

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

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TALIB W. ABDUR-RASHID

Petitioner,

v.

Index No.

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

Respondents.

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

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MEMORANDUM IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of the Verified Petition seeking a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"). The proceeding seeks to vindicate the right of Petitioner, Talib W. Abdur-Rashid, under the Freedom of Information Law ("FOIL")¹ to have access to records created and held by the New York Police Department ("NYPD"). On October 23, 2012, Talib W. Abdur-Rashid submitted a FOIL request ("Request") to the NYPD requesting records relating to NYPD surveillance and possible investigation of him, as well as surveillance and possible investigation of the Mosque of Islamic Brotherhood where he serves as Imam. Recognizing the sensitivity of the requested records, Petitioner made clear that he 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.

After nearly eight months without providing a firm response, the NYPD denied the request, invoking several FOIL general and boilerplate exemptions to justify withholding all of the requested records from the public. However, as discussed below, these exemptions do not support the NYPD's near blanket denial of the Request. Precedence has made it clear that even when a requested record subject to disclosure has information that is exempted from disclosure, the NYPD must redact the exempt information and produce the requested record. The Court should compel production of the requested documents, as well as reward attorney fees to the Petitioner.

¹ N.Y. Pub. Off. Law §§ 84-90.

STATEMENT OF FACTS

Since 2002, the New York City Police Department (“NYPD”) has engaged in a domestic surveillance program and practice of religious profiling that targeted Muslim individuals, places of worship, businesses, schools, student groups, and other establishments located in and throughout New York, New Jersey and Connecticut. The details of this program were first revealed in a series of Pulitzer Prize winning investigative articles published by the Associated Press (or “AP Reports”).² According to the reports, one staple of the NYPD’s new domestic surveillance program was the widespread placement of informants in Muslim communities without any evidence of wrongdoing.³ The NYPD would recruit informants by targeting certain ethnicities or nationalities, arresting individuals from those ethnicities or nationalities, and subsequently use the arrest to pressure them into becoming informants.⁴

As documented extensively in the NYPD’s own records and in reporting by the Associated Press, NYPD officers and informants have routinely monitored mosques and businesses frequented by Muslims, including restaurants and bookstores.⁵ The NYPD built databases tracking where Muslims lived, shopped, ate, and gathered.⁶ The NYPD paid

² AP’s Probe Into NYPD Intelligence Operations, Associated Press, *available at* <http://www.ap.org/Index/AP-In-The-News/NYPD> (last accessed October 9, 2013).

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-covertlyin-Muslim-areas>.

⁴ *Id.*

⁵ *Id.*

⁶ Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, Associated Press, October 11, 2011, *available at* <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-infiltration-of-colleges-raises-privacy-fears>.

infiltrators to surveil people, through photos and notes, simply because they are Muslims.⁷ The NYPD further instructed officers and informants to spy on and record the First Amendment-protected speech and activities of Muslim religious and community leaders and members, including students and activists.⁸

Particularly egregious was the NYPD's monitoring of mosques frequented by Muslims. Video surveillance cameras were mounted outside mosques, recording every person who entered to worship.⁹ Maps created and maintained by the NYPD identified not only the location of mosques, but the "ethnic orientation, leadership and group affiliations," as well.¹⁰ Using these techniques, in addition to the information provided by rakers and informants, the NYPD identified fifty-three "mosques of concern" in which the Department placed additional informants and plainclothes officers¹¹. Ultimately, the NYPD surveillance officers intended to place an NYPD source in every mosque within a 250-mile radius of New York City and succeeded in placing a source in many of them.¹²

Talib W. Abdur-Rashid is the Imam of the Mosque of Islamic Brotherhood Inc. The mosque, located in Harlem, New York City, is the lineal descendant of the Muslim Mosque Inc., founded by Malcolm X in 1964. According to NYPD Intelligence Reports uncovered by the

⁷ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, *supra* note 3.

⁸ *Id.*

⁹ Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press, February 23, 2012, *available at* <http://www.ap.org/Content/AP-In-The-News/2012/Newark-mayor-seeks-probe-of-NYPD-Muslim-spying>.

¹⁰ Adam Goldman & Matt Apuzzo, *Documents Show NY Police Watched Devout Muslims*, Associated Press, September 6, 2011, *available at* <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims>.

