SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK - CIVIL TERM - PART 17

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CENTER ON PRIVACY & TECHNOLOGY,
Plaintiff,

-against-

Index No.
154060-2017

NEW YORK CITY POLICE DEPARTMENT,
Defendant.

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60 Centre Street
New York, New York
Oral Argument October 31, 2018

B E F O R E: HONORABLE SHLOMO S. HAGLER, Justice

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Maria E. Rivera
Senior Court Reporter

THE COURT: Let's go on the record.

Good morning. Thank you for being patient. We had a brief discussion with regard to ~~pursuant~~ to a matter while we were in the robing room.

SSI J.S.C.

As you saw, I have read the latest submissions, and they were quite numerous. I also pulled some of the cases. I also went back to the prior motions and reviewed them again because this case has been on many many times. And the last time we did anything substantively was probably the summertime, and it's several months later. I wanted to make sure I was in the same position that you were in. And I have reread most of the submissions again while you were waiting.

So I apologize for your waiting. I ask for indulgence because I want to make the right decision. I want to be fresh in my mind what the motions are.

I think the best way to just start is dealing with the discreet issues first, and then we'll get to the bigger issues, because I think we all want to get to the nonroutine procedure technique first. I think that would be the last. Let's deal with the little issues first, then we will get to the big issues.

I would like to deal with motion sequence number 3 which is the issue of the notice to admit. It's a very discreet area and it will be easier to deal with that first,

and then we'll build on that.

So I think both parties made motions on this.

MS. GLABERSON: That's correct.

THE COURT: A motion to compel and a motion to strike. I'm not sure ~~if we~~ who made the first one. ~~I think it was --~~ I think the first motion came from the respondent. So I'll let you argue that. Obviously, we have the motion to compel. It's the same issue, but ~~in~~ conversely.

Counsel.

MR. DANTOWITZ: Thank you, Your Honor. Jeffrey Dantowitz for the Police Department. I have with me counsel from the Police Department, Lesa Moore. And I want to thank you all for taking the time to read the papers just now and with the first issues, and I'm happy to discuss and to answer any questions that Your Honor may have.

THE COURT: Just start. This will be quick. ~~I don't think this will be a --~~ This should be the easier of the issues that we have to contend with.

MR. DANTOWITZ: So on July 3rd of this year, a couple of months ago, the petitioner served on NYPD a notice to admit, primarily with respect to an article that appeared in The Wall Street Journal previously in April, two months ago, three months earlier. That notice, Your Honor, was untimely under CPLR 408 which requires that a notice to admit be served no later than three days before the

petition's noticed to be heard.

In this case, Your Honor, the petition was noticed to be heard on June 2nd. And subsequently adjourned by stipulation to August 15th of 2017. So the return date, Your Honor, was almost a year before the notice to admit was served. So, Your Honor, it's improper because it was just plainly untimely.

The petitioner will argue that that's incorrect because, if I understand their argument correctly, they suggest that every adjournment of the oral argument and every subsequent adjournment of court conferences actually constituted an adjournment for a return date. That's incorrect, Your Honor.

In our papers we have cited the rules and protocols of this court. We've made it plain that the return date of the motion is the date that the papers are to be served, filed in the motions support office in Room 130 either electronically or by paper. And that was done as of last August.

It's very clear that in this court the return date comes first. Should the presiding Judge wish to have oral argument or court conferences, the presiding Judge may do so. That does not impact at all the fact that the return date is a set date by which the papers were submitted. And again in this case they were submitted well, well before the

notice to admit was served.

We also argue that the notice is improper because it doesn't serve the purposes for which a notice to admit is intended, which is to eliminate from litigation any factual issues that might come up at trial. Here, Your Honor, it's clear that no hearing has been scheduled, no trial has been scheduled.

And although the petitioner purports to argue that the notice to admit goes to the City's waiver of its ability to assert a non-exemption -- nonroutine technique exemption. As of the time the notice to admit was served, that was not even an issue in this case.

So, Your Honor, the petitioner is creating an issue and then using the notice to admit to foster and to further that issue.

Most and very importantly, Your Honor, but this is not in our papers, the petitioner is using the notice to admit as a discovery device. It is using it as a way to compel NYPD to acknowledge that it made certain statements, and in doing so to compel NYPD to acknowledge -- to effectuate a waiver.

There is no case I'm aware of, Your Honor, either in state court or the analogous federal cases under the federal Freedom of Information Act that would require any discovery of such an issue or would require an agency to

admit or confirm that it made statements that might have appeared in the press or that might have been disclosed in any other setting in order to determine whether there was a waiver or not.

A waiver is a burden that's borne by in this case by petitioner. The analogous federal cases which the petitioner appears to adopt here, saying that in order for there to be a waiver there must be disclosure, there must be a showing. It's a very high burden, Your Honor. That the material that was disclosed is exactly the same as that which was being withheld.

Here there's no -- they're woefully short of that. What they are trying to do is get discovery as to that. And in fact, Your Honor, there are many many cases under the federal statute in which a waiver argument is rejected for the specific reason that the petitioner, or the plaintiff in federal court, that the plaintiff has not demonstrated that the information disclosed and the information withheld are exactly the same. And in those cases, and I'm not aware of any cases, and the petitioner does not cite any cases informative, in none of those cases does the court say, you know what, the plaintiff has not demonstrated that there is an equivalence of these two pieces of information, but go take discovery and figure it out.

And again, Your Honor, for your information so that

is I think plain because the Court -- the Court cannot compel an agency, and I would suggest specific with respect to Luongo it cannot compel an agency to waive its exemption.

And with that point, Your Honor, I will answer any questions you have, but again it cannot limit us --

THE COURT: Thank you.

Opposition and your motion ~~to pick up~~.

MS. GLABERSON: Your Honor, to respond, I don't want to spend a lot of time here talking about counsel's argument about when the return date is. But ultimately Your Honor has the power under the CPLR to forgive any CPLR 2004 -- to forgive any failure on our part to be timely. However, on that point the defendant has provided his work with good cause to forgive any failure to meet any return dates such as they are. Your Honor can look at the papers that were filed to parse out that argument.

But these events had not yet occurred as of the date that counsel relies on. These events happened over the spring and summer, and they became relevant when the Center finally received the NYPD's disclosures and exemption laws and figured out sort of what the Department here, what is it actually claiming with regards to these records.

And for the reasons stated in our papers, the Center has shown good cause, should Your Honor see fit to excuse any such delay and to compel the Department to

respond to this notice.

The Department has not raised any argument that it will be prejudiced by being required to respond to this notice. The notice itself does not effectuate a waiver. It is the Department's conduct that may or may not have effectuated a waiver contained within that article written by The Wall Street Journal reporter and then the cooperation and sign-off of NYPD personnel, many of whom are the affiants here in this case.

This issue is highly relevant to this case and has been since the Department itself put forward or engaged in this practice of releasing information to the public outside of this courtroom. It has been relevant to this case throughout.

The Department comes in here and swears under oath the information contained in these records regarding face recognition technology is so sensitive that it cannot be released to the public, despite the serious risk to the public of a face recognition program that is poorly run or run without the appropriate guardrails of misidentification and misuse.

It is the public that bears the burden of being hauled into court into criminal proceedings with which they have nothing to do on the basis of this face recognition program.

Despite those serious risks, the Department comes in here and says that these records are so sensitive that they cannot be released because they fall under FOIL. But then turns around and releases information, and now we have a pattern of these practices to those with the power or the money to pay for access to that information. And this is exactly the kind of situation that FOIL was designed to prevent.

For this reason, we are argue that this notice to admit is extremely relevant to these proceedings. And that Your Honor should compel the Department to respond.

THE COURT: Counsel, anything else?

MR. DANTOWITZ: Yes, Your Honor. If the petitioner thought there was no waiver argument here or a waiver, what she should have done is come to court and said so, not serve or brought to Your Honor's attention as soon as they thought there was such an issue. She hasn't. And she served a notice to admit. And then what were they going to do with it? And you could see more proceedings and put in more papers and more papers and more papers. This is not the way court proceedings were ever intended to be.

Petitioner says there's no prejudice by the notice to admit, that's completely false, Your Honor. The prejudice is exactly what they are asking us to do is to confirm -- not conduct -- it's statements that were made to

a reporter, and in so doing we would be forced to confirm that those statements were made, the accuracy of those statements and therefore effectuate a waiver.

Therefore, Your Honor, this is a discovery device. It's nothing but a rank discovery device. And they should be rejected.

Thank you.

THE COURT: CPLR 408 provides that leave of court shall be required for disclosure except for a notice under section 3123. A notice under section 3123 may be served at any time not later than three days before the petition noticed to be heard and the statement denying or setting forth the reasons for failing to admit or deny shall be served not later than one day before the petition is noticed to be heard, unless the court orders otherwise on motion made without notice.

I'm going to excuse any late filing.

I'm not going to pursue the procedural argument.

Counsel is correct. The Court can excuse a late filing. And I'm going to go right into the merits as I have done throughout this proceeding. I don't think it's worth my words and effort to get into a procedural argument at this stage, given that we are, for the better part of at least a year, litigating this matter. I think that the parties deserve a substantive decision.

