

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
and ANTHONY J. ANNUCCI, in his official capacity as
Acting Commissioner of the New York State
Department of Corrections and Community Supervision,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules.

Index No.
(NYSCEF Filed)

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Dated: June 30, 2021
New York, New York

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PRELIMINARY STATEMENT

This Article 78 Proceeding seeks to vindicate the public’s right to know basic facts about the New York State Department of Corrections and Community Supervision’s (“DOCCS”) policies, practices, and use of face recognition technology at its facilities to screen families, friends, and loved ones, including children, who visit or individuals under DOCCS’s custody.

DOCCS uses face recognition technology for “visitation processing,” using it to screen out and deny visitation to family members, friends, and other loved ones who wish to visit people in DOCCS’s custody. VP ¶ 3, Ex. 7.¹ Face recognition software is notoriously inaccurate and prone to error. Face recognition software is particularly bad at recognizing Black people and other people of color, women, and young people, often misidentifying or failing to identify them. VP ¶¶ 16-20. There is no public information about DOCCS’s utilization of face recognition technology for “visitation processing.” VP ¶¶ 31-35. There has been no public process, no oversight, and no accountability concerning DOCCS’s acquisition and deployment of this technology. VP ¶¶ 36-39.

To the extent that DOCCS is using face recognition technology to screen families, friends, and loved ones visiting incarcerated individuals, DOCCS’s system will inevitably misidentify visitors as unwelcome and deny visitation. VP ¶¶ 21-22. There are no regulations, directives, guidance, or public-facing policy that address DOCCS’s utilization of this technology, including how it will account for misidentifications.² VP ¶ 37. Moreover, there is no public-facing policy in place that speaks to limitations, if any, on who may access or use the sensitive

¹ All citations within this memorandum of law are to the factual recitations of the Verified Petition dated June 30, 2021 (“VP”) and/or to its exhibits (“Ex. __”).

² It is well documented that there are gross racial disparities in the nation’s prison population. The racial disparities in New York State’s prison population are particularly stark: approximately 75 percent of those incarcerated are Black or Latinx. VP ¶ 22. Ex. 9. Thus, it is more likely than not that the family, friends, and loved ones who visit people under DOCCS’s custody will be disproportionately people of color.

biometric data collected from the family members, friends, and loved ones who visit people who are under DOCCS's custody. VP ¶ 38. There are no regulations, directives, guidance, or public-facing policy that address what privacy protections, if any, accrue to the visiting families, friends, and loved ones whose biometric data may be captured by DOCCS. VP ¶ 39.

The NYCLU submitted its September 23, 2020 FOIL Request (the "FOIL Request") seeking information about, among other things, the use by DOCCS of face recognition technology at correctional facilities, including its use to screen family members, friends, and other loved ones visiting those in DOCCS's custody. DOCCS has failed to produce any records in response, withholding vital information from the public about DOCCS's use of this technology – particularly against people of color, including children. VP ¶ 41, Ex. 1. DOCCS has also not come close to meeting its burden of "articulating a particularized and specific justification for denying access" to requested records. (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). DOCCS may not completely withhold responsive records without even attempting to redact exempt material. (*See Gould v New York Police Dept.*, 89 NY2d 267, 275 [1996])("blanket exemptions for particular types of documents are inimical to FOIL's policy of open government").

PROCEDURAL BACKGROUND

The FOIL Request sought seven categories of records regarding the face recognition system, including records relating to DOCCS's adoption and/or use of the face recognition technology with respect to screening of family, relatives, and friends seeking to visit people incarcerated in DOCCS' facilities, including training materials, policies, protocols, or procedures relating to how inaccurate results generated by the face recognition technology are supposed to be handled. Ex. 1. The FOIL Request sought records relating to DOCCS's assessment of the accuracy and/or efficacy of the face recognition technology across racial demographics,

including accuracy or inaccuracy for particular racial or ethnic groups. *Id.* The FOIL Request sought records relating to the ownership, maintenance, retention, destruction, access to, and security of, the images and/or the biometric data produced by the face recognition technology. *Id.*

DOCCS unilaterally extended its own deadline to respond to the FOIL Request by four months, without providing a reason. VP ¶¶ 44. DOCCS initially immediately acknowledged receipt of the FOIL Request, indicating that it would respond to the FOIL Request within approximately 20 business days. *Id.*, Ex. 2. On October 13, 2020, DOCCS informed the NYCLU that it needed to extend its response time to the FOIL Request to December 30, 2020. *Id.*, Ex. 3. On December 28, 2020, DOCCS wrote the NYCLU to extend once again DOCCS's time to respond to the FOIL Request to February 16, 2021. *Id.*, Ex. 4. DOCCS did not respond to the FOIL Request until January 29, 2021, a full four months after the FOIL Request was issued. VP ¶ 45, Ex. 5.³

