NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

IN RE MICHAEL GRABELL,	:	
	:	
Petitioner-Respondent,	:	
	:	Sup. Court, New York County
-against-	:	Index No. 100580/2013
	:	
NEW YORK CITY POLICE DEPARTMENT,	:	
	:	
	:	
Respondent-Appellant.	:	

NOTICE OF MOTION BY THE NEW YORK CIVIL LIBERTIES UNION AND THE BRENNAN CENTER FOR JUSTICE FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER-RESPONDENT

PLEASE TAKE NOTICE, that upon the affirmation of Mariko Hirose sworn to on October 9, 2015, and all exhibits attached thereto including a copy of the proposed brief of *amici curiae*, the undersigned will move this Court at 27 Madison Avenue, New York, New York, on Monday, October 19, 2015, at 10:00 AM, or as soon thereafter as is practicable, for an order granting leave to the New York Civil Liberties Union and the Brennan Center for Justice to file with this Court a brief of *amici curiae* in support of Petitioner-Respondent, Michael Grabell, in the above-styled action.

Respectfully submitted,

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Dated: October 9, 2015
New York, New York

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NEW YORK SUPREME COURT
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IN RE MICHAEL GRABELL,	:	
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AFFIRMATION OF MARIKO HIROSE IN SUPPORT OF MOTION BY THE NEW YORK CIVIL LIBERTIES UNION AND THE BRENNAN CENTER FOR JUSTICE TO FILE *AMICI CURIAE* BRIEF

Mariko Hirose, an attorney admitted to practice before the courts of New York, affirms the following to be true under penalty of perjury:

1. I am an attorney at the New York Civil Liberties Union (NYCLU) Foundation. On behalf of the NYCLU and the Brennan Center for Justice, I submit this affirmation in support of the motion for leave to file the attached brief as *amici curiae* in support of Petitioner-Respondent Michael Grabell.

2. This case raises an important issue of whether the lower court correctly held that the Freedom of Information Law gives a journalist the right to access records about the New York Police Department's (NYPD) acquisition of "Z

Backscatter Vans," military-grade surveillance equipment that relies on x-ray radiation to image the inside of cars and buildings. This equipment, like many other new surveillance technologies, raises significant concerns about impact on public health and personal privacy.

3. *Amicus curiae* the New York Civil Liberties Union, the New York State affiliate of the American Civil Liberties Union, is a non-profit, non-partisan organization with tens of thousands of members. The NYCLU is committed to the defense and protection of civil rights and civil liberties, including the right to be free of unwarranted government surveillance and unjustified police actions. The NYCLU seeks to participate as *amicus curiae* in this case because the NYCLU frequently uses FOIL in its work, including to promote public understanding of and dialogue on police practices and new surveillance technology (*see e.g. N.Y. Civil Liberties Union v Erie County Sheriff's Office*, 47 Misc 3d 1201 [Sup Ct, Erie County 2015] (request for records related to Stingrays surveillance equipment); *N.Y. Civil Liberties Union v City of N.Y. Police Dept.*, [Sup Ct, NY County, July 2, 2009, index No. 112145/08] (request for records relating to the Lower Manhattan Security Initiative, the surveillance infrastructure that includes a network of cameras); NYCLU, Automatic License Plate Readers, http://www.nyclu.org/content/automatic-license-plate-readers (publishing results of FOIL requests relating to automatic license plate readers, including a request to the

NYPD)). The NYCLU currently has a number of pending FOIL requests to local police agencies seeking records related to the use of new surveillance technology.

4. The NYCLU is well-positioned to be of assistance to this Court because of its familiarity with FOIL. Earlier this year, the NYCLU prevailed in a FOIL case which sought similar types of records as this case but relating to Stingrays, a surveillance device acquired by the Erie County Sheriff's Office *(see Erie County Sheriff's Office*, 47 Misc 3d 1201).

5. *Amicus curiae* the Brennan Center for Justice is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and constitutional limits on the government's exercise of power. The Center's Liberty and National Security (LNS) Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security policies that respect the rule of law and constitutional values. Reining in excessive government secrecy is one of the LNS Program's main areas of focus and the Brennan Center has issued several reports on the need to increase the transparency of national security policies and activities (*see e.g.* Brennan Center for Justice, Strengthening Intelligence Oversight [Michael German, ed., 2015]; Elizabeth Goitein, Reducing Overclassification Through Accountability [2011]; Emily Berman, Executive Privilege: A Legislative Remedy [2009]). The Brennan Center also routinely uses FOIL in its work and has

filed *amicus* briefs addressing similarly exceptional claims of secrecy (*see e.g. Abdur-Rashid v City of N.Y. Police Dept.*, No. 101559/2013 [1st Dept filed Sept. 23, 2015]; *Dhiab v Obama*, 787 F3d 563 [DC Cir 2015] (arguing that the U.S. government should not be permitted to classify information simply because it could be used to stir anti-American sentiment abroad or embarrass the U.S.); *Ctr. for Constitutional Rights v Cent. Intelligence Agency*, 135 S Ct 1530 [2015] (supporting certiorari, describing the epidemic of overclassification in government agencies and the resulting risk to FOIA itself)). The Brennan Center's views as *amicus curiae* in this case do not and will not purport to represent the position of NYU School of Law.

6. The NYCLU and the Brennan Center for Justice seek to participate as *amici curiae* in this case because of the importance of public disclosure of basic records about government use of surveillance technology.

7. This case illustrates the legitimate and acute need for public awareness of government actions in the era of advancing surveillance technologies. Like many new surveillance technologies, the Z Backscatter Vans are expensive—the NYPD reportedly spent between $729,000 and $825,000 per unit on these vans.[1] And like many new surveillance technologies, the use of these vans raises

[1] *See e.g.* Michael Grabell, *Judge Orders NYPD to Release Records on X-ray Vans*, ProPublica, Jan. 9, 2015, https://www.propublica.org/article/judge-orders-nypd-to-release-records-on-x-ray-vans.

significant concerns about impact on privacy and public health.[2] New York City residents have the right to ask: How is the NYPD ensuring that innocent New Yorkers are not subject to harmful x-ray radiation? How long is the NYPD keeping the images that it takes and who can look at them? Is the NYPD obtaining judicial authorization prior to taking images, and if so, what type of authorization? Is the technology funded by taxpayer money, and has the use of the vans justified the price tag?

8. The proposed brief of *amici curiae* is attached to this affirmation as Exhibit A. This brief supplements the Petitioner's brief by elaborating on two issues that may otherwise escape the Court's consideration. First, *amici* describe how the decision below is consistent with the growing consensus that transparency about government use of surveillance technology is crucial for accountability—the very goal of FOIL. Second, *amici* describes how the decision below is consistent with the public disclosure of records similar to those requested here, both specifically with respect to backscatter technology and generally with respect to surveillance technology, by other law enforcement agencies.

---

[2] *See id.* (explaining how the Z Backscatter Vans use the same technology as airport scanners that raised public outcry over privacy and safety and that were removed from airports); Diane Macedo, *X-Ray Vans: Security Measure, or Invasion of Privacy?*, Fox News, Oct. 22, 2010, http://www.foxnews.com/scitech/2010/10/19/x-ray-vans-security-measure-invasion-privacy/; Patrik Jonsson, *'Feds Radiating Americans'? Mobile X-Ray Vans Hit U.S. Streets*, The Christian Science Monitor, Sept. 29, 2010, http://www.csmonitor.com/USA/2010/0929/Feds-radiating-Americans-Mobile-X-ray-vans-hit-US-streets; Marc Georges, *X-Ray Scanning Vans Hit Streets, Raising Privacy Concerns*, Mashable, July 5, 2012, http://news.yahoo.com/x-ray-scanning-vans-hit-streets-raising-privacy-144109188.html.

