To be Argued By:
Stefanie Coyle
Time Requested: 15 Minutes

New York Supreme Court

Appellate Division—First Department

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Defendant-Respondent.

BRIEF OF PETITIONER-APPELLANT

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Appellate Division—First Department Case No. 2021-03900

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QUESTION PRESENTED

Whether the Supreme Court erred in upholding the NYPD's denial of access to the requested records on the basis of the public safety exemption (Public Officers Law 87 [2] [f]) ("if disclosed could endanger the life or safety of any person")?

PRELIMINARY STATEMENT

This case presents the critical issue of whether the NYPD can obscure the public's right to know basic facts about police activities in New York City public schools. This includes data on contraband seized by the NYPD as a result of metal detector screening, the sites of school metal detectors, and the distribution of school safety agents in each borough. Though the NYPD claims there are public safety reasons for declining to release this data, their arguments for such safety reasons are unsubstantiated and overbroad. Following the NYPD's assertions to their logical conclusion, the NYPD would never have to disclose what is required under FOIL.

Tens of thousands of New York City children cannot get to classes without passing through a gauntlet of metal detectors, bag-searches, and pat-downs administered by police personnel. These police are inadequately trained for the school setting and are often belligerent, aggressive, and disrespectful. Even a middle or high school without permanent metal detectors may be unexpectedly forced to subject its students to mandatory "unannounced" scans and searches that could consume as much as three hours of class time. These interactions delay students from

instruction and often create flashpoints of confrontation. Metal detector scanning makes many students feel violated, diminished, and distrustful of authorities in their school. This tactic is incompatible with a healthy school climate, which is built through positive interactions and trusted relationships with adults.

For more than two decades, the NYPD has operated in New York City schools with minimal public visibility into whether its activities—particularly in schools serving predominantly students of color—are a proper response to a real threat, part of a plan to create healthy school climates, or are simply an extension of the NYPD's pattern of over-policing Black and Latinx New Yorkers. Even school principals have difficulties figuring out why their school is the site of more or fewer school safety agents, or why they have or do not have metal-detector scanning on any given day.

In its refusal to provide the requested information, the NYPD inappropriately invoked the "public safety exemption," making conclusory claims of harm to attempt to shield the requested data from the public eye. The lower court erred in accepting the NYPD's broad, speculative statements as permissible under FOIL. In doing so, it failed to consider whether data on contraband confiscated as a result of magnetometer scanning, the location of magnetometers, and borough-level data on school safety agent deployment should be made publicly available.

STATEMENT OF THE CASE

Since 1998, the NYPD has been responsible for school safety in the New York City Department of Education ("DOE") schools and offices.[1] The NYPD has been required to provide transparency about its activities in DOE schools by the Student Safety Act, which mandates that the NYPD provide quarterly reports to the New York City Council on the use of metal detectors and the distribution of school safety agents ("SSA") across the New York City public schools system. R. at 39-40 (Petition ¶ 11-13, Administrative Code of the City of NY § 14-150 [a] [3]; § 14-152 [e]). Specifically, Section 14-152 [e] requires the NYPD to produce:

1. A list of school buildings with permanent metal detectors.
2. A list of school buildings subjected to random scanning.
3. A list of schools that have requested the removal of metal detectors.
4. A list of schools for which a requested removal of metal detectors has been honored. R. at 40 (Petition ¶ 13).

In addition, the NYPD is required to produce an annual report on the total amounts and types of contraband seized as a result of metal detector scanning, disaggregated by school building, including firearms, knives, box cutters and laser pointers (Administrative Code of the City of NY § 14-152 [e]).

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[1] *See generally*, Record on Appeal ("Record" or "R.") at 39 (Petition ¶ 10).

On March 7, 2019, the NYCLU submitted a Freedom of Information Law ("FOIL") request to the City Council seeking data on the use of metal detectors that had been produced by the NYPD pursuant to Section 14-152 [e]. R. at 40 (Petition ¶ 16). On March 19, 2019, the City Council FOIL officer responded that "the New York City Council does not have responsive documents to the portion of your request that has asked for documentation provided to the New York City Council by the New York Police Department" because, despite its mandate, the NYPD did not report to the City Council the required information under Section 14-152 [e] of the Administrative Code. R. at 41 (Petition ¶ 17).

On January 3, 2020, the NYCLU submitted a FOIL request to the NYPD for records related to metal detectors in schools and the assignment of school safety agents across the DOE via the NYPD's OpenRecords platform. R. at 41 (Petition ¶ 18). Specifically, the NYCLU submitted two requests:

1. All records regarding metal detectors in schools collected since September 2015 pursuant to the NYPD's reporting requirements under § 14-152 (e) of the New York City Administrative Code.

2. All records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under § 14-150 (a) (3) of the New York City Administrative Code. R. at 4.1 (Petition ¶ 19).

After correspondence between the NYCLU and the NYPD, R. at 41 (Petition ¶ 20 - 23), the NYPD provided some records partially responsive to Request 1 and denied access to records responsive to Request 2 on the basis of the "public safety

exemption" and claiming that "such information, if disclosed, would reveal non-routine techniques and procedures." R. at 42 (Petition ¶ 23). In its response, the NYPD provided a chart labeled "dangerous instruments," including totals from what appeared to be school years starting in July 2014. R. at 42, 62 (Petition ¶ 24, Ex. F). The chart did not disaggregate the data on confiscated items by school building, as required under the Administrative Code, nor did it indicate the type of "contraband," as was also required. The chart also did not define the term "dangerous instruments" or indicate whether any of the required categories, including firearms, knives, box cutters and laser pointers, were included within this definition. R. at 42 (Petition ¶ 24). The NYPD also produced a chart containing what appeared to be the total number of metal-detector scanning sites across the DOE, including permanent and random scanning, from various months starting in 2017. R. at 42 (Petition ¶ 25). This aggregate data did not reflect a list of school buildings, as required by the Administrative Code. R. at 42, 62 (Petition ¶ 25, Ex. F).

On March 13, 2020, the NYCLU appealed this determination, R. at 43, 64 (Petition ¶ 27, Ex. G), and on April 27, 2020, the NYPD denied the appeal via email based on the "public safety exemption" under FOIL (Pub. Off. Law § 87 [2] [f]) and a provision within the Administrative Code itself (§ 14-150 [c]) ("information, data and reports…shall be provided to the council except where disclosure of such

material could compromise the safety of the public or police officers." R. at 43, 94 (Petition ¶ 30, Ex. J).

Despite denying the appeal, in response to Request 1, the NYPD directed the NYCLU to a public website containing data that can be used to identify a large number of schools where permanent or random scanning has taken place or whether certain contraband items were confiscated if there was an NYPD "incident" at the school. R. at 43 (Petition ¶ 31). The website did not contain complete data regarding the location of SSAs or metal detectors, nor did it contain data related to requests to remove metal detectors or types of items confiscated. R. at 44 (Petition ¶ 32).

On August 26, 2020, Plaintiffs commenced an action under Article 78 seeking a judgment directing the NYPD to comply with its duty under FOIL and disclose the records sought by the petitioner in Requests 1 and 2 in the FOIL request dated January 3, 2020 and appealed March 13, 2020. R. at 44 (Petition ¶ 39). In addition, Plaintiffs sought an award of reasonable attorneys' fees and litigation costs as permitted under New York Public Officers Law § 89.

On October 16, 2020, the NYPD cross-moved to dismiss the NYCLU's petition pursuant to CPLR §§ 7804 [f] and 3211 [a], alleging that the NYCLU failed to state a cause of action "because the records were properly withheld as disclosure could endanger the life and safety of law enforcement officers and the public" and that the proceeding is "moot and academic." R. at 149 (Respondent's Notice of

Cross-Motion to Dismiss at 1). In its affirmation and supporting papers, the NYPD revealed that it had identified 58 pages of responsive documents, as follows: 2 pages encompassing "a quarterly list of school buildings with permanent metal detectors and random scanning, as well as a list of schools which have requested the removal of metal detectors, and schools for which the request was honored" dating from 2015. R. at 155 (Drennen Aff. at ¶ 16); 5 pages encompassing "an annual list showing types of weapons seized citywide as a result of metal detector scanning and hand wands" dating back to 2015 (*Id.*); and 51 pages that includes "lists of the number of school safety agents assigned to each borough, as well as each school, on a twice a year basis since 2018." R. at 155 (*Id.* at ¶ 17). The NYPD claims that these 58 pages of documents are exempt from production "as disclosure could endanger the life and safety of students, school personnel, and school safety agents." R. at 156 (*Id.* at ¶ 18; Pub. Off. Law § 87 [2] [f]).

The Supreme Court denied the NYCLU's petition and granted the NYPD's cross-motion in a decision dated April 1, 2021. R. at 25 (Decision and Order at 2). In its decision, the court upheld the NYPD's denial of access to the requested records on the basis of the "public safety exemption," Pub. Off. Law § 87 [2] [f], holding "the NYPD has demonstrated 'a possibility of endangerment' to its school safety operations, which justifies its invocation of the public safety exemption set forth in Pub. Off. Law § 87 [2] [f]." R. at 32 (Decision and Order at 9). In response to the

NYCLU's argument that the "public safety exemption" is inapplicable, the court allowed the NYPD to rely on a "possibility of endangerment" to public safety standard, finding school safety operations are akin to undercover anti-gang police operations (*Id.*).

The court also relied on the NYPD's justification regarding a "tactical principle of uncertainty" to limit public availability of school safety information in order to deter "the ability of certain types of criminals to attack NYC schools," R. at 30 (Decision and Order at 7) even though it acknowledged that "the NYPD's reliance on a 'tactical principle of uncertainty' plainly entails some degree of speculation." *Id*.

ARGUMENT

The Supreme Court erred in several areas. First, its ruling allowing the NYPD to withhold citywide, annual lists of contraband seized at metal detectors failed to recognize that nothing in the NYPD's supporting declaration offered any explanation about how disclosure of these lists would even implicate, much less endanger, public safety. Second, the court erroneously sustained NYPD's denial of the branch of the first FOIL request related to the location of magnetometer scanning sites, disregarding the public information the NYPD already disclosed in this case and information which is publicly visible. Lastly, the court erred in allowing the NYPD to withhold borough-level school safety agent data and failing to differentiate

between school safety agents and police officers in denying the release of school safety agent deployment data.

