempting non-routine criminal investigative techniques or procedures), 87(2)(e)(i) (exempting records for protecting law enforcement and judicial proceedings), 87(2)(g)(iii) (exempting inter- or intra-agency materials), and 87(2)(e)(iii) (exempting records that identifies a confidential source or information relating to criminal investigation).

As set forth below, none of these exemptions remotely applies to the Request.

**1. The Exemptions For Trade Secret and Contract Awards Do Not Apply.**

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." At a minimum, application of this exemption

should be supported by a showing by the commercial enterprise—here, presumably any of the specified vendors such as Clearview AI, or any other company from which the NYPD has purchased or leased Surveillance Technologies—that would purportedly be injured. *See [Newsday LLC v. Nassau Cnty. Police Dep't](#), 42 Misc. 3d 1215(A), 984 N.Y.S.2d 633, at \*5 (Sup. Ct. Nassau Cnty. 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 made no such showing.

Moreover, “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.” *Matter of Verizon N.Y., Inc. v. N.Y. State Pub. Serv. Comm’n*, 137 A.D.3d 66, 71 (N.Y. App. Div. 3d Dep’t 2016). Where, as here, any trade secret or competitive information is in the NYPD’s possession not because it was submitted to a state agency carrying out its regulatory function but as a result of the City of New York’s or the NYPD’s purchasing of that commercial enterprise’s goods and services, this policy concern does not apply. *See [Prof’l Standards Review Council of Am. Inc. v. N.Y. State Dep’t of Health](#), 193 A.D.2d 937, 939 (1993)* (“There 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 sought by AI USA, the NYPD should have provided the nondisclosure agreements with potentially impacted vendors. It did not do so, and accordingly cannot demonstrate that the exemption for trade secrets or competitively sensitive information applies.

Nor does the exemption for contract awards apply. Public Officers Law Section 87(2)(c) exempts records that “if disclosed would impair present or imminent contract awards or collective

bargaining negotiations.” [Public Officers Law § 87\(2\)\(c\)](#). However, “once a contract is conditionally awarded to a bidder, the terms of the successful bidder’s response to the Request for Proposal could no longer be ‘competitively sensitive.’” [CAT\\*ASI, Inc. v. New York State Ins. Dep’t](#), 760 N.Y.S.2d 284, 287 (2002). Because AI USA seeks information concerning the Surveillance Technologies *that NYPD has already contracted for*, these records cannot impair those already-granted contract awards or otherwise hamstring the successful bidder’s bargaining negotiations.

In addition, disclosure is required because the NYPD’s assertion that contract awards will be compromised is untethered to any evidence. [Bahnken v. N.Y. City Fire Dep’t](#), 17 A. D.3d 228, 230 (1st Dep’t 2005) (requiring disclosure of contract terms because the City’s argument was “speculative and unsupported by any evidentiary documentation”). The NYPD has not made any showing that release of the information sought would impair any specific pending contract award to be granted to a vendor.<sup>10</sup> Accordingly, the NYPD cannot demonstrate exemption under section [87\(2\)\(c\)](#).

In fact, police contracts for procurement of surveillance technologies are frequently disclosed in many other jurisdictions pursuant to the local ordinances. At least 15 municipalities have enacted regulations compelling local police departments to disclose detailed information about how the acquired surveillance technology works, how it will be used, and the potential

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<sup>10</sup> Nor have the companies that are parties to the withheld contracts indicated that release would impair their competitive positions, or intervened to object to the release of the procurement contracts. *Id.* (“Clearly the [companies] themselves would have seen fit to intervene if this issue were as crucial to their well-being as argued by respondent. Their declination to do so speaks for itself.”)

impact on citizens.<sup>11</sup> These routine disclosures of surveillance technologies across the nation negate the NYPD's speculative claims of harm on the third-party vendors.

## **2. The Exemption For Protecting Law Enforcement Investigations or Judicial Proceedings Does Not Apply.**

[Public Officers Law Section 87\(2\)\(e\)\(i\)](#) exempts records that “are compiled for law enforcement purposes and which, if disclosed, would ... interfere with law enforcement investigations or judicial proceedings.” This exemption applies only where there are specific, ongoing, or prospective investigations or judicial proceedings that would be harmed by the disclosure of records. See [Leshner v. Hynes](#), 19 N.Y.3d 57, 68 (2012). Although an agency may make “a generic determination” that disclosure of a record would interfere with a judicial proceeding against a particular individual, it may not refuse disclosure upon a “wholly speculative” claim of potential interference with an “unspecified law enforcement action” to which the documents may or may not be relevant. [Time Warner Cable News NYI v. New York City Police Dep't](#), 36 N.Y.S.3d 579, 588 (2016), on reargument, (2017); [Church of Scientology of New York v. State](#), 61 A.D.2d 942, 943, 403 N.Y.S.2d 224, 226 (1978), *aff'd*, 46 N.Y.2d 906, 387 N.E.2d 1216 (1979).