9. As required by Rule 600.2(a)(3), attached as Exhibit B is the notice of appeal in this matter and attached as Exhibit C is the order sought to be reviewed.

10. For these reasons, the NYCLU and the Brennan Center for Justice respectfully seek the Court's permission to file the attached *amici curiae* brief.

Dated: October 9, 2015
New York, New York

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EXHIBIT A

New York Supreme Court

Appellate Division – First Department

In the Matter of the Application of

MICHAEL GRABELL,

Petitioner-Respondent,

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent-Appellant.

BRIEF OF *AMICI CURIAE* THE NEW YORK CIVIL LIBERTIES UNION AND THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF PETITIONER-RESPONDENT

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Dated: October 9, 2015

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PRELIMINARY STATEMENT

In this Freedom of Information Law case, the lower court correctly held that a journalist—and, by extension, the public—has the right to access records about the NYPD's acquisition and use of "Z Backscatter Vans," military-grade surveillance equipment that uses x-ray radiation to image the inside of cars and buildings. While it is known that the U.S. military uses these vans in Afghanistan to sweep areas for roadside and car bombs, little public information exists on how the NYPD is using the vans in the streets of New York City. The court below held that the NYPD must release, subject to certain redactions, records about the use of the vans responsive to the FOIL request at issue: policies and procedures and training materials; summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation; records sufficient to disclose both the aggregate cost of the vans purchased by or for the NYPD and the total number of vans purchased; and any tests or reports regarding the radiation dose or other health and safety effects of the vans.

Amici curiae the New York Civil Liberties Union and the Brennan Center for Justice file this brief because both organizations are dedicated to ensuring that the public is informed about its government's acquisition and use of new surveillance technologies, including through policy work and pursuit of similar

public records requests. Such technologies—from x-ray scanners to drones, automatic license plate readers that record license plates of cars passing by, and "Stingrays" that spy on nearby cell phones by imitating cell phone towers—have brought rapid advances to law enforcement capacity to monitor its citizens. Some of these new technologies have filtered in from the battlefields into the hands of local law enforcement with little notice to the public and with little oversight. These technologies raise legitimate questions for communities about cost, effectiveness, and the impact on the rights of everyday people to live in a society free of unwarranted government surveillance.

The decision below correctly construed FOIL to allow the public to obtain answers to these pressing questions and reject the NYPD's refusal to disclose *any* of the records responsive to the FOIL request. In urging that the Court affirm the decision, *amici* supplement the Petitioner's brief by elaborating on two reasons why the blanket secrecy advocated by the NYPD is unwarranted. First, *amici* describe how the decision below is consistent with the growing consensus that transparency about government use of surveillance technology is crucial for accountability—the very goal of FOIL. Second, *amici* describe how the decision below is consistent with the public disclosure of records similar to those requested here, both specifically with respect to backscatter technology and generally with

respect to surveillance technology, by other law enforcement agencies. Although the NYPD relies heavily on the specter of terrorism to argue for blanket secrecy over any record relating to the Z Backscatter Vans, the Court should affirm the lower court decision and make clear that the NYPD must make basic records relating to its acquisition and use of surveillance technology available to the public, to whom it is accountable.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae the New York Civil Liberties Union, the New York State affiliate of the American Civil Liberties Union, is a non-profit, non-partisan organization with tens of thousands of members. The NYCLU is committed to the defense and protection of civil rights and civil liberties, including the right to be free of unwarranted government surveillance and unjustified police actions. The NYCLU seeks to participate as *amicus curiae* in this case because the NYCLU frequently uses FOIL in its work, including to promote public understanding of and dialogue on police practices and new surveillance technology (*see e.g. N.Y. Civil Liberties Union v Erie County Sheriff's Office*, 47 Misc 3d 1201 [Sup Ct, Erie County 2015] (request for records related to Stingrays surveillance equipment); *N.Y. Civil Liberties Union v City of N.Y. Police Dept.*, 2009 NY Misc Lexis 2542 [Sup Ct, NY County, July 2, 2009, No. 112145/08] (request for records relating to

the Lower Manhattan Security Initiative, the surveillance infrastructure that includes a network of cameras); NYCLU, Automatic License Plate Readers, http://www.nyclu.org/content/automatic-license-plate-readers (publishing results of FOIL requests relating to automatic license plate readers, including a request to the NYPD)). The NYCLU currently has a number of pending FOIL requests to local police agencies seeking records related to the use of new surveillance technology.

Amicus curiae the Brennan Center for Justice is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and constitutional limits on the government's exercise of power. The Center's Liberty and National Security (LNS) Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security policies that respect the rule of law and constitutional values. Reining in excessive government secrecy is one of the LNS Program's main areas of focus and the Brennan Center has issued several reports on the need to increase the transparency of national security policies and activities (*see e.g.* Brennan Center for Justice, Strengthening Intelligence Oversight [Michael German, ed., 2015]; Elizabeth Goitein, Reducing Overclassification Through Accountability [2011]; Emily Berman, Executive Privilege: A Legislative Remedy [2009]). The Brennan Center also routinely uses FOIL in its work and has

filed *amicus* briefs addressing similarly exceptional claims of secrecy (*see e.g. Abdur-Rashid v City of N.Y. Police Dept.*, No. 101559/2013 [1st Dept, filed Sept. 23, 2015]; *Dhiab v Obama*, 787 F3d 563 [DC Cir 2015] (arguing that the U.S. government should not be permitted to classify information simply because it could be used to stir anti-American sentiment abroad or embarrass the U.S.); *Ctr. for Constitutional Rights v Cent. Intelligence Agency*, 135 S Ct 1530 [2015] (supporting certiorari, describing the epidemic of overclassification in government agencies and the resulting risk to FOIA itself)). The Brennan Center's views as *amicus curiae* in this case do not and will not purport to represent the position of NYU School of Law.

ARGUMENT

I. THE LOWER COURT DECISION IS CONSISTENT WITH THE GROWING CONSENSUS THAT DISCLOSURE OF BASIC RECORDS REGARDING SURVEILLANCE TECHNOLOGY IS NECESSARY FOR ACCOUNTABILITY.

The Court should affirm the lower court's decision to release basic records relating to Z Backscatter Vans because it furthers the goal of FOIL to "promote open government and public accountability" (*Gould v City of N.Y. Police Dept.*, 89 NY2d 267, 274 [1996]). In codifying FOIL, the Legislature made the determination that "a free society is maintained when government is responsive

and responsible to the public, and when the public is aware of governmental actions" (Pub. Off. Law § 84). The Legislature recognized that "[t]he more open a government is with its citizenry, the greater the understanding and participation of the public in government" (*id.*).

This case illustrates the legitimate and acute need for public awareness of government actions in the era of advancing surveillance technologies. Like many new surveillance technologies, the Z Backscatter Vans are expensive—the NYPD reportedly spent between $729,000 and $825,000 per unit on these vans.[1] And like many new surveillance technologies, the use of these vans raises significant concerns about impact on privacy and public health.[2] New York City residents have the right to ask: How is the NYPD ensuring that innocent New Yorkers are not subject to harmful x-ray radiation? How long is the NYPD keeping the images that it takes and who can look at them? Is the NYPD obtaining judicial

[1] *See e.g.* Michael Grabell, *Judge Orders NYPD to Release Records on X-ray Vans*, ProPublica, Jan. 9, 2015, https://www.propublica.org/article/judge-orders-nypd-to-release-records-on-x-ray-vans.

