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On July 19, 2019, the NYPD denied the FOIL request. The NYPD stated that "[i]n regard to the document(s) which you requested, this unit is unable to locate records responsive to your request based on the information you provided."

On August 16, 2019, Petitioner appealed the NYPD's denial of the FOIL request. On August 26, 2019, the NYPD summarily denied Petitioner's appeal, stating that the FOIL request "does not reasonably describe a record in a manner that could enable a search in accordance with POL §89(3)" and that the requested records were exempt from disclosure under four separate exemptions: POL §§ 87(2)(c), 87(2)(d), 87(2)(g), and 87(2)(e)(iv).

Petitioner brings this Article 78 proceeding (1) directing the NYPD to provide the requested records; and (2) awarding attorneys' fees and costs reasonably incurred in this litigation as allowed under FOIL.

On November 10, 2020, the Court heard oral argument via TEAMS. The Court permitted Petitioner to amend the broad request and provide the Court with the items that remain in dispute.

On November 25, 2020, Petitioner submitted a revised FOIL request, seeking:

> Purchase records from 2017 through present: Purchase orders or invoices for MDFTs from Cellebrite, MSAB, AccessData, Magnet Forensics, Oxygen Forensics, and Guidance Software/OpenText from 2017 through the present.
>
> Records of use from 2018 and 2019: From 2018 and 2019, records that show the total number of device searches over time (e.g., each month), the types of cases MDFTs were used in (i.e., the charges or alleged offenses), and the legal justification for the search (e.g., search warrant, consent, abandoned, deceased).
>
> Policies, standard operating procedures ("SOPs"), and procedures manuals that guide how the Department, and specifically the Computer Crimes Squad, uses MDFTs; and any policies governing what to do when encountering evidence on a device unrelated to the search warrant, retention periods for extracted data, how to perform cloud

extractions, and how to document extractions and forensic analysis.

The items that are in dispute are: (1) whether data about the frequency with which MDFTs are used to investigate specific crimes should be produced and (2) whether the MDFT model name identified in NYPD purchase records should be produced.

On December 7, 2020, and January 7, 2021 the Court heard oral argument via TEAMS. The parties filed supplemental papers and uploaded the transcripts from oral argument. On February 4, 2021, the Petition was marked fully submitted.

Legal Standard

To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public (see, Public Officers Law § 84 [legislative declaration]).” *Gould v. New York City Police Dept.*, 89 NY2d 267, 274 [1996]. “All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2).” *Id.* at 274-275. “To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.” *Id.* at 275 (citation omitted).

Discussion

“Records of use from 2018 and 2019: From 2018 and 2019, records that show the total number of device searches over time (e.g., each month), the types of cases MDFTs were used in (i.e., the charges or alleged offenses), and the legal justification for the search (e.g., search warrant, consent, abandoned, deceased).”

Petitioner asserts that the NYPD has stated that it will produce the “aggregate numbers of MDFT use from that period” and it “has further indicated it has identified and can produce a list of the general crimes and offenses associated with those instances of MDFT use for that period.” Petitioner further asserts that “[t]he NYPD refuses, based on an overstated and misguided concern with respect to burden, to correlate that list of offenses with the ‘aggregate numbers’ it is willing to produce.” Petitioner argues that the NYPD should identify “how often it used MDFTs with respect to each crime category on that list” because the “information is squarely

within the public interest that FOIL serves because it sheds necessary daylight on the extent to which this expenditure provides a corresponding public benefit." Petitioner asserts that the NYPD's argument "that producing such information involves a 'document by document' review and raises confidentiality issues with respect to certain information in its case records' is misguided." Petitioner contends that it "has not asked for production of case file records associated with instances of MDFT use." Petitioner argues that "[n]o case analysis is required. No time-consuming review is required. No redaction is required. This is a simple counting exercise." Petitioner further argues that there is no "undue" burden on the NYPD to produce this information.

In opposition, the NYPD argues that it "does not track the use of MDFT's in the manner the Petitioner seeks here." The NYPD asserts that the producing the information "would require far more than the 'simple manipulation of the computer necessary to transfer existing records [that] does not involve significant time or expense.'" The NYPD contends that "Petitioner has conceded liability for the cost of outside services pursuant to Public Officers Law § 89(3)(a), and where NYPD has been able to identify and extract data with manageable levels of effort, NYPD has produced or agreed to produce that information." The NYPD asserts that the information not produced "could not be reasonably identified." The NYPD argues that "the First Department very recently and clearly held that a City agency 'is not obligated to compile aggregate data from the documents or records in its possession.' *Matter of Empire Ctr. for Public Policy v. New York City Off. of Payroll Administration*, 187 A.D.3d 435, 435 (lst Dept. 2020)." Additionally, the NYPD asserts that "the amount of highly-confidential information strewn amongst the material that NYPD would be forced to comb through - which the Petitioner largely concedes would be confidential - makes searching even more difficult." The NYPD argues that the "demands remain overly burdensome, and call for productions beyond the capacity of NYPD's records management systems."