When DOCCS eventually responded on January 29, 2021, it denied the FOIL Request in its entirety. VP ¶¶ 45-46, Ex. 6. DOCCS's denial merely recited a list of FOIL exemptions without providing facts or reasoning for withholding the presumptively public requested information. DOCCS did not indicate which exemption it claimed applied to which record request, all in violation of Public Officers Law § 89 [4] [a]. *Id.*

The NYCLU sought an administrative appeal of the initial denial on February 11, 2021.

³ While FOIL permits DOCCS to extend the 20-day statutory response deadline, any extension must be “reasonable under the circumstances of the request” and be accompanied with a “statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part.” 21 NYCRR § 1401.5 [c] [3]; see also Public Off. Law § 89 [3] [a]. DOCCS disregarded these regulations with its sequential extensions, which gave no explanation for the delay. This conduct is improper. *Empire Ctr. for Pub. Policy v New York Dept. of Health*, 2021 WL 2213803 at *5-6 [Sup Ct, Albany County 2021] (finding DOH failed to offer an adequate explanation for its failure to respond to Empire Center's “straightforward request for records and data”).

VP ¶ 47, Ex. 6 (“NYCLU’s Appeal”). On March 1, 2021, DOCCS’s Records Access Appeals Officer denied NYCLU’s Appeal. VP ¶ 48, Ex. 7. DOCCS predicated its denial of six of the seven requests⁴ on the blanket assertion that the records sought could endanger the life and safety of any person, pursuant to Public Officers Law § 87 [2] [f]. *Id.*, Exs. 7 and 8. DOCCS did not provide any information about how disclosure of the records sought would endanger anyone’s life or safety. *Id.* Regarding requests 1 and 6 of the FOIL Request, DOCCS asserted that the records sought were exempt under Public Officers Law § 87 [2] [g], claiming production of any responsive record would jeopardize its electronic information systems and infrastructure because “[a]ll information can only be viewed by authorized and approved users, and only used in accordance with the policies and procedures of the Department.” *Id.* DOCCS did not identify how the requested records “could allow unauthorized access to, and potentially the disclosure of, confidential security information.” *Id.*

DOCCS provided no explanation for its claim that the interagency materials exemption under Public Officers Law § 87 [2] [g] applied to FOIL Requests 3,4, 5, and 6, instead parroting the words of the statute rather than identifying which portions of the requested records were subject to the interagency materials exemption. *Id.* Finally, regarding FOIL Request 3, DOCCS merely recited the statutory language of proprietary information/trade secrets exemption under Public Officers Law § 87 [2] [d] and did not explain its reasons for claiming that exemption or describing which portion(s) of the responsive records were subject to this exemption. *Id.*

⁴ With regard to the seventh and last Request, DOCCS offered a certification pursuant to Public Officers Law § 89 [3] that “a diligent search was conducted and no responsive records could be located” relating to DOCCS’s consideration of the accuracy of face recognition technology across racial demographics.

Based on this response, a very strong, and troubling, inference can be drawn that DOCCS gave no consideration whatsoever to racial accuracy issues and the collateral consequences on those incarcerated and their family members and friends attempting to visit DOCCS’s facilities -- either prior to, or after, DOCCS’s adoption of face recognition technology as part of the “visitation screening” process. VP ¶ 51, Ex. 7.

Having exhausted its administrative remedies, the NYCLU now files this Article 78 petition seeking immediate production of responsive documents, as well as attorneys' fees and costs. To effectuate FOIL's purpose and provide the public important information about DOCCS's use of face recognition technology on visitors at its facilities, DOCCS must be ordered to disclose the requested records immediately.

