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January 2, 2016

BY EMAIL, BY HAND, AND BY MAIL

Mr. Jonathan David
Records Access Appeals Officer
New York City Police Department
One Police Plaza – Room 1406
New York, New York 10038

Re: Administrative Appeal – FOIL # 2014-PL-10945 – 2014-PL-10989
12/12/14 FOIL Request – NYPD Long Range Acoustic Devices (LRADs)

Mr. David:

I represent clients who have been seeking access to information from the New York City Police Department (“NYPD”) since their December 12, 2014 request pursuant to the New York State Freedom of Information Law (“FOIL”), §§ 84-90 of the Public Officers Law, 21 NYCRR Part 1401, as well as the Uniform Rules and Regulations for All City Agencies Pertaining to the Administration of the Freedom of Information Law, Title 43, Rules of the City of New York Chapter 11, regarding NYPD uses of LRADs and other related matters (the “Request”).

By letter dated December 3, 2015 (the “Decision”), the NYPD produced twenty-three pages of NYPD Patrol Guide provisions partially responsive to parts “i” and “j” of the Request and denied the remainder of the request, citing Section 87(2)(e)(iv) of the FOIL as the first basis for withholding responsive records because their disclosure “would reveal non-routine techniques and procedures” and Section 87(2)(e) as the second basis for withholding them because their disclosure would “interfere with law enforcement investigations or judicial proceedings.”

I write to appeal those determinations. I also hereby renew my appeals of the constructive denials and other violations of the FOIL, its implementing regulations, and local law complained of in the March 2, 2015 First Administrative Appeal, October 24, 2015 Second Administrative Appeal, and December 1, 2015 Third Administrative Appeal. Finally, I renew my appeals of the Department’s refusals to comply with the requirements that the Department accept and respond to requests electronically, codified in FOIL Sections 89(3)(b) and 87(5)(a).

Attached are the following documents, which constitute the administrative record relevant to this appeal:

1. The December 12, 2014 Request;
2. The December 12, 2014 form email from NYPD Lt. Richard Mantellino to me;
3. December 15, 2014 form letter from Lt. Mantellino to “Gordon Oliver” related to what NYPD designated as FOIL Req #: 2014-PL-10945 acknowledging receipt of the Request on December 15, 2014 and estimating that further review would be completed and a determination issued “within twenty business days” of December 15, 2014;
4. December 19, 2014 form letter from Lt. Mantellino me related to what NYPD designated as FOIL Req #: 2014-PL-10989 acknowledging receipt of the Request on December 15, 2014 and estimating that further review would be completed and a determination issued “within twenty business days” of December 19, 2014;
5. March 2, 2015 First Administrative Appeal – Constructive Denial letter;
6. March 3, 2015 letter-request for advisory opinion to Robert Freeman – New York State Committee on Open Government (“COOG”) requesting an advisory opinion in connection with Point 2 of the March 2, 2015 First Administrative Appeal, specifically whether FOIL Section 89(3)(b) requires the NYPD to accept and respond to FOIL requests by electronic means;
7. January 21, 2010 COOG Advisory Opinion FOIL-AO-107965 provided by COOG in response to the March 3, 2015 letter-request (opining “that if an agency ... has the ability to receive and respond to requests via email, it is required to do so”);
8. April 27, 2015 form letter from Lt. Mantellino to me indicating that responsive records were “located in several locations and ... difficult to search or locate” that “numerous records must be reviewed in order to determine whether disclosure is required” and “records [had] not yet been received from other NYPD units” and estimating based on those factors that “the processing of [the Request would] be completed by June 22, 2015”;
9. May 18, 2015 letter from you to me stating, *inter alia*, that “[i]nasmuch as [the] FOIL was not denied, the appeal lacks the predicate denial of access and is, therefore, premature” and noting that ; and
10. August 17, 2015 letter from Lt. Mantellino to me indicating that “numerous records must be reviewed in order to determine whether disclosure is required” and estimating based on that factor that “the processing of [the Request would] be completed by September 11, 2015”.
11. October 14, 2015 Second Administrative Appeal – Constructive Denial letter;
12. October 28, 2015 letter from you to me purporting to determine the Second Administrative Appeal reiterating your May 18, 2015 determination and “estimat[ing] that the RAO [would] issue a determination on or before November 13, 2015”;