CPLR 3123 provides for admissions as to matters of fact, papers, documents and photographs. CPLR 3123 provides that a party may seek admissions as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

The request for admissions require that the respondent answer disputed facts at trial. It goes to the defense of waiver. It is not the type of notice to admit that would elicit non-disputed information.

The only possible request for admission that without request Number 10, was there a Wall Street Journal article published? That I think should be responded to. I think it's a simple request.

All the others go into communications between parties and is better suited for a discovery device that is not a notice to admit, because it does go to disputed facts and into the defenses that the petitioner has raised, specifically the issue of waiver, which we will deal with later. This would amount to a discovery device without leave of court.

In order to get this information, you would have to have made a motion to seek leave of court in order to determine and obtain these allegations, whether it will be

true or not, it's probably more of an interrogatory for a deposition. This is not the standard notice to admit, in admitting there was a recent executed photograph, here I'm allowing only one request to be answered. And I'm not sure if you want it in writing or not. I think it's a simple request. It's request Number 10.

Is that a true copy of what was published in The Wall Street Journal? If you have reason to believe it's not, just answer that within 20 days hereof, as the statute requires in a non-petition within a year later, 20 days I think is fine. And it shouldn't take longer than 20 days to admit or deny or provide for the answers.

~~As~~ pursuant to the CPLR 3123, I'm granting both motions to the extent it's compelling only request Number 10 to be answered. And striking the rest of the notice to admit which need not be answered.

MR. DANTOWITZ: Thank you, Judge.

THE COURT: You are welcome. Let's move on.

Off the record.

(Whereupon, there is a discussion held off the record.)

THE COURT: Let's go back on the record.

I think that the next issue we should deal with is waiver. I'm doing it in specific to general order because I think it makes a lot more sense to do it that way. And let's deal

with the issue of whether or not the respondent waived any of the exemptions set forth in FOIL. I believe that the petitioner has propounded that argument and should begin. I know there has been submissions by the parties.

Just to clarify the record, the petitioner has sent a letter dated October 4, 2018 to this Court. In that letter the petitioner alleges that a member of the petitioner went to a summit on September 17, 2018, wherein respondent gave information to the public. Petitioner alleges that approximately 35 or so attendees were there. ~~At that time they --- strike that~~.

Petitioner discussed in great detail the use of facial recognition technology. There were slides. The petitioner representative took photos of the slides that were previously redacted, and they were now in full view in this summit on September 17, 2018.

The petitioner alleges that their representative, Ms. Garvie, was permitted to do so, and as such has waived the respondent's right now to argue that the exemption is still effective.

~~I'll allow counsel to --- let me continue. I apologize~~. Let me just continue with what I received, so the record is clear.

So I received that letter of October 4, 2018. It was accompanied by an affidavit of Clare Garvie. ~~It is~~

dated ~~— strike~~ that. It was sworn to on October 13, 2018. There are Exhibits A through S. And in those exhibits there are copies of the redacted portion, and then below that there's an unredacted portion that was allegedly provided at the summit.

I also have a memorandum of law requiring NYPD's purported waiver which is dated October 29, 2018, which effectively contests that there has been a waiver.

I also have a letter from the petitioner dated October 30, 2018, which I think is essentially a reply to the opposition.

That sets the record straight in terms of what documents this Court has reviewed.

And I reviewed, I actually pulled some of the cases. Again, I apologize for the delay, but I received this only today, so that meant I had a little bit of time to review. I did my best to review, and I actually pulled some of the cases that I cited to you right now and pulled some more based upon what I cited.

So I'll allow counsel for petitioner to argue the waiver issue.

MS. GLABERSON: So it's our understanding of where we stand today, there is only a narrow issue in contest as to the waiver issue. The Department has conceded that it has waived any claims to exemption that identifies to the

slides of which there are now photographs in the record. And that any claims of exemption as to those documents are now waived and those documents will be released in full.

THE COURT: Let me just stop there because I believe the memo did state exactly what counsel just reiterated. So, Counsel, are you going to now provide the specific slides that were redacted within a certain period of time?

MR. DANTOWITZ: Yes, Your Honor, we will produce the 19 slides.

THE COURT: When? Within what period of time?

MR. DANTOWITZ: Within a week.

THE COURT: Within a week? Done.

MS. GLABERSON: That's fine.

THE COURT: Let's move on.

MS. GLABERSON: So the only remaining issue as to waiver, as I understand it, is whether the information that was revealed to the public by the Department at this session and is memorialized in Ms. Garvie's affidavit which has now been memorialized, sworn to and filed publically on the docket in this case, and any information that appears in those, not only the affidavit but also the slides, that also appears elsewhere in the records but is redacted, whether the NYPD has also waived its claim of exemption as to that. And the Center's argument is that it has. And that is a

narrow question.

What this incident brings up is a larger issue about the implacability of a nonroutine techniques and procedures to the exemption, and whether the Department has appropriately asserted it here. And whether Your Honor can look to the Department's treatment of its own information and behavior in this case to understand more clearly whether this technique is routine, and whether the Department sincerely believes that revealing information details about it and its functioning would cause any issue to the effectiveness of the technique.

So that's a larger issue that is brought up by this incident. And we think it's the more important one.

As to the waiver question, we think the law is clear. And my reading of the Department's memo does not dispute this. That was the same information that appears in these documents, appears in the records elsewhere, that waiver also applies. So my understanding is it will continue with the argument as to the nonroutine techniques and procedures to the exemption but I --

THE COURT: No, I don't want to get there yet. I want to first deal with the waiver issue because, quite frankly, if there is a waiver, that really ends our discussion at least for that narrow exemption. And, quite frankly, that's the bulk of it. That would narrow our view

considerably, that would the best way to describe it. I think it would take us the rest of the day to be finished if that exemption was removed.

MS. GLABERSON: So the information that was revealed during the summit, that was revealed to a mixed group of professionals, industry personnel, academics, including my client, revealed an immense amount of detail about the functioning of the NYPD's face recognition system. It revealed what features on the face they just look at when they compare photographs. They reveal the hours of operation and location of the facial identification information, facial identification information that had previously been redacted, the number of personnel that work there, and information that was previously redacted, techniques, specific techniques of photo editing and creating generated images to search against the face recognition system, which in our view it's highly problematic and important vital information for the public to know to argue against to help the public assess these risks of misidentification and misuse of face recognition technology.

So details of specific and vital information was revealed to this group, a group that by virtue of their positions and their resources were able to pay the fee to enter this conference.

The Department, as I stated earlier, comes into this court and argues that the public should not have access to this very same information because they argue, you know, the sky will fall. But when faced with a group that has the resources, again same issue, has the resources to pay for access, the Department sings a different song on that concern about the face.

So I think I'm pleading into a larger issue here, but our argument is that where any of this information appears in the records, these claims of exemption are waived, and then we have a larger issue of what this means for the Department's assertion of the nonroutine techniques and procedures exemption.

THE COURT: Counsel, in opposition.

MR. DANTOWITZ: Thank you, Your Honor.

Under FOIL it's clear, they're not mandatory, that's clear from the case law, and it's also clear from the case that we cited in our papers. There was a recent decision Luongo, L-U-O-N-G-O, which the Department very clearly was permitted to assert an exemption regarding certain information but not -- but could disclose it with respect to others. And the court in that case upheld by the First Department said that there was no waiver of the general exemption. And that's the case most directly on point here.

In terms of the analogous federal cases, which again is not disputed, is at least helpful, if not applicable in this case.

In order for there to be a waiver, the petitioner, it's the petitioner's burden, and again it's an extremely high burden to recognize that, it's a high burden. The petitioner must demonstrate that the specific information that was disclosed was that which was being withheld.

Here, except for the PowerPoints, there is nothing. All there is, is Ms. Garvie's statements as what she said somebody said. We don't know that those statements are accurate. The Department doesn't have to confirm whether they're accurate or not.

So, Your Honor, the petitioner falls, again, falls short in satisfying the waiver, it's their burden on the waiver to show that those statements that are in Ms. Garvie's affidavit were previously revealed and previously disclosed.

Again with respect to the PowerPoints, specifically the PowerPoints, that's fine, because there's proof. There's the PowerPoint and there's the different redacted version of the PowerPoint, that's clear. But there's no indication, the petitioner has not presented any evidence. And whatever is in those PowerPoints has also been redacted elsewhere. Again, that's their burden, and the case law

makes that clear.

And with respect to you know -- so the first prong clearly is not met here.

There is also, I mean I call Your Honor's attention to the case we cited in our brief, the Muslim Advocates case which is a case from 2011 from the District Court in Washington, D.C., where it says that the FBI disclosure started investigations and operations by the civil rights groups and civil liberties groups during the two-hour meeting was not at all a disclosure.

So I question even whether the disclosure that was made at One Police Plaza to a group of only 35 people was in fact public disclosure. The only reason it became public was because Ms. Garvie put in an affidavit, not because we put in an affidavit. We didn't disclose it publicly, she did.