¹¹ *Id.*

¹² *Id.*

Associated Press, the Mosque of Islamic Brotherhood was particularly targeted for surveillance in the days following the Sean Bell verdict in 2008.¹³ The NYPD instructed its sources to be alert to any rhetoric regarding the verdict, especially in the mosques that had been flagged, which included the Mosque of Islamic Brotherhood.¹⁴

Born a Baptist in Greensboro, North Carolina in 1951, Mr. Abdur-Rashid is an African-American. He was raised in the South Bronx during the 1960s, where he became Lutheran. He was an active member of the Lutheran Church until the age of 18 years. Mr. Abdur-Rashid became a Muslim in 1971 at the age of 20 years. Talib W. Abdur-Rashid is also the President of the Islamic Leadership Council of Metropolitan New York. Nationally, he serves as the Vice President of the Muslim Alliance in North America. Mr. Abdur-Rashid has no history of criminal activities, and has been a highly regarded civil rights leader in the community for several years. Mr. Abdur-Rashid has long since been involved in safeguarding constitutional rights, a noble effort that does not provide any basis or justification for surveilling by the NYPD. He has been surveilled only because he is a Muslim African-American leader who has spoken out against the NYPD's profiling of Muslims and non-Muslims.

PROCEDURAL BACKGROUND

Petitioner Talib W. Abdur-Rashid submitted the Request on October 23, 2012 to the FOIL Unit of the NYPD. The Request consisted of 15 requests, which seek information regarding records pertaining to the NYPD's surveillance of Imam Talib W. Abdur-Rashid as well as surveillance and possible investigations into the Mosque of Islamic Brotherhood for which

¹³ See Intelligence Division Report, Deputy Commissioner's Briefing, April 25, 2008, *available at* <http://hosted.ap.org/specials/interactives/documents/nypd/dci-briefing-04252008.pdf>.

¹⁴ *Id.*

Mr. Abdur-Rashid serves as Imam. Petitioner made it clear that he did not oppose receiving redacted records to the extent that any information in the requested records fell within a statutory exemption by requesting release of “all reasonably segregable nonexempt portions of the documents” in the FOIL request.

The NYPD acknowledged receipt of the Request on November 13, 2012, and estimated a date that it would provide a response by. On December 12, 2012, the NYPD unilaterally revised and extended this estimate to February 13, 2013. On February 13, 2013, the NYPD again unilaterally revised and extended this estimate to March 19, 2013.

After nearly eight months, the NYPD denied the Request in a letter dated June 28, 2013. The NYPD did not 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.¹⁵

Petitioner timely appealed. On July 19, 2013, Petitioner submitted a letter to Records Access Appeals Officer Jonathan David appealing the June 28, 2013 denial of the Request.¹⁶ The NYPD denied the appeal in a letter dated August 7, 2013. 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. The NYPD's response also failed to acknowledge the

¹⁵ More specifically, according to the NYPD, FOIL does not require disclosure of the requested records because the Request (1) did not include a certification of identity of Petitioner and was not accompanied by the written statement of Talib W. Abdur-Rashid consenting to disclosure to the Firm, as his attorney; (2) failed to “reasonably describe” the records sought in a manner that would evoke a path that could lead to the retrieval of responsive records with reasonable efforts; (3) sought records that, if disclosed, would result in an unwarranted invasion of privacy; (4) sought records that are exempt pursuant to the statutory, privacy, law enforcement, public safety, and inter-agency materials exemption.

¹⁶ 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, Petitioner reiterated that he did not oppose receiving redacted records.

feasibility of producing redacted records to the extent that any information in the requested records fell within a statutory exemption.

Petitioner timely commenced this Article 78 proceeding to force the NYPD to comply with its obligations under FOIL and provide Petitioner with documents responsive to the Request. N.Y. C.P.L.R. 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").

ARGUMENT

I. The Freedom Of Information Law Establishes a Broad Right of Public Access to Agency Records, That Can Be Enforced Through Article 78 Of The CPLR.

