

At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 17 day of MARCH, 2015

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

In the Matter of

NEW YORK CIVIL LIBERTIES UNION,
Petitioner,

v.

ERIE COUNTY SHERIFF'S OFFICE,
Respondent,

DECISION and JUDGMENT

INDEX NO. 2014/000206

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

APPEARANCES: JOHN NED LIPSITZ, ESQ., MARIKO HIROSE, ESQ., and
ROBERT HODGSON, ESQ., for Petitioner
ANDREA SCHILLACI, ESQ., for Respondent

PAPERS CONSIDERED: the NOTICE OF PETITION, the VERIFIED PETITION, the
MEMORANDUM OF LAW IN SUPPORT OF VERIFIED
PETITION, and the AFFIRMATION OF MARIKO HIROSE[,
ESQ.] IN SUPPORT OF VERIFIED PETITION, with annexed
exhibits;

the VERIFIED ANSWER TO PETITION;

the AFFIRMATION [of Andrea Schillaci, Esq.] IN OPPOSITION
TO PETITIONER'S APPLICATION FOR ARTICLE 78 RELIEF,
with annexed exhibits, including the untitled affidavit of Bradley S.
Morrison and the untitled affidavit of John W. Greenan;

the MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONER'S APPLICATION FOR RELIEF PURSUANT TO
ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES;

the reply AFFIRMATION OF NATHAN WHISTLER[, ESQ.], with
annexed exhibits;

the reply AFFIRMATION OF Mariko Hirose[, Esq.], with annexed
exhibits;

the REPLY MEMORANDUM OF LAW IN SUPPORT OF

VERIFIED PETITION; and

the unredacted documents submitted for the Court's in camera review under cover letters of February 19 and March 13, 2015.

THE PARTIES AND THE NATURE OF THE PROCEEDING:

Petitioner is the New York Civil Liberties Union. Respondent is the Erie County's Sheriff's Office. By this proceeding, which was brought pursuant to CPLR article 78 in November 2014, petitioner nominally challenges respondent's initial complete denial in July 2014 of petitioner's FOIL request for documents relating to respondent's acquisition and use of a "Stingray" device. As recent circumstances have overtaken the pleadings, however, the proceeding actually seeks judicial review of respondent's subsequent qualified or limited granting of such request in January 2015).

THE BACKGROUND:

The Stingray, which is manufactured by Harris Corporation, a Florida-headquartered electronics firm, is an electronic surveillance device originally developed for military uses but now increasingly in the arsenal of civilian law enforcement agencies. Indeed, the Court is led to believe that use of the device may be an important tool of law enforcement agencies in a wide range of missions that include investigating crimes, apprehending suspects and fugitives, rescuing crime victims, locating missing persons, and assisting citizens in distress.

The Stingray device is a cell site simulator. It and like devices are designed to mimic a cell phone tower in a way that enables the device's user to target and locate cell phones. Typically, before resorting to use of the device, the law enforcement agents will have obtained information that a particular person's cell phone has a particular connection to a certain criminal investigation or public safety issue, and will have inferred that ascertaining the precise location of that cell phone might likewise reveal the location of the subject criminal suspect, victim,

missing person, or person in distress. From the wireless carrier that provides service to that cell phone, the law enforcement officials then typically obtain the phone number and the electronic serial number or identifier that are uniquely assigned to that cell phone and by or through which the wireless carrier typically communicates with that phone, specifically with respect to geo-location. The law enforcement agents might typically also obtain from the wireless carrier the location of the permanent cellular tower or towers with which that phone usually communicates or perhaps most recently has communicated, and they might also learn within what general radius and from which direction that cell phone usually communicates or recently has communicated with such cell phone tower or towers. Where usual or recent communication has been with multiple towers near one another, the likely origination area can be more closely delineated by triangulation.

Then, such information is inputted into the device, which can be transported in an aircraft or vehicle or hand-carried by the law enforcement officer to the area where the cell phone usually is or most recently was used or located. When the device is brought within some range of the cell phone, the device simulates the cell phone tower in such a way that the geo-location signals and other communications that otherwise would have passed between the cell phone and that tower are now diverted to or through the device, i.e., the ersatz tower. By means of range and directionality information displayed on the device's map overlay in real time, the user can approximate the current location of the cell phone and move toward it. As the device is moved closer to the cell phone being tracked, that phone's disclosed location becomes less and less approximate until, eventually, the phone's whereabouts may be relatively pinpointed in a particular public place or behind a particular door.

As the Court understands the workings of the device, the cell phone must be "on," with some battery life remaining, in order to be located and tracked by the device, but a call need

not be in progress. However, as the Court understands things, besides displaying the existence and location of the targeted cell phone in an area, the device simultaneously collects and displays information concerning the existence and location of other cell phones being used nearby on at least that wireless network. Apparently such tracking information can be stored with the help of the device for future review and analysis. Evidently, cell site simulators also can be used to ascertain telephone calling information, such as the time of, the location from which, and the number of the call, and the device apparently allows for storage of that kind of information also for future review and analysis. (The record is not definitive concerning whether cell site simulators in general, and the Stingray or other like products of the Harris Corporation in particular, can be used to monitor the content of cell phone conversations or texts.)

