SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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BRENNAN CENTER FOR JUSTICE AT NEW YORK
UNIVERSITY SCHOOL OF LAW,

Petitioner,

- against -

NEW YORK CITY POLICE DEPARTMENT and 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.

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**AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO
REARGUE**

Index No. 160541/2016

IAS Part 12

(Jaffe, J.)

Mot. Seq. 003

LESLEY BERSON MBAYE, being an attorney admitted to practice before the

courts of this State, hereby affirms under the penalties of perjury:

1.   I am an Assistant Corporation Counsel in the office of Zachary W. Carter,

Corporation Counsel of the City of New York, attorney for Respondents New York City Police

Department ("NYPD") and NYPD Commissioner James P. O'Neill in the above-captioned

proceeding. As such, I am familiar with the facts and circumstances set forth herein.

2.   I submit this affirmation in support of Respondents' motion pursuant to

CPLR 2221(d) for leave to reargue those portions of the Court's Decision and Judgment issued

by this Court on December 22, 2017 and entered January 5, 2018 (the "Decision") (dkt. no. 35)

which (a) ordered Respondents to produce to Petitioner within 45 days of notice of entry (i)

email correspondence with vendors redacted of social security numbers and telephone numbers

only; (ii) the output data from "the inception of the predictive policing" until six months before

the date of this decision with certain specified redactions; and (b) ordered Respondents to search

its Counterterrorism Bureau for responsive records and to submit an affidavit as to the results of

that search. A copy of the Order is annexed hereto as Exhibit "A."

Background

1.   The factual and procedural history of this matter is set out in detail in

Respondents' Memorandum of Law in Support of their Verified Answer (dkt. no. 24)[1] at 1-5. A

brief summary is set forth below.

2.   By letter dated June 14, 2016, and received by NYPD on June 20, 2016,

Petitioner submitted a FOIL request to Respondent NYPD in which it sought the following:

1) **Purchase Records and Agreements:** Any and all records reflecting an agreement for purchase, acquisition, or licensing of, or permission to use, test, or evaluate a predictive policing product or service, including any product or service offered by Palantir Technologies.

2) **Vendor Communication:** Records reflecting any communications with Palantir Technologies, or any other third party vendor concerning Palantir Gotham or other predictive policing products or services, including sales materials and emails relating to those products.

3) **Policies Governing Use:** Any and all policies, procedures, manuals, or guidelines governing the use, testing, or evaluation of Palantir Gotham or other predictive policing products or services, including (but not limited to) policies regarding the retention, sharing, and use of collected data.

4) **Federal Communications:** Records reflecting any communications, contracts, licenses, waivers, grants, or agreements with the National Institute of Justice, Bureau of Justice Assistance, U.S. Department of Justice, or the National Science Foundation concerning the use, testing, or evaluation of Palantir Gotham or other predictive policing products or services.

5) **Information Inputs:** Records regarding what data may be, and/or actually is, used by or supplied to Palantir Gotham or other predictive policing products

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[1] Pursuant to CPLR 2214(c), Respondents are referring to previously filed documents by their docket number on the e-filing system in lieu of annexing such papers to this motion. CPLR 2214(c) ("in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system").

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6) **How it Works:** Records regarding how Palantir Gotham or other predictive policing products or services use the input data to create outputs, the algorithms or machine learning used, the possible or actual outputs, and how NYPD uses the system to make operational decisions.

7) **Past Uses:** Records reflecting the utilization, testing, or evaluation of Palantir Gotham or other predictive policing products or services, including records regarding the number of investigations in which predictive policing products or services have been used and the number of those investigations that have resulted in prosecutions or crime prevention.

8) **Audits:** Any records of, or communications regarding, audits or internal review of Palantir Gotham, or other predictive policing products or services.

9) **Nondisclosure Agreements:** Any records of, or communications regarding, any agreement that creates nondisclosure or confidentiality obligations governing NYPD contact with a vendor of predictive policing products or services.

See dkt. no. 2 (Petitioner's original FOIL request, dated June 16, 2016).

3. Respondents denied the FOIL Request in full by letter dated June 29, 2016. See dkt. no 21 (Affidavit of Lori Hernandez in Support of Respondents' Verified Answer) at ¶ 5. Petitioner appealed this denial by letter dated July 29, 2016. Id. at ¶ 6.

