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

In the Matter of,	:	
	:	
CENTER ON PRIVACY & TECHNOLOGY,	:	
	:	
Petitioner,	:	
	:	
-against-	:	Index No. 154060/2017
	:	
NEW YORK CITY POLICE DEPARTMENT,	:	
	:	
Respondent.	:	
	:	
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules.	:	

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S ORDER TO SHOW CAUSE (Mot. Seq. No. 004)

I. Introduction

In its order to show cause, Respondent New York City Police Department (the "Department") seeks to claw back records it produced to Petitioner the Center on Privacy & Technology (the "Center") after Respondent took more than nine months to review them, and was ordered on multiple occasions to disclose them. The Center is entitled to these records under FOIL. The Department has put forward no argument—and supplied no evidence—to the contrary. Even if the Department were able to show that material contained within these records could qualify for a FOIL exemption, which it has not done, the Department's careless treatment of its information belies its claim that the information is sensitive; that conduct also constitutes a waiver. The Department's request should be denied in its entirety.

II. Background

The Center submitted the FOIL request at issue more than three years ago, and filed this case nearly two years ago. (Dkt. Nos. 1, 4). The parties appeared before the Court for argument for the first time on November 6, 2017. At that time, the Department represented that it had located twelve records, all but one of which it withheld in full. Following the November 6 argument, this Court ordered the Department to renew its search for responsive records, and to complete that search within thirty days.[1] In February 2018, the Department began releasing, with redactions, the eleven records it had located in its initial search and previously withheld. (*See* Affidavit of Clare Garvie, sworn to on March 6, 2019, attached here as Exhibit A, ¶¶ 4-5).

On February 27, 2018, the Department moved to adjourn an appearance scheduled for the following day. (Dkt. No. 57). In his letter requesting this adjournment, counsel for the Department acknowledged that the Court had "directed Respondent to conduct an additional search," and represented that the Department had "recently identified an additional source of responsive documents." (*Id.* at 1-2). The Department asked for an additional thirty days to "continue to review these documents and produce them to Petitioner, with appropriate redactions." (*Id.*). The Court granted the Department's adjournment request, and the parties entered into a stipulation, signed by this Court on February 28, 2018, that required the Department to "complete its renewed diligent search for records responsive to the Center's"

[1] The November 6 order has been the subject of a motion for contempt because the Department made no effort to comply with it and its thirty-day deadline. (Dkt. No. 50). In its belated responsive papers to that motion, the Department characterized this Court's November 6 order as a mere "request," an assertion that this Court unequivocally rejected at oral argument on October 31, 2018. (Dkt. No. 116 at 4-5; Glaberson Affirm. Ex. 2 (Oct. 31, 2018 Transcript) at 47-49).

request "no later than March 30, 2018," and to disclose "all non-exempt portions of any records identified" through this search "no later than April 20, 2018." (Dkt. No. 60).

By April 16, 2018, the Department produced additional records, bringing the total to approximately 614 pages. (Garvie Aff. ¶ 4). By that time, the Department had produced, with redactions, all twelve records it had identified as responsive to the Center's request during its initial search. (*Id*. ¶ 5). The Department did not disclose any of the records located in later searches, despite its representations in its February 27, 2018, letter and the requirements of the February 28 stipulation. (Dkt. Nos. 57, 60; Garvie Aff. ¶ 5).

On May 9, 2018, the parties appeared before this Court. (May 9, 2018 Transcript, Exhibit 1 to Affirmation of Stephanie Glaberson dated March 8, 2019, attached here as Exhibit B). Appearing on behalf of the Department, Attorneys Dantowitz and Lesa Moore represented that the Department had located and been reviewing potentially responsive records, and requested three additional months in which to complete this review and produce these records to Petitioner. (*Id.* at 6-7). This Court granted the Department's request, and adjourned the matter. (*See id.* at 11; Dkt. No. 85). Pursuant to this order, the Department was required to complete its review and produce these records by August 2018. Once again, it failed to comply with this Court's order.

On October 3, 2018, the Center filed papers alerting the Court that the Department had disclosed to attendees of the "Global ID Summit" records previously withheld in this case, claiming that the withheld material was exempt under FOIL's exemptions for non-routine law enforcement techniques and procedures and IT information—claims belied by the Department's Summit disclosures. (Dkt. Nos. 91-112). As a result of these events, the Department conceded

that it had waived any exemption claims it might have had as to the records memorialized in Exhibits A through S (Dkt. Nos. 94-112) to that filing. (Dkt. No. 120 at 4).[2]

The parties next appeared before this Court on October 31, 2018. Describing the Department's failure to comply with its prior directions as "quite negligent," this Court set an unequivocal deadline of December 4, 2018, for the Department to produce the remaining outstanding responsive records to the Center. (Glaberson Affirm., Ex. 2 (October 31, 2018 Transcript) at 48-50; Dkt. No. 124). In issuing this order, the Court expressed concern over the Department's apparent lack of diligence, noting that the Department had repeatedly represented that it had been engaged in its review of the outstanding records for months. (Glaberson Affirm., Ex. 2 at 48 ("When can you complete the task you were required to do about a year ago? You should have been working on it. I know your colleague [Ms. Moore] was there and had been working consistently in trying to get this done. We had spoken off the record.")).

On December 3, 2018, the day before the December 4 deadline, the Department asked the Center for yet another extension, to December 11, 2018, to make its production. (Dkt. No. 131, Amended Affirm. of Jeffrey Dantowitz, ¶ 11). The Center agreed on the condition that the Department not seek any further extensions. (*Id.*).

On December 11, 2018, the Department produced 173 documents, totaling 2630 pages, to the Center. (*Id.* ¶ 18). The majority of those records were sent on a compact disc. The Department did not include with the production a privilege log identifying or justifying the redactions in the documents produced. (*See id.* at ¶¶ 19-20.) Counsel for the Center informed the Department via

[2] Via email dated February 13, 2019, the Department agreed to unredact the records so as to reveal the information described in paragraphs 11-14 of Clare Garvie's affidavit of October 3, 2018 (Dkt. No. 92).

email on December 12, 2018 that the mailing had arrived, and on December 18, 2018, that the Center actively was reviewing the production. (Glaberson Affirm. ¶¶ 5, 8).

Approximately three weeks after sending the records, at 3:52 p.m. on New Years' Eve, December 31, 2018, counsel for the Department—for the first time—contacted counsel for the Center to claim that the Department had inadvertently produced certain records. (Dkt. No. 132).[3]

In emails exchanged between December 31, 2018 and January 10, 2019, counsel for the parties attempted to resolve the dispute. The Center agreed to (1) exchange at the court appearance scheduled for January 16, 2019, the disc the Department had provided to the Center; (2) delete/destroy any personally-identifying information pertaining to non-NYPD individuals contained within the identified pages, once the Department provided the locations of the information it asserts should be deleted on this basis; and (3) refrain from further reviewing, using, or disseminating the identified records until this matter could be resolved. (Dkt. No. 133 (containing partial email exchange between counsel); Glaberson Affirm. Ex. 5 (containing remainder of email exchange)). The Center also confirmed that none of the identified pages had yet been shared with any third party, so there was no need to notify anyone. (Dkt. No. 133).

On January 10, 2019, the Department filed the instant order to show cause, seeking a protective order directing the Center to, among other things, cease further review, use, or dissemination of the identified records, and to destroy or return them. (Dkt. Nos. 126-36). The Department amended its filing on January 11, 2019, (Dkt. Nos. 131-34), and subsequently filed a letter correcting an additional error in the moving papers. (Dkt. No. 135 (describing the Department's misrepresentation of the Center's position in its moving papers and clarifying that

[3] The Department seeks the return and/or destruction of the documents bearing Bates numbers 2048, 2078, 2517-2578, 2601, 2731-2737, 2739-2817, 3142, and 3242. (Dkt. No. 131 ¶ 23, Ex. A.)

the Center had repeatedly "made clear that it will not review, use or disseminate these documents for any purpose pending the Court's ruling on the motion")).

In his affirmation in support of the Department's motion, counsel for the Department acknowledged that he "did not conduct a page-by-page review of the CD's contents" before mailing them to the Center. (Dkt. No. 131 ¶ 17). Counsel further admitted that he recognized the purported error shortly after making the production, but waited nearly three weeks to notify the Center of the issue. (*Id.* ¶ 21 ("During [privilege log] review, I realized that certain redactions that were intended to be made were not, in fact, made on the documents downloaded to the CD produced to Petitioner. Rather than notify Petitioner of these errors in piecemeal fashion, I awaited until I completed my review.")). The Department did not submit any affidavit from someone with personal knowledge of the records. Its motion included no evidence to support the Department's claim that any of the records the Department seeks to claw back are confidential or that their disclosure would cause harm.

The Center now opposes the Department's baseless request.

III. Argument

a. The Center Is Entitled to the Records

The Center is entitled to the records at issue in this motion. The Department has not provided this Court with a shred of evidence to show otherwise. Under FOIL, "[a]ll agency records are presumptively available for public inspection and copying" unless the agency shows that the records fall under one of the law's "narrowly construed" exemptions. (*Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109 [1992]). The burden is squarely on the Department to show that any particular record, or portion thereof, is exempt from disclosure. (*Id.*). In its

motion, the Department seeks extraordinary relief, asking this Court to permit it to "claw back" certain records on the basis that portions of those records are exempt. But the Department puts forward no factual support—no affidavits, no exhibits—for its contention that anything contained in these records is subject to an exemption claim, relying instead on the generalized and unsupported assertions of its counsel.

Making matters worse, the Department refuses even to identify the exemptions it claims apply, let alone to justify their application. The Department instead asserts that it "cannot disclose the specific bases" of its redaction claims. (Dkt. No. 134 at 8; Dkt. No. 131, ¶ 33). Not surprisingly, the Department cites no case supporting its claim that it can conceal the basis for withholding information without even identifying the relevant exemption. (*See* Dkt. No. 134 at 7-8). The Center is aware of none.

The Department's argument as to why it cannot supply any justification for its exemption claims not only lacks factual and legal support, but also is not grounded in the current status of the dispute. The Department asserts that attempting to comply with its statutory burden would "undermine the protection afforded by the exemption" because the Center's "knowing that specific information on a specific page reveals a non-routine law enforcement technique would allow [it] to more closely review that document to determine how to evade or defeat that technique." (*Id.* at 8). But this assertion ignores that, even before the Department had filed its motion, the Center agreed not to review further, use or disseminate the records in question. And the Court has now put the force of law behind that agreement by granting the Department's request for interim relief on consent. (Dkt. No. 137).

The Department also fails to acknowledge that, long before its delayed communication to the Center regarding its purported inadvertent production, the Center already had reviewed the

records and was well aware of their contents. (Garvie Aff. ¶ 6). On the basis of this review, the Center does not believe that any information contained in these records properly would be withheld under an exemption, much less would allow a potential wrongdoer to evade detection or prosecution, or is in any way sensitive such that a withholding claim would be justified.[4] (*Id.* ¶¶ 7-12).

The Department's silence on this point speaks volumes, but its actions speak even louder. The Department's behavior—first in disclosing these records without conducting a rigorous, document-by-document review of the mailing, and then in failing immediately to alert the Center and instead waiting for weeks to convey that an error occurred—belies any suggestion that these records in fact contain sensitive information. No responsible public servant would treat sensitive information this way. The Center could have published these records at any time. If the Department truly believed these records contained information that was as sensitive as it now claims, it surely would not have treated them as cavalierly as it did here.

The Department's carelessness during this episode would be unjustified if its exemption claims were well founded, but they plainly are not. This behavior is consistent with the Department's treatment of its information throughout this litigation, and symptomatic of a larger issue. The Department repeatedly has made representations to this Court that information is too sensitive to be released and must be withheld under FOIL. But, time and again, those claims have been shown to be baseless. The Department's disclosures in this case are rife with examples of information that is withheld from the Center in some places, based on the Department's representations to this Court that the information is too sensitive for public view,

[4] The records do contain a small amount of personally-identifying information. The Center has never sought such information and immediately offered to destroy it, wherever it appears in the records. (Dkt. No. 133; Garvie Aff. ¶ 13). Accordingly, the dispute in this motion is not about these pieces of information.

but disclosed in others. (*See, e.g.*, Garvie Aff. ¶ 8; Glaberson Affirm. ¶¶ 11-16, Ex. 6). These inconsistencies show many of the Department's exemption claims to be meritless, shielding from the public information that the Department had no valid claim to withhold. And as this Court will recall, in September 2018, the Department gave a presentation in which it displayed PowerPoint slides and provided information to paying conference attendees that it had withheld here, claiming the information was too sensitive to release. (Dkt. Nos. 91-112). Similarly, the Department previously shared with the press information that it withheld under FOIL, claiming release would jeopardize law enforcement efforts. (*See, e.g.*, Dkt. Nos. 69 at 8-10, 74). Most recently, the Center received an unredacted copy of a user guide from DataWorks Plus. The Department has withheld large parts of this document here, claiming, again, that this information was so sensitive that it could not be made public (Bates Nos. 303-86). But the Department has disclosed it—without redactions—elsewhere. (Garvie Aff. ¶ 10, Ex. 1). Comparing the two documents, it becomes clear that the Department's exemption claims as to much of the previously-withheld information are baseless, and the Department appears to follow no clear organizing principle for assigning information to the category of "exempt" versus "not exempt." (*See id.*)

Each of these incidents raises questions about the legitimacy of the Department's claims in this matter. Taken together, these disclosures show that the Department has engaged in a pattern of crying wolf: representing to this Court that material must be withheld or dire law enforcement consequences will result, when these claims are simply not true. The Department once again, and without an iota of support, attempts to do so here. The Department's conduct is unlawful under FOIL, and the Center respectfully asks this Court to put a stop to it.

b. **The Department has waived any exemption claims it might have had.**

Even if the Department could put forward a factual basis to justify its exemption claims—and its failure to do so suggests it cannot—its motion would still be meritless. By disclosing these records and waiting weeks to alert the Center to its purported mistake, the Department waived any exemption claims it might have had. Not only is the burden squarely on the Department at all times to justify its claimed withholdings, but the Department also is free to waive otherwise-valid exemption claims at will. The Department has argued as much before this Court. (Dkt. No. 120, at *4 (FOIL exemptions "are permissive, not mandatory," and "an agency may choose to assert an exemption over certain material, but not over other similar material.")).

No court has sanctioned the claw back of documents when an agency has behaved as recklessly as the Department did here. The Department has not provided—and the Center is not aware of—a single decision in which a New York Court has allowed an agency to turn over records to a FOIL requester unconditionally, wait weeks while that requester reviews those records and could disseminate them without restraint, and later claim that the records must be returned or destroyed due to the agency's negligence. The cases on which the Department relies offer no support for its position. In *Miller v. NY State DOT*, 58 A.D. 3d 981, 982 [3d Dep't 2009], there is no indication that the requester ever saw the records in dispute. In *Matter of Mazzone v. NY State Dept. of Transp.*, 95 A.D. 3d 1423, 1423-24 [3d Dep't 2012], *Mitzner v. Sobol*, 173 A.D. 2d 1064, 1065 [3d Dep't 1991] and *McGraw-Edison Co. v. Williams*, 133 Misc. 2d 1053, 1054 [Sup Ct, Albany County 1986], records were shown briefly to a requester, but never provided to him or her, and remained in the possession and control of the agency at all times. These cases in no way sanction the Department's cavalier treatment of records here.

Finding no support in the FOIL case law, the Department turns to the discovery context. But those cases too undermine its position. For one thing, these cases are not relevant. The rules governing discovery are irrelevant to the mandatory, public disclosure required by FOIL. In any event, even those decisions are contrary to the Department's argument. Courts have developed a four-part test to determine when a purported inadvertent disclosure in discovery waives privilege claims. Only where the proponent of privilege can show each of the following four factors does the party retain the privilege: (a) it did not intend to produce the material in question; (b) it took reasonable steps to prevent disclosure; (c) it took prompt action after discovering the disclosure to remedy it; and (d) compelling the recipient to return the materials would not subject it to undue prejudice. (*See, e.g.*, *NY Times Newspaper Div. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dep't 2002]). Had this case arisen in the discovery context, the Department's actions would result in waiver.

First, as discussed above, the Department has failed to put forward evidence showing that there is anything in these records that is subject to a FOIL exemption or any discovery privilege. Absent such a showing, the Department is under a statutory duty to disclose these records.

