Index No.: 153965/2016 IAS Part 13 (Mendez, J.)

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

Application of JAMES LOGUE,

Petitioner,

For Judgment Pursuant to Article 78 of the CPLR

- against -

NEW YORK CITY POLICE DEPARTMENT, and WILLIAM BRATTON, in his official capacity as Commissioner of the New York City Police Department,

Respondents.

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ANSWER

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, N.Y. 10007-2601

Of Counsel: Elizabeth Edmonds
Telephone: (212) 356-0883

NYCLIS No. 2016-015888

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

On July 7, 2016, at a peaceful protest in Dallas, Texas, police officers were ambushed and attacked by a gunman. It was the most deadly attack on police officers since September 11, 2001; five officers were killed and nine were injured. Then, ten days later, on July 17, 2016, in Baton Rouge, Louisiana, another gunman targeted and attacked police, killing three officers and wounding three more. Four days after that, on July 21, 2016, a man threw a hoax bomb into an occupied NYPD car. The string of recent attacks on law enforcement officers comes less than two years after NYPD officers Raphael Ramos and Wenjian Liu were shot and killed. These attacks make plain that there can be no doubt that law enforcement officers are presently at great risk of being targeted, ambushed, attacked, and killed in the line of duty.

This memorandum of law is submitted on behalf of Respondents the New York City Police Department ("NYPD") and William Bratton (together, "Respondents" or "NYPD"), in support of their Verified Answer in this proceeding, in which Petitioner seeks disclosure under the Freedom of Information Law ("FOIL") of records pertaining to NYPD's filming and photographing in Grand Central Station from November 2014 through January 2015, including communications pertaining to protests in Grand Central Station. These protests were, according to Petitioner, associated with the national "Black Lives Matter" movement. Petitioner is already in receipt of certain records, but NYPD does not possess records responsive to most of Petitioner's requests. To the extent that NYPD does have responsive records, they are multimedia records and communications between and among undercover officers and their handlers. It cannot be seriously disputed that disclosure of such records would put the lives and safety of NYPD undercover officers in danger. Additionally, disclosure would reveal non-routine investigative techniques and would interfere with NYPD's ability to keep critical information infrastructure secure. Finally, portions of the Petition should be dismissed for

failure to exhaust administrative remedies and as moot. Petitioner, moreover, is not entitled to attorneys' fees in connection with this proceeding.

STATEMENT OF FACTS

For a complete statement of material facts, the Court is respectfully referred to Respondents' Verified Answer, sworn to August 22, 2016, and to the accompanying Affidavits of Michael Fitzpatrick, sworn to August 22, 2016, and John Donohue, sworn to August 15, 2016. A brief summary follows.

By letter dated January 25, 2015, and received by NYPD on January 30, 2015, Petitioner submitted a FOIL request to Respondent NYPD in which he sought "all records pertaining to officers' filming and photographing in Grand Central Station from November 2014 through January 2015, including, but not limited to:

1) All pictures, videos, audio recordings, data, and metadata related to Grand Central Station protests that were collected or received by your agency;
2) Records describing the information collected, the dates of collection, and the official purpose of the collection;
3) Copies of files documenting the use of property within Grand Central Station related to monitoring of the protests;
3a) Records describing the surveillance equipment used by officers within Grand Central Station;[1]
4) Copies of all communications sent or received by your agency between November 2013 and January 2015 pertaining to protests in Grand Central Station;
5) The names of governmental organizations and private security companies who collaborated in the collections of the information;
6) The names of all organizations public and private with whom the information was shared."

(hereinafter, "Petitioner's FOIL request"). See Verified Answer, at ¶37, Ex. 1. Some ancillary correspondence ensued, and by letter dated November 6, 2015, NYPD denied Petitioner's FOIL request. Id. at ¶39, Ex. 3. Specifically, NYPD stated that it could not locate records responsive

[1] Petitioner's FOIL request includes two items marked "3." For ease of reference these will be referred to as "3" and "3a."

to Petitioner's request and, moreover, to the extent such records did exist, they would nonetheless be subject to several exemptions under FOIL. Id.

Petitioner appealed NYPD's denial of his FOIL request by letter from his attorney dated December 4, 2015 and received by the Appeals Officer on December 28, 2015. Id. at ¶40, Ex. 4. In his appeal letter, however, Petitioner recharacterized his FOIL request as having "requested documents relating to surveillance of 'Black Lives Matter' protests and demonstrations, and interagency communication in support thereof." Id. In response, NYPD, through its Records Access Appeals Officer, denied Petitioner's appeal by letter dated January 11, 2016. Id. at ¶41, Ex. 5. NYPD explained that to the extent the appeal letter encompassed records not requested by Petitioner, such as all records related to surveillance of Black Lives Matter protests and demonstrations, it was outside of the Records Access Appeals Officer's authority to address those additional records. NYPD additionally denied the appeal because the requested records, if in existence, would be exempt from disclosure under Public Officers Law §§87(2)(e)(iv), 87(2)(e)(i), 87(2)(f), and 87(2)(e)(iii). Id. Petitioner then commenced the proceeding at bar by filing a Verified Petition on May 11, 2016, pursuant to which he appeals NYPD's denial of his FOIL request.