So to that extent, Your Honor, again we think that the petitioner has not met their burden of showing why we're here. What they are trying to suggest is that by somehow disclosing certain specific information, which we agree we waived, that being the PowerPoint, that somehow we waived either information that might be elsewhere, or their larger point which they -- that that specific waiver now creates a general waiver of our ability to assert the exemption in whole.

And that, Your Honor, isn't supported by the case law. The petitioner hasn't cited any case law to that effect, and we would request that that application be denied.

THE COURT: Counsel, you get the last word.

MS. GLABERSON: That's fine. A couple of points. One is that counsel continually both in the papers and here today misrepresents the Center's argument, sets up this straw man then spends his time battling it.

What the Center argues is not that by revealing to the 35 people that the Facial Identification Section is located where it's located, that the Department has waived its ability to claim an exemption overall.

What the Center has argued is two things, that the specific information that we have pointed to, we have described it specifically and shown Your Honor the exhibits in which its contained as well, is available in a public record and anywhere that that specific information that is memorialized and contained in a publicly available record, that that information wherever it appears in these records claims of exemption are waived as to that.

THE COURT: Limited to those 19 slides?

MS. GLABERSON: I'm sorry, Your Honor?

THE COURT: Limited to those 19 slides?

MS. GLABERSON: No. The information contained in

the slides where that same information appears elsewhere and the information contained in Ms. Garvie's affidavit memorializing what was told, what was presented to this group by Detective Markiewicz at this section. And addressing counsel's --

THE COURT: I need you to clarify what you just meant. Are you arguing, let's say for argument's sake the hours of operation is one of the slides, let's say it's in a different document that's not part of the slides, you want that information; is that correct?

MS. GLABERSON: That is one aspect of the case, true.

THE COURT: I'm just trying to be discreet and specific as to what you're arguing because I'm not getting the full extent of your argument. Are you then extrapolating and arguing that because you gave the hours of operation you now have to give me more documents not related to the hours of operation or it's only connected to the hours of operation, and then we could do the similar arguments for other 18 slides.

MS. GLABERSON: So let me attempt to clarify.

THE COURT: All right, please.

MS. GLABERSON: So there is information contained in these slides. For instance, I would just open to slide Number 11, Exhibit C. Numerous images are always extracted

from videos to obtain the best possible images for a facial recognition search. That's one example.

THE COURT: Where numerous images are obtained, that's what you're arguing about?

MS. GLABERSON: Are extracted from videos, that is a piece of information.

THE COURT: Okay. And that's a general proposition, fine.

MS. GLABERSON: That's a piece of information, where that information appears, the waiver that the Department has conceded is undertook. That waiver of slides to anywhere that specific information appears, anywhere in these records. So this is why continuing an in-camera inspection regardless of the outcome here today is vitally important we think.

THE COURT: So you are limiting it to the information that's in the 19 slides, which would then be disclosed in other documents that the respondent has, but only the information that's limited there would then cut across to the other documents, and that would make those further documents disclosable. But you are not saying in general everything is disclosable because of it?

MS. GLABERSON: So the dispute is about whether this is limited to the slides.

THE COURT: Correct.

MS. GLABERSON: Or includes the information that Ms. Garvie memorialized in her affidavit. That's the dispute as to waiver.

THE COURT: That is not sufficient. What do you mean "that Ms. Garvie memorialized in her affidavit"? I don't know what that means. Showed a lot of things.

MS. GLABERSON: If I can go back to Ms. Garvie's affidavit.

THE COURT: Fine.

MS. GLABERSON: Let's select an example.

THE COURT: One second. Let me just get it. Okay, I have her affidavit.

MS. GLABERSON: So for instance, I don't know off the top of my head if this is the best example, but paragraph 11 of Ms. Garvie's affidavit, she documents that the group was told that the database contains approximately 9 million photographs, includes not only all NYPD arrest mugshots, but also all juvenile arrest mugshots, photos submitted as a part of pistol license applications, and photos the NYPD has related to desk appearance tickets that it's issued, and the operation of the high intensity drug trafficking area.

If there is evidence in the records that this exact information is redacted throughout the records, the sources of the photographs that make up this database and expose

over the 9 million New Yorkers to the reach of the NYPD's face recognition system, our argument is that where that information that was disclosed to this paying group of summit attendees with seemingly no concern for what they would do with the information, that any claim of the exemption as to that information also gets waived, and that's separate from our larger concern about the exemption as a whole.

THE COURT: I'm glad you picked that example. Now you've explained what you're talking about. You're telling me that you're seeking to obtain any oral information that was imparted by the respondents in that summit even if it was not in the slide?

MS. GLABERSON: Correct.

THE COURT: So it doesn't necessarily have to be a photograph or a slide, any information that was revealed in the summit is subject to waiver?

MS. GLABERSON: That we memorialize here, yes, we think --

THE COURT: Now you said it clearly.

MS. GLABERSON: And we think that the case law supports that.

THE COURT: I thought you were saying that. I wanted to make sure there was a record. You are not only seeking the specific information that was recorded in the

slides, the 19 slides, you want any information incapsulated and revealed at any time during the summit meeting with the respondent?

MS. GLABERSON: Yes, as memorialized in Ms. Garvie's affidavit.

THE COURT: Thank you. Now I see.

MS. GLABERSON: And we believe that we have pointed this Court to specific information, so paragraph 11 is one example. And that it has been revealed publicly by the Department with no concern for how that information would be limited or what the attendees would do with it. And we have supplied the Court with a publicly filed document containing that information.

The problem is some of the cases that the Department relies on was that the plaintiffs had taken some notes, but they weren't able to point to specific information that had been provided. They weren't able to point to a publicly available memorialization of that information. And the Court said that wasn't sufficient.

What we have here is a much more complete record. We pointed this Court to specific information that was disclosed by the NYPD, and that that information, any claims of exemption as to that information now are waived.

THE COURT: Can you point to any case wherein any court anywhere has ever permitted such a waiver to occur? I

didn't see one case cited where any court in the state, whether it be a state court or a federal court, as a matter of fact, they said the burden was so high, it's a double burden. And even where it was provided to certain attendees, let's say the FBI case which is, I think you just stated it, the Muslim Advocates versus the United States Department of Justice, 833 F.Supp.2d 92, a 2011 case. The court found that that was not a public record.

MS. GLABERSON: So again that states the example that I was just describing, that the plaintiffs have not provided specific information and not able to point to specific information.

And the other issue in these cases that we don't have here is the government agencies that had done this, had revealed information to groups or other individuals, had done so out of necessity. And this is a very different situation. For the CIA to go to a reporter and carefully reveal information to protect sources and methods to ensure that that reporter who they had learned was about to publish a case or publish a story, it would reveal something that the CIA would not want to reveal. That's a very different situation than the NYPD going to a conference without making any efforts to ensure who is present, without making any efforts to secure the participants' cooperation and not disseminating this information, knowing full well that

academics whose job it was to publish would be present.

THE COURT: Why is that different than the Muslim Advocates versus United States Department of Justice where the FBI allowed several Muslim Advocates, civil rights and civil liberties groups to chat during the two-hour meeting at the FBI headquarters?

MS. GLABERSON: So they were doing that to get feedback on their policies. There was a purpose to that meeting. Here we have the FBI in a PR campaign. We think that's very different. There was no necessity, no need -- the Department has put forward no need for explaining their participation in this event any further than they waived, yes, we agreed, waived our claims as to these slides.

Their argument is not that they had a necessity to release this information, and therefore it's all still protected. Their argument is we waived it, but they can't prove it.

THE COURT: I think they make a double argument. They state that the specific information has not been imparted and it's not a public record. And they have discretion to disclose or not disclose. They make a multiple argument. They don't just make an argument stating that it has not been disclosed.

MS. GLABERSON: So I don't understand that to be contesting that this information was disclosed, I'll just

say that.

THE COURT: We'll find out in a moment. I think that that's not the case.

MS. GLABERSON: And I'll point as a last comment, I will point the Court to Cottone versus Reno, which is the case for identification that's cited in our submission which says very specifically that we don't have to provide hard copy simulacrum. We did not have to provide a copy to the court of a piece of information that was disclosed. The photographs are overkill, that is not the threshold that we have to meet. So that's all I'll say.

THE COURT: Counsel, I don't want you responding, you will get the last word, but we touched on new information so you should get an opportunity to respond.

MR. DANTOWITZ: Thank you, Your Honor.

It's our position in this argument that this case is exactly like the notes because the petitioner --

THE COURT: Exactly like what?

MR. DANTOWITZ: Notes. What they've presented in the form of Ms. Garvie's affidavit is exactly like the notes that were issued in Muslim Advocates, and it's exactly different than the emails in Johnson, which we also cited in our argument. The reason is because it's the petitioner -- and in Johnson the case there found that the information sought to be for which the waiver was argued was exactly the

same as that, as that which was withheld. And that's a high burden here, Your Honor.