Clearly, even apart from any concerns about the "dragnet" or general search capabilities of the device, its employment by law enforcement officers to acquire information of the foregoing type, even if not especially within the context of a targeted criminal investigation, has implications under the Fourth Amendment and its New York analog, and also under federal or state statutes, such as those set forth in CPL articles 700 and 705, governing the issuance of electronic surveillance warrants and pen register and trap and trace orders, respectively. The United States Justice Department is apparently of the view, as are some other law enforcement agencies, civil liberties advocates, and courts, that at the very least a pen register or trap and trace order must be obtained before a cell site simulator may be used to "ping" and thereby approximate the location of a particular cell phone and certainly before ascertaining any calling information (i.e., apart from the content of communications, the capture of which would require an eavesdrop warrant). Further, it may be the case that, depending on the circumstances (such as the existence or non-existence of exigent circumstances), the probable cause and the warrant requirements of the Fourth Amendment may have to be satisfied before law

enforcement agencies may lawfully engage in real-time mobile tracking of a particular cell phone to an extent that pinpoints the phone's location within a home or other private place.

THE FOIL REQUEST AND THE RESPONSE(S) THERETO:

All of the foregoing is background explaining petitioner's interest in the particular information that it seeks from respondent. That request for documents or public "records" was made pursuant to article 6 of the Public Officers Law, known as the Freedom of Information Law (or FOIL). That request was dated June 16, 2014 and sought eight categories of records, as follows:

- "1. Records regarding the Sheriff's Office's acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar documents. In response to this request, please include records of all contracts, agreements, and communications with Harris Corporation.
2. All requests by the Harris Corporation or any other corporation, or any state or federal agencies, to the Sheriff's Office to keep confidential any aspect of the Sheriff's Office's possession and use of cell site simulators, including any non-disclosure agreements between the Sheriff's Office and the Harris Corporation or any other corporation, or any state or federal agencies, regarding the Sheriff's Office's possession and use of cell site simulators.
3. Policies and guidelines of the Sheriff's Office governing use of cell site simulators, including restrictions on when, where, how, and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.
4. Any communications or agreements between the Sheriff's Office and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of cell site simulators.
5. Any communications, licenses, or agreements between the Sheriff's Office and the Federal Communications Commission or the New York State Public Service Commission concerning use of cell site simulators.
6. Records reflecting the number of investigations in which cell site simulators were used by the Sheriff's Office or in which cell site simulators owned by the Sheriff's Office were used, and the number of those investigations that have resulted in prosecutions.

7. Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used by the Sheriff's Office as part of the underlying investigation or in which cell site simulators owned by the Sheriff's Office were used as part of the underlying investigation.

8. All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by the Sheriff's Office in criminal investigations or authorizing use of cell site simulators owned by the Sheriff's Office, as well as any warrants or orders, denials of warrants or orders, and returns of warrants associated with those applications. If any responsive records are sealed, please provide documents sufficient to identify the court, date, and docket number for ea

By letter dated July 6, 2014, respondent denied the FOIL request in its entirety for the following reasons:

- "1. If disclosed it would result in an unwarranted invasion of personal privacy.
2. Are trade secrets or are submitted to an agency by a commercial enterprise and if disclosed would cause substantial injury to the competitive position of the subject enterprise.
3. Identify a confidential source or disclose confidential information relative to a criminal investigation.
4. Reveal criminal investigative techniques.
5. Could if disclosed endanger the life and safety of a person.
6. Are inter-agency or infra-agency communications.
7. If disclosed would jeopardize the agency's capacity to guarantee the security of information technology assets.
8. The agency is not in possession of item that you requested."

The agency's letter did not correlate any particular reason or reasons for the denial with any particular one among the eight distinct requests for records made by petitioner. Upon the return of the petition, the Court was told that all eight reasons for denial pertained to each of the eight requests, which of course could never have made any sense, and certainly makes no sense in light of subsequent disclosures. The letter advised petitioner of its right to appeal, a right that petitioner exercised by letter dated July 22, 2014. Respondent admits receiving the

letter of appeal and failing to respond to it.

Petitioner commenced this proceeding by the filing of the verified petition on November 18, 2014, challenging the denial of its FOIL request. In particular, petitioner complains about respondent's failure to search for records (or certify that it had conducted such a search), to produce responsive records, and to respond to requests for records with particularized reasons for any denials. The petition requests a judgment directing respondent to comply with its duties under FOIL by searching for and disclosing the records sought, and awarding petitioner reasonable attorneys' fees and litigation costs pursuant to FOIL.

