

Index No.: 157002/2015 IAS Part 8 (Kenney, J.)

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

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Application of SUSAN CRAWFORD,

Petitioner,

For Judgment Pursuant to Article 78 of the CPLR

- against -

NEW YORK CITY DEPARTMENT OF  
INFORMATION TECHNOLOGY AND  
TELECOMMUNICATIONS,

Respondent.

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**RESPONDENT'S REPLY MEMORANDUM OF  
LAW IN FURTHER SUPPORT OF ITS MOTION  
TO DISMISS**

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## **PRELIMINARY STATEMENT**

This reply memorandum of law is submitted on behalf of Respondent New York City Department of Information Technology and Telecommunications (“DoITT”) in further support of its Motion to Dismiss the Verified Petition in this Article 78 proceeding, in which Petitioner seeks disclosure of the precise locations of telecommunications conduits under New York City pursuant to the Freedom of Information Law (“FOIL”). As discussed in greater detail in Respondent’s moving papers, this is the second time Petitioner has sought the same information from DoITT, having lost a previous Article 78 proceeding before Justice Hagler, who held that disclosure of the precise locations of conduits “would make our fiber optic network more susceptible to terrorist or other attack.” Crawford v. New York City Dep’t of Info. Tech. & Telcomm., 43 Misc. 3d 735, 745 (Sup. Ct. N.Y. Co. 2014) (hereinafter, “Crawford I”).

In its moving brief, Respondent argued that the Verified Petition should be dismissed in its entirety on the ground of *res judicata*, and that the portion of the Verified Petition seeking the identities of ECS franchisees or customers should be dismissed as barred by the statute of limitations. Petitioner’s opposition papers fail to refute either of these arguments. Instead, Petitioner completely misconstrues the applicable and controlling law and the scope of Justice Hagler’s previous decision, and attempts to distract the Court from the fact that Petitioner is again seeking here the same information Justice Hagler previously ruled DoITT properly withheld.

## ARGUMENT

### POINT I

#### **PETITIONER HAS FAILED TO REFUTE RESPONDENT'S ARGUMENTS THAT THE PETITION SHOULD BE DISMISSED AS *RES* *JUDICATA***

The doctrine of *res judicata*, or claim preclusion, bars future litigation between the same parties on the same cause of action where there is a valid final judgment. Hodes v. Axelrod, 70 N.Y.2d 364, 372-73 (1987). In the FOIL context the First Department has explained that this means that “where a judgment on the merits exists,” the parties may not litigate a claim “involving the same subject matter.” Mays v. New York City Police Dep’t, 48 A.D.3d 372, 372-73 (1<sup>st</sup> Dep’t 2008)(emphasis added)(quoting In re Hunter, 4 N.Y.3d 260, 269 (2005)). Here, Petitioner has wholly misconstrued both the doctrine of *res judicata* and the scope of Justice Hagler’s decision in Crawford I. First, Justice Hagler’s decision in Crawford I explicitly found that “the precise locations of the conduits” could be properly withheld; Petitioner’s misstatement of this holding should not be countenanced by this Court. Second, Petitioner attempts, without valid citations, to limit the doctrine of *res judicata* in FOIL cases to only those in which a petitioner seeks exactly the same documents for a second time. This argument should be rejected, because it is completely unsupported by applicable and controlling law.

#### **A. Petitioner Mischaracterizes Justice Hagler’s Decision in Crawford I and Seeks the Same Information Denied Her in That Earlier FOIL Proceeding**

Petitioner attempts to avoid the application of *res judicata* by mischaracterizing Justice Hagler’s decision in Crawford I and then arguing that she is not seeking the same information that Justice Hagler previously denied her. As discussed more fully below, Petitioner’s arguments should be easily rejected.

In this proceeding, Petitioner seeks “records sufficient to disclose for each year since 2004 the total number of conduits owned or operated by ECS, broken down by the smallest geographic unit available to DoITT (e.g., a zip code, neighborhood, block, or similar defined region).” Verified Petition at ¶18. Respondent has provided a spreadsheet containing various responsive information, but redacted the “from location” and “to location” columns. The “from location” column identifies the manhole location where the conduit originates and the “to location” column identifies the manhole location where that conduit ends. Remarkably, Petitioner asserts that such information would not reveal the precise location of the conduits. This contention is absurd on its face, as such information would permit a user to draw a line on a publicly available map between manhole locations to show the routes of the conduits. This is precisely the information that Justice Hagler already found could be properly withheld.<sup>1</sup>