The reason Ms. Garvie's affidavit is like notes, it's because it's hearsay statements as to what she thinks NYPD said or what she reported or what her notes suggested was reported at the meeting.

We don't to have to confirm that, and we are not going to confirm that because to do so we would in fact be to perhaps effectuating our own waiver. And it's their burden as the case and the law makes clear, as Your Honor pointed out it's like a double burden.

They have to show that material -- that they want to be now held and waived is exactly the same as that which was disclosed before. And they can't do it. They just said, oh, it might be there, oh, if it's there, then we're out. Then maybe this was said at the conference. And if it was said at the conference, then you waived it. That doesn't satisfy the burden, Your Honor. It's not specific enough.

Thank you.

THE COURT: Counsel, do you want to add anything?

MS. GLABERSON: (Nodding in the negative.)

THE COURT: You don't have to say anything. I want you to have the last word if you want, okay, if you think that you made your arguments well.

MS. GLABERSON: All I'll say is we believe we have memorialized the specific information that was provided by Detective Markiewicz at this conference to this mixed group of attendees who had no obligation to keep it at all confidential or secret. We point Your Honor to specific examples, for instance paragraph 11, the sources of photographs. We think this information is vital for the public to know, and that there is no reason to continue its withholding.

And I think that can take us to the next portion of our afternoon to discuss the routineness of face recognition and the vast amount of information that we have now that we did not have a year ago when we were here arguing that point.

THE COURT: Off the record.

(Whereupon, there is a discussion held off the record.)

THE COURT: Let's go on the record.

I want to thank the parties for the written submissions, as well as oral argument on this issue of waiver.

I have reviewed the submissions, and I heard oral argument, and I'm ready now to rule on this issue.

There is very little that is written on this issue in the state courts. The one case that respondent's counsel

cited was a recent decision from the First Department, and that is Matter of Luongo, L-U-O-N-G-O, versus Records Access Officer, Civilian Complaint Review Board. The citation is 150 A.D.3d page 13. It's a decision from 2017.

The Appellate Division First Department stated that the prior disclosure of records concerning other officers -- in that case we are talking about police officers.

The Luongo case revolved around the arrest and death of Eric Garner. The Appellate Division held that prior disclosure of records concerning other officers cannot act as an estoppel against objections to releasing the records requested herein.

The Appellate Division First Department found that nothing in the Freedom of Information Law restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions, with or without deletion of identifying details.

This case doesn't help too much, but nonetheless is the latest pronouncement in the area.

The parties have looked to the federal courts. As we all know that our state FOIL, Freedom of Information Law, is modeled after the federal standard, and it is helpful to review the federal cases in order to get enlightenment of the law on any particular Freedom of Information issue. And the parties were rightly guided to the federal court.

The federal court has a high burden that a petitioner must meet in order for exemption to occur. Both parties cited the case which sets forth the standard. The case is Afshar, A-F-S-H-A-R, versus Department of State, 702 F.2d 1125, it's a D.C. Circuit decision from 1983.

In that case the D.C. Circuit held that a FOIA plaintiff bears the burden of proving that the information he seeks is (1) exactly the same (not "substantially similar") as (2) information that is already in the public domain.

This case has been cited approvingly by the Second Circuit courts, Johnson versus Central Intelligence Agency, 309 F.Supp.3d 33. This is a recent decision from 2018. ~~The southern -- strike that~~.

The Southern District Judge, actually Chief Judge McMahon cited approvingly. And the Chief Judge stated: The stringency that is of what quickly became known as the Afshar test for deciding whether FOIA protection for national security information had been waived by the Executive was made clear in another case.

And I won't cite it. But basically she goes through the progeny of cases that emanated in Afshar and has been adopted by D.C. courts, and has been decided approvingly by the Second Circuit.

And the Chief Judge goes through the history citing

to various cases, and goes to another issue of what is a permanent public record.

In the Johnson case the Chief Judge stated that you have to identify with precision the information that is being sought. And the Chief Judge found in this case they were able to do so because it was comprised of emails.

And then went to the information whether or not the information seeks resides in the public domain, he must show that there exists a permanent public record. And the Chief Judge described it as a safe harbor.

And the Chief Judge stated for something to be public, it has to be, in some sense, be accessible to members of the general public.

And the Chief Judge eventually stated that the information did not remain in the public domain and denied the request for waiver.

Let's now define more readily what the public-domain doctrine is. And that is set forth in Muslim Advocates versus United States Department of Justice, a 2011 decision from the U.S. District Court, D.C.

The public-domain doctrine is the paradigm for evaluating the waiver of a potential FOIA exemption. Under the public-domain doctrine, material is normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.

In the case cited the FBI disclosed chapters 4, 5, 10 and 16 of a certain book to members of the general public. It was argued that it can no longer rely on any exemption to continue withholding the requested information.

It was argued the FBI, the respondent agency contended that because the contested provisions of those chapters have not been made part of a permanent public record, the FBI has not waived any exemptions.

In this case the FBI allowed several civil rights and civil liberties groups to view those disputed chapters during a two-hour meeting at FBI headquarters.

The court noted that the attendees were permitted to view and take notes on the disputed chapters for approximately two hours. They were required to return the documents at the end of the meeting. As none of the disputed chapters left the FBI headquarters, the court found there was no permanent public record of disputed chapters in the public domain.

Let's now compare it to our case. The high burden that the petitioner must meet is that the information it seeks is exactly the same. They have not done so in this case. The best they can do is those slides. The notes that were taken and memorialized in the affidavit of Ms. Garvie is insufficient as a matter of law to provide the exemption at this stage.

Just because 35 attendees were there and took notes, nothing other than the slides is exactly the same, and the high burden has not been met.

Indeed, it also has to be in public domain as a permanent public record. This too is not the case where there is a limited summit of 35 people, which mainly was comprised of individuals that were interested in furthering their knowledge on the technology.

It's not in the public domain for those because those releases were limited individuals, whether the person who paid for it or not that makes it not better. It actually shows that only those that could afford to pay for it, $1,700 or so, which I think is probably not a good idea for the respondents, but nonetheless, it shows if you have money, you get information. If you don't, it sets a very bad precedent, but nonetheless would not act as a precedent to release that because 35 well-heeled individuals, entities were able to get that information. It is a terrible policy. And the public was not privy to it. Only those that had paid could be privy to it, and would minimize the effect of becoming in the public domain.

And therefore this Court has found that the petitioner has not met its burden that there will be a sweeping waiver of the exemption.

However, counsel has already conceded that the

information contained in the slides is exactly the same. That cannot be readily denied. And has already conceded that that would be released within seven days thereof.

The foregoing constitutes the order of the Court.

Off the record.

(Whereupon, there is a discussion held off the record.)

THE COURT: Let's go back on the record.

Counsel, we have contempt remaining as one of the issues to be dealt with today. Hopefully we could do that. We have about 20 minutes left of the session. I guess this is petitioner's counsel.

MS. GLABERSON: Can I just clarify something as to the last order?

THE COURT: Yes.

MS. GLABERSON: So there were a couple of issues, one is the information contained in the affidavit. And I'll just note my objection to the ruling as to that.

THE COURT: So noted.

MS. GLABERSON: The information contained in the slides appears elsewhere in the records. For instance, the hours, that's just one example, the hours of the office. So is there -- has Your Honor ruled as to where the information is contained in those slides and those photographs? It is now, you know, it has been waived and that's been conceded,

where that information exactly appears in the records.

THE COURT: So I was ruling on the affidavit. I did not rule on the cross reference, if you will, from those slides to other material. I asked you to argue that, and I heard your argument. I haven't heard opposition yet. I wasn't sure if that's been opposed ~~or~~

MR. DANTOWITZ: It has been opposed for really the reasons it comes down to, they can't just say it appears elsewhere, they have to come and show Your Honor that it appears elsewhere.

THE COURT: Well, why don't we have it in-camera and preferably without prejudice. Let's do the in-camera, if it pops up, we will deal with it then, because he's correct. At this point I have no document that is in front of me that would be subject to that. Unless we can do an in-camera that may be more refocused as to a specific document. And then maybe they will concede at that point in time because it's silly. Let's take the hours of operation, discovery, the hours of operation, if you got it already, it's almost silly.

MR. DANTOWITZ: Right, it's silly, that's what I would say. Actually the information they have, they have, whether it appears elsewhere or not. Unredacting is just an effort --

THE COURT: I choose not to rule on that at this

time. I choose to have an in-camera inspection. I will rule on it at a later time, because I don't want to waste more time. I think it's almost now a silly exercise. If you have it, you have it. If it's out there, it's out there. And it might be the exact same. It is redacting. I can't rule at this juncture without a further in-camera inspection on the argument, I have not ruled on that yet.

MS. GLABERSON: Thank you for clarifying.

So we have two outstanding issues, and one has been lingering for quite a long time. I understood these oral argument days were for the purpose of continuing our discussion of the nonroutine techniques and procedures exemption. So would you like to address that now?

THE COURT: I think you should address the contempt because that's going to take longer. The question is can you stay after 1 o'clock and come back in the afternoon and complete this. I have other matters on, but I will spend a little more time if you want.

