

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART _____

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In the Matter of the Application of

**SURVEILLANCE TECHNOLOGY
OVERSIGHT PROJECT,**

Petitioner,

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

N.Y. Sup. Ct.
Index No.: 150127 /20

-against-

**VERIFIED ARTICLE 78
PETITION**

**METROPOLITAN TRANSPORTATION
AUTHORITY, NEW YORK CITY TRANSIT**

Respondent.

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Petitioner Surveillance Technology Oversight Project, Inc. (“S.T.O.P.”), by and through its attorneys, Weil, Gotshal & Manges LLP, petitions and alleges as follows:

INTRODUCTION

Petitioner S.T.O.P. is a public interest, advocacy, and legal services organization that specializes in addressing state and local officials’ growing use of surveillance technologies. To end discriminatory surveillance, S.T.O.P challenges agency misconduct and crafts privacy-protective policies. S.T.O.P.’s staff has broad experience in anti-surveillance advocacy and public education.

On April 19, 2019, an analyst with the New York Times “tweeted” (*i.e.*, posted on her Twitter social media account) a photograph of a video monitor in the Times Square subway station that appeared to be using facial recognition software capable of recognizing or identifying individuals entering and exiting the subway station. The words “RECORDING IN

PROGRESS,” “WISENET,” and “Please pay your fare – NYCT” appeared on the screen. On April 20, 2019, a spokesperson with Metropolitan Transit Authority Headquarters (“MTA HQ”) publicly denied suggestions that MTA HQ was operating facial recognition-enabled cameras in the subway. The spokesperson stated that the system was merely a decoy to deter fare evasion.¹

In an attempt to confirm MTA HQ’s explanation and to provide information to the public about potentially sensitive personal data being collected by a government agency, S.T.O.P. submitted Freedom of Information Law (“FOIL”) requests to MTA HQ and to MTA New York City Transit (“NYCT”) on April 22, 2019 seeking documents and communications relating to the alleged facial recognition software being used by MTA HQ, including communications with the provider of the WISENET technology, Hanwha Techwin America. Specifically, S.T.O.P. requested:

(1) “records of any and all contracts, memos, audits, reports, and communications (including emails) from 1/1/14 through 4/22/19 between the Metropolitan Transportation Authority, New York City Transit and Hanwha Techwin America”; and

(2) “records of any and all instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc. from 1/1/14 through 4/22/19 in regards to the use of any product provided by Hanwha Techwin America, including, but not limited to WISENET.”

MTA HQ eventually responded that it had no such records and directed S.T.O.P. to NYCT. NYCT responded that the request “fell into the category that usually takes 4 Months to complete” and that S.T.O.P. could “expect that [the agency’s] response should be completed by August 29, 2019.” On June 18, 2019, S.T.O.P.’s counsel filed an administrative appeal arguing, among other things, that NYCT’s four-month time frame for complying with S.T.O.P.’s request was unreasonable and constituted a constructive denial of the requests. NYCT failed to respond

¹ See Adi Robertson, *NYC subway denies using ‘real-time face recognition screens’ in Times Square*, The Verge (Apr. 19, 2019), <https://www.theverge.com/2019/4/19/18507552/mta-nyc-subway-times-square-fare-evasion-cameras-facial-recognition>.

to that administrative appeal. Prior to filing this petition, S.T.O.P.'s counsel left a voicemail for, and also sent an email to, NYCT's FOIL officer in what proved to be a futile last-ditch effort to obtain a response before commencing this action.

To date, some eight months after S.T.O.P. filed its FOIL request and nearly four months after NYCT's stated target date for compliance, S.T.O.P. has received no substantive response to its FOIL requests from NYCT—not even an explanation for missing its self-imposed deadline—let alone any responsive documents.

FOIL, and the public oversight of government that it enables, is a dead letter if, as seems to have occurred here, government agencies do not take its requirements seriously. NYCT's unexplained constructive denial of S.T.O.P.'s FOIL request—its apparent stonewalling, in dereliction of its FOIL obligations—is a clear violation of FOIL. Accordingly, the Court should order NYCT to produce any responsive documents promptly and to pay S.T.O.P. its reasonable attorneys' fees incurred in preparing this Petition.

