

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NEW YORK CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF
LABOR,

Respondent,

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

Index No. _____
(NYSCEF Filed)

VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 action seeks to vindicate the public’s right to know how the New York State Department of Labor (“DOL”) determines eligibility for the unemployment insurance benefits that many New Yorkers rely on to survive periods of financial instability. In early 2021, the DOL began requiring New Yorkers applying for unemployment employment benefits to verify their identities using automated tools provided by ID.me, a private contractor. There are well-documented concerns about the use of automated identity-verification technology, including markedly higher error rates for people of color, women, and individuals in other marginalized groups; inequitable access; and the transfer of large amounts of applicants’ biometric information to private companies operating with minimal regulation and oversight.

2. Accordingly, in August 2021, Petitioners the New York Civil Liberties Union (“NYCLU”) and the American Civil Liberties Union (“ACLU”) submitted a Freedom of

Information Law request to the DOL for records regarding the agency's use of automated tools for unemployment insurance identity verification.

3. More than one year and nine months later—and more than eight months after the DOL's own FOIL Appeal Officer ordered the immediate release of responsive records—the DOL still has not provided any substantive response to Petitioners' request or produced a single record.

4. The DOL's ongoing failure to respond violates the agency's obligations under FOIL and has forced Petitioners to seek judicial relief to compel the DOL promptly to produce responsive records.

PARTIES

5. Petitioner the New York Civil Liberties Union is a not-for-profit, nonpartisan organization that seeks to promote government transparency and to defend civil rights and civil liberties on behalf of individuals who have experienced injustice. The NYCLU maintains its primary office at 125 Broad Street, 19th Floor, New York, New York 10004.

6. Petitioner the American Civil Liberties Union is a not-for-profit, nonpartisan organization that seeks to promote government transparency and to defend civil rights and civil liberties on behalf of individuals nationwide who have experienced injustice. The ACLU maintains its primary office at 125 Broad Street, 17th Floor, New York, New York 10004.

7. Respondent the New York State Department of Labor is a public agency subject to the requirements of the Freedom of Information Law. The DOL maintains its principal office at Building 12, W.A. Harriman Campus, Albany, New York 12226.

FACTS

The Use of Automated Tools for Unemployment Insurance Identity Verification

8. During the height of the COVID-19 pandemic, as millions of New Yorkers lost their jobs, Governor Andrew Cuomo announced that to receive unemployment insurance, applicants would be required to verify their identities using automated technology.¹ The DOL contracted with ID.me, a private company, to provide and operate the automated identity-verification tools.² Governor Cuomo declared that the DOL was using “state-of-the-art technologies to make sure that benefits go to New Yorkers with legitimate claims,” and the Commissioner of the DOL elaborated that the “new ID verification tool” provided by ID.me “add[ed] to the Department of Labor’s constantly-expanding arsenal of weapons to combat fraud” in the unemployment insurance system.³

9. Most notably, the DOL “uses ID.me’s” facial-recognition technology “to verify the identity of unemployment insurance (UI) claimants and applicants.”⁴ To engage in this identity-verification process from home, applicants must have internet access, an email account, and an adequate cellphone with a camera or an adequate computer with a webcam.⁵ The verification process requires applicants to upload photos of an identification document and “a video selfie.”⁶

¹ New York State Department of Labor, *Governor Cuomo Announces Launch of New ID Verification Tool to Fight Unemployment Fraud, Speed Processing of Claims*, <https://dol.ny.gov/news/governor-cuomo-announces-launch-new-id-verification-tool-fight-unemployment-fraud-speed> (Feb. 25, 2021).

² *Id.*

³ *Id.*

⁴ New York State Department of Labor, *Information about ID.me*, <https://dol.ny.gov/information-about-idme> (last accessed May 28, 2023).

⁵ ID.me, *Verifying for the New York Department of Labor*, <https://help.id.me/hc/en-us/articles/1500002038882> (last accessed May 28, 2023).

⁶ *Id.*

10. ID.me also touts a variety of other automated tools it uses in verifying identities. Among other tools, to attempt to prevent identity fraud ID.me relies on “artificial intelligence” and “machine learning” technology that evaluates “patterns of typical behavior,” “linguistic patterns,” and “dataset[s] of previously fraudulent transactions.”⁷ ID.me likewise analyzes users’ phone location records.⁸

11. New Yorkers and their families rely on unemployment insurance to get through difficult periods of job loss. Conditioning their access to these critical benefits on the use of automated tools like those deployed by ID.me raises a host of equity and privacy concerns.

12. As the U.S. Department of Labor’s Office of Inspector General highlighted in a recent Alert Memorandum, there are “urgent equity . . . concerns” with the use of automated identity verification tools in unemployment insurance.⁹ Studies conducted by the National Institute of Standards and Technology “found empirical evidence [that] the algorithms used in current facial recognition technology have a racial and gender bias.”¹⁰ For example, facial-recognition algorithms have been found to produce higher error rates for non-white individuals, including African Americans, Native Americans, and Asian Americans; women; and young people.¹¹

⁷ JT Taylor, *Recognizing Synthetic Identity Theft Through Identity Verification*, ID.me, <https://insights.id.me/article/recognizing-synthetic-identity-theft-through-identity-verification/> (last accessed June 8, 2023).

⁸ Drew Harwell, *ID.me Gathers Lots of Data Besides Face Scans, Including Locations. Scammers Still Have Found a Way Around It*, Washington Post, <https://www.washingtonpost.com/technology/2022/02/11/idme-facial-recognition-fraud-scams-irs/> (Feb. 11, 2022).

⁹ Carolyn R. Hantz, *Alert Memorandum: ETA and States Need to Ensure the Use of Identity Verification Service Contractors Results in Equitable Access to UI Benefits and Secure Biometric Data* at 1, U.S. Department of Labor Office of Inspector General, <https://www.oig.dol.gov/public/reports/oa/2023/19-23-005-03-315.pdf> (Mar. 31, 2023) (“USDOL Alert Memo”).

¹⁰ USDOL Alert Memo at 2.

¹¹ USDOL Alert Memo at 4–5, citing National Institute of Standards and Technology, *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects* (NISTIR 8280), <https://nvlpubs.nist.gov/nistpubs/ir/2019/nist.ir.8280.pdf> (Dec. 2019); and National Institute of Standards and Technology, *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age->

13. Compounding the higher error rates for certain demographics, applicants have frequently faced significant wait times to be screened by humans when automated tools were unable to verify their identities, causing the applicants to suffer lengthy delays in receiving their benefits.¹² A 2022 investigation conducted by two Congressional Committees found that ID.me’s facial-recognition tool was unable to verify the identities of 10 to 15 percent of users, requiring these users to prove their identities to human operators via video calls.¹³ And in most states, users were forced to wait for more than four hours on average to reach a human operator.¹⁴ The same investigation revealed that in promoting its services to government agencies, ID.me had dramatically overstated—by as high as a factor of ten—the extent of fraudulent claims for unemployment benefits.¹⁵

14. Artificial intelligence and algorithmic tools have also repeatedly been shown to cause discriminatory harm, in part because bias is inherent in the data used to train such tools. Credit lenders using algorithms to determine the pricing of loans have disproportionately

[sex-face-recognition-software](#) (Dec. 19, 2019); *see also* Letter from U.S. Senate Committee on Finance to Martin J. Walsh, Secretary of Labor (Feb. 15, 2022) (“[M]any facial recognition technologies are biased in ways that negatively impact vulnerable groups, including people of color, women, and seniors.”); Peter Wong, *Oregon allows alternatives for identity checks for benefits*, Portland Tribune, https://www.portlandtribune.com/news/oregon-allows-alternatives-for-identity-checks-for-benefits/article_a51aefaf-645c-5a5d-9853-ed6cb1fba00f.html (Feb. 16, 2022) (Oregon Employment Department found that “Latino, Black and Native American residents” and “[w]orkers age 20 and younger” faced “special difficulties” securing their unemployment insurance through ID.me’s facial recognition tool).

¹² *See, e.g.*, Todd Feathers, *Facial Recognition Failures Are Locking People Out of Unemployment Systems*, VICE, <https://www.vice.com/en/article/5dbywn/facial-recognition-failures-are-locking-people-out-of-unemployment-systems> (June 18, 2021).

¹³ Press Release, *Chairs Clyburn, Maloney Release Evidence Facial Recognition Company ID.me Downplayed Excessive Wait Times for Americans Seeking Unemployment Relief Funds* at 2, Committee on Oversight and Reform and Select Subcommittee on the Coronavirus Crisis (Nov. 17, 2022).

¹⁴ *Id.*

¹⁵ *Id.* at 3–4.

overcharged or wrongly denied credit to borrowers of color.¹⁶ Likewise, algorithms used to inform decisions in the criminal legal system about pre-trial detention, parole, and sentencing incorrectly generate significantly higher risk assessments for Black individuals.¹⁷ Similar harms have been documented for algorithmic tools used in other critical contexts such as housing,¹⁸ employment,¹⁹ education,²⁰ and medical care.²¹

15. Identity verification by automated technology may result in inequitable access for certain people. For example, some individuals with disabilities such as visual impairment may have difficulty using facial-recognition tools. And individuals who do not have reliable internet service, a quality webcam, or a smartphone with a quality camera—such as people in low-income or rural households—struggle to access facial-recognition tools as well as the live video support they must resort to when automated tools fail to verify their identity.²²

¹⁶ Patrick Sisson, *Housing discrimination goes high tech*, Curbed, <https://archive.curbed.com/2019/12/17/21026311/mortgage-apartment-housing-algorithm-discrimination> (Dec. 17, 2019).

¹⁷ Julia Angwin et al., *Machine Bias*, ProPublica, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (May 23, 2016).

¹⁸ Sisson, *supra* n 15.

¹⁹ Aaron Rieke & Miranda Bogen, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn, <https://www.upturn.org/work/help-wanted/> (Dec. 10, 2018).

²⁰ Ctr. for Democracy & Tech., *Algorithmic Systems in Education: Incorporating Equity and Fairness When Using Student Data*, <https://cdt.org/insights/algorithmic-systems-in-education-incorporating-equity-and-fairness-when-using-student-data/> (Aug. 12, 2019).

²¹ Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 *Sci.* 447, <https://www.science.org/doi/10.1126/science.aax2342> (Oct. 25, 2019).

²² Jonathan Keane, *Facial Recognition Apps Are Leaving Blind People Behind*, VICE, <https://www.vice.com/en/article/ezpzzp/facial-recognition-apps-are-leaving-blind-people-behind> (March 22, 2016); Alexandra Mateescu, Data & Society, *Electronic Visit Verification: The Weight of Surveillance and the Fracturing of Care* at 54, https://datasociety.net/wp-content/uploads/2021/11/EVV_REPORT_11162021.pdf (2021); USDOL Alert Memo at 6 (“Claimants that do not have advanced technological skills or use outdated technology are less likely to be able to submit a high-quality photograph and pass facial recognition eligibility procedures.”).

16. The U.S. Department of Labor’s Alert Memorandum also highlighted that the use of automated identity-verification tools in unemployment insurance raises “urgent . . . security concerns.”²³ Outsourcing identity verification to private contractors like ID.me gives those contractors “access to a large amount of highly-sensitive [personally identifiable information],” and “[t]he risks associated with a biometric data breach raises serious privacy concerns for both the public and the government.”²⁴ In the absence of strict government regulation and oversight, there is also a risk that the private contractors will use the sensitive information they acquire from unemployment insurance applicants for purposes other than verifying their identities.²⁵ Indeed, ID.me has made inaccurate and deceptive statements to the public about how it uses applicants’ data in the verification process: ID.me had previously represented that its facial-recognition tool uses only one-to-one matching, which compares one photo of an applicant to a single other photo of the same applicant, but subsequently admitted that it also uses one-to-many matching, which compares one photo of an applicant to a database of all other faces to find potential matches, essentially querying each face in endless digital lineups.²⁶ One-to-many matching raises additional privacy concerns and creates higher risks of erroneous matches than one-to-one matching.

17. New Yorkers therefore have a strong interest in the DOL’s records regarding how the agency uses automated tools to determine applicants’ eligibility for unemployment insurance.

²³ USDOL Alert Memo at 1.

²⁴ USDOL Alert Memo at 7.

²⁵ USDOL Alert Memo at 7; *see also, e.g.*, Joseph Marks, *IRS dodged a cyber minefield by ditching facial recognition*, Washington Post, <https://www.washingtonpost.com/politics/2022/02/08/irs-dodged-cyber-minefield-by-ditching-facial-recognition/> (Feb. 8, 2022).

²⁶ Letter from U.S. Senators Ron Wyden, Edward Markey, Alex Padilla, and Cory Booker to Federal Trade Commission Chairperson Lina Khan, <https://www.wyden.senate.gov/imo/media/doc/Letter%20to%20FTC%20on%20ID.me%20deceptive%20statements%20051822.pdf> (May 18, 2022).

Petitioners' FOIL Request and the DOL's Constructive Denial

18. On August 26, 2021, Petitioners submitted a FOIL request (the "Request") to the DOL seeking information regarding the DOL's use of automated tools, such as facial-recognition technology, for verifying the identities of people claiming unemployment insurance. (Ding Affirmation, Exhibit A.) The Request was limited to records created on or after January 1, 2020. (*Id.* at 2.)

19. On September 3, 2021, the DOL acknowledged receipt of the Request and indicated it would "provide a response or status update within 20 business days." (Ding Affirmation, Exhibit B.)

20. On October 6, 2021, after more than twenty business days had passed without an update from the DOL, Petitioners sent a follow-up inquiry regarding the status of the Request. (Ding Affirmation, Exhibit C.)

21. On October 8, 2021, the DOL stated that it would provide "a response to [the Request] within 90 business days." (Ding Affirmation, Exhibit D.)

22. More than 90 business days later, on February 24, 2022, the DOL stated that it would need an additional 90 business days—until July 5, 2022—to respond to the Request. (Ding Affirmation, Exhibit E.)

23. On March 11, 2022, Petitioners filed an administrative appeal arguing that the DOL's continued delay in responding to the Request was not reasonable under the circumstances and constituted a constructive denial of the Request. (Ding Affirmation, Exhibit F.)

24. On March 29, 2022, the DOL's FOIL Appeal Officer denied Petitioners' administrative appeal, stating, "Under [the] circumstances I do not find an anticipated response date of on or before July 5, 2022, unreasonable." (Ding Affirmation, Exhibit G.) In an effort to

accommodate the DOL, Petitioners did not further appeal this denial, instead opting to wait for the agency to produce the requested documents by the promised date.

25. On August 25, 2022, however, long after the DOL's cited deadline of July 5 had passed, the agency represented that it would need at least another 90 business days, until January 2023, to respond to the Request. (Ding Affirmation, Exhibit H.)

26. On September 23, 2022, Petitioners filed a second administrative appeal arguing that the anticipated response date DOL cited, which was one year and four months after the Request was submitted, was not reasonable under the circumstances. (Ding Affirmation, Exhibit I.)

