

Amnesty Intl. USA v New York City Police Dept.
2022 NY Slip Op 32558(U)
July 29, 2022
Supreme Court, New York County
Docket Number: Index No. 156672/2021
Judge: Laurence Love
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: <u>HON. LAURENCE LOVE</u> <i>Justice</i> -----X AMNESTY INTERNATIONAL USA Petitioner, - v - NEW YORK CITY POLICE DEPARTMENT, Respondent. -----X	PART 63M INDEX NO. <u>156672/2021</u> MOTION DATE <u>03/25/2022</u> MOTION SEQ. NO. <u>001</u> DECISION + ORDER ON MOTION
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34
 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the decision on Petitioner, Amnesty International USA's ("AI") Petition seeking a judgment pursuant to CPLR Article 78 directing the New York City Police Department ("NYPD") to comply with its duty under FOIL to provide Petitioner with documents responsive to Petitioner's Request that are not subject to any exemption and to specifically identify and describe any documents allegedly exempt from disclosure and for related relief and Respondent's cross-motion for an order, pursuant to CPLR §§ 7804(f), 3211(a)(2), and 3211(a)(7), directing the Clerk to enter a judgment denying the petition and dismissing the proceeding on the grounds of objections in point of law that: (1) this Court lacks subject matter jurisdiction, in part, in that the instant proceeding is moot and academic; (2) that the remainder of the petition fails to state a cause of action in that Petitioner's Freedom of Information Law Request is unreasonably burdensome, is as follows:

In a Freedom of Information Law ("FOIL") Request dated September 15, 2020, directed to the NYPD FOIL Office, AI requested as follows:

1. All documents pertaining to the NYPD's procurement of facial recognition technology from March 1, 2020 until September 1, 2020. This request includes, but is not limited to contracts with Vigilant Solutions, Cognitec, NEC, Rank One Computing, and Clearview AI;
 - a. All accompanying policy documents, memoranda or guidance on:
 - i. the input data submitted to and/or requested for these facial recognition systems;
 - ii. the source of that data for the facial recognition systems;
 - iii. the outlining rationale for individual searches in facial recognition systems;
 - iv. the categorization and use of data returned by entries into the facial recognition system;
2. All documents pertaining to the NYPD's procurement of surveillance drone technologies from March 1, 2020 until September 1, 2020. This request includes, but is not limited to, contracts with Planck Aerosystems, Impossible Aerospace, Azur Drones, Wingtra, Skyfish, Dedrone, Gryphon Sensors, Cheerson, Workswell, FLIR, Ambarella, Draganfly Innovations, Insitu, Parrot, RMUS, and DJI;
3. All documents pertaining to the NYPD's procurement of gait recognition technologies from March 1, 2020 until September 1, 2020. This request includes, but is not limited to, contracts with Watix.
 - a. All accompanying policy documents, memoranda or guidance on:
 - i. the input data submitted to and/or requested for these gait recognition systems;
 - ii. the source of that data for the gait recognition systems;
 - iii. the outlining rationale for individual searches in gait recognition systems;
 - iv. the categorization and use of data returned by entries into the gait recognition system;
4. All documents pertaining to the NYPD's procurement of cell-site simulators, ISMI catchers, and "sting-ray" devices from March 1, 2020 until September 1, 2020. This request includes, but is not limited to, contracts with Mobilewalla;
5. All documents pertaining to the NYPD's procurement of ambient sound recording devices from March 1, 2020 until September 1, 2020;
6. All correspondence pertaining to the procurement of electronic surveillance tools. This request includes, but is not limited to, correspondence pertaining to facial recognition technologies, surveillance drones, gait recognition technology, cell-site simulators, and ambient sound recording devices;
7. A list of all donated materials, equipment and funds from the New York Police Foundation to the NYPD between January 1, 2010 – September 1, 2020. For any donated funds received by the NYPD from the New York Police Foundation, please include a list of items purchased with those funds, specifically anything related to facial recognition or surveillance technologies.

Said FOIL request was assigned identification number FOIL-202-056-13681 and was assigned to Detective Halk.