4. NYPD, through its Records Access Appeals Officer, denied Petitioner's appeal by letter dated August 15, 2016. NYPD denied the appeal on grounds that the requested records were exempt from disclosure pursuant to the following statutory exemptions: N.Y. Pub. Off. Law §§ 87(2)(i), § 87(2)(d), § 87(2)(g), and § 87(2)(e)(iii). The letter stated that other exemptions could apply. See dkt. no. 21 at ¶ 7.

5. Petitioner then commenced the instant proceeding by filing a Verified Petition on December 15, 2016 to appeal NYPD's denial of its FOIL request. See dkt. no. 1, et. seq.

6. Following the filing of the Petition, and as described in Respondents' Verified Answer and supporting affidavits, a further thorough and diligent search was conducted

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of the following divisions: Information Technology Bureau, Office of Management Analysis and Planning, and the Office of the Deputy Commissioner of Management and Budget's Contract Administration Unit. See dkt. no. 21 at ¶ 9. Respondents certified that these were the only divisions where responsive records would be located. Id.

7. Respondents certified that they did not locate any records responsive to FOIL Request numbers 4 and 8. See dkt. no. 21 at ¶ 9. Respondents produced records in response to FOIL Request numbers 1, 2, 3, 5, 6, 7 and 9, and invoked various FOIL exemptions to redact portions of some of those records. Id. at ¶¶ 10-17. One of the records produced was an article by NYPD's Assistant Commissioner of Data Analytics, Evan S. Levine, which described some of NYPD's predictive policing methodology. Petitioner later filed a copy of that article as an exhibit in support of its Reply to the Verified Answer. See dkt. no. 30.

8. Respondents also disclosed that they had identified some responsive records that were being partially redacted or completely withheld pursuant to various FOIL exemptions. Set forth here is a brief recapitulation of the invoked exemptions that are at the crux of the instant motion to reargue:

9. In response to FOIL Request No. 2, Respondents produced email communications with third party vendors concerning predictive policing products and services. Within these emails, Respondents redacted social security numbers and phone numbers pursuant to the exemption for personal privacy. See N.Y. Pub. Off. L. § 87(2)(d). Respondents also redacted contents of those emails or withheld other emails in their entirety because those records (or portions thereof) constituted trade secrets and/or because disclosure would cause substantial injury to the competitive position of the vendor, pursuant to Public Officers Law § 87(2)(d). See dkt. no. 23.

10.   In response to FOIL Request No. 5, Respondents withheld (i) written and electronic notes maintained by Asst. Commissioner Evan Levine pursuant to Pub. Off. L § § 87(2)(e)(iii) and (iv) because disclosure would reveal confidential information and non-routine investigative techniques. Respondents also redacted portions of emails with predictive policing vendors pursuant to § 87(2)(d); and withheld all vendor test results and an NYPD draft presentation concerning those results because these records constituted trade secrets and/or because disclosure would harm the competitive position of the vendors under § 87(2)(d). Respondents also invoked the deliberation process exemption of § 87(2)(g) as an additional reason for withholding the draft presentation and memoranda. See dkt. no. 21 at ¶ 21.

11.   Petitioner filed its Verified Reply and supporting papers on May 17, 2017. See dkt. nos. 27-31.

12.   The Court held oral argument on August 30, 2017. See dkt. no. 33.

13.   The Court issued its Decision and Judgment on December 22, 2017, and it was entered on January 5, 2018. (dkt. no. 35).

The Instant Motion for Leave to Reargue

24.   Respondents now move for leave to reargue pursuant to CPLR 2221(d)(2).

25.   A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221(d)(2); see also Tadesse v Degnich, 81 A.D.3d 570, 570 (1st Dep't 2011); C.R. v. Pleasantville Cottage Sch., 302 A.D.2d 259, 260 (1st Dep't 2003); Foley v. Roche, 68 A.D.2d 558, 567 (1st Dep't 1979).

Disclosure of Vendor Emails Could Cause Competitive Injury

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26.   Respondents argued that portions of their email communications with predictive policing vendors were exempt pursuant to Public Officers Law § 87(2)(d) as trade secrets or because disclosure of those communications would substantially injure the vendors' competitive position. See dkt. no. 24 at 7-11.[2] Respondents explained that these emails contained reports of the vendors' products' success rates during a 45-day trial, and that disclosure of these success rates could potentially reveal the capabilities and shortcomings of the vendors' products. Id. at 10.

