

**Surveillance Tech. Oversight Project v New York
City Police Dept.**

2021 NY Slip Op 32805(U)

December 28, 2021

Supreme Court, New York County

Docket Number: Index No. 156442/2021

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD **PART** **35**

Justice

-----X

SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT

Plaintiff,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Defendant.

-----X

INDEX NO. 156442/2021

MOTION DATE 07/08/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Surveillance Technology Oversight Project (Motion Seq. 001) is partially granted to the extent that this matter is remanded for a Framed Issue Hearing; and it is further

ORDERED that all issues raised in the petition and in Respondent New York City Police Department's cross-motion to dismiss, including, *inter alia*, the issue of whether undisclosed documents may exist that are responsive to Petitioner's Freedom of Information Law (FOIL) request, and the amount of attorney's fees, if any, to which Petitioner is entitled pursuant to Public Officers Law § 89(4)(c), are hereby referred to a Special Referee to Hear and Determine. It is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the

“References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the ‘References’ link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, the petitioner Surveillance Technology Oversight Project (STOP) seeks to compel the respondent New York City Police Department (NYPD) to comply with a Freedom of Information Law (FOIL) request, and the NYPD cross-moves to dismiss the

petition (together, motion sequence number 001). For the following reasons, the petition is granted solely to the extent set forth below.

FACTS

On November 23, 2020, STOP served the following FOIL request on the NYPD:

“Pursuant to state open records law, NY Pub Off Law §§ 84 to 99, I write to request access to and a copy of any and all records from 1/1/2005 to 11/23/2020 relating to the Accuracy and Bias of the New York City Police Department's Facial Recognition.

“Records, as used herein, includes, but is not limited to, all agency records including memoranda, correspondence, analyses, interview notes, logs, charts, and other written records as well as records maintained on computers, electronic communications, videotapes, audio recordings, or any other format.

“Accuracy, as used herein, signifies any metrics or other indicators regarding defects, patches, the error rate, the precision, and/or the exactness of Facial Recognition.

“Bias, as used herein, means any difference in outcome based on a protected characteristic, as defined in NYC Admin. Code § 8-101, including but not limited heightened or diminished rates of false positive and false-negative results.

“Facial Recognition is defined as computer vision software capable of identifying a person from a static image or a video source.”

See verified petition, exhibit D. On November 25, 2020, an NYPD records access officer (RAO) acknowledged receipt of the FOIL request via email. *See* notice of cross motion, exhibit 2. On January 29, 2021, the RAO informed STOP via email that the FOIL request had been closed since the NYPD's FOIL Unit was unable to locate records responsive to the request (the RAO's decision). *Id.*, exhibit 3. On February 26, 2021, STOP filed an administrative appeal of the RAO's determination. *Id.*, exhibit 4. On March 10, 2021, an NYPD records access appeals officer (RAAO) issued a decision denying STOP's appeal (the RAAO's decision). *Id.*, exhibit 5. The RAAO's decision specifically stated as follows:

“Your appeal of that determination is denied because a diligent search has been conducted for the requested records based on the information provided; however, no records were located. The New York Court of Appeals has determined that “[w]hen an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89 (3) requires the agency to certify that it does not have possession of a requested record or that such record cannot be found after diligent search . . . Neither a detailed description of the search nor a personal statement from the person who actually

conducted the search is required’ *Raittley v New York City Police Dept.*, 96 NY2d 873, 875 (2001).

“Furthermore, in 2009, the Appellate Division held that an agency cannot produce documents it does not possess or cannot disclose and that the Court cannot require respondents to produce documents that they certify they cannot find after a diligent search because petitioner ‘has received all that he . . . is entitled to under the law’ *Bernstein Family Ltd. P’ship v Sovereign Partners, LP.*, 66 AD3d 1, 8 (1st Dept 2009).

“You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.”
Id., exhibit 5.

STOP thereafter commenced this Article 78 proceeding on July 8, 2021. *See* verified petition. Rather than answer, the NYPD filed a cross motion to dismiss STOP’s petition on September 10, 2021. *See* notice of cross motion. With the service of STOP’s reply papers, this matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

The Appellate Division, First Department, has recently summarized the legislative policy underlying the FOIL as follows:

“‘The Freedom of Information Law 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’ (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986]). All documents in the possession of an agency are presumed to be open to the public under FOIL unless the agency can identify a specific statutory exemption (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *see Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 [1st Dept 1999]). Courts construe FOIL exemptions narrowly, and the agency bears the burden of showing that the requested records ‘fall squarely within’ a given exemption (*Matter of Rauh v de Blasio*, 161 AD3d 120, 125 [1st Dept 2018] quoting *New York Comm. For Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 [1st Dept 2010]).”
Matter of New York Times Co. v City of New York Off. of the Mayor, 194 AD3d 157, 163 (1st