New York's Freedom of Information Law mandates that all records of a public agency are presumptively available for inspection. *See* N.Y. Pub. Off. Law §§ 84, 87(2) ("...it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible... The people's right to know the process of government decision making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.") The New York Court of Appeals has upheld this law, repeatedly holding 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*, 67 N.Y.2d 562, 496 N.E.2d 665 (1986); *Gould v. NYC Police Dep't*, 653 N.Y.S.2d 54, 57 (1996). 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); *NY Civil*

Liberties Union v. NYC 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 "). Further, "blanket exemptions for particular types of documents are inimical to FOIL's open policy of government." *Gould*, 653 N.Y.S.2d at 57. Therefore, under NY court precedent, Petitioner Abdur-Rashid has a clear right under FOIL to the records sought in the Request.

II. The Records Sought By Petitioner Were "Reasonably Described."

The availability of public records for inspection as mandated by the NY Public Officers Law is restricted only by the requirement that the records sought be described in a reasonable manner so that an appropriate search may be made by the agency. *See* N.Y. Pub. Off. Law § 89(3); *see also Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249, 501 N.E.2d 1 (1986), holding that to support a denial because records are not reasonably described, an agency has to establish that "the descriptions [are] insufficient for purposes of locating and identifying the documents sought," *id.* at 249, and that the records sought do not fall within any statutory exemption of FOIL (*see discussion below*). Further, according to N.Y. Pub. Off. Law § 89(3)(a), an agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. When an agency has the ability to retrieve

or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.

New York courts have previously held that the threshold for “reasonable” description of documents requested is not very stringent. In *Irwin v. Onondaga County Resource Recovery Agency*, a petitioner made a FOIL request of a public waste agency for any records containing an image of the petitioner that the agency had used in its marketing materials. Though the agency had nearly 29,000 photographs on its system that it had to review for the FOIL request, the Appellate Division of the Fourth Department held that the petitioner’s description of the photograph sought was reasonable enough to enable the agency to locate the requested records. *See Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314 (2010); *see also Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, at 249, holding that a request for disclosure should not be denied merely because the request is voluminous. In contrast, in *Roque v. Kings County District Attorney’s Office*, the Court held that the petitioner, seeking to compel disclosure of records of criminal convictions and pending criminal cases for 10 particular witnesses who testified at his criminal trial, failed to reasonably describe documents requested because he did not provide dates of birth, addresses, or other identifiable information for persons to distinguish their records from records of other people. *See Roque v. Kings County District Attorney’s Office*, 12 A.D.3d 374 (N.Y. 2004). *See also M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75 (1984), holding that the fact a request is so broad that it may even require thousands of records is not enough reason to deny the request – rather, the respondent must show that the descriptions of the record were insufficient for purposes of locating and identifying the documents sought.

Here, NYPD claims that the documents requested in the FOIL Request were not reasonably described, as required by POL § 89(3)(a). The NYPD claims that Mr. Abdur-Rashid's FOIL Request for all records related to any investigation or surveillance of him, and for all records related to him, is an unreasonable description of records because it would not lead to the retrieval of responsive records with reasonable efforts. Additionally, the NYPD notes that the failure of Petitioner to attach time periods to three of his seven requests renders the requests unreasonable. However, as noted above, courts have held that the sheer volume of a request is not sufficient reason for its denial. Here, where Petitioner has clearly identified himself, he has met the statutory threshold for the "reasonable" description of records sought.

The NYPD also claims Petitioner's request is unreasonable because it does not identify any specific NYPD Units involved in purported investigations, or the types of activity investigated. However, this too is an invalid argument. First, the language of FOIL does not require such detail in a request – it requires only "a written request for a record *reasonably* described." N.Y. Pub. Off. Law § 89(3)(a) (emphasis added). Second, the NYPD's claim that Petitioner's Request is unreasonably described because it fails to specify NYPD Units and the activity investigated is without merit. Several media outlets have identified exactly which NYPD units were authorized to surveil Muslims in and around the New York City metro area (*see* AP reports) – surely the NYPD has knowledge of these units and their mandate as well. Additionally, requiring Petitioner to specify the crime or type of crime that may have been investigated is ludicrous – the whole purpose of requesting these records under FOIL from the NYPD is to determine just what exactly the agency was surveilling, and the extent of the surveillance. The NYPD has deliberately shrouded its surveillance program in extreme secrecy,

and Petitioner cannot be expected to know the particularities of the process and which types of activities are investigated.