In an email from donotreply@records.nyc.gov to AI on January 29, 2021, said FOIL request was closed and denied in its entirety as follows:

To the extent records may exist; they would be exempt based on the following:

1. To In regard to the documents which you requested, I must deny access to these records on the basis of Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed would reveal non-routine-techniques and procedures.
2. In regard to the documents which you requested, I must deny access to these records on the basis of Public Officers Law 87(2)(e)(i) as such information, if disclosed would interfere with law enforcement investigations or judicial proceedings.
3. In regard to the documents which you requested, I must deny access to these records on the basis of Public Officers Law 87(2)(g)(iii) as such records/information are inter-agency or intra-agency materials which are not final agency policy or determinations.
4. In regard to the documents which you requested, I must deny access to these records on the basis of Public Officers Law 87(2)(e)(i) as such information, if disclosed, would identify a confidential source or disclose confidential information relating to a criminal investigation.

In a letter dated March 1, 2021, AI filed an appeal to the initial denial dated January 29, 2021, as “First, the NYPD’s recitation of FOIL subsections is inadequate to meet its burden of providing a “particularized and specific” justification for the nondisclosure of the documents and correspondences requested under FOIL. Second, the NYPD improperly invoked and/or incorrectly applied four FOIL exemptions to deny records for the seven enumerated categories in the Request.” Said letter contains specific reasoning as to why each of the asserted exceptions do not apply to the records requested, and specifically cites the New York City Council’s passage of the Public Oversight of Surveillance Technology (“POST”) Act (Int 0487-2018) in 2020, which “requires the NYPD to publish impact and use policies for all existing surveillance technologies describing how the technology will be used, the limitations in place to protect against abuse, and the oversight mechanisms governing use of the technology.”

The NYPD, through Records Access Appeals Officer Sgt. Jordan S. Mazur, responded to the March 1, 2021 appeal in a letter dated March 15, 2021. Said letter abandons entirely the

reasoning contained in the NYPD's January 29, 2021 email and instead denied the FOIL request on the basis that:

1. "Public Officers Law Section 89(3) requires that a FOIL request describe the records it seeks in a manner that can reasonably lead to the retrieval of records maintained by the entity to which the request was directed and a request for "all documents" does not reasonably describe any records. Your request also seeks "[a]ll accompanying policy documents, memoranda or guidance" which also does not reasonably describe a record." *Konigsberg v. Coughlin*, 68 NY 2d 245, 249 (1986).
2. "The production of the records identified in your request would require extraordinary efforts not required under Public Officers Law Section 89(3)." *Matter of Huseman vs. NY DOE*, 2016 NY Slip Op. 30959(U).
3. "to the extent that either the Department does not maintain records responsive to your request or maintains records which, if disclosed, would impair present or imminent contract awards [§87(2)(c)] or reveal trade secrets or cause substantial injury to the competitive position of the subject enterprise [§87(2)(d)]."

Following said denial, Petitioner filed the instant CPLR Article 78 Petition seeking to compel the NYPD to respond to its FOIL request on July 15, 2021. Pursuant to Pub. Off. Law § 89(4)(b), "a person denied access to a record in an appeal determination under the provisions" governing appeals "may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules." Pursuant to CPLR 7803(3), review is appropriate where "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

As discussed in *Gould v. New York City Police Dep't*, 89 N.Y.2d 267 (1996) "All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2). To ensure maximum access to government documents, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750; see, Public Officers Law § 89[4][b]). As this Court has stated, "[o]nly where

the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld” (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

Almost eight months following the filing of the instant action, on the date that its response to the instant Petition was due, Respondent in a letter dated March 4, 2022, disclosed a copy of the First Amendment Agreement between the Police Department of the City of New York and Flymotion LLC in partial satisfaction of its FOIL duties alleging that same “was the only documentation found pursuant to a diligent search of items 1 through 5 of your client’s FOIL request.” and records from the New York City Police Foundation, Inc. (“NYCPF”) documentation, documenting donations from the NYCPF to the New York City Police Department, responsive to item 7 of Petitioner’s FOIL request.