13. December 1, 2015 Third Administrative Appeal – Constructive Denial letter;
14. December 3, 2015 letter-determination to produce, and enclosing, twenty-three pages of NYPD Patrol Guide provisions partially responsive to parts “I” and “j” of the Request, and denying the remainder of the request, citing Section 87(2)(e)(iv) of the FOIL as a basis for withholding production because disclosure “would reveal non-routine techniques and procedures” and Section 87(2)(e) as a basis for withholding them because their disclosure would “interfere with law enforcement investigations or judicial proceedings.”

Also attached are the following documents related to a similar FOIL request and response:

15. December 20, 2011 Freedom of Information Law Request from the New York Civil Liberties Union (“NYCLU”) regarding LRADs (the “NYCLU Request”);
16. April 27, 2012 NYPD response letter and attachments;
17. August 2, 2012 NYCLU Administrative Appeal letter; and
18. September 11, 2012 NYPD Response to the NYCLU Request and attachments (the “NYCLU Response”).

SECTION 1

THE DECISIONS TO WITHHOLD THE RECORDS THE DEPARTMENT FOUND RESPONSIVE TO THE REQUEST WERE IN ERROR

I hereby appeal the decisions to withhold those records the Department found that were responsive to sections (a), (c) through (h), and (k) of the Request. The Department cited FOIL Sections 87(2)(e)(iv) and 87(2)(e) of the FOIL in withholding such records.

The Request specifically demands that the Department provide an appropriately detailed written denial so that judicial review can be meaningful. The Decision is not particular enough in its descriptions of the documents located to do that.

For example, although the Decision determines to withhold documents, it does not say how many. Nor does the Decision break down how many of the total number of documents found were responsive to each of sections (a), (c) through (h), and (k) of the Request – just that the Department is withholding whatever documents, aside from Patrol Guide provisions, it did find.

Beyond that, because there is no reasonably particularized description of the documents it is also impossible to determine which documents the Department is withholding on the basis of FOIL Section 87(2)(e)(iv) and which documents the Department is withholding on the basis of FOIL Section 87(2)(e).

So, to illustrate by discussing a few examples, it is not clear whether any of the

recorded police communications sought in (a), documents reflecting training materials sought in (e), or documents related to LRAD deployment sought in (g), were located or are being withheld.

With respect to (a), if no recorded police communications were found, that would beg questions to be determined in connection with this appeal about how such communications are stored and retrieved in the regular course of business and whether there was a diligent search for such communications. Upon information and belief, the Communications Division was in possession of the requested Citywide One or other similar recordings related to the December 4, 2015 and December 5, 2015 incidents as of the date of the FOIL. If recorded police communications were found but are being withheld, it is not clear on what grounds. It is not clear how disclosure of recorded police communications related to purported criminal activities – which occurs routinely in criminal prosecutions – could reveal “non-routine techniques and procedures.” If the Department would claim the other exception, it is not clear whether the Department means that the disclosure would interfere with judicial or administrative proceedings, it is not clear which, and it is therefore not clear how.

With respect to (e), if no responsive training materials were found, that would beg questions to be determined in connection with this appeal about how and where training materials are maintained in the regular course of business and whether there was a diligent search for such materials, including in the NYPD’s Police Academy, any Training Division or similar aspect, the Disorder Control Unit, the Strategic Response Group or Strategic Response Command, the Office of Management, Assistance, and Planning, and any other, similar NYPD aspect involved in training related to uses of force, crowd control, policing demonstrations, and the like. If a diligent search was conducted including a search of those NYPD aspects, the Decision should so state. If responsive documents were uncovered but withheld, it is not clear why, and the Decision lacks information on this point such that a court can review the determination adequately.