I. STANDARD OF REVIEW

Under CPLR § 7803 [3], Article 78 relief should be granted when an agency determination "was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." With regard to FOIL, Article 78 relief is appropriate whenever a reviewing court determines the agency's determination was "affected by an error of law" (*Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 490 [1st Dept 2021]; *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD 3d 506, 507 [1st Dept 2011] ["The [Supreme Court] should have determined whether respondents' determination 'was affected by an error of law.' (CPLR 7803 [3])"]. In reviewing the Supreme Court's disposition in an Article 78 proceeding, the Appellate Division reviews legal conclusions of the Supreme Court *de novo* (*see id.*; *Matter of Barry v O'Neill*, 185 AD3d 503, 505 [1st Dept 2020] ["the standard of review is whether the denial of the FOIL request was 'affected by error of law'" (citations omitted)].

II. THE NYPD IMPROPERLY WITHHELD RECORDS ABOUT CONTRABAND SEIZED FROM AND THE LOCATION OF METAL DETECTORS.

The first of the NYCLU's two FOIL requests focused on the use of metal detectors in schools. Specifically, it sought "[a]ll records regarding metal detectors

in schools collected since September 2015 pursuant to the NYPD's reporting requirements under Section 14-152 [e] of the New York City Administrative Code." R. at 25 (Decision and Order at 2) Section 14-152 [e] in turn requires the NYPD to produce certain information about contraband recovered through the use of metal detectors and about various aspects of the placement of metal detectors. In this appeal, the NYCLU focuses on two specific parts of the NYPD's metal-detector response: (1) its refusal to produce citywide, annual lists of contraband recovered; and, (2) its refusal to produce annual listings identifying schools where metals detectors are located.

A. The NYPD Improperly Withheld the Annual, Citywide Lists of Contraband Seized at Metal Detectors.

As noted, in response to the NYCLU's Article 78 petition, the NYPD stated it had identified, among other responsive documents, five pages encompassing "an annual list showing types of weapons seized citywide as a result of metal detector scanning and hand wands," dating back to 2015. R. at 155 (Drennen Aff. at ¶ 16). Though this representation reveals that the NYPD is not complying with Section 14-152, which requires more detailed reporting, it is those documents that are in dispute in this appeal under FOIL.[2] The NYPD withheld the five pages in their entirety,

[2] In addition, the NYPD is required to produce an annual report on the amounts and types of contraband seized as a result of metal detector scanning, disaggregated by school building, including firearms, knives, box cutters, and laser pointers (Administrative Code of the City of NY § 14-152 [e]).

invoking FOIL's "public safety exemption" and relying on an affidavit of an official of the NYPD School Safety Division. The Supreme Court's decision upholding this claim of exemption was erroneous.

An agency to which a FOIL request is made "does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure," (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). The NYPD must provide "specific, persuasive evidence" and "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm" (*Markowitz v Serio*, 11 NY3d 43, 51 [2008]). The "public safety exemption" "may not be applied simply because there is speculation that harm may result" (*New York Lawyers for Pub. Int. v New York City Police Dept*, 64 Misc3d 671, 683 [Sup Ct, NY County 2019]). Specifically, FOIL restricts the agency from merely stating that harm will occur; rather, demonstrative harm is required: "'Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed'" (*Matter of Baez v Brown*, 124 AD3d 881, 883 [2d Dept 2015], quoting *Matter of Dilworth v Westchester County Dept of Correction*, 93 AD3d 722, 724 [2d Dept 2012]]. The

requirement for particularized and specific justifications means that the NYPD cannot claim blanket exemptions as "blanket invocation of . . . statutory exemptions . . . without offering a specific basis for any of the claims of exemption" violates FOIL (*City of Newark v Law Dept of City of New York*, 305 AD2d 28, 34 [1st Dept 2003]).

Here, the NYPD's invocation of the "public safety exemption" to withhold the annual, citywide lists of seized contraband relies entirely upon conclusory assertions and includes disclosures that undermine even those conclusory assertions. Specifically, the NYPD relied upon the affidavit from Associate Supervisor of School Security, Pamela Lightsey (the "Lightsey Affidavit"), which contains the following three paragraphs that bear on the issue of the annual, citywide wide lists of recovered contraband the NYPD withheld:

> 17. In the 2011-2012 school year, unannounced scanning resulted in the discovery of 176 knives, 79 box cutters, and 57 other dangerous items such as mace, laser pointers or various blunt instruments, for a total of 312 items removed. Id. It is common to recover weapons or unlawful items from the grounds outside school on unannounced scanning days, presumably disposed of by students so that they are not carried through the scanners. Id. Citywide, the recovery of guns has decreased as scanning has increased. For example, 22 guns were recovered during the 2002-2003 school year but only 8 were recovered during the 2011-2012 school year. Id. Furthermore, for the one year periods between July 2014 through June 2019, the number of dangerous instruments confiscated steadily rose in number from 710 to 1295. See NYSCEF Doc No. 7. R. at 198 (Lightsey Aff. ¶ 17).
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> 19. With this affidavit, I wish to advise the Court that Petitioner's request for the presence of metal detectors in each Department of

> Education school, contraband seized in schools as a result of metal detector scanning, and the number of school safety agents assigned to each school, if granted, would undermine the NYPD's ability to safely secure schools. If these statistics were released, someone who reviewed them would be able to know whether a school has a metal detector and how many school safety agents are assigned to a school. This would enable a person to tailor a criminal act at a specific school that does not have a metal detector and/or has a reduced school safety agent presence. No deciphering of statistics or inspection at schools would be required. R. at 198 (Lightsey Aff. ¶ 19).
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> 20. The NYPD tactically relies on a principle of uncertainty. That principle applies to schools in that potential perpetrators face a tactical disadvantage in not knowing how many school safety agents are assigned to a school, and whether a person would be subject to metal detector scanning upon entry at the school. Thus, it would [be] detrimental to school safety operations if the NYPD was ordered to release specific metal detector and agent deployment statistics. R. at 199 (Lightsey Aff. ¶ 20).

Three aspects of these representations foreclose invocation of the "public safety exemption" for the annual, citywide contraband lists. First, and most importantly, nothing in these paragraphs purports to explain how disclosing these lists would implicate safety concerns. The NYPD's presentation is premised on concern about public disclosure of which specific schools have metal detectors and school safety agents, but the affidavit says nothing about how annual, citywide numbers of contraband seized would reveal anything about which specific schools had metal detectors and which did not. And that is no surprise, given that nothing can be discerned about the location of metal detectors from an annual, citywide list of seized contraband.

Second, that disclosure of these lists would not implicate public safety is buttressed by the NYPD's own affidavit, which in paragraph 17 discloses specific citywide annual numbers for contraband seized in previous years. And the NYPD offers no explanation as to why these disclosures of annual, citywide numbers do not present the public safety considerations upon which it relies in seeking to withhold the five pages of other annual, citywide figures. This Court has rejected claims of the "public safety exemption" for aggregate, statistical data, such as that which was requested here (*Council of Regulated Adult Liquor Licensees v City of New York Police Dept*, 300 AD2d 17 [1st Dept 2002]); *see also infra Section* II(B), regarding data that has already been disclosed).

Finally, the NYPD's invocation of the "principle of uncertainty" is inappropriate. Associate Supervisor Lightsey stated:

> [t]hat principle applies to schools in that potential perpetrators face a tactical disadvantage in not knowing how many school safety agents are assigned to a school, and whether a person would be subject to metal detector scanning upon entry at the school. Thus, it would be detrimental to school safety operations if the NYPD was ordered to release specific metal detector and agent deployment statistics. R. at 199 (Lightsey Aff. ¶ 20).

The NYPD again makes no mention about the utility of the "principle of uncertainty" to annual, citywide contraband lists. To be sure, the less the public knows about the government, the more uncertainty the public will have about the government. But this of course is squarely at odds with the very premise of FOIL, which is to increase

public awareness of the government. Without far more in the way of specifics and justification, the NYPD cannot simply invoke uncertainty as a basis for withholding the annual, citywide lists of contraband.

In fact, the Supreme Court acknowledged the inherently speculative nature of this claim, yet still accepted it as justification for the NYPD to withhold the responsive records ("The NYPD's reliance on a 'tactical principle of uncertainty' plainly entails some degree of speculation.") R. at 30 (Decision and Order at 7).

And though a requestor need not establish a justification for seeking records, (*Data Tree, LLC v Romaine*, 9 NY3d 454 [2007]), here there is an important public policy benefit to the disclosure of information about contraband seized through the use of metal detectors The number of items confiscated dropping or rising could have impacts on the staffing of counselors and need for targeted initiatives at the city level. The nature of the items also provides valuable information on what the actual safety threat is to students, rather than relying on the NYPD's conclusory and speculative statements of such threats which do not meet the NYPD's burden (*see, e.g., Matter of Laveck v Vill. Bd. of Trustees of Vill. of Lansing*, 145 AD3d 1168, 1171 [3d Dept 2016] [holding that affidavits from employees stating only that disclosure would cause harm were insufficient to satisfy requirement of nonspeculative justification to invoke "public safety exemption"; *Newsday LLC v Nassau Cty. Police Dept*, 42 Misc3d 1215[A], 2014 NY Slip Op. 50044[U] [Sup

Ct, Nassau County 2014] [rejecting the Nassau County Police Department's claim of the "public safety exemption" despite the production of an officer's affidavit because his claims were "unsupported by proof and thus constitute no more than conclusions and speculation, which are insufficient."]; *Matter of Mack v Howard*, 91 AD3d 1315, 1316 [4th Dept 2012] [rejecting a sheriff's explanation that the release of video footage of an altercation with corrections officers would endanger others because it "demonstrate[d] the manner in which an inmate can create a disturbance."]; *New York Lawyers for Pub Int v New York City Police Dept*, 64 Misc3d 671, 683 [Sup Ct, NY County 2019] [rejecting similar "public safety exemption" under public-endangerment theory because exemption "may not be applied simply because there is speculation that harm may result."].

For the foregoing reasons, the Supreme Court's decision to allow the NYPD to withhold the citywide, annual lists of contraband confiscated by metal detector scanning was an error of law.

