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Docketed

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

ASIAN AMERICAN LEGAL DEFENSE AND
EDUCATION FUND, and MUSLIM ADVOCATES

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT, and
RAYMOND KELLY, in his official capacity as
Commissioner of the New York City Police Department,

Index No.: *103802/2012*

Respondents.

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

MEMORANDUM IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

This proceeding is brought under Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and seeks to vindicate the right of the public and of the petitioners, the Asian American Legal Defense and Education Fund (“AALDEF”) and Muslim Advocates, to better understand the policies, procedures, and scope of the New York City Police Department’s (“NYPD”) covert surveillance of Muslims in New York, New Jersey, Pennsylvania, and Connecticut. Under the Freedom of Information Law (“FOIL”),¹ AALDEF, the Brennan Center for Justice at NYU Law School (“Brennan Center”), and Muslim Advocates² submitted a FOIL request (the “Request”) that sought documents and information regarding record keeping and retention, policy guidelines, statistics, and investigatory records concerning the NYPD’s infiltration and surveillance of Muslim individuals, businesses, and organizations. Recognizing that the requested records may contain sensitive information, Petitioners AALDEF and Muslim Advocates made clear that they did not oppose receiving redacted records. The requested records are subject to disclosure under FOIL, which imposes a broad disclosure obligation on government agencies that makes *all* government records, including police records, presumptively open for public inspection.

There is a vital public interest in knowing more about how the NYPD implements its domestic surveillance program. The little that has been made known about the program through the press suggests that the NYPD’s methods may be illegal and unconstitutional. For example, according to press reports, the NYPD initiates counterterrorism investigations of Muslim

¹ N.Y. Pub. Off. L. §§ 84-90.

² The Brennan Center is not a party in this proceeding.

individuals, businesses, and organizations based entirely on ethnic and religious identity. If true, this would violate the surveillees' religious freedom and equal protection rights.

The NYPD did not give a firm response to the Request for nearly six months, and its eventual belated response amounted to little more than a categorical denial of the Request. The NYPD invoked several FOIL exemptions in an attempt to justify withholding nearly all of the requested records from the public and it flatly refused to redact the responsive records. But, as discussed below, these exemptions do not support the NYPD's near blanket denial of the Request. Indeed, the Court of Appeals has held repeatedly that such blanket exemptions are inimical to FOIL's policy of open government. The NYPD's refusal to provide redacted documents is particularly unreasonable. Every relevant precedent makes clear that if a requested record has information that is subject to disclosure and information that is exempt from disclosure, the NYPD must redact the exempt information and produce the requested record.

STATEMENT OF FACTS

After the tragic events of September 11, 2001, the NYPD embarked on a covert, domestic surveillance program that targeted Muslim individuals, places of worship, businesses, schools, student groups, and other establishments located in and throughout New York, New Jersey, Pennsylvania, and Connecticut. The details of this program were first revealed in a Pulitzer Prize-winning series of investigative articles published by the Associated Press beginning in August 2011.

According to the Associated Press reports, the Central Intelligence Agency ("CIA") played a key role in developing the NYPD's domestic surveillance program. For example, David Cohen, a retired 35-year CIA veteran, became the NYPD's first civilian intelligence chief

in January 2002.³ After just a few months in his new position, Mr. Cohen hired Larry Sanchez, a CIA veteran, to help him build the NYPD's surveillance program, on a "temporary assignment" with the NYPD.⁴ Mr. Sanchez, who had an office at the NYPD, interviewed officers for positions within the intelligence division, taught them how to gather information, and directed their efforts.⁵ With such assistance, the NYPD's Intelligence Division became a full-fledged domestic surveillance operation.⁶

The aims of this program – to prevent further terrorist attacks – are laudable, but the available evidence suggests that the methods used by the NYPD are not. One staple of the NYPD's new domestic surveillance program is the widespread placement of informants in Muslim communities without any evidence of wrongdoing. According to the available evidence, the NYPD recruited informants by targeting certain ethnicities or nationalities, arresting members of those ethnicities or nationalities, and using the arrest to pressure them to become informants. For example, according to a former police official, NYPD officers were dispatched to "Pakistani neighborhoods and . . . instructed . . . to look for reasons to stop cars: speeding, broken tail lights, running stop signed, whatever."⁷ Stopping cars gave the police "an opportunity to search for outstanding warrants or look for suspicious behavior. An arrest could be the leverage the police needed to persuade someone to become an informant."⁸ In another

³ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, Associated Press, August 23, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

attempt to recruit informants, the NYPD sought a list from the New York Taxi and Limousine Commission (“Taxi and Limousine Commission”) of every Pakistani cab driver in the city so that it could determine who received their licenses fraudulently and would therefore “be more susceptible to pressure to cooperate.”⁹

According to the Associated Press reports, the NYPD’s domestic surveillance program also extensively used undercover agents who were assigned to monitor locations based on the ethnic or religious identity of the owners or patrons, and not on any evidence of wrongdoing. The NYPD monitored Muslim communities by stationing agents in businesses such as cafes, bookstores, and nightclubs (also known as “raking”) and assigned “mosque crawlers” to monitor sermons.¹⁰ According to current and former officials associated with these programs, the NYPD does not require evidence of a crime before commencing an investigation.¹¹ Instead, locations were put under surveillance simply because they attracted a “devout [Muslim] crowd” or because a business was owned by an Egyptian and frequented by “Egyptians, Palestinians, Lebanese, and Caucasians.”¹²

Indeed, according to a recent Associated Press report, Assistant Chief Thomas Galati, the commanding officer of the Intelligence Division, admitted in a recent deposition that the Demographics Unit¹³ would “gather information on people even when there is no evidence of

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Matt Apuzzo & Adam Goldman, *Documents Show NY Police Watched Devout Muslims*, Associated Press, Sept. 6, 2011, *available at* <http://ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims>; Egyptian Locations of Interest Report at 8, *available at* <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf>.