Dept 2021). The Court of Appeals holds that Public Officers Law § 89 (3) (a) sets forth the “three permissible final responses to a FOIL request: (1) grant the request and disclose documents, (2) certify that the record cannot be found after a diligent search, or (3) ‘deny such request,’ invoking one or more [statutory] exemption.” *Matter of Abdur-Rashid v New York City*

Police Dept., 31 NY3d 217, 232-233 (2018), quoting *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-441 (2005). “In an article 78 proceeding, judicial review of an agency's determination of a FOIL request is limited to whether it ‘was affected by an error of law.’” *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 490 (1st Dept 2021), quoting *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 (1st Dept 2011), lv denied 18 NY3d 806 (2012), quoting CPLR 7803 (3).

Here, STOP’s petition identifies two potential errors of law affecting the RAAO’s order; specifically, that it failed to: “(I) properly certify that [the NYPD] conducted a diligent search, and[or] (II) [to] produce documents responsive to STOP’s FOIL request.” See verified petition, at 6 (¶¶ 18-33). The former argument is wholly belied by the documentary evidence. The RAAO’s March 10, 2021 decision plainly states that “[y]our appeal of that determination [i.e., the RAO’s order] is denied *because a diligent search has been conducted* for the requested records based on the information provided; however, no records were located.” See notice of cross motion, exhibit 5 (emphasis added). In addition, the affirmation of NYPD counsel Emily Gold, which is annexed to the cross motion, contains both an explanation of the circumstances of the document search that NYPD personnel performed and a certification that “a diligent search was conducted for the requested records, and no records responsive to Petitioner’s FOIL request have been located.” *Id.*, Gold affirmation, ¶¶ 12-17. Therefore, the court rejects as unfounded STOP’s contention that the RAAO’s order failed to certify that a diligent search was performed. See e.g., *Matter of Gajadhar v New York Police Dept.*, 61 Misc 3d 1218(A), 2018 NY Slip Op 51570(U) (Sup Ct, NY County 2018).

STOP additionally argues that the NYPD failed “produce documents responsive to STOP’s FOIL request.” See verified petition, ¶¶ 23-33. The NYPD responds that it is not

required to produce documents which it has determined that it does not possess, and that STOP is not entitled to a hearing on the issue of whether or not requested documents do, in fact, exist. See notice of cross motion, Gold affirmation, ¶¶ 18-32. The First Department recognizes that an NYPD certification that the department could not locate documents responsive to a FOIL request satisfies its requirements under Public Officers Law § 89 (3) (a) and renders the FOIL request moot. See e.g., *Matter of Grabell v New York City Police Dept.*, 139 AD3d 477, 479 (1st Dept 2016) citing *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001); *Matter of Tarantino v New York City Police Dept.*, 136 AD3d 598, 599 (1st Dept 2016), citing *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873; *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598 (1st Dept 2014). The First Department also acknowledges that the NYPD is not required to provide either a detailed description of a FOIL search it performed or a personal statement from the NYPD employee who actually conducted the search.¹ See e.g., *Matter of Whitfield v Moriello*, 71 AD3d 415, 416 (1st Dept 2010), quoting *Matter of Rattley v New York City Police Dept.*, 96 NY2d at 875. However, the First Department further acknowledges the rule that the proponent of a FOIL request who is able “to articulate a demonstrable factual basis to support the contention that [further] requested documents exist[] and [are] within the NYPD’s control” is entitled to a hearing on that matter. See *Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637, 637 (1st Dept 2015), citing *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 269 (1996); see also *Matter of Grabell v New York City Police Dept.*, 139 AD3d at 479; *Matter of Tarantino v New York City Police Dept.*, 136 AD3d at 599. Should the FOIL proponent prevail at such a hearing,

¹ The court notes that the NYPD nevertheless did so herein. See notice of cross motion, Gold affirmation, ¶¶ 12-17.

the NYPD will be required to demonstrate that any newly discovered responsive documents are protected from disclosure by one of the provisions of POL §§ 87 or 89. *Matter of Gould v New York City Police Dept.*, 89 NY2d at 26.