Second, the Department did not take reasonable steps to prevent disclosure. To the contrary, the Department's behavior here was objectively unreasonable. The Department had *years* to make its production. It has been obligated to search for and produce these records since the Center's request more than three years ago, on January 5, 2016. More to the point, the Department had located and has been reviewing the specific records in question since at least February 28, 2018, a total of more than nine months. The production ultimately contained only 2630 pages, many of which required no redactions, or were duplicates of, or similar to, one another or other records that NYPD previously has released in part in this litigation. *See*

Glaberson Affirm. ¶ 7. Despite the lengthy period the Department had to review these records, and the minimal burden that accurately redacting material in this disclosure would have presented, Mr. Dantowitz in his affirmation admits that no one reviewed each document included in the disc that was prepared for and sent to the Center before it was mailed. Instead, Mr. Dantowitz confesses that all he did was a "spot-check." (Dkt. No. 131 ¶ 17). According to Mr. Dantowitz, he did nothing to "ensure that all material that should have been redacted was, in fact, redacted." (*Id.*). Failing to do so was more than unreasonable, such that it casts doubt on counsel's unsupported claim that the records contain sensitive information. What's more, the Department's conduct flouts this Court's orders. The Department not only has been under an obligation to disclose these records for years, but also specifically was ordered to do so on numerous occasions. (*E.g.*, Dkt. Nos. 60, 124). Those orders required the Department to disclose the records without conditions; not to turn them over to the Center unconditionally only to, weeks later, try to claw some back.

Third, the Department failed to take prompt action to remedy its purported error. Again, Mr. Dantowitz admits as much. He did not just fail to take prompt action; he inexplicably decided to wait for weeks to raise the issue. This behavior is incomprehensible since, in the interim, the Center could have done anything it wished with the records, including posting them on its website or publishing them on the front page of the New York Times, at any time. The Department had no way of knowing that the Center would not do so at any moment, and it is only by sheer luck that such a result did not occur. Waiting weeks to alert the Center to the Department's purported error in this context is indefensible. (*Compare LaSalle Bank N.A. v. Merrill Lynch Mtge. Lending, Inc.*, 2007 US Dist LEXIS 59301, at *6-*7, *14-*16 [SDNY Aug. 13, 2007] (privilege waived when party delayed one month before requesting return) *and*

Ecological Rights Found. v. Fed. Emergency Mgt. Agency, 2017 US Dist LEXIS 1054, at *21-*22 [ND Cal Jan. 3, 2017, No. 15-cv-04068-DMR] ("virtual immediacy" is required to remedy an inadvertent production; nine-day delay could produce waiver) *with Mfrs. & Traders Trust Co. v Servotronics, Inc.*, 132 A.D. 2d 392, 400 [4th Dep't 1987] (notifying recipient of inadvertent production within two business days of discovering the error satisfied the promptness requirement)).

And fourth, permitting the Department to claw back these records not only would harm the Center here, but also would do systemic damage to the FOIL process. Such an order would handicap the Center in its efforts to achieve its mission, and would do nothing to further the aims of FOIL's narrowly-drawn statutory exemptions. The Center works to research and educate the public about government surveillance practices. (Garvie Aff. ¶¶ 2-3). This work requires Center staff to draw on its knowledge of facial recognition, but also to support its knowledge with primary sources. As a result of the Department's actions, this knowledge now includes information Center staff learned from reviewing the records the Department disclosed, long before Mr. Dantowitz's New Years' Eve email. (*Id.* ¶ 6, 14). There can be no question that Center staff is not required to excise from their minds the information learned during the Center's review of the records the Department disclosed. (*See Stinson v City of NY*, 2014 US Dist LEXIS 145612, at *10 [SDNY Oct. 10, 2014] (allowing recipient of inadvertent disclosure to use in contesting privilege claims any material learned between the production and the producing party's clawback demand)). Nor could they. Such forcibly-imposed selective memory would be impossible—especially given that the Department refuses to identify the information it wishes forgotten.