¹³ The Demographics Units, along with the Terrorist Interdiction Unit and the Special Services Unit, are three units within the Intelligence Division that are heavily involved in the NYPD’s covert domestic surveillance program.

wrongdoing, simply because of their ethnicity and native language.”¹⁴ The report also revealed that Assistant Chief Galati testified that “a business can be labeled a ‘location of concern’ whenever police can expect to find groups of Middle Easterners there.”¹⁵ Assistant Chief Galati further disclosed that, contrary to earlier statements issued by the NYPD, none of the information gathered by the Demographics Unit has led to an investigation or the commencement of criminal proceedings.¹⁶

Many of the recruitment and surveillance methods described in the press are, if true, illegal and unconstitutional in that they violate the surveillees’ religious freedom and equal protection rights.¹⁷

PROCEDURAL BACKGROUND

In an effort to better understand the policies, procedures, and scope of the NYPD’s domestic surveillance program – particularly in Muslim, Arab and South Asian communities – AALDEF, Muslim Advocates, and the Brennan Center submitted the Request on September 21, 2011 to the FOIL Unit of the NYPD.¹⁸ The Request consisted of four general requests and 26 specific requests, which seek information regarding record keeping and retention, policy guidelines and statistics pertaining to the NYPD’s surveillance of Muslim individuals, businesses, and organizations throughout New York City and surrounding areas.

¹⁴ Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012, available at <http://ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The New York Code prohibits racial profiling of the type described in the press reports concerning the NYPD’s domestic surveillance program. N.Y. ADC. Law § 14-151.

¹⁸ The FOIL Unit gave the Request File # 11-PL-105567.

The NYPD acknowledged receipt of the Request on September 30, 2011, and estimated that it would provide a response on November 18, 2011. The NYPD unilaterally revised and extended this estimate in letters dated November 21, 2011, January 9, 2012, and February 17, 2012. The Brennan Center wrote to the NYPD on February 22, 2012, stating that FOIL did not permit these unilateral extensions of time and that any further extensions would be treated as a constructive denial subject to appeal.

After nearly six months of delay, the NYPD denied the vast majority of the Request in a letter dated March 5, 2012 (the “FOIL Denial”). The NYPD made no attempt to offer particularized justifications for the denial. Instead, the denial simply listed and repeated statutory language from the FOIL provisions that purportedly exempted the requested records from disclosure. More specifically, according to the NYPD, FOIL does not require disclosure of the requested records because the Request (1) did not reasonably describe records; (2) sought records that, if disclosed, would result in an unwarranted invasion of privacy; (3) sought records that are exempt pursuant to the law enforcement, public safety, infrastructure, and information technology exemptions; and (4) sought records that are exempt pursuant to the inter- and intra-agency materials exemption.

Although the NYPD essentially denied the Request in its entirety, the NYPD did disclose 26 pages of records, consisting of pages from the Patrol Guide, Operations Order #7, and Administrative Guide Procedure 322-27. These 26 pages likely represent only a tiny fraction of the responsive records because, according to the Associated Press, the NYPD “received daily reports on life in Muslim neighborhoods.”¹⁹

¹⁹ Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, Associated Press, August 31, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist>.

Petitioners timely appealed. On April 4, 2012, AALDEF, Muslim Advocates, and the Brennan Center submitted a letter to Commissioner Raymond Kelly appealing the March 5, 2012 denial of the Request. The appeal letter explained that, in denying a request for records, FOIL required the NYPD to offer more than a bare recitation of the statutory exemptions. In addition, the appeal letter demonstrated that the NYPD's essentially blanket denial of the Request was not supported by either the facts or the governing law. Importantly, AALDEF, Muslim Advocates, and the Brennan Center made clear that they did not oppose receiving redacted records to the extent that any information in the requested records fell within a statutory exemption.

The NYPD denied the appeal in a letter dated May 18, 2012 (the "Appeals Denial"). This denial offered nearly the same reasons as the earlier denial, except this time the NYPD offered some explanation for why, in its view, the statutory exemptions applied to the Request. In short, the NYPD did not produce any additional records – redacted or otherwise – as a result of the appeal. The NYPD's complete denial of the appeal seemed premised on the assumption that FOIL provided blanket exemptions from disclosure of the requested records. In a new development, the NYPD refused to produce redacted versions of the requested records because, in its view, most of the statutory exemptions do not expressly provide for redactions.

Petitioners AALDEF and Muslim Advocates timely commenced this Article 78 proceeding to force the NYPD to comply with its obligations under FOIL and provide Petitioners with documents responsive to the Request. CPLR § 217 ("a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner"). Although Petitioners continue to believe that the NYPD's

blanket denial of their Request is without merit, they appeal only the denial of requests 12-13 and 16-26 in this Article 78 proceeding, in an effort to invite cooperation from the NYPD.²⁰

ARGUMENT

I. THE FREEDOM OF INFORMATION LAW ESTABLISHES A BROAD RIGHT OF PUBLIC ACCESS TO AGENCY RECORDS, INCLUDING TO NYPD RECORDS, THAT CAN BE ENFORCED THROUGH ARTICLE 78