At a threshold level, the NYPD failed to even make “a generic determination” that disclosure of any of the records sought would imperil a specific law enforcement proceeding. Moreover, the vast majority of records sought in AI USA's request is directed to the NYPD's procurement, functionality, and general use of Surveillance Technologies during the BLM protests, disclosure of which is unlikely to interfere with any specific, ongoing, or prospective law

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<sup>11</sup> See, e.g., Degroff & Cahn, *An Early Assessment of Community Control of Police Surveillance Laws*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (Feb. 10, 2021), <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/602430a5ef89df2ce6894ce1/1612984485653/New+CCOPS+On+The+Beat.pdf>.

enforcement proceeding. To the contrary, courts often deem disclosure of purchase order and policy documents concerning electronic surveillance tools as compatible with law enforcement operations. See *New York C.L. Union v. Erie Cty. Sheriff's Off.*, 2015 WL 1295966 (N.Y. Sup. Ct. 2015) (disclosure of sheriff office's purchase orders, procedural manual, and summary logs of use of cellular site simulators did not interfere with specific law enforcement efforts).

In the unlikely event that any responsive record critical to a law enforcement investigation is responsive to the Request (such as guidance materials developed in connection with a specific proceeding or investigation), the investigation- or proceeding-specific materials may be redacted or withheld from production. *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v. Mills*, 18 N.Y.3d 42, 45 (2011) (“an agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.”); *Time Warner Cable News NYI v. New York City Police Dep't*, 53 Misc. 3d 657, 670 (“an agency relying on the volume of a request” must “establish that an outside service cannot be utilized to comply with the request.”). But AI USA's Request cannot be denied under the NYPD's blanket recital of this exemption.

### **3. The Exemption For Protecting Confidential Sources Does Not Apply.**

*Public Officers Law Section 87(2)(e)(iii)* exempts records that “are compiled for law enforcement purposes and which, if disclosed, would ... identify a confidential source or disclose confidential information.” The purpose of the exemption is to protect the “NYPD's [a]bility to protect the identities of undercover officers and informants,” and prevent “the hindrance of recruitment and retention of investigative sources, and the ‘chilling effect’ upon the public's

willingness to report leads or other information of investigative value” that might result from disclosure. *Asian Am. Legal Def. & Educ. Fund*, 964 N.Y.S.2d at 895.

To invoke this exemption, the NYPD generally must show that the information was provided by a confidential source. *See, e.g., Beyah*, 309 A.D.2d at 1052 (“[I]n the absence of an allegation that anyone on the list qualifies as a ‘confidential source’ within the meaning of **Public Officers Law § 87 (2)(e)(iii)**, there is no basis in the record before us to deny disclosure of these documents.”). It is curious how disclosure of procurement contracts with commercial vendors could possibly reveal the NYPD’s covert operation with informants. Neither is there an apparent way in which information about the general functionality and use of the Surveillance Technologies could be utilized to identify confidential sources or undercover officers in specific criminal investigations. Again, to the extent there was a responsive document that legitimately implicated this information, it could be redacted or excluded from production.

#### **4. The Exemption For Non-Routine Criminal Investigative Techniques or Procedures Does Not Apply.**

The purpose of **Public Officers Law Section 87(2)(e)(iv)** is to protect from public disclosure information that would reveal criminal investigative techniques that would give criminals an advantage, or provide “the safecracker with the combination to the safe.” *Fink*, 419 N.Y.S.2d at 471. “Indicative, but not necessarily dispositive, of whether investigative techniques are non[-]routine is whether disclosure of those procedures would give rise to 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.” *Id.* By way of example, fingerprinting and ballistics tests are considered routine and are not exempt from disclosure. *Id.* at 472. Additionally, routine information gathering such as contacting participants and witnesses (absent an allegation that a “confidential source” is involved) is not exempt from disclosure. *Beyah*



*v. Goord*, 309 A.D.2d 1049, 1051-52 (N.Y. App. Div. 3d Dep’t 2003). Again, as discussed *supra* at 2, 15, general police use of surveillance tools and related procurement contracts are frequently disclosed in other jurisdictions to safeguard against police abuse of these tools. It is hard to see how information sought by the Request amounts to “the combination to the safe” given that these records have been regularly made public in other jurisdictions.