As evidenced above, Petitioner Abdur-Rashid's FOIL Request reasonably described the records sought in a manner consistent with NY courts' previous rulings. *See Irwin*, 72 A.D.3d 314; *see also Matter of Konigsberg*, 68 N.Y.2d 245, at 249; *see also M. Farbman & Sons, Inc.*, 62 N.Y.2d 75. It should be noted that the attorney of record has also submitted other FOIL requests to the NYPD using the identical form used in this instance, and those requests have been processed without mention of any defect in the proof of identity provided. Additionally, Mr. Abdur-Rashid's Request was both subject specific and person specific, and did not seek disclosure of the NYPD's entire policy on Muslim surveillance – the NYPD's denial of the request was therefore unwarranted and invalid.

III. The NYPD Improperly Denied The Request in its Entirety.

Having established Petitioner Abdur-Rashid has a presumptive entitlement to review the requested records, and that he reasonably described his request, 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 shifts to the NYPD. *Gould*, 653 N.Y.S.2d at 57.

NY Courts have repeatedly held that the FOIL exemptions are to be narrowly construed, and the burden rests on the agency to demonstrate that the material properly falls within the stated exemption. Further, "only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld". *Gould*, 653 N.Y.S.2d at 57. An agency that seeks to withhold documents, pursuant to one or another of the statutory exemptions, must make a particularized showing that each such document falls within that exemption.

A conclusory contention that an entire category of documents is exempt will not suffice. See *Matter of Washington Post Co. v. New York State Ins. Dep't.*, 61 N.Y.2d 557, 567, 463 N.E.2d 604 (1984); *Matter of Buffalo Broadcasting Co., Inc. v. New York State Dep't. of Correctional Servs.*, 155 A.D.2d 106, 110, 552 N.Y.S.2d 712 (3rd Dep't 1990). Where a document contains both confidential and non-confidential material, a court may, consistent with FOIL, order its disclosure subject to a redaction of personal information necessary to protect a person's safety and/or prevent an unwarranted invasion of personal privacy. See, e.g., *Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 464 (2007); *Beyah v. Goord*, 309 A.D.2d 1049, 1050–53 (3rd Dept.2003). See also *Matter of New York Civ. Liberties Union v. New York City Police Dep't.*, 866 N.Y.S.2d 93 (2008), holding that NYPD's denial of an organization's FOIL request for information on the NYPD's stop and frisk program on the grounds that it would endanger the safety of law enforcement and the public was invalid – with proper redaction of personal information concerning the officers who made the stop and/or the individuals stopped, the records were clearly subject to FOIL disclosure and the NYPD had not met its burden to show that the records fell squarely within the claimed exemptions. Alternatively, if appropriate and necessary to determine whether the withheld documents fall entirely within the scope of the asserted exceptions, the court can conduct an in camera inspection of representative documents and order the disclosure of all non-exempt material, appropriately redacted. *Gould*, 653 N.Y.S.2d at 275.

The NYPD cannot meet its burden to show that all of the requested records are completely exempt from disclosure in this case. The NYPD offered a bare recitation of six exemptions in its denial of Petitioner's request, and failed to provide any meaningful explanation, much less a particularized and specific justification, as to why any of them were

applicable to Petitioner's Request for documents concerning himself. Further, the NYPD did not address the feasibility of turning over the requested documents with a redaction of sensitive material. *See Canty v. Office of Counsel*, 913 N.Y.S.2d 528 (2010), holding that accident reports of certain correction officers who were injured during a prison riot had to be produced under FOIL, but could be redacted to protect the confidentiality of the personal information of the officers; *see also Matter of New York Civ. Liberties Union* 866 N.Y.S.2d 93.

IV. The Exemptions Cited by the NYPD Do Not Apply.

a. The Disclosure Would Not Constitute an Unwarranted Invasion of Privacy.

Without offering any explanation as to how the disclosure of information would constitute invasion of privacy, the NYPD contends that the Request is exempt under N.Y. Pub. Off. Law § 87(2)(b). Records that, if disclosed, would constitute an unwarranted invasion of privacy under the provisions of N.Y. Pub. Off. Law §§ 87(2)(b), 89(2) are exempt from disclosure. "[A]n unwarranted invasion of personal privacy includes, but shall not be limited to six specific kinds of disclosure." *Matter of New York Times Co. v. City of NY Fire Dep't*, 4 N.Y.3d 477, 485 (2005). 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." N.Y. Pub. Off. Law § 89(2)

As a threshold matter, the NYPD fails to identify with particularity which, if any, of these categories the requested records fall into.

