

**Brennan Ctr. for Justice at New York Univ. Sch. of
Law v New York City Police Dept.**

2017 NY Slip Op 32716(U)

December 22, 2017

Supreme Court, New York County

Docket Number: 160541/2016

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

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BRENNAN CENTER FOR JUSTICE AT NEW
YORK UNIVERSITY SCHOOL OF LAW,

Petitioner,

- v -

NEW YORK CITY POLICE DEPARTMENT,
JAMES P. O'NEILL, in his official capacity as
Commissioner of the New York City Police
Department,

Respondents,

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

INDEX NO. 160541/2016

MOTION DATE _____

MOTION SEQ. NO. 1

**DECISION AND
JUDGMENT**

-----X
HON. BARBARA JAFFE:

By notice of petition and petition pursuant to CPLR article 78, petitioner challenges respondents' compliance with its request for records pursuant to the Freedom of Information Law (FOIL). (Verified Petition [NYSCEF 1]). Respondents oppose. (Verified Answer [NYSCEF 19]). Resolution of the proceeding requires a sensitive balancing of the public's interest in understanding policing and society's interest in safety and security. As governmental transparency is a transcendent virtue, the law is duly weighted in favor of disclosure.

I. PERTINENT BACKGROUND

Petitioner is a non-profit, non-partisan public policy and law institute with a self-described focus on "fundamental issues of democracy and justice." (NYSCEF 1). Through its Liberty and National Security Program, it "seeks to ensure that law enforcement agencies

execute their responsibilities in compliance with constitutional and statutory limits.” (*Id.*). By letter dated June 14, 2016, it sought from respondent New York City Police Department (NYPD) public records relating to the use of “predictive policing technology.” (NYSCEF 2).

As evidenced by purchase orders (NYSCEF 6), petitioner alleges that the City of New York has paid for certain software licenses, one of which, Palantir Gotham, is a tool that allows data from multiple sources to be analyzed and thereby predict where crimes are likely to occur.

Petitioner sought the following records:

1. purchase records/agreements relating to predictive policing technology;¹
2. vendor communications with Palantir Technologies or any other third-party vendor relating to predictive policing products or services, including sales materials and emails;
3. policies governing use of the technology, including policies regarding retention, sharing, and use of data collected;
4. communications with federal agencies relating to the technology;²
5. records reflecting what data may be or is actually used by predictive policing products and any weighting used, and other available details about the data;
6. records reflecting how predictive policing products or services use the data input to create output, the algorithms or machine learning used, possible or actual outputs, and how NYPD uses it to arrive at operational decisions;
7. past uses of statistical data with predictive policing products, and number of investigations resulting in criminal prosecutions or crime prevention;
8. any records of, or communications regarding, audits or internal reviews of Palantir Gotham, or other predicting policing products or services;³ and
9. nondisclosure agreements governing NYPD’s contact with a vendor.⁴

(NYSCEF 2).

By letter dated June 29, 2016, NYPD’s Records Access Officer denied access to these records, relying on Public Officers Law (POL) § 87(2)(e)(iv) and stating that the disclosure of such information “would reveal non-routine techniques and procedures.” (NYSCEF 3).

¹ Withdrawn by petitioner. (NYSCEF 33).

² Withdrawn by petitioner (NYSCEF 33); no such records located after “thorough and diligent search.” (NYSCEF 21).

³ No such records located after “thorough and diligent search.” (NYSCEF 21).

⁴ Withdrawn by petitioner. (NYSCEF 33).

Petitioner appealed the denial by letter dated July 29, 2016, alleging that NYPD had failed to sustain its burden of setting forth a particularized and specific justification for refusing to disclose the records, that the exemption it cited does not govern the request, and that in any event, NYPD's reliance on the exemption is overbroad for failing to distinguish between routine and non-routine criminal investigative techniques, the former of which may be disclosed and redacted to eliminate the revelation of non-routine criminal investigative techniques and procedures. (NYSCEF 4).

By letter dated August 15, 2016, NYPD's Record Access Appeals Officer denied petitioner's appeal on the additional grounds that disclosure of the records sought, "which are related to NYPD information management and security technology, would jeopardize [its] capacity to guarantee the security of its information technology assets, including both electronic information systems and infrastructures" (POL § 87(2)(i)), that the vendor agreements contain trade secrets and proprietary information (POL § 87(2)(d)), and to the extent that other records contain opinions and recommendations (POL § 87(2)(g)), and/or are confidential (POL § 87(2)(e)(iii)). (NYSCEF 5).