Even information about the functionality and use of the Surveillance Technologies (such as data inputs, data categorization, and data returned) is akin to routine information gathering; like fingerprinting and ballistic tests, they are not easily susceptible to exploitation for criminal purposes. In contrast, for example, details regarding undercover operations from which sources may be determined are exempted. *Cf.*, *Asian Am. Legal Def. & Educ. Fund v. N.Y. City Police Dep’t*, 964 N.Y.S.2d 888, 895 (Sup. Ct. N.Y. Cnty. 2013), *aff’d*, 125 A.D.3d 531, 5 N.Y.S.3d 13 (N.Y. App. Div. 1st Dep’t 2015).

Accordingly, this exemption cannot apply to AI USA’s Request.

#### **5. The Exemption For Inter- and Intra-Agency Records Does Not Apply.**

Finally, the NYPD attempted to justify its denial of the Request by invoking [Public Officers Law Section 87\(2\)\(e\)\(iv\)](#), which exempts from disclosure 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 Cnty. Cmty. Coll.*, 623 N.E.2d 15, 19 (N.Y. 1993). The exemption is in place to allow “[p]eople within an agency to exchange opinions, advice and criticism freely and frankly,

without the chilling prospect of public disclosure.” *The N.Y. Times Co. v. City of N.Y. Fire Dep’t*, 829 N.E.2d 266, 272 (N.Y. 2005).

As an initial matter, most if not all of the records sought by AI USA fit squarely within one of the enumerated exceptions to this exemption. For example, the Request calls not for deliberative documents but for materials like procurement documents, as well as policy and guidance documents about how the Surveillance Technologies are actually used. Petition, Ex. A. This includes information on what *data* is inputted into the Surveillance Technologies by NYPD, the vendor or others, where that *data* comes from, and how the NYPD is to use the outputs of the technologies in connection with its work. None of that information is “deliberative.”

Moreover, 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*, 675 N.E.2d at 812. To the extent the NYPD’s deliberative process might be truly captured by any of the AI USA’s requests, such material can be redacted or excluded from production.

### **III. PETITIONERS ARE ENTITLED TO THEIR LEGAL COSTS, INCLUDING ATTORNEY’S FEES**

AI USA also requests attorney’s fees and reasonable litigation costs under FOIL. [Section 89\(4\)\(c\)](#) grants a court discretion to award reasonable attorney’s fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute.

The legislature amended FOIL in 2006 to amend [Section 89\(4\)\(c\)](#) to “strengthen the enforcement of [citizens’ rights to access records pursuant to FOIL] by discouraging agencies from denying public access to records by guaranteeing the award of attorney’s fees when agencies fail to respond in a timely fashion or deny access without any real justification.” [2005 Legis. Bill Hist.](#)

N.Y. S.B. 7011. Indeed, as the court in *West Harlem Bus. Grp. v. Empire State Dev. Corp.* noted, “litigation could have been avoided, or significantly limited, had [the agency] in the first instance complied with the dictates of FOIL” and provided a substantive response. *West Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884 (2009). Here, the NYPD’s failure to fulfill its statutory duty “compelled [the plaintiffs] to bring suit to obtain either the documents or an explanation of [the NYPD]’s denial, the very information it should have received during the administrative appeals process.” *Id.* at 885. Any potential litigation here could have been avoided or limited, if NYPD had faithfully fulfilled its statutory duty. Moreover, AI USA put NYPD on notice that it had failed to meet its burden to provide particularized and specific justification for its withholding of records from production. In response, the NYPD issued a denial devoid of any substantive explanation with bare recitations and paraphrases of a number of FOIL exemptions.

### CONCLUSION

For the foregoing reasons, AI USA respectfully requests that the Court grant the Verified Petition, enter a judgment directing the NYPD to disclose the documents requested in its FOIL Request, and award AI USA litigation costs and reasonable attorney’s fees and such other relief the Court deems necessary and proper.

Dated: July 15, 2021  
New York, NY

Respectfully Submitted,

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