The New York Court of Appeals has repeatedly held that FOIL “expresses this State’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*, 505 N.Y.S2d 576, 578 (1986); *Gould v. N.Y.C. Police Dep’t*, 653 N.Y.S.2d 54, 57 (N.Y. 1996)(same); *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 476 N.Y.2d 69, 70-71 (N.Y. 1984) (same). FOIL “proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *Fink v. Lefkowitz*, 419 N.Y.S.2d 467, 470 (N.Y. 1979). To promote these principles, the Court of Appeals has made clear that “[a]ll government records are thus presumptively open for public inspection and copying.” *Gould*, 653 N.Y.S.2d at 57 (emphasis added); *Capital Newspapers*, 505 N.Y.S.2d at 578 (same). Police records are no exception. *See, e.g., Gould*, 653 N.Y.S.2d at 58 (holding that NYPD complaint follow-up reports are subject to disclosure under FOIL); *N.Y. Civil Liberties Union v. N.Y.C. Police Dep’t*, Index No. 115928/09, slip op. at 11 (N.Y. Sup. Ct. Feb. 14, 2011) (“All government documents, including police records, are presumptively available for public inspection and copying. . . .”) (“N.Y.C. Civil Liberties Union I”). *See also Capital Newspapers v. City of Albany*, 63 A.D.3d 1336, 1339 (N.Y. App. Div. 2009) (holding that City of Albany must disclose police gun tag records); *Council of Regulated Adult Liquor Licenses v. N.Y.C.*

²⁰ Verified Article 78 Petition at ¶ 2.

Police Dep't, 300 A.D.2d 17, 18 (N.Y. App. Div. 2002) (holding that NYPD must disclose records concerning law enforcement history of certain nightclubs). Indeed, it is well-settled that “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” *Gould*, 653 N.Y.S.2d at 57. Thus, under *Gould* and other Court of Appeals precedents, Petitioners AALDEF and Muslim Advocates have a clear right under FOIL to the NYPD records sought in the Request.

Because Petitioners AALDEF and Muslim Advocates are presumptively entitled to review the requested records, the NYPD has the burden to prove that a requested record “falls squarely within the ambit of one of [FOIL’s] statutory exemptions” and is therefore not available for inspection. *Gould*, 653 N.Y.S.2d at 57. This is not an easy burden satisfy. The Court of Appeals has held that “[t]o ensure [FOIL’s policy of] maximum access to government documents, the exemptions are to be construed narrowly.” *Id.* Furthermore, the NYPD must prove that a requested record falls squarely within an exemption “by articulating a particularized and specific justification for denying access.” *Konigsberg v. Coughlin*, 508 N.Y.S.2d 393, 396 (N.Y. 1986). In this case, the NYPD refused to redact the requested records and denied any access to them; as a result, the NYPD must prove that the entirety of the requested records falls within an exemption (or exemptions) because “not all of a document is necessarily exempt because a portion of it would be.” *See Polansky v. Regan*, 440 N.Y.S.2d 356, 358 (N.Y. App. Div. 1981).

As discussed below, the NYPD cannot meet its burden in this case. In particular, it cannot meet its burden to show that all of the requested records are completely exempt from disclosure.

II. THE NYPD IMPROPERLY DENIED THE REQUEST IN ITS ENTIRETY

Petitioners AALDEF and Muslim Advocates seek records concerning the NYPD's covert surveillance of Muslims throughout the Northeast, including information regarding record keeping and retention, policy guidelines, statistics, and investigatory records concerning the NYPD's infiltration of Muslim individuals, businesses, and organizations. As discussed, Petitioners AALDEF and Muslim Advocates are presumptively entitled to inspect the requested records. Point I above. Nonetheless, in violation of the controlling law, the NYPD categorically denied Petitioners access to the requested records. In addition to offering a number of specific reasons for denying the Request (which are discussed below in Points III to VII), the NYPD suggested that, as a general matter, it could completely withhold virtually all of the requested records because (i) the exemptions from disclosure generally do not provide for redaction, (ii) the records concern "non-routine investigations" of terrorism, and (iii) compliance would be too burdensome. *See Appeals Denial* at 1, 3, 9-10. These arguments are fatally flawed for the same reason: blanket withholdings "are inimical to FOIL's policy of open government." *See, e.g., Gould*, 653 N.Y.S.2d at 57. The NYPD's arguments also fail for several additional reasons.

First, the NYPD's contention that it could not provide redacted records because only the inter-agency exemption of section 87(2)(g) and the privacy exemption of section 87(2)(b) provide for redaction is contrary to the statutory text and the controlling case law. *See Appeals Denial* at 9. Section 87(2) gives express authority for an agency to "deny access to records *or portions thereof*" that fall within any of the exemptions from disclosure listed in section 87(2)(a)-(i). § 87(2) (emphasis added). Thus, contrary to the NYPD's contention, FOIL clearly provides for the redaction of exempt information that falls within any of the statutory exemptions. In fact, time and again, irrespective of the particular exemption at issue, New York courts have held that when a portion of the record is subject to disclosure and a portion is exempt from disclosure, the

agency must disclose the responsive record and redact the exempt information. *See, e.g., City of Albany*, 63 A.D.3d at 1339 (ordering disclosure and redaction of records that were partially exempt under § 87(2)(a)); *Zukerman v. N.Y. Board of Parole*, 385 N.Y.S.2d 811, 815 (N.Y. App. Div. 1976) (ordering disclosure and redaction of records that were partially exempt under the law enforcement exemption of § 87(2)(e)).²¹ Indeed, this is the only outcome consistent with FOIL's mandate "to ensure maximum access to government documents." *Gould*, 653 N.Y.S.2d at 57. The NYPD is therefore simply incorrect when it asserts that the case law has only permitted redactions as to the inter-agency exemption, section 87(2)(g), and privacy exemption, section 87(2)(b).