MS. GLABERSON: Yes.

THE COURT: I want to try to accommodate you if I can. So far I have done this ~~positively~~ methodically. It took time. You have been here since 10 o'clock. It took me an hour to prepare and to read all the new material and pull the cases, and you were sitting there patiently. But nonetheless, this is not a run of the mill arguments that you made. And I

wanted to give you the careful attention that these issues needed. I didn't want to rule from the bench without further discussion and further review of the record.

So I think the better choice of time now would be to deal with the contempt. I don't think it's going to take too long. The bigger issue of whether or not it would normally take for the nonroutine or routine is the ultimate issue, and it would take longer than 15 minutes, and I'd rather not do that now. Let's deal with the sweet issue of contempt.

Counsel.

MS. GLABERSON: So we set forward our arguments as to why the Department is in contempt, nearly a year ago in December of 2017, Your Honor, we were approaching the one year anniversary of our first argument in this case coming up on November 6th. And on that date Your Honor heard argument and ruled that the Department must return and renew its search for audit records, and Your Honor's order was clear, that the Department must complete that search within 30 days and report back. The Department has failed to do so. And on top of that, the Department failed even to respond to this motion.

THE COURT: There is no opposition to the motion.

MS. GLABERSON: The Department has now 10 months late filed an opposition --

THE COURT: I saw it.

MS. GLABERSON: -- seeking Your Honor to excuse their delay in responding for really no basis, arguing only that counsel having gotten this case in May, five months after the motion was served, five months after his predecessor who had been on the case, for approximately five months had the case, that he neglected to realize there were no opposition records filed. There is no electronic docket. It has been available at all times.

And we appeared twice. And in counsel's first appearance on this case, the transcript shows that he was aware at that time that the Department had not filed a response.

So we talked earlier today about the CPLR and what it allows Your Honor to do. But what it requires before Your Honor can exercise your discretion in excusing delay, it requires the person seeking an excuse to provide good cause.

And in this case the Department has not provided any good cause. And we think we documented that quite clearly in our papers. I won't go into more detail.

And the Center by the Department's delay in responding has been prejudiced. Throughout this year of this proceeding, the Department has never fully answered the question of what it has done to try to search for and

produce records in response to the Center's request for audit records, has never fully responded to that question.

As of June of this year, the Department put in yet another affidavit of Inspector Courtesis saying only, we understand Your Honor has ordered us to look for this, to the extent it exists, we'll let you know.

That is not a sufficient response. Your Honor ordered them to do this in November of 2017. We are now, tomorrow it will be November of 2018. It has been a year. And the Center has a right to this information. FOIL provides rights to information.

So we argue that Your Honor's order in November of 2017 was clear. The Department has been in contempt of it for nearly a year, and has not shown on the merits otherwise. And also that their opposition coming 10 months late no excuse should not be considered in opposition to our motion.

THE COURT: Counsel in opposition.

MR. DANTOWITZ: Thank you, Your Honor.

Regarding the timing, yeah, I messed up. I messed up, and my predecessor did as well by not putting in a more timely opposition. I would ask that that not be excused under 2004.

Also ironic here is that in response to my motion to strike the notice to admit, the petitioner said the

return date isn't until today. So you know, what's good for the goose is good for the gander.

THE COURT: Let me just do this quickly. I'm not going to default anyone. It's not the way I operate. I can excuse a late submission, quite frankly, ongoing anyhow. There has been negotiations, there has been in-camera inspections, there has been arguments. While it is woefully late, nonetheless it is here. Whether it's the return date or not return date, I choose not to quibble over procedural arguments.

I want to get to the substance as I have done to the notice to admit, I will excuse any lateness, tardiness, whether it be very late or not as late as to the notice to admit. I choose not to dwell on procedural niceties, and those can and will be excused by this Court, as I want to get to the merits as I have done in every single aspect of this case.

Let's move on to the substance.

MR. DANTOWITZ: Thank you, Your Honor.

Despite petitioner's argument, the issue here is clearly very very narrow. Did Your Honor unequivocally direct that the NYPD to search for and produce records by January 3rd? The answer is no. And in fact petitioner cited nothing in the record from the November 6, 2017 transcript that says so.

I will call Your Honor's attention to my affidavit which was filed on October 4th, which is docket 114. And in fact I point out the Court's statements. And what the Court does is it requests the City to do various things, to find out some information, to report back. It never directs us to produce the records within 30 days. All this is is a series of requests. And the only thing that petitioner can point to is quoted in paragraph 14, which is where Your Honor explains in over 25 pages later in the transcript, as a matter of fact, 35 pages later in the transcript, Your Honor characterized what we will -- what my predecessor had agreed to do as a search -- well, in fact, it wasn't a search. It was a series of requests to find information.

Nonetheless, Your Honor characterized it as a search and said, "How much time do you need to do that? Thirty days?" Mr. Tuffaha responded, "Yes, Your Honor. That should be fine."

Bear in mind, the law of contempt there has to be a clear unequivocal mandate that was in effect. That is --

THE COURT: Have you done it? Have you actually complied?

MR. DANTOWITZ: We produced more documents after that date and recently.

THE COURT: Have you complied with that request even though you believe it to be equivocal?

MR. DANTOWITZ: Yes, Your Honor, we went back, in fact, we submitted -- part of that request was to report to Your Honor on the next conference certain things. We did that. We produced documents after that. And also, part of the response was those supplemental submissions that both parties made regarding our next conference session regarding why it constitutes a routine or nonroutine technique.

So, Your Honor, it's clear here, there's no unequivocal mandate that was in effect that directed us to do what the petitioner told us to do. Again, any ambiguities are to result in our favor, and it's really quite as simple as that.

Thank you.

THE COURT: Counsel, you get the last word.

MS. GLABERSON: Counsel here represents that the NYPD has complied, and that's just unequivocally not true. The Courtesis affidavit that I pointed to and the record in this case shows that the NYPD has never, never completed its search for records responsive to the Center's request for audit records, records of past use of the system.

It made various arguments at various points. They have come into this court and said that there are so many records that might be responsive that this request may be unduly burdensome. They never filed anything to that effect. They've indicated that there are records that

exist, and they've never informed us, they've never informed this Court what they have done to track those records down or produce them.

Counsel is correct that records have been produced. We recently got a disclosure of records that appear to be responsive to the Center's request for procurement records, records that we knew existed and hadn't been turned up in the initial search. But as I referenced, the latest statement as to the audit request was in June, and that statement from Inspector Courtesis says, to the extent there are records we -- I don't have it exactly in front of me right now, but basically, we will let you know. They will be searched for, and we will update the Court.

In June, nine months, or whatever that would be, after Your Honor's unequivocal order that the search be renewed, the NYPD put in a sworn document before this Court that it had not yet completed the request. So to stand here today and argue that it has complied, is simply a lie on the record.

MR. DANTOWITZ: I go back, Your Honor, to what this motion is about, which is whether there was an order in effect on November 6th to do certain things by January 3rd, and it wasn't.

Again, I point to Your Honor's statements that are quoted in paragraph 11 and 12 of my -- paragraph 11 -- and

paragraph 11 of my affirmation and also paragraph 12 is just nothing of the sort.

With respect to audit records, we've been clear we're thinking that the only audit records that exist are instances that are within each file where a request for facial recognition technology was made and the results of that. But there's no report that can be printed out because there's no computer data. All there is are these worksheets that are contained within each file, which we put in the submissions, and we all had to go back and search each file because that was totally burdensome. That's a different argument.

But in terms of what this motion is about, is about what was directed on November 6th, what was clearly unequivocally directed, and that's not here.

MS. GLABERSON: Your Honor can review the transcript and recall the hearing. It was clear. It is clear. And counsel here represents that this, you know, they've identified what the records are and that's the end. But they've never put in an affirmation, they've never provided evidence. Counsel's representations here are not evidence. They have never provided evidence of this search.

THE COURT: Okay, whether or not you believe that it is equivocal or unequivocal, quite frankly, I thought it was unequivocal. There was a direction. I thought you just

needed extra time to do so. I'm going to make an unequivocal direction to do so, that you go through the process discussed in the transcript -- I'm not going back and forth -- and how much time will you need to do so.

Your prior colleague said 30 days, and we agreed. I think ~~it was~~ it behooves you to next time to ask the Court whether or not there was a direction and not ignore it. I'm not going to hold you in contempt. You are an agency of the City of New York. But nonetheless, it was quite negligent. I'll use that word. It wasn't intentional to ignore a court order.

MR. DANTOWITZ: And I apologize for the neglect, Your Honor, without using it as an excuse. I'm only reading a cold transcript. I wasn't --

THE COURT: I'm not blaming you, but now it's unequivocal.

MR. DANTOWITZ: I understand, Your Honor.

THE COURT: 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 was there and had been working consistently in trying to get this done. We had spoken off the record. And I'm quite amazed that you believe there was no order, because we spoke about it in conferences, which was not on the record, it was done in my robing room. I'm amazed that you believe there is no

ongoing order. But nonetheless, I will ascribe it to negligence rather than intentional failure to comply with an order.

MR. DANTOWITZ: Again, Your Honor, I wasn't there. I don't know the colloquy --

THE COURT: But your colleague was there. I have a good memory. Your colleague was there.

MR. DANTOWITZ: My colleague was there. I'm only focusing on what was my --

THE COURT: Again, I don't want to get into procedural stuff. I want to deal with substance. When will it be completed? If you don't have it, put it in an affidavit saying you don't have it. Or you have done a search and you cannot comply because X, Y and Z.

MR. DANTOWITZ: One month.

THE COURT: I'm sorry?

MR. DANTOWITZ: One month.

THE COURT: That would be 30 days from now?

MR. DANTOWITZ: Yes.

THE COURT: Let's make it clear, I'm going to pick a date, today is the 31st of October, so you will have it complete by, can you do it by November 30th, is that sufficient, because otherwise we go into the next week. That's 30 days.

MR. DANTOWITZ: Yes, November 30th, Your Honor -- there are three holidays in there.

THE COURT: Is it unequivocal you are supposed to get it done by November 30th?

MR. DANTOWITZ: Yes, we are just thinking of the time.

THE COURT: I'm not sure if you understand my order.

MR. DANTOWITZ: Ms. Moore just reminded me 30 days, also during that time there are three holidays during that period of time. So if we can have until December 4th.

THE COURT: Any objection to December 4th?

MS. GLABERSON: I guess that's fine. I will look at my calendar.

THE COURT: No, no. That's the time period that she has to complete.

MR. DANTOWITZ: Right.

THE COURT: Not coming back on December 4th.

MR. DANTOWITZ: Right.

THE COURT: And I'm running out of time. It's only a few days more.

MS. GLABERSON: Yes.

THE COURT: December 4th is the final date, please get it done one way or another.

MR. DANTOWITZ: Yes, Your Honor.

MS. GLABERSON: And I would just like to remind counsel to review the transcript. We had discussed the

scope of this request. Your Honor has previously a year ago --

THE COURT: I don't have the time to go over details. Please look at the record. And I will tell you it was unequivocal. It was an order. It wasn't a request, like I would ask you to go get some candy from a candy store for Halloween. This is an order. I don't speak in terms of requests. It's an order.

MS. GLABERSON: The search must comply with the spirit of the request from the record.

THE COURT: I'm not going to speak to this anymore. It's now 1 o'clock. Do you want to come back in the afternoon to complete more stuff?

MS. GLABERSON: Yes, Your Honor.

MR. DANTOWITZ: Yes.

THE COURT: 2:15, please.

Off the record.

A F T E R N O O N S E S S I O N

THE COURT: Let's go on the record.

We are on the record.

I had an off the record discussion with counsel. We have one overarching issue remaining, whether or not the NYPD's facial recognition technology is routine or nonroutine is the remaining large issue.

Counsel off the record stated correctly that we

have been doing this now for the better part of a year, and we only have now more information to supplement the record, that is true.

I have never ruled on that issue. I think the time is right for determination. I'm going to allow brief discussion on that issue, and then hopefully I will make a ruling.

Counsel.

MS. GLABERSON: So since we were here a year ago and had this argument, we've gained quite a bit more information about the way the New York City Police Department uses facial recognition technology, and the way it treats its information about face recognition technology.

So as to the question of routineness, we now have through the records that the Department has disclosed through the presentation that the Department gave at the summit through press reports and its own documents, we now know that the New York City Police Department seems to use facial recognition technology in virtually every case in which there is a question of identity and photographic evidence. They use facial recognition technology in all manner of identification scenarios, ranging from a person at a hospital who can't identify herself, to a man stealing a couple of beers from a CVS, to larcenies, burglaries and murders.

This technology is not specialized to any particular area of inquiry. It is an evidence processing tool that the NYPD uses across all manner of investigations far enough.

We also now know that every arrestee in New York, in New York covered by the NYPD's jurisdiction is subject to facial recognition database. When we were here last November, Your Honor asked me when we were talking about comparison between face recognition and fingerprinting. I didn't have a very satisfying answer to your question, isn't it true every single person who comes through the system gets fingerprinted. I said yes. And you said wouldn't that make it routine. And I said they also get mugshots. And that is true.

And we have put forward ample evidence at this point showing that every mugshot, both of adults and of juveniles, as well as photos from desk appearances, as well as other photo sources, people applying for pistol licenses. They are all contained in a number of the filings of the Department's own records and Ms. Garvie's affidavit. All of these sources of images, and in that way among many others.

Face recognition cannot principally print something in a principled pattern be distinguished from fingerprinting. It's used across investigations with no specification as to the type of investigation.

Every single arrestee is subject to this system. It's being put into the system and subject to searches. The agency clearly uses the system we now know multiple times per day, and it's increasing financially to the use of this system all the time.

So in all of these ways facial recognition is the evidence processing tool that the NYPD uses. Once that evidence is already collected, it is used every day routinely. It touches all persons who have ever had any kind of photo interaction with the New York City Police Department, and that includes every arrestee, just like fingerprinting. And it's used in all manner of crimes small to large anytime it appears there is photo evidence and a need to identify.

So we argue that face recognition is quintessentially just like fingerprinting, routine. And that this exemption for nonroutine techniques cannot be applied.

We also now have information about the way that the Department itself understands this obligation that there is need for secrecy around face recognition. Throughout the course of this case while coming into court and professing that there is this dire need to maintain the secrecy of this information to avoid, you know, would-be bad actors modifying their behavior in response. They have gone out

and spoken to the press, published accounts about their views of face recognition, published details about how it works, and recently gone to a group of paying attendees, and as Your Honor mentioned this morning, giving a different set of information to those with the resources to pay or the power to pay for access than they do for the general public.

And this scenario where we have a technology that's touching people from across the state, all walks of life, every arrestee, and those people are subject to these dire risks of face recognition, of being hauled into court in a criminal matter on the basis of an erroneous identification on the basis of a misuse of this technology.

We argue that it is in the public interest to find that this technology is routine, that this invention cannot be applied here. And that the information that the Department has withheld on the subject should be disclosed.

And just one final note. To the extent Your Honor does not agree, we do still need to continue our in-camera inspection of the records because what we also have seen based on all of this information from the beginning of our in-camera and our most recent this experience at the summit is that at the very least the Department has over broadly exercised the use of the invention, that there is information that is included in these records that regardless of the outcome of this discussion is segregable,

it can be disclosed, and it is not covered by the exemption.

Thank you.

THE COURT: Opposition.

MR. DANTOWITZ: Thank you, Your Honor.

Part of what Your Honor had inquired about in November regarding the case law is what is the definition of nonroutine technique. And sadly the case law is not particularly helpful in that regard. Most of the cases really rely upon, for instance, they talk about -- there's really an outcome here, an outcome-based determination in disclosing the technique would -- disclosing information would reveal methods and capabilities that would allow somebody to undermine that particular investigative technique or undermine the technology that would constitute something that's nonroutine.

I think also in what I think is somewhat overlooked at, she also says that the purpose of -- while it's not to enable persons to use agency records to frustrate any ongoing investigations in addition. So it's more than just the frequency of use. In fact, the courts also say that time-tested, time-tested techniques can be nonroutine.

We all know that NYPD can in bust and buy, bust and buy operations, we all know they use surveillance of some sort. They do undercover investigations. These things are well-known. But the details and the manner of which those

are done make those sorts of investigative tools nonroutine.

Similarly here, Your Honor, as Your Honor pointed out this morning, we know it's public knowledge that facial recognition technology is used. That's not the point. The issue is how is it used, and we are revealing material concerning its use and its capabilities and its limitations, revealing matters that would allow somebody to undermine its efficacy.

The petitioner goes on and on about the frequency with which it's used. Your Honor, they clearly misstate -- they overstate their position. It's not true. What they say is -- and Ms. Glaberson just said it right now, we seem to use it in all cases. There is no evidence of that whatsoever. In fact, it's very clear from our submission, we certainly don't use it in every case.

THE COURT: I need to stop you because I need to get the details. I know that you provided affidavits from various individuals, keep both from them, and tell me in what instance the facial recognition technology is used, what is the import, what is the circumstances, what is the purview of facial recognition technology, and why would it be nonroutine.

I need -- I want you to read into the record affidavits that actually support this. I think you had submitted them. It's been a while.

MR. DANTOWITZ: We did submit, Your Honor. I can tell you. The instances in which it is not used is clearly every complaint and every --

THE COURT: But that --

MR. DANTOWITZ: It's not used in every instance.

THE COURT: Let's go off the record.

(Whereupon, there is a discussion held off the record.)

THE COURT: Let's go back on the record.

MR. DANTOWITZ: Thank you, Judge. I know Your Honor is focusing right now on frequency and the circumstances, but I don't want to neglect the main part of that disclosure -- that the case law it is found where disclosure would undermine the capability. I know we are focusing on frequency now but that section --

THE COURT: I'll allow you to argue both.

MR. DANTOWITZ: Sure -- excuse me?

