

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

The Legal Aid Society, a non-profit  
corporation,

Petitioner,

For a Judgment Under Article 78,

-against-

Records Access Officer, New York City  
Police Department,

Respondent.

Index No.

NOTICE OF CPLR ART. 78 VERIFIED  
PETITION

Oral argument requested

PLEASE TAKE NOTICE, that upon the annexed verified Petition, the undersigned will make application before this Court in Room 130 at 60 Centre Street, New York, NY 10007 on the 17th day of November, 2020 at 9:30 in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order and judgment pursuant to C.P.L.R. Art. 78,

- A. Compelling Respondent to search for documents responsive to Petitioner's FOIL request;
- B. Compelling Respondent to perform a document-by-document analysis of those responsive documents and to grant Petitioner access to those responsive documents;
- C. Compelling Respondent to provide Petitioner with a log explaining which documents it has withheld from Petitioner and why, to the extent that Respondent withholds documents on the basis of an exemption or statutory provision of FOIL law; and

- D. Granting costs and reasonable attorney's fees to cover expenses incurred in this proceeding. *See* N.Y. CPLR §§ 7806, 8601.
- E. Granting Petitioner such other and further relief as the Court deems just and proper.

Date: New York, New York  
October 13, 2020

By: Jonathan R. McCoy  
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VERIFIED ART. 78 PETITION

Oral argument requested

Petitioner, by its undersigned attorney, for its Verified Petition in this Article 78 proceeding, alleges as follows:

THE NATURE OF THE PROCEEDING

1. Petitioner brings this Article 78 proceeding to obtain records properly subject to New York’s Freedom of Information Law (“FOIL”). Petitioner seeks access to and a copy of any and all emails sent between any New York City Police Department email address and any emails originating from the “clearview.ai” domain from January 1, 2017 to February 26, 2020. Clearview AI (“Clearview”) collected photographs from social media websites/applications and other public sources, which, upon information and belief, was then utilized by NYPD officers to facilitate their use of facial recognition technology. In response to Petitioner’s FOIL request, Respondent refused to produce any responsive emails and relied, in a conclusory fashion, on inapplicable exceptions to New York’s FOIL. Respondent’s determination was based on errors of law and was insufficiently supported by required justifications.

### SOURCE OF JURISDICTION

2. This Court may conduct “special proceedings” pursuant to Article 78 of New York’s Civil Practice Law and Rules. *See* CPLR §§ 7801-7806. Petitioner seeks review of Respondent’s determinations on its FOIL petition, pursuant to CPLR § 7803(3).

3. Respondent is a “body” subject to judicial review pursuant to Article 78 of New York’s Civil Practice Law and Rules. *See* CPLR § 7802(a).

### VENUE

4. Venue is proper in New York County, which is Respondent’s principal place of business, and the place where the adverse agency determination was made. CPLR §§ 7804(b) & 506(b).

### SUMMARY OF RESPONDENT’S ERRORS

5. Respondent erred when it issued a blanket denial to produce documents pursuant to the unwarranted invasion of personal privacy exemption, Public Officers Law § 87(2)(b). Respondent was obligated, at a minimum, to make a document-by-document assessment of whether the exemption applied and to apply appropriate redactions before disclosing the requested documents to Petitioner.

6. Respondent erred when it issued a blanket refusal to produce documents on the grounds that producing responsive documents would be burdensome. *See* Public Officers Law § 89(3)(a). Respondent was obligated, at a minimum, to make a document-by-document assessment of whether it could produce the requested documents through its own capabilities or whether it would need to hire the services of a third-party to facilitate the production of the requested documents.

## FACTUAL BACKGROUND

7. Petitioner made his initial FOIL request on February 26, 2020. *See* Exhibit 1. The request asked for “access to and a copy of any and all emails sent between any New York City Police Department email address and any emails originating from the “clearview.ai” domain from January 1, 2017 to February 26, 2020” and further requested that the NYPD provide “all segregable portions of otherwise exempt material.” *See id.*

8. Respondent denied Petitioner’s request on May 14, 2020. *See* Exhibit 2. Respondent stated that “to the extent records may exist,” they would be exempt based on the following assertions:

- A. Such information, if disclosed, would constitute an unwarranted invasion of personal privacy, under Public Officers Law § 87(2)(b).
- B. Such records/information are inter-agency or intra-agency materials which are not final agency policy or determinations, under Public Officers Law 87(g)(iii).
- C. Production of the records would require extraordinary efforts not required under FOIL.