Here, STOP identifies three publicly available NYPD documents which, it argues, compel the conclusion that the NYPD clearly possesses other material that would be responsive to its FOIL request for “any and all records from 1/1/2005 to 11/23/2020 relating to the Accuracy and Bias of the New York City Police Department's Facial Recognition.” *See* verified petition, ¶¶ 24-25, 27-32; exhibits A, B, C. These are, respectively: 1) a web page entitled “NYPD Questions and Answers - Facial Recognition”; 2) an internal NYPD publication, dated April 11, 2021, entitled “Facial Recognition: Impact and Use Policy”; and 3) an extract from the NYPD Patrol Guide 212-129, dated March 12, 2020, which concerned “Facial Recognition Technology.” *Id.*, exhibits A, B, C. STOP notes that, in these documents, the NYPD refers to other source material regarding facial recognition technology that it has reviewed while developing departmental protocols for the use of such technology. *See* verified petition, ¶ 25. STOP also argues that “if the [NYPD] actually has official protocols to prevent misidentification and bias . . . [in conjunction with facial recognition technology], it is inconceivable that the Department has no documents concerning those protocols or their application.” *Id.*, ¶ 25. The NYPD responds that the web page and the Patrol Guide are publicly available, and that the internal publication is non-responsive to the FOIL request. *See* notice of cross motion, Gold affirmation, ¶¶ 25-32. The NYPD also asserts that the source material which is referred to in these documents was not generated by the NYPD itself, and is therefore not subject to disclosure. *Id.*, ¶¶ 25-32. The court rejects the NYPD’s arguments. If it wishes to claim that certain of its documents are protected from disclosure, it must “articulate [a] particularized and specific

justification for not disclosing [the] requested documents.” *Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 18 (1st Dept 2017), quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d at 275. Here, the NYPD hints at, but does not identify, any statutory exemptions from disclosure that might pertain to the documents STOP located. The court also finds that, in light of STOP’s broad and inclusive request for “any and all documents from 1/1/2005 to 11/23/2020” regarding the NYPD’s use of facial recognition computer software,² the existence of those three documents demonstrates that the NYPD’s assertion that “no [responsive] records were located” cannot be credited. Instead, the court finds that this is one of the cases in which the FOIL petitioner has located publicly available documents which so strongly indicate the existence of other responsive documents that a hearing on the matter is warranted. *See e.g., Matter of Oddone v Suffolk County Police Dept.*, 96 AD3d 758, 761 (2d Dept 2021), quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d at 279; *Matter of LatinoJustice PRLDEF v South Country Cent. Sch. Dist.*, 61 Misc 3d 1210(A), 2018 NY Slip Op 51440(U) (Sup Ct, Suffolk County 2018). Accordingly, the Court directs that this matter is referred to a Special Referee to “Hear and Determine.”

Finally, STOP requests legal fees pursuant to POL § 89 (4) (c) on the ground that it “substantially prevailed” in this proceeding. *See* verified petition, ¶ 7. The NYPD opposes this request on the ground that it is premature. *See* notice of cross motion, Gold affirmation, ¶¶ 33-34. At this juncture, the court agrees. While STOP has demonstrated that it is entitled to a hearing pursuant to the holding of *Matter of Gould v New York City Police Dept.*, it has not yet prevailed at that hearing, and therefore cannot be considered to have “substantially prevailed” on

² Which FOIL request includes equally broad and inclusive definitions of the terms “documents”, “accuracy” and “bias.”

its Article 78 petition as that term is defined in POL § 89 (4) (c) (i) and (ii). As a result, the Court directs that, should STOP prevail at the Framed Issue Hearing, the Special Referee shall determine the amount of attorney's fees to which STOP is entitled.

In conclusion, the court grants STOP's Article 78 petition to the extent of ordering a hearing pursuant to the holding of *Matter of Gould v New York City Police Dept.*, and refers the entirety of this matter to a Special Referee to "Hear and Determine."

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the application of Petitioner Surveillance Technology Oversight Project (Motion Seq. 001) is partially granted to the extent that this matter is remanded for a Framed Issue Hearing; and it is further

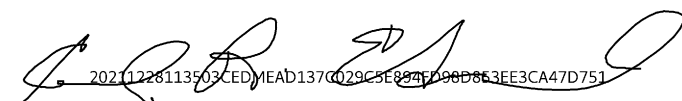
ORDERED that all issues raised in the petition and in Respondent New York City Police Department's cross-motion to dismiss, including, *inter alia*, the issue of whether undisclosed documents may exist that are responsive to Petitioner's Freedom of Information Law (FOIL) request, and the amount of attorney's fees, if any, to which Petitioner is entitled pursuant to Public Officers Law § 89(4)(c), are hereby referred to a Special Referee to Hear and Determine. It is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the ‘References’ link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.



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12/28/2021
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE