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

In the Matter of,	:	
	:	
NEW YORK CIVIL LIBERTIES UNION,	:	Index No. _____
	:	
Petitioner,	:	
	:	
-against-	:	
	:	
NEW YORK CITY POLICE DEPARTMENT,	:	
	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	:	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Respectfully submitted,

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PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the public's right to access basic records about the NYPD's acquisition of costly military-grade surveillance equipment called "Stingrays." The records sought—records that would show how much a local government agency has spent, from what funds, and for what purposes—go to the heart of what New Yorkers have the right to know about their own government under the Freedom of Information Law.

"Stingray" is a commonly-used generic term that refers to a suite of cell site simulators—surveillance equipment that captures information from nearby cell phones by mimicking cell phone towers and tricking cell phones into delivering data to it. Stingrays can be used to surreptitiously locate or track individuals, whether in their own home, at places of worship, or at a political gathering. Some models can be used to intercept calls and text messages or to interfere with cell phone service. Depending on the model, Stingrays can cost about $25,000 or over $150,000, plus additional costs for accessories and training.

Originally developed for the military, Stingrays have filtered into local police departments across the country without adequate public discussion as to whether this powerful and expensive surveillance equipment is appropriate for everyday law enforcement use. In New York City, the public learned through the FOIL request at issue in this case that the NYPD has used Stingrays over 1,000 times since 2008, in investigations ranging from robbery and drug cases to criminal contempt of court, all without a written policy governing such use.

Despite releasing some records in response to the NYCLU's FOIL request relating to its use of Stingrays, the NYPD has withheld from disclosure requested records relating to its acquisition of Stingrays. The NYPD justified its denial by citing a laundry list of FOIL exemptions that are not applicable to the basic information sought regarding how much the

NYPD paid, from what funds, and for what models of these devices. This is information that other law enforcement agencies, including the State Police, the Rochester Police Department, and the Erie County Sheriff's Office, have released to their communities—in the case of Erie County after a successful lawsuit by the NYCLU for the release of the very same information.

Democratic governance depends on an informed electorate. In this case, information regarding the NYPD's acquisition of Stingrays involves policy choices that the public is entitled to evaluate fully. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to compel the NYPD to comply with its legal obligation to produce the records requested in this petition.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Stingrays Are Powerful Surveillance Devices That Raise Privacy Concerns.

"Stingray" is a commonly-used term for cell phone surveillance equipment originally developed for military use.[1] The generic term "Stingray" refers to a cell site simulator that captures information from nearby cell phones by mimicking cell phone towers and deceiving the cell phones into delivering data to it.[2] There are a number of different models of Stingrays on the market, and the equipment's price, capability, and the magnitude of privacy concerns raised depend on the model and configuration.[3]

Even at the most basic level, devices with brand names like StingRay and KingFish can capture the unique identifying information for cell phones (also called International Mobile

[1] *See* Jeremy Scahill & Margot Williams, *Stingrays: A Secret Catalogue of Government Gear for Spying on Your Cellphone*, The Intercept, Dec. 17, 2015, https://theintercept.com/2015/12/17/a-secret-catalogue-of-government-gear-for-spying-on-your-cellphone/ [accessed May 8, 2016] (hereinafter "Stingrays Catalogue") (Hirose aff, exhibit 1).

[2] *Id.*; *see also* Dept of Justice, Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology, available at http://www.justice.gov/opa/file/767321/download [accessed May 8, 2016] (hereinafter "DOJ Stingrays Guidance") (Hirose aff, exhibit 2).

[3] Federal Supply Service: Information Technology Schedule Pricelist, available at https://web.archive.org/web/20140804113923/https:/www.gsaadvantage.gov/ref_text/GS35F0283J/0ML8KB.2S6VTT_GS-35F-0283J_HARRISMOD162.PDF [accessed May 11, 2016] (Hirose aff, exhibit 3).

Subscriber Number or "IMSI") so that people can be identified or located with precision.[4] This capacity to locate and track people raises significant concerns under the Fourth Amendment and Article I, Section 12 of the New York State Constitution, which protect the right to one's privacy in the home and in one's movement (*United States v Karo*, 468 US 705, 715-16 [1984] [holding that a search requiring a warrant occurred when law enforcement employed a beeper to determine whether a particular article was located inside a home]; *People v Weaver*, 12 NY3d 433, 442 [2009] [requiring a warrant to use GPS to monitor a person's movement because "the technology yields and records . . . a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits"]; *State v Andrews*, 2016 WL 1254567, *32 [Md Ct Spec App, Mar. 30, 2016, No. 1496] [holding, in the first decision to address the constitutionality of the use of a Stingray, that its use required a warrant under the Fourth Amendment]). These concerns are heightened by the fact that Stingrays impact bystanders: they collect unique identifying information from bystander cell phones that are not targeted for surveillance and can cause interference with service for other cell phones in the area.[5]

[4] DOJ Stingrays Guidance; Harris Corp., StingRay™: Transportable CDMA Interrogation, Tracking and Location, and Signal Information Collection System, available at http://egov.ci.miami.fl.us/Legistarweb/Attachments/34769.pdf [accessed May 8, 2016] (Hirose aff, exhibit 4); Harris Corp., KingFish™ (Preliminary): Portable CDMA Interrogation, Direction-Finding, and Collection System, available at http://egov.ci.miami.fl.us/Legistarweb/Attachments/34771.pdf [accessed May 17, 2016] (Hirose aff, exhibit 5); Ryan Gallagher, *Meet the Machines That Steal Your Phone's Data*, ArsTechnica, Sept. 25, 2013, http://arstechnica.com/tech-policy/2013/09/meet-the-machines-that-steal-your-phones-data/ [accessed May 17, 2016] (Hirose aff, exhibit 6). For a description of how Stingrays have been used to identify and track individuals in criminal cases, see *State v Andrews*, 2016 WL 1254567, *2-7 [Md Ct Spec App, Mar. 30, 2016, No. 1496]; Transcript on Motion to Suppress at 10-18, *State v Thomas*, No. 2008-CF-3350A [Florida Circuit Court 2d Judicial Cir, Aug. 23, 2010], available at https://www.aclu.org/files/assets/100823_transcription_of_suppression_hearing_complete_0.pdf [accessed May 10, 2016]; Criminal Complaint at 8 n.1, *United States v Arguijo* [ND Ill Feb. 13, 2012], available at http://www.justice.gov/usao/iln/pr/chicago/2013/pr0222_01d.pdf [accessed May 10, 2016].