By its verified answer dated January 19, 2015, respondent generally denies any violation of its duties under FOIL and seeks the denial/dismissal of the petition. On the same day it drafted its answer, however, respondent belatedly made some disclosures to petitioner and the Court, attaching 21 pages, comprising four documents or groupings of documents, to an e-mail¹ sent by respondent's counsel to petitioner's counsel. Respondent simultaneously appended those pages to the affidavit of respondent's counsel submitted in response to the petition and in support of a request for its dismissal. The first three pages turned over at that juncture are three single-page "Purchase Order[s]" by which respondent requisitioned the purchase of a Kingfish system, a Stingray system, and the proprietary software for each, as well as training classes, from the Harris Corporation on three different dates in 2008 and 2012 for a total price of about \$350,000. On the 12/12/2008 purchase order, two evidently descriptive words or phrases are redacted from respondent's disclosure; on the 06/08/2012 purchase order (which later was "cancelled"), one descriptive phrase, one historical phrase, and three figures (i.e., price data) are redacted; and on the 12/28/2012 purchase order, one historical phrase is redacted. The Court has been furnished with unredacted copies of the 2012 purchase orders,

¹The Court has not seen that cover email.

but not of the 2008 purchase order (the original unredacted version of that having been routinely discarded pursuant to the County's records retention policy, according to respondents' counsel).

The fourth page turned over to petitioner on January 19th is a June 5, 2012 letter by a representative of Harris Corporation to the Erie County Sheriff, which letter basically advertised the sale of certain of the equipment and software in question. That document was somewhat heavily redacted. The Court has been provided with an unredacted version, which shows that the redactions are of product trade names and cursory references to the devices' purpose, features, and capabilities, as well as of the identity and phone number of the letter writer.

The next item disclosed by respondent at that time is an eleven-page document entitled "Harris Government Communication System Division Terms and Conditions of Sale for Wireless Equipment, Software and Services, Effective date: June 25, 2012." That document was disclosed in unredacted form, and thus the Court will not further address it.

Finally, the last document belatedly turned over or disclosed on January 19, 2015 is the June 29, 2012 letter from a certain FBI agent to various officers of respondent. The six-page letter constitutes a "non-disclosure agreement" extracted from the Sheriff's Office by the FBI as a condition of the former's acquiring and using the cell site simulator. The letter turned over to petitioner is redacted of all but its heading, preamble, first paragraph, and signature page. The Court has been provided with an unredacted copy of that document, the gist of which is more fully addressed *infra*.

On January 22, 2015, counsel for petitioner wrote counsel for respondent, seeking clarification of respondent's position with regard to the aforementioned redactions from the documents turned over to petitioner on January 19th. Opposing counsel responded by letter of January 26, 2015, basically setting forth respondent's eventual and ostensibly current position

with regard to the particular disclosures and redactions from disclosure previously made by respondent on January 19th in response to each specific item of the FOIL request, as well as with regard to the complete withholding of certain documents responsive to that request.

Obviously, the new position differs notably from the position set forth in respondent's answer and other formal legal papers, by which respondent initially purported to defend the complete denial of the FOIL request. Given the January 26th letter's sharpening effect upon the issues raised in this proceeding, the Court sets forth that letter in its virtual entirety, as follows:

"1. Records regarding the Sheriff's Office acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices and similar documents. In response to this request, please include records of all contracts, agreements and communications with Harris Corporation.

RESPONSE: Respondent has identified Purchase Orders no. 4600005905, 4500028732, 4500031273; correspondence from Harris Corporation to the Erie County Sheriff dated June 5, 2012; and Harris Government Communications Systems Division Terms and Conditions of Sale for Wireless Equipment, Software and Services with an effective date of June 25, 2012 as documents responsive to this request. These documents were originally requested by and produced to The Buffalo News in redacted form. Copies of these documents were also provided to Petitioner under cover of correspondence dated January 19, 2015. Redactions were warranted as portions of these documents are exempt from disclosure pursuant to Public Officers Law §87(2)(e)(i, iii and iv), Public Officers Law §87(2)(g), 22 C.F.R. § 121.1, 22 C.F.R. Parts 120-130, 22 U.S.C. § 2778, and Executive Order 13663.

2. All requests by the Harris Corporation or any other corporation or any state or federal agencies, to the Sheriff's Office to keep confidential any aspect of the Sheriff's Office's [possession and use of cell site simulators, including any non-disclosure agreements] between the Sheriff's Office and the Harris Corporation or any other corporation, or any state or federal agencies, regarding the Sheriff's Office possession and use of cell site simulators.

RESPONSE: Respondent has identified Harris Government Communications Systems Division Terms and Conditions of Sale for Wireless Equipment, Software and Services with an effective date of June 25, 2012 and the Confidentiality Agreement between the ECSO and the FBI as documents responsive to this request. These documents were provided to Petitioner, without and with redaction respectively, under cover of correspondence dated January 19, 2015. Redactions were warranted as portions of these documents are exempt from disclosure pursuant to Public Officers Law §87(2)(e)(i, iii, and iv), Public Officers Law §87(2)(g), 22 C.F.R. § 121.1, 22 C.F.R. Parts 120-130, 22 U.S.C. § 2778, and Executive Order 13663.

3. Policies and guidelines of the Sheriff's Office governing use of cell site

simulators, including restrictions on when, where, how, and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.