"Public Officers Law § 89(3) places the burden on petitioner to reasonably describe the documents requested so that they can be located." *Mitchell v. Slade*, 173 A.D.2d 226, 227 [1st Dept. 1991] (citation omitted). "FOIL provides that '[n]othing in [the statute] shall be construed to require any entity to prepare any record not possessed or maintained by such entity' (Public Officers Law § 89 [3] [a]), with exceptions not raised here." *Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d 435 [1st Dept 2020], *appeal denied*, 36 NY3d 906 [2021]. "Accordingly, respondent is not obligated to compile 'aggregate data' 'from the documents or records in its possession' (*Matter of Reubens v Murray*, 194 AD2d 492, 492 [1st Dept 1993] [internal quotation marks omitted])." *Id.*

The NYPD has stated that it will produce the "aggregate numbers of MDFT use from" 2018 to 2019 and it "has further indicated it has identified and can produce a list of the general crimes and offenses associated with those instances of MDFT use for that period." However, Petitioner argues that the NYPD should identify "how often it used MDFTs with respect to each crime category on that list." The NYPD has stated that it "does not track the use of MDFT's in the manner the Petitioner seeks here." The NYPD further stated that the information not produced "could not be reasonably identified." "Accordingly, respondent is not obligated to compile 'aggregate data' 'from the documents or records in its possession' (*Matter of Reubens v Murray*, 194 AD2d 492, 492 [1st Dept 1993] [internal quotation marks omitted])." *Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.*, 187 AD3d 435 [1st Dept 2020], *appeal denied*, 36 NY3d 906 [2021].

Purchase records from 2017 through present: Purchase orders or invoices for MDFTs from Cellebrite, MSAB, AccessData, Magnet Forensics, Oxygen Forensics, and Guidance Software/OpenText from 2017 through the present.

Petitioner asserts that "[t]he NYPD has indicated it has identified purchase records responsive to this request and that it is willing to provide the quote, vendor identity, and purchaser identity information for each responsive contract." Petitioner asserts that the NYPD refuses "to disclose the service or product sold under each responsive contract, arguing that disclosure of this limited category of information would reveal law enforcement techniques and trade secrets." Petitioner argues that "[k]nowing the specific product or service information sold under each contract helps the public understand the actual scale and scope of the NYPD's MDFT program, which is consistent with FOIL's statutory purpose of promoting open government and public accountability." Petitioner asserts that "[s]uppressing the information concerning the product or service sold under each contract frustrates the public's right to judge for itself the actual scope and scale of the NYPD's MDFT program."

Petitioner argues that the NYPD's arguments "that disclosure of this limited category of information would frustrate ongoing law enforcement efforts and harm the competitive position of MDFT manufacturers" are without merit. Petitioner argues that "the NYPD has failed to articulate the harm to law enforcement operations that would result from disclosing only the particular identity of the product or service purchased under each contract." Petitioner asserts that "there is no risk that identifying the specific product sold to the NYPD under each contract will reduce MDFT manufacturers' interest in contracting with the NYPD because

the products these companies sell are in the public domain." Petitioner argues that "identifying the specific product sold under each contract provides no additional information that could alert mobile device companies, rivals, third-party software developers, or other stakeholders to particular ways to copy specific MDFTs." Additionally, Petitioner argues that "the NYPD has failed to articulate that disclosure of this limited category information would cause injury to the competitive interests of the MDFT manufacturers associated with each responsive contract."

Petitioner argues that "[t]he NYPD's argument that MDFT manufacturers are commercial enterprises actively competing for law enforcement contracts is not a particularized justification for withholding this information." Petitioner asserts that Grayshift, a MDFT manufacture, is concerned that disclosure of its purchase records may harm its competitive position (correspondence attached as NYSCEF DOC. NO. 28). Petitioner argues that Grayshift's "concerns are irrelevant in light of the fact that the NYPD already produced a Grayshift contract that identified the specific product sold under that contract." Petitioner contends that "the substantially narrowed scope of Petitioner's revised request makes Grayshift's concerns moot because the revised request excludes any information, either general or technical, concerning how a product or service works." Petitioner argues that "[t]he NYPD has failed to provide any evidence of injury, substantial or otherwise, as to MDFT manufacturers other than Grayshift."

In opposition, the NYPD argues that "[a]s to the trade secret issue here, Grayshift - one of the affected vendors in this proceeding - plainly stated in this proceeding that the Petitioner's request 'seeks materials that would constitute bona fide trade secrets,' and provided a detailed explanation of why disclosure would reveal Grayshift's trade secrets and directly addressing each of the prongs outlined in Verizon." The NYPD asserts that "Grayshift 'is a unique MDFT that Grayshift uses in its business and that gives Grayshift an advantage over competitors who market other MDFTs,' Grayshift further explained that 'even the broad contours of how the product works are not known outside of Grayshift, and that information related to Graykey is limited even within Grayshift to those who have reason to need to know about the product.'" The NYPD contends that Grayshift further stated in the letter that "the materials sought include information that is highly valuable to Grayshift and which would also be highly valuable if it fell into the hands of third parties" that "Grayshift's research and development efforts require substantial amounts of effort and money," and finally that "the technical information concerning Grayshift's products cannot be easily acquired or duplicated by others, as is evidenced by the fact that no other company licenses an MDFT similar to Grayshift." The NYPD argues that "Petitioner has offered nothing to suggest any material difference in the business models or experiences of any of the MDFT manufacturers

it names in this proceeding besides Grayshift, and therefore offers no basis to treat their products any differently than those by Grayshift."