[5] *See* DOJ Stingrays Guidance at 2, 5.

Other models and configurations of Stingrays have greater surveillance capabilities and raise even greater concerns for privacy. Some models, like DRTs (nicknamed "dirt boxes"), can locate up to 10,000 target phone numbers at once and can be mounted on an aircraft to fly over a crowd.[6] Some models can be configured to listen in on calls, read text messages, and intentionally interrupt cell phone service of a phone in a blanket or targeted manner.[7]

Acquisition and Use of Stingrays By Law Enforcement in New York State.

Stingrays have filtered into local law enforcement under a blanket of secrecy, but this secrecy has begun to unravel in recent years because of the efforts around the country by the media, criminal defense attorneys, and advocacy organizations.[8] In New York, the NYCLU served a FOIL request nearly identical to the one at issue here on the Erie County Sheriff's Office and on the New York State Police in 2014, after media reports revealed that the two agencies owned Stingrays. (Hirose affirmation ¶ 10, exhibit 9.) After the Sheriff's Office denied the FOIL request, the NYCLU filed an Article 78 lawsuit in Supreme Court, Erie County. (*NYCLU v Erie County Sheriff's Office*, 47 Misc 3d 1201(A) [Sup Ct, Erie County 2015] [hereinafter "*Erie County Stingray FOIL*"].) The court found that the agency had no reasonable basis for denying access to the records, rejecting the Sheriff's argument that disclosure was exempt from FOIL under the law enforcement exemption, intra-agency materials exemption, and

[6]*See* Stingrays Catalogue, DRT 1201C, https://theintercept.com/surveillance-catalogue/drt-1201c/ [accessed May 16, 2016] (Hirose aff, exhibit 7).

[7]*See id.*; Stingrays Catalogue, Blackfin I/II, https://theintercept.com/surveillance-catalogue/blackfin-iii/ [accessed May 8, 2016] (Hirose aff, exhibit 8).

[8]*See e.g.* ACLU of Northern California, *Breaking: Documents Reveal Unregulated Use of Stingrays in California*, https://www.aclunc.org/blog/breaking-documents-reveal-unregulated-use-stingrays-california [Mar. 14, 2014]; Fred Clasen-Kelly, *Mecklenburg County District Attorney's Office to Review Surveillance Cases*, Charlotte Observer, Nov. 21, 2014, http://www.charlotteobserver.com/2014/11/20/5330929/mecklenburg-county-district-attorneys.html#.VMKRHS6TRdw [accessed May 10, 2016]; Adam Lynn, *Tacoma Police Change How They Seek Permission to Use Cellphone Tracker*, Nov. 15, 2014, http://www.thenewstribune.com/news/local/crime/article25894096.html1 [accessed May 10, 2016]; Nathan Freed Wessler, ACLU, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida [Feb. 22, 2015]. The documents obtained by the NYCLU are publicly available at www.nyclu.org/stingrays.

the Arms Export Control Act. (*Id.* at *10-14.) The court ordered the Sheriff to disclose all responsive records, including acquisition records, with only limited redactions to protect the privacy of individuals who were tracked using a Stingray. (*Id.* at *14.) The Sheriff's disclosure included purchase records showing that the Office had spent over $350,000 on KingFish, StingRay, and Stingray II systems. (Hirose aff, exhibit 10.)[9]

Following the decision from the Erie County Supreme Court, the New York State Police disclosed acquisition records that were responsive to the NYCLU's FOIL request. (Hirose affirmation ¶ 12, exhibit 11.) As a result, the New York State Police disclosed that it has spent over $640,000 on purchasing and maintaining Stingrays, including on models called StingRay II and Hailstorm, as well as an amplifier called Harpoon. (*Id.*)[10]

Finally, more recently, the NYCLU received a response to its FOIL request to the Rochester Police Department, which included disclosure of records relating to the acquisition of Stingrays without redactions. (Hirose affirmation ¶ 15, exhibit 14.) These records showed that the Rochester Police Department obtained a KingFish system and an AmberJack amplifier in 2012 using over $150,000 in state grant funding to "identify and track" gang activity. (*Id*.)

The NYCLU's FOIL Request to the NYPD

Because a cloak of secrecy remained over the use of Stingrays by the country's largest local police force, the NYCLU filed a FOIL request with the NYPD that was substantially the same as the requests served on the Erie County Sheriff's Office and the State Police. The request,

[9]The court ordered the purchase orders to be produced in unredacted form, but the Sheriff's Office represented that one of those orders could not be located in unredacted form. (*Erie County Stingray FOIL*, 47 Misc 3d 1201(A), *10-14.)

[10]Harpoon is described in the trademark application filed with the U.S. government as "amplifiers for use in surveillance systems of the type used by law enforcement and government agencies." (Harpoon, Trademark No. 77494349 (Hirose aff, exhibit 12); *see also* Harris Corp., Harpoon™: Software-Controlled, High-Power Filtered Amplifier, http://cdn.arstechnica.net/wp-content/uploads/2013/09/harpoon.pdf [accessed May 8, 2015] (Hirose aff, exhibit 13).)

dated April 13, 2015, sought nine categories of records including the following requests which are at issue in this Petition:

> (1) Purchase orders, invoices, contracts, loan agreements, and other similar records regarding the NYPD's acquisition of cell site simulators.
>
> . . . .
>
> (3) All requests by the Harris Corporation or any other corporation, or any state or federal agencies, to the NYPD to keep confidential any aspect of the NYPD's possession and use of cell site simulators, including any non-disclosure agreements between the NYPD and the Harris Corporation or any other corporation, or any state or federal agencies, regarding the NYPD's possession and use of cell site simulators.
>
> (Petition exhibit A at 2.)