NYPD does not have primary jurisdiction for policing in Grand Central Terminal. Rather, that responsibility falls to the Metropolitan Transit Authority ("MTA") police. Id. at ¶43. Given its lack of jurisdiction there, NYPD did not generally undertake to photograph or film individuals protesting at Grand Central Station between November 2014 and January 2015. Accordingly, NYPD has a limited set of documents responsive to Petitioner's FOIL request. Id. In response to Petitioner's FOIL request, NYPD conducted a thorough search of the following divisions, which are the only places responsive documents could reasonably be located: the

Counterterrorism Bureau, the Technical Assistance and Response Unit ("TARU"), and the Intelligence Bureau. Id. at ¶44. NYPD has now certified that it did not locate any records that would have been responsive to the request items numbered 2, 3, 3a, 5, or 6. Id. at ¶45.

However, NYPD did locate certain records. In response to subcategory "1," which sought "all pictures, videos, audio recordings, data, and metadata related to Grand Central Station protests that were collected or received by your agency," NYPD located multimedia records. Id. at ¶46. Additionally, in response to subcategory "4," which sought "copies of all communications sent or received by your agency between November 2013 and January 2015 pertaining to protests in Grand Central Station," NYPD located three sets of records. Id. at ¶47. One set of these records are the communications from Metropolitan Transit Authority ("MTA") personnel to NYPD personnel. Id. at ¶48. All of these records have now been disclosed to Petitioner, whether by NYPD or by the MTA. Id.

There are two remaining sets of records responsive to subcategory "4." Id. at ¶¶49. The first set consists entirely of communications between and among NYPD undercover officers and their handlers. Id. The second set consists of a single record, which is a communication from an NYPD officer working in an undercover capacity and his base. Id. Both of these sets of records have been withheld. Id. Accordingly, the only responsive records NYPD has withheld are (i) the multimedia records, which are responsive to subcategory "1;" (ii) the communications between and among NYPD undercover officers and their handlers, which are responsive to subcategory "4;" and (iii) the single communication from the NYPD officer

working in an undercover capacity, which is responsive to subcategory "4." Id. at ¶50. Together, these records will be referred to as the "Withheld Records."[2]

As explained in much greater detail by Assistant Chief John Donohue, who is the Executive Officer of the Intelligence Bureau at NYPD and the second highest ranking uniformed officer in the Intelligence Bureau, disclosure of the Withheld Records could endanger the lives and safety of members of the public, and especially of undercover officers. See Accompanying Affidavit of John Donohue in Support of Respondents' Verified Answer, sworn to August 15, 2016 ("Donohue Aff."). Following the assassination of NYPD officers Wenjin Lu and Raphael Ramos in Brooklyn in December of 2014 and of the eight police officers and sheriffs in Dallas and Baton Rouge in July of 2016, it is clear that law enforcement officers around the country are at risk of being targeted, attacked and killed simply because of their status as law enforcement officers. Id. at ¶5. As explained at length in the Donohue Affidavit, undercover officers' lives and safety are at even greater risk. Id. at ¶¶7-12. Additionally, disclosure of the Withheld Records would greatly hamper NYPD's ability to conduct undercover operations and to engage in non-routine investigative techniques and would interfere with pending investigations. See id. Moreover, the communications are non-final intra-agency communications, and disclosure of the multimedia records would jeopardize NYPD's ability to guarantee the security of its information technology assets. See id.

[2] For ease of reference, because the single communication from the plainclothes NYPD officer was made while he was working in an undercover capacity, any references to "undercover officers and their handlers," or similar language concerning undercover officers, should also be read herein to encompass that single communication.

ARGUMENT

POINT I

THE PETITION SHOULD BE DISMISSED IN PART AS PETITIONER HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

Public Officers Law § 89(4)(b) confers subject matter jurisdiction in a CPLR Article 78 proceeding brought pursuant to FOIL only after a request for records has been made and denied and then further denied upon an administrative appeal. See N.Y. Public Officers Law § 89(4)(b). As explained in Watergate II Apts. v. Buffalo Sewer Authority, 46 N.Y.2d 52, 57 (1978),

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

(internal citations omitted). In the FOIL context, the courts have recognized that administrative remedies are exhausted only after the agency has completed processing the FOIL request and has rendered a final adverse determination of any administrative appeal of that request. See Matter of Carty v New York City Police Dep't, 41 A.D.3d 150 (1st Dep't 2007). Thus, the right to judicial review will accrue only once the agency's records access officer makes a determination on a request, and then only if an administrative appeal from such determination is taken and denied by the agency's records access appeals officer. See, e.g., Tellier v. New York City Police Dep't, 267 A.D.2d 9, 10 (1st Dep't 1999). The Court's subject matter jurisdiction extends only over the records sought in the initial FOIL request. See Covington v. Sultana, 59 A.D.3d 163,

164 (1st Dept 2009); see also Carty, 41 A.D.3d at 150. An attempt to litigate disclosure of records that were not included in the FOIL request must be rejected in that the agency has not searched for, reviewed and assessed the applicability of FOIL exemptions to such records.

Here, Petitioner's FOIL request sought "all records pertaining to officers filming and photographing in Grand Central Station from November 2014 through January 2015, including, but not limited to" several categories of records. See Ex. 1. After NYPD made a determination and denied Petitioner's FOIL request, Petitioner appealed the denial through his attorney. However, in the appeal letter, Petitioner broadened and inaccurately recharacterized the original FOIL request into one seeking "documents relating to surveillance of 'Black Lives Matter' protests and demonstrations, and interagency communication in support thereof." See Ex. 4. Such language had not been in Petitioner's initial FOIL request, nor are such documents encompassed by a reasonable reading of his FOIL request.

