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VIA FIRST CLASS MAIL & ELECTRONIC MAIL Michael.Ranieri@doccs.ny.gov

Michael J. Ranieri, FOIL Appeals Officer
Office of Counsel
New York State Department of Corrections and Community Supervision
The Harriman State Campus
1220 Washington Avenue, Building 9
Albany, New York 12226-2050

Re: New York Civil Liberties Union’s (“NYCLU”) Public Records
Request dated April 27, 2021 (FOIL Number DOCCS-21-04-309)
 (“FOIL Request”) & New York State Department of Corrections
and Community Supervision’s (“DOCCS”) Use of Voice Recognition Technology

Dear Mr. Ranieri:

Thank you for your letter dated December 2, 2021 in which you now have provided a Public Officers Law § 89(3)(a) certification¹ that DOCCS could not locate responsive, non-exempt records (aside from its initial July 2021 production) after a diligent search for responsive records to the NYCLU’s above-referenced FOIL Request (the “Certification”).²

¹ As a courtesy to those people copied on this letter, a basic requirement of FOIL is that “[w]hen 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.” *Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440-41, 808 N.Y.S.2d 568, 571 (2005) (emphasis added); see also N.Y. Pub. Officers L. § 89(3)(a) (McKinney 2020) (Section 89(3)(a) of the Public Officers Law states in relevant part: “Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search.”) (emphasis supplied). We sought the Section 89(3)(a) Public Officers Law certification given that it was unclear whether DOCCS withheld any records in their entirety from its production in response to the NYCLU’s FOIL Request. See footnote 2, *infra*.

² The following is relevant background information regarding the exchanges between the NYCLU and DOCCS regarding this FOIL Request. On April 27, 2021, the NYCLU filed its FOIL Request, which is attached. In DOCCS’ FOIL response letter dated June 4, 2021, DOCCS informed us that it had redacted portions of responsive records pursuant to Public Officers Law § 87(2)(d) (where responsive records contain trade secrets or information that if released could cause substantial injury to the competitive position of a commercial enterprise) and Public Officers Law § 87(2)(c) (where release of information would impair present or imminent contracts). On July 6, 2021, the NYCLU received DOCCS’s production of responsive records – including thirty-nine fully redacted pages – without a transmittal letter and without any identification by DOCCS as to the categories of the FOIL Request to which DOCCS believed the documents

As you know, in October 2017, DOCCS entered into a five-year contract with Securus Technologies, LLC, which is a technology firm that delivers pay-per-call telephone services to prisons throughout the United States. DOCCS contracted with Securus to enable DOCCS to use the vendor's "Secure Call Platform" through which people who are incarcerated may place outgoing calls. Through this web-based facility portal, DOCCS officials can access detailed recordings and logs of these calls as well as additional analytics. Securus also agreed to provide to those people who are incarcerated in DOCCS' facilities free tablets that provide communications, education, and entertainment applications. Securus provides live and investigative support for law enforcement, featuring voice recognition technology ("VRT") and identification capabilities, as well as call monitoring, behavioral analysis, suspicious keyword notification, pattern analysis, and even location tracking of the called party.

In 2018, the NYCLU received at least seventeen requests for legal assistance from people who are incarcerated in New York State correctional facilities, reporting their concerns about the privacy implications raised by DOCCS' use of VRT. Given the privacy issues raised by DOCCS' reported telephone system, the NYCLU reached out to Mark Richter, Esq. of DOCCS's Counsel's Office in April 2019. We asked Mr. Richter a series of questions about the VRT and how any information gathered was used, stored, and secured, but he did not answer those questions. In March 2021, it was further revealed that Securus recorded confidential attorney-client calls and provided them to New York City district attorneys.³ A recent audit disclosed that nearly 2,300 calls to attorneys were recorded.⁴

In light of DOCCS' resistance to provide information about its telephone system and the systemic concerns regarding the reported failure by Securus to secure many attorney-client calls, the NYCLU filed the FOIL Request.

As you will recall, the NYCLU's FOIL Request sought records regarding DOCCS' acquisition and/or use of VRT in connection with telephone calls placed or received at one or more correctional facilities. We sought these records because we have concerns that use of VRT in a carceral setting presents a threat to the privacy rights of people who are incarcerated as well as those whom they call, including attorneys, friends, family members, and minor children. We are also concerned that DOCCS' VRT telephone system, which collects and retains call participants' voiceprints and geographic location, is flawed and vulnerable to racial bias and may subject thousands of New Yorkers to unlawful racial profiling and discrimination in its reliance on VRT's

it produced were responsive. On July 27, 2021, the NYCLU filed an administrative appeal because DOCCS failed to meet its statutory obligation beyond its blanket statement that redactions were made pursuant to Public Officers Law §§ 87(2)(c) and (d). In our administrative appeal, we asked for DOCCS to disclose the records sought, claim particularized and specific justification(s) for the nondisclosure of records, or provide a certification pursuant to the Public Officers Law §89(3)(a). By letter dated August 17, 2021, DOCCS denied our administrative appeal, informing us that it relied on Public Officers Law Sections 87(2) (c), (d), (f) and (i) to justify withholding responsive information. In its denial letter, it did not provide the requested Public Officers Law §89(3)(a) certification.