On October 30, 2015, after months of delay, the NYPD provided a substantive response. (Petition exhibit B.) The response revealed that the NYPD had been using Stingrays without a written policy since 2008 and that it had used Stingrays over 1,000 times for over-the-air intercepts. (*Id.* at 1, 6-30.) It did so without obtaining warrants under Criminal Procedure Law 690 or 700, but rather relying on lower-level court orders under Criminal Procedure Law 705. (*Id.* at 2.)

In parts relevant to this Petition, however, the NYPD denied Request 1 for acquisition records in whole, stating:

> "Access to records that may be responsive to Item #1 of the FOIL request must be denied pursuant to [Public Officers Law] §§ 87(2)(a), 87(2)(c), 87(2)(d), 87(2)(e), 87(2)(f), 87(2)(g), 87(2)(i), 89(2), 18 USC § 3123, 6 USC §§ 482(e) and (f), 22 CFR Parts 120-130, and 47 CFR § 0.457."
>
> (Petition exhibit B at 1.)

In response to Request 3 for confidentiality agreements, the NYPD produced a non-disclosure agreement between the NYPD and Harris Corporation but redacted all information identifying the devices in the NYPD's possession. (*Id.* at 4-5.) The NYPD stated that

"[r]edactions have been made pursuant to [Public Officers Law] §§ 87(2)(c) and (e) and pursuant to 22 CFR Parts 120-130, and 47 CFR § 0.457." (*Id.* at 1.)

By letter dated November 18, 2015, the NYCLU filed an administrative appeal of the NYPD's response. (Petition exhibit C.) The letter appealed the denial of records responsive to Request 1 and the redaction of the non-disclosure agreement produced in response to Request 3. (*Id*.)

On February 4, 2016, the NYPD issued its final denial, refusing to disclose additional documents. (Petition exhibit D.) With respect to Request 1, the NYPD affirmed its refusal to release any acquisition records, stating:

> "First, the public disclosure of commercial information such as price, delivery times, and other contract terms that pertain to specified equipment within a specific business relationship would impair the ability of buyers and sellers to finalize contract negotiations and is not required pursuant to [Public Officers Law] § 87(2)(c). Second, such commercial and technical information, which has not previously been disclosed, remains a trade secret that is proprietary to the manufacturer, and is exempt from disclosure pursuant to [Public Officers Law] § 87(2)(d). Also, § 87(2)(g) exempts predecisional information from disclosure.
>
> In addition, technical details that are proprietary to [Stingrays] are also exempt under [Public Officers Law] 87§ § (2)(e)(iii) and (iv), in that their disclosure would (1) constitute the disclosure of confidential information that is used in criminal investigations and also (2) reveal non routine criminal investigative techniques, the disclosure of which would permit criminals to evade detection and apprehension.
>
> As a corollary, the availability of such information to kidnappers, terrorists, or other actual or potential perpetrators of serious crimes could endanger the life or safety of a victim, of bystanders, and of numerous others if a perpetrator is able to evade detection as a result of engaging in countermeasures enabled through knowledge of such technical or proprietary details. Furthermore, [Stingrays are] a type of information technology asset in the hands of law enforcement, and the disclosure of detailed information pertaining thereto would make it impossible to guarantee the security of such information technology, and is therefore not required pursuant to [Public Officers Law] § 87(2)(i)."
>
> (Petition exhibit D at 3.)

The NYPD further listed 6 USC § 482 [f] [1], 47 CFR 0.457, and the International Traffic in Arms Regulations as reasons for withholding acquisition records. (*Id.*) The NYPD also cited Public Officers Law § 87 [2] [c] and [d], as well as 6 USC § 482 [f][1], 47 CFR 0.457, and the International Traffic in Arms Regulations as justifying the redactions to the non-disclosure agreement released under Request 3. (*Id.* at 3-4.)

Having exhausted administrative remedies, the NYCLU is filing this Article 78 proceeding within the statute of limitations.[11]

ARGUMENT

I. THE NYPD VIOLATED FOIL BY FAILING TO DISCLOSE PURCHASE ORDERS, CONTRACTS, AND SIMILAR RECORDS.

The NYPD disregarded its FOIL obligations by withholding all records responsive to Request 1, which sought purchase orders, contracts, and similar basic records about its acquisition of Stingrays. As the Supreme Court in Erie County recognized in ordering the disclosure of the very same category of records, these acquisition records—records that show how much a local agency is spending and for what purposes—go to the heart of the purpose of FOIL to "encourage public awareness and understanding of and participation in government" (*Erie County Stingray FOIL*, 47 Misc 3d 1201[A], *8 [internal quotation marks omitted], 10-14 [holding that "[t]he purchase orders [for Stingrays] should have been disclosed in their entirety, without redaction of the various words, phrases and figures"]; *see also Town of Waterford v NY State Dept. of Envtl. Conservation*, 18 NY3d 652, 656-57 [2012] ["It is settled that FOIL is based on the overriding policy consideration that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." (internal quotation marks

[11]The NYCLU is not pursuing the other requests to which it did not receive responsive records based on the NYPD's representation in its responses it does not maintain such records.

omitted)]). The NYPD's denial of this request violated FOIL for three independent reasons: because it relied on a conclusory recital of the exemptions; because the exemptions that it listed do not apply; and because even if any exemption did apply the NYPD had the obligation to redact, rather than withhold wholesale, the responsive records.