Second, even if disclosure of some portions of the requested records did implicate any personal privacy interests, the Court must "balance the privacy interests at stake against the public interest in disclosure of the information." *Matter of New York Times 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. Certainly, there is a vital public interest in particular individuals knowing more about what intelligence is being gathered on them, and the extent to which they are surveilled.

Importantly, press reports indicate that the NYPD's counterterrorism investigation of Muslim individuals has been premised solely on their ethnic and religious identity. Such methods may be illegal and unconstitutional, and in direct violation of the surveillees' religious

freedom and equal protection rights. As such, any privacy interests at stake are outweighed by the public interest in disclosure of the information.

In the event an agency can demonstrate that an exemption applies to some material, it must redact that information and still release the remainder. *See, e.g., Beyah*, 309 A.D.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). *See also Canty v. Office of Counsel*, 913 N.Y.S.2d 528 (2010), holding that accident reports of certain correction officers who were injured during a prison riot had to be produced under FOIL, but could be redacted to protect the confidentiality of the personal information of the officers. *See also Matter of New York Civ. Liberties Union*, 866 N.Y.S.2d 93.

b. The Law Enforcement Exemption Under N.Y. Pub. Off. Law § 87(2)(e) Does Not Apply.

In addition to its categorical denial of the Request, the NYPD denied specific requests based on the law enforcement exemption of § 87(2)(e), which exempts from disclosure certain records that "are compiled for law enforcement purposes." However, the law enforcement exemption provides no support for the NYPD's near categorical denial of the Request. N.Y. Pub. Off. Law § 87(2)(e) exempts from disclosure records which are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings,
- ii. deprive a person of a right to a fair trial or impartial adjudication,
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation, or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

As discussed more specifically below, the NYPD has failed to show that the petition should be dismissed on the basis of N.Y. Pub. Off. Law § 87(2)(e).

i. The Disclosure Would Not Interfere with Any Ongoing Law Enforcement Investigation.

The NYPD contends that N.Y. Pub. Off. Law § 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 such a contention is false. N.Y. Pub. Off. Law § 87(2)(e)(i) applies only to ongoing criminal investigations. *See, e.g., Legal Aid Society v. NYC 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"). New York courts have held that N.Y. Pub. Off. Law § 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. NY C. Police Dep 't*, 300 A.D.2d 17, 18 (N.Y. App. Div. 2002); *see also 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 complaint have already been responded to, have been the subject of inquiry, have resulted in no further action, 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.

The Court of Appeals of New York has further held that generic determinations of likely interference with a criminal investigation are not sufficient for withholding documents. Specifically, "not...every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents." *Matter of Lesher v Hynes*, 19 N.Y.3d 57, 67 (2012). Further, the Court of Appeals has made clear that "the agency must...fulfill its burden under N.Y. Pub. Off. Law § 89(4)(b) to articulate a factual basis for the exemption." *Id.* See also *Loevy & Loevy v New York City Police Dep't*, 957 N.Y.S.2d 628, 632 (2013). In *Loevy*, the NYPD denied the petitioner's FOIL request based on a blanket exemption under N.Y. Pub. Off. Law § 87(2)(e)(i). The *Loevy* Court noted that despite filing an affidavit to prove there was an ongoing investigation, the NYPD had failed to specify any generic harm that would be caused by production of the documents, and required the NYPD to produce the requested documents. *Id.* at 3-4.

Importantly, N.Y. Pub. Off. Law § 87(2)(e)(i) does not give the NYPD *carte blanche* to withhold all documents concerning current investigations. As noted above, if a responsive record contains both exempt information and non-exempt information relating to current investigations, the NYPD must produce the responsive records with the exempt information redacted. See Point II above.