II. PETITION AND MEMORANDUM IN SUPPORT THEREOF

Petitioner efiled the instant petition on December 15, 2016, addressing the statutory exemptions relied on by respondents in refusing to disclose the requested information, and reiterating the arguments set forth in its correspondence with the NYPD. It denies that the information it seeks would reveal non-routine criminal investigative techniques (POL § 87(2)(e)(iv)), analogizing the information to "routine police procedures, like fingerprinting tests," insists that a criminal would not be able to gain an advantage through knowledge of a "predictive policing algorithm that analyzes dynamic historical crime data," and maintains that

the exemption is inapplicable because the technology behind predictive policing relies on historical data. It also expresses doubt that the data reflect trade secrets or commercially sensitive information (POL § 87[2][d]), stresses that it seeks no NYPD internal considerations (POL § 87[2][g]), and denies that the information it seeks threatens the safety of NYPD's information technology (POL § 87[2][i]), that its revelation would facilitate an attack on the data, and that it would reveal the identity of confidential sources. (*Id.*).

Petitioner bases its request for records on NYPD's "substantial financial commitment to predictive policing, and stated intent to rely heavily on these technologies, and the public's significant interest in the transparency of these predictive policing systems." (*Id.*). Moreover, it adds, the policies governing its use, the purchase and audit records, and communications concerning non-disclosure agreements are not "easily susceptible to exploitation for criminal purposes" as are details underlying undercover operations. (*Id.*).

Absent any indication that the information sought contains trade secrets, petitioner denies that POL § 87(2)(d) applies, or that the exemption for inter- and intra-agency records (POL § 87[2][g]) applies to audits of the software, policies governing its use, and information inputs. Moreover, while it asserts that the exemption for "statistical or factual tabulations or data" has been broadly interpreted as "objective information," not opinions, ideas or advice, it agrees to redact any deliberative process if "truly captured." (*Id.*).

Although the statute permits the NYPD to deny access to records that, if disclosed would jeopardize its ability to guarantee the security of its information technology assets (POL § 87[2][i]), petitioner argues that expert evidence must support such a denial, and that a request for facts concerning information technology will not, *ipso facto*, lead to a security breach without a particularized showing that the information sought "would actually subject its information

technology to attack.” (*Id.*). Petitioner observes that any sensitive information such as the location of servers or details concerning encryption may be redacted. (*Id.*).

There being no risk apparent from the record that information about predictive policing technologies may be used to identify confidential sources or undercover officers, petitioner maintains that POL § 87(2)(e)(iii) is inapplicable. (*Id.*).

Petitioner also complains that NYPD’s refusal to provide any document is overbroad, and thus seeks legal costs, including attorney fees. (*Id.*).

III. ANSWER AND MEMORANDUM IN SUPPORT THEREOF

In their verified answer, respondents certify that NYPD conducted a diligent search for records responsive to the petition (Verified Answer [Ans.], NYSCEF 19, 21), and set forth the documents that were found. Those that remain in issue are: in response to request two, email correspondence with three vendors who sought to sell their predictive policy technology to respondents, redacted of social security numbers and telephone numbers pursuant to POL § 87(2)(b) and of trade secrets and other information pursuant to POL § 87(2)(d); in response to request three, Public Security Privacy Guidelines; in response to requests five and six, an article by and written/electronic notes by Evan S. Levine, NYPD’s Assistant Commissioner of Data Analytics, and “interfaces”; and in response to request seven, draft presentations relating to the trial performances of the three vendors and the results of their predictions. (*Id.*).

In withholding, pursuant to POL § 2(e)(iv), the aforementioned notes maintained by Levine containing information regarding types and sources of data used with the Palantir platform, respondents argue that Levine, not Palantir or any other third party vendor, developed the program, and thus, public disclosure of such material, “as it pertains to the weights of the variables in the algorithms, or the computer code itself, would enable an individual

knowledgeable in programming to use public databases and make the same predictions that the NYPD's predictive policing tool makes," and would reveal confidential information and non-routine investigative techniques. (NYSCEF 19, 21, Respondents' Memorandum of Law in Support of the Verified Answer [NYSCEF 24], Affidavit of Evan S. Levine [NYSCEF 22]). They also assert that as predictive policing helps determine where to deploy police officers, disclosing this material would put officers at risk of harm, relying on POL § 87(2)(e)(iii) and (f). In any event, respondents observe that notwithstanding petitioner's benign intent with respect to such records, making them available would render them available to anyone, regardless of their purpose in seeking them. (NYSCEF 24).

