

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

----- X

In re Application for a Judgment under Article :
78 of the Civil Practice Law and Rules by :
:
SUSAN CRAWFORD, :
:
Petitioner, :
:
- against - :
:
NEW YORK CITY DEPARTMENT OF :
INFORMATION TECHNOLOGY AND :
TELECOMMUNICATIONS, EMPIRE CITY :
SUBWAY COMPANY LTD., AT&T CORP., :
TIME WARNER CABLE INC., AND RCN :
TELECOM SERVICES, LLC, :
:
Respondents. :

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Index No.: 157002/2015

**MEMORANDUM OF LAW
IN OPPOSITION TO THE PETITION
AND IN SUPPORT OF THE AMENDED ANSWER**

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Respondent Empire City Subway Company (Limited) (“ECS”), by and through its attorneys, Greenberg Traurig, LLP, respectfully submits this Memorandum of Law in opposition to the Article 78 petition of Susan Crawford (“Petitioner”) and in support of ECS’ Amended Answer.

PRELIMINARY STATEMENT

By this Article 78 proceeding, Petitioner seeks disclosure under New York’s Freedom of Information Law (“FOIL”), N.Y. PUB. OFF. LAW §§ 84-90, of the same kind of information about underground telecommunications facilities in New York City (the “City”) that Supreme Court, New York County, has previously ruled should not be released because disclosure “would make [the City’s] fiber optic network more susceptible to terrorist or other attack.” *Matter of Crawford v. N.Y.C. Dep’t of Info. Tech. and Telecoms.*, 43 Misc. 3d 735, 743, 982 N.Y.S.2d 725, 731 (Sup. Ct., N.Y. Cty. 2014), *app. dismissed*, 136 A.D.3d 591, 25 N.Y.S.3d 595 (1st Dep’t 2016) (“*Crawford I*”). Specifically, Petitioner seeks an unredacted version of a spreadsheet (the “Spreadsheet”) that shows the location, across the City, of conduits used to carry underground communication cables. While in *Crawford I* Petitioner sought that information in the form of a map, here she seeks the same information in the form of a spreadsheet. In whatever form the information is presented, the geographic location of conduits remains highly sensitive information that if disclosed could make them more susceptible to terrorist attacks and endanger the lives and safety of persons living, working and visiting in New York City.

ECS’ conduit system is a network of manhole-to-manhole connections that run underground throughout Manhattan and the Bronx. The manholes serve as access points and connection hubs between the conduits and provide the ability to route cables in various

directions. The ECS conduits contain ducts that house and protect copper, coaxial and fiber-optic telecommunications cables. These cables are used to provide voice telephone, cable television and internet services to millions of residents and businesses in the City, as well as critical government agencies, such as the New York City Police Department, the New York City Fire Department, the State and Federal court systems, and the Federal Reserve Bank of New York. Importantly, government and law enforcement agencies rely on this conduit infrastructure to communicate vital information to the public, respond to public emergencies, and perform other essential services. The cables also carry highly sensitive commercial information, including, but not limited to, transactions between banks and other financial institutions. In short, the conduit system constitutes critical infrastructure and ensuring its security is essential for the overall safety of New Yorkers.

Indeed, although manhole locations are generally visible to the naked eye, disclosure of the manner in which conduit is routed between manholes, and the specific manholes through which cable passes on the way to a particular location, would make the City's vital telecommunications infrastructure far more vulnerable. It would enable terrorists to identify locations for attacks that would maximize the impact on communications generally (i.e. by targeting manholes through which the greatest number of conduits pass), and give them a tool for planning attacks against specific, high-interest targets (e.g. the Federal Reserve Bank of New York). Such attacks, the Court in *Crawford I* found, could have "catastrophic" consequences. 43 Misc.3d at 742, 982 N.Y.S.2d at 731 (internal quotation marks omitted).

Thus, the information in the Spreadsheet is exempt from disclosure pursuant to at least two provisions of FOIL: the information technology exemption in § 87(2)(i) and the

public safety exemption in § 87(2)(f).¹ N.Y. PUB. OFF. LAW §§ 87(2)(f), (2)(i). The information technology exemption applies here because disclosure of the Spreadsheet would jeopardize ECS' capacity to guarantee the security of its information technology assets. And the public safety exemption applies because disclosure would endanger the lives and safety of New York City residents and visitors.

Accordingly, the Verified Petition and the relief requested therein should be denied and this proceeding dismissed in its entirety and with prejudice.