A. The NYPD's Conclusory Invocation of Exemptions Is Insufficient to Justify the Withholding of Records.

The New York State legislature, in enacting the Freedom of Information Law, created a broad right of public access to government records in order to foster transparency and accountability in government. (Public Officers Law § 84.) The agency seeking to withhold records bears the burden to demonstrate that the requested material qualifies for an exemption and to articulate "particularized and specific justification for not disclosing requested documents." (*Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] (internal quotation marks omitted).) Blanket exemptions are "inimical to FOIL's policy of open government." (*Id.*)

The NYPD's conclusory, laundry-list invocation of exemptions, which merely parrots the words of six FOIL exemptions, one federal law, and three federal regulations, falls short of the requirement that the agency articulate "particularized and specific" facts justifying denial of access. (*See e.g. Capital Newspapers v City of Albany*, 15 NY3d 759, 761 [2010] [finding a "conclusory affidavit" from agency insufficient to establish exemptions]; *Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984] [rejecting claim for exemption that relied on "conclusory pleading allegations and affidavits"]; *Church of Scientology of New York v State*, 46 NY2d 906, 908 [1979] [rejecting invocation of exemptions where the government "tendered only references to sections, subdivisions, and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld"].) Ultimately, FOIL exemptions only apply in the "specific, narrowly constructed instances where the governmental

agency convincingly demonstrates its need." (*Fink v Lefkowitz*, 47 NY2d 567, 571 [1979].) Here, the NYPD has failed to demonstrate its need for an exemption in *any* fashion and has certainly not done so, as required, convincingly. The Court should grant the Petition on this basis.

B. The NYPD Relies on Exemptions that Are Inapplicable.

In addition, the exemptions that the NYPD recited simply do not apply to NYCLU's request. FOIL must be "liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." (*Waterford*, 18 NY3d at 657 (internal quotation marks omitted).)[12] The records sought are basic records about the functioning of a local government agency that do not fall under any of the narrow exemptions to FOIL.

1. Public Access to Acquisition Records Would Not Impair Present or Imminent Contract Awards.

The NYPD asserts that it is withholding responsive records because "commercial information such as price, delivery times, and other contract terms" is exempt from disclosure under Public Officers Law § 87 [2] [c]. (Petition exhibit D at 1.) This exemption protects against the disclosure of records that would "impair present or imminent contract awards." (Public Officers Law § 87 [2] [c].) But the NYPD has not stated that there are any present or imminent contract awards relating to Stingrays that could be impaired by this disclosure, much less explained how such "commercial information" contained in contracts that have been entered into in the past—even as far back as eight years ago when the NYPD first began using Stingrays—could impair any "present or imminent contract awards." (*See Cross-Sound Ferry Servs. Inc. v Dept. of Transp.*, 219 AD2d 346, 349 [3d Dept 1995] [rejecting invocation of exemption because "[o]nce the contract was awarded, the terms of [the] RFP response could no longer be

[12] In responding to the administrative appeal, the NYPD appropriately abandoned its reliance on Public Officers Law § 89 [2] [exemption for privacy] and 18 USC § 3123 [setting forth standards for the issuance of a pen register order]. NYPD has not explained how the requested acquisition records could implicate either of these provisions.

competitively sensitive"]; *Contr. Plumbers Coop. Restoration Corp. v. Ameruso*, 105 Misc 2d 951, 953 [Sup Ct, New York County 1980] [rejecting invocation of exemption as to the contents of a successful bid proposal and finding the disclosure to "be expressive of the legislative purposes set forth" in FOIL].) The Court should reject the invocation of this exemption which, if taken at face value, would mean no records relating to the purchase of any goods or services by a local entity would ever be subject to disclosure under FOIL. Such a result would clearly contradict the purpose of FOIL.

2. Public Access to Acquisition Records Would Not Reveal Trade Secrets.

Nor should the Court accept the NYPD's assertion that disclosure of "commercial information" (i.e., price, delivery times, and other contract terms) and unspecified "technical information" that appear in responsive records and that have not been previously disclosed remain "a trade secret that is proprietary to the manufacturer, and is exempt from disclosure pursuant to under [Public Officers Law] § 87(2)(d)." (Petition exhibit D at 1.) The basic information sought here is not even a "secret"—price information and model names have been made public by other law enforcement agencies as well as the federal General Services Administration (*see* Hirose aff, exhibits 3, 10, 11, 14). Moreover, although the term "trade secret" is not defined by FOIL, and neither the Court of Appeals nor the First Department has adopted a definition, the information requested is not a "trade secret" under any definition of the term, and there is certainly no evidence that it is a trade secret which, if disclosed, "would cause substantial injury to the competitive position of the subject enterprise" as required by Public Officers Law § 87 [2] [d]).[13]

[13] Neither the Court of Appeals nor the First Department has decided whether a "trade secret" is automatically exempt from disclosure under Public Officers Law § 87 [2] [d] or whether its disclosure must also "cause substantial injury to the competitive position of the subject enterprise" to be protected under that section. (*Verizon New York v.*

Under the definition of "trade secrets" adopted by some federal courts, a trade secret is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." (*Pub. Citizen Health Research Group v Food & Drug Admin.*, 704 F2d 1280, 1288 [DC Cir 1983] [concluding that this definition hews closely to the language and legislative intent of FOIA].) Commercial information and technical information appearing in records of a municipal agency's purchase or acquisition of a piece of equipment clearly fall outside of the definition. This is the definition that New York courts should also adopt for FOIL given that, like FOIA, FOIL's exemptions should be construed narrowly. (*Waterford,* 18 NY3d at 657.)

But the NYPD's argument fails even if this Court were to use the alternate and broader definition of "trade secrets" adopted by some courts that tracks the definition of the term in the Restatement of Torts. (*See Verizon New York v. N.Y. State Pub. Serv. Commn.*, 46 Misc 3d 858, 872-73 [Sup Ct, Albany County 2014], *affd*, 137 AD3d 66, 72 [3d Dept 2016].) The Restatement of Torts defines "trade secrets" as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (Restatement [First] of Torts § 757.) But it explicitly explains that a trade secret is "a process or device for continuous use in the operation of the business" and "not simply information as to single . . . events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract." (*Id.*) It is therefore apparent that even under the broader definition of "trade secrets" provided by the Restatement of Torts, what the NYCLU is seeking here is by definition not trade secrets, much less trade secrets

New York State Pub. Serv. Commn., 137 AD3d 66, 69-70 [3d Dept 2016] [adopting the former position].) This Court need not consider this question given that the information requested is clearly not a "trade secret."

whose disclosure would cause "substantial injury to the competitive position of the subject enterprise." (Public Officers Law § 87 [2] [d].)