ARGUMENT

I. DOCCS'S FAILURE TO PROVIDE ANY REQUESTED RECORDS IS IMPROPER AND NOT JUSTIFIED BY ANY OF ITS CLAIMED FOIL EXEMPTIONS.

A. FOIL Requires Disclosure of Government Documents that are Not Properly Exempt.

The New York State legislature, in enacting FOIL, created a broad and presumptive right of public access to government records to foster transparency and accountability in government. "The people's right to know the process of governmental decision-making and to review documents and statistics leading to determinations is basic to our society" (Public Officers Law § 84; see also *Gould*, 89 NY2d at 274-75). When withholding records, an agency must "fully explain" its reason for denial. (Public Officers Law § 89 [4] [a]; see also DOCCS Directive No. 2010 § VI-A-3-b, *FOIL/Access to Departmental Records* (DOCCS FOIL Appeals Officer must fully explain in writing the factual and statutory reasons for denial), available at <https://doccs.ny.gov/system/files/documents/2020/11/2010.pdf> [accessed June 28, 2021], Ex. 22).

When claiming an exemption from disclosure under Public Officers Law § 87 [2], the withholding agency must demonstrate the claimed exemption applies to the requested materials. (Public Officers Law §§ 87 [2], 89 [4]; see also *Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109 [1992]). To ensure maximum access to government documents, FOIL exemptions are narrowly construed. (*Gould*, 89 NY2d at 275; see also *Matter*

of *Dilworth v Westchester County Dept. of Corr.*, 93 AD3d 722, 724 [2d Dept 2012]). The withholding agency must prove the materials fall “squarely within the ambit of one of these statutory exemptions” (*Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]).

The party seeking an exemption “must present specific, persuasive evidence” and “cannot merely rest on a speculative conclusion” (*In re Markowitz v Serio*, 11 NY3d 43, 51 [2008]; see also *Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984] (agency must provide “evidentiary support” for its justification); *Gould*, 89 NY2d at 275). Even where a record contains some exempt material, the agency should not withhold the record but “[w]here it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information” (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 45 [2011]).

DOCCS has failed to meet its obligations under FOIL.

B. DOCCS’s Claim that Records are Subject to the Life Safety Endangerment Exemption Is Unsupported.

DOCCS claims that the release of records responsive to each of requests 1, 2, 3, 4, 5 and 6 “could facilitate attempts to circumvent security procedures meant to prevent unauthorized access to a facility,” specifically concerning the “visit process room.” Ex. 7. This assertion is both speculative and insufficient under FOIL, which requires an agency deciding a FOIL appeal to “fully explain in writing to the person requesting the records the reasons for further denial.” (Public Officers Law § 89 [4] [a]; see also *Matter of Bass Pro, Inc. v Megna*, 69 AD3d 1040, 1041 [3d Dept 2010] (noting that the agency is “required to provide a full written explanation of the reasons for denying access to a record”)).

Public Officers Law § 87 [2] [f] provides that agencies “may deny access to records or portions thereof that . . . if disclosed could endanger the life or safety of any person.” Although

an agency must “only demonstrate the ‘possibility of endanger[ment]’ to properly invoke the exemption,” courts have held that the exemption “may not be applied simply because there is speculation that harm may result” (*New York Lawyers for the Pub. Interest v New York City Police Dept.*, 103 NYS3d 275, 284 [Sup Ct, NY County 2019]; *see also Matter of Mack v Howard*, 91 AD3d 1315, 1316 [4th Dept 2012]; *Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011]). Where agencies have been unable to identify specific threats or actual evidence of endangerment, courts have required disclosure under FOIL (*See Matter of Laveck v Vil. Bd. of Trustees of the Vil. of Lansing*, 145 AD3d 1168, 1171 [3d Dept 2016] (requiring disclosure of personal identifying information where no indication that subjects “had received any threats”); *Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1292 [3d Dept 2009] (requiring disclosure of witness statements, including names and addresses, where city “provided no proof that these witnesses’ lives or safety would be endangered by releasing their names or addresses”)).

DOCCS has asserted a blanket invocation of the life safety exemption to deny response to six Requests that seek a variety of different records – without supplying any facts, without indicating whose life or safety would be put at risk by disclosure of the withheld records, and without identifying which portions of those records would be subject to the exemption – all of which is clearly improper.