STATEMENT OF FACTS

ECS specializes in subsurface engineering and construction services. (Affidavit of Robert F. Connolly dated January 23, 2017 ("Connolly Aff.") ¶ 4.) Since 1891, ECS has held a franchise from the City of New York ("the City") to build and maintain a conduit and manhole infrastructure in the City. (Connolly Aff. ¶ 4.) ECS owns approximately 58 million feet of conduit and 11,000 manholes. (*Id.*) ECS' conduit system is a network of manhole-to-manhole connections that run underground throughout Manhattan and the Bronx. (Affidavit of Michael A. Mason dated January 26, 2017 ("Mason Aff.") ¶ 8.) The manholes serve as access points and connection hubs between the conduits, and provide the ability to route in various directions copper, coaxial and fiber-optic telecommunications cables housed in and protected by the conduits. (*Id.* ¶¶ 9-10.)

¹ Respondents AT&T Corp. ("AT&T"), Time Warner Cable Inc. ("Time Warner"), and RCN Telecom Services, LLC ("RCN") also assert that the information is exempt from disclosure, pursuant to FOIL's trade secret and confidential commercial information exemption, N.Y. PUB. OFF. LAW § 87(2)(d), because the information on the specific conduit routes that they use would constitute a trade secret and confidential commercial information and its disclosure would cause substantial injury to their competitive position. ECS believes that the tenants themselves are in the best position to offer evidence and argument in support of that contention.

ECS leases space in its conduits to various telecommunications, internet access, and cable television service providers, in addition to critical governmental entities such as the New York City Police Department, the New York City Fire Department, the United Nations and the Federal Reserve Bank of New York. (Connolly Aff. ¶¶ 5, 8.) ECS also provides a broad array of services to facilitate the installation, maintenance and protection of underground cables in the greater metropolitan New York City area. (*Id.* ¶ 5.) The cables are used to provide voice telephone, cable television and internet services to millions of residents and businesses in the City. (Mason Aff. ¶ 9.) The cables also carry highly sensitive commercial information, including transactions between banks and other financial institutions. (*Id.* ¶ 11.)

Government and law enforcement agencies rely on ECS' conduit infrastructure to communicate vital information to the public and perform essential services. (*Id.* ¶ 10.) For example, the conduits provide a means for communication between hospitals, police and fire departments, and other emergency responders. (*Id.* ¶ 12.) Therefore, protecting the conduits is essential for the overall safety of the City, its residents and its visitors. (*Id.* ¶ 13.)

DoITT is an administrative agency that administers the franchise agreement between the City and ECS, and provides certain forms of regulatory oversight over ECS within its franchise area. (Connolly Aff. ¶ 6.) In discharging its oversight authority, DoITT, on a regular basis, requests ECS to produce documents, data and other information relating to ECS' business operations and tenants. (*Id.*) Prior to producing documents to DoITT, ECS engages in a rigorous analysis of the documents to determine whether they contain sensitive, confidential or proprietary information. (*Id.* ¶ 7.) If the documents contain such

information, ECS clearly indicates this on the document produced, and asserts its statutory right under FOIL to prevent DoITT's disclosure of the information to third parties. (*Id.*)

Such was the case with respect to the Spreadsheet prepared by ECS that is the subject of this proceeding. When ECS originally submitted the Spreadsheet to DoITT, it advised that the Spreadsheet was exempt from disclosure under FOIL, by conspicuously placing the following label on the document:

This document contains confidential and competitively sensitive information of both Empire City Subway and its tenants. Empire City Subway requests that this information be treated as confidential and proprietary, and that, in accordance with Public Officers Law § 87(2)(d) and 87(2)(f), it not be disclosed. This information is not otherwise readily ascertainable or publicly available by proper means by other persons from another sources in the same configuration as provided herein, would cause substantial harm to the competitive position of Empire City Subway (and its tenants) if disclosed, is intended to be proprietary confidential business information, and is treated by Empire City Subway as such. Disclosure of the information would also constitute a security risk as it could endanger the life or safety of New York City residents and visitors.

(*Id.* ¶ 9.)

On May 9, 2014, Petitioner submitted a FOIL request to DoITT seeking records “concerning DoITT’s regulation of any Internet infrastructure owned or operated by Empire City Subway Company Ltd.” (Verified Petition, NYSCEF Doc. No. 1 (“Pet.”), Ex. A at 1.) DoITT provided a partial response to Petitioner’s FOIL request on November 21, 2014. (*Id.* ¶ 12.)