*See id.*

9. Petitioner timely appealed the decision on June 13, 2020. *See* Exhibit 3. The appeal noted that Respondent had failed to acknowledge that responsive documents existed, meaning that Respondent failed to undertake its obligatory diligent search for such records or that Respondent was claiming a “Glomar” exception. *Id.* at 1. Petitioner argued that Respondent’s failure to undertake a diligent search for responsive records constituted an intentional violation of FOIL. *Id.* Petitioner further argued that, to the extent that Respondent was claiming a Glomar exception, such an exemption was inapplicable to the extent that the NYPD’s revelation that officers used an unauthorized third-party facial recognition system did not meet the standard of “acknowledging that [if] any responsive records exist would, itself,

reveal information tethered to a narrow exception.” *citing Abdur-Rashid v. New York City Police Dept.*, 31 N.Y.3d 217, 233 (2018), *rearg denied*, 31 N.Y.3d 1125 (2018). *Id.* Petitioner noted that the NYPD had already acknowledged its use of Clearview, both authorized and unauthorized, as reported by the New York Post.<sup>1</sup> *Id.*

10. Turning to the “unwarranted invasion of personal privacy” exemption, Petitioner noted that Respondent had failed to cite to Public Officers Law § 89(2)(b), which defines an “unwarranted invasion of personal privacy” and had failed to specify whose privacy it was claiming to protect. *Id.* Petitioner argued that neither the privacy of NYPD members, nor the privacy of investigatory targets could be claimed in this context, as the NYPD members were using an official governmental email system as part of the NYPD’s ordinary work. *Id.* Petitioner asserted that, if the NYPD was claiming to protect the privacy of investigatory targets, then the appropriate response would be to provide the requested materials with redactions, rather than issue a blanket denial. *Id.* at 1-2.

11. Petitioner further argued that the “inter-agency/intra-agency” exception codified in Public Officers Law § 87(2)(g)(iii) was wholly inapplicable, as Clearview is not an agency as defined by Public Officers Law § 86(3), noting that he specifically requested emails between the NYPD and Clearview. *Id.* at 2. Addressing Respondent’s allegation that disclosure of the requested emails was exempt due to purported “extraordinary efforts” required to collate the emails, Petitioner argued that Respondent’s assertion was “irrelevant and not true,” while noting that Respondent failed to provide any facts to support that assertion. *Id.* Petitioner referenced Public Officers Law § 89(3)(a), which prohibits denying a FOIL request solely due to a

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<sup>1</sup> See Craig McCarthy, *Rogue NYPD cops are using facial recognition app Clearview*, NY POST, Jan. 23, 2020, available at <https://nypost.com/2020/01/23/rogue-nypd-cops-are-using-sketchy-facial-recognition-app-clearview/> [last accessed October 6, 2020]

purported burden. Petitioner further noted that the NYPD had been easily able to search for and produce responsive emails pursuant to a FOIL request *citing Logue v. New York City Police Dept.*, Index No. 153965/2016 (NY Co. Supreme Ct. 2016) and directed Respondent to copies of the emails disclosed as a result of the *Logue* litigation. *Id.*

12. Petitioner argued that the Court of Appeals has found that “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government” *citing Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 569 (1986). *Id.* Petitioner asserted that an agency that receives a FOIL request must articulate “particularized and specific justification” for not disclosing requested documents *citing Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) and *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 275 (1996). Petitioner further asserted that Respondent’s blanket denial was counter to FOIL’s purpose and was unsupported by any requisite justification. *Id.*

13. Petitioner requested that Respondent respond to his original request as directed and, if redactions were made to responsive materials, that Respondent provide redaction/exemption/privilege logs along with the requested materials. Petitioner further requested that Respondent provide an affidavit pursuant to Public Officers Law § 89(3)(a) if Respondent were to claim that no responsive records exist or could be located after a diligent search. *Id.*

14. Respondent replied to Petitioner’s FOIL appeal on June 15, 2020. *See* Exhibit 4. Respondent claimed that a “diligent search” was conducted for responsive records and that 16,674 NYPD emails were found that *mentioned* “Clearview AI”, as opposed to emails sent between NYPD email addresses and the clearview.ai domain. *Id.* at 1. Respondent stated that it was denying Petitioner’s appeal because reviewing each of the 16,674 emails that mentioned

Clearview and applying any relevant exemptions to those 16,674 emails would require “extraordinary efforts that are not required under FOIL.” *Id.*

15. Respondent next claimed that the 16,674 emails contained “personally identifying information, the disclosure of which would constitute an unwarranted invasion of personal privacy.” *Id.* Respondent failed to identify any specific, particular, or general type of personally identifiable information that would be disclosed pursuant to Petitioner’s request. *Id.* Respondent further claimed that that some of the records would be exempt under the “deliberative inter-agency or intra-agency” FOIL exemption, but conceded that the exemption would apply only to internal NYPD emails or to emails between NYPD and another agency and not to emails between NYPD and Clearview, the latter category comprising the substance of Petitioner’s FOIL request.<sup>2</sup> *Id.* at 1-2; *see also* Exhibit 1.