1. *DOCCS Has Not Demonstrated that Withheld Records Responsive to Requests 1 and 2 Would Endanger the Life or Safety of Any Person.*

Requests 1 and 2 sought records relating to DOCCS’s adoption of face recognition technology and DOCCS’s policies and procedures relating to visitation. DOCCS’s assertion of the life safety exemption appears to overstate the role face recognition technology occupies in its

visitation security and to discount DOCCS’s already extensive security process.⁵ Exemption under Public Officers Law § 87 [2] [f] is appropriate only when disclosure could “potentially [be] exploited by [wrongdoers],” which would “create ‘a possibility of endangerment’” (*Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.* 125 AD3d 531, 532 [1st Dept 2015] (emphasis added); accord *Grabell v New York City Police Dept.*, 139 AD3d 477, 478 [1st Dept 2016]). For instance, in *Asian American Legal Defense and Educational Fund*, the court exempted “a trove of NYPD Intelligence Division documents replete with sensitive information about the unit’s methods and operations” because disclosing these investigative techniques could have created a possibility of endangerment” (125 AD3d at 532). Similarly, in *Grabell*, the court exempted sensitive information “describing the strategies, operational tactics, [and] uses” of highly specialized vans—also investigative techniques—used to combat terrorism (139 AD3d at 478). This is intuitive: giving an individual an abundance of sensitive information about the NYPD’s Intelligence Division or Counterterrorism Division’s investigative methods and operations is akin to giving a thief a roadmap to the bank safe —furnishing this information creates a possibility of endangerment.

The concerns present in *Asian American Legal Defense and Educational Fund* and *Grabell* are simply not implicated here. Disclosing information concerning DOCCS’s adoption and/or use of the face recognition technology in aid of “visitation processing,” will not create a possibility of endangerment because this information does not disclose any investigative

⁵ DOCCS requires visitors to provide government or employer- issued photo identification; have their photo taken for a “visitor identification system”; turn over all bags for search; abide by an exhaustive dress code; pass through a metal detector upon arrival, which is so sensitive that hair pins, zippers, and bras can set it off; and be hand-frisked if the metal detector is set off (*See* New York State Department of Corrections and Community Supervision, *Identification*, available at <https://doccs.ny.gov/identification> [accessed June 28, 2021]), Exs. 23 and 24. The NYCLU seeks the records identified in the FOIL Request in part to assure that those families, friends and visitors subjected to DOCCS’s visitation screening process should be informed of the privacy risks DOCCS’s face recognition technology and identification process present, just as they are advised of privacy protections they are entitled to when subjected to frisking and other body searches.

techniques that could jeopardize DOCCS's correctional staff. DOCCS's system is used against visitors, not suspected of any wrongdoing -- who are already obligated to submit to an extensive identification and security screening process to prevent the introduction of weapons and/or contraband into its correctional facilities. DOCCS's nascent utilization of face recognition appears to be only a small component of DOCCS's visitor screening process. Further, all "visitation processing" measures are supplemented by the presence of armed corrections officers, alarm systems, CCTV systems, and physical barriers. It is entirely unclear how the disclosure of the records sought in the FOIL Request would somehow endanger any person's safety.

Disclosing information concerning why DOCCS uses face recognition technology, how it functions, and its efficacy does not create a possibility of endangerment because such information will not help any unwelcome individual evade DOCCS's procedures. For example, if one of the face recognition technology's shortfalls is that it cannot accurately detect faces covered in certain types of makeup, and therefore DOCCS has a policy forbidding this makeup, this knowledge will not assist a someone in evading face recognition technology system —if a visitor were to wear evasive makeup, DOCCS' employees would require the person to remove the makeup or the person would be denied entry. Further evasive makeup would not help a bad actor evade the other identification requirements, metal detectors, and the thorough search DOCCS employs on visitors. This cannot be said for police investigative techniques and operations used in the field. Unlike DOCCS's complete control over visitors, police in the field do not have control over bad actors. Nor do police in the field have an extensive security system to back up their operations. Moreover, merely knowing how DOCCS's face recognition technology system functions does not give a bad actor the ability to evade it because DOCCS will subject *all* visitors to the technology, in addition to DOCCS's other security measures.

Moreover, face recognition technology is not necessarily susceptible to exploitation for criminal purposes, in contrast with disclosing sensitive information regarding police investigative techniques and operations (*Cf. Grabell*, 139 AD3d 477; *Asian Am. Legal Defense & Educ. Fund*, 125 AD3d at 533). DOCCS’s claim that disclosure of the requested records would allow an unwelcome visitor to surmise how to evade DOCCS security and endanger those within its facilities is unsupported.

Alternatively, even if some of the responsive records do contain details that, if disclosed, would endanger life or safety, DOCCS may redact those details and disclose the remainder of the records (*See Matter of Castorina v De Blasio*, 55 NYS3d 599, 611 [Sup Ct, Richmond County 2017] (citing *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc.*, 18 NY3d at 46) (“[W]hen only a portion of a document is properly exempt, the agency must produce a redacted version that discloses all the nonexempt information”)).