Second, there is no categorical exemption for "confidential and non-routine" terrorism investigations as the NYPD falsely suggests. *See Appeals Denial* at 3-5.²² Specifically, the NYPD relied on sections 87(2)(e)(iii), (iv) to justify its blanket denial of the requested records because those records concern confidential and non-routine investigations into terrorism. *See id.* But section 87(2)(e)(iii) only exempts from disclosure the identity "of a confidential *source*" or the disclosure of "confidential information relating to a *criminal investigation*." § 87(2)(e)(iii) (emphasis added). And section 87(2)(e)(iv) only exempts from disclosure information that would reveal non-routine "*criminal investigative techniques and procedures*." § 87(2)(e)(iv) (emphasis added). Plainly neither provision shields entire categories or types of investigations, such as terrorism investigations, from disclosure. Moreover, the NYPD's broad reading of these

²¹ *See also N.Y.C. Civil Liberties Union I*, slip op. at 18 (ordering disclosure and redaction of police records that were partially exempt under § 87(2)(f)); *N.Y.C. Civil Liberties Union v. N.Y.C. Police Dep't*, Index No. 115154/07, at 3 (N.Y. Sup. Ct. 2010) (rejecting NYPD argument that documents were completely exempt from disclosure under §§ 87(2)(e) and 87(2)(f) because "the NYPD does not address the feasibility of turning over the requested database with redaction of the names and personal information of the police officers").

²² It is unclear whether these NYPD practices all concern an "investigation" of criminal activity.

exemptions violates the Court of Appeals' mandate that "the exemptions are to be construed narrowly." *Gould*, 653 N.Y.S.2d at 57.

Finally, the NYPD withheld virtually all responsive records because it viewed compliance as burdensome, but this is not a valid reason to refuse to produce responsive records. As the Court of Appeals made clear in *Konigsberg v. Coughlin*, an agency "cannot evade the broad disclosure requirement of [FOIL] upon the naked allegation that the request will require review of thousands of records." *Konigsberg*, 508 N.Y.S.2d at 395; *Irwin v. Onondaga County Resource Recovery Agency*, CA 09-0035, at 3 (N.Y. App. Div. 2010) ("A request for disclosure should not be denied merely because the request is voluminous."). Furthermore, the NYPD's complaint that the Request "seeks disclosure of virtually every record prepared and maintained by the NYPD" since September 11, 2001, is based on a misreading of the Request. Appeals Denial at 10. The Request targets records relating to the NYPD's covert surveillance of Muslims in the Northeast, and is not concerned with "every [investigative] record" made during the last eleven years. See FOIL Request at 1-3. In any event, the reduced scope of the Request that Petitioners AALDEF and Muslim Advocates are pursuing in this proceeding should allay any concerns about the burden of compliance.

III. THE REQUESTED RECORDS ARE NOT SUBJECT TO COMPLETE NON-DISCLOSURE UNDER THE LAW ENFORCEMENT EXEMPTIONS OF SECTION 87(2)(E).

In addition to its categorical denial of the Request, the NYPD denied specific requests based on the law enforcement exemption of section 87(2)(e), which exempts from disclosure certain records that "are compiled for law enforcement purposes." As discussed more specifically below, the law enforcement exemption provides no support for the NYPD's near categorical denial of the Request.

A. The Ongoing Law Enforcement Investigations Exemption of Section 87(2)(e)(i) Does Not Categorically Prevent the Disclosure of the Requested Records

The NYPD contends that section 87(2)(e)(i), which exempts from disclosure information that would “interfere with law enforcement investigations or judicial proceedings,” applies to certain of the requested records, but the NYPD misapprehends the scope of this exemption. According to the NYPD, this exemption justifies withholding records responsive to requests 16-19 and 21-26, which seek records relating to the NYPD’s infiltration of Muslim individuals, businesses, and organizations, including records, statistics or other data concerning the use of informants, undercover officers, and physical surveillance. Appeals Denial at 6; FOIL Request at 8-10.²³ The NYPD’s wholesale denial of these requests based on section 87(2)(e)(i) overlooks the fact that this exemption applies only to ongoing criminal investigations. *See, e.g., Legal Aid Soc’y v. N.Y.C. Police Dep’t*, 274 A.D.2d 207, 214 (N.Y. App. Div. 2000) (holding that disclosure of records “to a defendant in a pending criminal prosecution would interfere with that proceeding”). Indeed, New York courts have held that section 87(2)(e)(i) does not apply to completed investigations in which no further action is contemplated. *See, e.g., Council of Regulated Adult Liquor Licensees v. N.Y.C. Police Dep’t*, 300 A.D.2d 17, 18 (N.Y. App. Div. 2002) (section 82(2)(e)(i) did not prevent disclosure because “the information at issue is now almost two years old and is for the most part not relevant to any current or future investigation or prosecution of one of the named nightclubs”); *Church of Scientology of N.Y v. State of N.Y.*, 403 N.Y.S.2d 224, 226 (N.Y. App. Div. 1978) (disclosure would not interfere with law enforcement investigations because “it is apparent from the facts submitted that the letters of compliant have already been responded to, have been the subject of inquiry, have resulted in no further action,

²³ The NYPD also denied requests 7 and 9-11 for the same reasons, but those requests are not at issue in this proceeding. *See Verified Petition at ¶ 2.*

and that there presently exists no intention to commence any further action with regard to them”). Thus, the NYPD must release records for investigations that are completed and either (a) did not result in further action or (b) resulted in a criminal prosecution that has been fully resolved. Some investigations undoubtedly fall into these categories because Assistant Chief Galati, head of the Intelligence Division, recently admitted that information gathered by the Demographics Unit has not lead to the commencement of any criminal proceedings. Statement of Facts above.