16. Respondent finally argued that agencies need not resort to “herculean efforts” to respond to FOIL requests and asserted that the NYPD would have to conduct a “fact-intensive review” of each of the 16,674 emails it identified as mentioning Clearview, along with any records pertaining to any associated cases or investigations, to determine the applicability of the exemptions it was relying upon in denying Petitioner’s appeal. *Id.* at 2. Respondent failed to indicate that it undertook a diligent search for emails that were actually responsive to Petitioner’s request and failed to adequately indicate whether any of the exemptions upon which it was relying applied to emails that were actually responsive to Petitioner’s request. *See id.* at 1-2.

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<sup>2</sup> Given Respondent’s concession that the deliberative process exemption would not apply to emails sent between NYPD employees and Clearview, and since Petitioner only seeks such emails (rather than every NYPD email that mentions Clearview), Petitioner will not address the deliberative process exemption since it is plainly inapplicable.

## BACKGROUND LAW OF FOIL PETITIONS

17. The Freedom of Information Law, codified at Public Officers Law §§ 84-90, expresses New York's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. *Capital Newspapers v. Burns*, 67 N.Y. 2d 562, 565 (1986). FOIL affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government, thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities. *Id.* at 565-66. FOIL is also an effective tool for exposing waste, negligence and abuse on the part of government officers. *Id.* at 566.

18. FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted. *Id.* at 566. Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access. *Id.*

19. Where a document contains a mixture of information that must be disclosed and information that may be withheld, the government should redact out the information it seeks to withhold. *See Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 275 (1996) ("If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material."); *McFadden v. Fonda*, 50 N.Y.S.3d 605, 610 (3d Dept 2017) (remanding for in camera review and suggesting that redactions be used); *Police Benevolent Ass'n of New York State, Inc. v. State*, 44 N.Y.S.3d 578, 581-82 (3d Dept 2016) (reversing and remanding so that redactions could be applied); *Applegate v. Fischer*, 936 N.Y.S.2d 329, 331 (3d Dept 2011) (ordering production of redacted documents);

*Dobranski v. Houper*, 546 N.Y.S.2d 180, 182 (3d Dept 1989) (same); *Cook v. Nassau Cty. Police Dept.*, 972 N.Y.S.2d 638, 640 (2d Dept 2013) (affirming use of redactions); *Whitfield v. Bailey*, 914 N.Y.S.2d 58, 60 (1st Dept 2011) (same); *Laporte v. Morgenthau*, 783 N.Y.S.2d 571, 571 (1st Dept 2004) (same).

RESPONDENT’S CONCUSORY RELIANCE ON THE “UNWARRANTED INVASION OF PRIVACY” EXEMPTION IS INSUFFICIENTLY SUPPORTED AND INAPPLICABLE.

20. A governmental agency may decline to disclose materials requested under FOIL if said disclosure would amount to an unwarranted invasion of privacy. *See* Pub. Off. Law § 87(2)(b). A non-exhaustive list of scenarios that would amount to an unwarranted invasion of privacy is provided in Pub. Off. Law § 89(2)(b). Where the disclosure of the requested materials does not fall within one of the exemptions enumerated by Pub. Off. Law § 89(2)(b), then a court must balance the privacy interests at stake with the public’s interest in disclosure of the information. *See Matter of New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005). In either event, whether the disclosure falls within the scenarios enumerated by Pub. Off. Law § 89(2)(b) or not, the agency still must carry its burden by articulating a particularized and specific justification for denying access. *See Matter of Dilworth v. Westchester County of Dept. of Correction*, 93 A.D.3d 722, 724 (2d Dept. 2012); *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986)

21. Conclusory assertions that requested records fall within a statutory exemption are insufficient; rather, an agency must provide evidentiary support that requested records fall within a statutory exemption. *See Matter of Dilworth, supra; see also* Pub. Off. Law §§ 89(5)(e)-(f); *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 885 (2009) (holding that conclusory characterizations of documents requested under FOIL failed to meet an agency’s burden of establishing that the requested records were subject to a statutory

exemption); *Prall v. New York City Dept. of Corrections*, 129 A.D.3d 734, 735-36 (2d Dept. 2015) (holding that the agency's conclusory allegations that disclosure of the requested records would result in economic or personal hardship to the subject party were insufficient to establish that the records were exempt under Pub. Off. Law §§ 89(2)(b)(iv)-(v)).

