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

In the Matter of,	:	
	:	
MILLIONS MARCH NYC, an unincorporated association; and VIENNA RYE, ARMINTA JEFFRYES, & NABIL HASSEIN, in their individual capacities and as representatives of Millions March NYC,	:	Index No. 100690/2017
Petitioners,	:	
-against-	:	
NEW YORK CITY POLICE DEPARTMENT,	:	
Respondent,	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	:	

AMENDED OPENING MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Respectfully submitted,

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Dated: October 5, 2018
New York, N.Y.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page**(s)**

Cases

Statutes

Miscellaneous

PRELIMINARY STATEMENT

Millions March NYC and its representatives Vienna Rye, Arminta Jeffryes, and Nabil Hassein (together, "the petitioners"), filed this FOIL suit in May 2017 to challenge the NYPD's sweeping refusal to confirm or deny the existence of a vast array of records related to NYPD policies and practices affecting protestors. After several significant developments—including a stay, the March 2018 issuance of a Court of Appeals decision bearing on related legal questions, and the NYPD's recent decision to update its response and produce 125 new pages of redacted records—the petitioners submit this amended opening memorandum of law pursuant to the parties' stipulation and this Court's order dated October 2, 2018. For the reasons stated below, the petitioners respectfully request that this Court order the NYPD to produce all responsive material in its possession that has been withheld in violation of FOIL.

Millions March NYC is a multiracial grassroots collective of activists committed to building and strengthening the movement for Black lives in New York City. As a result of troubling reports of unwarranted police interference with Black Lives Matter protests across the nation and a series of problems that activists in New York City were experiencing with their cell phones, the petitioners filed a FOIL request in October 2016 seeking records relating to the NYPD's use of technology to interfere with the use of cell phones by protestors, the NYPD's monitoring of social media accounts of protestors, and the NYPD's acquisition of the contents of protestors' cell phones without a court order. After the NYPD refused to confirm or deny the mere existence of records responsive to these requests, the petitioners filed suit in this Court.

After the petition was filed, proceedings were stayed pending a Court of Appeals decision regarding the threshold issue of whether a "neither-confirm-nor-deny" FOIL response—a so-called "Glomar" denial—could *ever* be permissible. In March 2018 the Court of Appeals held

that a Glomar denial was justified "when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the NYPD Intelligence Bureau" while reaffirming the "general rule requiring an agency . . . to reveal that a particular record exists in order to demonstrate the applicability of an exemption" (*Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 232-33 [2018]). The Court of Appeals limited Glomar to the "extremely specific and quite unusual" case at hand and cautioned that "'blanket' or 'carte blanche'" Glomar denials would not be justified (*id.* at 234).

The NYPD has now amended its response to the petitioners in this case, producing 125 pages of partly redacted records responsive to part of the FOIL request but reasserting its blanket Glomar denial as to the petitioners' entire set of requests for policies and other records regarding the NYPD's use of technology to interfere with protestors' cell phones. The NYPD's sweeping Glomar invocation is not supported by any of the narrow FOIL exemptions enumerated in the statute—and indeed purports to deny basic information about a vast swath of policies that affect lawful protestors, directly contradicting the Court of Appeals's admonition to avoid "blanket" Glomar denials. In addition, many of the significant redactions obscuring records that the NYPD *did* produce are not justified by any FOIL exemptions. Accordingly, the petitioners respectfully request that the Court order the NYPD to complete its production, unredact nonexempt material, and provide a non-Glomar response to the petitioners' Request 1 that either produces responsive records or identifies responsive materials and sufficiently justifies withholding that material pursuant to a valid FOIL exemption.

FACTUAL BACKGROUND

Rye, Jeffryes, and Hassein are all representatives of Millions March NYC and activists who frequently lead and take part in protests against police abuse of Black communities (verified petition ¶ 12). In the years leading up to the filing of this suit, some of them experienced problems when using cell phones to organize and publicize protest activities.

The first time that Rye encountered these problems was on December 13, 2014 (*id.* ¶ 13). On that day, Rye, on behalf of Millions March NYC, organized a large march in New York City to protest the grand juries' failure to indict the police officers who killed Eric Garner and Michael Brown (*id.* ¶ 13). Rye's cell phone shut down during the march while she was trying to film what was happening (*id.* ¶ 13). The phone indicated that it was out of battery power even though it was fully charged (*id.* ¶ 13).

The petitioners have experienced other problems using their phones during protests. During an April 29, 2015, protest that began at Union Square in solidarity with the protests in Baltimore over the killing of Freddie Gray and during an April 14, 2016, protest against Donald Trump, which took place at the New York State Republican Committee's annual gala at the Grand Hyatt Hotel near Grand Central, Rye and Jeffryes both lost reception on their phones for no apparent reason (*id.* ¶ 14). Additionally, at certain protests during 2015, Rye's cell phone would not allow her to post to Millions March NYC's social media account (*id.* ¶ 15). The petitioners have heard other activists describe similar problems with their phones during protests, including loss of cell phone service, battery failures, and inability to film their surroundings or post on social media (*id.* ¶ 17). Rye and Jeffryes, as well as other advocates, also received messages indicating the possibility of interference with their use of messaging functions on

Signal, a secure communication tool available on smart phones, when planning for their protests (*id.* ¶ 16). These problems began around August of 2015 (*id.* ¶ 16).

The petitioners' concerns about these strange cell phone problems were heightened by reports of police surveillance targeting Black Lives Matter protests across the country and the use of powerful emerging technologies to spy on protestors (*id.* ¶ 19). Elsewhere in the country, it has been reported that police departments have purchased social media monitoring software like Digital Stakeout, Geofeedia, and Dataminr to facilitate analysis of social media data and to target surveillance of Black Lives Matter activities (*id.* ¶ 21). It has also been confirmed that police departments, including the NYPD, own powerful cell phone surveillance tools called "stingrays" (*see* affirmation of Mariko Hirose, May 22, 2017 ["Hirose aff"] exhibits B, C, F). Stingrays can rapidly drain a cell phone's battery (*see* affirmation of Robert Hodgson, Sept. 28, 2018 ["Hodgson aff"] exhibits B, C) and interfere with cell phone reception and functionality (*see id.* exhibits B, D; Hirose aff exhibit C). In some configurations, stingrays can be used to intercept the contents of communications or to engage in targeted or blanketed interference with service (*see* Hirose aff ¶ 5).

In addition, Rye and Jeffryes heard comments from NYPD police officers about the monitoring of Millions March NYC's organizing and protest activities specifically (verified petition ¶ 18). On some occasions, they heard officers make comments indicating that they were monitoring the social media accounts of activists (*id.* ¶ 18).

PROCEDURAL HISTORY

By letter dated October 24, 2016, the petitioners filed a FOIL request with the NYPD seeking records relating to interference with and surveillance of protestors' communications (petition exhibit A). The request sought the following categories of records:

1. Records relating to the NYPD's use of technology to engage in targeted or blanketed interference with the use of cell phones or cell phone applications by protestors (excluding intercept of contents of communications, but including interference with battery life and cell phone reception), specifically:
    a. Records identifying and describing the software or technology that the NYPD uses to engage in such interference;
    b. Policies or guidelines relating to the NYPD's engagement in such interference; and
    c. Records describing the occasions in which the NYPD has engaged in such interference.

2. Records relating to the NYPD's access to or acquisition of contents of Requestors' cell phones, including emails or text messages or Signal messages or video, without a court order, specifically:
    a. Records identifying and describing any software or technology that the NYPD uses to engage in such access or acquisition;
    b. Policies or guidelines relating to the NYPD's engagement in such access or acquisition; and
    c. Records describing the occasions in which the NYPD has engaged in such access or acquisition.

3. Records relating to the NYPD's monitoring of social media accounts of protestors and protest groups, regardless of privacy settings, specifically:
    a. Records identifying and describing any software or technology (including for example Geofeedia, MediaSonar, X1 Social Discovery, or similar products) that the NYPD uses to engage in such monitoring;
    b. Policies or guidelines relating to the NYPD's engagement in such monitoring; and
    c. Records reflecting the NYPD's monitoring of the following social media accounts of the Requestors:
        i. Facebook accounts of:
            1. Millions March NYC
            2. Vienna Rye
            3. Cleo Jeffryes
        ii. Twitter accounts of:
            1. @millionsmarch
            2. @nabilhassein
            3. @armintasade
        iii. Instagram accounts of:
            1. @millionsmarchnyc
            2. @vrye
            3. @armie_sade

4. Records maintained by the NYPD relating to protest and organizing activities of Millions March, including copies of any "movement files." With regard to this request, on July 17, 2015, while Rye and Jeffryes were being processed at 1 Police

> Plaza for disorderly conduct arrests arising from their protest activities, they saw officers make duplicates of arrest records and heard them saying to each other that a copy would be placed in "movement files."

After acknowledging receipt of the FOIL request, and after an appeal concerning the NYPD's delay in responding to the request, the NYPD issued a response to the FOIL request on January 10, 2017 (petition exhibits B-E). The NYPD denied Requests 1-3 on the basis that the records, "if in existence, are exempt from disclosure pursuant to Public Officers Law Section 87(2) and/or other statutes," and disclosed records responsive to Request 4 relating to Millions March NYC's protest and organizing activities (petition exhibit E).

The petitioners filed a timely administrative appeal on January 23, 2017 (petition exhibit F), which the NYPD denied on February 3, 2017 (petition exhibit G). With respect to Requests 1-3, the NYPD claimed a blanket Glomar response, stating that it could "neither confirm nor deny the existence of records responsive to [the] FOIL request, as knowledge of the existence or non-existence of such records would interfere with a law enforcement investigation, could impair the life and safety of others and would reveal confidential information," pursuant to Public Officers Law §§ 87(2)(e)(i), 87(2)(f) and 87(2)(e)(iii) (*id.*). The NYPD further claimed, without explanation, that to the extent that the records responsive to Requests 1-3 existed they were exempt from disclosure under Public Officers Law §§ 87(2)(b), 87(2)(e)(i), 87(2)(e)(iii), 87(2)(e)(iv), and 87(2)(f) (*id.*). With respect to Request 4, the NYPD certified that a diligent search was conducted and that the records disclosed were the sole records responsive to the request (*id.*).

On May 22, 2017, the petitioners filed their Article 78 petition and supporting materials in this Court. On October 16, 2017, the Court stayed all proceedings pending the outcome of *Abdur-Rashid v New York City Police Dept.* (31 NY3d 217 [2018]) because that case was poised

to answer the threshold question of "whether Glomar responses are permitted under FOIL"(Decision and Order Staying Case, Oct. 16, 2017). The Court of Appeals decided *Abdur-Rashid* in March 2018, and on August 10, 2018, the NYPD amended its responses to the petitioners' original FOIL request, producing 125 pages of partly redacted records (*see* Hodgson aff exhibit A [Amended FOIL Determination]). The amended response reasserted a blanket Glomar denial in response to Request 1—which sought policies and other records related to the NYPD's interference with protestors' cell phones (excluding the interception of contents of communications, but including interference with battery life and cell phone reception)—citing without explanation Public Officers Law § 87(2)(e)(iv) (the non-routine criminal investigative techniques exemption) and § 87(2)(f) (the safety exemption) (*see id.* at MM1).

In response to Request 2—which sought policies and other records related to the NYPD's interception of the contents of protestors' cell phone communications without a court order—the NYPD stated that it does not remotely access the contents of any cell phone without a court order and that it did not access the contents of the petitioners' phones (*see id.*). It further stated that, accordingly, there were no records responsive to Request 2(a) or 2(c), and it included 24 unredacted pages of policy documents concerning the non-remote acquisition of the contents of cell phones in response to Request 2(b) (*see id.* at MM1, MM3-26).

Finally, in response to Request 3—seeking records regarding the NYPD's monitoring of the social media accounts of protestors—the NYPD stated that it "does not monitor the social media accounts of any specific protestor or protest group" and it further stated that it did not locate any records responsive to Request 3(c) regarding the petitioners' specific social media accounts (*see id.*). It also produced approximately 90 pages of NYC contracts, agreements, and invoices regarding the corporation Dataminr, Inc., in response to Request 3(a) seeking records

concerning social media monitoring software or technology (*id.* at MM2, MM 27-117). Those pages were redacted, seemingly to remove the names of Dataminr and New York City personnel, to remove all references to cost or money, to remove product names and descriptions, and to black out approximately six full pages without context or explanation (*id.*). The NYPD cited Public Officers Law § 87(2)(b) (the privacy exemption) and § 87(2)(f) (the safety exemption) to justify redacting names, and it cited Public Officers Law § 87(2)(d) to justify redacting unspecified "matter that either constitutes the vendor's trade secrets, or . . . would substantially injure the vendor's competitive position" (*id.* at MM2). Finally, the NYPD produced 8 pages of Detective Guide policy documents responsive to Request 3(b), the policies labeled "Investigative Techniques" and "Use of Social Networks for Investigative Purposes," with significant redactions justified by the non-routine criminal investigative technique exemption of Public Officers Law § 87(2)(e)(iv) (*see id.* at MM2, MM118-125).

In light of the NYPD's revised FOIL determination, the petitioners submit this amended memorandum of law seeking responses and additional production as required by FOIL.

ARGUMENT

I. THE COURT SHOULD REJECT THE NYPD'S INVOCATION OF GLOMAR AS TO REQUEST 1.

Citing the non-routine criminal investigative technique exemption and the safety exemption, the NYPD has refused to confirm or deny that it has records relating to any part of Request 1, which sought:

> 1. Records relating to the NYPD's use of technology to engage in targeted or blanketed interference with the use of cell phones or cell phone applications by protestors (excluding intercept of contents of communications, but including interference with battery life and cell phone reception), specifically:
>   a. Records identifying and describing the software or technology that the NYPD uses to engage in such interference;

b. Policies or guidelines relating to the NYPD's engagement in such interference; and
c. Records describing the occasions in which the NYPD has engaged in such interference.

(*see* Hodgson aff exhibit A [Amended FOIL Determination] at MM1). This Glomar response—a blanket refusal to confirm the existence of a vast swath of general information and municipal policy documents untethered to any specific person or investigation but powerfully affecting the personal lives, property, and privacy of thousands of protestors engaging in First Amendment-protected activity in New York City—far exceeds the narrow scope of Glomar as articulated by the Court of Appeals in *Abdur-Rashid* and is unsupported by the claimed FOIL exemptions. This Court should reject the NYPD's attempt to expand—massively—the scope of the Glomar doctrine and frustrate FOIL's purpose of promoting government transparency and accountability. Clarifying that Glomar cannot be used to eviscerate New York's FOIL law is particularly important in this case because it may be, to the petitioners' knowledge, the first to apply the *Abdur-Rashid* decision.

In *Abdur-Rashid*, the Court of Appeals considered the FOIL request of an individual who wanted to know if he was being investigated by the NYPD and thus sought any investigatory or surveillance records in the NYPD's possession targeting him specifically (31 NY3d at 223). The Court noted that FOIL creates a "general rule requiring an agency to acknowledge the existence of responsive records . . . in order to demonstrate the applicability of an exemption" (*id.* at 232) but recognized that "when there is a FOIL request as to whether a specific individual or organization is being investigated or surveilled, the agency—in order to avoid 'tipping its hand'—must be permitted to provide a Glomar-type response" (*id.* at 231). Rather than announce a broad new rule, however, the Court highlighted the narrowness of its holding:

> It is the rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, acknowledging that any responsive records exist would, itself, reveal information tethered to a narrow exemption under FOIL. . . . To recognize that those unusual circumstances coalesce here does not create a broad judicial exemption. . . . While the dissent rightfully expresses concern about "blanket" or "carte blanche" exemptions, we endorse nothing of the sort here.

(*id.* at 231, 234; *see also id.* at 234 [characterizing Abdur-Rashid's request as "both extremely specific and quite unusual . . . [i]ndeed, we know of no other FOIL case in which individuals who had never been arrested, involved in a police confrontation or formally charged have asked a police agency to acknowledge if they were under investigation"]; *id.* at 270 n 5 ["In most instances, the fact that an agency possesses responsive records does not itself provide substantive information protected by an exemption."]).

Here, particularly in light of the Court of Appeals's repeated statements regarding the narrowness of the availability of Glomar under FOIL, this Court should not accept the NYPD's bare assertion that confirming or denying the existence of responsive records to any part of Request 1 would "reveal non-routine criminal investigative techniques or procedures and . . . could impair the life and safety of others" (Amended FOIL Determination). To establish entitlement to Glomar, the agency has the burden of "establish[ing] a bona fide, factual basis for the exemptions claimed" (*Abdur-Rashid*, 31 NY3d at 237). It cannot, under the general principles of FOIL, rely on blanket claims for exemptions or the conclusory listing of statutory exemptions (*see Gould v NYPD*, 89 NY2d 267, 275 [1996] [stating that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"]; *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"]). On the current record, the NYPD has plainly not met its burden.