RELIEF SOUGHT

1. S.T.O.P., brings this proceeding pursuant to Article 78 of the CPLR requesting that the Court: (1) direct Respondent to provide S.T.O.P. with documents responsive to its April 22, 2019 FOIL requests; (2) award S.T.O.P. its reasonable attorneys' fees in an amount to be determined at the conclusion of this proceeding; and (3) grant S.T.O.P. such other and further relief as this Court may deem just and proper.

PARTIES

2. S.T.O.P. is a non-profit advocacy organization and legal services provider that litigates and advocates for privacy and fights excessive local and state surveillance. S.T.O.P.

is hosted by the Urban Justice Center. S.T.O.P.'s office is located at 40 Rector Street 9th Floor, New York, New York 10006.

3. Respondent NYCT is a New York public agency that operates public transportation in New York City. Part of the Metropolitan Transportation Authority, the busiest and largest transit system in North America, NYCT operates the New York City Subway, Staten Island Railway, and MTA Regional Bus Operations. NYCT is located at 2 Broadway, New York, New York 10004.

JURISDICTION

4. This Court has jurisdiction under Section 7801 et seq. of the CPLR to review administrative decisions made by NYCT.

VENUE

5. Venue lies in New York County pursuant to CPLR §§ 506(b) and 7804(b) because it is brought within the judicial district where the Respondent NYCT made the determination complained of and where NYCT's principal office is located.

STATEMENT OF FACTS

6. On April 22, 2019, pursuant to New York's Freedom of Information Law, Public Officers Law §§ 84 to 99, Albert Fox Cahn, Executive Director of S.T.O.P., submitted to both MTA HQ and NYCT requests for:

(1) "records of any and all contracts, memos, audits, reports, and communications (including emails) from 1/1/14 through 4/22/19 between the Metropolitan Transportation Authority, New York City Transit and Hanwha Techwin America"; and

(2) "records of any and all instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc. from 1/1/14 through 4/22/19 in regards to the use of any product provided by Hanwha Techwin America, including, but not limited to WISENET." *See* Affirmation of Christopher R. Dyess, dated December 20, 2019 ("Dyess Aff."), Ex. A.

7. By letter dated April 29, 2019, Richard Harrington, NYCT's Deputy FOIL Officer, informed Mr. Cahn that his request "[fell] into the category that usually takes 4 Months to complete" and that he could "expect that [the agency's] response should be completed by 08/29/2019." The letter also stated that the agency would notify Mr. Cahn if it could not "provide . . . responsive records within the aforementioned time." *Id.* Ex. B.

8. In addition, on April 30, 2019, Mr. Harrington emailed Mr. Cahn acknowledging receipt of the FOIL Request (labeled #24047 in the subject line) and advised that "should you have any questions or concerns, please do not hesitate to contact me as soonest. Thank you." *Id.* Ex. C. This was the last communication S.T.O.P. has received on this matter from Mr. Harrington or anyone else at NYCT.

9. By an email dated May 1, 2019 to Mr. Cahn, Ann Cutler, Paralegal and FOIL Officer for MTA HQ, acknowledged receipt of S.T.O.P.'s April 22, 2019 FOIL request to MTA HQ (which was identical to its request to NYCT) and stated that the agency would "review [its] files to identify responsive records that can be disclosed pursuant to FOIL" and that it "anticipate[d] being able to reply within thirty (30) business days." *Id.* Ex. D.

10. On June 18, 2019, having received no substantive response from NYCT or MTA HQ, Anthony J. Zangrillo, an attorney with Weil, Gotshal & Manges LLP, S.T.O.P.'s outside counsel in this matter, submitted letters appealing NYCT's April 29, 2019 response and MTA HQ's May 1, 2019 response on the ground that both agencies had constructively denied S.T.O.P.'s FOIL requests without justification. *Id.* Ex. E.