In Crawford I, Justice Hagler repeatedly expressed concern about releasing information showing the precise location of the conduits. He framed his decision by noting that it was Respondent’s burden to show that “disclosure of the precise locations of the conduits would jeopardize the respondent’s ability to ‘guarantee the security of its information technology assets.’” Crawford, 43 Misc. 3d. at 741 (citing N.Y. Pub. Off. L. §87(2)(i)). In assessing the parties’ positions, Justice Hagler credited Respondent’s statement that “[k]nowledge of the precise location of the conduits would help an attacker disrupt communications and data flowing

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<sup>1</sup> Petitioner’s argument that the manholes themselves are visible to the public (see Opp. Br., at 12) is not germane at this stage of the proceeding. Petitioner made this argument previously, and failed, in Crawford I. See Affirmation of Elizabeth Edmonds in Further Support of Respondent’s Motion to Dismiss the Verified Petition, dated January 15, 2016. In any event, the fact that certain manholes are visible to an observant member of the public does not mean that the precise locations of all manholes and conduits throughout the City have also been publicly released on a list (which they have not). Similarly, Petitioner’s statement that “Anyone with an internet connection can already find this information online” (Opp. Br at 13) is frankly untrue. This statement has also been countered in supporting affidavits from the proposed intervenors. See, e.g., Affidavit of Noel Dempsey, sworn to November 11, 2015 (dkt. no. 18), at ¶¶13-15.

through such conduits.” Id. at 741 (citations omitted). He further explained, “suffice it to say that even a single attack on a remote location [of the conduit] could cause a substantial disruption or interruption of computers that could compromise the ability of government to perform its essential services.” Id. (citations omitted).

After summarizing an affidavit submitted by NYPD concerning the potential devastating harm that would be caused by disclosure of the precise locations of the conduits, Justice Hagler concluded his analysis as follows:

The above allegations, as vividly and clearly enunciated by Sgt. Wingert, which cautions against the release of sensitive information because it may result in an attack on our information technology assets is, unfortunately, a real life danger that we have experienced in a different context but has dramatically affected New Yorkers in so many different and painful ways. While the unforgettable attack on the World Trade Center towers seem not to have been anticipated, we are now all much more vigilant to guard against the same, new or different terrorist attacks. Sgt. Wingert predicts that the release of the precise location of the conduits would make our fiber optic network more susceptible to terrorist or other attack. “[I]t is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies” (American Civil Liberties Union v Dept. of Justice, 681 F3d 61, 70-71 [2d Cir 2012], citing to Wilner v NSA, 592 F3d 60, 76 [2d Cir 2009]). Therefore, this Court will defer to Sgt. Wingert's professional expertise that the disclosure of the precise information on the Maps would pose a substantial threat and would jeopardize the respondent's ability to "guarantee the security of its information technology assets."

Crawford, 43 Misc. 3d at 743 (emphasis added). Thus, Justice Hagler held that Respondent had properly withheld the precise location of the conduits pursuant to N.Y. Pub. Off. L. §87(2)(i). See also id. at 745, n. 1 (“the precise location of the conduits may reveal sensitive information”).

Realizing that Crawford I already held she was not entitled to information concerning the precise location of the conduits, Petitioner asserts that the Crawford I Court did not make a determination as to “all locational information” concerning the conduits, and re-casts

her requests to contend that that she seeks only general information about conduit location (even though such information is not at issue here). Accordingly, Petitioner argues, her requests do not fall within the holding of Crawford I and so, she argues, the instant Petition should not be dismissed. While repeatedly accusing Respondent of misstating Justice Hagler’s holding, it is readily apparent that it is Petitioner who has mischaracterized that decision.

At most, Justice Hagler suggested only that the disclosure of “other responsive documents, even if not in a precise map form, which provide petitioners with non-sensitive and non-exempt general information,” such as “the broader location of the conduits by street or neighborhood,” might need to be disclosed. Id. at 745 (emphasis added). However, such non-sensitive and non-exempt general information is not at issue here, as the only responsive documents regarding the conduit locations reveal the precise locations of the conduits.<sup>2</sup>

As noted above, knowledge of the information in the “from location” and “to location” columns on the spreadsheet at issue would allow someone to draw lines on a map showing the routes of the conduits. Repeated drawing of these lines would permit the user to wholly recreate – with even greater precision – the very maps that were at issue in Crawford I. Justice Hagler’s decision upheld DoITT’s refusal to disclose “the precise information on the

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<sup>2</sup> The Crawford I Court had asked DoITT to search again for responsive documents that did not show the precise locations of conduits—for example, documents showing the number of conduits in a particular zip code. Although Petitioner moved for discovery on this issue, Justice Hagler denied Petitioner’s motion and dismissed the proceeding after DoITT again certified that it had no such documents. Now, again, just as in Crawford I, DoITT has conducted such a search and has certified that it has no responsive documents to Petitioner’s request item “11” other than the spreadsheets at issue. As an agency has no obligation to create documents in response to a FOIL request, discussions of any other hypothetical documents not in DoITT’s possession that might show general non-sensitive locational information are not germane to the issue before the Court. See, e.g., Brown v. New York City Police Dep’t, 264 A.D.2d 558, 562 (1st Dep’t 1999) (agency has no duty to create documents in response to FOIL request).

maps.” Id. at 743. The data points Petitioner now seeks in spreadsheet format are just that—the precise information on the maps. Accordingly, their release should not be permitted.