With respect to (g), upon information and belief, unusual occurrence reports and after-action reports are stored and/or searchable in a small number of discrete locations (such as the Borough commands and/or online). That fact about the manner in which responsive records are regularly stored begs questions to be determined in connection with this appeal about whether there were diligent searches for responsive documents, including at the Borough command level. If responsive documents were uncovered but withheld, it is not clear why, and the Decision lacks information on this point such that a court can review the determination adequately.

Those examples should serve to illustrate why the decisions to withhold the documents sought in Sections (a), (c) through (h), and (k) of the Request were in error.

Significantly, the Department initially withheld access to records similar to those sought in the Request in connection with a previous request in 2011 related to NYPD LRAD use, citing Section 87(2)(e)(iv) and 87(2)(g) of the FOIL. However, in that case, on appeal, the Department disclosed all of the records. As described above, the relevant

correspondence and production related to FOIL Request #11PL107361 are attached.

Section (d) of the Request seeks records substantially similar to the records sought in Item #1 in the NYCLU FOIL.

Section (e) of the Request seeks records substantially similar to the records sought in Item #2 in the NYCLU FOIL.

Section (c) of the Request seeks records substantially similar to the records sought in Item #4 in the NYCLU FOIL.

Sections (f), (g), and (k) seek records substantially similar to the records sought in Item #3 of the NYCLU FOIL.

Of course, the NYCLU FOIL and the Request are not duplicative. They do not request the same records. Therefore, the Department's 2012 response to the NYCLU FOIL cannot excuse its failure to disclose in response to the Request. Among other differences, the NYCLU FOIL sought records related to LRADs through December 21, 2011, and the Request seeks records covering the time period after December of 2011 through December of 2014.

However, the Department's determination to release documents to NYCLU in 2012 undermines its claims that FOIL Sections 87(2)(e)(iv) and 87(2)(e) are appropriate grounds for withholding disclosure in this case.

In this connection, the Department disclosed 25 pages total of documents, consisting of all of the documents it found responsive to the NYCLU FOIL, and did not withhold any responsive documents at all.

Of course, since 2012, the NYPD has purchased and utilized numerous LRAD devices on the streets. The devices are regular and publicly observable fixtures at protests, most recently wielded by officers wearing Strategic Response Group uniforms.

It is beyond belief that such escalations of LRAD use and deployment could have occurred without the creation of numerous records between 2011 and the end of 2014 related to the purchase and uses of LRAD devices, as well as related training and protocols.

The documents sought, including the documents sought reflecting the NYPD's public deployment and uses of LRAD devices are statistical or factual tabulations or data, instructions to staff that affect the public, and/or final agency policy or determinations. *See* FOIL Section 87(2)(g)(i) through (iii).

For those reasons, and for the reasons set forth below, the decisions to withhold records responsive to the Request were in error.

SECTION 2

THE RAO'S RESPONSES WERE UNTIMELY AND VIOLATED THE FOIL

I repeat and reiterate all of the facts and arguments set forth in the corresponding sections of the March 2, 2015 First Administrative Appeal, October 24, 2015 Second Administrative Appeal, and December 1, 2015 Third Administrative Appeal as if fully set forth herein.

After acknowledging receipt of the Request, the Department had no communication about the Request between December of 2014 and March of 2015.

On March 2, 2015, I made the First Administrative Appeal. On April 27, 2015 – more than a month later – the Department provided a revised estimated response date of June 22, 2015. That estimated response date was unreasonable under the circumstances.

You were required to respond to the March 2, 2015 First Administrative Appeal within ten business days.

Your grossly untimely May 18, 2015 determinations to uphold the RAO's actions up until that time were arbitrary and capricious and contrary to law and constituted abuses of discretion.

Your May 18, 2015 determination of the appeal on the grounds that it was "premature" ignores the timing and communication requirements, as well as the laws related to constructive denials, in the FOIL, implementing regulations, and local law.