Moreover, the NYPD argues that "the disclosure of the use of particular MDFT's would pose a two-fold risk to NYPD's law enforcement work that the First Department has recognized and from which it has previously shielded NYPD: disclosure of nonroutine investigative techniques and undue interference to present and future investigations." The NYPD asserts that "[b]eyond case-specific information, the First Department has recognized that disclosure of even seemingly mundane information about certain law enforcement tools can have deleterious effects on law enforcement. *Matter of Grabell*, at 478 (finding that Supreme Court 'erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of the vans,' as even that information could hamper law enforcement efforts)." The NYPD further asserts that "while technology may change with time, those concerns which the First Department have recognized are neither new nor novel. *Dobranski v. Houper*, 154 A.D.2d 136,737 (3d Dept. 1989) (exempting from disclosure records regarding identikit tools)." The NYPD argues that "Petitioner has not distinguished the facts of this proceeding from those in *Grabell* or *Dobranski*, and the fact that NYPD's completed and anticipated productions in this proceeding exceed that which the First Department required in *Grabell* only illustrates NYPD's reasonableness in crafting its position in this proceeding." The NYPD asserts "that there may be public interest or intrigue - even intense interest - in the use of MDF's does not divest records of MDFT usage of their need for shielding." The NYPD argues that it "has sought a balance here, disclosing more information than it was required to in *Grabell* including aggregate cost data and general policy and procedure materials."

Under POL § 87(2)(c), an agency may deny access to records that, "if disclosed, would impair present or imminent contract awards or collective bargaining negotiations."

POL § 87(2)(d) exempts from disclosure records which contain "trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise . . ." This exemption is to "protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York." *Matter of Encore College Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 420 [1995]. "The court must consider whether the information sought is valuable to the competing business, as well as the resulting damage to the submitting

business if information is released, and if the disclosure is the only means for the competitor to gain the requested information, the inquiry ends here." *Empire Healthchoice Assur., Inc. v. Clement*, 2018 N.Y. Slip Op. 30489[U], 6 [N.Y. Sup Ct, New York County 2018] (citing *Matter of Encore College Bookstores, Inc.*, 87 at 420).

Agencies may deny a FOIL Request pursuant to POL § 87(2)(e), where "access to records that reveal criminal investigative techniques or procedures, except routine techniques and procedures". *Fink v. Lefkowitz*, 47 N.Y.2d 567, 568 [1979]. "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel." *Id.* at 572.

Here, the NYPD has stated that it will produce "the quote, vendor identity, and purchaser identity information for each responsive contract." The NYPD has refused to provide "the service or product sold under each responsive contract, arguing that disclosure of this limited category of information would reveal law enforcement techniques and trade secrets." Grayshift, one of the affected vendors in this proceeding, opposes this request. Grayshift states that request "seeks materials that would constitute bona fide trade secrets." Therefore, "the information sought is valuable to the competing business, as well as the resulting damage to the submitting business if information is released, and if the disclosure is the only means for the competitor to gain the requested information." *Empire Healthchoice Assur., Inc.*, 2018 N.Y. Slip Op. 30489[U], 6 [N.Y. Sup Ct, New York County 2018] (citation omitted). Furthermore, the information sought by Petitioner falls under POL § 87(2)(e), it would interfere with nonroutine investigative techniques and with present and future investigations.

Reasonable Attorney's Fees and Costs

Pursuant to POL § 89(4)(c), a Court may award reasonable attorney's fees and litigation costs incurred where a party has "substantially prevailed" and when the agency "failed to respond to a request or appeal within the statutory time"; and the agency had no "reasonable basis" for denial. The Court of Appeals has stated, "[p]ursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that 'substantially prevailed' in the proceeding if the court finds that (1) 'the record involved was, in fact, of clearly significant interest to the general public,' and (2) 'the agency lacked a reasonable basis in law for withholding the record' Public Officers Law § 89 [4] [c]. Only after a court finds

that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees." *Beechwood Restorative Care Ctr. v. Signor*, 5 NY3d 435, 441 [2005]. "However, even if these elements are met, an award of counsel fees remains within the discretion of the Court." *Matter of Herald Co., Inc. v. Feurstein*, 3 Misc 3d 885, 898 [Sup Ct 2004]. Further, "[e]ven in cases where documents are ultimately required to be disclosed, the agency may be found to have had a reasonable basis for initially denying access." *The E.W. Scripps Co. v. New York City Police Dept.*, 2019 N.Y. Slip Op. 32626[U], 8 [N.Y. Sup Ct, New York County 2019][citations omitted].

Viewing the requests in their entirety, and within the Court's discretion, the application for attorney's fees is denied.

Wherefore, it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Petition is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 6, 2021

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

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