3. Acquisition Records Are Not Exempt Inter-Agency or Intra-Agency Materials.

The NYPD's assertion that Public Officers Law § 87 [2] [g], which exempts certain inter-/ intra-agency materials, applies because the records sought are "predecisional materials that pertain to purchases of equipment" (Petition exhibit D at 1) is not correct as a factual or legal matter. The NYCLU's request for purchase orders, invoices, contracts, and other similar records does not seek "predecisional materials." Moreover, FOIL clearly provides that even predecisional materials that were exchanged within state or local agencies are subject to disclosure if they reflect statistical tabulations or data, instructions to staff that affect the public, final agency policy or determinations, and external audits. (Public Officers Law § 87 [2] [g] [i]-[iv].) As the Supreme Court in Erie County held in rejecting the invocation of this exemption with respect to the same NYCLU request, purchase orders and similar records are quintessentially instructions to staff that affect the taxpaying public—"in essence, 'Pay this bill of this vendor for this item purchased by the [agency] at this price'" (*Erie County Stingray FOIL*, 47 Misc3d 1201[A] at *10). These records should not be shielded from disclosure under the inter-/intra-agency materials exemption.

4. Public Access to Acquisition Records Would Not Implicate the Law Enforcement Exemption.

The Supreme Court in Erie County also rejected the notion that the basic acquisition records sought here are records "complied for law enforcement purposes" which would, if disclosed, reveal "confidential information relating to a criminal investigation" (Public Officers Law § 87 [e] [iii]), or in the alternative "reveal criminal investigative techniques and procedures,

except routine techniques and procedures" (Public Officers Law § 87 [e] [iv]). (*See Erie County Stingray FOIL*, 47 Misc 3d 1201(A) at *10.) This Court should do the same with the NYPD's assertions.

First, purchase records are not "compiled for law enforcement purposes" as the term is intended by FOIL. (*Erie County Stingray FOIL*, 47 Misc 3d 1201(A) at *10.) They are compiled in the ordinary course of business for the purpose of keeping track of the municipal acquisition of equipment. As the Committee on Open Government has explained, records "compiled for law enforcement purposes" do not include records "prepared in the ordinary course of business, likely long before any investigation was commenced" (Comm on Open Govt FOIL-AO-11228 [1998][14]). Otherwise all records in the hands of a law enforcement agency would be considered "compiled for law enforcement purposes"—a broad reading of the law that is not consistent with a narrow reading of FOIL exemptions (*see Waterford*, 18 NY3d at 657).

Second, even if purchase records of surveillance equipment could be considered "compiled for law enforcement purposes," the disclosure of the limited technical information in these records will not reveal "confidential information relating to a criminal investigation." (*Erie County Stingray FOIL*, 47 Misc 3d 1201(A) at *10.) The NYPD has already disclosed records summarizing when Stingrays have been used in investigations. (Petition exhibit B at 6-30.) Disclosure of information about their acquisition will not reveal information pertaining to any particular criminal investigation.

Finally, the purchase records also do not reveal non-routine "criminal investigative techniques or procedures" (Public Officers Law § 87 [e] [iv]). This exemption protects against a "substantial likelihood that violators could evade detection by deliberately tailoring their conduct

[14] Available at http://docs.dos.ny.gov/coog/ftext/f11228.htm [accessed May 8, 2016] (Hirose aff, exhibit 15).

in anticipation of avenues of inquiry to be pursued by agency personnel." (*Fink*, 47 NY2d at 572.) There is no such "substantial likelihood" of harm from the disclosure of basic technical information contained in acquisition records of Stingrays, as "violators" already know that the NYPD employs cell phone surveillance, including that it has used Stingrays in over 1,000 routine criminal investigations since 2008 (petition exhibit B at 6-30; *cf. Grabell v NY Police Dept.*, 2016 NY Slip Op 03685, 2016 WL 2636688, *2 [1st Dept May 10, 2016] [applying law enforcement exemption to records relating to technology that was described as "highly specialized and nonroutine technology used to combat terrorism in New York City"]). Thus violators as well as the public are "already aware that minimizing . . . cell phone usage will allow them to evade detection" (*Am. Civil Liberties Union of N. California v Dept. of Justice*, 2014 WL 4954277, *13-14 [ND Cal, Sept. 30, 2014, No. 12-CV-04008-MEJ] [rejecting the conclusory declaration that wrongdoers could evade detection as a result of disclosure of records relating to Stingrays where there is much public information available already on Stingrays from media reports and from the government itself], *appeal docketed*.) Given the public availability of information about Stingrays, including from the federal government and other local agencies, *see supra* 2-5, the NYPD cannot show that the limited information in these acquisition records could create a "substantial likelihood" of wrongdoers evading detection (*see e.g. Am. Civil Liberties Union v Fed. Bur. of Investigation*, 2013 WL 3346845, *9 [ND Cal, July 1, 2013, No. 12-03728] [rejecting FBI affidavit stating that records "may" reveal an investigative technique, because it "fails to delineate how, in this case, a technique unknown by the public will be revealed"]; *Am. Civil Liberties Union v Dept. of Homeland Sec.*, 973 F Supp 2d 306, 318-19 [SDNY 2013] [rejecting law enforcement exemption where the government's procedure at issue is public and available in federal regulations]).

5. Public Access to Acquisition Records Would Not Endanger Anyone's Life or Safety.

The Court should reject the NYPD's assertion that Public Officers Law § 87 [2] [f] applies because the availability of the basic technical information in acquisition records "to kidnappers, terrorists, or other actual or potential perpetrators of serious crimes could endanger the life or safety of a victim, of bystanders, and of numerous others if a perpetrator is able to evade detection as a result of engaging in countermeasures enabled through knowledge of such technical or proprietary details" (petition exhibit D at 3). As explained above, there is not a substantial likelihood that the limited information requested—the same type of information that is in the hands of many local government agencies and has already been disclosed to the public by many of them, including in New York, *see supra* 2-5—would endanger anyone's life or safety. Moreover, this is basic information that the NYPD should routinely be disclosing in court applications for authorization to use this technology and turning over to criminal defendants. (*Andrews*, --A.3d--, 2016 WL 1254567, at *32 [finding the State's application for judicial authorization for use of a Stingray device inadequate, faulting the application for "fail[ing] to name or describe any cell site simulator," to identify "the Hailstorm device," and to provide "even a rudimentary description of cell site simulator technology"].) The NYPD cannot rely on Public Officers Law § 87 [2] [f] to withhold this information from community members, lawmakers, and all law-abiding people who have the right to maintain some level of oversight over the NYPD's use of new surveillance technologies.