11. On June 26, 2019, Ms. Cutler sent Mr. Cahn an email in which she stated that MTA HQ did not have responsive records and directed Mr. Cahn to submit a FOIL request to

NYCT—which Mr. Cahn had already done. *Id.* Ex. F. MTA HQ thereby suggested that NYCT would have responsive records.

12. On June 27, 2019, Harris Berenson, Deputy General Counsel for MTA HQ, stated in an email to S.T.O.P.’s counsel that MTA HQ’s June 26, 2019 response confirmed that “no further action by MTA HQ” was necessary and that the FOIL appeal was closed. *Id.* Ex. G.

13. In an effort to avoid the need for litigation, on November 15, 2019, Christopher Dyess of Weil, Gotshal & Manges LLP sent a follow-up email to Mr. Harrington, the FOIL officer, asking for “written confirmation as to whether MTA, NYCT has responsive documents, whether it intends to produce them, and, if so, when it expects to do so” within ten (10) business days (i.e., by November 29, 2019). *Id.* Ex. H. Mr. Harrington did not respond.

14. On December 3, 2019, Mr. Dyess followed up on his November 15 email by calling Mr. Harrington and leaving a detailed voicemail message requesting a return call. Mr. Harrington did not respond.

ARGUMENT

RESPONDENT VIOLATED FOIL BY FAILING TO RESPOND SUBSTANTIVELY TO S.T.O.P.’S FOIL REQUEST

A. The Purpose and Requirements of FOIL

15. The purpose of FOIL is to ensure transparency in government so that the public has the information necessary to detect and deter abusive government practices. *See, e.g., Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (noting that FOIL “can be a remarkably effective device in exposing waste, negligence and abuses on the part of the government; in short, ‘to hold the governors accountable to the governed’”) (citation omitted). FOIL

“proceeds under the premise that the public is vested with an inherent right to know and that office secrecy is anathematic to our form of government.” *Fink*, 47 N.Y.2d at 571.

16. Under FOIL “[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of [several specific exemptions].” *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274 (1996); *see also Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575 (1980) (“In the absence of specific statutory protection for the requested material, [FOIL] compels disclosure, not concealment.”).

17. An agency must respond to a FOIL request within “five business days of the receipt of a written request for a record reasonably described.” Public Officers Law § 89(3)(a). The agency must either “make such record available, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.” *Id.*; *see also Abdur-Rashid v. New York City Police Dept.*, 31 N.Y.3d 217, 232 (2018) (identifying § 89(3)(a)’s 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 the request).

18. “If an agency determines to grant a request, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date

certain within a reasonable period, when the request will be granted.” Public Officers Law § 89(3)(a).

19. The court “may” assess reasonable attorney’s fees and other litigation costs reasonably incurred by a substantially prevailing petitioner in cases where the agency “failed to respond to a request or appeal within the statutory time.” Public Officers Law § 89(4)(c). The court “shall” assess reasonable attorney’s fees and other litigation costs reasonably incurred by a substantially prevailing petitioner where the court finds that the agency had “no reasonable basis for denying access.” *Id.*

B. Respondent’s Failure to Comply with FOIL

20. Although NYCT promptly acknowledged receipt of S.T.O.P.’s FOIL requests, it set an unreasonably long four-month time frame for complying without providing any explanation as to why so much time was needed to respond to S.T.O.P.’s narrowly targeted request. *See Dyess Aff. Ex. B* (stating that the Request “[fell] into the category that usually takes 4 Months to complete”). This failure to explain, except in conclusory fashion, the need to so greatly exceed the statutory twenty business-day response period was by itself a violation of FOIL. *See Public Officers Law § 89(3)(a).*

21. That initial FOIL violation was compounded by NYCT’s failure to respond to S.T.O.P.’s June 18, 2019 administrative appeal or to counsel’s subsequent informal outreach. Administrative appeals serve as a due process safeguard for parties seeking review of an unfavorable judgment. FOIL requires an agency to respond to an administrative appeal within ten (10) business days. Public Officers Law § 89(4). It is now nearly six months since

S.T.O.P. submitted its administrative appeal, yet, as noted, NYCT has failed to even acknowledge receiving it, let alone to respond substantively.