Based upon same, Respondent cross-moves seeking an Order dismissing this action pursuant to CPLR §§ 7804(f), 3211(a)(2), and 3211(a)(7) on the grounds that the March 4, 2022 production renders the instant proceeding moot and that the remainder of Petitioner’s request is unduly burdensome. As discussed in *Matter of Rattley v. New York City Police Department*, 96 N.Y.2d 873 (1st Dept. 2001), an attorney’s certification that “that all responsive documents had been disclosed and that it had conducted a diligent search for the documents” is sufficient to certify that a FOIL request has been complied with. To challenge an agency’s certification that it has no additional responsive documents, Petitioner must “articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [agency’s] control.” See *Gould v. N.Y. City Police Dep’t*, 89 N.Y.2d 267, 269 (1996). Specifically, Respondents contend that because Petitioner’s Foil request was time limited to the period from March 1, 2020, to September 1, 2020, that Respondents disclosure of the single Flymotion LLC

agreement completely satisfied Respondent's FOIL obligations. Respondent further contends that "Petitioner has provided no demonstrable factual basis in its petition to challenge Respondents' certification," an incomprehensible contention in that Respondent's "production" occurred after the filing of the instant Petition.

Further, Respondent appears to intentionally misinterpret Petitioner's request, which in addition to the procurement contracts entered into between the NYPD and the various firms detailed in the FOIL request also seeks details on how the specified technologies are used. As such, Respondent has not established that it fully complied with the subject FOIL request.

Respondent further contends that pursuant to POL Section 89(3)(a), which provides that:

[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article . . . When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.

That providing the requested documents would be unreasonably burdensome and hiring an outside contractor is not a viable solution given the privacy concerns involved, *See Huseman v. New York City Dep't of Educ.*, 2016 N.Y. Slip. Op. 30959(U) at *14-15 (Sup. Ct. N.Y. Cnty. May 25, 2016) (citing *New York Comm. for Occupational Safety and Health v. Bloomberg*, 72 A.D.3d 153, 892 (1st Dep't 2010)). Specifically Respondent argues that "As Petitioner did not supply a narrow list of document titles being sought, pursuant to the diligent search described supra, the undersigned first attempted searching email communications for the terms: "electronic surveillance tools;" "facial recognition technology" or "FRT;" "drone" or "drones;" "gait

recognition technology;” “cell site simulators” or ISMI catchers” or “sting-ray;” “ambient sound recording device;” and the names of approximately 82 vendors that the undersigned determined that the Department had contracts with, possibly for the surveillance technologies identified by Petitioner. This search, based on the request as written by Petitioner, returned upwards of 30,000,000 emails” and that as such, requiring respondent to review all of said records for disclosure would be unduly burdensome.

Respondents argument that the initially demanded documentation is too voluminous is utterly refuted by Petitioner’s counsel’s affirmation that “Since the commencement of this proceeding in July 2021, counsel for AI USA and the NYPD engaged in numerous meet and confers to potentially narrow down the number of responsive documents in order to reduce the production burden on the NYPD” which “reduced number of documents that NYPD asserted it would need to review to approximately 2,700 documents” a far more reasonable number. Unfortunately, said list of documents is not before the Court and cannot be evaluated at this time. As such, it is hereby Ordered that the Petition is GRANTED to the following extent.

ORDERED that Petitioner shall re-submit its Foil request seeking the approximately 2,700 documents currently requested; and it is further

ORDERED that upon receipt of Petitioner’s updated FOIL request, Respondent shall either provide the demanded documents, subject to any necessary redaction, and/or allege with specificity that each document falls within one of the enumerated exemptions of Public Officers Law § 87(2). If such process results in a new Article 78 proceeding same should be referred to this Court based on its familiarity with the issues at hand.

7/29/2022

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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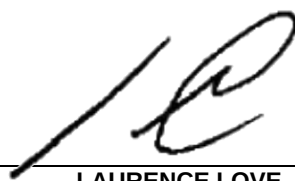
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FIDUCIARY APPOINTMENT

☐

REFERENCE



LAURENCE LOVE, J.S.C.