More problematic, the order the Department seeks is vague and overbroad. It risks acting as a prior restraint and causing a prejudicial, and unconstitutional, chilling effect on the Center's personnel. (*See The Florida Star v. BJF*, 491 U.S. 524 [1989]; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 [1976]). The Department here seeks an order restraining the Center from using and disseminating information that it lawfully obtained. But the Department's December 11 disclosure "without qualification, . . . convey[ed] to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further." (*Florida Star*, 491 U.S. at 538-39). Absent a showing that its clawback request is "narrowly tailored to a state interest of the highest order," granting the Department's request would violate the First Amendment. (*Id.* at 532-41; *see also New York Times Co. v. United States*, 403 U.S. 713, 714 [1971]). The Department did not—and cannot—make such a showing. (*See Florida Star*, 491 U.S. at. 538 ("where the government itself provides information . . . , it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech")). The Department's requested order would cause "timidity and self-censorship," forcing Center staff to perform mental gymnastics to decide what information they can safely discuss and publish, and what they are prohibited from using or disseminating. (*Id.* at 535-36; Garvie Aff. ¶¶ 14-15.) Such an unconstitutional result cannot be tolerated.

Permitting the Department to claw back these records also would damage the FOIL process. In its motion, the Department argues that the Center's counsel "has an ethical obligation vis-à-vis the inadvertently disclosed records" and that "Petitioner's counsel should have known that the inadvertently disclosed records contain exempt material, as many of these records are substantially similar to, or virtually identical to, other records that NYPD produced

with redactions, including other records produced on December 11, 2018." (Dkt. No. 134 at 8). This assertion ignores the fact that the Department repeatedly has revealed information in its productions, presentations, and interviews with media that it has, in other records disclosed to the Center, redacted. (Garvie Aff. ¶¶ 8-11; Glaberson Affirm. ¶¶ 11-16). In this context, the Center could not have extrapolated from the Department's inconsistency that the Department later would claim that some of these records had been inadvertently disclosed. The Department's argument is a poor effort to shift blame to the Center for the Department's woeful failings, especially where the Department has refused to identify the claimed applicable exemptions and has not offered a shred of evidence that any of the material it seeks to claw back is, in fact, exempt from disclosure. But it also is a naked attempt to offload the FOIL burden onto the requester.[5] Accepting this argument risks subverting the purpose of FOIL by placing FOIL requesters in the impossible position of having to divine when an agency intended to disclose selectively otherwise-exempt records, as it has the power to do, and when it "inadvertently disclosed" records. In government records cases, the agency is inevitably at a significant informational advantage. (*See Vaughn v. Rosen*, 484 F.2d 820, 823-24 [1973]). For this reason, the legislature placed the burden squarely on the agency to invoke exemptions and justify its

[5] The Center disputes the Department's assertion that an ethical duty required it to take any action in this situation. Even when an ethical duty does arise, it requires only that the receiving attorney alert the sender when he or she knows or reasonably should know that a document or other writing was sent inadvertently. (New York Rule of Professional Conduct 4.4, comment [2] ("this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures.")). In this case, the Department spent months reviewing the records, was under an obligation (both statutory and based on this Court's mandates) to disclose them for years, and provided them to the Center with the intention that the Center receive, review and disseminate them as the Center saw fit. The Department previously had asserted its right to disclose selectively even otherwise-exempt material. (Dkt. No. 120 at *4). Given this context, the Center and its counsel reasonably could have discovered that portions of the December 11, 2018 disclosures had been "inadvertently" sent only when the Department alerted it to that claim. The Center had no obligation to alert the Department to information of which the Department already was aware.

withholdings. The Department here asks this Court to offload that burden. It should not be permitted to so do.

IV. Conclusion

For the foregoing reasons, the Center respectfully requests that this Court deny the Department's order to show cause in its entirety.

Dated: March 8, 2019

_____/s/_____
Stephanie Glaberson
David C. Vladeck
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, D.C. 20001
Tel: (202) 662-9251
Fax: (202) 662-9444
Email: stephanie.glaberson@georgetown.edu

VLADECK, RASKIN & CLARK, P.C.
By: Debra L. Raskin
565 Fifth Avenue, 9th Floor
New York, New York 10017
Telephone: (212) 403-7300
Facsimile: (212) 221-3172

Attorneys for Petitioner[*]

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