B. The NYPD Improperly Withheld the List of Schools with Metal Detectors.

The second part of the NYCLU's FOIL request related to metal detectors at issue in this appeal arises from the NYPD's disclosure in the Supreme Court that the responsive documents it had identified also included two pages encompassing "a quarterly list of school buildings with permanent metal detectors and random scanning, as well as a list of schools which have requested the removal of metal

detectors, and schools for which the request was honored" dating from 2015. R. at 155 (Drennen Aff. at ¶ 16). Random scanning is when a permanent metal detector in a school building is used "on a random basis throughout the week."[3] As with the annual, citywide lists of contraband, the NYPD withheld these two pages entirely.[4]

The NYPD's claim that life and safety would be endangered by the disclosure of the requested records is belied by the NYPD's public disclosure of many of the requested records and the availability of the information through public inspection. Courts have held that public availability of the information sought in a FOIL request refutes the argument that its disclosure will cause harm (*Physicians Comm for Responsible Med v Hogan*, 29 Misc3d 1220[A], 2010 NY Slip Op. 51908[U], *4 [Sup Ct, Albany County 2010] [while distinguishing three of the exact cases currently cited by the NYPD, the court held that "none of the cases relied upon by [the agency] have upheld the withholding of information pursuant to the life/safety exemption where substantially similar information is available to the public"]). The

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[3] *Scanning in NYCDOE Schools*, July 21, 2016, at 2, https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/scanning-protocols-in-nyc-doe-schools-english.pdf?sfvrsn=cfef48d6_6.

[4] Under § 14-152 [e] "Use of permanent and temporary metal detectors," of the New York City Administrative Code, and related to the Request for metal detector locations, the NYPD shall:

> …submit to the council on a quarterly basis a report including: (i) a list of school buildings with permanent metal detectors; (ii) a list of school buildings subjected to random scanning; (iii) a list of schools that have requested the removal of metal detectors; and (iv) a list of schools for which a requested removal of metal detectors has been honored.

lower court erred in allowing the NYPD to shield records related to the locations of the permanent magnetometers and random screening sites[5] based on an inappropriate claim of exemption.

In its response to the NYCLU's FOIL appeal, the NYPD directed the NYCLU to a public website containing data that can be used to identify some schools where permanent or random scanning has taken place if there was an NYPD "incident" at the school. R. at 43 (Petition ¶ 31). For example, based on the Fourth Quarter 2019 reporting data by school on the website[6], at least 120 schools[7] had permanent magnetometers at that time.[8] Having already disclosed a significant portion of

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[5] Note that the list of schools that have requested magnetometer removal and a list of schools for which the request was granted is also required by the Administrative Code of the City of NY Section 14-152 [e].

[6] City of New York, *School Safety Data*, https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page (last accessed Oct. 27, 2021).

[7] In its response to the NYCLU's FOIL request, the NYPD indicated that there were 79 "sites" where there were "full time" magnetometers during "2019/2020". R. at 42 (Petition ¶ 25, Ex. F). It is unclear if this number refers to buildings, as more than one school may be co-located within the same building.

[8] The following is the list of schools that the NYPD reported as having had a permanent magnetometer during the Fourth Quarter of 2019: Abraham Lincoln HS, Academy for Environmental Leadership, Academy of Innovative Technology, Academy of Medical Technology, Adlai Stevenson HS, Alfred E. Smith Campus, Antonia Pantoja Preparatory Academy, August Martin HS, Beach Channel HS, Boys and Girls HS, Brandeis YABC, Bronx Academy of Health Careers, Bronx Community HS, Bronx HS of Business, Bronx Lab School, Bronx Regional HS, Bronx School of Law & Finance, Bronx Theater HS, Bronxwood Preparatory Academy, Brooklyn Frontiers, Brooklyn Lab School, Brooklyn Preparatory HS, Brownsville Academy HS, Bushwick Community HS, Bushwick HS, Bushwick School for Social Justice, Canarsie HS, Christopher Columbus HS, Clara Barton HS, Cobble Hill School of American Studies, Dewitt Clinton HS, East New York Family Academy, Erasmus Hall HS, Evander Childs HS, Excelsior Preparatory HS, Far Rockaway HS, Flushing HS, Franklin K Lane HS, George Washington HS, George Wingate HS, Grand Street Campus, Grover Cleveland HS, Harry S Truman HS, Harry Van Arsdale HS, Herbert H Lehman HS, Hillcrest HS, HS for Arts Imagination

information regarding the location of permanent magnetometers, the NYPD is left with no argument as to why the complete list of magnetometers from each quarter and year requested cannot be produced pursuant to FOIL. The NYPD's own identification of specific location information for magnetometers in the instant FOIL dispute forecloses its argument that disclosure of this exact information would pose a danger to the life or safety of anyone in the school community.[9]

Further, the presence of metal detectors in a school is clearly observable by the entire school population of teachers, students, administrators, and visitors. In its cross-motion, the NYPD admitted that information sought in the requests, including

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& Inquiry, HS for Civil Rights, HS for Contemporary Arts, HS for Law & Public Service, HS for Teaching & the Professions, HS for Violin & Dance, HS of Arts & Technology, Humanities & Arts Magnet HS, Hunts Point School, International School for Liberal Arts, IS 172, IS 217 School of Performing Arts, IS 219 New Venture School, IS 313 School of Leadership Development, IS 339 School of Comm Tech, IS 53, IS/JHS 291, It Takes a Village Academy, Jamaica Gateway to the Sciences, Jamaica HS, James Madison HS, JHS 113, JM Rappaport School for Career Development, John Adams HS, John Bowne HS, John Dewey HS, John F. Kennedy HS, John Jay HS, Kingsbridge International HS, Lafayette HS, Liberation Diploma Plus HS, Louis D. Brandeis HS, Monroe Academy for Business & Law, Morris HS, MS 201 School of Theatre Arts, Nelson Mandela HS, New Directions Secondary School, Newcomers HS, Norman Thomas HS, P25 South Richmond, P35, P371, P752 Career Development, Pan American International School, Paul Robeson HS, Peace & Diversity Academy, Progress HS for Professional Studies, Prospect Heights HS, P12, PS 469, Queens Collegiate: A College Board School, Rockaway Collegiate HS, Samuel J. Tilden HS, School for Excellence, Schuylerville Preparatory High School, Sheepshead Bay HS, South Shore HS, Springfield Gardens HS, Street Academy, Success Academy Harlem Central, The Brooklyn School for Math & Research, The Metropolitan HS, Theodore Roosevelt High School, Thomas Jefferson HS, Tottenville HS, Water's Edge, Village Academy, Voyages Prep South Queens, Walton HS, Washington Irving HS, West Bronx Academy for the Future, West Side HS, Westchester Square Academy, William H. Taft High School, and Wings Academy.

[9] As noted in both the NYCLU's Memorandum of Law and Reply Memorandum of Law in Support of the Verified Petition, the NYPD also frequently posts information regarding the location of metal detectors and school safety agents on Twitter. R. at 140 (Pet's MOL at 18); R. at 286 (Pet's Reply MOL ISO Verified Petition at 7).

the location of metal detectors, could be obtained by public inspection. R. at 159 (Drennen Aff. at ¶ 23); R. at 198 (Lightsey Aff. at ¶ 17) [noting that "it is common to recover weapons or unlawful items from the grounds outside school on unannounced scanning days" reflecting that the scanners are visible prior to entering the building]). Given this and the long lines of students queuing outside school buildings, R. at 137 (Petitioner's Memorandum of Law at 15), it is clear that information regarding the location of metal detectors is available based solely on observation of public spaces.[10]

Courts have repeatedly held that data available by public inspection should be produced in response to a FOIL request. In *Lancman v NYPD*, Index No. 154329/2019 [Sup Ct, NY County, Sept. 23, 2019], a FOIL case regarding subway enforcement data, the New York County Supreme Court rejected the NYPD's "public safety exemption" claim because "the data being sought [on subway fare evasion arrests and summonses] could be obtained by simple public inspection." Therefore, contrary to the NYPD's suggestion, the *Lancman* case cited by the NYCLU is directly on point, underscoring the common sense argument that the "public safety exemption" cannot be applied to data available by public inspection (*accord Mack v Howard*, 91 AD3d 1315 [4th Dept 2012]).

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[10] In 2014, the NYCLU called and/or visited every DOE school across the city to determine the existence of metal detectors. R. at 137 (Pet's MOL at 15).

In the *Matter of Buffalo Broadcasting Company Co*, a FOIL case involving video recordings from a correctional facility, the appellate court rejected the Department of Correctional Service's claim of the "public safety exemption" finding that the exemption did not apply to "matters…which would have been readily observable" (*Matter of Buffalo Broadcasting Co v New York State Dept of Corr Servs*, 174 AD2d 212, 216 [3d Dept 1992]). The court further upheld the lower court's determination that "the depictions [at issue]…were of scenes witnessed by the general prison population and…the techniques, weapons and equipment used by correction officers and officials as shown on the tapes were not only observable by the inmates but completely conventional in nature" (*Id.* at 215). Here, any member of the public could visit a school and discover the presence of a magnetometer.

Therefore, the lower court erred by allowing the NYPD to withhold information regarding the location of metal detectors as the agency has already publicly disclosed this information and this data is readily available by public inspection.

III. THE NYPD IMPROPERLY WITHHELD ALL RECORDS ABOUT SCHOOL SAFETY AGENTS.

The second FOIL request from the NYCLU sought information about school safety agents assigned to schools. Specifically, it sought "[a]ll records regarding the deployment of School Safety Agents collected since 2005 pursuant to the

NYPD's reporting requirements under Section 14-150 [a] [3] of the New York City Administrative Code." R. at 41 (Petition ¶ 19). Section 14-150 [a] [3] requires the NYPD to report "…for each school operated by the department of education to which school safety agents are assigned, the number of school safety agents, averaged for the quarter, assigned to each of those schools." In its cross-motion, the NYPD disclosed it had identified 51 pages of responsive records, which included "lists of the number of school safety agents assigned to each borough, as well as each school, on a twice yearly basis since 2018." R. at 155-156 (Drennen Aff. ¶ 17). As with the records responsive to the metal-detector request, the NYPD withheld these 51 pages entirely, claiming the "public safety exemption." The Supreme Court sustained this withholding, relying again on the Lightsey Affidavit.