[2] *See id.* (explaining how the Z Backscatter Vans use the same technology as airport scanners that raised public outcry over privacy and that were removed from airports, and discussing possible health concerns); Diane Macedo, *X-Ray Vans: Security Measure, or Invasion of Privacy?*, Fox News, Oct. 22, 2010, http://www.foxnews.com/scitech/2010/10/19/x-ray-vans-security-measure-invasion-privacy/; Patrik Jonsson, *'Feds Radiating Americans'? Mobile X-Ray Vans Hit U.S. Streets*, The Christian Science Monitor, Sept. 29, 2010, http://www.csmonitor.com/USA/2010/0929/Feds-radiating-Americans-Mobile-X-ray-vans-hit-US-streets; Marc Georges, *X-Ray Scanning Vans Hit Streets, Raising Privacy Concerns*, Mashable, July 5, 2012, http://news.yahoo.com/x-ray-scanning-vans-hit-streets-raising-privacy-144109188.html.

authorization prior to taking images, and if so, what type of authorization? Is the technology funded by taxpayer money, and has the use of the vans justified the price tag?

There is a growing consensus that providing the public with answers to these types of questions about law enforcement use of new technology promotes good governance. The President's Task Force on 21st Century Policing, convened by President Obama, recommended that law enforcement agencies "encourage public engagement and collaboration, including the use of community advisory bodies, when developing a policy for the use of a new technology,"[3] and that they include representatives from the community in evaluating or assessing the effectiveness of any new technology.[4] The International Association of Chiefs of Police, in issuing a privacy impact assessment of automatic license plate readers, recognized the privacy implications of this technology and suggested that "[o]ne way to promote public confidence is to increase the transparency surrounding how [the license plate reader] data will be managed by the law enforcement agency."[5] The

[3] Final Report of the President's Task Force on 21st Century Policing at 35 (May 2015), *available at* http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.
[4] *Id.* at 35-36.
[5] Int'l Ass'n of Chiefs of Police, Privacy Impact Assessment Report for the Utilization of License Plate Readers at 28 (Sept. 2008), *available at* http://www.theiacp.org/Portals/0/pdfs/LPR_Privacy_Impact_Assessment.pdf.

Department of Justice recently made public its policy on the use of Stingrays to "enhance transparency and accountability[.]"[6]

Local governments around the country are also learning the importance of community involvement in making decisions about surveillance technology, especially technology with capacity to indiscriminately record private information about people. In California, the Oakland city council formed a privacy advisory committee open to the public after community backlash opposing the expansion of the city's network of surveillance cameras.[7] In Washington, the City of Seattle passed an ordinance that makes public basic information about purchases of "surveillance equipment," such as drones, including intended uses of the equipment and the data to be collected and retained.[8]

The NYPD states that it is "mindful of the public's legitimate desire to know the privacy, health, and fiscal implications of [Z Backscatter Vans]" (brief of respondent-appellant at 3), but offers no alternative other than complete secrecy. That result advocated by the NYPD is detrimental to the purpose of FOIL to

[6] Press Release, Department of Justice, Justice Department Announces Enhanced Policy for Use of Cell-Site Stimulators (Sept. 3, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-announces-enhanced-policy-use-cell-site-simulators.
[7] Memorandum from Fred Blackwell to Honorable Mayor & City Council (Apr. 25, 2014), http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/report/oak046804.pdf.
[8] City of Seattle, Wash., Ordinance No. 124142, http://clerk.seattle.gov/~archives/Ordinances/Ord_124142.pdf.

promote public discussion and government accountability. As surveillance technology becomes cheaper and more advanced, it becomes ever more important for FOIL to facilitate communities' understanding of their government's use of surveillance technology and to serve as a check on their government.

II. THE LOWER COURT DECISION IS CONSISTENT WITH THE PUBLIC DISCLOSURE OF SIMILAR BASIC RECORDS ABOUT SURVEILLANCE TECHNOLOGY BY OTHER LAW ENFORCEMENT AGENCIES.

The lower court correctly rejected the NYPD's sweeping argument that disclosing *any* of the requested records relating to its use of Z Backscatter Vans would "reveal criminal investigative techniques or procedures, except routine techniques and procedures" (Pub. Off. Law § 87 [2][e][iv]), or could endanger the life and safety of any person (Pub. Off. Law § 87 [2][f]) (*see* order at 10-19). As the court explained, the NYPD did not meet its burden of establishing how all of the responsive records—such as records revealing x-ray's public health risks, the NYPD's prior use of the vans, its policy relating to judicial authorization, or the policy governing retention of images—could lead to the dire consequences predicted by the NYPD (*see id.* (citing *Gould*, 89 NY2d at 275 (stating that the agency has the burden of establishing a "particularized and specific justification" for withholding records under each exemption))).

The lower court's conclusion is supported, first, by the public availability of much information about the backscatter technology, as described both in the Petitioner's brief and below. New York courts have recognized that, as a logical matter, public availability of information undercuts a claimed justification for secrecy under a FOIL exemption (*see e.g. Laborers' Int'l Union of N. Am. Local Union No. 17 v N.Y. State Dept. of Transp.*, 280 AD2d 66, 70 [3d Dept 2001] (denying exemption over records revealing information already known); *N.Y. Civil Liberties Union v City of N.Y. Police Dept.*, 20 Misc 3d 1108, *2-3 [Sup Ct NY County 2008] (denying law enforcement exemption when the same information has already been provided to two research institutes); *Gray v Faculty-Student Ass'n of Hudson Valley Community Coll.*, 717 NYS2d 507, 510 [Sup Ct, Rensselaer County 2000] (denying exemption over "information which is already available to any member of the public simply by walking into the bookstore"); *Matter of Muniz v Roth*, 163 Misc 2d 293, 297 [Sup Ct, Tomkins County 1994] (refusing to apply law enforcement exemption to methodology that "was the subject of testimony in open court")). Federal courts have held the same under the federal Freedom of Information Act (*see e.g. Ferri v Bell*, 645 F2d 1213, 1224 [3d Cir 1981] (explaining that the law enforcement exception does not apply to "procedures already well-known to the public" and noting that law enforcement's "assertion of

confidentiality is controverted by evidence . . . suggesting that information on the mechanics of surveillance can already be found in the public domain in various scientific, technical, and government literature"), *modified on other grounds by* 671 F2d 769 [3d Cir 1982]; *Am. Civil Liberties Union of N. Cal. v Dept. of Justice*, 70 F Supp 3d 1018, 1037 [ND Cal 2014] ("Location Tracking FOIA") (rejecting law enforcement exemption under FOIA for records relating to mobile tracking devices because information is already available in the government's "own publicly available guides and manuals, as well as having been the subject of extensive media coverage"), *appeal pending*).

Much information about backscatter technology is available as a result of the Department of Homeland Security—the federal agency specifically tasked with preventing terrorism—making basic records about its use accessible to the public. When DHS began deploying backscatter x-ray systems at the borders, for example, it issued public Environmental Assessments under the National Environmental Policy Act of 1969 that described the systems in place, discussed the purpose and the need, analyzed radiological health and safety, and made clear that "occupants of the vehicle will have the option to remain in the vehicle while the driver drives it through the portal or exit the vehicle and have a [Customs and Border Patrol]

Officer drive it through the portal."[9] In addition, when DHS began using body scanners for airport screening, including scanners employing backscatter technology similar to the Z Backscatter Vans, it was required to engage in rulemaking under the federal Administrative Procedures Act (*see Elec. Privacy Info. Ctr. v Dept. of Homeland Security*, 653 F3d 1, 6 [DC Cir 2011] (requiring DHS to undergo rulemaking because the use of the new scanners "affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking")). The notice posted by DHS described the costs and benefits of the technology, the privacy safeguards proposed, the safety evaluation, and other analyses of the impact that the technology would have on the traveling public.[10] DHS was further required to release records relating to backscatter technology in response to a FOIA lawsuit, including a report evaluating a body scanning machine's health effects (*see Elec. Privacy Info. Ctr. v Dept. of Homeland Security*, 928 F Supp 2d 139, 148 [DDC 2013]).

Second, the lower court decision is supported by recent court decisions from other jurisdictions rejecting the invocation of the law enforcement exemption in

[9] Dept. of Homeland Security, Final Environmental Assessment for Deployment of Backscatter X-Ray Inspection Systems, Otay Mesa Port of Entry, San Diego County, California at 3 (Apr. 2011), *available at* https://ecso.swf.usace.army.mil/PublicReview/Otay%20Mesa%20Backscatter%20FEA%20.pdf.
[10] Passenger Screening Using Advanced Imaging Technology, 78 FR 18287, 18287-18302, https://www.federalregister.gov/articles/2013/03/26/2013-07023/passenger-screening-using-advanced-imaging-technology.

public records requests seeking similar types of basic records relating to new surveillance technologies. In *Erie County Sheriff's Office* (47 Misc 3d at *10-13), for example, the court ordered the release of policies and procedures, summaries of past uses, and invoices relating to the Sheriff's acquisition and use of Stingrays, rejecting the argument that such disclosure would undermine law enforcement interests protected by FOIL. With respect to policies and procedures in particular, the court held that law enforcement interests would not be compromised by the release of a procedure manual for officers that included rules limiting the use of Stingrays for official law enforcement purposes, requiring recordkeeping, regulating retention of data, and mandating secrecy (*see id.* at *9-10). Similarly, the Northern District of California has ordered the Department of Justice to release policy documents regarding the legal procedures followed in its use of location tracking technology, including its use of Stingrays, despite claims of undermined law enforcement interests (*see eg*, *Location Tracking FOIA*, 70 F Supp 3d at 1038 (rejecting law enforcement exemption as to portions of legal resource book and reference guide for federal prosecutors on electronic surveillance and tracking); *Am. Civil Liberties Union of N. Cal. v Dept. of Justice*, 2015 WL 3793496, at *16 [ND Cal June 17, 2015, No. 13-CV-03127-MEJ] (rejecting law enforcement

exemption as to documents discussing legal requirements and procedures to follow when using location tracking technologies)).

Although courts have in some cases limited disclosure of certain records of use of technologies under a state law's exemption for investigatory records, the agencies in those cases did not insist on blanket secrecy like the NYPD. In *American Civil Liberties Union Foundation of Southern California v Superior Court of Los Angeles County*, for example, an appellate court in California denied disclosure of raw data collected by automatic license plate readers, but noted that the agency had already produced the policies and guidelines governing use of license plate readers in response to the public records request (*see* 186 Cal Rptr 3d 746, 748 [Court of appeal, May 11, 2015], *review granted*, 352 P.3d 882 [Cal 2015]). In *Hodai v City of Tucson*, a trial court in Arizona denied access to a limited set of records relating to Stingrays different from those sought here, such as a data dump and records disclosing the technical specification of the technology, but praised the City's efforts to address public concerns by disclosing how often the equipment has been used and whether it was used with a warrant, producing all case files in which Stingrays were used except for one ongoing investigation, and describing the City's legal process and data retention policies ([Arizona Sup Ct.,

Pima County Dec. 11, 2014, No. C20141225],[11] *appeal filed*). The NYPD's response is extraordinary even measured by these cases in which some records were withheld, in that it asserts that *no* record relating to the Z Backscatter Vans can be disclosed without interfering with law enforcement interests (*cf. e.g. Am. Civil Liberties Union v Dept. of Justice*, 655 F3d 1, 16 [DC Cir 2011] (ordering disclosure of docket information for people convicted of crimes who had been subject to cell phone location surveillance where agency did not raise the law enforcement exemption); *N.Y. Times v Dept. of Justice*, 2015 WL 1454939, *1-2, 7 [SD NY Mar. 31, 2015, No. 14CV328(DLC)] (denying access to a single internal email based on the law enforcement exemption after the agency released over seventy pages of documents relating to GPS surveillance); *Soghoian v Dept. of Justice*, 885 F Supp 2d 62, 74-75 [DDC 2012](denying access to limited records relating to electronic surveillance after the agency had produced "a 299-page manual entitled *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*" that described legal process and limitations on use).[12]

[11] *Available at* http://www.sandiego.gov/cityattorney/pdf/news/2014/nr141222b.pdf.

[12] The NYPD's reliance on older cases involving eavesdropping records is misplaced (*see* brief of respondent-appellant at 18, 29-30). In *United States v Van Horn* (789 F2d 1492, 1508 [11th Cir 1986]) the court held that the criminal defendant did not show a need for further discovery into the nature and location of wiretapping equipment in a criminal case, using a common-law law enforcement privilege that does not apply under New York FOIL (*see e.g. Doolan v Bd. of*

In taking this extreme position of secrecy, the NYPD relies heavily on its assertion that the vans are not a "routine crime-control device" but are used for "the detection and prevention of terrorist attacks" (brief of respondent-appellant at 16). But the NYPD has not disclosed any policy documents, or put forth anything in the record, that limit the use of Z Backscatter Vans in that manner. In fact, surveillance technologies are often initially justified as counterterrorism tools but quickly become a fixture of everyday law enforcement and have the potential to indiscriminately gather private data about innocent community members.[13] "Counterterrorism" should not be used to justify a blanket exemption from FOIL

Co-op Educ. Servs., Second Supervisory Dist. of Suffolk County, 48 NY2d 341, 347 [1979] ("The public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed."); *Johnson v City of N.Y. Police Dept.*, 257 AD2d 343, 349-50 [1st Dept 1999] (rejecting application of common law "privilege" and holding that the "public safety provisions of FOIL are quite explicit and it is by these provisions that a FOIL request is to be judged")). In *Matter of De Zimm v Connelie* (102 AD2d 668, 671 [3d Dept 1984], *affd on other grounds* 64 NY2d 860 [1985]) the court denied access to records relating to eavesdropping techniques after identifying specific details of the manual that posed the substantial likelihood of wrongdoers evading detection. Here, the NYPD claims a blanket right to secrecy over all records without adequately establishing how particular portions of records are substantially likely to help wrongdoers evade detection.

[13] For example, the Stingray surveillance device, which was "billed as a tool to hunt terrorists and kidnappers," has become "a staple of everyday policing" in cities across the United States. Brad Heath, *Police Secretly Track Cellphones to Solve Routine Crimes*, U.S.A. Today, Aug. 24, 2015, http://www.usatoday.com/story/news/2015/08/23/baltimore-police-stingray-cell-surveillance/31994181/. In another example, automatic license plate readers were "conceived primarily as a counterterrorism tool," but have "aided in all sorts of traditional criminal investigations." Al Baker, *Camera Scans of Car Plates Are Reshaping Police Inquiries*, N.Y. Times, Apr. 11, 2011, http://www.nytimes.com/2011/04/12/nyregion/12plates.html?_r=0.

for all records relating to surveillance technology (*see* order at 21 ("While this court is cognizant and sensitive to concerns about terrorism, being located less than a mile from the 9-11 site, and having seen firsthand the effects of terrorist destruction, nonetheless, the hallmark of our great nation is that it is a democracy, with a transparent government.")).[14]

The NYPD's refusal to disclose any record responsive to this FOIL request is out of step both with the growing consensus that public disclosure of this kind is consistent with good government practices and with the trend of disclosures made by other law enforcement agencies. At bottom, the NYPD is a local law enforcement agency that is accountable to the people. The Court should affirm the lower court decision and hold that the NYPD cannot keep all records about its use of Z Backscatter Vans shielded from the people to whom it is accountable.

[14] In *New York Civil Liberties Union v New York City Police Dept.* (Sup Ct, NY County, July 2, 2009, No. 112145/08) ("Lower Manhattan Security Initiative Decision"), the lower court relied on the NYPD's counterterrorism concerns in denying access to certain records revealing operational details of the network of cameras and automatic license plate readers in Lower Manhattan—a system that was described as "designed to detect and monitor possible terrorist activity." To the extent that the case dealt with similar types of records as the records requested here, the Court should adopt the lower court decision's more thorough reasoning here rather than in the Lower Manhattan Security Initiative Decision.

CONCLUSION

For the reasons above, the Court should affirm the lower court decision granting in part the Petitioner's FOIL request for records relating to Z Backscatter Vans.

DATE: October 9, 2015

Respectfully submitted,

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EXHIBIT B

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

----------x

In the Matter of the Application of

MICHAEL GRABELL,

Petitioner,

NOTICE OF APPEAL

Index No. 100580/13

For a Judgment under Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

----------x

PLEASE TAKE NOTICE that respondent, the New York City Police Department, hereby appeals to the Appellate Division of the Supreme Court, First Department, from an order, Dated December 9, 2014 and entered January 8, 2015, in the above entitled proceeding in favor of the above named Petitioner, directing the disclosure of certain records.

Dated: New York, New York
January 8, 2015

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JAN 08 2015

EXHIBIT C

J

EA 12/10/14 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Hon. Doris Ling-Cohan

Index Number : 100580/2013

GRABELL, MICHAEL

vs

N.Y.P.D.

Sequence Number : 001

ARTICLE 78

PART 36

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Article 78 proceeding

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo | No(s). 1, 2, 3

Answering Affidavits — Exhibits + Memo | No(s). 4, 5

Replying Affidavits Memo | No(s). 6

Stip dated 8/26/14, letters dated 9/9/13 + 9/11/14, interim orders of 9/25/14 + 8/7/14 + 1/21/14 + 7/8/14 7-13

Upon the foregoing papers, it is ordered that this motion is Article 78 proceeding is granted in accordance with the attached memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

FOR THE FOLLOWING REASON(S): _____

FILED
JAN - 8 2015
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
DEC 10 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 12/9/14

_____, J.S.C.
JUDGE DORIS LING-COHAN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

In re Application for a Judgment Under Article 78 of the Civil Practice Law and Rules and other relief by

MICHAEL GRABELL,

Petitioner,

-against-

Index No. 100580/13

NEW YORK CITY POLICE DEPARTMENT,

Motion Seq. No.: 001

Respondent.

----------X

DORIS LING-COHAN, J.S.C.:

Petitioner Michael Grabell, a journalist employed by ProPublica, brings this action seeking a judgment declaring that respondent New York City Police Department (NYPD or Department) acted unlawfully in withholding documents that are not properly exempt from disclosure under the Freedom of Information Law (FOIL) (Public Officers Law (POL) § 85 *et seq*), directing the NYPD to provide petitioner with immediate access to all the nonexempt documents that he requested, and awarding petitioner costs and attorney's fees, pursuant to POL § 89 (4) (c).

Background

By letter, dated February 15, 2012, petitioner journalist requested copies of certain documents pertaining to the NYPD's purchase and use of a police vehicle known as the Z-backscatter van (Van). The Van(s) is an unmarked vehicle that contains an x-ray device that can detect drugs, certain bomb-making equipment, and

other organic and inorganic matter in vehicles or buildings. The radiation that the device emits does not penetrate its target, but reflects back a visual image. The U.S. Department of Defense has acquired a number of such Van(s) to assist in detecting roadside and car bombs in Afghanistan.

Petitioner seeks certain records as they would "reveal whether the NYPD has taken steps necessary to protect drivers, passengers and pedestrians from exposure to potentially harmful ionizing radiation". ¶14, Affidavit in Support. Petitioner states in his affidavit, and respondent does not dispute, that: backscatter technology, previously deployed in European Union airports, was banned in 2011, because of health concerns; an internal presentation from American Science & Engineering, Inc., the company that manufactures the Van(s), determined that the Vans deliver a radiation dose 40% larger than that delivered by a backscatter airport scanner; bystanders present when the Van(s) is in use are exposed to the radiation that the Van(s) emits; and the Transportation Security Administration recently removed all of its backscatter x-ray body scanners from airports in the United States, because the devices failed to comply with privacy requirements established by Congress. Petitioner also states, without dispute, that each of the Vans costs between $729,000 and $825,000. ¶9, Grabell Affidavit in Support, dated April 8, 2013 ("Affidavit in Support"). Moreover, petitioner maintains, and it is not disputed by the NYPD, that "[t]here may be significant health risks associated with the use of backscatter x-ray devices [as] these

machines use ionizing radiation, a type of radiation long known to mutate DNA and cause cancer". ¶5, Affidavit in Support.

Finally, petitioner states, again without dispute, that, on August 2011, the United States Customs and Border Protection Agency, which used the Van(s) to scan vehicles crossing into and out of the United States, despite repeated testing and analysis of the amount of radiation emitted by such devices, nevertheless, prohibited continued use of the Van(s) to scan occupied vehicles, until approval was granted by the United States Customs and Border Protection Radiation Safety Committee and the Attorney General. ¶14, Affidavit in Support.

Petitioner requested the following documents, by letter dated February 15, 2012:

> "[1] Any lists or itineraries of past missions/ deployments of the Z-backscatter van as well as any memos, debriefings, or after-action reports on past missions/deployments of the Z-backscatter van.
>
> [2] The department's policies and procedures regarding the Z-backscatter van as well as any training materials.
>
> [3] The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used.
>
> [4] Any contracts and supplemental contracting documents regarding the purchase of the Z-backscatter van.
>
> [5] Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.
>
> [6] Any records related to data storage including but not limited to: the type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored.
>
> [7] The contents of the image databases used and/or

created by the Z-backscatter van."

Verified Petition, Exhibit A.

By letter, dated April 18, 2012, the NYPD denied the entire request on the basis of POL § 87 (2) (e) (iv) "in that such law enforcement records, if disclosed, would reveal criminal investigative techniques or procedures." In addition, the NYPD based its denial on POL § 87 (2) (g), which exempts intra-agency materials from disclosure. Verified petition, exhibit B.

By letter, dated May 15, 2012, petitioner appealed the denial of his FOIL request, pointing out, among other things, that "[w]hile portions of [the records requested] may be withheld or redacted under the statutes [cited], the vast majority of the records are public and can be segregated for release." Verified petition, exhibit C, 1. By letter, dated December 19, 2012, the Department denied petitioner's appeal pursuant to POL § 87 (2) (e) (4), "because disclosure of the requested records would reveal non-routine investigative techniques or procedures"; pursuant to POL § 87 (2) (f), "because the utility of the `Z-backscatter scanner' as a law enforcement tool designed to protect public safety would be diminished if detailed information pertaining to its functioning and deployment could be used to foil the Z-backscatter van's effectiveness, thus endangering public safety"; and pursuant to POL 87 (2) (g), "to the extent that the requested records include preliminary data and information which is deliberative and pre-decisional in nature." Verified petition, exhibit D.

By its silence on the subject, the NYPD's December 19, 2012

letter effectively acknowledges that the intra-agency exemption is inapplicable, and such argument was not raised in its memorandum of law. The NYPD does not defend its denial of petitioner's appeal on the basis of POL § 87 (2) (g)(intra-agency exemption), either in its memorandum of law, or in the affidavit of Richard Daddario, Deputy Commissioner of Counter-terrorism. Accordingly, the court deems the NYPD to have abandoned that exemption as a ground for withholding the documents responsive to petitioner's FOIL request. In any event, petitioner argues that POL § 87 (2) (g) applies neither to instructions to staff that affect the public, nor to final policy decisions.

After a conference with the court, by stipulation dated August 26, 2014, petitioner agreed to modify his FOIL requests, addressing some of NYPD's concerns raised during settlement discussions and the court permits such modified FOIL requests. Petitioner narrowed or abandoned four of the seven categories of documents previously requested. Accordingly, the FOIL requests now before the court are limited to the following six (6) requests:

[1] Summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation.

[2] The Department's policies and procedures regarding backscatter van as well as any training materials.

[3] The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used.

[4] Records sufficient to disclose both the total aggregate cost of the Z Backscatter Vans purchased by or for the NYPD and the total number of vans purchased.

[5] Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.

[6] NYPD's final policy governing retention and storage of data generated by the Z Backscatter Vans, and other documents sufficient to disclose NYPD's policies regarding the length of time images are stored or maintained, the process by which images are deleted or destroyed, the number and type of individuals permitted to access stored images, and any restrictions NYPD imposes on the use of the images.

Despite petitioner's new sharply narrowed requests for documents, NYPD maintains its original objections to their disclosure.

Discussion

Standard of Review in FOIL Cases

"The premise of FOIL is `that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" *Matter of Newsday, Inc. v State Dept. of Transp.*, 5 NY3d 84, 88 (2005), quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 (1979). The purpose of requiring disclosure of governmental records is "to assist the public in formulating `intelligent informed choices with respect to both the direction and scope of governmental activities.'" *Matter of New York State United Teachers v Brighter Choice Charter School*, 15 NY3d 560, 564 (2010), quoting *Matter of Fink*, 47 NY2d at 571. FOIL requires state and municipal agencies to provide the public with all records

pertaining to the agencies' operations, that are not specifically exempted from disclosure. *Matter of Whitfield v Bailey*, 80 AD3d 417, 418-419 (1st Dept 2011). The statutory exemptions to disclosure are to be "narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *see also Matter of Markovitz v Serio*, 11 NY3d 43, 51 [2008]).

"[T]he burden of proof rests solely with the [agency] to justify the denial of access to the requested records." *Data Tree, LLC*, 9 NY3d at 463. In fact, where only a portion of a given document is properly exempt, the agency is nonetheless obligated to produce a redacted version that discloses all the non-exempt information. *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v Mills, Inc.*, 18 NY3d 42, 45-46 (2011); *Data Tree, LLC*, 9 NY3d at 464.

Contrary to respondent's argument that this court should defer to the NYPD's expert knowledge, it is settled law that a court reviewing an agency's failure to disclose requested records owes no deference to the agency's decision, but must "presume that all records of a public agency are open to public inspection ..., and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure." *New York Committee for Occupational Health & Safety v Bloomberg*, 72 AD3d 153, 158 (1st Dept 2010); *see also* POL §89 (4)(b); (5)(e); *Matter of Markowitz v.*

Serio, 11 NY3d 43, 50-51 (2008); *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562, 566 (1986). Such a showing must be made by "articulating a particularized and specific justification for denying access." *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 (1986); *see also Matter of New York State Pistol & Rifle Assn. v Kelly*, 55 AD3d 222, 225 (1st Dept 2008).

Moreover, as in the recent case of *Hashmi v. New York City Police Dept* (___ Misc 3d ___, 2014 NY Slip Op 24357 [Sup Court, NY County 2014]), this court will not adopt the federal standard as to Freedom of Information requests, as such is not contemplated by this state's current FOIL statute. It is the province of the legislature to change the applicable statute.

Thus, as explained above, it is well settled that the starting point for any FOIL inquiry is that the public has the right to know and it is the burden of the government to justify the denial of access. *See Data Tree, LLC*, 9 NY2d at 463. Respondent NYPD has articulated only two (2) reasons for exemption: (1) the "law enforcement/investigatory exemption" (POL §87(2)(e)); and (2) the "endangerment of life and safety of any person exemption" (POL §87(2)(f)). Both of such exemptions are to be "narrowly interpreted". *See Data Tree, LLC v Romaine*, 9 NY3d at 462.

POL § 87 (2) (e) - Law Enforcement/Investigatory Exemption

POL § 87 (2) (e) exempts from disclosure records

"compiled for law enforcement purposes and which, if disclosed, would: ... iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures." This exemption is properly invoked only where there is "`a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.'" *Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353, 355 (1st Dept 2009), *recalled and vacated on other grounds* 87 AD3d 874 (1st Dept 2011) quoting *Matter of Fink*, 47 NY2d at 572. In *Matter of Fink*, the Court held that portions of the office manual of the Deputy Attorney General and Special Prosecutor for Nursing Homes, which constituted "detailed, specialized methods" of conducting an audit of the books of nursing home operators, was exempt from disclosure, because release of the information would "actually countenance[] fraud by enabling miscreants to alter their books and activities to minimize the possibility of being brought to task for criminal activities." *Matter of Fink*, 47 NY2d at 572-573. Subsequently, in *Matter of Spencer v New York State Police* (187 AD2d 919 [3d Dept 1992]), the Court held that documents describing the method by which the State Police gathered information about the petitioner, a convicted murderer, and his accomplices, were exempt from disclosure, pursuant to POL § 87 (2) (e) (iv).

POL § 87 (2) (f) - Endangerment of Life & Safety of Any Person Exemption

POL § 87 (2) (f) exempts records that, "if disclosed could endanger the life or safety of any person." This exemption is generally invoked when a specific person or group of people would be endangered by the disclosure of the documents sought. *See e.g. Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 407 (1st Dept 2013); *Matter of Hynes v Fischer*, 101 AD3d 1188, 1190 (3d Dept 2012); *Matter of Bellamy*, 87 AD3d at 875. The exemption may not be invoked on the basis of mere speculation that harm will result from disclosure of the documents sought. *Mack v Howard*, 91 AD3d 1315, 1316 (4th Dept 2012); *Matter of New York Veteran Police Assn. v New York City Police Dept. Art. I Pension Fund*, 92 AD2d 772, 773 (1st Dept), *revd on other grounds* 61 NY2d 639 (1983).

Application of the Two Exemptions to Petitioner's Request

The NYPD has submitted an affidavit from Commissioner Richard Daddario, of which only 9 paragraphs (4 pages) are even directly relevant to the requested documents. In his affidavit, Mr. Daddario takes the blanket position that disclosing "any" documents responsive to petitioner's FOIL request would "reveal criminal investigative techniques or procedures" and "endanger the life or safety" of police officers and the people of New York City by allowing aspiring terrorists to circumvent the effectiveness of the Van.

Daddario affidavit, ¶ 6.

In *Matter of Dilworth v Westchester County Dept. of Correction* (93 AD3d 722, 725 [2d Dept 2012]), the Court contrasted a disclosure of a record of electronic video surveillance of petitioner from one camera angle, on the particular day on which he claimed to have slipped and suffered an injury, to all records of electronic video surveillance of him throughout his detention at the jail. The former was disclosable. *Id.* The latter could be withheld, however, on the ground that such disclosure would inherently disclose gaps in the camera's ability to survey. *Id.*

Unlike the surveillance cameras in *Matter of Dilworth*, the Van(s) at issue here are mobile, and a record of where they have been deployed does not, without more, necessarily allow an inference of locations in which they will not be deployed. Although, one could speculate that the NYPD has deployed the Van(s) in locations that can be defined by one or more characteristics, such that someone might thereby infer locations in which the Vans would likely not be used, nonetheless, Mr. Daddario does not state in his affidavit this specific possibility as a fact, even at this level of generality.

Rather, Mr. Daddario merely states that "disclosure of records that contain [the] categories of information [set forth in petitioner's first request] would tend to reveal the kind of mission for which the NYPD would or would not use the

technology[,] and that [s]uch records *might include* descriptions of areas being surveyed, the reasons for surveillance, the NYPD personnel (and their respective ranks) involved in such surveillance, and the dates, times and duration of such surveillance." Daddario affidavit, ¶ 20 (emphasis added). Fully taking into account the seriousness of Mr. Daddario's concerns, this court, nevertheless, concludes that Mr. Daddario's mere speculation, that any records about the NYPD's prior use of the Van(s) could lead to a circumvention of their future effectiveness, does not rise to the required showing of "a substantial likelihood" that such records would allow criminals to tailor their behavior so as to evade detection (*Matter of Bellamy v New York City Police Department*, 59 AD3d at 355), and it "falls far short of 'articulating a particularized and specific justification for denying access'", which the law requires. *Matter of New York Times Co. v New York State Dept. of Health*, 243 AD2d 157, 160 (3d Dept 1998), quoting *Matter of Capital Newspapers Div.*, 67 NY2d at 566. In any event, as noted above, petitioner has significantly limited the first requested item, to only summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation. [Stipulation dated August 26, 2014, with letter September 9, 2013 attached].

With regard to petitioner's second item, a request for the NYPD's Van-related policies, procedures and training

materials, Mr. Daddario discusses solely such documents as might disclose when the Vans may not be used. While those documents, as with the documents responsive to petitioner's third request (*see* below), may be withheld, the NYPD may not assert a blanket exemption for all the documents responsive to the second request. *See Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 (1996) (blanket nondisclosure of categories of documents is "inimical to FOIL's policy of open government"). Rather, the NYPD must redact the documents that are responsive to petitioner's second request, withholding such portions of them as come plainly within POL § 87 (2) (e) (iv), and disclose the remainder. *See Matter of Schenectady County Soc. for the Prevention of Cruelty to Animals v Mills*, 18 NY3d at 45-46 (2011); *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 (1984).

The third request, compliance with which would disclose "when and in what situations" the Van(s) cannot be used, clearly comes within the ambit of POL § 87 (2) (e) (iv), inasmuch as, with regard to such situations, it would extend a free pass from detection by the Van(s). In addition, "any legal opinion," as to when the Van can and cannot be used is protected by the attorney-client privilege (CPLR 4503 [a]), and it is, therefore, exempt from disclosure pursuant to POL § 87 (2) (a), which permits an agency to withhold documents that "are specifically exempted from disclosure by state or federal statute." Thus, item three need not be provided to

petitioner.

With regard to the petitioner's fourth request for records sufficient to disclose both the total aggregate cost of the vans purchased by or for the NYPD and the total number of vans purchased, Mr. Daddario states that knowledge of the number of Vans in use "would undermine any deterrent effect achieved through the lack of more specific information," and that "knowledge of the number of [V]ans in use would help terrorists determine locations at which the [V]ans are likely to be present and design an attack to overwhelm the Department's available resources." Daddario Affidavit, ¶ 22.

It is not disputed, however, that much information about the equipment in the Van(s), however, is already public. *See* Grabell affirmation, ¶¶ 4-6. Additionally, Mr. Daddario's speculation notwithstanding, mere knowledge of the number of Van(s) purchased by the NYPD and the cost of the Vans would hardly create a "substantial likelihood" (*Matter of Fink*, 47 NY2d at 572) that, on the basis of that knowledge, a would-be criminal could infer the number of Vans deployed at any given time, or the locations, some of which would, presumably, be routes, rather than fixed points, where they might be deployed.

With regard to petitioner's fifth request, Mr. Daddario states that the disclosure of any documents regarding the radiation dose or other health and safety effects of the Van(s) "would provide terrorists with the knowledge needed to

determine the power and capacity of the [V]ans' x-ray capabilities [and that] [d]isclosure of such information would permit a terrorist to tailor his or her conduct so as to exploit any limitations in the [V]ans' x-ray and backscatter capabilities." *Id.* ¶ 24.

However, the NYPD disputes neither that, as noted above, the Van(s) deliver a radiation dose approximately 40% larger than that delivered by a backscatter airport scanner, nor that this information is publicly available. Secondly, Mr. Daddario offers not even a hint as to how knowledge of the Van(s)'s x-ray capabilities would allow a would-be criminal to tailor his or her actions so as to thwart detection by the mobile Vans. Mr. Daddario's conclusory statement, as to how a criminal might benefit from reading the information as to any health risks sought by petitioner, is patently insufficient to meet NYPD's burden to establish that the NYPD may properly withhold documents responsive to petitioner's fifth FOIL request. *Matter of Dilworth*, 93 AD3d at 724; *see also Data Tree, LLC*, 9 NY2d at 463.

As to petitioner's sixth FOIL request, which originally sought "records related to data storage including but not limited to: the type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored", petitioner has narrowed significantly his request to focus on

NYPD's confidentiality policy as to the data maintained, limiting his request to only "NYPD's final policy governing retention and storage of data generated by the Z Backscatter Vans, and other documents sufficient to disclose NYPD's policies regarding the length of time images are stored or maintained, the process by which images are deleted or destroyed, the number and type of individuals permitted to access stored images, and any restrictions NYPD imposes on the use of the images". As to this category of documents, Mr. Daddario merely states:

> "such records would disclose the targets, potential targets, or types of potential targets, of NYPD's ongoing criminal investigations. Further, such information would be especially useful to terrorists and would allow them to avoid engaging in activities likely to be captured by the van, or to time their activities so that NYPD could not connect significant events. Revealing the 'use of information stored' could also reveal other confidential non-routine law enforcement techniques unrelated to the use of the van, or impede other criminal and/or national-security related investigations and could disclose the design and limits of NYPD networks and information systems".

Daddario Affidavit, ¶23.[1] Again, the speculative nature of Daddario's opinion carries no weight, as it is not fully explained how releasing the NYPD's final policy governing the retention and storage of data and the access of the class of individuals permitted access, for example, would allow

[1] NYPD did not submit any affidavits in opposition in response to petitioner's narrowed requests.

potential criminals "to avoid engaging in activities likely to be captured by the van". *Id.* To the extent that such documents concerning data retention may "impede other criminal and/or national security related investigations", such may be redacted, after *in camera* review. *Id.*

In sum, with the exceptions noted above, Mr. Daddario's affidavit consists largely of repeated, conclusory statements that the disclosure of any records pertaining to the Van(s) would allow would-be criminals to circumvent the Van(s)'s potential effectiveness. However, the standard to exempt a document from disclosure is quite high in that, a party seeking to withhold documents that are sought pursuant to FOIL, must tender a "factual basis" for claiming that the documents come within one or another exemption. *Church of Scientology of N.Y. v State of New York*, 46 NY2d 906, 908 (1979). Further, it is well settled that it is the government's burden to justify the denial of access. See Data Tree, LLC, 9 NY 2d at 463. In *Matter of Gould, supra*, the Court explained that the statutory exemptions to disclosure, themselves, "strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files." Accordingly, the NYPD must articulate "`a particularized and specific justification'" for claiming an exemption. *Id., quoting Matter of Fink*, 47 NY2d at 571. It has not done so here, in relation to either POL § 87 (2) (e) (4) or POL § 87 (2) (f) and has failed in carrying its burden.