Relatedly, section 87(2)(e)(i) does not give the NYPD *carte blanche* to withhold all documents concerning current investigations. As to both current investigations and completed investigations, if a responsive record contains both exempt information and non-exempt information, the NYPD must produce the responsive records with the exempt information redacted. *See* Point II above.

Finally, the NYPD’s contention that the Request’s demand for statistics concerning its domestic surveillance program would interfere with investigations by revealing the level of resources needed to overcome the NYPD’s investigations is incorrect and wholly speculative. Appeals Denial at 6. Generally, statistical information is subject to disclosure. *See, e.g., Gould*, 653 N.Y.S.2d at 58 (requiring NYPD to disclose certain statistical information); *Council of Regulated Adult Liquor Licensees*, 300 A.D.2d at 18 (same). In this case, requests 21, 24, and 25 seek statistics regarding informants, undercover agents, and the number of instances in which the NYPD has used physical surveillance to infiltrate Muslim individuals and organizations. The NYPD’s argument that these statistics would enable terrorists to infer the level of resources needed to defeat their investigations is wholly speculative. *Church of Scientology*, 403 N.Y.S.2d at 226 (holding that records must be disclosed because agency position was based on a “wholly

speculative proposition”). Based on the NYPD’s flawed and speculative logic, information concerning the number of canines in service – which is publicly available – would be exempt from disclosure because it would enable drug smugglers to infer the level of resources needed to escape detection.

B. The Fair Trial Exemption of Section 87(2)(e)(ii) Does Not Categorically Prevent the Disclosure of the Requested Records

The NYPD maintains that section 87(2)(e)(ii), which exempts from disclosure information that would “deprive a person of a right to a fair trial or impartial adjudication,” applies to requests 16-19 and 21-26, but once again the NYPD misapprehends the scope of this exemption. Section 87(2)(e)(ii) does not justify the NYPD’s refusal to withhold virtually all responsive records because it must be read narrowly to apply only to those records that are relevant to contemplated or pending trials or adjudications. *Gould*, 653 N.Y.S.2d at 57 (“[t]o ensure [FOIL’s policy of] maximum access to government documents, the exemptions are to be construed narrowly”). As a result, the NYPD must release records of completed investigations that did not find any wrongdoing. In such instances, there is no potential to “deprive a person of a right to a fair trial or impartial adjudication” since there will be no trial or adjudication. As discussed above, some records undoubtedly fit this description because Assistant Chief Galati, head of the Intelligence Division, has stated that information gathered by the Demographics Unit has not lead to the commencement of any criminal proceedings. Statement of Facts above. As to investigations that did or will result in trials or adjudications, the NYPD must produce responsive records and redact the information that could adversely impact a trial or adjudication.

Id.

C. The Confidential Sources Exemption of Section 87(2)(e)(iii) Does Not Categorically Prevent the Disclosure of the Requested Records

The NYPD further contends that section 87(2)(e)(iii), which exempts from disclosure information that would “identify a confidential source or disclose confidential information relating to a criminal investigation” applies to requests 16-20, 22, and 26.²⁴ First, several of the requests the NYPD identifies pertain to largely factual and objective data. For example, requests 18 and 19 seek, among other information, maps, and request 26 seeks, among other data, information concerning the duration of and reason for intelligence gathering. These requests by their nature do not demand any identification of individuals or confidential sources. Second, even if the NYPD were to establish that these confidential sources are exempted from disclosure they pertain to an actual criminal investigation, as discussed in Point II above, the NYPD’s concerns about identifying confidential sources can be addressed by appropriately redacting any identifying information from the documents. *Data Tree LLC v Romaine*, 9 N.Y.3d 454, 464 (2007); *Johnson v New York City Police Dept.*, 257 A.D.2d 343, 349 (1999) (rejecting the NYPD claim of a blanket exemptions and ordering a disclosure of the requested records with names and other identifying information redacted). *Zukerman*, 385 N.Y.S.2d at 815 (ordering disclosure and redaction of records that were partially exempt under the law enforcement exemption of § 87(2)(e)).

D. The Non-Routine Criminal Investigative Techniques Exemption of Section 87(2)(e)(iv) Does Not Categorically Prevent the Disclosure of the Requested Records

Section 87(2)(e)(iv), which applies to information that would “reveal criminal investigative techniques or procedures, except routine techniques or procedures,” does not

²⁴ The NYPD also denied requests 2-8 for the same reasons, but those requests are not at this in this proceeding. *See* Verified Petition at ¶ 2.

exempt from disclosure all records responsive to requests 16-19 and 21-26, as the NYPD falsely contends. First, the requested records do not “fall squarely within the ambit” of section 87(2)(e)(iv) because these requests largely seek maps, policy guidelines, and statistics, not details about investigative techniques and procedures. *See* FOIL Request at 8-10. Second, the Court of Appeals has held that section 87(2)(e)(iv) applies only to non-routine investigative procedures, and the NYPD has conceded that it sometimes deploys routine “time-tested techniques and procedures in the course of its intelligence investigations.” *Fink*, 419 N.Y.S.2d at 471 (holding that only non-routine investigative techniques are exempt from disclosure); Appeals Denial at 3 (contrasting NYPD’s use of “novel and unique” techniques with its use of “time-tested techniques”). Those routine techniques are not exempt from disclosure under section 87(2)(e)(iv), and should be disclosed. *Beyah v. Goord*, 309 A.D.2d 1049, 1052 (N.Y. App. Div. 2003) (police reports that merely set forth “the routine process of contacting participants and witnesses” are not exempt from disclosure). If a responsive record contains both exempt information and non-exempt information, the NYPD must produce the responsive records with the exempt information concerning non-routine investigative techniques redacted. *Fink*, 419 N.Y.S.2d at 472 (ordering disclosure of a manual created to instruct investigator regarding nursing home fraud, with specialized techniques subject to law enforcement exemption redacted).