22. Here, Respondent has asserted only, in the most bare-boned fashion possible, that the records contain personally identifiable information, the disclosure of which would constitute an unwarranted invasion of personal privacy. *See* Exhibit 4 at 1. Respondent utterly failed to articulate any specific or particularized allegations tending to show that anyone's personally identifiable information would be disclosed, utterly failed to articulate how disclosure of the requested documents would result in an unwarranted invasion of personal privacy, and utterly failed to assert what kind of personally identifiable information would be exposed upon disclosure of the requested documents. Thus, Respondent has failed to carry its burden of showing that the fulfillment of Petitioner's FOIL request is exempt under Pub. Off. Law § 89(2)(b).

23. Regarding the alternative balancing test that courts must undergo when requested documents do not fall within Pub. Off. Law § 89(2)(b)'s enumerated exemptions, Respondent has failed to carry its burden to demonstrate that the privacy interests at stake outweigh the public's interest in disclosure of the requested documents. First, Respondent has failed to specify whose privacy interests are at stake and the species of personal privacy concerns that would be implicated by the documents' disclosure. Second, the requested documents all fall within the ambit of communications by governmental employees fulfilling their official duties and, as such, are permitted to be disclosed under FOIL. *See Thomas v. New York City Dept. of Educ.*, 103 A.D.3d 495, 499 (1st Dept. 2013) (holding that "the courts have found that, as a general rule,

records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy”). Third, since public employees possess a weaker privacy interest in records they create in the fulfillment of their official duties, the public’s interest in learning to what extent NYPD employees have used Clearview outweighs whatever limited privacy interests are at stake. This is especially true where both the NYPD and Clearview have publicly acknowledged that some NYPD officers use Clearview. *See* p. 6, n.1, *ante*. Further, as explained, the appropriate response to a situation where some responsive materials contain personally identifiable information not subject to disclosure under FOIL is redaction of such information instead of a blanket denial. *See* p. 9, ¶19, *ante*.

24. In sum, Respondent has failed to carry its burden of showing, on balance, that the appropriate disclosure of emails sent between NYPD employees and Clearview would be “offensive and objectionable” to a reasonable person of ordinary sensibilities. *See Thomas, supra*, at 497; *Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police*, 218 A.D.2d 494, 498-99 (2d Dept. 1996) (holding that the disclosure of an individual’s educational background would not be offensive and objectionable to a reasonable person of ordinary sensibilities).

**RESPONDENT CANNOT RELY ON A CLAIM OF BURDENSOMENESS TO DENY ACCESS TO THE REQUESTED RECORDS.**

25. The text of the statute is plain: a governmental agency cannot rely on a purported claim of burdensomeness, on any basis, when denying a FOIL request, where the agency can engage an outside professional service to facilitate the fulfillment of the request, the costs of which can be recovered by the agency. Pub. Off. Law § 89(3)(a). Here, a claim that NYPD cannot search its own email system for documents actually responsive to Petitioner’s request is

ludicrous on its face, especially since it has already undergone a “diligent search” for documents that Petitioner did not request. Moreover, fulfilment of Petitioner’s request would necessarily implicate a smaller subset of documents than the 16,674 emails that merely mention Clearview. Further, if the NYPD could not do so itself, it could easily engage an outside professional service to do so, given its \$5.6 billion budget for the year 2020.<sup>3</sup> Taking the NYPD’s voluminous budget into account, it cannot be gainsaid that the NYPD is more than capable of engaging an outside vendor, if it must, to review documents responsive to Petitioner’s request and to apply redactions as needed. *See* Pub. Off. Law § 87(1)(c)(iii-iv) (allowing an agency to engage an outside professional service to prepare a copy of records and requiring the agency to notify the requester of the cost first). There would be no “herculean effort” on the NYPD’s part and, thus, Respondent’s citation of *Matter of Huseman vs. NY DOE*, 2016 NY Slip Op. 30959(U) (NY Co. Supreme Ct., May 25, 2016) is completely inapposite.