³ Chelsia Rose Marcius, *NYC's 5 DA offices wound up with recordings of confidential jailhouse calls between inmates and lawyers*, NYDAILYNEWS.COM, <https://www.nydailynews.com/new-york/ny-jails-recordings-attorney-client-privilege-calls-20210321-tzbyxwnle5dc5jgvi5cona6wry-story.html> (last visited Apr 8, 2021).

⁴ Noah Goldberg & John Annese, *NYC Correction contractor recorded thousands more lawyer-client jail phone calls than first reported; could jeopardize court cases*, NYDAILYNEWS.COM, <https://www.nydailynews.com/new-york/nyc-crime/ny-audit-shows-doc-listened-in-on-even-more-lawyer-inmate-calls-20211230-zni5qacdhjaozok7rdmwyg2wsm-story.html> (last visited Jan 10, 2022).

inherently biased algorithms.⁵

Despite the NYCLU's repeated requests since July 27, 2021 for a Public Officers Law § 89(3)(a) certification, DOCCS inexplicably stonewalled us and refused to provide one until our fourth request. DOCCS refusal to provide the requested certification for four months certainly flouted its statutory obligation.

DOCCS' certification, moreover, leads to the more disturbing conclusion that DOCCS deployed its VRT telephone system without call participants' informed consent and without any policies and protocols in place to protect personal biometric data. DOCCS has the technological capability to engaging in highly intrusive surveillance, using VRT to monitor and record calls with people who are incarcerated and identify call participants by collecting their voiceprints and geographic location. Without any policies or procedures to appropriately limit the use of this technology, DOCCS may be sharing this information with other entities, including other law enforcement agencies that maintain voiceprint database without call participants' consent or judicial authorization. There can be no "consent" by any of the parties to the use of the biometric information contained in their voiceprints⁶ where there is no notice to the parties and no policies in place regarding notification to people who are incarcerated. With respect to those call participants who are not incarcerated, the recorded announcement as the one illustrated in the Securus Technologies, LLC's "Call Flow Diagram" is insufficient notification and affords no opportunity to provide informed consent to the collection, retention, sharing or other utilization of personal biometric and location data.⁷ Secretly subjecting innocent members of the public to investigation and intelligence-gathering simply because of their associational ties to incarcerated individuals is inappropriate and unlawful.

Chilling communications between people who are incarcerated and their counsel is also a real concern. Given DOCCS' apparent lack of policies and protocols that reflect the criteria it uses to assess what constitutes a "private" telephone call—which the VRT system reportedly eliminates from monitoring and recording—and who makes that privacy determination, we have serious concerns that calls that people who are incarcerated make to their attorneys are not protected from disclosure as required by law.⁸ The knowledge that a privileged call can be recorded is likely to deter people who are incarcerated from speaking freely with their counsel.

⁵ According to a recent study by researchers at Stanford University, speech recognition systems from five of the world's biggest technology companies – Amazon, Apple, Google, IBM, and Microsoft – make far fewer errors with white speakers (rate of 0.19) than with Black speakers (rate of 0.35). See Allison Koenecke et al., *Racial Disparities in automated speech recognition*, 117 PNAS No. 14, 7684 (2020), available at: <https://www.pnas.org/content/117/14/7684>. More due diligence must be conducted on VRT to ensure its accuracy so that systems using VRT are broadly inclusive and eliminate racial bias.

⁶ To make a telephone call, DOCCS requires people who are incarcerated to enroll in its VRT telephone system and provide voice samples.

⁷ See Securus Technologies, LLC Response to RFP 2016-02 at p. 127.

⁸ In 2020, Securus settled lawsuits in Kansas and California for recording privileged calls. See Michael Brown, Kansas Prison Operator, Phone Provider to Pay \$3.7M, AP News (August 6, 2020), <https://apnews.com/article/technology-us-news-lawsuits-michael-brown-kansas-48128da688695578bd8f5e1707bab7ae>; Brigitte Honaker, Securus Prison Call Recording Class Action Settlement Gets Ok, TOP CLASS ACTIONS (Jun. 22, 2020), <https://topclassactions.com/lawsuit-settlements/jail-prison/securus-prison-call-recording-class-action-settlement-gets-ok/>; Maeve Allsup, Inmates, Attorneys Settle California Prison Call Recording Suit, BLOOMBERG LAW (Jun. 17, 2020), <https://news.bloomberglaw.com/us-law-week/inmates-attorneys-settle-california-prison-call-recording-suit>.

DOCCS' lack of adequate oversight, safety, and accountability policies and protocols implicate serious privacy concerns and is dangerous and potentially discriminatory in light of the inherent bias in the VRT and the data DOCCS is collecting with this technology. Accordingly, we strongly urge DOCCS to stop using VRT altogether and immediately given VRT's inherent dangers and DOCCS' lack of adequate policies and protocols to address them.

Sincerely,



Lisa Laplace
Senior Staff Attorney

Copy (with attachment):

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Chair, Committee on Crime Victims, Crime and Correction
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