According to respondents, public disclosure of the test results of the predictive policy products of three vendors which were unsuccessful in bidding for the project would discourage potential vendors from demonstrating their product to the NYPD and thereby limit the pool of technology available to it. (NYSCEF 19). They rely on POL § 87(2)(d), which exempts from disclosure trade secrets or information the disclosure of which would substantially injure the enterprise (NYSCEF 24), and offer the affidavit of their Director of Operations Research in the Office of Management Analysis and Planning (Director of Operations), who had the responsibility of coordinating the vendors' access to data, collating their predictions, and assessing their accuracy. (NYSCEF 23). He states that in discussing the prospect of purchasing predictive police products from three vendors, "it was the Vendors' expectation and understanding that NYPD and its employees would keep the Vendors' trade secrets—including their products' performance in the 45-day trial—strictly confidential," and claims that nondisclosure agreements were entered into assuring that confidentiality. He characterizes competition in the predictive policing field as fierce, and asserts that minor differences among

products “can give a vendor a competitive advantage in the marketplace,” and that therefore, the disclosure of a vendor’s performance in the trial “could greatly influence the vendor’s position in the marketplace . . .” (*Id.*). Respondents also justify the withholding of the “draft presentation summarizing the vendors’ performance during the 45-day trial” as it constitutes a non-final draft to aid it in its deliberations, relying on POL § 87(2)(g)(iii). (NYSCEF 24).

IV. VERIFIED REPLY AND MEMORANDUM IN SUPPORT THEREOF

Petitioner again complains of NYPD’s initial categorical denial of its requests, only to produce, belatedly with respondents’ answer to its petition and without an adequate search, some of the information, and withholding relevant non-exempt information. In any event, it asserts that NYPD’s production of documents governing policies, past use and testing, and audits is incomplete and that a search for certain data was never undertaken. Moreover, it claims, the single document disclosed relating to the policy governing predictive policing pre-dates the system in issue, and NYPD’s representation that no audit or testing documentation exists is “unlikely.” (NYSCEF 28).

Although respondents produced certain communications relating to the third-party vendors, petitioner alleges that they contain no substantive information because they were overly redacted. Thus, it argues, respondents have, in effect, advanced a blanket objection based on the alleged competitive and sensitive information of the third-party vendors. Petitioner in any event disputes that the redacted communications are exempt from disclosure and asserts that the NYPD’s view of what it sought in terms of predictive policing and a standard for it constitutes information to which it is entitled. Having sought no proprietary information, petitioner denies that the trade secret exemption applies. (*Id.*).

In the interest of allowing the public to understand the impact of predictive policing technology and how the NYPD polices itself in using it, petitioner maintains that respondents' search was insufficient in that they failed to provide information concerning the past usage of the technology and information about the testing of it, the policies governing its use, and any audits of it. Having produced a policy statement from 2009 alluding to the use of audits of their algorithm under the NYPD's Domain Awareness System without producing information about the audits, and the Levine paper, without producing evidence of the tests undertaken to produce the statistics contained therein, petitioner seeks those materials as well. It withdraws its request for the algorithm and code, claiming that "other relevant, non-exempt records about the model should be produced, namely the crime data (or inputs) that are used in the model and the predictions (or outputs) that were made in the past," limited to when the predictive model was first used in 2015 until six months before the rendering of a decision on this petition, as such information is crucial to a public understanding of whether the NYPD's actions based on the technology are non-discriminatory and unbiased. (*Id.*). Petitioner denies that such disclosure would pose a threat to officers. (*Id.*).

Petitioner asks that respondents expand its search for documents to the Counterterrorism Bureau, as the predictive policing algorithm was incorporated into the Domain Awareness System and is used by that Bureau, and withdraws its requests for records reflecting vendor agreements, communications with federal agencies as to predictive policing, and records reflecting non-disclosure agreements. And, absent a basis to withhold records at the outset, petitioner reiterates its prayer for attorney fees and costs, observing that in opposing an award of expenses, respondents do not explain why NYPD failed to provide a substantive response to its FOIL request before the petition was filed. (*Id.*).

V. ORAL ARGUMENT

At oral argument on the petition, petitioner expressed a concern that the predictive policing technology could be used to shore up predicates for stops, arrests, and searches, and again observed that respondents had produced no information until the instant proceeding was commenced. (NYSCEF 33).