Under the well-established legal standards discussed above governing agency invocation of FOIL's "public safety exemption", the NYPD's withholding of these 51 pages was improper. As an initial matter, nothing in the Lightsey Affidavit addresses, much less justifies, the withholding of the number of school safety agents assigned to each borough. As with the metal detectors, the NYPD's argument about school safety agents is based on a concern about public knowledge of school safety agents assigned to specific schools. But as with the citywide, annual contraband lists, nothing about the number of agents assigned at the borough level would reveal anything about agents at any specific school. This

Court therefore should reject the NYPD's withholding of this information in the 51 pages of responsive records.[11]

The affidavit otherwise has very little in the way of potential harms resulting from the release of school safety agent data, and none justifying why release at the borough level would be problematic. The references to school safety agent deployments appear in paragraphs 19 and 20:

> 19. With this affidavit, I wish to advise the Court that Petitioner's request for the presence of metal detectors in each Department of Education school, contraband seized in schools as a result of metal detector scanning, and the number of school safety agents assigned to each school, if granted, would undermine the NYPD's ability to safely secure schools. If these statistics were released, someone who reviewed them would be able to know whether a school has a metal detector and how many school safety agents are assigned to a school. This would enable a person to tailor a criminal act at a specific school that does not have a metal detector and/or has a reduced school safety agent presence. No deciphering of statistics or inspection at schools would be required. R. at 198-199 (Lightsey Aff. ¶ 19).
>
> 20. The NYPD tactically relies on a principle of uncertainty. That principle applies to schools in that potential perpetrators face a tactical disadvantage in not knowing how many school safety agents are assigned to a school, and whether a person would be subject to metal

[11] The NYPD invokes terrorism as a rationale for the first time in their argument here: "In 2003, the School Safety Division Counter Terrorism Unit was created to train and equip School Safety Division personnel to prepare for and prevent terrorist threats…This Unit supports and enhances the Department's anti-terrorism initiatives." R. at 197-198 (Lightsey Aff. at ¶ 15). Of note "as a general matter in Article 78 review, a court should not evaluate arguments and proof that were not raised or presented at the administrative level," (*Newsday LLC v Nassau Cty. Police Dept*, 42 Misc3d 1215[A], 2014 NY Slip Op. 50044[U] [Sup Ct, Nassau County 2014], citing *Matter of Molloy v New York City Police Dept.*, 50 AD3d 98, 100 [1st Dept 2008]; *Matter of Graziano v Coughlin*, 221 AD2d 684 [3d Dept 1995]). The court erred in allowing the NYPD to raise this claim at this late juncture.

> detector scanning upon entry at the school. Thus, it would [be] detrimental to school safety operations if the NYPD was ordered to release specific metal detector and agent deployment statistics. R. at 199 (Lightsey Aff. ¶ 20).

In addition to these conclusory claims of harm, it also must be noted that school safety agents are not armed police officers, but rather are unarmed peace agents, without full police training.[12] This puts school safety agents in a similar position to park rangers, employees of the New York City Department of Finance who enforce taxes on cigarettes, and First Department court clerks (NY Crim Proc Law § 2.10).

This distinction between peace agents, police officers, and undercover police officers cannot be understated. The lower court made an error of law when classifying these peace agents as akin to undercover police officers. While the public safety exemption may apply to information requests regarding undercover officers, the exemption is not a blanket exemption that applies to non-undercover officers (*Empire Center for Public Policy v Metropolitan Transit Authority*, 2021 NY Slip Op. 31358[U] *4 [Sup Ct, New York County 2021]). Therefore, the lower court's analogy linking school safety agents to undercover police officers is an overreach. The court reasoned that "…the NYPD seeks to assert the exemption to protect the

[12] NYPD School Safety Agents Training, https://www1.nyc.gov/site/nypd/careers/civilians/school-safety-agents-training.page.

security of school safety operations, which it plainly regards as co-equal with its various undercover criminal operations, since it has created separate NYPD divisions that are entirely devoted to each of these specialized functions. The court acknowledges the seriousness that the NYPD accords to its school safety operations and is disinclined to undermine the Department's mission by granting the instant FOIL request, even if only a 'possibility of endangerment' has been demonstrated today." R. at 31 (Decision and Order at 8). Merely having a separate division does not mean that the activities of that division warrant covert protections. A school safety agent is widely recognizable upon entry to a school, unlike an undercover police officer.

The Supreme Court relied heavily on this Court's decision in *Matter of Empire Ctr For Pub Policy v New York City Office of Payroll Administration*, but that case is readily distinguishable. In *Empire*, the Petitioner-Appellant sought an order directing the New York City Office of Payroll Administration to produce the aggregate gross salary of all individuals not included in the NYC Open Data Citywide Payroll Database and for individualized salary information. There, this Court held that the "respondent's past disclosure of salary and other information as to certain public employees not employed by the NYPD is not dispositive," (187 AD3d 435, 436 [1st Dept 2020]). The critical distinction between that case and this one is that the information in dispute in that case would have allowed the requestor

to deduce from the salary information the actual number of undercover officers, which was otherwise unknown and unknowable by the public.

In *Empire*, the NYPD relied upon the affidavit of Sergeant Manuel Matos which gave concrete examples of harm that would result from disclosure of the requested information. In his affidavit, he claimed "it is self-evident that the risk of discovery by a subject that someone is an undercover officer can have catastrophic consequences…in some instances, subjects of drug operations force undercover officers, many times at gunpoint, to ingest narcotics to prove they are not undercover officers." Coyle Affirmation, Ex. 3 at 18 (Matos Aff. ¶ 11). Matos detailed the serious concern of retaliation. Coyle Affirmation, Ex. 3 at 19 (Matos Aff. ¶ 12) as well as investigations and dangers of investigating gangs, organized narcotics, and gun-dealing rings. Coyle Affirmation, Ex. 3 at 19 (Matos Aff. ¶ 13). He stated specifically that "undercover officers are subject to a far greater level of danger than the typical uniformed officer and other plainclothes officers, especially when they work alone. Undercover officers are given special training and provided with false identifications." Coyle Affirmation, Ex. 3 at 19 (Matos Aff. ¶ 14). Even other NYPD officers do not know the identities of these undercover officers, as their "names do not appear in most NYPD databases containing employee information." Coyle Affirmation, Ex. 3 at 19 (Matos Aff. ¶ 15).

In very clear contrast to those descriptions, Associate Supervisor Lightsey only provided conclusory, speculative statements regarding harm and did not even address the requested borough-level data in her affidavit. R. at 198-199 (Lightsey Aff. ¶ 19).

The Supreme Court erred in not requiring the NYPD to release borough-level data on school safety agents, conflating peace agents and undercover officers, and by relying on the Lightsey Affidavit's speculative claims of harm.

IV. THE NYPD SHOULD PRODUCE REDACTED RECORDS.

The NYPD should be ordered to produce all 58 pages of responsive documents to this FOIL request and redact any portions of the records that are exempt from disclosure, instead of withholding the documents in their entirety (*Matter of Schenectady County Society for the Prevention of Cruelty to Animals v Mills*, 18 NY3d 42 [2011]; *New York State Defs Assn v New York State Police*, 87 AD3d 193, 197 [3d Dept 2011]).

In the alternative, the NYPD should be required to produce the records it is withholding from production to the Court for in camera inspection so the Court can determine whether the documents were properly withheld (*Gould v New York City Police Dept*., 89 NY2d 274, 275-278 [1996] ["If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order

disclosure of all nonexempt, appropriately redacted material"] [internal citations omitted]; *Fink v Lefkowitz*, 47 NY2d 567 [1979]).

CONCLUSION

Petitioner-Appellant respectfully requests that the Court reverse the Supreme Court order with instructions that the Supreme Court grant the NYCLU's Petition, deny Respondents-Appellees' cross-motion to dismiss, and enter an order requiring Respondents-Appellees to comply with the NYCLU's request to produce all responsive records subject to any redactions permitted by the statute. As the Supreme Court committed multiple errors of law, the NYCLU should be awarded attorneys' fees.

Dated: October 28, 2021
New York, New York

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION, by

Stefanie D. Coyle
Christopher Dunn
Counsel for Petitioner-Appellant

On the brief: Rae Shih

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 12

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 7288.

Dated: October 28, 2021
New York, N.Y.

Stefanie Coyle

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

----------X

NEW YORK CIVIL LIBERTIES UNION

Plaintiff,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Defendant.

----------X

INDEX NO. 156799/2020

MOTION DATE 08/26/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner New York Civil Liberties Union (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Police Department (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties along with notice of entry within twenty (20) days.

In this Article 78 proceeding, the petitioner New York Civil Liberties Union (NYCLU) seeks to compel the records access officer (RAO) of the respondent New York City Police Department (NYPD) to comply with a Freedom of Information Law (FOIL) request, and the NYPD cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted, and this proceeding is dismissed.

FACTS

On January 3, 2020, the NYCLU served a FOIL request on the NYPD for:

> "1. All records regarding metal detectors in schools collected since September 2015 pursuant to the NYPD's reporting requirements under §14-152 (e) of the New York City Administrative Code. [NYC Admin Code; and]
> 2. All records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under §14-150 (3) of the New York City Administrative Code."

See verified petition, ¶ 18; exhibit A. On February 14, 2020, the NYPD's RAO issued a decision that made a partial document disclosure in response to item one of the NYCLU's request, but denied petitioner's request with respect to item two (the RAO's order). *Id*., ¶ 23; exhibit E. the NYCLU thereafter submitted an administrative appeal of the RAO's order to the NYPD on March 13, 2020. *Id*., ¶ 27; exhibit G. On April 27, 2020, an NYPD records access appeals officer (RAAO) issued a decision that denied the NYCLU's administrative appeal (the RAAO's order). *Id*., ¶ 30; exhibit J. The RAAO's order specifically found as follows:

> "As it pertains to Item No. 1 of your request for records related to the NYPD's reporting requirement under Administrative Code §14-152 (e); first, please note that the reporting pursuant to §14-152 is published online at the following web address:
> https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page
> "As it pertains specifically to §14-152 (e), however, the appeal is denied because the information specifically pertaining to magnetometers may be withheld pursuant to §14-152 (h), which provides that "information, data, and reports required by this section shall be subject to the disclosure limitations of section 14-150 of this chapter." Section 14-150 (c), in turn, provides that "information, data and reports . . . shall be provided to the council except where disclosure of such material could compromise the safety of the

public or police officers." The NYPD's position has always been, and remains, that the disclosure of this information could compromise the safety of the students.

"Accordingly, the appeal is denied to the extent that disclosure could endanger the life or safety of certain individuals [§ 87 (2) (f)]. 'Public Officers Law § 87 (2) (f) permits an agency to deny access to records, that, if disclosed, could endanger the life or safety of any person. The agency in question need only demonstrate a possibility of endanger[ment]' in order to invoke this exemption' *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 (1st Dept 2011), quoting *Matter of Connolly v New York Guard*, 175 AD2d 372, 373 (3d Dept 1991]) affd 20 NY3d 1028); *see Matter of Ruberti v New York Div. of State Police*, 218 AD2d 494, 499 (3d Dept 1996).