THE COURT: I will allow you to argue both.

MR. DANTOWITZ: Okay, so let's start at that the first, if you don't mind, and come back to frequency.

So it's clear and there is evidence in all of the City's affidavits, including the Coello affidavit, Courtesis affidavit, McClelland affidavit, which talks about how the documents are complete with details concerning the capabilities and the details, and the operation of the

details regarding facial recognition technology. Certainly disclosing that would allow somebody to undermine its efficacy. This is very unlike fingerprinting, by the way.

And putting aside fingerprinting just for a moment. Although the cases do hold that fingerprints are routine, there is actually no basis for -- no reason for that finding.

I can surmise to one is by the time that announcement was made, fingerprinting was so well-known and so ridiculously used that it was found to be routine.

Incidentally, the Attorney General has said, and this is quoted in our papers, that if modifications or improvements are made to fingerprinting technique and technology perhaps it would no longer be found to be routine.

So clearly whether under different circumstances and perhaps under more modern technology, fingerprinting actually might be found to be nonroutine.

The other thing is that fingerprinting is very unlike facial recognition technology, because the only way to defeat fingerprinting is by mutilating one's fingers. It's not so. That's an unreasonable thing. And nobody is going to go to those lengths for that technology, so that's an obvious way of trying to evade detection. That is not true as to facial recognition technology.

One could surmise about ways that FRT can be defeated, but it's not as easy as wearing -- or it may not be as easy as wearing fake mustaches, that was I think suggested at one point, or perhaps even a ski mask. There may be other ways based on camera angles, types of the quality of a photograph, and other things that could actually defeat a viable -- the creation of a viable image match. But it's not necessarily so that it's so well-known and so obvious somebody could defeat facial recognition technology. That distinction is very much from fingerprinting.

Regarding the secrecy argument that petitioner made, that's certainly a rehashing or a factual way of making up their waiver argument again.

FOIL is permissive, as Your Honor actually ruled this morning on another issue, FOIL is permissive, and we can disclose certain information relating to the use of FRT while still deciding to withhold others.

In this case, obviously the Police Department made certain determinations that the material may disclose would not so undermine the use of FRT.

Petitioner also goes on to say that facial recognition technology is used in every every case, in every case, because they say every arrestee is subject -- and note the language that she used -- subject to FRT. That's very

different than is used in every case.

What they do is the petitioner does create a false equation stating facial recognition technology uses mugshots. Mugshots are taken of everyone who's arrested, therefore, facial recognition technology is used in every case. Well, that's not so. And here we are getting into the frequency of it.

So it's clear from our submissions, and I'll direct your attention now to the Courtesis affidavit of June 6th of this year, June 6, 2018, and the Exhibits A, B that are attached thereto.

And it's clear from those that facial recognition technology cannot possibly be used in connection with every arrest, and certainly not every complaint. It goes without saying that it's not used in every case in which a perpetrator is unidentified. The number of times that facial recognition technology is requested is far far less than the number of times -- it's far far less than the number of times that a perpetrator is unknown to the Police Department.

In terms of its use, again, I'm calling Your Honor's attention to the Courtesis affidavit at paragraph 5. It says, quote, FRT, referring to facial recognition technology, is not used in every investigation in which an individual is unidentified. Rather, the decision to use FRT

is left to the discretion of the investigating detectives and their supervisors.

So if they want to request that FRT be used, they can request it. But they don't have to. And certainly there is no evidence that they do it in every case in which somebody is unidentified. And that's in the first sentence, "FRT is not used in every investigation in which an individual is unidentified."

He goes on in paragraph 6, "In fact, FRT is used in a small fraction of cases."

He goes on and cites the data regarding arrests and the complaints.

He goes on in paragraph 9 to say that facial recognition technology is used not only by the Facial Identification Section, but is also used at times by the Police Department's Intelligence Bureau. And then it says that it's used less than a hundred times a year.

So I think we have -- and it goes on to say NYPD utilizes FRT in a very small fraction of its investigations.

So I think -- there is certainly no evidence quoted in the record that we use FRT in connection with every case. And certainly not in connection even more narrowly in connection with a case where somebody is unidentified. Or even there is no evidence when somebody is unidentified and you happen to have a photograph.

So what the petitioner is suggesting is that we use FRT in all manner of cases, and they cite specific examples. Well, Your Honor, it would be mistaken if Your Honor were to infer from that specific -- those specific uses of FRT to generalize that we use it in every case. There is just no evidence.

Clearly we use it in certain cases. The petitioner cites certain examples. That's fine. I won't deny that we use it in certain examples. I'm not going to stand here and deny that we use it in those particular examples, because we use it. It makes sense to use it. But that doesn't mean we use it all the time.

Petitioner goes on to call facial recognition technology as an evidence processing tool. I believe in certain cases they make a distinction between evidence processing and evidence gathering.

That distinction is found nowhere in -- FOIA permits -- I couldn't find it in FOIA, jurisprudence, because it doesn't exist. It's a misnomer, Your Honor.

In fact, in certain facial recognition technology, yes, it processes evidence, but it also gathers evidence, because by comparing a photograph to a known sample, it gathers evidence as to whether a particular person is a perpetrator or who a particular -- who perhaps a missing person might be. To suggest that it's evidence processing,

and that's the distinction, and that's what matters here, is just no basis for making that sort of distinction.

Again, we would suggest that there's -- that the key here for Your Honor to determine is based on thinking its progeny whether disclosure of information would undermine the use of facial recognition technology, and on that definition, plus it's infrequency of use, plus the fact that FRT is used by a specialized unit, by individuals who are specially trained on specialized technology.

Perhaps one day FRT might be considered routine, but even as most -- as recently as 2017, even in one of the exhibits cited by petitioner which is Exhibit T, which is an article from Forensic Magazine says, although facial recognition technology has been around for years, it's still considered an open and coming technology.

So, yes, it may be used, and in fact its use may be increasing year by year, but it's not used to the point now where we can confidently say, confidently say that it's routinely used.

Again, disclosure would undermine its use, and the frequency with which it's used should not be a consideration. It's not sufficient to justify a finding that this is not nonroutine.

Thank you, Judge.

If I may, one other thing. Just bear in mind, Your

Honor, that we also have other exemptions to much of the same thing.

THE COURT: I'm not dealing with this now.

MR. DANTOWITZ: I'm not going to argue --

THE COURT: You're not waiving your right with respect to the other exemptions.

Counsel, you have the last word, and then I'm going to rule.

MR. DANTOWITZ: And Your Honor --

THE COURT: I'll give you, Counsel, an opportunity. I won't cut you off.

MS. GLABERSON: I'll just start by reminding everyone that it is the City's burden -- it is the Police Department's burden to show that the material falls squarely within the exemption. And while counsel relies heavily on the Courtesis affidavit for good reason because it is the only substantive piece of evidence that the Department has put forward to date.

That affidavit provides only conclusory assertions. It does not provide information on which this Court can base a decision to find that facial recognition is the nonroutine technique such that all information withheld is subject to the exemption.

First, I'd like to focus on comparison fingerprinting for another moment.

So counsel attempts to distinguish fingerprinting, and they've done this throughout the case, but provides no principled basis on which to do so. So, again, when we come back to the issue of whether fingerprinting can be evaded in some way. And for some reason the Department cannot get their mind around the fact that an individual can wear gloves, it isn't easy, there are obvious ways to avoid fingerprint detection, and yet that does not in and of itself make fingerprinting a nonroutine technique.

Similarly, the Department has put forward assertions that there are ways that individuals could evade detection based on face recognition if the information in these records were revealed. But the records that have been revealed and the absolute absence of any plausible basis for this or plausible argument on this count in the evidence that the Department has put forward, shows that this is -- it's really just another conclusory assertion. The Department has not supported its argument on this -- on this count.

Of course there are ways that individuals can avoid having their photograph taken. And Mr. Courtesis attempts to confuse the issue saying that, for instance, people could learn how to make alters to hide their facial features or how to avoid certain angles from the camera's focal length.

Well, the Center's request has not asked anything

about cameras or where they are or what focal length. And from what we have seen from the records so far that information is nowhere in here. And were we to come across that during our in-camera review, we could have that discussion. But that in and of itself does not establish that there is some way that knowing the safeguards, the checks, the standards, the training, any limits at all that are placed on how this Department can modify, play with, substitute, focus on images, how that would at all allow someone to evade detection.

What we have seen in the slides that we discussed this morning is that, for example, the Department felt very comfortable revealing to the attendees, paying attendees that an open mouth might make a photograph more difficult to pass through the system, but that they Photoshop, the mouth appears closed, rotate faces, and now they're able to use the photograph.

So the records that have been provided thus far undercut these conclusory assertions completely.

Now, as to fingerprinting and this discussion of frequency, again, this is another instance in which the Department sets up a straw man to battle and does not confront our argument directly. No one has ever argued that either face recognition or fingerprinting is used in every case. That would be a waste of resources. Where identity

is not an issue, of course, police do not ask for a fingerprint search to try to identify an unknown individual.