22. NYCT also failed to meet its own August 29, 2019 deadline for completing its compliance with the FOIL requests or to offer an explanation for its dereliction. Indeed, NYCT has yet even to confirm that responsive documents exist, much less (assuming they do, as MTA HQ suggested) attempt to justify withholding them.

23. If NYCT does not have any responsive documents—which seems unlikely—FOIL requires it to certify that no records were found after a diligent search. Public Officers Law § 89(3); *Rattley v. New York City Police Dept.*, 96 N.Y.2d 873, 875 (2001) (holding that when an agency cannot locate the requested records, the Public Officers Law requires the agency to certify that it does not have possession of a requested document or that the document could not be found after diligent search). Unlike in *Rattley*, S.T.O.P. has received no indication from NYCT that it searched for and could not find responsive documents after a diligent search, as it did from MTA HQ.

24. S.T.O.P.’s mission is to “ensure that technological advancements don’t come at the expense of age-old rights.” See <https://www.stopspying.org/our-vision>. It requested the records from NYCT relating to video monitoring in the subway in an effort to ensure that novel and controversial technology is not being used in a discriminatory manner having an adverse impact on New York’s most marginalized communities. This attempt to ascertain whether NYCT’s use of video monitoring comports with civil liberties is an indisputably proper use of FOIL. But the Court need not, and should not, assess the worthiness of S.T.O.P.’s objective in evaluating this Petition. See *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75 (1984) (“Full disclosure by public agencies is,

under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.”). NYCT’s blatant shirking of its FOIL obligations violates the public right of access to the requested records and impairs the public interest S.T.O.P. seeks to advance through its FOIL requests.

**CAUSE OF ACTION: ARTICLE 78 REVIEW OF
LACK OF RESPONSE TO FOIL REQUEST**

25. Petitioner repeats and realleges each and every allegation contained in paragraphs 6 through 24 as if fully set forth herein.

26. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

27. Petitioner has a clear right under Public Officers Law § 87 et seq. to the records requested.

28. Respondent has not produced the information sought by Petitioner’s FOIL requests or offered any explanation for its failure to do so, as FOIL requires.

29. Petitioner has exhausted its administrative remedies and has no other remedy at law.

PRIOR APPLICATION

30. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

31. WHEREFORE, Petitioner respectfully requests that this Court issue an Order:

- a. directing Respondent to provide Petitioner with documents responsive to its April 22, 2019 FOIL request for “records of any and all contracts, memos, audits, reports, and communications (including emails) from 1/1/14 through 4/22/19

between the Metropolitan Transportation Authority, New York City Transit and Hanwha Techwin America”;

- b. directing Respondent to provide Petitioner with documents responsive to its April 22, 2019 FOIL request for “records of any and all instructions, guides, guidelines, directions, rules, information, manuals, operations orders, memoranda, etc. from 1/1/14 through 4/22/19 in regards to the use of any product provided by Hanwha Techwin America, including, but not limited to WISENET”;
- c. awarding reasonable attorneys’ fees in favor of Petitioner and against Respondent in an amount to be determined at the conclusion of this proceedings;² and
- d. (4) granting Petitioner such other and further relief as this Court may deem just and proper.

Dated: New York, New York
January 3, 2020

Respectfully Submitted,

By: 
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² *Legal Aid Soc. v. New York State Dept. of Corrections and Community Supervision*, 105 A.D.3d 1120 (3rd Dep’t 2013) (holding that organization substantially prevailed in proceeding, warranting award of fees and costs)


VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)


Albert Fox Cahn, being duly sworn, deposes and says:

I am the Executive Director of the Surveillance Technology Oversight Project, petitioner in this action. I have reviewed the petition and know the facts set forth therein to be true based on my own knowledge.

Dated: New York, New York
January 2nd, 2020


Albert Fox Cahn

Sworn to and subscribed before me
this 2nd day of January, 2020


Notary Public

MARISSA SOBEL
NOTARY PUBLIC-STATE OF NEW YORK
No. 02SO6376759
Qualified in New York County
My Commission Expires 06-18-2022