"There is no requirement that this agency demonstrate the existence of a specific threat or intimidation; rather a showing must be made of a 'possibility of endanger[ment]' to invoke this exemption. *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438 (1st Dept 2014); *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277-278 (1996). It is this agency's position that the disclosure of those schools that are equipped with magnetometers, are subject to random scanning, have requested the removal of magnetometers, and which have been granted those requests for removal, would provide a list of those schools which would be vulnerable to the possession of weapons that would otherwise be prevented by magnetometers.

"The information requested here falls squarely within FOIL's statutory exemption designed to protect public safety. The life and safety exemption excludes these records from disclosure to ensure public safety, and so as not to assist malefactors in committing crimes. As the Court of Appeals warned, FOIL 'was not enacted to furnish the safecracker with the combination to the safe.' *See Fink*, 47 NY2d at 573.

"As it pertains to Item No. 2 of your request for records related to the NYPD's reporting requirement under Administrative Code § 14-150 (3) regarding the number of uniformed personnel and civilian personnel assigned to each and every patrol borough and operational bureau . . . 'for each school operated by the department of education to which school safety agents are assigned, the number of school safety agents, averaged for the quarter, assigned to each of those schools,' the appeal is denied to the extent that disclosure of the data could endanger the life or safety of certain individuals [§ 87 (2) (f)]. For the same reasons described above, access is denied in that the disclosure of these records would reveal the total number of the officers assigned to each specific borough - information which could then be used to produce a reasonable estimate of the number of agents assigned to each of the schools within that borough, and, consequently, the scope of coverage maintained by the Department. This information would, consequently, compromise the NYPD's ability to secure the schools and the safety of both the members of service and the students and teachers at certain schools."

Id., exhibit J. Dissatisfied, the NYCLU commenced this Article 78 proceeding pro se on August 28, 2020. *See* verified petition. Rather than file an answer, the NYPD submitted a cross motion to dismiss it on October 16, 2020. *See* cross motion. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The Appellate Division, First Department, recently reiterated the rules that govern document requests submitted pursuant to the FOIL (Public Officers Law §§ 84-90) as follows:

> "'All government records are presumptively open for public inspection unless specifically exempted from disclosure as provided in the Public Officers Law.' An agency may withhold records sought pursuant to FOIL only if it 'articulate[s] particularized and specific justification for not disclosing requested documents.' . . . In an article 78 proceeding, judicial review of an agency's determination of a FOIL request is limited to whether it 'was affected by an error of law.'"

Matter of Jewish Press, Inc. v New York City Police Dept., 190 AD3d 490, 490 (1st Dept 2021) (internal citations omitted). Here, the NYCLU argues that the RAAO's order violated the FOIL with respect to both items in its January 3, 2020 document request.

Before reaching the NYCLU's arguments, the court notes that Steven Drennen (Drennen), counsel to the NYPD Commissioner, certifies that his office performed a "diligent search" for all of the magnetometer-related information in the subject FOIL request, and subsequently compiled 58 pages of responsive material that consists of: 1) operational reports dated 2015 that contained a "list of school buildings with permanent metal detectors . . . as well as a list of schools which have requested the removal of metal detectors;" 2) "an annual list showing types of weapons seized citywide as a result of metal detector scanning and hand wands;" and 3) "lists of the number of school safety agents assigned to each borough, as well as each school, on a twice a year basis since 2018," but not from before 2018, and not including deployment statistics. *See* notice of cross motion, Drennan affirmation, ¶¶ 16-17. Drennen further attests that these 58 pages, along with the magnetometer-related information contained on the NYPD's public website, are the only documents responsive to the NYCLU's FOIL request, and that the NYPD does not possess any additional documents. *Id*., ¶¶ 18-19.

Public Officers Law § 89 (3) permits the NYPD to respond to a FOIL request by "certify[ing] that it does not have possession of [a requested] record or that such record cannot be found after diligent search." The First Department consistently holds that doing so moots the FOIL request and discharges the NYPD's disclosure obligation, since the statute does not require the NYPD to provide records that it does not already possess or maintain. *See e.g.*, *Matter of Stengel v Vance,* _ AD3d_, 2021 NY Slip Op. 01734, * 1 (1st Dept 2021), citing *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001); *see also Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217 (2018); M*atter of Tarantino v New York City Police Dept.*, 136 AD3d 598 (1st Dept 2016); *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598 (1st Dept 2014). Here, Drennen has provided the statutory certification. *See* notice of cross motion, Drennan affirmation, ¶¶ 16-19. As a result, the court accepts the NYPD's assertion that it possesses no documents responsive to the instant FOIL request apart from the information on its public website and the 58 pages of withheld documents. The issue is therefore whether the NYPD properly withheld those documents pursuant to the "public safety" exemption set forth in Public Officers Law § 87 (2) (f). The NYCLU raises four arguments that it was improper for the NYPD to do so.

The NYCLU's first asserts that the NYPD improperly invoked the public safety exemption in a "blanket" manner to justify its refusal to disclose any of the five categories of magnetometer-related information that it is required to report by NYC Admin Code §14-152 (e).[1]

[1] NYC Admin Code §14-152 (e) requires the NYPD to submit quarterly reports to the City Council that set forth four categories of information regarding school metal detectors, including: "(i) a list of school buildings with permanent metal detectors; (ii) a list of school buildings subjected to random scanning; (iii) a list of schools that have requested the removal of metal detectors; and (iv) a list of schools for which a requested removal of metal detectors has been honored." NYC Admin Code §14-152 (e). The regulation also requires the NYPD to submit an annual report to the City Council which lists "the amounts and types of contraband seized as a

See petitioner's mem of law at 9-12. However, this argument fails in light of the NYPD's certification that it only possesses a limited amount of such information. As the NYPD's cross motion makes clear, it withheld the subject 58 pages of documents on the ground that releasing the specific information contained in them would pose a danger to "public safety." The fact that the NYPD addressed its argument to the subject documents with particularity gainsays the NYCLU's characterization of that argument as a "blanket" rationale. Further, the NYCLU itself admits that the NYPD made a partial response regarding the first and second categories of information described in NYC Admin Code §14-152 (e), since that information is set forth in the NYPD's public website. *See* petitioner's mem of law at 16. Therefore, the court rejects the NYCLU's first argument.

Next, the NYCLU argues that it "is not aware of instances where prior public disclosure of this type of information has resulted in threats to public safety." *See* petitioner's mem of law at 13. The NYPD responds that Public Officers Law § 87 (2) (f) only requires it to demonstrate "a possibility of endangerment" to invoke the public safety exemption from FOIL disclosure. *See* notice of cross motion, Drennan affirmation, ¶¶ 20-27. It also asserts that the 58 pages of magnetometer-related documents that it withheld contains information about the "operational capabilities of the NYPD [with respect to] . . . the size and structure of school safety operations" which "would be of enormous operational value to someone seeking to harm [a] school, its students, teachers and support staff or the residents and visitors to the City." *Id.* The NYPD presents an affidavit from Pamela Lightsey (Lightsey), an Associate Supervisor of School Security in the NYPD's School Safety Division, who explains that the NYPD limits public

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result of metal detector scanning, disaggregated by school building . . . [which] shall include but not be limited to firearms, knives, boxcutters and laser pointers." *Id.*

availability of a wide variety of school safety information pursuant to a "tactical principle of uncertainty" which posits that lack of ready access to such information complicates, and therefore deters, the ability of certain types of criminals to attack NYC schools; including, e.g., kidnappers, thieves, sexual predators, gangs, school shooters and/or terrorists. *Id*.; Lightsey aff., ¶¶ 1-23. Lightsey cites statistical data showing decreases in various school safety-related incidents in NYC schools as evidence that the "tactical principle of uncertainty" is an effective deterrent. *Id*. The NYCLU replies that "the NYPD fails to provide specific, persuasive evidence and relies on hypothetical "bad actors" to justify withholding responsive documents." *See* petitioner's reply mem at 3-6. The NYPD's reliance on a "tactical principle of uncertainty" plainly entails some degree of speculation. Nevertheless, after reviewing the applicable case law, the court finds in the NYPD's favor.

Last year in *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.* (187 AD3d 435 [1st Dept 2020]), the First Department held that the public safety exemption recognized in Public Officers Law § 87 (2) (f) justified the denial of petitioner's FOIL request for "information . . . as to the salaries of undercover police officers, whether aggregated or individualized," on the ground that the release of such information could "allow members of the public to estimate the increases or decreases in the overall number of undercover officers, which could 'undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack.'" 187 AD3d at 435-436, quoting *Matter of Grabell v New York City Police Dept.*, 139 AD3d 477, 478 (1st Dept 2016). The First Department ruled that the "possibility of endangerment" standard applied to invoke the exemption, and found that the affidavit of the NYPD's Undercover Coordinator which opined as to how the subject information could be misused by bad actors was a sufficient evidentiary basis

to invoke the exemption. 139 AD3d at 435; *see also Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 (1st Dept 2015). Here, the NYPD seeks to assert the exemption to protect the security of school safety operations, which it plainly regards as co-equal with its various undercover criminal operations, since it has created separate NYPD divisions that are entirely devoted to each of these specialized functions. The court acknowledges the seriousness that the NYPD accords to its school safety operations and is disinclined to undermine the Department's mission by granting the instant FOIL request, even if only a "possibility of endangerment" has been demonstrated today. As the Court of Appeals recently reiterated, "FOIL was not designed to assist wrongdoers in evading detection or, put another way, 'to furnish the safecracker with the combination to the safe.'" *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d at 226, quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 573 (1979). Against this rationale, the NYCLU cites a portion of an unpublished 2010 decision by the Supreme Court, Albany County, which upheld a FOIL request for information about researchers engaged in certain animal experimentation over the objection that PETA-like animal rights terrorist groups might use such information to retaliate against the researchers. *Matter of Physicians Comm. for Responsible Medicine v Hogan*, 29 Misc 3d 1220 (A), 2010 NY Slip Op 51908(U) (Sup Ct, Albany County 2010). The court (Platkin, J.) based its decision on the respondent's failure to provide "a non-speculative basis for withholding" the subject information, and declined to apply the public safety exemption to FOIL disclosure solely because "because the passions of unknown terrorists or criminals might be inflamed." *Id*., at *6. Here, in contrast, the NYPD has presented Lightsey's affidavit, which does provide a "non-speculative basis" for invoking the exemption. Therefore, the court finds that the NYCLU's cited precedent is inapposite, and rejects its "speculation" argument. Instead, the court finds that

the NYPD has demonstrated "a possibility of endangerment" to its school safety operations, which justifies its invocation of the public safety exemption set forth in Public Officers Law § 87 (2) (f). As a result, the court finds that the decision in the NYPD's RAAO's order to deny petitioner's FOIL request should be upheld with respect to item one of that request.