IV. THE PRIVACY EXEMPTION OF SECTIONS 87(2)(B) AND 89(2) DOES NOT CATEGORICALLY PREVENT THE DISCLOSURE OF THE REQUESTED RECORDS

The NYPD further contends that requests 16-20, 22, and 26 be denied pursuant to sections 87(2)(b) and 89(2),²⁵ because they constitute an unwarranted invasion of privacy. Appeals Denial at 7.²⁶ Again, the NYPD wrongly refuses to provide responsive records.

First, the NYPD has failed to establish that the requested documents contain information protected by the privacy exemption. FOIL's personal privacy exemption permits an agency to deny access to records or portions thereof that "would constitute an unwarranted invasion of personal privacy," as described by section 89(2). § 87(2)(b), 89(2). Section 89(2) further sets forth a list of specific types of disclosure that implicate the personal privacy exemption including, for example: "employment, medical or credit histories," and "names and addresses *if such lists would be used for solicitation or fund-raising purposes.*"²⁷ Where an agency record does not fall within one of the enumerated categories, the court must determine whether release

²⁵ In its initial response of March 5, 2012, the NYPD also argued that requests 16-26 were exempt under 5 USC § 522(b)(6), which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court has interpreted "similar files" to include detailed Government records on an individual which can be identified as applying to that individual. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

However, the NYPD seemingly abandoned this argument in its more detailed response of May 18, 2012. Appeals Denial at 7. To the extent that the NYPD continues to contest this point, the arguments set forth below apply by analogy. Moreover, to the extent the requests cover records related to organizations, associations, activities and businesses disconnected to a single individual, this exemption is inapposite on its face.

²⁶ The NYPD also denied requests 3-8 for the same reasons, but those requests are not at this in this proceeding. *See* Verified Petition at ¶ 2.

²⁷ Specifically, the enumerated categories are: "i. disclosure of employment, medical or credit histories or personal references of applicants for employment; ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility; iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes; iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law." § 89(2) (emphasis added).

would nonetheless constitute an unwarranted invasion of personal privacy by “balancing the competing interests of public access and individual privacy.” *Dobranski v. Houper*, 154 A.D.2d 736, 737 (N.Y. App. Div. 1989) (“What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a man of ordinary sensibilities.”) As a threshold matter, the NYPD fails to identify with particularity which, if any, of these categories the requested records fall into. However, it is clear in any case from the face of the requests themselves, that several of them do not seek this type of information. For example, requests 18 and 19 seek, among other information maps, and request 26 seeks information concerning the duration of and reason for intelligence gathering. Moreover, there are numerous instances where the disclosed information would be potentially much less harmful to the reputation of individuals and organizations, for example, records of completed investigations where there NYPD concluded no wrongdoing could be found. Finally, many of the requested records cannot implicate any privacy interests because the media has already revealed the subject of them. *New York Times Co. v. City of NY. Fire Dept*, 4 N.Y.3d 477, 485 (2005). For example, the Associated Press has already released numerous documents marked “NYPD Secret” that identify and describe various institutions and restaurants as “locations of concern” to the NYPD.²⁸

Second, recognizing a protected privacy interest is only the beginning of the inquiry. Assuming, *arguendo*, that disclosure of some portions of the requested records did implicate personal privacy interests, the inquiry does not end there. The Court must “balanc[e] the privacy interests at stake against the public interest in disclosure of the information.” *New York Times*

²⁸ See e.g., the “Albanian Locations of Concern Report,” “Egyptian Locations of Concern Report,” “Syrian Locations of Concern Report,” and “Moroccan Locations” documents obtained by the Associated Press as part of its probe into NYPD intelligence operations, *available at*: <http://www.ap.org/media-center/nypd/investigation>.

Co., 4 N.Y.3d at 485-86. (“The recognition [of] a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure . . . would injure that interest . . . and whether the injury to privacy would be ‘unwarranted’ within the meaning of FOIL’s privacy exception.”). There is enormous public interest in the disclosure of NYPD practices, and alleged police misconduct in particular, and the requested records concern allegations of the NYPD’s use of potentially illegal and unconstitutional methods of collecting information. The release of these records serves the public interest by providing transparency and accountability for agency action. *Associated Press v. U.S. Dep’t of Defense* 554 F.3d 273, 285 (2d Cir. 2009). This falls precisely into the purview of the request for information in question. “Official information that sheds light on an agency’s performance of its statutory duties falls squarely within the statutory purpose.” *U.S. Dep’t of State v. Ray* 502 U.S 164, 177-78 (1991). Where, if at all, the NYPD identifies a protected privacy interest, it should be weighed against the substantial public interest in these matters.

Finally, to the extent that a requested record contains personally identifying details, the appropriate remedy is redaction. As discussed generally in Point II, even when an agency can demonstrate that an exemption applies to some material, it must redact that information and release the remainder. *See, e.g., Beyah*, 309 AD.2d at 1052 (ordering release of employee training records of corrections officers with social security numbers redacted to prevent an unwarranted invasion of personal privacy). Moreover, the privacy exemption in particular is intended to apply only to information of a “genuinely private nature.” *Matter of Hernandez v. Office of the Mayor the City of New York*, Index No. 106213/11, 2011 WL 6012165 (N.Y. Sup. Ct. Nov. 23, 2011), citing *New York Committee for Occupational Safety v. Bloomberg*, 72 A.D2d 153, 160 (N.Y. App. Div. 2010). In fact, section 89(2)(c) itself provides that “disclosure shall

not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted.” § 89(2)(c). A claimed unwarranted invasion of personal privacy, therefore, does not permit the wholesale withholding of an entire document; rather the NYPD should redact any identifying details in accordance with section 89 (2), and produce the responsive documents.