In response, NYPD, through its Records Access Appeals Officer, denied Petitioner's appeal and explained that the initial FOIL request "did not expressly reference 'Black Lives Matters' protests." See Ex. 5. NYPD's Records Access Appeals Officer further explained that to the extent the appeal letter encompassed records not requested by Petitioner, it was outside his authority to address this aspect of the appeal. Id. Accordingly, NYPD had never issued a determination concerning Black Lives Matter protests and demonstrations generally.

Nevertheless, in an attempt to circumvent the carefully-crafted administrative process set forth in the statute, the Petition references records concerning surveillance both of the protests at Grand Central Station (as per the FOIL request) and of Black Lives Matter (requested only in the administrative appeal). As Petitioner's FOIL request does not include records relating to surveillance of the Black Lives Matter protests, that issue is not properly before this

Court, and Petitioner has failed to exhaust his administrative remedies with respect to those records. To the extent any records relating to Black Lives Matter protests could be perceived as encompassed by the initial request, they are addressed below. However, any portion of the Verified Petition seeking records relating to surveillance of Black Lives Matter protests beyond the scope of the initial FOIL request, should be dismissed for lack of subject matter jurisdiction and will not be further addressed herein.

POINT II

THE PETITION SHOULD BE DISMISSED IN PART BECAUSE IT IS MOOT

It is well-established that an action or proceeding will be dismissed as moot where there is no longer any live controversy to resolve. Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 810-11 (2003). A certification by an agency that, after a diligent search, responsive non-exempt materials have been produced is sufficient to satisfy the agency's obligations under FOIL and, based on that certification, a proceeding to compel disclosure with regard to those records becomes moot. See, e.g., Rattley v. N.Y. City Police Dep't, 96 N.Y.2d 873, 875 (2001) (dismissing a proceeding to compel disclosure as moot because the agency "satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate"); Alicea v. N.Y. City Police Dep't, 287 AD2d 286, 287 (1st Dep't 2001); Norde v. Morgenthau, 262 A.D.2d 129, 129 (1st Dep't 1999) (same); see also Porter v. David, 2014 N.Y. Misc. LEXIS 1723, at *17 (Sup. Ct. N.Y. Co. April 10, 2014)("A party cannot be compelled to [produce] documents that it does not possess."). Moreover, FOIL "does not specify the manner in which an agency must certify that documents cannot be located," and "neither a detailed description of the search nor a personal statement from the person who actually conducted the search is

required." Rattley, 96 N.Y.2d at 875; see also Grabell v New York City Police Dept., 139 A.D.3d 477,479 (1st Dep't 2016).

The Court of Appeals has held that when a movant receives records from another agency, the relief sought from the other agency is academic. Fappiano v. New York City Police Dep't, 95 N.Y.2d 738, 749 (2001). The disclosure of documents to a requester by another agency renders the FOIL request academic and requires dismissal of the Article 78 proceeding. See Khatibi v. Weill, 8 A.D.3d 485 (2d Dep't 2004); see also Brightley v. Lai, 266 A.D.2d 131, 132 (1st Dep't 1999); Ramos v. New York City Police Dep't, 2009 N.Y. Slip Op. 30714(U), **6 (Sup. Ct. N.Y. Co. 2009). Additionally, an Article 78 petition, seeking review of a denial of a FOIL request, is also moot when the respondent produces responsive records during the pendency of the litigation. See Taylor v. New York City Police Dep't FOIL Unit, 25 A.D.3d 347, 347(1st Dep't, 2006).

Here, Respondents have certified that they have searched for and not located records responsive to most of the sub-categories of documents sought by Petitioner. See Fitzpatrick Aff., at ¶5. Specifically, Respondents have certified that no documents were located that were responsive to sub-categories "2," "3," "3a," "5," and "6." Id. As Respondents have certified that they did not locate any responsive records after a diligent search, there is no longer any live controversy to resolve concerning NYPD's production of any such documents, rendering any dispute concerning these records moot.

The remaining records Petitioner seeks are records responsive to sub-categories "1" and "4," which would include "all records pertaining to officers filming and photographing in Grand Central Station from November 2014 through January 2015" including, respectively, (1) "all pictures, videos, audio recordings, data, and metadata related to Grand Central Station

protests that were collected or received by your agency," and (4) "copies of all communications sent or received by your agency between November 2014 and January 2015 pertaining to protests at Grand Central Station." See Ex. 1. The MTA and MetroNorth provided Petitioner with a large quantity of records responsive to this request after Petitioner submitted identical FOIL requests to those agencies. See Petition, at ¶¶14-15. NYPD has compared its records with those apparently disclosed to Petitioner by MTA and MetroNorth and, with respect to communications from MTA personnel, has found that NYPD has virtually the same set of files that MTA already provided to Petitioner. See Fitzpatrick Aff., at ¶10. To the extent there were any additional communications from MTA personnel in NYPD's possession responsive to subcategory "4," NYPD disclosed an additional two records on August 22, 2016. Id. Thus, all communications from MTA personnel to NYPD personnel that are responsive to Petitioner's request for item "4," and which are in NYPD's possession, have now been disclosed to Petitioner, whether by MTA or by NYPD. Id. With regard to the additional Withheld Records, responsive to subcategories "1" and "4," such records are exempt for the reasons stated in points III below.

