

drug cases to criminal contempt of court, but their acquisition and use had not been reported in the media until the NYCLU released the records it obtained in response to this FOIL request.

3. Although the NYPD disclosed records about its use of Stingrays in response to the NYCLU's FOIL request, it refused to disclose any purchase orders, invoices, contracts, loan agreements, and other similar records regarding its acquisition of the Stingrays, and it redacted information about the models of Stingrays that it owns from responsive records. Without these records, the public will remain in the dark about crucial information: the taxpayer money spent on purchasing the devices, the models of Stingrays in the NYPD's possession, and the basic capacities of the Stingrays used by the NYPD. Without this information, the public—including the elected legislators who are supposed to provide direct oversight of the NYPD—has no way to assess whether the acquisition of the devices was in the public interest.

4. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to compel the NYPD to comply with its legal obligation to produce responsive documents.

VENUE

5. Pursuant to C.P.L.R. 7804(b) and 506(b), venue in this proceeding lies in New York County, in the judicial district in which the respondent took the action challenged here and where the office of the respondent is located.

PARTIES

6. Petitioner the New York Civil Liberties Union ("NYCLU") is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice and to promote transparency in government. For over fifty years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

7. Respondent New York City Police Department (“NYPD”) is a law-enforcement agency administered under New York Administrative Code, Title 14. The NYPD is a public agency subject to the requirements of the Freedom of Information Law, New York Officers Law § 84 et seq.

FACTUAL BACKGROUND

Stingrays¹

8. “Stingray” is a commonly-used term for surveillance equipment originally developed for military use. 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.

9. There are a number of different models of Stingrays on the market, and the equipment’s price and capability depends on its model and configuration. Stingrays may cost about \$25,000 or over \$150,000 per unit depending on the model, plus additional costs for accessories and training.

10. Even at the most basic level, portable devices with brand names like StingRay and KingFish can capture the unique identifying information for cell phones so that people can be identified or located with precision, including in their own home, at a place of worship, or a political gathering. 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. Some models can be configured to listen in on calls, to read text messages, and to intentionally interfere with cell phone service. These various capabilities raise serious privacy concerns under both the federal and New York Constitutions.

¹ Background information on Stingrays is alleged on information and belief, relying on various sources including government sources. The citations to these facts are provided in the memorandum accompanying the Petition.

11. Stingrays are also troubling in the impact that they have on nearby cell phones of innocent third parties who are not under investigation. Stingrays, by their operation, collect unique identifying information from bystander cell phones and can cause interference with service for other cell phones in the area.

Acquisition and Use of Stingrays by Law Enforcement Agencies in New York²

12. 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. After litigation in the Supreme Court in Erie County in which the NYCLU prevailed (*see NYCLU v Erie County Sheriff's Office*, 47 Misc 3d 1201[A] [Sup Ct, Erie County 2015]), the Erie County Sheriff's Office disclosed records on its acquisition and use of Stingrays, including records showing that it had spent over \$350,000 on KingFish, StingRay, and Stingray II systems. The State Police thereafter disclosed records showing that it had spent over \$640,000 on purchasing and maintaining Stingrays, including on models called StingRay II and Hailstorm, as well as an amplifier called Harpoon.

13. The NYCLU also served a FOIL request on the Rochester Police Department in 2015. The Rochester Police Department disclosed records showing that, using over \$150,000 in state grants, it had obtained KingFish and an amplifier called AmberJack in 2012 with the intention of using the system to investigate gang members.

The NYCLU's FOIL Request to the NYPD

14. Because a cloak of secrecy remained over the use of Stingrays by the country's largest local police, the NYCLU filed a FOIL request with the NYPD on April 13, 2015, requesting nine categories of records, including the following:

² Results of the NYCLU's FOIL requests are available on the NYCLU website at: <http://www.nyclu.org/stingrays>.

- (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.

A true and correct copy of the FOIL request (with page numbers added) is attached as **Exhibit A** to this Petition.