Respondents argued that having replaced its request for the algorithm and code with a request for the historical input and output of data alone, petitioner should file a new FOIL request, adding that the production of the data would be burdensome. Petitioner claimed that having sought the data in its request for information regarding the types and sources of the data used with the Palantir platform and information about how the technology works, it need not file a new FOIL request.

In opposing petitioner's prayer for fees and costs, respondents dispute that petitioner is the prevailing party. (*Id.*).

VI. ANALYSIS

The purpose of the Freedom of Information Law (FOIL) is the promotion of "open government and public accountability." (*Matter of Friedman v Rice*, NY3d , 2017 WL 5574476 [2017]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]). It is premised on the public's inherent right to know (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]), and is intended to expose government abuses and hold it accountable (*Id.*, quoting *NLRB v Robbins Tire & Rubber Co.*, 437 US 214, 242 [1978]). Thus, the public is afforded broad access to government records, and absent a specific exemption to disclosure, records must be made available for public inspection and copying. (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). The exemptions set forth in the Public Officers Law are therefore,

narrowly construed in favor of granting the public with maximum access to the records. (*Id.* at 462). Consequently, a government agency must articulate a particularized and specific justification to exempt its records from disclosure, and only where the material requested “falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.” (*Matter of Fink*, 47 NY2d at 571).

The agency bears the burden of demonstrating that the material sought is exempt from disclosure. (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 18 [1st Dept 2017]; *Matter of Brown v New York City Police Dept.*, 264 AD2d 558, 560 [1st Dept 1999]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-9 [1st Dept 1999]). Blanket exemptions for particular types of documents conflict with FOIL’s policy of encouraging open government. (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]; *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 437 [1st Dept 2014]; *Matter of Legal Aid Soc. v New York City Police Dept.*, 274 AD2d 207, 209 [1st Dept 2000], *lv dismissed in part, denied in part* 95 NY2d 956; *Matter of Johnson*, 257 AD2d at 348-49; *Matter of Brown*, 264 AD2d at 560-1). Thus, the responding agency must articulate a particularized and specific justification for not disclosing requested documents (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 [2017], 2017 NY Slip Op 07209, *3; *Matter of Gould*, 89 NY2d at 275; *Matter of Luongo*, 150 AD3d at 18).

The agency must also, in its denial of a FOIL request, invoke the particular exemption for denying disclosure. (*Matter of Madeiros*, 2017 NY Slip Op 07209, *3). Indeed, “judicial review of an administrative determination is limited to the grounds invoked by the agency . . .” (*Id.*).

If the reviewing court cannot determine whether withheld or redacted documents “fall entirely within the scope of the asserted exemption,” an *in camera* inspection of them is warranted. (*Matter of Gould*, 89 NY2d at 275; *Matter of Johnson*, 257 AD2d at 349).

Pursuant to POL § 87, and to the extent invoked by respondents in refusing petitioner’s requests and on its appeal:⁵

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

...

(d) 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;

(e) are compiled for law enforcement purposes and which, if disclosed, would:

...

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;

(g) are inter-agency or intra-agency materials which are not:

iii. final agency policy or determinations;

...

(i) 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 . . .

In light of the foregoing, it must be determined whether respondents have articulated a particularized and specific justification for not disclosing the requested documents, and whether an *in camera* review is required.

⁵ Absent any mention of POL § 87(2)(b) and (f) in their correspondence with petitioner, neither provision is considered.

A. POL § 87(2)(d)

trade secrets or records submitted to an agency by a commercial enterprise . . . which if disclosed would cause substantial injury to the competitive position of the subject enterprise

As respondents observe, in determining whether information constitutes a trade secret, the court must look at several factors: the extent to which the information is known outside the business of the party seeking to keep it confidential, the extent the information is known by employees in the business, the extent of measures taken to guard the information, the value of the information to the party and to its competitors, the amount of effort and funds expended in developing the information, and the ease or difficulty in acquiring or duplicating the information by others. (NYSCEF 24). Apart from his reference to nondisclosure agreements between NYPD and the vendors, respondents' Director of Operations offers no facts relating to the aforementioned factors, his position with NYPD provides no basis for inferring that he is particularly knowledgeable about trade secrets and the marketplace in predictive policing software, and to the extent that he offers any facts in support of this exemption, they are based on hearsay. Moreover, that the vendors entered into nondisclosure agreements with NYPD does not prove that disclosure would cause substantial injury to any of the vendors' competitive position, and the Director's assertion that disclosure would impair NYPD's ability to attract other vendors is fatally speculative. Consequently, respondents fail to demonstrate that sales materials and emails constitute trade secrets or that their disclosure would impair NYPD's ability to attract other vendors.

B. POL § 87(2)(g)

records constituting inter-agency or intra-agency materials which are not:
iii. final agency policy or determinations

Respondents acknowledge that New York State appellate courts "routinely and consistently reject requests for disclosure of material that contain 'opinions, advice, valuations,

deliberations, proposals, policy formulations, conclusions or recommendations' or other subjective material." (NYSCEF 24). To determine whether the summary of the results of the 45-day trials of the three vendors' products, audits of their software, internal reviews, and policies governing their use may be withheld by respondents, these records must be examined *in camera*. Any deliberative process contained within these records will be ordered redacted.

C. POL § 87(2)(e) and POL § 87(2)(i)

records compiled for law enforcement purposes and which, if disclosed, would:
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
and
records which if disclosed, would jeopardize the capacity of an agency . . . to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures . . .

Petitioner first sought to replace its request for the algorithm and codes with a request for the input data in its verified reply, having initially sought only the possible or actual outputs. It thereby deprived respondents of a sufficient opportunity to address the application of these exemptions to the input data. Thus, petitioner's request for the input data must be set forth in a new FOIL request.

Absent expert evidence that the disclosure of the output data and Levine's notes would jeopardize the NYPD's capacity to guarantee the security of its information technology assets, respondents fail to sustain their burden as to the applicability of this exemption to such data and notes. (*See Newsday Inc. v Nassau Co. Police Dept.*, 42 Misc.3d 1215[A], *5 [Sup Ct, Nassau County 2014] [respondent offered no expert evidence as to how security breach could occur if data released; exemption not warranted]).

VII. DILIGENT SEARCH

If the agency cannot locate a record requested under FOIL, it must certify that it does not possess the record or that it cannot be found after diligent search. (POL§ 89[3][a]). As the statute does not specify the manner of certification, “[n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required.” (*Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Oddone v Suffolk County Police Dept.*, 96 AD3d 758, 761 [2d Dept 2012]).

Here, respondents certify that a diligent search for certain records was fruitlessly conducted. Petitioner offers no basis for its belief that an additional search is required, except as to the Counterterrorism Bureau.

VIII. ATTORNEY FEES

Pursuant to POL § 87(4)(c), attorney fees may be awarded a petitioner who “has substantially prevailed” in a FOIL proceeding when “i. the agency had no reasonable basis for denying access”; or “failed to respond to a request or appeal within the statutory time.” In *Medeiros, supra*, 2017 NY Slip Op 07209, the Court faulted the motion court for failing, in its determination that the petitioner had not substantially prevailed, to consider that the respondent had made no disclosures before the petitioner commenced the article 78 proceeding.

As NYPD had no reasonable basis for refusing to disclose the vendor agreements (*supra*, VI.A.), and it remains to be seen whether it had a reasonable basis for refusing to disclose the test results, and as NYPD produced some of the records only after petitioner brought the instant proceeding, a determination as to whether petitioner “substantially prevailed” is reserved pending the *in camera* review of records.

IX. CONCLUSION

Accordingly, the petition is granted to the following extent, and it is hereby

ORDERED and ADJUDGED, that respondent is directed to provide to petitioner, within 45 days of notice of entry of this decision, the email correspondence with the vendors, redacted of social security numbers and telephone numbers only, the output data from the inception of the predictive policing until six months before the date of this decision, redacted of any sensitive information such as the location of servers or details concerning encryption, and Levine's notes; it is further

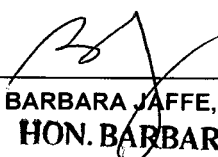
ORDERED AND ADJUDGED, that respondents produce, for *in camera* review, the summary of results of the 45-day trial of the vendors' products within 45 days of the date of this decision with notice of entry; it is further

ORDERED AND ADJUDGED, that petitioner's request for disclosure of the input data is denied; it is further

ORDERED AND ADJUDGED, that within 45 days of the date of this decision with notice of entry, NYPD search its Counterterrorism Bureau for the requested records and submit an affidavit as to results of the search within 30 days thereafter; and it is further

ORDERED AND ADJUDGED, that petitioner file a copy of this order with notice of entry within 15 days of the date of this order.

12/22/2017
DATE


BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: