SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of,   :
                                                               :
NEW YORK CIVIL LIBERTIES UNION,   :   Index No. 903807-20
                                                               :
                              Petitioner,   :
                                                               :
         -against-   :   **AMENDED VERIFIED PETITION**
                                                               :
NEW YORK STATE EDUCATION   :
DEPARTMENT,   :
                                                               :
                              Respondent,   :
                                                               :
For a Judgment Pursuant to Article 78   :
of the Civil Practice Law and Rules.   :

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PRELIMINARY STATEMENT

1.   This Article 78 Proceeding seeks to vindicate the public's rights to know basic facts about the New York State Education Department's ("NYSED") abrupt and unexplained determination that a school district's biometric facial recognition system, which uses enhanced surveillance cameras in schools to take biometric measurements of children's faces to compare to a reference database, does not implicate the creation or maintenance of "student data."

2.   After engaging with the Lockport City School District ("Lockport" or the "District") over many months about privacy and other student data concerns regarding Lockport's proposed facial recognition system, by letter dated November 27, 2019, NYSED changed its position and, without explanation, accepted Lockport's assertion that its biometric facial recognition system would not involve the creation or maintenance of student data.

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3.   On January 2, 2020, the same day the system was activated, the New York Civil Liberties Union ("NYCLU") submitted a request under the Freedom of Information Law ("FOIL") to NYSED to learn more about NYSED's decision to approve Lockport's controversial facial recognition system in its schools.

4.   NYSED belatedly produced incomplete records nearly five months after the initial request and failed to timely respond to three separate administrative appeals.

5.   Having exhausted administrative remedies, the NYCLU now seeks judicial relief to compel NYSED to produce records responsive to its request, correct its faulty redactions, and certify it conducted a diligent search.

6.   Petitioner also seeks an award of attorneys' fees and costs in light of NYSED's failure to adhere to FOIL's statutory requirements.

7.   Petitioner files this Amended Verified Petition pursuant to C.P.L.R. § 3025.

VENUE

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

PARTIES

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

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10. Respondent New York State Education Department is a public agency subject to the requirements of the Freedom of Information Law, New York Officers Law § 84 et seq.. NYSED maintains its office at 89 Washington Avenue, Albany, New York 12234.

FACTUAL BACKGROUND

11. On January 2, 2020, the District activated a facial recognition technology system in all of its schools, from elementary to high school, which scans and takes biometric measurements of each student's face every time they walk by one of the numerous cameras throughout the schools.[1]

12. This system engages in the real-time collection, analysis, and retention of biometric information from children and is one of the first biometric surveillance systems to be deployed in a public school system in the entire country.

13. In 2016, the District filed an application to use $3,810,833 in New York Smart Schools Bond Act funds to acquire a face and object recognition system for all eight of its schools, serving students from K-12. A true and correct copy of Lockport's application for funding through the Smart Schools Bond Act is attached as **Exhibit 1** to the Affirmation of Stefanie D. Coyle.

14. The District's object recognition system reportedly detects ten types of guns and would directly alert law enforcement if a gun is detected. A true and correct copy of a newspaper article that provides information regarding the District's object recognition system is attached as **Exhibit 2** to the Affirmation of Stefanie D. Coyle.

15. Facial recognition technology is a way of recognizing and identifying a human face through biometric analysis. Using algorithms, the District's facial recognition system maps each

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[1] Documents 1-9 cited in this Petition are attached as exhibits to the Affirmation of Stefanie D. Coyle and Documents A-I cited in this Petition are attached as exhibits to this Petition.

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student's facial features from the video streams generated by the schools' closed-circuit camera system.

16.   Some algorithms explicitly map the face, measuring the distances between the eyes, nose and mouth. Other algorithms map the face using more abstract features. Either way, the algorithm identifies facial landmarks that are key to distinguishing each student's facial signature.

17.   The system reduces each student's facial signature to a mathematical formula and then the system outputs a discrete and unique "vector" identifying each face. That "vector" is the string of numbers that uniquely identifies each person among all the others.

18.   The District installed its facial recognition technology system during the summer of 2018 and had intended to utilize it at the start of the academic year in fall 2018.

19.   However, in August, NYSED intervened and requested that the District delay activating the system pending a "privacy assessment." A true and correct copy of a letter from MaryEllen Elia, then-Commissioner of Education, to Stefanie Coyle, dated August 30, 2018, is attached as **Exhibit 3** to the Affirmation of Stefanie D. Coyle.

20.   As part of the privacy impact and security risk assessment, the District issued several draft privacy policies throughout 2018 and 2019 governing the facial recognition system before the Lockport Board of Education finally adopted Policy 5685: *Operation and Use of Security Systems/Privacy Protections* at its January 8, 2020 meeting ("Policy 2020 5685"). A true and correct copy of the Lockport Board of Education's Policy 5685: Operation and Use of Security Systems/Privacy Protections is attached as **Exhibit 4** to the Affirmation of Stefanie D. Coyle.

21.   The District presumably edited its privacy policies at the direction of NYSED as part of its ongoing privacy assessment.

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22.   In August 2019, NYSED again confirmed that it was engaged with the District about its facial recognition system. NYSED stated that "the Department continues to work with the District to ensure that its policies on data privacy and security, and its programs that utilize student's personally identifiable information comply with state and federal laws and take into consideration concerns raised by stakeholders regarding the civil rights of students." A true and correct copy of an email received by Stefanie Coyle from Beth Berlin, then the Interim Commissioner of NYSED, on August 23, 2019 is attached as **Exhibit 5** to the Affirmation of Stefanie D. Coyle.

23.   Throughout the fall of 2019, NYSED continued to prevent the District from using its biometric surveillance technology and assured that it "continues to research and review" the issue of the use of "technology that uses biometric data in schools." A true and correct copy of NYSED's responses to comments it received during its notice and comment period while promulgating the governing regulations for Education Law §2-d is attached as **Exhibit 6** to the Affirmation of Stefanie D. Coyle.

24.   On November 27, 2019, however, NYSED drastically changed its position and not only allowed Lockport to activate its system, but also agreed with the District's assessment that the system did not implicate student data at all. A true and correct copy of a letter sent by Tope Akinyemi, the Chief Privacy Officer of NYSED, to the Lockport City School District dated November 27, 2019 is attached as **Exhibit 7** to the Affirmation of Stefanie D. Coyle.

25.   In its November 27, 2019 letter, NYSED explicitly referenced a letter written by the District to NYSED on September 20, 2019, in which the District outlined its position that the system does not "create or maintain student data."

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26.   When accepting the District's representation that the facial recognition system does not create or maintain "student data," NYSED stated that "this change reflects the progress we have made in discussions over many months [and] with additional revisions [to Policy 2020 5685], the Department believes that the Education Law § 2-d issues it has raised to date relating to the impact on the privacy of students and student data appear to be addressed."

27.   The process by which the District received approval from NYSED remains opaque.

28.   Despite intense local concern about the biometric facial recognition system, NYSED and the District have provided very little information. A true and correct copy of articles demonstrating the high level of concern from the local community about Lockport's facial recognition system are attached as **Exhibit 8** to the Affirmation of Stefanie D. Coyle.

29.   NYSED has publicly claimed that it engaged with the District in a privacy assessment, yet it continues to withhold relevant information about what this process entailed; what materials, if any, were reviewed; what vendors, if any, NYSED met; whether outside research and analysis on face surveillance and/or shape detection technology was conducted; whether and how the systems will be audited; and what criteria NYSED used to evaluate the system.

30.   There is also a lack of public information about the District's system as neither NYSED nor the District provided details about the system's capabilities or accuracy prior to its activation.

31.   There is almost no information available about the District's "object recognition system" whose existence is only mentioned once in the District's privacy policy.

32.   In response to all of these unanswered questions, the NYCLU submitted its January 2, 2020 FOIL request.

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The NYCLU's FOIL Request to NYSED

33.   The NYCLU submitted a FOIL request to NYSED on January 2, 2020, the date on

which Lockport activated its facial recognition system in all of its public schools, seeking records

relating to NYSED's decision to permit the District to activate and use the system. A true and

correct copy of the FOIL request is attached as **Exhibit A** to this Petition.

34.   The request sought seven categories of records regarding the facial recognition

system:

1.   Any records reflecting NYSED's communications with:

    a.   Any employee, contractor, or school board member of the
Lockport City School District, including the September 20, 2019
letter described in NYSED's November 27, 2019 letter;

    b.   Any employee, contractor, or board member of SN Technologies;

    c.   J.A. "Tony" Olivo;

    d.   Any employee, contractor, or board member of Corporate
Screening and Investigative Group, LLC; and/or

    e.   Any employee, contractor, or board member of Ferguson Electric
Construction Company, Inc.

2.   Any records reflecting NYSED's internal communications regarding
biometric surveillance, facial recognition technology, or the Proposal [to
use SSBA funds to purchase facial recognition technology];

3.   Any records regarding the "privacy assessment" undertaken by NYSED
with regard to Lockport's facial recognition system;

4.   Any records reflecting invoices submitted by Lockport for reimbursement
for its Smart Schools Bond Act proposals;

5.   Any records reflecting accuracy tests and evaluations of Lockport's facial
recognition technology and, if existing, on representative datasets,
disaggregated by age, gender, and race;

6.   Any records reflecting accuracy evaluations of the shape-based
recognition system and descriptions of what testing data was used; and

7.   Any records reflecting research, studies, experts, vendors, or data regarding the efficacy of facial recognition technology that was consulted or considered by NYSED in its evaluation of Lockport's Proposal.

35.   After submitting its request, the NYCLU received an email acknowledgment from the Records Access Officer (FOIL@nysed.gov) on January 9, 2020 stating that the NYCLU would "hear further from the Department by approximately February 4, 2020 as to whether your request will be granted or denied in whole or in part." A true and correct copy of NYSED's acknowledgement is attached as **Exhibit B** to this Petition.

36.   After NYSED failed to respond, the NYCLU sent a follow up email to FOIL@nysed.gov on February 5, 2020, inquiring about the status of the FOIL request. A true and correct copy of this email is attached as **Exhibit C** to this Petition.

37.   When NYSED failed to respond to this inquiry, the NYCLU appealed the constructive denial of our request on February 6, 2020. A true and correct copy of the administrative appeal is attached as **Exhibit D** to this Petition.

38.   The FOIL appeal was submitted to the email address FOILappeal@nysed.gov, as instructed on NYSED's website. A true and correct copy of NYSED's FOIL webpage is attached as **Exhibit 9** to the Affirmation of Stefanie D. Coyle.

39.   NYSED did not respond to this appeal within the ten business day statutory deadline, which expired on February 21, 2020.

40.   On February 10, 2020, however, the NYCLU received an email from NYSED's Records Access Officer (FOIL@nysed.gov) indicating that the NYCLU's FOIL request is "still under review." In that email, NYSED's Records Access Officer stated that "[d]ue to the scope and nature of [NYCLU's] request, and the effort required to identify and collate the appropriate records," NYSED will be unable to indicate whether NYCLU's request "will be granted or denied

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in whole or in part" until "approximately May 29, 2020". A true and correct copy of this email is attached as **Exhibit E** to this Petition.

41.   On February 21, 2020, the NYCLU appealed again on the basis that this response constituted a constructive denial of the FOIL request as the timeframe articulated was not reasonable given the circumstances of the request. A true and correct copy of this administrative appeal is attached as **Exhibit F** to this Petition.

42.   The FOIL appeal was again submitted to the email address FOILappeal@nysed.gov.

43.   Like before, the NYCLU received no response from NYSED to this second appeal within the ten business day statutory deadline, which expired on March 6, 2020.

44.   Without acknowledging either of the previous appeals, on May 14, 2020, NYSED finally responded to the NYCLU's January 2, 2020 FOIL request, producing 16 documents responsive to the Request. A true and correct copy of NYSED's response to the FOIL request is attached as **Exhibit G** to this Petition.

45.   However, NYSED's production was incomplete and its redactions were inappropriate.

46.   Therefore, the NYCLU submitted a third appeal on May 21, 2020. A true and correct copy of this appeal is attached as **Exhibit H** to this Petition.

47.   For the third time, the FOIL appeal was submitted to the email address FOILappeal@nysed.gov, as instructed in NYSED's FOIL response ("If you wish to appeal this partial denial, you may do so within 30 days by emailing FOILappeal@nysed.gov..."). The statutory deadline for NYSED's response to this appeal expired on June 8, 2020.

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48.   On June 10, 2020, without receiving any correspondence from NYSED, the NYCLU filed the instant action.

49.   On June 11, 2020, the NYCLU received, via regular mail, an appeal decision from NYSED. A true and correct copy of NYSED's response to the NYCLU's February 6, 2020 and February 21, 2020 appeals is attached as **Exhibit I** to this Petition.

50.   Due to hygiene protocols surrounding the coronavirus, the letter was not transmitted to the attorneys on this case until June 16, 2020.

51.   NYSED's letter, postmarked June 3, 2020, was a hard copy of NYSED's appeal response to NYCLU's February 6, 2020 and February 21, 2020 appeals.

52.   The appeal decision acknowledged the NYCLU's third appeal, dated May 21, 2020, but did not respond to it stating "[t]hat administrative FOIL appeal will be determined in a separate subsequent Commissioner's decision."

53.   In its decision, NYSED denied both February appeals, claiming that both were moot due to NYSED's May 14, 2020 FOIL response.

54.   NYSED failed to timely respond to all three of the NYCLU's appeals.

55.   Having exhausted administrative remedies, the NYCLU files this Article 78 proceeding seeking immediate production of responsive documents, correction of inappropriately redacted documents, certification of a diligent search, and attorneys' fees.

CAUSE OF ACTION UNDER ARTICLE 78

56.   Petitioner repeats and realleges paragraphs 1 through 55 hereof, as if fully set forth herein.

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

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58. Petitioners have a clear right to the records responsive to Requests 1 through 7.

59. There is no basis in law or fact for the respondent to fail to timely respond to any of the administrative appeals or withhold the requested records.

60. The respondent's obligation under FOIL to respond to a FOIL administrative appeal and produce documents is mandatory, not discretionary.

61. The petitioner exhausted its administrative remedies with the respondent when it appealed the respondent's constructive denial of its initial request on February 6, 2020 and did not receive records or a response to the appeal within the statutory time.

62. The petitioner again exhausted its administrative remedies with the respondent when it submitted a second administrative appeal of respondent's constructive denial on February 21, 2020 and did not receive records or a response to the appeal within the statutory time.

63. For a third time, the petitioner exhausted its administrative remedies with the respondent when it submitted a third appeal, this time of respondent's partial denial on May 21, 2020 and did not receive a response to the appeal within the statutory time.

64. The petitioner has no other remedy at law.

65. This Petition is timely under CPLR § 217 as it is filed within four months of June 8, 2020, the expiration of respondent's time to timely respond to the third administrative appeal.

<div align="center">**REQUESTED RELIEF**</div>

WHEREFORE, the petitioner seeks judgment:

(1) Pursuant to CPLR § 7806, directing the respondent to comply with its duty under FOIL and disclose the records sought by the petitioner in Requests 1 through 7 in the FOIL request dated January 2, 2020 and May 21, 2020 appeal, correct inappropriately redacted documents, and certify a diligent search was conducted;

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(2) Awarding reasonable attorneys' fees and litigation costs as allowed under New York Public

Officers Law § 89; and

(3) Granting such other relief as the Court deems just and proper.

Respectfully Submitted,
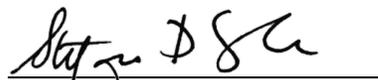
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Counsel for Petitioner

Dated: June 18, 2020
        New York, NY

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VERIFICATION

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

Molly K. Biklen, an attorney admitted to practice in the State of New York, affirms

pursuant to CPLR § 2106 under the penalties of perjury:

1. I am an attorney for the petitioner in the within proceeding. I make this Verification

pursuant to CPLR § 3020 (d).

2. I have read the attached Verified Petition and know its contents.

3. All of the material allegations of the Verified Petition are true to my personal knowledge

or upon information and belief. As to those statements that are based upon information and

belief, I believe those statements to be true.

MOLLY K. BIKLEN

Dated: June 18 , 2020
        New York, New York

Sworn and subscribed to me
this 18 day of June, 2020

NOTARY PUBLIC

BETH HAROULES
Notary Public, State of New York
No. 02HA4890292
Qualified in New York County
Commission Expires March 30, 2023

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