Finally, there is no basis here for doubting the validity of NYPD's search. Any argument that additional responsive documents actually exist, despite NYPD's search, should be rejected as unsupported speculation. Lopez v. New York City Police Dep't, 126 AD3d 637 (1st Dep't 2015); Mitchell v. Slade, 173 A.D.2d 226, 227 (1st Dep't 1991) ("Petitioner must show by more than speculation that all responsive documents were not produced"); Diaz v. New York City Police Dep't, 2012 N.Y. Misc. LEXIS 5637, at *4 (Sup. Ct. N.Y. Co. Dec. 6, 2012) (burden shifts to petitioner "to come forward with factual proof that the items sought actually exist in the files of the office to which the FOIL request was directed."); see also Sable v. N. Y. City District

Attorney's Office, 2014 N.Y. Misc. LEXIS 3381 (Sup. Ct. N.Y. Co. July 23, 2014)(after respondents certified that records could not be located, petitioner's assertions that records were available by pushing a button on computer terminal not supported by factual evidence). Accordingly, the portions of the Petition seeking documents responsive to items "2," "3," "3a," "5," and "6," or seeking documents already disclosed by the MTA and MetroNorth, should be dismissed as moot. Saratoga County Chamber of Commerce, Inc., 100 N.Y.2d at 810-11.

POINT III

NYPD PROPERLY DID NOT DISCLOSE THE WITHHELD RECORDS, AS THEY ARE EXEMPT UNDER FOIL

As discussed above, the only records NYPD has in its possession that are responsive to Petitioner's FOIL request are (i) multimedia records; (ii) communications between and among undercover NYPD officers and their handlers; and (iii) a single communication from an NYPD officer acting in an undercover capacity (together, the "Withheld Records"). As the Withheld Records were properly withheld under several FOIL exemptions, the Petition should be denied.

A. Disclosure of the Records Could Endanger the Lives and Safety of Undercover Officers

Under Public Officers Law § 87(2)(f) ("life/safety exemption"), an agency may deny access to records or to portions thereof where the information, if disclosed, could endanger the life or safety of any person. An agency is "not required to prove that a danger to a person's life or safety will occur if the information is made public." Stronza v. Hoke, 148 A.D.2d 900, 900-01 (3d Dep't 1989). Instead "there need only be a possibility that such information would endanger the lives or safety of individuals." Id. (emphasis added); see also, e.g., Bellamy v. New

York City Police Department, 87 A.D.3d 874, 875 (1st Dep't 2011), aff'd, 20 N.Y.3d 1028 (2013) (same); Johnson v. New York City Police Dep't, 257 A.D.2d 343, 348-49 (1st Dep't 1999) (holding that certain information, by its very nature, could endanger the lives or safety of individuals if it were to be released in an unredacted form). Where disclosure of information could jeopardize the lives and safety of undercover officers, that information is exempt from FOIL disclosure. See Asian American Legal Defense and Education Fund v. New York City Police Department, 964 N.Y.S.2d 888, 894 (Sup. Ct. N.Y.Co. 2013), aff'd, 125 A.D.3d 531 (1st Dep't. 2015).

Here, there is a strong possibility that disclosure of the records could endanger the lives and safety of undercover officers, their handlers, and other members of the public. See Verified Answer, at ¶¶51, 61-64, 72, 76-77. It has become apparent in recent months that law enforcement officers are at great risk of being targeted, attacked, and killed. In less then a one-month span, between July 7, 2016 and August 5, 2016, NYPD has investigated over ninety separate threats to police in New York City. Id. at ¶52. There are additionally persistent calls from foreign terrorist organization to kill law enforcement officers and there have been recent attacks against police in France and Belgium. Id. at ¶53.

The Withheld Records consist of communications between undercover officers and their handlers, and of multimedia records. As explained by Chief Donohue, undercover officers in the field are often in grave danger and are extremely vulnerable should they be discovered. See Donohue Aff., at ¶¶7-10. They often must work without immediate police backup and are not able to carry weapons or police identification. Id. In the event that they are discovered, they may be assaulted, threatened, or even killed. Id. NYPD thus takes great care to protect the confidentiality of the identities of its undercover officers. Id. at ¶¶10-12. However,

disclosure of the Withheld Records would tend to identify undercover officers, thus placing such officers in great danger. Id. at ¶¶13-15. Even if redacted, the Withheld Records would reveal confidential techniques of surveillance employed by undercover officers, which could make it more likely that undercover officers engaged in surveillance would be discovered and their true identities revealed. Id. As there is clearly more than a "possibility" that the information in the Withheld Records would endanger the lives or safety of individuals, the Withheld Records were properly exempt under Public Officers Law § 87(2)(f).

Additionally, it should be noted that even if this Petitioner does not seek such records with any nefarious intent, this does not mitigate in favor of disclosure as intent has no bearing here on the applicability of the life/safety exemption. When records are found accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest, or the intended use of the records. See, e.g., M. Farbman & Sons. v. New York City Health & Hospitals Corp., 62 N.Y.2d 75, 80 (1984). Thus, disclosure to this Petitioner would require disclosure to a different requestor who may have an unknown criminal intent. It is by now obvious that information that is disclosed to any person could well be published online for all the world to see, often in a format more user-friendly and manageable than the original format was. As one court has pointed out, the internet has no sunset. Bursac v. Suozzi, 22 Misc. 3d 328, 339 (Sup. Ct. Nassau Co. 2008). Should the Withheld Records be ordered disclosed, there will be no opportunities to retract the information and prevent it from ending up in the hands of criminals and those who would target or attack police officers.