6. Public Access to Acquisition Records Would Not Jeopardize the NYPD's Capacity To Guarantee the Security of Its Information Technology Assets.

Disclosure of acquisition records, and the basic technical information in them, does not jeopardize the NYPD's capacity to guarantee the security of its information technology assets as

to implicate the exemption in Public Officers Law § 87 [2] [i]. This exemption is on its face "concerned with ensuring the security of information technology assets," and the "expressed legislative intent was to protect against the risks of electronic attack, including damage to the assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency's electronic data." (*TJS of New York, Inc. v NY State Dept. of Taxation & Fin.*, 89 AD3d 239, 243 [3d Dept 2011] [holding that the exemption does not apply to allow withholding of a software program that was required to review certain government files].) The NYPD has not and cannot justify withholding acquisition records on this basis as such information, of the type that is publicly available and should be disclosed routinely in criminal cases, *see supra*, will not in any way interfere with the security or operation of the Stingrays themselves or any data obtained by the Stingrays.

7. Public Access to Acquisition Records Does Not Violate the Homeland Security Information Sharing Act, 6 USC § 482 [f] [1].

The Homeland Security Information Sharing Act does not shield the requested acquisition records from disclosure because that Act only permits the NYPD to withhold disclosure of "homeland security information" in response to a FOIL request if that information has been "obtained by a State or local government *from* a Federal agency under this section" (6 USC § 482 [e] (emphasis added)).[15] There is no evidence that acquisition records like purchase orders were obtained *from* a federal agency such that they can be withheld under the Act. Moreover, the NYPD has made no attempt to show that the responsive acquisition records have been obtained "under [the] section" (6 USC § 482). That section gives the President authority to prescribe procedures for sharing "homeland security information" that is "sensitive" or classified

[15] That Act defines "homeland security information" as information that "relates to the threat of terrorist activity," or "relates to the ability to prevent, interdict, or disrupt terrorist activity," or "would improve the identification or investigation of a suspected terrorist or terrorist organization," or "would improve the response to a terrorist act" (6 USC § 482 [f] [1]).

with state or local government agencies. (6 USC § 482 [a].) By Executive Order, this authority was delegated to the Secretary of Homeland Security. (68 Fed Reg 45149 [2003].) The NYPD has failed to identify the procedure promulgated by the Secretary of Homeland Security that purportedly governed the receipt of any responsive "homeland security information," nor has it explained how such procedure was followed.

8. Public Access to Acquisition Records Does Not Violate the Federal Communications Commission's Regulation, 47 CFR § 0.457.

The NYPD's citation to 47 CFR § 0.457, the Federal Communications Commission's regulation implementing the Freedom of Information Act and describing categories of records that the Commission deems "not routinely available for public inspection" from the FCC under FOIA, is inapposite. FOIL does not permit the NYPD to rely on a federal *regulation* (as opposed to a statute) to withhold records. (Public Officers Law § 87 [2] [a] [stating that "[a]n agency may deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute"]; *Zuckerman v Bd. of Parole*, 53 AD2d 405, 407 [3d Dept 1976] [explaining that under Public Officers Law § 87 [2] [a] "exemptions can only be controlled by other *statutes*, not by regulations which go beyond the scope of specific statutory language"].) Moreover, the NYPD does not and cannot point to any paragraph within 47 CFR § 0.457 that expressly requires the NYPD to withhold the requested records. The NYPD thus cannot show "clear legislative intent" to accord the requested records with statutorily protected confidentiality. (*Capital Newspapers v Burns*, 67 NY2d 562, 567 [1986] [holding that when relying on Public Officers Law § 87 [2] [a], the FOIL respondent must show "clear legislative intent to establish and preserve the confidentiality which one resisting a FOIL disclosure claims as protection"].)

9. Public Access to Acquisition Records Does Not Violate the International Traffic in Arms Regulation, 22 CFR § 121.1.

Finally, the Court should reject the NYPD's invocation of the International Traffic in Arms Regulations ("ITAR"), 22 CFR § 121.1, the implementing regulations for the Arms Export Control Act, 22 USC § 2778, to withhold the basic acquisition records requested in the NYCLU's FOIL. The Arms Export Control Act authorizes the President to promulgate the ITAR in order to "control the export and import of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services." (22 USC § 2778 [a] [1].) "Export," in the context of disclosure of information, is defined as "[d]isclosing . . . or transferring technical data to a foreign person." (22 CFR § 120.17 [a] [4].) As the Supreme Court in Erie County already held (*Erie County Stingray FOIL*, 47 Misc. 3d 1201(A), at *10), and as Robert Clifton Burns, an attorney who is an expert on export controls laws, explained in the course of that proceeding (Hirose aff, exhibit 16 (Affidavit of Robert Clifton Burns, Feb. 4, 2015)), the Arms Export Control Act and ITAR have no bearing on the NYCLU's FOIL request.

First, the disclosure of records to the NYCLU in response to a FOIL request is not an "export" regulated under the Arms Export Control Act because it is not a disclosure of information to "a foreign person." Thus, even if the information requested by the NYCLU's FOIL request were regulated by the Act (which it is not for reasons described below), the Act does not regulate the disclosure of information under FOIL to the NYCLU, which is not a foreign person. (22 CFR § 120.16 [defining "foreign person" to include groups "not incorporated or organized to do business in the United States"]; *see* Hirose aff, exhibit 17 (showing that the NYCLU is incorporated to do business in New York); *Erie County Stingray FOIL*, 47 Misc. 3d 1201[A], at *10 ["[T]he 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."].)