Id.

V. The Public Safety Exemption of Section 87(2)(f) does not categorically prevent the disclosure of the requested records

The NYPD also denied requests 16-20, 22, and 26 pursuant to section 87(2)(f), which exempts responsive records from disclosure that, “if disclosed could endanger the life or safety of any person.” §87(2)(f).²⁹ Appeals Denial at 6, 7. Again, the NYPD’s blanket refusal to produce responsive documents is unduly broad. First, the NYPD has failed to show how the requested records, if disclosed, could endanger the life or safety of any person. In citing the exemption, the NYPD has not identified with particularity which exemptions apply to any specific record. *Cornell University v. City of New York Police Dep’t*, 153 A.D.2d 515, 544 N.Y.S.2d 356 (N.Y. App. Div. 1989). At a minimum, the NYPD needs to demonstrate at the least “a possibility of endangerment” in order to invoke the safety exemption. *Matter of Bellamy v. New York City Police Dep’t*, 87 A.D.3d 874, 875 (N.Y. Sup. Ct. App. Div. 1st Dep’t 2011). However, this “possibility” must be more than “speculative.” *Cf. The New York Times Co. v. City of New York Police Dep’t*, No. 116449, 2011 WL 5295044 (N.Y. Sup. Ct. Oct. 3, 2011). Second, Courts have looked unfavorably on such blanket exemptions to deny documents on public safety grounds. *Matter of Johnson v. New York City Police Dep’t*, 257 A.D.2d 343 (N.Y. App. Div. 1999). The NYPD’s concerns about public safety can be addressed by appropriately

²⁹ The NYPD also denied requests 2-8 for the same reasons, but those requests are not at this in this proceeding. See Verified Petition at ¶ 2.

redacting any information revealing the identities of undercover officers and informants from the documents. Many of the requested records largely seek information regarding record keeping and retention, policy guidelines and statistics, and are not likely to contain details about the NYPD's information gathering, especially after appropriate redactions. *Matter of New York Civ. Liberties Union v. New York City Police Dep't*, 20 Misc.3d 1108(A), 866 N.Y.S.2d 93, 93, 2008 WL 2522233 (N.Y. Sup. Ct., May 07, 2008) (releasing a database of 850,000 records of police stops noting that “[w]ith proper redaction of personal information concerning the officers who made the stop and/or the individuals stopped, the records are clearly subject to FOIL disclosure”); *Zukerman*, 385 N.Y.S.2d at 815 (ordering disclosure and redaction of records that were partially exempt under the law enforcement exemption of § 87(2)(e)).³⁰

VI. The Inter-Agency Exemption of Section 87(2)(g) Does Not Categorically Prevent the Disclosure of the Requested Records

The NYPD denied request 20, which seeks records provided by the Taxi and Limousine Commission to the NYPD in connection with its domestic surveillance program, because those records are purportedly exempt from disclosure under section 87(2)(g), but the NYPD has not shown that the requested records “fall[] squarely within the ambit” of this exemption. *Gould*, 653 N.Y.S.2d at 57.³¹ The NYPD contends that request 20 seeks records that “do not reflect final agency policy or determinations.” Appeals Denial at 5. Even if this were so, it would not justify withholding records responsive to request 20 under the inter-agency exemption of section 87(2)(g). As the Court of Appeals explained in *Gould v. New York City Police Department*, the

³⁰ See also *N.Y.C. Civil Liberties Union I*, slip op. at 18 (ordering disclosure and redaction of police records that were partially exempt under § 87(2)(f)); *N.Y.C. Civil Liberties Union v. N.Y.C. Police Dep't*, Index No. 115154/07, at 3 (N.Y. Sup. Ct. 2010) (rejecting NYPD argument that documents were completely exempt from disclosure under §§ 87(2)(e) and 87(2)(f) because “the NYPD does not address the feasibility of turning over the requested database with redaction of the names and personal information of the police officers”).

³¹ The NYPD also denied requests 5-6 and 8-11 on this ground, but those requests are not at issue in this proceeding. See Verified Complaint at ¶ 2.

inter-agency exemption was designed “to protect the deliberative process of the government by ensuring that persons in an advisory role will be able to express their opinions freely to agency decision makers.” *Gould*, 653 N.Y.S.2d at 58. Consequently, inter-agency records are exempt only to the extent that they contain “opinions, ideas, or advice exchanged as part of the deliberative process.” *Id.* In both of its denials of request 20, the NYPD has failed to explain how its request for records to the Taxi and Limousine Commission and that commission’s reply, if any, implicates “opinions, ideas, or advice exchanged as part of the deliberative process.” *See* FOIL Denial at 3, Appeals Denial at 5.

Furthermore, assuming records responsive to request 20 implicate opinions exchanged as part of the deliberative process, *Gould* makes clear that the NYPD must disclose “factual data” or “objective information” contained in those records, even if they are embodied in non-final inter-agency records. *Gould*, 653 N.Y.S.2d at 58 (“Thus, intra-agency documents that contain ‘statistical or factual tabulations or data’ are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination.”). The NYPD’s claim that records provided by Taxi and Limousine Commission do not contain any factual data strains credibility. Appeals Denial at 5. For example, according to the Associated Press, the NYPD asked the Taxi and Limousine Commission for a list of all Pakistani cab drivers in New York City. *See* Statement of Facts above. Such a list undoubtedly constitutes factual data or objective information, and therefore any record with such a list is subject to disclosure under FOIL. If a record contains exempt opinions and non-exempt factual data, the NYPD must produce the record with the exempt information redacted. *New York Times Co. v. N.Y.C. Fire Dep’t*, 829 N.E.2d 266, 271 (N.Y. 2005) (holding records must “be disclosed to the extent they consist of factual statements or instructions affecting the public, but that they be redacted to eliminate non-factual material).