Even if the NYPD responds by attempting to provide more support for its position, it is improbable that it can justify such a broad Glomar response to this routine request for records regarding how the NYPD monitors and potentially interferes with protestors. Prior to *Abdur-Rashid*, the NYPD regularly responded to similar requests regarding its use of surveillance technologies without invoking the Glomar doctrine: it identified responsive records and cited statutory exemptions as contemplated by FOIL (*see e.g.* Hirose aff exhibits F-I [regarding records relating to the use of a cell phone surveillance equipment and automatic license plate readers]; Hirose aff exhibit P [decision in *Logue v New York City Police Dept.* [Sup Ct, NY County, Feb 10, 2017, No 153965/2016 [regarding records relating to surveillance of Black Lives Matters protestors at Grand Central Terminal]]; *Grabell v New York City Police Dept.*, 139 AD3d 477 [1st Dept 2016] [regarding records relating to the use of x-ray vans]; *NYCLU v New York City Police Dept.*, 2009 NY Misc LEXIS 2542 [Sup Ct, NY County, June 26, 2009, No 112145/08] [regarding records relating to the Lower Manhattan Security Initiative]). Particularly where, as here, the FOIL request implicates Department-wide practices affecting tens of thousands of protestors in New York City engaging in First Amendment-protected activity, the NYPD should not be permitted to hide behind a cloak of secrecy and avoid acknowledging the mere existence of such practices by exploiting a "blanket" or "carte blanche" version of Glomar explicitly disclaimed by the Court of Appeals (*Abdur-Rashid*, 31 NY3d at 234).

And indeed, in the recent past the NYPD not only failed to raise a Glomar objection—it actually released extensive records that are likely responsive to Request 1 pursuant to a 2015 FOIL suit regarding the NYPD's acquisition and use of cell site simulator ("stingray") cell phone surveillance technology (*see* Hirose aff exhibits F-G; Hodgson aff exhibit E). The Department of Justice and the FBI have acknowledged that stingrays interfere with cell phone reception and

battery life (*see e.g.* Hirose aff exhibit C [Kim Zetter, "Feds Admit Stingrays Can Disrupt Cell Service of Bystanders," wired.com [March 1, 2015]]; Hodgson aff exhibit D [Dept. of Justice, *DOJ Policy Guidance: Use of Cell-Site Simulator Technology* [noting that "the target cellular device . . . and other cellular devices in the area might experience a temporary disruption of service"]]), and in that case the NYPD released acquisition records, cumulative cost information, and detailed records showing every use of the technology by the NYPD for seven years (Hirose aff exhibit G; Hodgson aff exhibit E). As the Court of Appeals stated in *Abdur-Rashid*, "a police agency that has already revealed the records sought and for which it claims an exemption cannot credibly support" a Glomar response (31 NY3d at 237).

In similar contexts, federal agencies have responded to analogous federal Freedom of Information Act requests about domestic surveillance practices and policies without invoking Glomar (*see e.g. Soghoian v Dept. of Justice,* 885 F Supp 2d 62 [DDC 2012] [request for records relating to electronic surveillance practices]; *Elec. Privacy Info. Ctr. v Dept. of Justice,* 511 F Supp 2d 56 [DDC 2007] [request for records relating to surveillance of domestic communications]; *Voinche v FBI*, 940 F Supp 323 [DDC 1996] [request for records related to the alleged wiretapping of the Supreme Court]; *Servicemembers Legal Defense Network v Dept. of Defense,* 471 F Supp 2d 78 [DDC 2007] [request for surveillance records of individuals and groups opposed to government's policy on LGBTQ people in the military]; *Am. Civil Liberties Union v FBI*, 429 F Supp 2d 179 [DDC 2006] [request for records related to the FBI's surveillance of certain domestic political and religious organizations]). As these past responses to similar FOIA and FOIL requests confirm, the petitioners' Request 1 does not implicate a topic that merits the extreme secrecy of Glomar. If the NYPD's Glomar invocation were accepted in

this case, there would be virtually no limit to the NYPD's ability to cloak its conduct in secrecy in contravention of FOIL's promise of transparency and government accountability.

II. THE NYPD HAS NOT JUSTIFIED ITS REDACTION OF PRICING INFORMATION, PRODUCT DESCRIPTIONS, AND POLICY DOCUMENTS RELATED TO SOCIAL MEDIA MONITORING TECHNOLOGY AND PRACTICES.

A. Redacted Dataminr Contract and Pricing Information Is Not Exempt from Disclosure Pursuant to FOIL's "Trade Secrets" Exemption.

While the NYPD recently produced approximately 90 pages of contracts, agreements, and invoices regarding the corporation Dataminr in response to Request 3(a) seeking records concerning social media monitoring software or technology, those pages were redacted, seemingly to remove the names of Dataminr and New York City personnel, to remove all references to cost or money, to remove product names and descriptions, and to black out approximately six full pages without context or explanation (*see* Hodgson aff exhibit A [Amended FOIL Determination] at MM2, MM 27-117). While the petitioners do not object to the redaction of names and contact information, the redaction of substantive information is plainly not justified by the lone FOIL exemption cited by the NYPD, Public Officers Law § 87(2)(d) (*see id.* at MM2 [stating without elaboration that the redactions cover "matter that either constitutes the vendor's trade secrets, or . . . would substantially injure the vendor's competitive position"]).

Basic information about the money the NYPD spent on Dataminr products, product descriptions, and other contract terms are not "trade secrets" exempt under Public Officers Law § 87(2)(d). As an initial matter, the information sought here is not even a "secret"—unredacted Dataminr price information, contracts, and product descriptions have been made public by New York State and multiple federal agencies (*see* Hodgson aff exhibits F-K). 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 that, if disclosed, "would cause substantial injury to the competitive position of the subject enterprise" pursuant to Public Officers Law § 87(2)(d).[1]

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]). This is the definition that New York courts should also adopt for FOIL given that, like FOIA, FOIL's exemptions should be construed narrowly (*see Abdur-Rashid*, 31 NY3d at 225). Commercial information appearing in records of a municipal agency's purchase or acquisition of a product clearly fall outside of this definition.

The NYPD's argument would also fail even if this Court were to use the alternate and broader definition of "trade secrets" adopted by some courts tracking the definition of the term in the Restatement of Torts: "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" (*see Verizon New York v N.Y. State Pub. Serv. Commn.*, 46 Misc 3d 858, 872-73 [Sup Ct, Albany County 2014], *aff'd*, 137 AD3d 66, 72 [3d Dept 2016]

[1] 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 (*see Verizon New York v 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 plainly is not a "trade secret."

[quoting Restatement [First] of Torts § 757]). The Restatement 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 broadest definition of "trade secrets" provided by the Restatement of Torts, the redacted information is by definition not a trade secret, much less a trade secret whose disclosure would cause "substantial injury to the competitive position of the subject enterprise" (Public Officers Law § 87 [2] [d]). The Court should order the NYPD to unredact all redacted material in the Dataminr records beyond names and other personally identifying information.

B. The NYPD Has Not Provided Sufficient Justification for Its Redactions of Policy Documents Regarding Social Media Monitoring.

Finally, the NYPD produced 8 pages of Detective Guide policy documents responsive to Request 3(b) regarding social media monitoring—the policies labeled "Investigative Techniques" and "Use of Social Networks for Investigative Purposes"—with significant redactions described as covering "information that, if disclosed, would reveal non-routine criminal investigative techniques or procedures" (*see* Hodgson aff exhibit A [Amended FOIL Determination] at MM2 [citing Pub. Off. Law § 87[2][e][iv]], MM118-125). On the present record, without a more detailed explanation of what material has been redacted and why the exemption applies, these redactions do not comply with FOIL.

The claimed exemption protects against 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" (*Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]), and the NYPD must articulate a "particularized and specific" explanation of why the redacted material would create such a likelihood (*Gould*, 89 NY2d at 275 [internal quotation marks omitted]). To date the

NYPD has not attempted to do so; the petitioners anticipate responding to any further attempts to describe the redacted material and explain why the exemption might apply in their reply.

III. THE PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES.

The petitioners respectfully request an award of attorneys' fees and litigation costs pursuant to FOIL. FOIL states that a court "shall assess" 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]). This provision was amended in 2017 to make an award of fees compulsory, not discretionary, when an agency had "no reasonable basis" for its denial (2017 Sess Law, Ch 453 [A 2750-A] [replacing "may assess" with "shall assess"]).

For all of the reasons discussed above, it appears that the NYPD lacked any reasonable basis for initially claiming a blanket Glomar response as to Requests 1-3; the NYPD likewise lacks any reasonable basis for its continued invocation of a blanket Glomar response as to Request 1 and for its significant over-redaction of records related to Dataminr and social media monitoring. The petitioners recognize, of course, that this issue cannot be definitively resolved until the NYPD files its opposition, at which point the petitioners will be able to address the fee issue more completely.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the Court order the NYPD to complete its production, unredact nonexempt material, and provide a non-Glomar response to the petitioners' first request that either produces responsive records or identifies responsive materials and sufficiently justifies withholding that material pursuant to a valid FOIL

exemption. The petitioners also respectfully request that the Court award them reasonable attorneys' fees and litigation costs.

DATED: October 5, 2018
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