RESPONSE: Respondent has conducted a good faith search and responsive documents were identified. These documents are exempt from disclosure pursuant to Public Officers Law §87(2)(e)(i, iii and iv), Public Officers Law §87(2)(g), 22 C.F.R. § 121.1, 22 C.F.R. Parts 120-130, 22 U.S.C. § 2778, and Executive Order 1363.

4. Any communications or agreements between the Sheriff's Office and wireless service providers including AT&T, [T-Mobile,] Verizon, Sprint Nextel, and U.S. Cellular governing the cell site simulators.

RESPONSE: Respondent has conducted a good faith search and no responsive documents were identified.

5. Any communications, licenses, or agreements between the Sheriff's Office and the Federal Communications Commission or the New York State Public Service Commission concerning use of cell site simulators.

RESPONSE: Respondent has conducted a good faith search and no responsive documents were identified.

6. Records reflecting the number of investigations in which cell site simulators were used by the Sheriff's Office, or in which cell site simulators owned by the Sheriff's Office were used, and the number of those investigations that have resulted in prosecutions.

RESPONSE: Respondent has conducted a good faith search and responsive documents were identified. These documents are exempt from disclosure pursuant to Public Officers Law §87(2)(e)(i, iii and iv), Public Officers Law §87(2)(g), 22 C.F.R. § 121.1, 22 C.F.R. Parts 120-130, 22 U.S.C. § 2778, and Executive Order 1363.

7. Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used by the Sheriff's Office as part of the underlying investigation or in which cell site simulators owned by the Sheriff's Office were used as part of the underlying investigation.

RESPONSE: Respondent has conducted a good faith search and no responsive documents were identified.

8. All applications submitted to state or federal courts for search warrants or orders authorizing use of the cell site simulators by the Sheriff's Office in criminal investigations or authorizing use of cell site simulators by the Sheriff's Office, as well as any warrants or orders, denials of warrants or orders, and returns of warrants associated with those applications. If any responsive records are

sealed, please provide documents sufficient to identify the court, date, and docket number for each sealed document.

RESPONSE: Respondent has conducted a good faith search and no responsive documents were identified."

To recapitulate, in response to the first two of the eight requests, respondent has now disclosed to petitioner the existence of four documents, and has disclosed those documents, albeit with redaction of portions of three of the four. With respect to requests nos. 3 and 6, respondent has acknowledged the existence of responsive documents, but has neither described nor otherwise identified those documents nor turned over any part of them to petitioner, instead merely submitting the documents to this Court for its in camera review. Otherwise, respondent has denied the existence of any documents responsive to FOIL requests nos. 4, 5, 7, and 8. It must be noted that in citing the various federal sources of law as justifications for withholding or redacting certain documents, the reformulated position of respondent, as set forth in the January 26th letter, effectively sets forth the FOIL exemption codified at Public Officers Law § 89 (2) (a), which exemption was not invoked by respondent in its July 6th letter (the Court nevertheless will address that FOIL exemption).

Submitted to the Court in camera, as mentioned *supra*, are unredacted versions of the two 2012 purchase orders, the June 5, 2012 letter of Harris Corporation, and the June 29, 2012 letter/non-disclosure agreement between the FBI and respondent. Also included in the in-camera submission but not previously mentioned, except by implication in the January 26th response to request no. 3 (seeking records of respondent's policies and guidelines), is a June 11, 2014 e-mail from one higher-up of respondent to three underlings, to which e-mail is attached a June 11, 2014 two-page "Memorandum" setting forth respondent's "Cellular Tracking Procedures." The nature and contents of that email and policy Memorandum are addressed *infra*.

Also submitted in camera and not previously mentioned, except implicitly in the January 26th response to petitioner's sixth request (for records of investigations involving use of the cell site simulator), is a 47-page set of documents. Each such page constitutes a "Complaint Summary Report" or "Complaint Information" report recording an instance between May 1, 2010 and October 3, 2014 in which the Sheriff's Office's cell site simulator was used to track a cellular phone. Most of those reports set forth or suggest that the cellular tracking was carried out for the purpose of criminal investigation, i.e., to locate a suspect or fugitive or even a crime victim. At least four of the reports, however, recite that the reason for the cellular tracking was to locate a missing person or a potentially suicidal person. A number of the documents do not reveal the precise purpose of the cell phone tracking. Most of the documents recite or suggest that, in conducting the cell phone tracking, respondent was assisting another law enforcement agency at the latter's request. Some but by no means all of the documents recite the name and/or phone number of the person being tracked. Just one of the reports – the most recent one, in fact – mentions the obtaining of a pen register or other judicial order as a predicate for engaging in the cellular tracking.