The NYCLU's remaining arguments relating to item one are unavailing. It argues that "the 'public safety exemption' is particularly inapplicable to backwards looking data, such as records detailing the items confiscated from the metal detectors or random screening." *See* petitioner's mem of law at 14-15. The NYCLU cites the unpublished 2019 decision by this court (Engoron, J.) in *Matter of Lancman v New York City Police Dept.* (Index No. 154329/19) which granted a FOIL request for information about subway fare-beating data, and denied the NYPD's invocation of the public safety exemption. *See* verified petition, Coyle affirmation, exhibit 4. However, the court's research has disclosed the more recent decision by the Supreme Court, Suffolk County (Berland, J.) that partially upheld the Suffolk County Police Department's challenge to an NYCLU FOIL request for information about undercover operations involving suspected gang members. *See New York Civ. Liberties Union v Suffolk County Police Dept.*, 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U) (Sup Ct, Suffolk County 2020). The court specifically acknowledged that a "possibility of endangerment" to public safety could arise if criminals were able to aggregate information about past police operations in order to further their ongoing criminal activities. *Id*., *19. The fact that the Suffolk County Police Department did not specifically invoke the "public safety" exemption to the NYCLU's FOIL request is not dispositive. Instead, this court finds that Justice Berland's analysis is persuasive because information about ongoing school safety operations is more similar to information about ongoing undercover anti-gang operations than it is to information about fare-beating statistics. Therefore,

the court rejects the NYCLU's argument about "backward looking data" in the context of this case.

The NYCLU also argues that "the 'public safety exemption' does not even apply because many of the requested records could be attained through simple public inspection." *See* petitioner's mem of law at 15-16. The NYCLU cites *Matter of Physicians Comm. for Responsible Medicine v Hogan* for the general proposition that "public availability of the information sought refutes the argument that its disclosure will cause harm." *See* petitioner's reply mem at 6-9; *see also* 29 Misc 3d 1220 (A), 2010 NY Slip Op 5190(U), *5. However, the NYCLU's assertion ignores that Justice Platkin based his decision in that case primarily on the fact that the respondent had failed to present evidence of a "a non-speculative basis for withholding" the requested information. Here, as observed, the NYPD has presented Lightsey's affirmation to provide that "non-speculative basis." Justice Platkin addressed the public availability of information about the subject animal researchers and their experiments as a secondary matter rather than as a dispositive factor, as the NYCLU appears to suggest. In this case, the fact that the NYCLU is capable of obtaining certain of the magnetometer-related information that it seeks through its own efforts is similarly not dispositive. That fact is simply insufficient to overcome the NYPD's evidence of a "possibility of endangerment" sufficient to invoke the public safety exemption set forth in Public Officers Law § 87 (2) (f). Therefore, the court rejects the NYCLU's "public availability" argument.

As a result of the foregoing, the court concludes that the portion of the RAAO's order that upheld the denial of the NYCLU's FOIL request with respect to item one in that request was not "affected by an error of law." *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d at 490. Accordingly, the court finds that so much of the NYCLU's petition as sought

to overturn said portion of the RAAO's order should be denied, and that so much of the NYPD's cross motion as sought to dismiss that part of the NYCLU's petition should be granted.

The next portion of the NYCLU's petition concerns item two in the January 3, 2020 FOIL request, which sought "[a]ll records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under [NYC Admin Code] §14-150 (3)." *See* verified petition, exhibit A. The NYCLU argues that the NYPD's reliance on the "public safety" exemption to deny this request is improper because item two "simply sought the average number of school safety agents at each school for the previous quarter." *See* petitioner's mem of law at 17-18. The NYCLU repeats its assertions that the NYPD imposed the public safety exemption in a "blanket" fashion to justify its denial of this request, and that its assertion that releasing the material could cause a possibility of endangerment was "speculative." *Id*. However, the court has already rejected these assertions for the reasons discussed above; i.e., that the NYPD tailored its denial to the magnetometer-related material that it discovered during its "diligent search," and that Lightsey's affirmation constitutes sufficient evidence to defeat the allegation of "speculation" and to justify the NYPD's invocation of the public safety exemption. The court has also adopted Justice Berland's finding in *New York Civ. Liberties Union v Suffolk County Police Dept.* that permitting criminals to aggregate older statistical data about certain types of police operations can give rise to a "possibility of endangerment," which the FOIL may not be used to excuse. 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U), *16-17. Therefore, the court rejects the NYCLU's arguments regarding item two in the subject FOIL request.

As a result of the foregoing, the court concludes that the portion of the RAAO's order that upheld the denial of the NYCLU's FOIL request with respect to item two in that request was not "affected by an error of law." *Matter of Jewish Press, Inc. v New York City Police Dept.*,

190 AD3d at 490. Accordingly, the court finds that so much of the NYCLU's petition as sought to overturn said portion of the RAAO's order should be denied, and that so much of the NYPD's cross motion as sought to dismiss that part of the NYCLU's petition should be granted.

The NYCLU's three remaining arguments are meritless. It first asserted that "the NYPD cannot use the NYC Administrative Code as a shield to block responsive records from disclosure." *See* petitioner's mem of law at 19-20. However, this argument is a "red herring." Although the RAAO's order mentioned Administrative Code §14-150, that decision was plainly based on Public Officers Law § 87 (2) (f), as were all of the arguments in the NYPD's cross motion. Simply put, the NYPD did not seek relief herein based on an inapplicable regulation. Therefore, the court rejects this argument.

The NYCLU also argues that "the NYPD could have produced portions of responsive records instead of withholding records in their entirety." *See* petitioner's mem of law at 20-21. However, as was previously discussed, the NYPD did provide a partial disclosure of the magnetometer-related information that is contained on its public website. Also, the NYPD did not "withhold records in their entirety," but rather only withheld those magnetometer-related documents that which it discovered during its "diligent search" which it deemed to be covered by the "public safety" exemption. Therefore, the court finds that the NYCLU's argument springs from an inaccurate characterization and rejects it.

Finally, the NYCLU argues that it is entitled to attorney's fees. *See* petitioner's mem of law at 21. However, pursuant to Public Officers Law § 89 (4) (c) (ii), attorney's fees may only be recovered when a party "substantially prevail[s]" on a FOIL request. *See e.g.*, *Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 (1st Dept 2015). Here, the NYCLU has not "substantially prevailed" because the court has determined that the NYPD's

decision to deny the subject FOIL request in the RAAO's order should be upheld. therefore, the NYCLU is not entitled to attorney's fees in this proceeding, and the court rejects its argument.

Accordingly, for the reasons discussed herein, the court concludes that the NYCLU's Article 78 petition should be denied, and that the NYPD's cross motion should be granted.

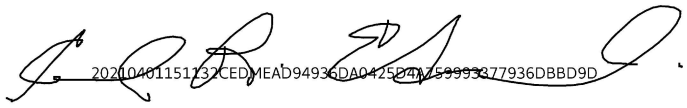
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner New York Civil Liberties Union (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Police Department (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties along with notice of entry within twenty (20) days.



4/1/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

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

In the Matter of,	:	
	:	
NEW YORK CIVIL LIBERTIES UNION,	:	
	:	
Petitioner,	:	**NOTICE OF APPEAL**
	:	Index No. 156799/2020
-against-	:	Hon. Carol R. Edmead
	:	
NEW YORK CITY POLICE DEPARTMENT,	:	
	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	:	

PLEASE TAKE NOTICE that Petitioner hereby appeals to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, from the Decision and Order on Motion of the Honorable Carol R. Edmead, dated April 1, 2021, and entered in the office of the clerk of the Supreme Court of the State of New York, New York County, on April 7, 2021. This appeal is taken from each and every part of said Decision and Order as well as the whole thereof.

Pursuant to 22 NYCRR 1250.3(a), the Decision and Order is attached hereto.

Dated: April 28, 2021
New York, NY

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by

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Christopher Dunn
New York Civil Liberties Union Foundation
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Counsel for Respondent
(via NYSCEF)

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

----------X

In the Matter of the Application of
NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

----------X

NOTICE OF ENTRY
Index No. 156799/2020
(Edmead, J.)

PLEASE TAKE NOTICE, that the within is a true copy of the ORDER AND JUDGMENT filed in the office of the Clerk of the within named Court on April 1, 2021.

Dated: New York, New York
April 7, 2021

JAMES E. JOHNSON
Corporation Counsel, City of New York
ERNEST F. HART
Deputy Commissioner, Legal Matters
New York City Police Department

By: Steven Drennen, Esq.
Attorney for Respondent
One Police Plaza, Room 1406
New York, New York 10038
(646) 610-5400
LB4 29/20

To: Stefanie D. Coyle, Esq.
Christopher Dunn, Esq.
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004

Counsel for Petitioner
(via NYSCEF)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

----------X

NEW YORK CIVIL LIBERTIES UNION

Plaintiff,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Defendant.

----------X

INDEX NO. 156799/2020

MOTION DATE 08/26/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner New York Civil Liberties Union (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Police Department (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties along with notice of entry within twenty (20) days.

In this Article 78 proceeding, the petitioner New York Civil Liberties Union (NYCLU) seeks to compel the records access officer (RAO) of the respondent New York City Police Department (NYPD) to comply with a Freedom of Information Law (FOIL) request, and the NYPD cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted, and this proceeding is dismissed.

FACTS

On January 3, 2020, the NYCLU served a FOIL request on the NYPD for:

> "1. All records regarding metal detectors in schools collected since September 2015 pursuant to the NYPD's reporting requirements under §14-152 (e) of the New York City Administrative Code. [NYC Admin Code; and]
> 2. All records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under §14-150 (3) of the New York City Administrative Code."

See verified petition, ¶ 18; exhibit A. On February 14, 2020, the NYPD's RAO issued a decision that made a partial document disclosure in response to item one of the NYCLU's request, but denied petitioner's request with respect to item two (the RAO's order). *Id.*, ¶ 23; exhibit E. the NYCLU thereafter submitted an administrative appeal of the RAO's order to the NYPD on March 13, 2020. *Id.*, ¶ 27; exhibit G. On April 27, 2020, an NYPD records access appeals officer (RAAO) issued a decision that denied the NYCLU's administrative appeal (the RAAO's order). *Id.*, ¶ 30; exhibit J. The RAAO's order specifically found as follows:

> "As it pertains to Item No. 1 of your request for records related to the NYPD's reporting requirement under Administrative Code §14-152 (e); first, please note that the reporting pursuant to §14-152 is published online at the following web address:
> https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page
> "As it pertains specifically to §14-152 (e), however, the appeal is denied because the information specifically pertaining to magnetometers may be withheld pursuant to §14-152 (h), which provides that "information, data, and reports required by this section shall be subject to the disclosure limitations of section 14-150 of this chapter." Section 14-150 (c), in turn, provides that "information, data and reports . . . shall be provided to the council except where disclosure of such material could compromise the safety of the

public or police officers." The NYPD's position has always been, and remains, that the disclosure of this information could compromise the safety of the students.