2. *DOCCS Must Disclose Records Responsive to FOIL Requests 3, 4, 5, and 6 Because those Records Have No Relation to Security or Safety and, Therefore, are Not Exempt from Disclosure.*

FOIL Request 3 seeks records concerning DOCCS’s review process in adding face recognition technology to its “visitation screening” process. FOIL Request 4 seeks records concerning data regarding the accuracy and efficacy of face recognition technology. FOIL Request 5 seeks records concerning the ownership, maintenance, access to, and privacy protective security measures relating to information DOCCS’s face recognition system produces. FOIL Request 6 seeks information relating to DOCCS’s databases and/or datasets that are used for individual identification, tracking, hotlists, and the circumstances under which new entries are added to these databases/datasets. It is not clear—and DOCCS did not explain—how these FOIL Requests would even implicate the life/safety exemption afforded by § 87 [2] [f].

C. DOCCS Improperly Claims that Withheld Records are Subject to the Intra-Agency Exemption

DOCCS has asserted, without explanation, that records responsive to FOIL Requests 3, 4, 5, and 6 are exempt from disclosure under the “inter-agency or intra-agency materials” exemption under Public Officers Law §87 [2] [g]. Ex. 7. Yet DOCCS has provided no facts to support this claimed exemption, which is intended to protect an agency’s deliberative process and which does not apply to factual data and objective information (*Gould*, 89 NY2d at 277).

Only those records that constitute “‘deliberative materials’ [or] communications exchanged for discussion purposes not constituting final policy” are exempted from disclosure (*Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 699 [1993]). Such materials include “predecisional, nonfinal discussion and recommendations by employees within and among agencies to assist decision makers in formulating a policy or determination” (*Matter of Stein v New York State Dept. of Transp.*, 25 AD3d 846, 847 [3d Dept 2006] (holding exempt letters and e-mails that exhibited nonfinal discussion and recommendations by employees); see also *Matter of Bass Pro, Inc. v Megna*, 69 AD3d at 1042 (holding exempt records from the Department of Taxation and Finance that were in connection with its investigation of petitioners prior to its decision to conduct a sales tax audit as they were pre-decisional, nonfinal discussion)).

Further, Public Officers Law § 87 [2] [g] outlines four types of records that are specifically *not* exempt from disclosure under the statute: “(i) statistical or factual tabulations or data⁶; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; (iv) [or] external audits, including but not limited to audits performed by the comptroller and the

⁶ “Statistical or factual tabulations or data is defined as “objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*Gould*, 89 NY2d at 277).

federal government.” A record that falls within any of the enumerated exceptions is disclosable. Thus, “intra-agency documents that contain ‘statistical or factual tabulations or data’ are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination” (*Gould*, 89 NY2d at 276 (quoting Public Officers Law § 87 [2] [g] [i])).

Certainly, opinions and recommendations made by agency personnel or outside consultants “may be exempt from disclosure under FOIL as [intra-agency] ‘pre-decisional material, prepared to assist an agency decision maker in arrival at his decision’” (*Matter of Xerox Corp. v Webster*, 65 NY2d 131, 133 [1985] (quoting *McAulay v Bd. of Educ. of City of New York*, 61 AD2d 1048 [2d Dept 1978])). This does not, however, include information presented by consultants who communicate with the agency for their own benefit, let alone a third-party vendor of a product, such as any face recognition technology vendors, used by DOCCS for “visitation processing” (*See Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 163 [1st Dept 2008] (“[S]uch communications lose their exemption if there is reason to believe that the consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant”)).

And, while opinions offered and recommendations made during DOCCS’s deliberative processes may be exempt, objective information regarding the process itself is not exempt from disclosure, nor are the agency’s “[b]ackup factual and statistical data to a final determination” (*Matter of Professional Standards Review Council of Am., Inc. v New York State Dept. of Health*, 193 AD2d 937, 940 [3d Dept 1993] (holding that rating sheets used to evaluate competing proposals “are subject to disclosure, however, the subjective comments, opinions and recommendations written in by committee members are not required to be disclosed and may be

redacted”)).