Second, the FOIL request at issue here does not seek disclosure of "technical data" that is controlled by the Arms Export Control Act. "Technical data" is defined in relevant part as "[i]nformation . . . required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles" (22 CFR § 120.10 [a]), and does not cover "basic marketing information on function or purpose or general system descriptions of defense articles" or information that is already in the public domain (22 CFR § 120.10 [b]). Nothing in Petitioner's FOIL request seeks such "technical data."

Finally, and more fundamentally, there is no support for the assertion that Stingrays are "defense articles." To be a "defense article," Stingrays must be designated as such in the United States Munitions List at 22 CFR § 121.1. In the Erie County litigation, FBI agent Bradley S. Morrison submitted an affidavit asserting that Stingrays are a regulated "defense article" under the ITAR because they fall under 22 CFR § 121.1, Category XI – Military Electronics, subpart [b].[16] Here, the NYPD argues again that Stingrays are regulated under the revised subpart [b] which regulates:

> "Electronic systems, equipment or software, not elsewhere enumerated in this sub-chapter, specially designed for intelligence purposes that collect, survey, monitor, or exploit, or analyze and produce information from, the electromagnetic spectrum (regardless of transmission medium), or for counteracting such activities."

In the alternative, the NYPD raises a new assertion that agent Morrison did not make, arguing that Stingrays are regulated under subpart [a][4][i] of the same category which regulates:

[16]Category XI of 22 CFR § 121.1 is attached to the Hirose affirmation as exhibit 18.

> "(4) Electronic Combat (i.e., Electronic Warfare) systems and equipment, as follows: (i) [electronic support] systems and equipment that search for, intercept and identify, or locate sources of intentional or unintentional electromagnetic energy specially designed to provide immediate threat detection, recognition, targeting, planning, or conduct of future operations."

The problem for the NYPD is that neither subpart describes Stingrays, which are equipment used in everyday law enforcement investigations (petition exhibit B at 6-30). There is no evidence that Stingrays are Electronic Warfare systems (§ 121.1 [a] [4] [i]), or that they are "specially designed to provide immediate threat detection, recognition, targeting planning, or conduct of future operations" (*id.*), or that they are powerful enough to be capable of conducting surveillance "regardless of transmission medium" (§ 121.1 [b]), or that they are "specially designed for intelligence purposes" (*id.*). As the expert pointed out in the Erie County litigation, "items that are disclosed in published U.S. Patent applications, as is the case with the Stingray device, are not likely to be 'specially designed for intelligence purposes' since such disclosure is at odds with the covert nature and purpose of items specially designed for intelligence purposes" (Burns aff. at 5 ¶ 9 (Hirose aff, exhibit 16)).

By contrast, the Export Administration Regulations, a separate regulatory structure that describes items not deemed "defense articles" under the ITAR, designates as ECCN 5A00.1.f.2 a category of equipment within its reach which aptly describes Stingrays: "[i]nterception equipment . . . designed for the extraction of client device or subscriber identifiers (e.g., IMSI, TIMSI or IMEI), signaling, or other metadata transmitted over the air interface" (15 CFR Pt 774, Supp 1, Cat 5 to Park 774 – The Commerce Control List (Hirose aff, exhibit 19).) That Stingrays likely fall under this regulation means that they are under the authority and jurisdiction of the Department of Commerce, not on the State Department's Munitions List. ((Burns aff. at 5 ¶ 9 (Hirose aff, exhibit 16); 22 CFR § 120.5).

There is no evidence that Stingrays are a device regulated by the Arms Export Control Act, much less that the disclosure of basic records about their acquisition by the NYPD is regulated in any way by that Act. The Court should reject this argument.

C. Even if Some Material Is Exempt, the NYPD Cannot Withhold Records In Their Entirety.

Finally, even if a government agency is able to establish that *some* material in a requested record is exempt, that does not mean the document is entirely exempt from disclosure. Rather, FOIL expressly provides that an agency may deny access to records "or portions thereof." (Public Officers Law § 87 [2].) Ample authority from the Court of Appeals favors disclosure of redacted records even where some information in the records is exempt. (*See e.g. Gould*, 89 NY2d at 275 [holding, in a case seeking disclosure of NYPD complaint follow-up reports, that all nonexempt material should be released with appropriate redactions)]; *Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007] [remitting to Supreme Court to determine whether exempt information can be redacted from the records].)

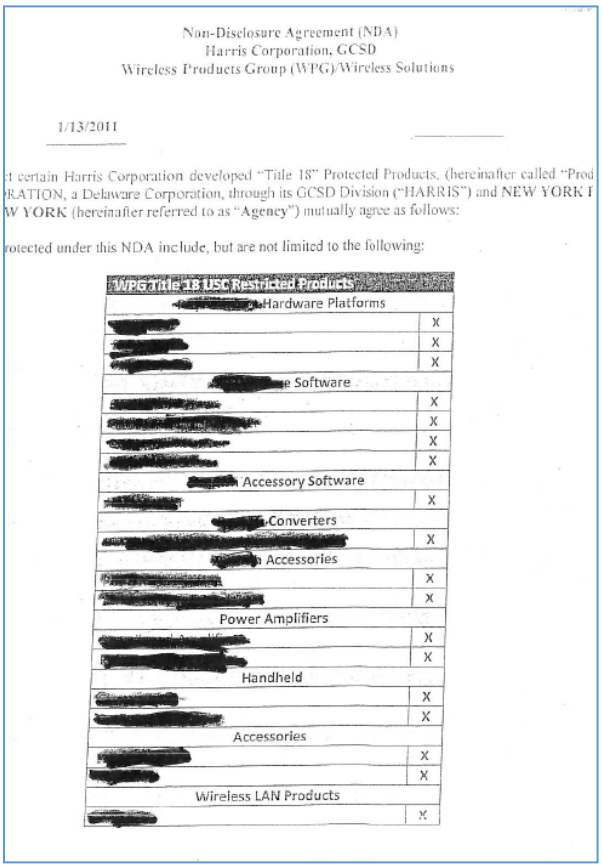
Here, the Respondent attempts to justify the wholesale denial of Request 1 without indicating why, if some material is indeed exempt, redaction would not be possible. For this reason, and all the reasons stated above, the NYPD's denial was improper and unlawful.