"Accordingly, the appeal is denied to the extent that disclosure could endanger the life or safety of certain individuals [§ 87 (2) (f)]. 'Public Officers Law § 87 (2) (f) permits an agency to deny access to records, that, if disclosed, could endanger the life or safety of any person. The agency in question need only demonstrate a possibility of endanger[ment]' in order to invoke this exemption' *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 (1st Dept 2011), quoting *Matter of Connolly v New York Guard*, 175 AD2d 372, 373 (3d Dept 1991]) affd 20 NY3d 1028); *see Matter of Ruberti v New York Div. of State Police*, 218 AD2d 494, 499 (3d Dept 1996).

"There is no requirement that this agency demonstrate the existence of a specific threat or intimidation; rather a showing must be made of a 'possibility of endanger[ment]' to invoke this exemption. *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438 (1st Dept 2014); *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277-278 (1996). It is this agency's position that the disclosure of those schools that are equipped with magnetometers, are subject to random scanning, have requested the removal of magnetometers, and which have been granted those requests for removal, would provide a list of those schools which would be vulnerable to the possession of weapons that would otherwise be prevented by magnetometers.

"The information requested here falls squarely within FOIL's statutory exemption designed to protect public safety. The life and safety exemption excludes these records from disclosure to ensure public safety, and so as not to assist malefactors in committing crimes. As the Court of Appeals warned, FOIL 'was not enacted to furnish the safecracker with the combination to the safe.' *See Fink*, 47 NY2d at 573.

"As it pertains to Item No. 2 of your request for records related to the NYPD's reporting requirement under Administrative Code § 14-150 (3) regarding the number of uniformed personnel and civilian personnel assigned to each and every patrol borough and operational bureau . . . 'for each school operated by the department of education to which school safety agents are assigned, the number of school safety agents, averaged for the quarter, assigned to each of those schools,' the appeal is denied to the extent that disclosure of the data could endanger the life or safety of certain individuals [§ 87 (2) (f)]. For the same reasons described above, access is denied in that the disclosure of these records would reveal the total number of the officers assigned to each specific borough - information which could then be used to produce a reasonable estimate of the number of agents assigned to each of the schools within that borough, and, consequently, the scope of coverage maintained by the Department. This information would, consequently, compromise the NYPD's ability to secure the schools and the safety of both the members of service and the students and teachers at certain schools."

Id., exhibit J. Dissatisfied, the NYCLU commenced this Article 78 proceeding pro se on August 28, 2020. *See* verified petition. Rather than file an answer, the NYPD submitted a cross motion to dismiss it on October 16, 2020. *See* cross motion. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The Appellate Division, First Department, recently reiterated the rules that govern document requests submitted pursuant to the FOIL (Public Officers Law §§ 84-90) as follows:

> "'All government records are presumptively open for public inspection unless specifically exempted from disclosure as provided in the Public Officers Law.' An agency may withhold records sought pursuant to FOIL only if it 'articulate[s] particularized and specific justification for not disclosing requested documents.' . . . In an article 78 proceeding, judicial review of an agency's determination of a FOIL request is limited to whether it 'was affected by an error of law.'"

Matter of Jewish Press, Inc. v New York City Police Dept., 190 AD3d 490, 490 (1st Dept 2021) (internal citations omitted). Here, the NYCLU argues that the RAAO's order violated the FOIL with respect to both items in its January 3, 2020 document request.

Before reaching the NYCLU's arguments, the court notes that Steven Drennen (Drennen), counsel to the NYPD Commissioner, certifies that his office performed a "diligent search" for all of the magnetometer-related information in the subject FOIL request, and subsequently compiled 58 pages of responsive material that consists of: 1) operational reports dated 2015 that contained a "list of school buildings with permanent metal detectors . . . as well as a list of schools which have requested the removal of metal detectors;" 2) "an annual list showing types of weapons seized citywide as a result of metal detector scanning and hand wands;" and 3) "lists of the number of school safety agents assigned to each borough, as well as each school, on a twice a year basis since 2018," but not from before 2018, and not including deployment statistics. *See* notice of cross motion, Drennan affirmation, ¶¶ 16-17. Drennen further attests that these 58 pages, along with the magnetometer-related information contained on the NYPD's public website, are the only documents responsive to the NYCLU's FOIL request, and that the NYPD does not possess any additional documents. *Id.*, ¶¶ 18-19.

Public Officers Law § 89 (3) permits the NYPD to respond to a FOIL request by "certify[ing] that it does not have possession of [a requested] record or that such record cannot be found after diligent search." The First Department consistently holds that doing so moots the FOIL request and discharges the NYPD's disclosure obligation, since the statute does not require the NYPD to provide records that it does not already possess or maintain. *See e.g., Matter of Stengel v Vance,* _ AD3d_, 2021 NY Slip Op. 01734, * 1 (1st Dept 2021), citing *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001); *see also Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217 (2018); M*atter of Tarantino v New York City Police Dept.*, 136 AD3d 598 (1st Dept 2016); *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598 (1st Dept 2014). Here, Drennen has provided the statutory certification. *See* notice of cross motion, Drennan affirmation, ¶¶ 16-19. As a result, the court accepts the NYPD's assertion that it possesses no documents responsive to the instant FOIL request apart from the information on its public website and the 58 pages of withheld documents. The issue is therefore whether the NYPD properly withheld those documents pursuant to the "public safety" exemption set forth in Public Officers Law § 87 (2) (f). The NYCLU raises four arguments that it was improper for the NYPD to do so.

The NYCLU's first asserts that the NYPD improperly invoked the public safety exemption in a "blanket" manner to justify its refusal to disclose any of the five categories of magnetometer-related information that it is required to report by NYC Admin Code §14-152 (e).[1]

[1] NYC Admin Code §14-152 (e) requires the NYPD to submit quarterly reports to the City Council that set forth four categories of information regarding school metal detectors, including: "(i) a list of school buildings with permanent metal detectors; (ii) a list of school buildings subjected to random scanning; (iii) a list of schools that have requested the removal of metal detectors; and (iv) a list of schools for which a requested removal of metal detectors has been honored." NYC Admin Code §14-152 (e). The regulation also requires the NYPD to submit an annual report to the City Council which lists "the amounts and types of contraband seized as a

See petitioner's mem of law at 9-12. However, this argument fails in light of the NYPD's certification that it only possesses a limited amount of such information. As the NYPD's cross motion makes clear, it withheld the subject 58 pages of documents on the ground that releasing the specific information contained in them would pose a danger to "public safety." The fact that the NYPD addressed its argument to the subject documents with particularity gainsays the NYCLU's characterization of that argument as a "blanket" rationale. Further, the NYCLU itself admits that the NYPD made a partial response regarding the first and second categories of information described in NYC Admin Code §14-152 (e), since that information is set forth in the NYPD's public website. *See* petitioner's mem of law at 16. Therefore, the court rejects the NYCLU's first argument.

Next, the NYCLU argues that it "is not aware of instances where prior public disclosure of this type of information has resulted in threats to public safety." *See* petitioner's mem of law at 13. The NYPD responds that Public Officers Law § 87 (2) (f) only requires it to demonstrate "a possibility of endangerment" to invoke the public safety exemption from FOIL disclosure. *See* notice of cross motion, Drennan affirmation, ¶¶ 20-27. It also asserts that the 58 pages of magnetometer-related documents that it withheld contains information about the "operational capabilities of the NYPD [with respect to] . . . the size and structure of school safety operations" which "would be of enormous operational value to someone seeking to harm [a] school, its students, teachers and support staff or the residents and visitors to the City." *Id.* The NYPD presents an affidavit from Pamela Lightsey (Lightsey), an Associate Supervisor of School Security in the NYPD's School Safety Division, who explains that the NYPD limits public

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result of metal detector scanning, disaggregated by school building . . . [which] shall include but not be limited to firearms, knives, boxcutters and laser pointers." *Id.*

availability of a wide variety of school safety information pursuant to a "tactical principle of uncertainty" which posits that lack of ready access to such information complicates, and therefore deters, the ability of certain types of criminals to attack NYC schools; including, e.g., kidnappers, thieves, sexual predators, gangs, school shooters and/or terrorists. *Id.*; Lightsey aff., ¶¶ 1-23. Lightsey cites statistical data showing decreases in various school safety-related incidents in NYC schools as evidence that the "tactical principle of uncertainty" is an effective deterrent. *Id.* The NYCLU replies that "the NYPD fails to provide specific, persuasive evidence and relies on hypothetical "bad actors" to justify withholding responsive documents." *See* petitioner's reply mem at 3-6. The NYPD's reliance on a "tactical principle of uncertainty" plainly entails some degree of speculation. Nevertheless, after reviewing the applicable case law, the court finds in the NYPD's favor.