Though the NYPD has failed to offer any affidavit to certify that a criminal investigation of Petitioner Abdur-Rashid existed, it can be presumed that, if such an investigation did exist, it failed to merit further action, as no such action was taken by the NYPD. In addition, Mr. Abdur-Rashid has never been aware of any criminal investigation against him unless his crime was

safeguarding constitutional rights as a well-respected Muslim and African-American civil rights advocate in New York City. Because N.Y. Pub. Off. Law § 87(2)(e)(i) does not apply to completed investigations in which no further action is required, the responsive records must be released, and the NYPD cannot claim a N.Y. Pub. Off. Law § 87(2)(e)(i) exemption. Even if the investigation were ongoing, however, the NYPD would be required to redact any sensitive information from the records that could adversely impact the investigation, and publish the redacted records.

ii. There Would be No Deprivation of the Right To Fair Trial.

The NYPD maintains that N.Y. Pub. Off. Law § 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 here, but such is not the case. As with § 87(2)(e)(i), § 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"). Accordingly, the NYPD must release records of completed investigations that did not find any wrongdoing. Without evidence of wrongdoing, there will be no trial or adjudication in those cases, and subsequently no potential to "deprive a person of a right to a fair trial or impartial adjudication."

Here, the NYPD cannot claim a N.Y. Pub. Off. Law § 87(2)(e)(ii) exemption. Because no formal charges were brought against Petitioner Abdur-Rashid following the NYPD's surveillance of him, it can be presumed that there will be no trial or adjudication. As such, the responsive records should be produced. In the event that the investigation of Petitioner Abdur-

Rashid 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.

iii. The Disclosure Would Not Reveal Confidential Sources.

The NYPD further contends that N.Y. Pub. Off. Law § 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 Petitioner's Request. First, the NYPD's contention is invalid because Petitioner's Request does not demand any identification of individuals or confidential sources except for his information. It merely requests publication of records relating to the surveillance of Petitioner. Secondly, even if the NYPD were to establish that the records contained confidential information, any such information can be redacted from the responsive records. *Data Tree LLC v Romaine*, 9 N.Y.3d 454, 464 (2007); *Johnson v New York City Police Dep't*, 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 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 N.Y. Pub. Off. Law § 87(2)(e)).

iv. The Disclosure Would Not Reveal Non-Routine Criminal Investigative Techniques.

The NYPD claims Petitioner's Request is exempted pursuant to N.Y. Pub. Off. Law § 87(2)(e)(iv), which applies to information that would "reveal criminal investigative techniques or procedures, except routine techniques or procedures."

The NYPD's claim is wholly inaccurate. First, the requested records do not "fall squarely within the ambit" of N.Y. Pub. Off. Law § 87(2)(e)(iv) because these requests largely do not seek details about investigative techniques and procedures. The Request simply seeks intelligence gathered specifically on Petitioner Abdur-Rashid. *See* FOIL Request. In the event any 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 v. Lefkowitz*, 419 N.Y.S.2d 467, 462 (1979) (ordering disclosure of a manual created to instruct investigator regarding nursing home fraud, with specialized techniques subject to law enforcement exemption redacted).

Second, certainly effective law enforcement demands that violators of the law not be apprised of the non-routine procedures by which an agency obtains its information. However beneficial its thrust, the purpose of FOIL is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution. Indicative, but not necessarily dispositive, of whether investigative techniques are non-routine 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. *Fink v. Lefkowitz*, 419 N.Y.S.2d 467. Here, however, disclosure of the requested documents would not provide any roadmap of investigative decisions or techniques that could undermine future investigations. The investigative decisions and techniques have largely been revealed already (*see* AP Reports, *supra* note 2, and Statement of Facts, *supra*). Further, Mr. Abdur-Rashid does not intend to evade any detection. Upon information and belief, Mr. Abdur-Rashid has been surveilled based on his religion and religious activities conducted in his capacity as an Imam. He has also been

surveilled because he has criticized the NYPD's illegal stop and frisk policies, and its surveillance of Muslims solely on the basis of their religion. Mr. Abdur-Rashid's activities have always been legal and noble, and do not provide any basis for surveillance or investigation. Petitioner's Request simply seeks disclosure of what information regarding him was actually compiled through such surveillance, and does not seek information regarding techniques used to carry out said surveillance.

c. The Disclosure Would Not Endanger the Life or Safety of Any Person.