1. *DOCCS Must Disclose Records Responsive to FOIL Requests 3 and 4 to the Extent the Records are Not Intra- or Inter-Agency Materials or the Records Fall within § 87 [2] [g]’s Enumerated Exceptions.*

Regarding FOIL Request 3, DOCCS must disclose not only any non-exempt records reflecting its process to review proposals to obtain face recognition technology but also any communications between DOCCS’s employees, agents, or representatives and any face recognition technology vendor, irrespective of if they contain opinions or recommendations. Communications between DOCCS and third-party vendors of face recognition technology are not intra- or inter-agency materials as the vendors are independent entities communicating with DOCCS in their own interest (*Cf. Tuck-It-Away Assoc., L.P.*, 54 AD3d at 163).

DOCCS must also disclose any records reflecting its process to review proposals to obtain face recognition technology that include communications among DOCCS employees, agents, or representatives or communications with other New York State governmental agency, to the extent those records fall under § 87 [2] [g]’s four enumerated exceptions. As stated above, records that fall under § 87 [2] [g]’s four enumerated exceptions are not exempt from disclosure as intra- or inter-agency materials (*Gould*, 89 NY2d at 276 (“[U]nder a plain reading of § 87(2)(g), the exemption for intra-agency [or inter-agency] material does not apply as long as the material falls within any one of the provision’s four enumerated exceptions”)).

Regarding FOIL Request 4, responsive records must be disclosed in full, with any “subjective comments, opinions and recommendations written” redacted (*Matter of Professional Standards Review Council of Am., Inc.*, 193 AD2d at 940). This is because FOIL Request 4 seeks statistical or factual tabulations or data, of which § 87 [2] [g] [i] mandates disclosure (*See, e.g., id.*, 193 AD2d at 940 (“Backup factual and statistical data to a final determination of an agency is not exempt from disclosure.”)).

2. DOCCS Must Disclose Records Responsive to FOIL Requests 5 and 6 Because those Records are Final Agency Policy or Determinations.

FOIL Request 5 seeks records that are post-decisional policies and directives that DOCCS currently abides by, and thus fall within the exemption set forth in §87 [2] [g] [iii]. These records are DOCCS' policies and operations effectuated *after* its decision to acquire and use face recognition technology, and after its adoption of those policies and operations (*See New York 1 News v Off. of President of Borough of Staten Is.*, 231 AD2d 524, 524-525 [2d Dept. 1996]). Any records responsive to FOIL Request 5 that DOCCS attempts to withhold by using the intra-agency materials exemption must be disclosed to Petitioner.

FOIL Request 6 seeks records concerning the databases and/or datasets used for identification or other matching functionalities. Like the records sought in FOIL Request 5, these records do not concern pre-decisional exempt information. DOCCS has already made its policy decisions to use specific databases and/or datasets; records reflecting those decisions, and the operations that are a result of those decisions, are post-decision, final policy records that must be disclosed under § 87 [2] [g] [iii].

D. DOCCS's Claim that Withheld Records Would Jeopardize the Security of DOCCS's Information Technology Systems Is Unfounded.

Public Officers Law §87 [2] [i] permits agencies to deny access to records or portions thereof that, "if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." The exemption is meant to protect "damage to the [information technology] assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency's electronic data" (*Matter of TJS of New York, Inc. v New York State Dept. of Taxation and Fin.*, 89 AD3d 239, 243 [3d Dept 2011]).

DOCCS gave vague, incomplete, and partial explanations of its reasons for claiming the critical infrastructure exemption under Public Officers Law §87 [2] [i] applied to Requests 1 and 6 because “[a]ll information can only be viewed by authorized and approved users, and only used in accordance with the policies and procedures of the Department.” Ex. 7.

But, an agency claiming exemption must show “expert proof of how a security breach could occur if the requested data were released” (*Newsday LLC v Nassau County Police Dept.*, 42 Misc3d 1215(A) at *6 [Sup Ct, Nassau County 2014]). Accordingly, DOCCS must prove two elements: (1) that the information sought fits the description of “electronic information systems and infrastructures,” and (2) that the disclosure of this information would jeopardize DOCCS’ ability to “guarantee the security of its information technology assets” (*Crawford v New York City Dept. of Info. Tech. & Telecom.*, 982 NYS2d 725, 729 [Sup Ct, NY County 2014] (disclosure of geographic location of high-speed internet conduits type of electronic information systems and infrastructure would jeopardize the state agency’s ability to guarantee the security of its information technology assets)).

DOCCS denied Petitioner’s FOIL Requests 1 and 6 on this ground without any particularized showing that the information sought would subject its technology to attack. Nor could it, as Petitioner is not asking for disclosure of the location of DOCCS information technology infrastructure supporting its face recognition technology. Petitioner merely seeks information regarding policies, procedure, and quantitative and qualitative data relating to how the face recognition system DOCCS operates functions. As in *Matter of TJS of New York, Inc.*, this Court should order disclosure of these records that would not put DOCCS information technology systems at risk.