27.   In concluding that Respondents did not meet their burden of proving this exemption applied, the Court overlooked both facts and legal argument set forth in Respondents' papers. First, the Court held that Respondents had not demonstrated that the vendor test results were trade secrets. See Decision at 12. However, as previously argued, Courts have held that computer programs and mathematical models equivalent to the predictive policing algorithms used by the Vendors constitute trade secrets. See dkt. no. 24 at 8 (citing Belth v. Insurance Dep't of New York, 95 Misc. 2d 18, 20 (Sup. Ct. N.Y. Co. 1977)). The Court overlooked this precedent.

Furthermore, the Court engaged in no discussion of Respondent's other argument – namely that disclosure of the Vendors' test results could substantially injure their competitive position. Respondents clearly argued that this was a reason to withhold the Vendor test results from disclosure. See dkt. no. 24 at 9 ("[e[]ven if the Vendors' technology and performance . . . were [] not deemed trade secrets . . . disclosure of such would cause substantial injury to their competitive position."). Respondents submitted an affidavit attesting that the Vendor

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[2] All pagination refers to the pagination assigned by the ECF system, not the original page numbers of the submitted document.

participants in the 45-day trial and NYPD had agreed that the test results would be kept strictly confidential. <u>See</u> dkt. no. 23 at ¶ 3. The Court overlooked this fact when it held that the Vendors' non-disclosure agreements – separate and apart from the strict confidentiality understanding – was not sufficient to establish the "substantial injury" exemption. <u>See</u> Decision at 14. This finding also overlooked case law holding that NY Pub. Off. Law § 87(2)(d) applied where a public entity had a policy of keeping test results in a competitive field confidential. <u>See</u> <u>Troy Sand & Gravel Co. v. N.Y. State DOT</u>, 277 A.D.2d 782, 785 (3d Dep't 2000) (recognizing respondent's policy of maintaining the confidentiality of producers' test results to "prevent the information from being used in a misleading or unintended manner").

<u>Order to Produce the Output Data from "the inception of the predictive policing until six months before the date of the Decision" was *sua sponte* and overly broad</u>

28. Petitioner's FOIL request for "output data" from the predictive policing algorithm did not set forth any time frame for which such records were sought. <u>See</u> dkt. no. 2 at 3 ("Request No. 6"). Due to the vague nature of this request, Respondents could not search for responsive records and, instead, the NYPD searched for records responsive to the remainder of Request No. 6, which sought records regarding "what data may be, and/or actually is, used by or supplied to . . . predictive policing products or systems." <u>See</u> <u>id.</u> After the filing of the underlying Verified Petition, the NYPD undertook a search for records responsive to the non-vague portion of Request No. 6, and produced an article authored by Evan S. Levine, NYPD's Asst. Commissioner of Data Analytics. (Affidavit of Lori Hernandez) at ¶¶ 14-15.

29. In its Decision, the Court, *sua sponte*, and without analysis, ordered the NYPD to produce output data "from "the inception of the predictive policing until six months before the date of the Decision." <u>See</u> Decision at 17. NYPD moves to reargue or to vacate that portion of the Decision. <u>See</u> <u>Sholes v. Meagher</u>, 100 NY2d 333, 335 (2003); <u>Bd. of Educ. of</u>

City Sch. Dist. of City of N.Y. v. Grullon, 117 A.D.3d 572, 273 (1ˢᵗ Dep't 2014) (motion to vacate is proper where party disputes an order entered *sua sponte*).

24.   There is no way for the Court to know whether the quantity of potentially responsive data would be unduly burdensome to produce. See Time Warner Cable News Ny1 v. N.Y.C. Police Dep't, 2017 NY Slip Op 30707(U), ¶ 3 (Sup. Ct. N.Y. Co. April 7, 2017) (although a request pursuant to FOIL cannot be rejected merely because of its "breadth or burdensomeness," the documents sought must be "reasonably described") (internal citations and quotations omitted); see also Public Officers Law § 89(3)(a).

25.   Here, Petitioner's original request for "output data" was not reasonably described because it put no boundaries or time limit on the extent of the request. The Court erred by rehabilitating the demand by affixing a time limit of its own devise, and denying Respondents the opportunity to argue that the scope of the records ordered to be produced would be overly burdensome.

26.   Therefore, Respondents respectfully request that this portion of the Decision be vacated pursuant to CPLR § 2221.

The Court Overlooked Respondents' Argument that Asst. Commissioner Levine's Notes on Predictive Policing Technology Were Exempt from Disclosure Under § 87(2)(e)

27.   Respondents argued that Asst. Commissioner Levine's notes concerning the development, creation of the NYPD's predictive policing algorithm and codes were exempt from disclosure as a non-routine law enforcement technique protected by Pub. Off. Law § 87(2)(e). See dkt. no. 24 at 18; dkt. no. 22 (Affidavit of Evan Levine). Respondents also argued that these records were exempt from disclosure under FOIL's so-called "technology exemption." See dkt. no. 24 at 21-23).

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28.   The Court overlooked Respondents' factual and legal arguments concerning § 87(2)(e) and, instead, considered (and rejected) only the second argument. See Decision at 15 (holding that respondents had not met the burden to prove how disclosure of Levine's notes would jeopardize NYPD's capacity to guarantee the security of its information technology assets).

29.   As set forth at length in Respondent's previous papers, Pub. Off. Law § 87(2)(e) holds that records that would reveal non-routine criminal investigative techniques and procedures are exempt from disclosure. See dkt. no. 24 at 13. Case law has evolved to recognize that much new and cutting-edge technology fall into the category of "non-routine procedures." See Grabel v. NYPD, 139 A.D.3d 477, 479 (1st Dep't 2016) (mobile x-ray units are protected under both the law enforcement and public safety exemptions); N.Y. Civ. Liberties Union v. N.Y.C. Police Dep't, 2009 N.Y. Misc. LEXIS 2542 (Sup. Ct. N.Y. Co. June 26, 2009) (exempting from disclosure records of operational details of Lower Manhattan Security Initiative, including the records reflecting the types of information to be collected and how the information will be used). The code and algorithms developed for NYPD's predictive policing program are new technologies equivalent to those at issue in Grabel and N.Y. Civil Liberties Union. See Levine Affidavit, generally; see also dkt. no. 30 ("Levine Article") at 7-13 (describing evolution and recent adoption of predictive policing). Therefore, records concerning this technology – such as Asst. Commissioner's notes reflecting the development of the mathematical codes and algorithms used for predictive policing – are properly exempted from disclosure under § 87(2)(e).

30.   Respondents respectfully request that the Court re-consider these arguments and vacate its order that Assistant Commissioner Levine's notes be produced.

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The Order to Search the Counterterrorism Bureau Overlooked Facts in the Record Establishing that No Responsive Records Would be Found in that Division

31.   The Court erred in ordering Respondents to conduct a search of its Counterterrorism Bureau for responsive records because the record establishes that no responsive records would be found there. The Court overlooked the following facts in evidence.

32.   A Deputy Managing Attorney in the NYPD Legal Bureau affirmed that she oversaw a search for records responsive to Petitioner's FOIL request, and that such search was undertaken in the Information Technology Bureau, the Office of Management Analysis and Planning, and the Office of the Deputy Commissioner of Management and Budget's Contract Administration Unit. See dkt. no 21 at ¶ 9. She attested that these were the only units where responsive documents would reasonably be located. Id. Petitioner has offered no facts whatsoever that would suggest this list of divisions was not comprehensive. Instead, they offer mere speculation that the Counterterrorism Bureau would hold responsive records. Mere speculation does not overcome the sworn testimony of the Deputy Managing Attorney.

33.   Moreover, the article authored by Assistant Commissioner Levine states plainly that the NYPD has "deployed predictive policing algorithms for six types of events: shootings, burglaries, felony assaults, grand larcenies, grand larcenies of motor vehicles, and robberies." See dkt. no. 30 at 7. Terrorism and terrorist acts are notably absent from this list.

34.   Indeed, one of the defining characteristics of terrorism is its unpredictability. It is counter-intuitive to think that a "predictive" method could be remotely effective against terrorist acts.

35.   As the record evidence does not support a conclusion that records relating to predictive policing would be found in the Counterterrorism Bureau, Respondents respectfully ask this Court to vacate the portion of its order requiring Respondents to conduct a search of that division.

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36.   Accordingly, Respondents respectfully request that the Court grant them leave to reargue the portions of the Court's Decision set forth herein, and upon such reargument to vacate those portions of the Decision.

Dated: New York, New York
         February 5, 2018

                                        _____/s/_____
                                        LESLEY BERSON MBAYE
                                        Assistant Corporation Counsel

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