26. Respondent’s reliance on *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454 (2007) is similarly unavailing. In *Data Tree*, the most relevant legal question (i.e. regarding the instant petition) was whether Data Tree’s FOIL request required the Suffolk County Clerk to create new records, a process that is not required under FOIL. *Id.* at 464. However, the Court held that if responsive records are maintained electronically by an agency, and are retrievable with reasonable effort, the agency is required to disclose the information. *Id.* The Court further held that a “simple manipulation” of the computer system necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as the creation of a new

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<sup>3</sup> See Council of the City of New York Finance Division, *Report to the Committee on Finance and the Committee on Public Safety on the Fiscal 2020 Executive Plan, the Ten-Year Capital Strategy for Fiscal 2020-2029, and Fiscal 2020 Executive Capital Commitment Plan – New York City Police Department* at 2, May 15, 2019, available at <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/05/NYPD.pdf> [last accessed October 8, 2020]

document. *Id.* at 465. While the Court stated that documents implicating privacy concerns that could not be reasonably redacted may not be subject to disclosure under FOIL, it remitted the case to Supreme Court for consideration of that issue in determining whether the Suffolk County Court had to comply with the FOIL request. *Id.* at 466.

27. Here, where Respondent misconstrued the nature of Petitioner's FOIL request to sweep in a plethora of potentially non-responsive documents, Respondent has failed to demonstrate that disclosing responsive documents would be unduly burdensome. There is simply no basis to conclude as such when Respondent has failed to specify the number of documents it possesses that are responsive to Petitioner's request. At the very least, a question of fact warranting a hearing has been raised to the extent that the NYPD must show that the fulfillment of Petitioner's request would be unduly burdensome and that it cannot utilize an outside service to facilitate compliance with Petitioner's request. *See Time-Warner Cable News NYI v. New York City Police Dept.*, 53 Misc.3d 657, 670 (NY Co. Supreme Ct. 2016) ("The statutes and case law thus require an agency relying on the volume of a request to, first, establish that the request is unduly burdensome and, second, establish that an outside service cannot be utilized to comply with the request."); *id.* at 675-76 (ordering a hearing on the issues of the NYPD's current technology, the costs associated with procuring software that would make performing necessary redactions possible and the extent to which that software would decrease the time required to perform the redactions); *see also Brown v. Goord*, 45 A.D.3d 930, 932 (3d Dept. 2007) ("Consistent with the statute's purpose of promoting open government, it is also well settled that an agency's expenses in fulfilling its FOIL obligations cannot be passed on to the public and that requests cannot be rejected simply due to their breadth or burdensomeness." (citations omitted)).

28. Thus, Respondent's denial of Petitioner's request on the grounds of burdensomeness should be rejected. It is axiomatic that an agency subject to FOIL cannot deny a petitioner's request on such grounds, especially where it has failed to specify the documents that are actually responsive to a petitioner's request, where it has produced similar documents pursuant to prior litigation, and where it very likely possesses the technological and financial resources to disclose such documents, subject to appropriate redactions. *See County of Suffolk v. Long Island Power Authority*, 119 A.D.3d 940, 942 (2d Dept. 2014) (stating that an agency may not deny a FOIL request on the grounds of burdensomeness if the request could be satisfied by engaging an outside service and remitting the matter back to Supreme Court, where there was a triable issue of fact as to whether that petitioner requested records that could be retrieved with reasonable effort).

29. No prior application has been made for the relief sought herein.

WHEREFORE, Petitioners request that this Court issue a judgment:

- A. Compelling Respondent to search for documents responsive to Petitioner's FOIL request;
- B. Compelling Respondent to perform a document-by-document analysis of those responsive documents and to grant Petitioner access to those responsive documents;
- C. Compelling Respondent to provide Petitioner with a log explaining which documents it has withheld from Petitioner and why, to the extent that Respondent withholds documents on the basis of an exemption or statutory provision of FOIL law; and
- D. Granting costs to cover attorney expenses and fees incurred in this proceeding. See N.Y. CPLR §§ 7806, 8601.

Date: New York, New York  
October 13, 2020

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**VERIFICATION**

JEROME D. GRECO, an attorney duly admitted to practice before the courts of this state, and associated with the Legal Aid Society, hereby affirms under penalty of perjury that the following statements are true, except for those made upon information and belief, which I believe to be true: I have reviewed the foregoing Petition and swear it is true upon information and belief, the source of which is my personal knowledge and the appended documents provided by Petitioner.

Date: New York, New York  
October 13, 2020

By: \_\_\_\_\_  
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