To the extent there was any evidence to support your claims in the May 18, 2015 letter that the RAO had "commenced a search for the records" sought in the Request or that the estimated date provided by the RAO was reasonable under the circumstances, please be reminded of your obligation to abide by the preservation demand in the First Administrative Appeal.

The June 22, 2015 revised estimated response date came and went. I called the Department to complain about the lack of response. On August 17, 2015, in response to that call, the RAO provided a second revised estimated response date of September 11, 2015.

The September 11, 2015 estimated response date came and went. I made the October 14, 2015 Second Administrative Appeal. As stated in the Second Administrative Appeal, the September 11, 2015 second revised estimated response date was unreasonable under the circumstances. On October 28, 2015, you responded to the Second Administrative Appeal by adhering to your May 18, 2015 determinations and providing a third revised estimated response date of November 13, 2015.

Your October 28, 2015 adherence to your May 18, 2015 determinations were

arbitrary and capricious and contrary to law and constituted abuses of discretion.

To the extent there was any evidence to support your claims that the RAO had “commenced a search for the records” sought in the Request or that the estimated date provided by the RAO was reasonable under the circumstances, please be reminded of your obligations to abide by the preservation demands in the administrative appeals.

November 13, 2015 came and went. I made the Third Administrative Appeal on December 1, 2015. As stated therein, the November 13, 2015 third revised estimated response date was unreasonable under the circumstances.

The RAO provided the Decision on December 3, 2015, nearly a year after the Request, providing access to a few sections of the Patrol Guide and withholding access to whatever other documents were discovered.

As set forth in the three prior administrative appeals, the Department’s failure to timely respond to the Request, and its related failures to communicate related to the Request, violated the FOIL, implementing regulations, local law, as well as my clients’ rights to access to the documents and information sought, including their rights under the First Amendment to the United States Constitution as well as Article I Section 8 of the New York State Constitution, and also including their rights to meaningful administrative and judicial review of any withholding or denial of such access, in a timely fashion.

SECTION 3. ELECTRONIC REQUESTS AND RESPONSES

I repeat and reiterate all of the facts and arguments set forth in the corresponding sections of the March 2, 2015 First Administrative Appeal, October 24, 2015 Second Administrative Appeal, and December 1, 2015 Third Administrative Appeal as if fully set forth herein.

The NYPD has “reasonable means available” to accept and respond to requests for records submitted in e-mail form such as the Request. The NYPD has the ability to receive and respond to requests via email.

The NYPD’s refusal to accept and respond to the Request by electronic means violates §§ 89(3)(b) and 87(5)(a) of the FOIL as well as my clients’ rights to access to the documents and information sought, including their rights under the First Amendment to the United States Constitution as well as Article I Section 8 of the New York State Constitution, and also including their rights to meaningful administrative and judicial review of any withholding or denial of such access, in a timely fashion.

CONCLUSION

As set forth above, the NYPD’s violations of the FOIL and its implementing regulations and related local laws, including its constructive denials of the Request and other failures to grant access or to deny access in a writing with meaningful notice of

appellate rights, along with its refusals to accept and respond to the Request electronically, have violated and continued to violate my clients' rights to access the information and/or their related rights.

These violations of their rights are serious and ongoing and the lack of access to the documents and information sought has caused and continues to cause irreparable harm.

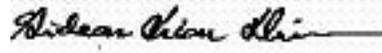
Please release the requested records in electronic format by e-mail in response to this appeal.

Please be advised that, unless the Department makes a written determination to comply with FOIL Sections 89(3)(b) and 87(5)(a) moving forward, I intend to seek a declaratory judgment and a related injunction directing the Department to do so with respect to FOIL requests received in the future.

I look forward to your response by e-mail within ten business days.

Thank you for your attention to these matters.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gideon Orion Oliver", is written over a light gray, textured rectangular background.

Gideon Orion Oliver

cc: Committee on Open Government
New York State Department of State
41 State Street
Albany, New York 12231