On January 30, 2015, DoITT’s Records Access Counsel (“RAC”) completed its response to Petitioner and disclosed a redacted version of the Spreadsheet. (*Id.* ¶¶ 14-15.) It shows, for over 200,000 segments of ECS conduit routes in Manhattan and the Bronx, the manholes at the beginning and end of each segment of those routes. (Mason Aff. ¶ 15.) The

specific manholes at the beginning and end of each particular segment are identified only by code numbers (*id.*), and the RAC redacted entries from the Spreadsheet that describe the locations of those manholes, as well as entries that identify tenants that occupy particular segments, including Respondents AT&T, Time Warner, and RCN. (Connolly Aff. ¶ 10.)

The RAC justified her redactions of the Spreadsheet on two grounds. (Pet. ¶¶ 14-15.) First, she redacted certain information pursuant to FOIL's information technology exemption, N.Y. PUB. OFF. LAW § 87(2)(i), because the redacted information, if disclosed, "would jeopardize the capacity of an entity that has shared information with an agency to guarantee the security of its information technology assets." (Pet. ¶ 14.) Second, the RAC made redactions pursuant to FOIL's trade-secret and confidential commercial information exemption, N.Y. PUB. OFF. LAW § 87(2)(d), which exempts from disclosure records that are "trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." *Id.* (Pet. ¶ 15.)

On February 26, 2015, Petitioner submitted an administrative appeal to DoITT challenging the redactions. (Pet. ¶ 16.) On March 12, 2015, DoITT's General Counsel granted in part and denied in part Petitioner's administrative appeal. (Pet., Ex. J at 1.) The General Counsel provided the names of ECS' tenants, but did not identify the locations of the particular conduit routes that each tenant leased. (Pet. ¶ 17.) The General Counsel otherwise affirmed the RAC's redactions on the ground that they were exempt from disclosure pursuant to the information technology exemption, § 87(2)(i), because disclosure would create the same risk as was identified in *Crawford I.* (Pet., Ex. J at 2.) There, the Court found that "disclosure of the precise information on the maps [i.e. the geographic location of the

conduits] would pose a substantial threat and would jeopardize the respondent's ability to 'guarantee the security of its information technology assets.'" *Crawford I*, 43 Misc.3d at 743, 982 N.Y.S.2d at 731. The General Counsel also denied Petitioner's appeal under the trade secret and confidential commercial information exemption, § 87(2)(d), on the basis that "[t]he communications industry in New York City is highly competitive and service providers jealously guard information about their service locations and customers." (Pet., Ex. J at 2-3.)

On July 10, 2015, Petitioner commenced this proceeding seeking an unredacted version of the Spreadsheet. A subsequent motion by ECS to intervene was granted on April 15, 2016 by this Court (NYSCEF Doc. No. 120), which ordered that (1) ECS be added to the proceeding as a party respondent, (2) ECS' proposed verified answer (NYSCEF Doc. No. 58) be deemed its answer, and (3) the County Clerk and Clerk of the Trial Support Office amend the caption to include ECS after receiving notice of entry. (NYSCEF Doc. No. 120, at 3-4.) The Court also granted the motions of AT&T, Time Warner and RCN, which sought leave to intervene, and therefore are now respondents in this proceeding as well. (NYSCEF Doc. No. 119.) On May 5, 2016, ECS filed an Amended Answer. (NYSCEF Doc. No. 131.)

On November 10, 2015, DoITT cross-moved to dismiss the Verified Petition under Section 3211(a)(5) of the N.Y. Civil Practice Law and Rules, arguing that this proceeding was barred on grounds of res judicata and the statute of limitations. By Interim Decision & Order dated September 28, 2016, this Court denied DoITT's cross-motion. *Matter of Crawford v. N.Y.C. Dep't of Info. Tech. and Telecoms.*, No. 157002/2015 (Sup. Ct., N.Y. Cty. Sept. 28, 2016), NYSCEF Doc. No. 134. The Court concluded "that in the case at hand neither res judicata nor the statute of limitations bars Professor Crawford's current Article 78

proceeding.” (*Id.* at 14.) In arriving at this conclusion, the Court did not address the merits of the Verified Petition. (*Id.* at 12.)