II. THE NYPD VIOLATED FOIL BY REDACTING THE NON-DISCLOSURE AGREEMENT.

The NYPD also erred in redacting the model names of the equipment from the two-page non-disclosure agreement between the NYPD and the Harris Corporation that was produced in response to Request 3 seeking all confidentiality agreements (petition exhibit B at 4-5). As can be seen below from a comparison of the document disclosed by the NYPD and a similar document disclosed by the Tucson Police Department in response to a public records request, the

information redacted consists entirely of product trade names of Stingrays and their accessories. This is information that the Supreme Court in Erie County ordered to be disclosed (*Erie County Stingray FOIL*, 47 Misc. 3d 1201[A], at *5, *14).

The redacted non-disclosure agreement produced by the NYPD (Petition exhibit B at 4):



Non-Disclosure Agreement (NDA)
Harris Corporation, GCSD
Wireless Products Group (WPG)/Wireless Solutions

1/13/2011

t certain Harris Corporation developed "Title 18" Protected Products, (hereinafter called "Prod
RATION, a Delaware Corporation, through its GCSD Division ("HARRIS") and NEW YORK I
W YORK (hereinafter referred to as "Agency") mutually agree as follows:

otected under this NDA include, but are not limited to the following:

Wireless Products Group (WPG) Title 18 USC Restricted Products	
Hardware Platforms	
[redacted]	X
[redacted]	X
[redacted]	X
[redacted] Software	
[redacted]	X
[redacted]	X
[redacted]	X
[redacted]	X
[redacted] Accessory Software	
[redacted]	X
[redacted] Converters	
[redacted]	X
[redacted] Accessories	
[redacted]	X
[redacted]	X
Power Amplifiers	
[redacted]	X
[redacted]	X
Handheld	
[redacted]	X
[redacted]	X
Accessories	
[redacted]	X
[redacted]	X
Wireless LAN Products	
[redacted]	X

The non-disclosure agreement produced by the Tucson Police Department (Petition exhibit C at 8):

Non-Disclosure Agreement (NDA)
Harris Corporation, GCSD
Wireless Products Group (WPG)/Wireless Solutions

[Effective Date: 6/7/10

t certain Harris Corporation developed "Title 18" Protected Products, (hereinafter called "Pro
)RATION, a Delaware Corporation, through its GCSD Division ("HARRIS") and the Ci
follows:

rotected under this NDA include, but are not limited to the following:

WPG Title 18 USC Restricted Products	
RayFish® Core Hardware Platforms	
KingFish®	X
StingRay®	X
StingRay II®	X
RayFish® Core Software	
GSM Transceiver	X
GSM StingRay II® Transceiver	X
CDMA Transceiver	X
iDEN Transceiver	X
RayFish® Necessary Software	
Map Router	X
RayFish® Converters	
Band IV Converter – AWS (2100/1700)	X
RayFish® Accessories	
RayFish® Power Kit	X
AmberJack® DF Antenna	X
Power Amplifiers	
Broadband Amplifiers	X
Harpoon™ Amplifiers	X
Handheld	
Gossamer®	X
Gossamer® DF Kit	X
Accessories	
Lanterneye	X
Tarpon®	X
Tactical WAN Products	
Moray®	X

The NYPD asserted Public Officers Law § 87 [2] [c] [impairment of contract awards], § [2] [d] [trade secrets], as well as the Homeland Security Information Sharing Act, the Arms Export Control Act, and the Federal Communications Commission regulations in redacting this

information. But product trade names for Stingrays have already been released by other law enforcement agencies (Hirose aff, exhibits 10, 11, 14), are available on the price list of products marketed to federal agencies that was published by the General Services Administration (Hirose aff, exhibit 3), and in many cases are registered with the U.S. Trademark Office and therefore publicly available (see *id.*, exhibits 12, 20). For this and all the reasons explained above, the exemptions relied on by the NYPD do not justify redacting the trade names of the equipment in the NYPD's possession.

III. THE NYCLU IS ENTITLED TO ATTORNEYS' FEES.

The NYCLU respectfully requests an award of attorneys' fees and litigation costs pursuant to FOIL. FOIL permits a court, in its discretion, to award reasonable attorneys' fees and other litigation costs when the moving party has "substantially prevailed" in its Article 78 petition and the government entity had "no reasonable basis for denying access" to the records in dispute. (Public Officers Law § 89 [4] [c].)

The attorneys' fees provision of FOIL was amended in 2006 to make it easier for petitioners to obtain fees. (*See e.g. Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120, 1122 [3d Dept 2013] [amendment was "in order to create a clear deterrent to unreasonable delays and denials of access"(internal quotations omitted)]; *see also New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195 n.2 [3d Dept 2011] [noting that the fee law was amended in order to combat the "'sue us' attitude" adopted by some agencies].) Under FOIL's fee provision, the petitioner need only establish that it has substantially prevailed in this Article 78 proceeding and that respondent had no "reasonable basis for denying access" to the records sought (Public Officers Law § 89 [4] [c]).

For all of the reasons discussed above, it appears that the NYPD lacks any reasonable basis for denying Request 1 and for redacting the record in response to Request 3. Moreover, by responding to these requests with a laundry list of statutory exemptions, many of which could not reasonably apply to the NYCLU's request and which were not reasonably explained or supported, the NYPD has forced the NYCLU to expend significant time and resources to respond to each claim of exemption in this Petition. The NYCLU recognizes, of course, that this issue cannot be definitively resolved until the NYPD files its opposition, at which point the NYCLU will be able to address the fee issue more completely.

CONCLUSION

For the foregoing reasons, Petitioner the NYCLU respectfully requests that the Court order the NYPD to produce records responsive to Request 1 and the unredacted non-disclosure agreement responsive to Request 3, and to award the Petitioner its attorneys' fees and litigation costs.

DATED: May 18, 2016

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