N.Y. Pub. Off. Law § 87(2)(f) exempts responsive records from disclosure that, "if disclosed could endanger the life or safety of any person." Again, the NYPD's blanket refusal to produce responsive documents under this exemption is invalid.

For this safety exemption to apply, the NYPD must demonstrate at the least "a possibility of endangerment". *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." *The New York Times Co. v. City of New York Police Dep't*, 116449/10, 2011 WL 5295044 (N.Y. Sup. Ct. Oct. 3, 2011). To preclude the disclosure of government records under the Freedom of Information Law (FOIL) exemption for records compiled for law enforcement purposes which would identify a confidential source, the agency must show that the circumstances give rise to the clear inference that a promise of anonymity was assumed. N.Y. Pub. Off. Law § 87(2)(e)(iii). 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).

Assuming that the undercover officers and informants in the NYPD's surveillance programs were given promises of anonymity, the NYPD's concerns about public safety can be

addressed by appropriately redacting any information revealing the identities of such individuals from the documents. Petitioner's Request seeks to uncover the substantive intelligence the NYPD has gathered on him. Details regarding who provided the intelligence and how is not essential to the Request. *Matter of New York Civ. Liberties Union*, 866 N.Y.S.2d 93, (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 N.Y. Pub. Off. Law § 87(2)(e)).

With proper redaction of personal information concerning the officers who surveilled Mr. Abdur-Rashid, the records are clearly subject to FOIL disclosure and the NYPD has not met its burden to show that the database falls squarely within the claimed exemptions. *See Matter of New York Civ. Liberties Union*, 866 N.Y.S.2d 93.

d. The Disclosure Would Not Reveal Documents Used to Form Agency Decisions.

The NYPD claims Petitioner's Request is further exempt under N.Y. Pub. Off. Law § 87(2)(g). This exemption allows agencies to withhold certain limited internal documents that are used as the basis of forming agency decisions. Such documents, as per the exemption, include: "(i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; [or] (iii) final agency policy or determinations." N.Y. Pub. Off. Law § 87(2)(g). The NYPD contends that this exemption applies to the Request, but it has failed to show that the requested records "fall squarely within the ambit" of this exemption. *Gould*, 653 N.Y.S.2d at 57.

The inter-agency exemption was designed to protect internal government consultations and deliberations. *Gould*, 653 N.Y.S.2d. 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.* Here, the NYPD has failed to explain how Petitioner's Request implicates "opinions, ideas, or advice exchanged as part of the deliberative process." The Request at issue simply seeks information the NYPD has gathered on Petitioner as a result of its surveillance. It does not seek the policies or procedures of the NYPD's surveillance program, nor does it seek any information regarding the theories that may or may not have been formed as a result of the investigation of Petitioner.

Even if the records responsive to Petitioner's Request include opinions exchanged as part of the deliberative process, they are not exempt entirely. As per the court's ruling in *Gould*, the NYPD must still 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."). If a record contains exempt opinions and non-exempt factual data, the NYPD must produce the record with the exempt information redacted. *Matter of New York Times Co.*, 4 N.Y.3d at 487 (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"). Here, the NYPD could not explain how the release of information on Mr. Abdur-Rashid in the form of non-exempt factual data would reveal any opinions or deliberations.

V. **Mr. Abdur-Rashid is Entitled to Attorneys Fees and Costs.**

Mr. Abdur-Rashid requests attorneys' fees and reasonable litigation costs under FOIL. N.Y. Pub. Off. Law § 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.¹⁷

Thus, the only showing that Petitioner 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." N.Y. Pub. Off. Law § 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.

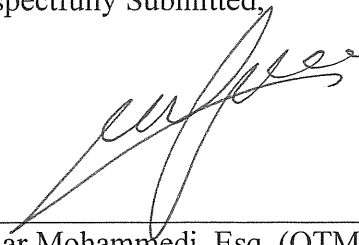
If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material. *See Gould*, 653 N.Y.S.2d. *See also Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133.

CONCLUSION

For all the foregoing reasons, Petitioner, Talib W. Abdur-Rashid, respectfully requests that the Court grant his petition. In the alternative, Petitioner respectfully requests 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 Petitioner, as well as the need for redactions.

¹⁷ POL § 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.

Respectfully Submitted,



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