B. The Records Are Exempt From Disclosure Under FOIL's Law Enforcement Exemptions, Public Officers Law §§87(2)(e)(i), (iii), and (iv).

New York Public Officers Law § 87(2) provides, that an agency may deny access to records that

> (e) are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. Interfere with law enforcement investigations or judicial proceedings; . . .
>
> iii. Identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

See New York Pub. Off. L. §§ 87(2)(e)(i),(iii),(iv). These exemptions codify what was commonly known as the "law enforcement privilege." See Dep't of Investigation of the City of New York, 856 F.2d 481, 484-85 (2d Cir. 1988). Its purpose "is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference in an investigation." Id. at 484.

The Withheld Records Are Exempt Under Public Officers Law §87(2)(e)(i)

Communications to and from undercover officers conducting intelligence surveillance falls in the category of records compiled for law enforcement purpose that may be withheld if "disclosure while a case is pending would generally interfere with law enforcement proceedings." Lesher v. Hynes, 19 N.Y.3d 57, 67 (2012). It is the agency's burden to "articulate a factual basis for the exemption" by identifying "generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of document." Id.; see also Legal Aid Soc'y v. New York City Police Dep't, 274 A.D.2d 207, 214 (1st Dep't 2000). This exemption applies whenever information "might interfere" with a law

enforcement investigation or with a judicial proceeding. DeLuca v. New York City Police Dep't, 261 A.D.2d 140 (1st Dep't 1999).

Here, the affidavit of Chief Donohue advises the Court that disclosure of the Withheld Records would greatly impede NYPD's ability to conduct investigations. Donohue Aff., at ¶16. Additionally, disclosure would endanger future law enforcement investigations. Id. An agency is not required to "detail the manner in which each document sought would cause such interference" because "the assertion that disclosure would interfere with an on-going…investigation [is] a sufficiently particularized justification for the denial of access to [the] records." Lesher v. Hynes, 80 A.D.3d 611, 612 (2d Dep't 2011), aff'd, 9 N.Y.3d 57 (2012). Therefore, Respondents have met their burden in claiming this exemption. Moreover, the exemption is also vital to on-going law enforcement efforts as the NYPD assures its undercover officers that it will take necessary steps to protect their identities to help assure their safety, now and in the future. [3] See Donohue Aff., at ¶21. Anything less than a robust assurance of confidentiality may hinder efforts to recruit and retain officers willing to serve as undercover officers. See id.

The Withheld Records are Exempt Under Public Officers Law §87(2)(e)(iii)

The disclosure of information that would identify undercover officers and the manner in which they communicate with handlers clearly falls within Public Officers Law 87(2)(e)(iii), which exempts information that reveals confidential sources and confidential information. Similar information pertaining to undercover officers has been held to be

[3] Indeed, Public Officers Law § 87(2)(f), discussed above, reflects a policy that disclosure could have a "chilling effect" on witness cooperation, a consideration that Respondent submits is equally applicable to the recruitment and retention of these officers. Compare Johnson, 257 A.D.2d at 355 with Donohue Aff., at ¶20(describing concerns of a chilling effect on officer communications).

confidential and exempt under FOIL. See Asian American Legal Defense and Education Fund, 964 N.Y.S.2d at 893-94. Furthermore, Respondent has demonstrated, in the affidavit of Chief Donohue, that the NYPD goes to great lengths to maintain the confidentiality of undercover officers' identities. See Donohue Aff., at ¶¶10-12, 20. Several methods used to ensure confidentiality include removing undercover officers from accessible NYPD databases containing other personnel, requiring that undercovers to work in confidential facilities and requiring that prosecutors conduct Hinton hearings to ensure courtrooms are closed during undercover testimony. Id. Accordingly, the Court should not order disclosure of the Withheld Records, which would compromise that confidentiality.

The Withheld Records are Exempt Under Public Officers Law §87(2)(e)(iv)

Public Officers Law §87(2)(e)(iv) permits an agency to deny access to records or portions thereof that "are compiled for law enforcement purposes and which, if disclosed, . . . would reveal criminal investigative techniques or procedures, except routine techniques and procedures." See Public Officers Law § 87(2)(e)(iv). The leading case on FOIL's law enforcement exemption is Matter of Fink v. Lefkowitz, 47 N.Y.2d 567 (1979), which involved a request for access to a manual prepared by a special prosecutor who investigated nursing homes. There, the Court of Appeals wrote, "Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information." Id. at 572 (emphasis added); see also Spencer v. New York State Police, 187 A.D.2d 919, 920-21 (3d Dep't 1992) ("The purpose of the exemption provided by Public Officers Law § 87(2)(e)(iv) is to prevent violators of the law from being apprised of nonroutine procedures by which law enforcement officials gather information."); De Zimm v. Connelie, 102 A.D.2d 668 (3rd Dep't 1984).

The Court of Appeals provided guidance in Fink as to which techniques may be considered nonroutine. It explained, "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine 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 [law enforcement] personnel." Id. at 573 (citations omitted)(emphasis added). For example, disclosure of papers and notations used by composite artists are not routine, because they "might alert prospective criminals to characteristics important in composite artistry and thus encourage them to tailor their appearance to evade detection." Dobranski v. Houper, 154 A.D.2d 736, 737 (3d Dep't 1989). Further, "[e]ven though a particular procedure may be 'time-tested,' it may nevertheless be nonroutine." Spencer, 187 A.D.2d at 921 (citing Fink, 47 N.Y.2d at 572, 573).

Undercover Operations and Methods Are Non-Routine Investigative Techniques

Controlling precedent in the First Department has made clear that "undercover operations, even though widely used and time-tested, have been adjudged non-routine." Asian American Legal Defense and Educ. Fund, 964 N.Y.S.2d at 895 (citing Matter of Urban Justice Ctr. v New York Police Dep't, 2010 N.Y. Misc. LEXIS 4258 (Sup. Ct. N.Y. Co. Sept. 10, 2011)). Additionally, disclosure of the "size and capabilities of [an] NYPD undercover program" has specifically been held exempt under FOIL. Asian American Legal Defense and Educ. Fund, 964 N.Y.S.2d at 895.

Here, the Withheld Records at issue consist of communications between and among undercover officers and their handlers which, if disclosed, would reveal NYPD's confidential methods of surveillance and investigation. See Verified Answer, at ¶¶61-68. As explained by Chief Donohue, if the methods were made public, criminals would be apprised of the likely times, places, and circumstances when they would be under observation, or when they

might not be under observation. See Id. They would additionally be more likely to discern the identities of undercover officers operating in their midst based on the undercover officer's behavior. Id. Criminals could then take precautions so as to conduct their criminal activities outside of any such observation, so as to evade detection, thus greatly impeding NYPD's ability to conduct investigations. Id.

Additionally, members of the public reviewing the communications might be able to discern the extent, scope, potential targets, and emphasis of NYPD's undercover operations. Id. at ¶65. Such a review would permit would-be criminals to learn the inverse: specifically, the circumstances in which NYPD does not, or cannot, deploy undercover officers. Id. It is critical that targets of investigations not be aware of the extent of NYPD's present or future resources. Id. at ¶66. Release of the Withheld Records would show precisely that information, thus undermining any deterrent effect, endangering future law enforcement investigations, and undermining the effectiveness of surveillance operations. Id. For this reason, NYPD properly withheld the communications, which would reveal non-routine techniques and procedures.

Multimedia Records That Would Reveal the Placement or Use of Cameras May Be Properly Withheld as Disclosure Would Reveal Non-Routine Investigative Techniques

The First Department has explicitly held that "any information regarding the placement of . . . surveillance cameras . . . cannot be characterized as 'routine' criminal investigation techniques or procedures." Burtis v. New York Police Dep't, 240 A.D.2d 259, 260 (1st Dep't 1997); see also Matter of Dilworth v. Westchester County Dep't of Correction, 93 A.D.3d 722, 724-25 (2d Dep't 2012)(release of records showing video feeds from jail would impair security by exposing "any gaps in the surveillance system," which could endanger the life and security of any person). This is because disclosure of such information concerning the placement of surveillance cameras "would enable an operator to tailor his activities in such a

way as to significantly diminish the likelihood of a successful prosecution," Fink, 47 N.Y.2d at 573, or to evade "detection by law enforcement personnel." Spencer, 187 A.D.2d at 921; see also N.Y. Civ. Liberties Union v. N.Y.C. Police Dep't, 2009 N.Y. Misc. LEXIS 2542 (Sup. Ct. N.Y. Co. June 26 2009)(operational details of the Lower Manhattan Security Initiative camera surveillance security program are exempt from FOIL disclosure).

Several courts interpreting parallel statutes have similarly found that government agencies should not be required to disclose records that could show the precise locations of cameras. As explained in a parallel federal Freedom of Information Act case concerning locations of cameras located in New York, "Even if the location of some cameras might be publicly knowable, the uncertainty concerning the other cameras is plausibly asserted to be a key component of their deterrent and disruptive effect" to criminals who might otherwise use the knowledge of the cameras' locations to evade police detection. New York Civil Liberties Union v. Dep't of Homeland Sec., 771 F. Supp. 2d 289, 292 (S.D.N.Y. 2011). Similarly, New Hampshire's highest court upheld a city's withholding of the precise locations of cameras, explaining,

> We conclude that the precise locations of the City's surveillance equipment, the recording capabilities for each piece of equipment, the specific time periods each piece of equipment is expected to be operational, and the retention time for any recordings are exempt from disclosure. This information is of such substantive detail that it could reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection. Accordingly, the release of such information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions" and "such disclosure

> could reasonably be expected to risk circumvention of the law."

Montenegro v. City of Dover, 162 N.H. 641, 648 (N.H. 2011)(quoting Murray v. N.H. Div. of State Police, 154 N.H. 579, 582 (N.H. 2006)) (emphasis added). See also Baines v. Port Auth of New York and New Jersey, 2014 N.Y. Misc. LEXIS 3473, at *6-7 (Sup. Ct. N.Y. Co. July 31, 2014)(holding that "camera locations . . . clearly fall under exemption 4" of the Freedom of Information code for the Port Authority, which permits documents to be withheld if they could, among other things, "jeopardize . . . surveillance techniques or details")(emphasis added).

Here, as explained by Chief Donohue, the multimedia records could reveal not only which areas are under optical surveillance, but also the inverse: areas that NYPD does not have under surveillance. See Donohue Aff., at ¶23. The multimedia records would thus show any gaps in coverage, allowing criminals to operate in areas they know are not surveilled, and thus undermining any deterrent effect. Id. at ¶¶23-24. Additionally, the multimedia records could reveal the kinds of optical technology NYPD uses in both its undercover and general surveillance operations, and would reveal NYPD's methods of conducting undercover surveillance using technology. Id. at ¶¶23-27. If such information were made public, it would greatly undermine NYPD's ability to conduct effective undercover surveillance in the future. Id. Accordingly, as the multimedia records could show the placement and methods of surveillance cameras, and as such information has been held to be "non-routine" by the First Department, NYPD properly withheld the multimedia records.

C. The Communications Between and Among Officers Are Exempt From Disclosure Under FOIL, as They Are Non-Final Intra-Agency Communications

Public Officers Law § 87(2)(g) specifically exempts disclosure of:

> [I]nter-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; (iv) external audits, including but not limited to audits performed by the comptroller and the federal government

Public Officers Law § 87(2)(g) does not define "intra-agency materials" for purposes of the FOIL exemption. However, caselaw makes clear that the purpose of the intra-agency exemption is to permit employees of government agencies to exchange opinions, advice and criticism freely, and "without the chilling prospect of public disclosure." N.Y. Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477, 488 (2005) (citing Matter of Xerox Corp. v Town of Webster, 65 N.Y.2d 131, 132 (1985)).

Courts have considered "intra-agency materials" to be materials relevant to the internal deliberations of an agency. Gould v. New York City Police Dep't, 89 N.Y.2d 267, 276-78 (1996); Russo v. Nassau County Community College, 81 N.Y.2d 690, 699 (1993). "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as "predecisional material, prepared to assist an agency decision maker . . . in arriving at his decision." Xerox Corp., 65 N.Y.2d at 132 (citing Matter of McAulay v. Board of Educ., 61 A.D.2d 1048 (2d Dep't 1978), aff'd, 48 N.Y.2d 659 (1979)). Any information that can be characterized as an "internal government exchange" would be protected by this exemption. See Burtis, 240 A.D.2d at 260. As explained by the Court of Appeals, "[s]uch material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers.'" Xerox Corp., 65

N.Y.2d at 132 (quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 A.D.2d 546, 549 (2d Dep't 1981)).

The exemption afforded by Public Officers Law § 87(2)(g) easily extends to materials prepared by officers or investigators to enable them to express their views candidly and to allow them the free expression that aids their investigative efforts. Thus, in Gould, the Court of Appeals stated that "impressions, recommendations, or opinions" recorded in police incident reports qualify as intra-agency material. 89 N.Y.2d at 277; see Matter of Gannett v. James, 447 N.Y.S.2d 781, 783 (4th Dep't 1982) (holding written police statements exempt under the intra-agency exemption because the exemption "permits police officers to express their views of events candidly and in writing"). Such an exemption heeds the strong public interest in encouraging candid discussions among government employees. See One Beekman Place v. City of New York, 169 A.D. 492, 493 (1st Dep't 1991); see also In re World Trade Center Bombing Litigation, 93 A.D.2d 1, 9 (1st Dep't 1999); Matter of Delaney v. Del Bello, 62 A.D.2d 281, 287 (2d Dep't 1978).

The ability to voice and discuss conflicting views is essential to an agency's ability to candidly assess competing facts and make well-reasoned decisions regarding the information to be disseminated to the public. See One Beekman Place, Inc., 169 A.D.2d at 493 (asserting this proposition as to discovery materials). Exposing these deliberations to public scrutiny would hinder this process, and undermine the agency's ability to make the best decisions regarding its duties. Cf. Goodstein & West v. O'Rourke, 201 A.D.2d 731, 731 (2d Dep't 1994); Kheel v. Ravitch, 93 A.D.2d 422, 427-28 (1st Dep't 1983), aff'd, 62 N.Y.2d 7 (1984); Sea Crest Constr. Corp., 82 A.D.2d at 549.

Here, NYPD withheld certain pre-decisional materials relevant to the internal deliberations at the agency, specifically communications between or among undercover officers and their handlers. See Verified Answer, at ¶49. These communications consist primarily of immediate impressions concerning ongoing events. Id. at ¶67. None of these communications contains verifiable factual data or instructions that affect the public. Id. Rather, they are entirely predecisional. See id. Public disclosure of these communications would discourage the kinds of candid discussions among government employees that should be encouraged in the development of agency decisions and policies; additionally such disclosure would likely have a chilling effect on such communications in the future and would greatly hamper NYPD's ability to recruit new undercover officers and to effectively maintain order in the event of a crisis. Id. The chilling effect would additionally impede NYPD officers' abilities to communicate candidly about ongoing events and to make split-second decisions. Id. Thus, these "internal government exchanges" should not be released. See Burtis, 240 A.D.2d, at 260. Accordingly, as the intra-agency exemption applies to these documents, NYPD properly withheld them.

D. Disclosure of Multimedia Records Would Jeopardize NYPD's Capacity to Guarantee the Security of its Information Technology Assets

Public Officers Law §87(2)(i) ("the technology exemption") permits an agency to withhold records that "if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." Courts have explained this exemption as "concerned with ensuring the security of information technology assets." Matter of TJS of N.Y. v. New York State Dep't of Taxation & Fin., 89 A.D.3d 239, 243 (3d Dep't 2011). The "expressed legislative intent was to protect against the risks of electronic attack, including damage to the assets themselves . . . ." Id.; see also N.Y.

Civ. Liberties Union, 2009 N.Y. Misc. LEXIS 2542 (describing the IT exemption as applying to "documents which contain information that would assist the recipient in invading an agency's computer system").

One recent case has squarely addressed the modern form of the technology exemption, Crawford v. New York City Dep't of Info. Tech. & Telecom., 43 Misc. 3d 735 (Sup. Ct. N.Y. Co. 2014). In Crawford, the court held that internet conduits containing fiber-optic cables are electronic information infrastructures within the plain meaning of Public Officers Law §87(2)(i). Crawford, 43 Misc. 3d, at 740-41. The Crawford court explained that the security considerations for the technology exemption are focused on "the preservation of both the electronic data and the physical system or infrastructure that carries the data." Id. at 741 (emphasis added). The plain language of the statute supports the Crawford court's interpretation. The technology exemption applies to "both electronic information systems and infrastructures." Public Officers Law §87(2)(i) (emphasis added).

Here, Respondents' Verified Answer, and the accompanying Donohue Affidavit have set forth how disclosure of the multimedia records would permit individuals to gain knowledge of the kinds of optical technology NYPD uses to conduct surveillance. See Donohue Aff., at ¶¶23-30. As explained by Chief Donahue, NYPD's network and its surveillance cameras are essential information technology assets. Id. at ¶29. Disclosure of the multimedia records could allow individuals to discern the locations of such equipment and the technical specifications of such equipment. Id. at ¶¶27-29. Some of this equipment is connected to NYPD's dedicated fiber-optic network, while other data from the equipment is transmitted wirelessly. Id. at ¶27. As explained by Chief Donahue, if the multimedia records were made public, "would-be hackers would have a much easier time understanding and exploiting and

attacking NYPD's wireless communications and transmission network." Id. at ¶28. This would jeopardize NYPD's ability to secure its network and surveillance cameras. Id. at ¶29. Additionally, in the event of an emergency, such an attack could wreak havoc on NYPD personnel's ability to communicate, thus endangering the lives and safety of New York's residents and visitors. Id.

* * *

Based on the foregoing, Respondents properly denied Petitioner's request for the Withheld Records, as their disclosure could endanger the lives and safety of NYPD's undercover officers, would interfere with law enforcement, and would reveal non-routine criminal investigative techniques, and additionally as the communications are protected by the intra-agency exemption, and release of the multimedia records would jeopardize NYPD's ability to guarantee the security of its information technology assets.

POINT IV

PETITIONER IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES OR OTHER COSTS IN CONNECTION WITH THIS PROCEEDING

Pursuant to FOIL, a court may assess "reasonable attorneys' fees and other litigation costs reasonably incurred" in a case in which a person "has substantially prevailed, when: (i) the agency has no reasonable basis for denying access; or (ii) the agency failed to respond to a request or appeal within the statutory time." Pub. Off. Law § 89(4)(c). Thus, as an initial matter, an award of attorney's fees and other litigation costs is available under FOIL only where the petitioner has "substantially prevailed." Id. "Even when these statutory prerequisites

are met, the decision to grant or deny counsel fees still lies within the discretion of the court." Matter of Henry Schein, Inc., v. Eristoff, 35 A.D.3d 1124, 1126 (3d Dep't 2006).

Petitioner here cannot establish, as a matter of law, that he has "substantially prevailed." First, as argued above, Respondents properly denied Petitioner's FOIL request. Furthermore, even if the Court were to find that the Withheld Records should have been disclosed, Petitioner still cannot be found to have substantially prevailed in this proceeding. Respondents acknowledged Petitioner's FOIL request within the statutory timeframe of five days. See Verified Answer, at ¶38. Even if the court does order the Withheld Records disclosed, which it should not, the court still must determine whether Respondents had a reasonable basis for denying access to those records, as an agency's decision to withhold requested records may be reasonable, even if it is ultimately rejected. See Miller v. New York State DOT**,** 871 N.Y.S.2d 489 (3d Dep't 2009)(although ordering documents disclosed, denying request for fees where respondents "had a rational basis for their belief that the majority of the documents withheld were exempt from disclosure."). Here, Respondents' withholding of the Withheld Records was entirely reasonable, as numerous FOIL exemptions apply to them. Thus, even if Petitioner is somehow found to have substantially prevailed, he would not be entitled to attorneys' fees because Respondents had a reasonable basis for denying access to the requested records.

In sum, as Petitioner has not met his burden for an award of attorney's fees under FOIL, Petitioner's request for such an award should be denied.

CONCLUSION

For these reasons set forth herein, Respondents respectfully request that the Court deny the Verified Petition in its entirety and all the relief requested therein, and award Respondents such other and further relief as this court deems just and proper.

Dated: New York, New York
August 22, 2016

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 356-0883

By: s/ Elizabeth Edmonds
ELIZABETH EDMONDS
Assistant Corporation Counsel