VII. PETITIONERS “REASONABLY DESCRIBED” ALL RECORDS

Contrary to the NYPD’s contention, requests 16-19 and 22-23 “reasonably describe” the requested records as required by section 89(3)(a). The NYPD argues that these requests do not reasonably describe the requested records because they seek records of every NYPD investigation of a Muslim individual, business, or organization for “any purpose” or “for any reason.” Appeals Denial at 8-9. But requests 16-19 and 22-23 are not concerned with run-of-the-mill criminal investigations, but are instead targeted to the NYPD’s covert surveillance of Muslims in the Northeast. Requests 16-19, for example, cite the Associated Press articles detailing the NYPD’s covert domestic surveillance program to provide context for the types of information that they seek. Although requests 22-23 do not have such citations, given the Request’s overall singular focus on obtaining information about the NYPD’s domestic surveillance program, the NYPD’s claim that these requests seek records “for any purpose” lacks credibility.

Relatedly, the Court should reject the NYPD’s attempt to evade its disclosure obligations under FOIL by requiring Petitioners AALDEF and Muslim Advocates to give particularized descriptions of the requested records when it refuses to disclose even the most basic information about its domestic surveillance program. The NYPD contends that records responsive to requests 16-19 and 22-23 cannot be retrieved because they do not specify the unit where a search for records could be conducted and are not “limited to any defined activity engaged in by the NYPD that generates records that can be located by following an established path.” Appeals Denial at 9. To begin with, FOIL does not require such specificity when requesting documents; rather, it requires only “a written request for a record *reasonably* described.” § 89(3)(a) (emphasis added). Even if FOIL did require such specificity, the NYPD cannot avoid its FOIL obligations by withholding from the public the very information that it claims it needs to retrieve

the records. For example, Petitioners cannot reasonably be expected to specify the NYPD units whose records should be searched when the NYPD has demonstrated a steadfast unwillingness to disclose any information about the units that carry-out its domestic surveillance program. Indeed, the NYPD has in the past denied that Demographics Unit exists.³² Although the NYPD shrouds its domestic surveillance in secrecy, the Associated Press articles and few publicly available documents leave no doubt that there are records responsive to requests 16-19 and 22-23.³³

VIII. PETITIONERS ARE ENTITLED TO ATTORNEYS FEES AND COSTS

Petitioners AALDEF and Muslim Advocates also request attorneys' fees and reasonable litigation costs under FOIL. Section 89(4)(c) grants a court discretion to award reasonable attorneys' fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute.

Section 89(4)(c) was amended in 2006, in part, to remove the previous requirement that "the record involved was, in fact, of clearly significant interest to the general public." *See, e.g. Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435,441-42 (N.Y. 2005) (rejecting fee claim under former "interest to general public" standard). The legislative history to the 2006 amendment states that "[t]his bill strengthens the enforcement of such a right [citizens' right to access certain government records via FOIL requests] by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to

³² Matt Apuzzo & Adam Goldman, *Inside the Spy Unit the NYPD Says Doesn't Exist*, Associated Press, August 31, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist>.

³³ *See* Intelligence Division Report, available at http://hosted.ap.org/specials/interactives/documents/nypd/nypd_plane crash.pdf (discussing DD5 reports generated from the infiltration of various mosques and Islamic centers).

respond in a timely fashion or deny access without any real justification.” 2005 Legis. Bill Hist. NY S.B. 7011.

Thus, the only showing that Petitioners AALDEF and Muslim Advocates must make for an award of attorneys’ fees under FOIL is that the petitioner substantially prevailed and that “the agency had no reasonable basis for denying access.” § 89(4)(c). For all the reasons discussed above, it appears at this stage that the NYPD lacks a reasonable basis for its virtually categorical denial of the Request, and in particular, its refusal to provide any redacted records. The Court of Appeals’ recent remarks in *Schenectady County Society for the Prevention of Cruelty to Animals, Inc. v. Mills* underscores the unreasonableness of the NYPD’s refusal to provide redacted records:

In responding to petitioner’s FOIL request, the [NYPD] had the choice of producing the existing record in full or removing the information that it did not want to produce and that petitioner did not demand. It cannot refuse to produce the whole record simply because some of it may be exempt from disclosure.

We are at a loss to understand why this case has been litigated. It seems that an agency sensitive to its FOIL obligations could have furnished petitioner with a redacted list with a few hours effort, and at negligible cost.

958 N.E.2d 1194, 1196 (N.Y. 2011). The NYPD’s conduct in this case is consistent with other New York City agencies, which consistently delay responding to FOIL requests and categorically deny valid requests when they belatedly respond.³⁴

³⁴ *Hernandez*, 2011 WL 6012165, at *1; New York Times Editorial, *They Like Transparency, Until They Don’t*, available at <http://www.nytimes.com/2011/11/14/opinion/they-like-transparency-until-they-dont.html>.

CONCLUSION

For all the foregoing reasons, Petitioners AALDEF and Muslim Advocates respectfully request that the Court grant their petition. In the alternative, Petitioners respectfully request that the Court order an *in camera* review of randomly selected responsive records in the event this would better inform the Court as to the contents and form of the records requested by Petitioners, as well as the need for redactions.

Respectfully Submitted,

Dated: September 18, 2012
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