THE LAW:

"The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Matter of Alderson v New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 NY3d 225, 230 [2005] [internal quote marks and citation omitted]; see *Perez v City Univ. of New York*, 5 NY3d 522, 528 [2005] [holding that FOIL guarantees "[t]he people's right to know the process of governmental decision-making and to review the documents . . . leading to determinations"]; see also Public Officers Law § 84 ["(G)overnment is the public's business and . . . the public . . . should have

access to the records of government in accordance with the provisions of (FOIL)"). To those ends, FOIL imposes a broad duty on government to make its records available to the public (see Public Officers Law § 84 [legislative declaration]; see also *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]). It is thus well settled that all records of a public agency are presumptively available for public inspection under FOIL, unless the documents in question fall squarely within one of the eight narrow exemptions to disclosure set forth in Public Officers Law § 87 (2) (see *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 79-80 [1984]; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). Moreover, in order that open government and public accountability be promoted, "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Capital Newspapers v Whalen*, 69 NY2d 246, 252; see *Buffalo News, Inc. v Buffalo Enterprise Dev. Corp.* (84 NY2d 488, 492 [1994]; *Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 697 [1993]). An agency that seeks to withhold documents or portions thereof pursuant to one or more of the statutory exemptions must articulate a "particularized and specific justification" for not disclosing requested documents and moreover must "make a particularized showing that a statutory exemption applies to justify nondisclosure" (*Gould*, 89 NY2d at 273, 275). "[T]he burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption [O]nly where the material requested falls squarely within . . . one of these statutory exemptions may disclosure be withheld" (*Gould*, 89 NY2d at 274-275 [internal quotation marks and citations omitted]). A conclusory contention that an entire category of documents is exempt will not suffice; evidentiary support for that position is required (see *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984]). In other words, "blanket exemptions for

particular types of documents are inimical to FOIL's policy of open government" (*Gould*, 89 NY2d at 274, citing *Capital Newspapers Div. of Hearst Corp.*, 67 NY2d at 569). Moreover, "just as promises of confidentiality by the [agency] do not affect the status of documents as records, neither do they affect the applicability of any exemption" (*Washington Post Co.*, 61 NY2d at 567). "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 [the] documents and order disclosure of all nonexempt, appropriately redacted material (see, *Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 133; *Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, *supra*, 62 NY2d, at 83)" (*Gould*, 89 NY2d at 274).

Rights under FOIL are not determined by the identity or status of the records seeker (see *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 156 [1999]). Indeed, "entitlement to the requested [records] is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" (*Matter of Scott, Sardano & Pomeranz v Records Access Officers of City of Syracuse*, 65 NY2d 294, 297 [1985]). Moreover, "access to government records does not depend on the purpose for which the records are sought" (*Gould*, 89 NY2d at 274; see also *Beechwood Restorative Care Ctr. V Signor*, 5 NY3d 436, 440 [2005]).

Applying the foregoing legislative purposes and juridical principles, the Court addresses those issues that remain in dispute between the parties, as follows:

WHETHER RESPONDENT SUFFICIENTLY CERTIFIED THE DILIGENCE OF ITS SEARCH:

The Court must reject petitioner's contention that respondent has not furnished a sufficient certification that a diligent search was made for those records that have been claimed not to exist (see Public Officers Law § 89 [3] [a]; cf. *Oddone v Suffolk County Police Dept.*, 96 AD3d 758, 761 [2d Dept 2012]; *Matter of De Fabritis v McMahon*, 301 AD2d 892, 893-894 [3d

Dept 2003]; see generally *Beechwood Restorative Care Ctr.*, 5 NY3d at 440-441 [2005] [held: "When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search"]. Certainly, respondent's July 6, 2014 letter denying the FOIL request, by which letter the agency represented that it was "not in possession of item that you requested," cannot suffice as the requisite certification. For one thing, the statement has been proven untrue by the subsequent disclosures and in-camera submissions made by respondent. More important, though, is the fact that the statement expresses nothing about the diligence of the search for the items.

Nevertheless, as this Court reads the Court of Appeals' decision in *Rattley v New York City Police Dept.*, (96 NY2d 873, 875 [2001]), respondent's counsel's assertion in her January 26, 2015 letter suffices as the essential certification. That letter states in four separate places that respondent had "conducted a good faith search and no responsive documents were identified." As reasoned in *Rattley*:

"The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required: Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279). To the extent that some courts have held to the contrary, those decisions are not to be followed (see, e.g., *Matter of Key v Hynes*, 205 AD2d 779; *Matter of Bellamy v New York City Police Dept.*, 272 AD2d 120; *Matter of Sanders v Bratton*, 278 AD2d 10). (*Rattley*, 96 NY2d at 875).

THE PROPRIETY OF THE REDACTIONS FROM THE DISCLOSED DOCUMENTS:

The Purchase Orders:

The purchase orders should have been disclosed in their entirety, without redaction of

the various words, phrases, and figures thus far withheld.² The purchase orders (and more particularly the redacted words, phrases, and prices), were not “compiled for law enforcement purposes” in the sense meant by the statute but, even if they were, their disclosure would not: “interfere with law enforcement investigations or judicial proceedings”; “identify a confidential source or disclose confidential information relating to a criminal investigation,” meaning a particular ongoing one; or “reveal [non-‘routine’] criminal investigative techniques or procedures, meaning techniques a knowledge of which would permit a miscreant to evade detection, frustrate a pending or threatened investigation, or construct a defense to impede a prosecution (see Public Officers Law § 87 [2] [e] [i], [iii], [iv]; see also *Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]; *Matter of Moore v Santucci*, 151 AD2d 677, 679 [2d Dept 1989]). Further, the purchase orders (or, more precisely, the information redacted therefrom), although clearly constituting inter-agency materials” (the other agency involved was Erie County and its Office of the Comptroller), amount entirely to “instructions to staff that affect the public” (Public Officers Law § 87 [g] [ii]). Indeed, the instructions set forth in the purchase orders -- in essence, “Pay this bill of this vendor for this item purchased by the Sheriff’s Office at this price” -- was and is of quintessentially compelling interest to and of undeniable impact upon the taxpaying public.