ARGUMENT

A. FOIL’s Information Technology Exemption is Applicable Because Disclosure of the Information at Issue Would Jeopardize ECS’ Ability to Secure Its Information Technology Assets

As was the case in *Crawford I*, the Petitioner’s request for the unredacted version of the Spreadsheet should be dismissed pursuant to FOIL’s information technology exemption, N.Y. PUB. OFF. LAW § 87(2)(i). Under that exemption, an agency may withhold a record if its disclosure would “jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.” *Id.* The language of this exemption reflects “concern[] with ensuring the security of information technology assets.” *Matter of TJS of N.Y., Inc. v. N.Y. State Dep’t of Taxation and Finance*, 89 A.D.3d 239, 243, 932 N.Y.S.2d 243, 246-47 (3d Dep’t 2011). The Legislative intent “was to protect against the risks of electronic attack, including damage to the assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency’s electronic data.” *Id.*

The *Crawford I* court found that a “targeted attack” on the conduits and connecting cable networks could place the City’s electronic infrastructure at risk. *Crawford I*, 43 Misc. 3d at 742, 982 N.Y.S.2d at 730. Such disclosure could result in internet disruptions “not only in New York City but also throughout the United States and overseas” as well as impair governmental services. *Id.* at 742, 982 N.Y.S.2d at 730-31. “More numerous attacks on ‘high value cables,’” the Court continued, “could be ‘catastrophic.’ The effects of such an

attack could lead, among other terrible scenarios, to impede the ability of police to communicate and provide security, and to delete valuable data in government and the private sector.” *Id.* at 742, 982 N.Y.S.2d at 731. The Court emphasized that “we are now all much more vigilant to guard against the same, new or different terrorist attacks,” and disclosure of “the precise location of the conduits would make our fiber optic network more susceptible to terrorist or other attack.” *Id.* at 743, 982 N.Y.S.2d at 731.

The circumstances regarding the conduits’ susceptibility to terrorist attacks have not changed since *Crawford I* was handed down nearly three years ago, nor has the risk of such attacks diminished. To the contrary, numerous new terrorist attacks have occurred around the world during that period. It remains the case that disclosure of the redacted contents of the Spreadsheet creates a grave security risk to the City and its critical communications infrastructure. (Connolly Aff. ¶ 12; Mason Aff. ¶¶ 22-23.) That additional information could be used to map with precision the manner in which conduits are routed between manholes, and the number of conduits that are routed to and from specific manholes. (Mason Aff. ¶ 16.) Such information in the hands of a terrorist or anyone seeking to disrupt communications within the City (and also across the United States and internationally) could be used to damage or destroy manholes that host high numbers of conduit segments. (*Id.*) For example, the bombing of carefully-selected manholes hosting hundreds of conduit segments could disrupt voice and internet traffic over a wide area, with impacts throughout the nation and abroad. (*Id.* ¶ 17.) Hospitals, police and fire departments, and other emergency responders, could instantaneously lose the ability to communicate with one another. (*Id.* ¶ 18.) The information could also be used to attack valuable targets such as court houses and financial institutions, leading to the irreparable loss of important and

sensitive data. (*Id.* ¶ 19.) The impact of such a loss on the citizenry, justice system, economy and other segments of society could be catastrophic. (*Id.*)

Accordingly the spreadsheet is exempt from disclosure under § 87(2)(i) of FOIL.

B. FOIL's Public Safety Exemption is Applicable Because Disclosure of the Information at Issue Could Endanger the Lives and Safety of Persons Living, Working and Visiting in New York City

The redacted spreadsheet also should be withheld pursuant to FOIL's public safety exemption, § 87(2)(f), on the grounds that disclosure could "endanger the life or safety of any person." N.Y. PUB. OFF. LAW § 87(2)(f). An agency is not required to prove that a danger to a person's life or safety will occur if certain records are made public. *Stronza v. Hoke*, 148 A.D.2d 900, 901, 539 N.Y.S.2d 528, 529 (3d Dep't 1989), *lv. denied*, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869 (1989). Nor does an agency need to provide a detailed description of the contents of such records, because disclosing the underlying facts contained in the subject records would "effectively subvert the purpose of [the exemption]." *Nalo v. Sullivan*, 125 A.D.2d 311, 312, 509 N.Y.S.2d 53, 55 (2d Dep't 1986), *appeal denied*, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86 (1987). Rather, "[t]he agency in question need only demonstrate 'a possibility of endanger[ment]' in order to invoke . . . [the public safety] exemption." *Matter of Bellamy v. N.Y.C. Police Dep't*, 87 A.D.3d 874, 875, 930 N.Y.S.2d 178 (1st Dep't 2011); *see also Stronza*, 148 A.D.2d at 901, 539 N.Y.S.2d at 901 ("there need only be a possibility that such information would endanger the lives or safety of individuals").

Here, the release of the redacted information on the Spreadsheet could make the underground communications network a more susceptible target for bombing and other destructive acts that could endanger the lives of men and women working in the manholes

and/or near them above ground. (Mason Aff. ¶ 20.) Terrorist attacks in the City are “a real life danger.” *Crawford I*, 43 Misc. 3d at 743, 982 N.Y.S.2d at 730. Thus, disclosure of any detailed information about conduits could place the City at far greater risk of attack and jeopardize the lives of persons located there. Such safety concerns are legitimate bases for upholding the public safety exemption in § 87(2)(f). *See e.g., Ruberti, Girvin & Ferlazzo P.C. v. N.Y. State Div. of State Police*, 218 A.D.2d 494, 499, 641 N.Y.S.2d 411, 415 (3d Dep’t 1996) (disclosure of the troop, zone, and station assignments of police officers could endanger the life and safety of those officers, and was properly withheld); *Rankin v. Metro. Transp. Auth.*, 2010 N.Y. Slip Op. 32161(U), 2010 N.Y. Misc. LEXIS 3829, at *13 (Sup. Ct., N.Y. Cty. Aug. 10, 2010) (denying FOIL request seeking maps and blueprints of MTA’s subways, noting that “subway system is highly vulnerable to terrorist attack” and “disclosure could have potentially devastating effect by making available to potential terrorists highly sensitive material”); *see also Matter of Grabell v. N.Y.C. Police Dep’t*, 139 A.D.3d 477, 478-79, 32 N.Y.S.3d 81, 84 (1st Dep’t 2014) (holding that public safety exemption shields from disclosure NYPD records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of mobile X-ray vans that scan vehicles or buildings for evidence of explosives, drugs and other materials; sufficient showing made by NYPD that disclosure would hamper its counterterrorism operations and increase likelihood of another terrorist attack), *lv. denied*, 2016 NY Slip Op 94764, 2016 N.Y. LEXIS 3827 (Dec. 20, 2016).

Petitioner argues that manhole locations are visible to the public and therefore the information DoITT seeks to withhold “is to a great extent already a matter of public knowledge.” (Petitioner’s Memorandum in Opposition [sic] to Respondent’s Motion to

Dismiss, NYSCEF Doc. No. 61, at 12.) However, Petitioner misses the point. The issue at hand is not the locations of manholes in general (*i.e.*, “Is there a manhole on 42nd Street and Fifth Avenue?”), but rather, which manhole corresponds to which conduit segment — information that could be used to identify and prioritize manholes as targets for terrorist attack. (Mason Aff. ¶ 22.) That information is not publicly available and is specifically exempted from disclosure under § 87(2)(f) of FOIL due to grave security concerns. (*Id.*)

C. This Proceeding is Barred by the Doctrine of Res Judicata and the Statute of Limitations

In denying DoITT’s cross-motion to dismiss the Petition, this Court previously ruled that the doctrine of res judicata and the statute of limitations does not bar the instant proceeding. (NYSCEF Doc. No. 134.) However, even assuming the correctness of this Court’s ruling at the pleading stage, ECS respectfully submits that the res judicata impact of *Crawford I* should be reassessed based on the affidavits that now have been provided by all Respondents. These submissions demonstrate that the unredacted spreadsheet would provide exactly the same information as a map would. Indeed, it is now clear beyond doubt that Petitioner is again seeking information that DoITT previously determined should be withheld, and that determination was upheld in *Crawford I* because disclosure of “the precise location of the conduits would make our fiber optic network more susceptible to terrorist or other attack.” 43 Misc. 3d at 743, 982 N.Y.S.2d at 731. Therefore, the Petition should be dismissed on the grounds of res judicata. (*See* Respondent DoITT’s Memorandum of Law in Support of its Motion to Dismiss, NYSCEF Doc. No. 53, at 7-11.) Additionally, as a part of the Verified Petition seeks review of the same FOIL request Petitioner made in 2012, this

duplicative portion of the Verified Petition should be dismissed as barred by the statute of limitations. (*See id.* at 11-14.)

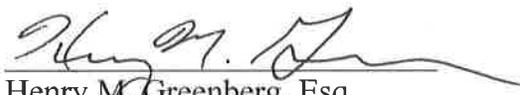
CONCLUSION

For the foregoing reasons and those reasons stated in ECS' Amended Verified Answer, ECS respectfully requests the Verified Petition and the relief requested therein be denied and the proceeding be dismissed in its entirety, and that the Court grant ECS such other and further relief as it deems just and proper.

Dated: Albany, New York
February 3, 2017

Respectfully Submitted,

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