E. DOCCS Cannot Demonstrate that Responsive Records Would Reveal Trade Secrets or other Confidential Commercial Information.

Regarding Request 3 of the FOIL Request, DOCCS recited the language of the exemption for trade secrets under Public Officers Law §87 [2] [d] without explanation. This lack of explanation violates Public Officers Law §89 [4] [a] (*See Matter of W. Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 884-85 [2009] (appeals officer’s mere “parrot[ing]” of statutory language in an appeal denial letter “constituted a failure . . . to fully explain in writing . . . the reasons for further denial as required by FOIL”); *Church of Scientology of New York v State of New York*, 46 NY2d 906, 907-08 [1979] (agency did not meet its burden where “State officials . . . tendered only references to sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld”). *See also Matter of Dilworth v Westchester County Dept. of Corr.*, 93 AD3d 722, 724 [2d Dept 2012] (“Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.”)). These one-sentence justifications do not “fully explain” the agency’s reasoning for denial and fail to demonstrate that the claimed exemptions apply to each of the specific records requested by Petitioner. Although DOCCS’s lack of justification makes it impossible to assess fully its basis for withholding presumptively public materials, none of the claimed exemptions justifies DOCCS’s withholding of the requested records. DOCCS has not and cannot meet its burden under *Burns* and *Gould* of making a “particularized and specific justification for denying access” (*Burns*, 67 NY2d at 566; *see also Gould*, 89 NY2d at 275).⁷ As such, DOCCS’s failure to explain with specificity its

⁷ No judicial deference is owed to DOCCS’s determination denying the NYCLU’s administrative appeal. This Court is not required to give any deference to agency determinations of statutory construction or pure questions of law (*See Matter of Belmonte v Snashall*, 2 NY3d 560, 565-66 [2004] (deference may be accorded when “interpretation involves some type of specialized knowledge”). The issue of whether a party invoking a FOIL exemption has met its burden is one of pure legal interpretation (*See Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 94 [3d Dept 1985], *affd*, 67 NY2d 562 [1986]; *see also New York Comm. for Occupational Safety & Health v Bloomberg*,

claimed exemptions should constitute a waiver and preclude it from relying on explanations for them for the first time during this proceeding. (*See Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Services*, 77 NY2d 753, 758 [1991] (“[J]udicial review of an administrative determination is limited to the grounds invoked by the agency [...] If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.”) (internal quotation omitted). *See also Barry v O’Neill*, 185 AD3d 503, 505 [1st Dept. 2020]; *Empire State Beer Distributors Assn., Inc. v New York State Liq. Auth.*, 158 AD3d 480, 481 [1st Dept 2018], *lv denied*, 31 NY3d 907 [2018]); *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 [2017]).⁸ The Petition should be granted on this basis alone.

Public Officers Law §87 [2] [d] exempts records that “are trade secrets or submitted to an agency by a commercial enterprise . . . which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” For this exemption to apply, there must be a showing by a commercial enterprise of a purported injury (*See Newsday LLC*, 42 Misc3d *6 (“There is no statement from the unnamed vendor, let alone persuasive evidence, demonstrating how release of the information would cause an injury to its competitive interests. Accordingly, it must be rejected.”)). Further, “the policy behind Public Officers Law § 87 [2] [d] is simply to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State’s economic development efforts and attract business to

72 AD3d 153, 158 [1st Dept 2010]; *Matter of Weiss Haus v Port Auth. of New York & New Jersey*, 18 NYS3d 268, 276-277 [Sup Ct, Kings County 2015]. DOCCS’s determinations in its denial of the NYCLU’s administrative appeal do not involve the agency’s “special competence or expertise” (*Matter of Belmonte*, 2 NY3d at 566).

⁸ Alternatively, if the Court is unable to determine whether certain withheld documents are within the scope of the asserted exemption, it should conduct an *in camera* inspection of a representative sample of responsive documents and order disclosure of all non-exempt material (*See Gould*, 89 NY2d 267, 277; *see also Matter of Rose v Albany County Dist. Attorney’s Off.*, 111 AD3d 1123, 1126 [3d Dept 2013]; *Matter of Grune v New York State Dept. of Corr. Services*, 166 AD2d 834, 835 [3d Dept 1990]).

New York” (*Matter of Verizon New York, Inc. v New York State Pub. Serv. Commn.*, 137 AD3d 66, 71 [3d Dept 2016]). It is entirely unclear whose trade secrets DOCCS purports to be protecting from disclosure.

FOIL Request 3 seeks “Any and all records reflecting the process undertaken by DOCCS to review any proposals to obtain any form of the face recognition technology, including records of, or relating to, communications: (a) among employees, agents or representatives of DOCCS; (b) with any other New York State governmental agency or organization; or (c) with any vendor offering [face recognition technology].” Ex. 1. DOCCS has made no showing that any of the companies that submitted a proposal to supply a face recognition technology system to DOCCS sought to have their proposal remain confidential. As the *Verizon* court noted, the intent behind the exemption in Public Officers Law § 87 [2] [d] is to prevent harm to companies who have submitted their trade secrets to agency, in compliance with some regulatory requirement. That certainly does not apply here. Face recognition vendors were under no obligation to submit any proposal to DOCCS (*Cf. Professional Standards Review Council of Am. Inc.*, 193 AD2d at 939 (“There is no showing that IPRO, bidding on a public contract, had any reasonable expectation of not having its bid open to the public”)). The NYCLU is not asking for the proprietary information or trade secrets of private companies that develop face recognition technology—NYCLU has sought records from DOCCS, to whom these companies proposed selling, or have sold, their technology, for information about its procurement procedures.

FOIL Request 3 will allow the public to shed light on the framework DOCCS used when selecting which face recognition technology to use. This could, and should, aid policymakers in directing DOCCS to “develop or rely on established guidelines surrounding [face recognition technology]” and to “require them to use technology and face recognition technology algorithms

that meet specified standards.” Congressional Research Service, *Federal Law Enforcement Use of Facial Recognition Technology* at 12 [R46586, 2020], <https://crsreports.congress.gov/product/pdf/R/R46586>. Further, different face recognition technology products have vastly different rates of error. VP 21. *See also* William Crumpler, Center for Strategic & International Studies, *How Accurate are Facial Recognition Systems – and Why Does It Matter?*, <https://www.csis.org/blogs/technology-policy-blog/how-accurate-are-facial-recognition-systems-%E2%80%93-and-why-does-it-matter> [April 14, 2020] (“Though some vendors have constructed highly accurate face recognition algorithms, the average provider on the market still struggles to achieve similar reliability, and even the best algorithms are highly sensitive to external factors.”). Ex. 14. In the absence of an overarching federal or state protective framework, this information is vital to the public.

II. THE NYCLU IS ENTITLED TO ATTORNEYS’ FEES.

Petitioner respectfully requests an award of reasonable attorneys' fees and litigation costs on two separate grounds. First, Petitioner is entitled to attorneys' fees and costs because DOCCS failed to provide a reasonable basis for denying access to the records and DOCCS flouted its legal obligations under FOIL by failing to respond to a FOIL appeal within the statutory time. (Public Officers Law § 89 [4] [c]). Second, Petitioners respectfully submit that this Court will determine that Petitioner will have "substantially prevailed" and the agency had "no reasonable basis for denying access" to the records in dispute. If this Court orders DOCCS to disclose documents in response to this Petition, the NYCLU will have "substantially prevailed" for the purposes of this provision (*Matter of Madeiros*, 30 NY3d at 79 (finding that the petitioner "substantially prevailed" when the respondent produced documents in response to the petition)); *Matter of Bottom v Fischer*, 129 AD3d 1604, 1605 [4th Dept 2015] [petitioner substantially prevailed when respondent made disclosures only after “the court directed it to justify their

nondisclosure”]; *Matter of Powhida v City of Albany*, 147 AD2d 236 [3d Dept 1989] [petitioner substantially prevailed when it was "the initiation of this proceeding which brought about the release of the documents"]).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the Verified Petition, enter a judgment ordering DOCCS to provide the complete, unedited records requested by Petitioner in the FOIL Request dated September 23, 2020, award Petitioner its reasonable attorneys’ fees and litigation costs, and award such other relief the Court deems necessary and proper.

Dated: June 30, 2021
New York, New York

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

I hereby certify that:

1. This brief complies with the word count limitation of 22 NYCRR §202.8-b because the total word count, according to the word count function of Microsoft Word, the word processing program used to prepare this document, of all printed text in the body of the brief, exclusive of the caption, table of contents, table of authorities and signature block is 6428.



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Dated: June 30, 2021
New York, New York