Finally, the Court finds that the purchase orders, and particularly the matters redacted therefrom, are not “specifically exempted from disclosure by state or federal statute”³ (Public Officers Law § 87 [2] [a]). The Court rejects respondent’s argument that the disclosures sought here would, if made, violate a particular federal statute, regulatory scheme, and executive order forbidding (and indeed criminalizing) the export of certain sensitive technology without

²The Court recognizes the apparent loss of an unredacted version of the 2008 purchase order.

³At the outset, the Court notes its agreement with petitioner’s observation that the FBI-drafted non-disclosure agreement is not itself a federal statute specifically exempting anything from disclosure under FOIL pursuant to Public Officers Law § 87 (2) (a).

government license or the illicit revelation of sensitive information about such sensitive technology to foreign nationals. The Court instead is convinced by petitioner's argument that the disclosure of public records pursuant to New York's Freedom of Information Law and the within judicial directive -- even records concerning respondent's ownership and use of a cell site simulator device that itself may or may not be subject to arms/munitions or defense technology export restrictions -- does not amount to the actual export of such arms, munitions, or defense technology. Further, the Court is satisfied by the showing on this record that petitioner, a New York not-for-profit corporation, is not a "foreign person," meaning that the disclosures sought by it pursuant to FOIL would not in fact run afoul of related federal legal restrictions on the revelation of sensitive technical data about export-restricted arms or technology.

The June 5, 2012 letter from Harris Corporation to respondent:

Likewise, the Court concludes that this document ought to have been disclosed in its entirety, without redaction. The letter, and more specifically its redacted verbiage, was not "compiled for law enforcement purposes" in the sense meant by the statute. Even if it was, the Court is certain that its disclosure would not have the prejudicial effect upon a criminal investigation or prosecution that the statute makes the linchpin of the FOIL exemption (see Public Officers Law § 87 [2] [e] [i]-[iv]). Further, the letter does not qualify as either inter- or intra-agency materials (see Public Officers Law § 87 [2] [g]), as Harris Corporation does not meet the statutory definition of an "agency" (Public Officers Law § 86 [3]). Finally, for the reasons stated *supra*, the Court concludes that the disclosures are not specifically precluded by federal legal restrictions on the actual export of military-grade electronic surveillance equipment or the constructive export of technical data about such equipment.

The June 29, 2012 letter/non-disclosure agreement:

Likewise, the Court concludes that this public record ought to have been disclosed in its

entirety. As indicated, the agreement was entered into between the FBI and respondent as an apparent pre-condition of respondent's being allowed to acquire and use the cell site simulator. The gist of the letter is not a recitation of the technological capabilities of the device or even the "hows" and "whens" or the advantages of its use for law enforcement purposes, but rather simply the need for the Sheriff's Office to avoid disclosing the existence, the technological capabilities, or any use of the device to anyone, lest "individuals who are the subject of investigation . . . employ countermeasures to avoid detection," thereby endangering the lives and safety of law enforcement officers and others and compromising criminal law enforcement efforts as well as national security. The Court has no difficulty in concluding that the agreement (or, more precisely, each redacted-at-length passage of it) was not "compiled for law enforcement purposes" in the sense meant by the statute (Public Officers Law § 87 [2] [e]). Again, even if it was, the Court would conclude that the disclosure of the non-disclosure agreement would not thwart or prejudice any particular ongoing law enforcement investigation or pending prosecution (see Public Officers Law § 87 [2] [e] [i], [ii]). Nor, the Court concludes, would the disclosure of the non-disclosure agreement "identify a confidential source or disclose confidential information relating to a criminal investigation," again meaning a specific ongoing one, or "reveal" other than "routine" "criminal investigative techniques or procedures" (see Public Officers Law § 87 [2] [e] [iii], [iv]).

Moreover, the Court must conclude that the document constitutes inter-agency material but nevertheless is not exempt from disclosure pursuant to that exemption inasmuch as it sets forth almost nothing but "instructions to staff that affect the public." In essence, those instructions are to conceal from the public the existence, technological capabilities, or uses of the device. Indeed, the Sheriff's Office is instructed, upon the request of the FBI, to seek dismissal of a criminal prosecution (insofar as the Sheriff's Office may retain influence over it) in

lieu of making any possibly compromising public or even case-related revelations of any information concerning the cell site simulator or its use. If that is not an instruction that affects the public, nothing is.

For the reasons summarized *supra*, the Court has no difficulty in concluding that the disclosure of the non-disclosure agreement would not amount to a federally forbidden export of sensitive technology nor a revelation of information about such technology to a foreign person.

THE PROPRIETY OF THE WITHHOLDING OF CERTAIN DOCUMENTS:

The June 11, 2014 Memorandum concerning "Cellular Tracking Procedures":

That document is a two-page procedural manual for those officers of respondent who are assigned to use the cell site simulator. Again, the Court must conclude that the policy or procedural directive was not "compiled for law enforcement purposes" in the sense meant by the statute. Even if it was, its disclosure would not interfere with or prejudice a particular law enforcement investigation or criminal prosecution, nor would it identify a particular confidential source or disclose particular confidential information, nor would it reveal other than "routine" – which to the Court merely means somewhat regularly resorted to – "criminal investigative techniques" (Public Officers Law § 87 [2] [e]). Again, the Court concludes that the document constitutes intra-agency materials, but it clearly constitutes or embodies a "final agency policy or determination[]" (Public Officers Law § 87 [g] [iii]) and in any event is comprised in its virtual entirety of "instructions to staff that affect the public" (Public Officers Law § 87 [g] [ii]).

Supporting those characterizations are the Memorandum's rules or instructions that the tracking equipment is to be used only for official law enforcement purposes; that certain records must be made and kept (including notations about who requested the cell phone tracking, what its purpose was, who and which phone were targeted, what legal authority was obtained for the tracking, whether any data was saved); that no data should be saved absent a specific

justification; that any saved data should be handled in certain ways and subject to certain procedures prior to and for purposes of any analysis or evidentiary use of such data; and that the foregoing procedures themselves should be kept secret from the public.⁴ Finally, for the reasons stated *supra*, the Court concludes that disclosure of the policy or procedural directive would not violate federal law governing the export of sensitive electronic surveillance technology, or the disclosure of information pertaining thereto to a foreign person.

The Complaint Summary Reports or logs:

The Court concludes that the 47 pages of "Complaint Summary" or "Complaint Information" reports -- i.e., records or logs of occasions on which sheriff's deputies used the cell site simulator -- likewise must be disclosed pursuant to petitioner's FOIL request, albeit with the minimal redactions outlined *infra*. The Court concludes that such records have not been shown to be exempt from FOIL pursuant to the first exemption cited by respondent. The Court has no doubt that the records were compiled for law enforcement purposes, i.e., investigating crimes, locating suspects or fugitives, or helping citizens in distress (see Public Officers Law § 87 [2] [e]). However, the Court concludes that respondent has not met its burden under FOIL of making the particularized showing necessary to justify withholding any of the 47 reports pursuant to that FOIL exemption. Respondent in particular has not shown, either by claim or by actual evidence, that any of the reports pertain to any specific still-ongoing investigation or pending criminal prosecution, let alone that any such ongoing investigation or prosecution would be interfered with as a result of a disclosure of the pertinent report (see Public Officers Law § 87 [2] [e] [i]). Moreover, respondent claims, but has not shown by means of any evidence, that disclosure of the reports would identify a confidential source or otherwise

⁴That last policy rule or instruction is the essence also of the "cover" email dated June 11, 2014, which email also must be turned over to petitioner as intra-agency material that sets forth instructions to staff that affect the public.

disclose confidential information (see Public Officers Law § 87 [2] [e] [iii]), or would reveal other than routine criminal investigation techniques and procedures (see Public Officers Law § 87 [2] [e] [iv]). Actually, any reading of the quite cursory reports would refute any such showing by respondent, had such a showing been attempted. The reports do not identify any confidential informants (or even non-confidential witnesses), set forth any confidential information (or even garden-variety statements of witnesses), or set forth any operational procedures of police (even routine procedures).

Likewise, the Court concludes that the second exemption asserted by respondent does not apply to the reports. Clearly, the records in question all constitute inter-agency and/or intra-agency materials (see Public Officers Law § 87 [2] [g]). In that connection, the Court notes that each report is in essence a communication between the officer assigned to use the cell site simulator on a particular occasion and that officer's superiors (see *The New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 487 [2005]). Moreover, a majority of the reports embody or reflect communications between respondent and sister law enforcement agencies. Nonetheless, the reports all clearly fall within the specific exception to that FOIL exemption for "statistical or factual tabulations or data" (see Public Officers Law § 87 [2] [g] [i]). Indeed, the Court sees almost nothing in any the reports that could not be regarded as "factual data," meaning only "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (*Gould*, 89 NY2d at 277). The complaint summaries are (even at their most detailed) just that – very brief synopses of those complaints or information, or interagency requests, that led to the Sheriff's office's use of its cellular tracking device, and of what resulted, investigatively speaking, when the complaint or information was acted upon.

Finally, the Court again rejects the notion that the reports are exempt from disclosure

under FOIL pursuant to other state or federal statute, including federal law prohibiting the export of or revelations about certain sensitive technology (see Public Officers Law § 87 [2] [a]).

Although respondent apparently has more recently abandoned the initially raised FOIL exemption available for disclosures that “would constitute an unwarranted invasion of personal privacy under the provisions of” Public Officers Law § 89 (2) (Public Officers Law § 87 [2] [b]); the Court sees a need to consider and apply that exemption on its own initiative in the context of two of the complaint summary reports, i.e., those that reflect efforts to find an identified missing person (an 87-year-old dementia case) and prevent an identified person from committing suicide. Public Officers Law § 89 (2) defines the concept of an “unwarranted invasion of personal privacy” as including, but not being limited to, six specific kinds of disclosure, two of which touch upon a person’s “medical” history or information (Public Officers Law § 89 [2] [b] [i], [ii]), and two of which concern “information of a personal nature” that was “reported in confidence to an agency” and/or is “not relevant to the ordinary work” of the agency (Public Officers Law § 89 [2] [b] [iv], [v]). Even in a case in which the statutory definition of an “unwarranted invasion of personal privacy” is not on point, however, the Court nonetheless must decide whether any invasion of privacy is “unwarranted” by balancing the privacy interests at stake against the public interest in disclosure of the information (see *The New York Times Co.*, 4 NY3d at 485). Engaging in that balancing exercise, and considering the two reports that on their face concern quests to help identified citizens in distress, the Court concludes that disclosure of each report would “constitute an unwarranted invasion of personal privacy” of the missing or suicidal individual – with particular reference to the individual’s medical and other personal information – unless the identity, address, phone number, and/or vehicle-ownership/registration information of such individual were first redacted from the report (Public Officers Law § 87 [2] [b]; see Public Officers Law § 89 [2]). The Court thus directs the redaction

of those two records to the foregoing extent prior to the court-ordered disclosure.

WHETHER PETITIONER IS A PREVAILING PARTY ENTITLED TO ATTORNEYS FEES:

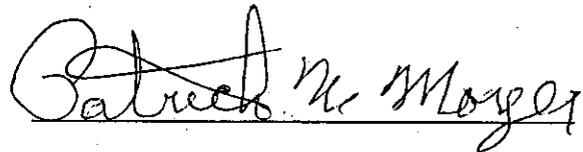
Given that this case at its outset concerned the complete denial of the multi-pronged FOIL request, the Court sees no plausible alternative to denominating petitioner the party that has "substantially prevailed" in the proceeding (Public Officers Law § 89 [4] [c]). The Court further sees no alternative but to conclude that "the agency had no reasonable basis for denying access" to the material sought by petitioner and either since voluntarily disclosed or now ordered to be turned over to them (Public Officers Law § 89 [4] [c] [i]). In any event, the Court must conclude that "the agency failed to respond to a request or appeal within the statutory time" (Public Officers Law § 89 [4] [c] [ii]). In the foregoing regards, the Court notes that petitioner's initial FOIL request was met with a blanket denial not merely of the existence of documents that were later conceded to exist, but also of access to some documents that were later turned over to petitioner, at least in redacted form. The Court further notes that there was a complete failure by respondent to do or even say anything in response to petitioner's administrative appeal of the initial denial (see Public Officers Law § 89 [4] [a]), a circumstance that violated respondent's statutory obligation at that stage to "fully explain in writing to the person requesting the record the reason for further denial." The overriding consideration, however, is that it was only well after the commencement of this proceeding that respondent revealed even the existence of any documents responsive to any of petitioner's requests, identified any (but no means all) of those documents by nature or title or description, and turned over any of the documents at all, whether in unredacted or redacted form. Clearly, that is not the way things are supposed to work under the statute. Just as clearly, the statutory authorization for an award of attorneys' fees is designed to deter such unfounded denials and inexcusable delays from occurring in violation of the statute (see *Matter of New York Civ.*

Liberties Union v City of Saratoga Springs, 87 AD3d 336, 338 [3d Dept 2011], citing Senate Introductor Mem in Support, Bill Jacket, L 2006, ch 492 at 5). Thus, the Court exercises its discretion to award reasonable counsel fees and litigation costs to petitioner (see Public Officers Law § 89 [4] [c]; see generally *Beechwood Restorative Care Ctr.*, 5 NY3d at 441).

Accordingly, the petition is GRANTED (except insofar as it seeks to compel a further certification), the July 6, 2014 determination of respondent is ANNULLED, and respondent is DIRECTED to disclose to petitioner, in unredacted form, the three purchase orders (or at least the two that still exist in unredacted form), the June 5, 2012 letter, the June 29, 2012 letter/non-disclosure agreement, and the June 11, 2014 Memorandum (and its cover e-mail). With regard to the requested disclosure of the Complaint Summary or Complaint Information reports, respondent is DIRECTED to disclose to petitioner the two reports related to the identified missing person and the identified would-be suicide, but only following the redaction of identifying information about those individuals; in all other instances, respondent is DIRECTED to disclose the reports to petitioner without redaction.

Petitioner is AWARDED reasonable attorneys' fees and other costs incurred in this proceeding. Petitioner is to submit a quantum meruit application with 30 days of the issuance of this Decision/Judgment, whereupon respondent has 15 days to respond to the application.

SO ORDERED:

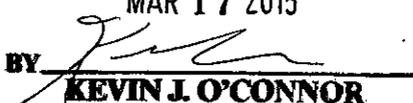


HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

MAR 17 2015

BY


KEVIN J. O'CONNOR
COURT CLERK