Last year in *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.* (187 AD3d 435 [1st Dept 2020]), the First Department held that the public safety exemption recognized in Public Officers Law § 87 (2) (f) justified the denial of petitioner's FOIL request for "information . . . as to the salaries of undercover police officers, whether aggregated or individualized," on the ground that the release of such information could "allow members of the public to estimate the increases or decreases in the overall number of undercover officers, which could 'undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack.'" 187 AD3d at 435-436, quoting *Matter of Grabell v New York City Police Dept.*, 139 AD3d 477, 478 (1st Dept 2016). The First Department ruled that the "possibility of endangerment" standard applied to invoke the exemption, and found that the affidavit of the NYPD's Undercover Coordinator which opined as to how the subject information could be misused by bad actors was a sufficient evidentiary basis

to invoke the exemption. 139 AD3d at 435; *see also Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 (1st Dept 2015). Here, the NYPD seeks to assert the exemption to protect the security of school safety operations, which it plainly regards as co-equal with its various undercover criminal operations, since it has created separate NYPD divisions that are entirely devoted to each of these specialized functions. The court acknowledges the seriousness that the NYPD accords to its school safety operations and is disinclined to undermine the Department's mission by granting the instant FOIL request, even if only a "possibility of endangerment" has been demonstrated today. As the Court of Appeals recently reiterated, "FOIL was not designed to assist wrongdoers in evading detection or, put another way, 'to furnish the safecracker with the combination to the safe.'" *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d at 226, quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 573 (1979). Against this rationale, the NYCLU cites a portion of an unpublished 2010 decision by the Supreme Court, Albany County, which upheld a FOIL request for information about researchers engaged in certain animal experimentation over the objection that PETA-like animal rights terrorist groups might use such information to retaliate against the researchers. *Matter of Physicians Comm. for Responsible Medicine v Hogan*, 29 Misc 3d 1220 (A), 2010 NY Slip Op 51908(U) (Sup Ct, Albany County 2010). The court (Platkin, J.) based its decision on the respondent's failure to provide "a non-speculative basis for withholding" the subject information, and declined to apply the public safety exemption to FOIL disclosure solely because "because the passions of unknown terrorists or criminals might be inflamed." *Id.*, at *6. Here, in contrast, the NYPD has presented Lightsey's affidavit, which does provide a "non-speculative basis" for invoking the exemption. Therefore, the court finds that the NYCLU's cited precedent is inapposite, and rejects its "speculation" argument. Instead, the court finds that

the NYPD has demonstrated "a possibility of endangerment" to its school safety operations, which justifies its invocation of the public safety exemption set forth in Public Officers Law § 87 (2) (f). As a result, the court finds that the decision in the NYPD's RAAO's order to deny petitioner's FOIL request should be upheld with respect to item one of that request.

The NYCLU's remaining arguments relating to item one are unavailing. It argues that "the 'public safety exemption' is particularly inapplicable to backwards looking data, such as records detailing the items confiscated from the metal detectors or random screening." *See* petitioner's mem of law at 14-15. The NYCLU cites the unpublished 2019 decision by this court (Engoron, J.) in *Matter of Lancman v New York City Police Dept.* (Index No. 154329/19) which granted a FOIL request for information about subway fare-beating data, and denied the NYPD's invocation of the public safety exemption. *See* verified petition, Coyle affirmation, exhibit 4. However, the court's research has disclosed the more recent decision by the Supreme Court, Suffolk County (Berland, J.) that partially upheld the Suffolk County Police Department's challenge to an NYCLU FOIL request for information about undercover operations involving suspected gang members. *See New York Civ. Liberties Union v Suffolk County Police Dept.*, 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U) (Sup Ct, Suffolk County 2020). The court specifically acknowledged that a "possibility of endangerment" to public safety could arise if criminals were able to aggregate information about past police operations in order to further their ongoing criminal activities. *Id.*, *19. The fact that the Suffolk County Police Department did not specifically invoke the "public safety" exemption to the NYCLU's FOIL request is not dispositive. Instead, this court finds that Justice Berland's analysis is persuasive because information about ongoing school safety operations is more similar to information about ongoing undercover anti-gang operations than it is to information about fare-beating statistics. Therefore,

the court rejects the NYCLU's argument about "backward looking data" in the context of this case.

The NYCLU also argues that "the 'public safety exemption' does not even apply because many of the requested records could be attained through simple public inspection." *See* petitioner's mem of law at 15-16. The NYCLU cites *Matter of Physicians Comm. for Responsible Medicine v Hogan* for the general proposition that "public availability of the information sought refutes the argument that its disclosure will cause harm." *See* petitioner's reply mem at 6-9; *see also* 29 Misc 3d 1220 (A), 2010 NY Slip Op 5190(U), *5. However, the NYCLU's assertion ignores that Justice Platkin based his decision in that case primarily on the fact that the respondent had failed to present evidence of a "a non-speculative basis for withholding" the requested information. Here, as observed, the NYPD has presented Lightsey's affirmation to provide that "non-speculative basis." Justice Platkin addressed the public availability of information about the subject animal researchers and their experiments as a secondary matter rather than as a dispositive factor, as the NYCLU appears to suggest. In this case, the fact that the NYCLU is capable of obtaining certain of the magnetometer-related information that it seeks through its own efforts is similarly not dispositive. That fact is simply insufficient to overcome the NYPD's evidence of a "possibility of endangerment" sufficient to invoke the public safety exemption set forth in Public Officers Law § 87 (2) (f). Therefore, the court rejects the NYCLU's "public availability" argument.

As a result of the foregoing, the court concludes that the portion of the RAAO's order that upheld the denial of the NYCLU's FOIL request with respect to item one in that request was not "affected by an error of law." *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d at 490. Accordingly, the court finds that so much of the NYCLU's petition as sought

to overturn said portion of the RAAO's order should be denied, and that so much of the NYPD's cross motion as sought to dismiss that part of the NYCLU's petition should be granted.

The next portion of the NYCLU's petition concerns item two in the January 3, 2020 FOIL request, which sought "[a]ll records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under [NYC Admin Code] §14-150 (3)." *See* verified petition, exhibit A. The NYCLU argues that the NYPD's reliance on the "public safety" exemption to deny this request is improper because item two "simply sought the average number of school safety agents at each school for the previous quarter." *See* petitioner's mem of law at 17-18. The NYCLU repeats its assertions that the NYPD imposed the public safety exemption in a "blanket" fashion to justify its denial of this request, and that its assertion that releasing the material could cause a possibility of endangerment was "speculative." *Id.* However, the court has already rejected these assertions for the reasons discussed above; i.e., that the NYPD tailored its denial to the magnetometer-related material that it discovered during its "diligent search," and that Lightsey's affirmation constitutes sufficient evidence to defeat the allegation of "speculation" and to justify the NYPD's invocation of the public safety exemption. The court has also adopted Justice Berland's finding in *New York Civ. Liberties Union v Suffolk County Police Dept.* that permitting criminals to aggregate older statistical data about certain types of police operations can give rise to a "possibility of endangerment," which the FOIL may not be used to excuse. 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U), *16-17. Therefore, the court rejects the NYCLU's arguments regarding item two in the subject FOIL request.

As a result of the foregoing, the court concludes that the portion of the RAAO's order that upheld the denial of the NYCLU's FOIL request with respect to item two in that request was not "affected by an error of law." *Matter of Jewish Press, Inc. v New York City Police Dept.*,

190 AD3d at 490. Accordingly, the court finds that so much of the NYCLU's petition as sought to overturn said portion of the RAAO's order should be denied, and that so much of the NYPD's cross motion as sought to dismiss that part of the NYCLU's petition should be granted.

The NYCLU's three remaining arguments are meritless. It first asserted that "the NYPD cannot use the NYC Administrative Code as a shield to block responsive records from disclosure." *See* petitioner's mem of law at 19-20. However, this argument is a "red herring." Although the RAAO's order mentioned Administrative Code §14-150, that decision was plainly based on Public Officers Law § 87 (2) (f), as were all of the arguments in the NYPD's cross motion. Simply put, the NYPD did not seek relief herein based on an inapplicable regulation. Therefore, the court rejects this argument.

The NYCLU also argues that "the NYPD could have produced portions of responsive records instead of withholding records in their entirety." *See* petitioner's mem of law at 20-21. However, as was previously discussed, the NYPD did provide a partial disclosure of the magnetometer-related information that is contained on its public website. Also, the NYPD did not "withhold records in their entirety," but rather only withheld those magnetometer-related documents that which it discovered during its "diligent search" which it deemed to be covered by the "public safety" exemption. Therefore, the court finds that the NYCLU's argument springs from an inaccurate characterization and rejects it.

Finally, the NYCLU argues that it is entitled to attorney's fees. *See* petitioner's mem of law at 21. However, pursuant to Public Officers Law § 89 (4) (c) (ii), attorney's fees may only be recovered when a party "substantially prevail[s]" on a FOIL request. *See e.g., Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 (1st Dept 2015). Here, the NYCLU has not "substantially prevailed" because the court has determined that the NYPD's

decision to deny the subject FOIL request in the RAAO's order should be upheld. therefore, the NYCLU is not entitled to attorney's fees in this proceeding, and the court rejects its argument.

Accordingly, for the reasons discussed herein, the court concludes that the NYCLU's Article 78 petition should be denied, and that the NYPD's cross motion should be granted.

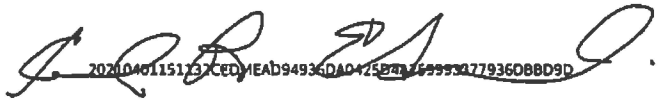
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner New York Civil Liberties Union (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Police Department (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties along with notice of entry within twenty (20) days.



4/1/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.	For Court of Original Instance
New York Civil Liberties Union - against - New York City Police Department	Date Notice of Appeal Filed For Appellate Division

Case Type		Filing Type	
☐ Civil Action	■ CPLR article 78 Proceeding	■ Appeal	☐ Transferred Proceeding
☐ CPLR article 75 Arbitration	☐ Special Proceeding Other	☐ Original Proceedings	☐ CPLR Article 78
	☐ Habeas Corpus Proceeding	☐ CPLR Article 78	☐ Executive Law § 298
		☐ Eminent Domain	☐ CPLR 5704 Review
		☐ Labor Law 220 or 220-b	
		☐ Public Officers Law § 36	
		☐ Real Property Tax Law § 1278	

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

■ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☐ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	☐ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
■ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 04/01/2021	Entered: April 7, 2021
Judge (name in full): Honorable Carol R. Edmead	Index No.: 156799/2020
Stage: ☐ Interlocutory ■ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

The appeal is from a Decision and Order dismissing the NYCLU's Article 78 petition seeking records pursuant to the Freedom of Information Law from the NYPD regarding magnetometer use and school safety agent deployment.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether the Supreme Court erred in upholding the NYPD's denial of access to the requested records on the basis of the public safety exemption (Public Officers Law 87(2)(f))?

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	New York Civil Liberties Union	Petitioner	Appellant
2	New York City Police Department	Respondent	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: New York Civil Liberties Union Foundation, Stefanie Coyle			
Address: 125 Broad Street, 19th Floor			
City: New York	State: New York	Zip: 10004	Telephone No: 212-607-3300
E-mail Address: scoyle@nyclu.org			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: New York Civil Liberties Union Foundation, Christopher Dunn			
Address: 125 Broad Street, 19th Floor			
City: New York	State: New York	Zip: 10004	Telephone No: 212-607-3300
E-mail Address: cdunn@nyclu.org			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: New York City Police Department, Steven Drennen			
Address: One Police Plaza, Room 1406			
City: New York	State: New York	Zip: 10038	Telephone No: 646-610-5400
E-mail Address: STEVEN.DRENNEN@nypd.org			
Attorney Type: ☐ Retained ☐ Assigned ☒ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			