Moreover, the NYPD also argues that it does not have documents responsive to petitioner's sixth request, which is inherently inconsistent with Mr. Daddario's affidavit. Specifically, NYPD cites to *Matter of Ratley v N.Y. City Police Dept.* (96 NY2d 873, 875 [2001]), arguing that, because the verified answer states that the NYPD does not have in its possession any records responsive to petitioner's request No. 6, except for a few test-photos used exclusively for training purposes (verified answer ¶¶ 37-39), the petition must be denied as moot, with regard to those requests. *See also Matter of Alicea v New York City Police Dept.*, 287 AD2d 286 (1st Dept 2001). However, NYPD bases such claim essentially on information and belief. Specifically, it merely submits an answer verified by Doram Tamati (a deputy managing attorney in the NYPD's Legal Bureau), in which he states that "the books and records of the [NYPD] and information received from other officers and employees of the [NYPD]" are the basis of his knowledge and belief that the contents of the answer are true. Notably, in sharp contrast to Mr. Tamati, Mr. Daddario never specifically states that there are no records responsive to petitioner's sixth request, and instead merely states that such records:

> "would disclose targets, potential targets, or types of potential targets, of NYPD's ongoing criminal investigations. Further, such information would be especially useful to terrorists and would allow them to avoid engaging in activities likely to be captured by the [V]an, or to time their

> activities so that NYPD could not connect significant events. Revealing the 'use of information stored' could also reveal other confidential non-routine law enforcement techniques unrelated to the use of the [V]an, or impede other criminal and/or national security related investigations and could disclose the design and limits of NYPD's networks and information systems."

Daddario affidavit, ¶ 23. If, indeed, the NYPD has no documents reflecting policies regarding: the length of time for which information gathered by the Van(s) is to be kept; who, within the NYPD, is authorized to have access to the images created; or any protections for the privacy of those whose images may have been captured by the Van(s), then paragraph 23 of Mr. Daddario's affidavit is inexplicable in that he discusses why certain documents that allegedly do not exist should not be disclosed (were they to exist). Given this inconsistency, the NYPD shall submit an affidavit, to the court, of a person who was engaged in, or in charge of the search that the NYPD made for documents responsive to petitioner's sixth FOIL request, and who can describe that search, and the results thereof, on the basis of personal knowledge, within 30 days of this order, or turn-over all documents responsive to petitioner's sixth request.[2]

Attorneys' Fees

Petitioner's request for attorneys' fees is granted as

[2] As indicated above, it is noted that petitioner's seventh request has been withdrawn.

provided below. POL § 89 (c) provides that a court reviewing an agency's failure to disclose documents responsive to a FOIL request may assess attorney's fees and other litigation costs against the agency when the petitioner "substantially prevailed," and "when the agency had no reasonable basis for denying access... ." Here, the NYPD denied petitioner's request in toto, and inasmuch as the court is ordering the NYPD to provide petitioner with at least redacted versions of documents responsive to four of the five requests in connection with which the NYPD acknowledges that it has documents, petitioner has "substantially prevailed." While the NYPD may have had a reasonable basis for withholding some of the documents that are responsive to petitioner's first five requests, it had no reasonable basis for withholding them all, or for failing to provide some of them in redacted form. Most egregiously, perhaps, it had no reasonable basis, or at least it has not articulated any such basis, for withholding documents responsive to petitioner's fifth request for documents. *See* pages 14-15 above. Accordingly, NYPD shall pay petitioner's attorneys' fees.

Citing *Matter of Friedland v Maloney* (148 AD2d 814 [3d Dept 1989]), the NYPD argues that, where an agency has begun to "work[] on and respond[] to a FOIL request prior to the commencement of a proceeding to compel disclosure, the petitioner cannot have substantially prevailed as a matter of law, since it is not the initiation of the proceeding that

caused the search for and release of the documents." Respondent's memo of law at 18. In *Matter of Friedland*, the agency notified the petitioner, one day before the proceeding was returnable, that it was treating the appeal as one from a constructive denial of her request, and that 45 pages of records would be forwarded to petitioner. The court proceeding was adjourned several times, and within three months the agency disclosed all the documents that petitioner had requested. Here, by glaring contrast, the NYPD denied petitioner's administrative appeal, disclosed not a single document, even those in the public domain, and took the position in this proceeding that not a single document should be released to petitioner, even after petitioner, in good faith, narrowly sharpened his request to address concerns of the NYPD.

It is noted that, significantly, respondent NYPD has not disputed the potential health risks inherent in the use of backscatter x-ray technology. While this court is cognizant and sensitive to concerns about terrorism, being located less than a mile from the 9-11 site, and having seen first-hand the effects of terrorist destruction, nonetheless, the hallmark of our great nation is that it is a democracy, with a transparent government.

> "[T]he public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Thus, the statute affords the public the means to attain information concerning the day-to-day operations of State government. By permitting access to official

> information long shielded from public view, the act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities...Moreover, judicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, 'to hold the governors accountable to the governed'...".

Fink v. Lefkowitz, 47 NY2d 567 (1979)(citations omitted). It is only through disclosure, public review and scrutiny, that potentially dangerous equipment and/or techniques, can be called into question, for the health and well being of the public at large. Nevertheless, as this is also an issue of public safety, prior to the release of the above discussed documents, appropriate redactions, as previously explained, will be permitted.

Accordingly, the petition is denied only as to petitioner's third request (the final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used) and the remaining petition is granted as follows:

ORDERED and ADJUDGED that respondent New York City Police Department acted unlawfully in withholding from petitioner Michael Grabell documents that are not properly exempt from disclosure under the Freedom of Information Law (Public Officers Law § 85 et seq); and it is further

ORDERED that respondent New York City Police Department shall produce the following:

1. All documents responsive to petitioner's request (item number 1) for summary reports or after-action reports of past deployments of the Vans that are not related to any ongoing investigation, redacted to omit any information explicitly describing a limitation, technical or other, on the use of the Van(s), the dates upon which one or more Van(s) were deployed, and any information expressly disclosing the reason or reasons for any particular deployment of the Van(s);

2. All documents responsive to petitioner's request (item number 2) for the department's policies and procedures regarding the Z-backscatter Van(s) as well as any training materials, redacted to omit any information explicitly describing a limitation, technical or other, on the use of the Van(s), or any information expressly disclosing a reason for a particular deployment of the Van(s);

3. As to item number four, records sufficient to disclose both the total aggregate cost of the Z Backscatter Vans purchased by or for the NYPD and the total number of vans purchased;

4. As to item number five, any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter Van(s); and it is further

ORDERED that the NYPD shall submit to this court, within 30 days, an affidavit from a person who can describe the search that the NYPD made for documents responsive to petitioner's sixth FOIL request, and the results of such search. Such affidavit shall be sent to the court in an envelope with a copy of this order attached to the outside of the envelope and also provided to petitioner;[3] and it is further

ORDERED that this proceeding is referred to a Special Referee who shall hear and determine the issue of attorneys' fees and other litigation costs, pursuant to CPLR 4317, as well as to supervise any disputes as to whether documents should have been redacted, and any other issues referred by the court, or which may arise, in accordance with CPLR 3104; and it is further

ORDERED that within 30 days of entry, petitioner shall serve a copy of this decision/order upon all parties and upon the Clerk of the Judicial Support Office to arrange a calendar date for the reference to a Special Referee with notice of entry.

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[3] Counsel may stipulate on consent to an extension, if necessary.

This constitutes the decision/order and judgment of the court.

Dated: 12/9/14

Doris Ling-Cohan, J.S.C.

J:\Article 78\GRABELL.-FOIL.wpd

CLERK

FILED

JAN - 8 2015

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NEW YORK