15. After months of delay during which the NYCLU continued to seek a response from the NYPD, the NYPD provided a substantive response on October 30, 2015. This response included the release of certain responsive records that showed that the NYPD had used Stingrays over one thousand times since 2008 without a written policy governing its use. A true and correct copy of the NYPD's response (with page numbers added), including copies of records released with the response, is attached as **Exhibit B** to this Petition.

16. 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 ("POL")] §§ 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."

17. In response to Request 3, the NYPD produced the non-disclosure agreement between the NYPD and the Harris Corporation, the manufacturer of Stingrays, but redacted all information identifying the devices in the NYPD's possession. The NYPD asserted 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.”

18. By letter dated November 18, 2015, the NYCLU filed a timely administrative appeal of the NYPD’s response, which included an appeal from the denial of records responsive to Request 1 and the redaction of the non-disclosure agreement produced in response to Request 3. A true and correct copy of the NYCLU’s administrative appeal (with page numbers added), with exhibits A and B thereto omitted, is attached as **Exhibit C** to this Petition.

19. On February 4, 2016, the NYPD issued its final denial, which denied disclosure of additional documents. A true and correct copy of the NYPD’s response to the NYCLU’s administrative appeal (with page numbers added) is attached as **Exhibit D** to this Petition

20. With respect to Request 1, the NYPD denied the request for acquisition records in its entirety, citing Public Officers Law § 87 [2] [c], [d], [g], [e] [iii] and [iv], and [i], as well as the Homeland Security Information Sharing Act (6 USC § 482 [f] [1]), Federal Communications Commission regulations (47 CFR 0.457), and the International Traffic in Arms Regulations (22 CFR § 121.1). With respect to Request 3, the NYPD attempted to justify the redactions by citing Public Officers Law § 87 [2][c] and [d], as well as the Homeland Security Information Sharing Act (6 USC § 482 [f][1]), Federal Communications Commission regulations (47 CFR 0.457), and the International Traffic in Arms Regulations (22 CFR § 121.1).

21. Having considered the NYPD’s response in good faith, the NYCLU files this Article 78 Petition to seek disclosure of acquisition records responsive to Request 1 and full disclosure without redactions of the non-disclosure agreement produced in response to Request 3.

CAUSE OF ACTION UNDER ARTICLE 78

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

23. The petitioner has a clear right to the records responsive to Requests 1 and 3, without any redactions.

24. There is no basis in law or fact for the respondent to withhold the requested records or redact them.

25. The respondent's obligation under FOIL to produce documents and to respond to requests with particularized, specific reasons for any denials or redactions is mandatory, not discretionary.

26. The petitioner exhausted its administrative remedies with the respondent when it appealed the respondent's denial of the request and received a final denial of that appeal. The petitioner has no other remedy at law.

27. This Petition is timely under CPLR § 217 as it is filed within four months of the respondent's final denial of the administrative appeal.

REQUESTED RELIEF

WHEREFORE, the petitioner seeks judgment:

- (1) Pursuant to CPLR § 7806, directing the respondent to comply with its duty under FOIL and disclose without redactions the records sought by the petitioner in Requests 1 and 3 in the FOIL request dated April 13, 2015;
- (2) Awarding reasonable attorneys' fees and litigation costs as allowed under New York Public Officers Law § 89; and
- (3) Granting such other relief as the Court deems just and proper.

Respectfully Submitted,



Mariko Hirose

Robert Hodgson

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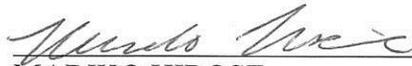
Counsel for Petitioner

VERIFICATION

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

Mariko Hirose, an attorney admitted to practice in the State of New York, affirms pursuant to CPLR § 2106 under the penalties of perjury:

1. I am an attorney for the Petitioner in the within proceeding. I make this Verification pursuant to CPLR § 3020 [d] [3].
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.



MARIKO HIROSE

Dated: 5/18, 2016
New York, New York

Sworn and subscribed to me
this 18th day of May, 2016



ROBERT ANDREW HODGSON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02HO6298810
Qualified in Kings County
Commission Expires 3/17/2018