27. On September 27, 2022, the DOL's FOIL Appeal Officer granted Petitioners' administrative appeal. (Ding Affirmation, Exhibit J.) The FOIL Appeal Officer agreed with Petitioners that "FOIL does not provide for such a delay in responding or for an additional extension of time to respond" in light of the repeated and lengthy extensions the DOL had already sought. (*Id.* at 2.) The decision ordered the DOL to "immediately release those records that are responsive to [the Request]." (*Id.*) The decision further specified: "If all responsive records have not yet been reviewed, I direct the FOIL Officer to give the highest priority to releasing those that have been reviewed, and to finish the collection, review, and release of the rest as soon as possible." (*Id.*)

28. Notwithstanding the FOIL Appeal Officer's order, the DOL did not produce any records. After receiving no communications from the DOL, Petitioners on December 13, 2022, asked the agency to confirm the date by which it would produce records as directed by the FOIL Appeal Officer. (Ding Affirmation, Exhibit K.) The DOL did not respond to that inquiry.

29. On April 24, 2023, having heard no word from the DOL more than six months after the FOIL Appeal Officer ordered the agency to release responsive records, Petitioners filed a third administrative appeal. (Ding Affirmation, Exhibit L.) Petitioners noted that the DOL “still ha[d] produced no records” or “given any indication as to when it will produce the records.” (*Id.* at 1–2.)

30. On May 4, 2023, the FOIL Appeal Officer denied the third administrative appeal. The FOIL Appeal Officer stated that although the DOL had not complied with his order to produce responsive records, he had no “additional authority to revisit this issue . . . or to take any further action,” and advised Petitioners that they “may have the right to seek judicial review pursuant to Article 78.” (Ding Affirmation, Exhibit M.)

31. As of the filing of this Petition—more than one year and nine months after Petitioners submitted the Request—the DOL has neither produced a single record nor provided any indication as to when it will produce records. Having exhausted their administrative remedies, Petitioners file this Petition seeking immediate production of responsive records as well as attorneys’ fees and costs.

JURISDICTION AND VENUE

32. This Court has jurisdiction over this matter pursuant to CPLR 7801 and 7804.

33. Pursuant to CPLR 7804 (b) and 506 (b), venue in this proceeding lies in Albany County, the judicial district in which Respondent made the determination complained of and refused to perform the duty enjoined upon it by law, and in which Respondent’s principal office is located.

CAUSE OF ACTION UNDER ARTICLE 78

34. Article 78 is the appropriate method of review of final agency determinations concerning FOIL requests.

35. Petitioners have a legal right under FOIL to each of the categories of records sought in the Request.

36. There is no basis in law or fact for the DOL to fail to respond to the Request or to defy the FOIL Appeal Officer's order to produce responsive records.

37. The DOL's obligation to respond to a FOIL request and produce documents is mandatory.

38. Petitioners have exhausted their administrative remedies and have no other remedy at law.

39. Petitioners have not made a prior application for the relief requested herein.

40. Because the DOL has no reasonable basis for failing to respond to Petitioners' FOIL request or for withholding the requested records, Petitioners are entitled under FOIL to the requested records.

REQUESTED RELIEF

WHEREFORE, Petitioners respectfully request the following relief:

- (1) A judgment pursuant to Article 78 directing the DOL to comply with its duty under FOIL to disclose the records sought by Petitioners in their August 26, 2021 FOIL request;
- (2) An award of reasonable attorneys' fees and litigation costs to Petitioners pursuant to Public Officers Law § 89 (4) (c); and
- (3) Any other relief the Court deems just and proper.

Dated: June 15, 2023
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

/s/ Terry Ding

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Counsel for Petitioners


VERIFICATION

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

Terry Ding, an attorney admitted to practice in the State of New York, affirms pursuant to CPLR 2106 under the penalties of perjury:

1. I am an attorney for the Petitioners in the within proceeding. I make this Verification pursuant to CPLR 3020 (d).
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

Dated: June 15, 2023
New York, New York



Terry Ding

Sworn and subscribed to me
This 15th day of June, 2023



MOLLY K. BIKLEN
NOTARY PUBLIC-STATE OF NEW YORK
No. 02816356621
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES 04/03/2025