What the Department tries to do here is both confuse the numerator and confuse the denominator of the fraction it hopes Your Honor considers. We're not talking about every arrest, every complaint, every allegation of a crime in New York City. We are talking about, is this technology specialized to a specific purpose, or is it used routinely, is it used in all manner of investigations with no limitations, is it touching all sorts of New Yorkers. I will refer back to our conversation in November. Fingerprinting is ubiquitous in the Department's own words in one of their submissions. But they fail to distinguish why, why is fingerprinting ubiquitous if facial recognition is not. It's because every arrestee is fingerprinted. But that same fact is true of fingerprinting. There is no way to print in a principled way to distinguish these two.

So anyway, I'll just return to, it is the City's burden and in the case of -- one, its insufficient evidence. The Center, on the other hand, provided multiple affidavits from Ms. Garvie regarding information. We've attached examples of information that appear in the records showing that face recognition is integrated into the arrest booking system right along with fingerprinting, that based on the Department's own records it's used right along with

fingerprinting, it is used with every arrest that the Department has revealed to the summit attendees that all arrest photos, all juveniles, all desk appearance tickets, all of those sources of photographs are made subject to the system.

And that the slides show that there is no specialization to this technology. It is used in petty larcenies like stolen beers from CVS, it used in non-criminal identification, non-criminal matters, and it is used throughout the City's -- the Department's work. In that way this technology is very different from, for instance, the manual in Fink. We all keep returning to that. The Court made a distinction between specialized procedures for a specialized type of investigation, nursing home investigations. And specifically ordered that certain pages be disclosed that cover techniques that will be used in any investigation.

And that's what we have here. We have a technique that does not allow the City to do anything it couldn't do before in terms of comparing an unknown photo to known a photo, it just allows them to do it more quickly, it presents serious risks, and it does not at all specialize in the way that Fink is contemplated.

So we ask that Your Honor find that face recognition is routine, and order that the Department not be

permitted to assert the exemption.

THE COURT: Thank you very much.

I'm not going to ask for further arguments. This has been going on for almost a year now. I think it's time for a decision on the open issue.

Let's just first discuss the standard. Counsel for petitioner is correct, the burden is squarely on the ~~petitioner~~ respondent to show an exemption as to records under FOIL are to be disclosed, unless it meets the enumerated exemptions under FOIL.

That is the straightforward standard. I think we all know that. Anyone that mixes up the standard is subject to reversal.

So the standard is the ~~petitioner~~ respondent has the burden --

MS. GLABERSON: Respondent.

THE COURT: I apologize.

The respondent has the burden, the agency, to come forward that the exemption applies. The petitioner has no burden whatsoever in showing the exemption.

Here the exemption is under Public Officers Law section 87(2)(e)(iv), exempted records are compiled for law enforcement purposes that would reveal nonroutine criminal investigative techniques or procedures.

I'm not addressing any other exemption at this time. This is limited to that. We will engage in further

discussion/argument as we had in the past with regard to anything else that remains, and quite frankly, there is not much more left. This is really the crux of the issue.

The latest case that I had researched came down in 2016. There are others that came up in the past.

The matter of Grabell, G-R-A-B-E-L-L, versus New York City Police Department. In that case petitioner filed a FOIL request with the NYPD seeking documents pertaining to the Z-backscatter vans, B-A-C-K-S-C-A-T-T-E-R. Those vans were essentially mobile X-ray machines that could penetrate other vans and vehicles and can see through it.

The petitioner sought reports of past deployments of the vans that were not related to any ongoing investigations; policies, procedures and training manuals regarding the vans; records sufficient to disclose total number and aggregate cost of the vans purchased by NYPD; tests or reports regarding radiation dose or other health and safety effects of the vans.

The Supreme Court granted the FOIL request. There was an appeal by NYPD to the Appellate Division. The Appellate Division reversed.

~~The court stated -- strike that~~.

The Appellate Division stated that the court erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials,

aggregate cost and total numbers of the vans.

The Appellate Division cited to the Matter of Asian American Legal Defense and Education Fund versus the NYPD, 125 A.D.3d 531, First Department, leave denied, 26 NY3d 919 of 2016, held that this exemption applied, ~~which was the~~ -- it revealed a nonroutine criminal investigative techniques or procedures.

This is not the same as the Z-backscatter vans, ~~another~~, but nonetheless that is the standard.

I'm not going to cite any more cases because none of the cases really are on point. There was really no case that has been cited that specifically touches upon this new technology, facial recognition technology.

In support of the exemption, the respondent sets forth the affidavit of Joseph Courtesis.

Off the record.

(Whereupon, there is a discussion held off the record.)

THE COURT: Back on the record.

Mr. Courtesis is an inspector assigned as the commanding officer of the Real Time Crime Center -- the Real Time Crime Center, I'll call it the Center -- oversees Facial Identification Section. The affidavit is sworn to on June 6, 2018.

In paragraph 6 of that affidavit, Mr. Courtesis

opines and states that facial recognition is used in a very small fraction of cases. According to Mr. Courtesis, there were over five and a half million crimes reported to NYPD between 2006 and 2016, approximately half a million crimes per year.

During 2015 the facial recognition technology, we will call it FRT for short, as everyone has used that acronym. So FRT had been used only 3,430 times in 2015.

In paragraph 7, Inspector Courtesis provides the statistics from 2011 to 2016. The request went from 87 in 2011 and populated to 4,763 in 2016.

In paragraph 9, Inspector Courtesis states that only the NYPD Intelligence Bureau has full access to FRT. And that the bureau utilizes FRT in less than a hundred searches per year.

There are other instances in which FRT is used by other units but that statistic is not available.

In paragraph 10, Inspector Courtesis states that the equipment is specialized, and there is a specialized skill ~~test~~ to perform FRT. The investigators are trained to use the FRT system in highly sophisticated ways, which he did not describe, of course, it may reveal the FRT's search techniques and capabilities.

Inspector Courtesis in paragraph 12 thereof argues that revealing the technology would allow individuals to

alter or disguise their facial features to avoid detection, and how to avoid certain angles in a camera's focal length to decrease the chance of detection.

Inspector Courtesis concludes that disclosure of such information would reveal specific investigative techniques that NYPD uses to obtain initial population of potential matches and what specific techniques are used to narrow the list of possible match leads. A would-be criminal would learn about the sources of images, public or otherwise, that FRT is able to cross-reference in performing facial identification investigations.

He concludes that it would be detrimental to NYPD's efforts to investigate reported incidents if NYPD were required to reveal detailed information about the FRT system and all its capabilities.

Petitioner argues that facial recognition technology, FRT, is used in every case, from Alzheimer's patients that were lost to petty crimes of beer being stolen from CVS, larger crimes, unfortunately, burglary and murder, that every arrestee is subject to facial recognition database, every mugshot, every juvenile, every pistol license is subject to FRT.

Petitioner equates the FRT technology to fingerprinting, there is no specification, every single person is subject to search in all manner of crime, small or

large are included.

In the last few weeks petitioner claims that it became more apparent, that it's in the public's fear, it's known to the press or published details in the infamous summit that occurred in September of this year, which I need not go into detail. We had plenty of discussion previously.

This Court finds that the respondent has met its burden, that facial recognition technology, FRT, is specialized versus routine.

Let me explain. It is now apparent that fingerprinting, everyone knows how it is used, everyone knows its capabilities, everyone knows its limitations.

FRT has not come that far yet. While it may occur in the future, I'm not sure if next year or the following year, most of the public including the petitioner don't know how exactly it's deployed, its capabilities, its limitations.

That is the investigative tool that the NYPD uses to stay ahead of potential individuals that commit crime. ~~It is something that has been -- strike that~~. FRT has been utilized only in a few cases. While it may have been used to identify an Alzheimer's patient, so what. I think that's a proper allocation of resources to help society.

Why it was used to track down a petty larceny of an individual that stole beer from CVS.? It's a mystery to me

of one isolated incident where it was used for a petty crime, does not mean that the entire FRT technology must be disclosed.

It is a valuable resource in the ~~analogy~~ panoply of resources that the NYPD utilizes to keep us safe. The technology is not routine. It is specialized. Only a certain unit within the NYPD is capable of doing it. It requires significant training.

It is limited in scope, as Inspector Courtesis has elicited accordingly in his affidavit, it's simply not routine.

Moreover, as stated in the Matter of Grabell, the disclosure of records related to FRT would reveal nonroutine criminal investigation techniques or procedures.

I need not get into whether or not they can evade detection or not.

This Court has squarely held that it is specialized and not routine. Therefore, the exemption is valid.

We will continue discussions at a later date.

Speak to my clerk about a date to continue the discussion for any other exemptions. I'll give you further a date, and that should close out the analysis of this case. Obviously this has to occur after the December 4th date because we have to give the respondents an opportunity to complete the search. And I'm hoping we can resolve this.

So if you have to go in the afternoon like here, we will be able to complete as much as possible.

Thank you for your time.

Please order the transcript.

* * * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

Maria E. Rivera
Senior Court Reporter

SO ORDERED:

4/3/19