Additionally, Petitioner’s request for an *in camera* review is entirely unwarranted here, where the information at issue here is exactly the same information the Crawford I court found was correctly withheld: namely, “the precise locations of conduits.” 43 Misc. 3d at 740, 741, 742, 743. Moreover, the type of information redacted on the spreadsheet concerning the manhole locations is already known – i.e., the locations of the manholes from which the conduits originate and end. Thus, no *in camera* review is necessary to determine what lies beneath the redactions and the applicability of the infrastructure exemption found in Public Officers Law §87(2)(i). See M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp., 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69, 73 (1984)(requiring *in camera* review where respondent failed to demonstrate that records fell within exemption); Davidson v. Police Dep’t of the City of New York, 197 A.D.2d 466, 467 (1st Dep’t 1993)(holding *in camera* review warranted only where respondent fails to establish the application of a statutory exemption).

As this Court has already ruled on the claim previously brought by Petitioner as to whether DoITT properly withheld the precise locations of the conduits and found in DoITT’s favor, and as Petitioner again seeks the precise locations of the conduits, Petitioner is not permitted to relitigate this claim.

**B. Both Petitioner’s FOIL Requests Concern the Same Subject Matter**

Contrary to Petitioner’s statements in her opposition brief, the doctrine of *res judicata* in the FOIL context is not limited to situations in which the petitioner seeks exactly the

same documents it previously sought, and no court has so limited the doctrine.<sup>3</sup> Indeed, to so limit the doctrine would be contrary to the explicit directions of both the Court of Appeals and the First Department.

The First Department's holding in Mays is instructive here and is on all fours with the case at bar. 48 A.D.3d 372. In Mays, the petitioner made a FOIL request in 1995 "essentially seeking all documents relating to a particular indictment," but did not seek certified copies of any of the documents. Id. at 372. The respondent granted petitioner's request in part and denied the request in part. The petitioner then commenced an Article 78 proceeding to challenge the respondent's determination to withhold certain documents. Id. The court conducted an *in camera* inspection of the withheld documents and ordered the respondent to disclose some of them, thus granting the petition in part and denying it in part. Id.

Eleven years later, in 2006, the petitioner in Mays made a second FOIL request "essentially seeking all documents relating to the same indictment." Id. The new request, however, "provided a more detailed description of the documents he sought and requested certified copies of the documents." Id. The respondent denied this new request as duplicative of the first. Id. The petitioner then began a second Article 78 proceeding seeking disclosure of the documents. Id. The Supreme Court dismissed the petition on the grounds of *res judicata*. Id. The petitioner appealed and the First Department upheld the Supreme Court's dismissal, explaining that even though the second request sought "more detailed and specific" information, because that second FOIL request related to the same "subject matter" as the first request, it should be dismissed on the ground of *res judicata*. Id.

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<sup>3</sup> Notably, Petitioner has not cited any cases to support her proposition that "Res judicata has no conceivable application in this case which does not seek the same documents . . . ." Opp. Br. at 9 (emphasis added).

Here, just as in Mays, there can be no doubt that Petitioner’s second FOIL request that is at issue in this proceeding seeks information related to the same “subject matter” as did her first, namely the geographic location and occupancy of conduits. Indeed, in her opposition brief, Petitioner describes the 2012 FOIL request as seeking “disclosure of the geographic location of conduits owned or operated by ECS and a list of the names of customers renting ECS-owned ducts.” Opp. Br. at 5 (emphasis added). Petitioner then describes the documents she seeks in the case at bar as “contain[ing] the locational information sought in request 11 identifying manhole by manhole the number of existing conduit and their current use.” Opp. Br. at 7 (emphasis added). That is, just as Petitioner previously sought the “geographic location of conduits,” she now seeks “the locational information [of conduits] . . . manhole by manhole.” Although this second request may be slightly “more detailed” than the first, it indisputably involves the same “subject matter” as the first one—namely the geographic locations of conduits. As Petitioner’s second request concerns the same subject matter as the first request, the Petition should be dismissed on the ground of *res judicata*. See Mays, 48 A.D.3d at 372-73.

In her opposition papers, Petitioner places significance on the facts that the Crawford I court conducted an *in camera* review; Petitioner’s second request was more detailed than her first request; and the documents now at issue are different versions of the documents at issue in Crawford I. However, these are all straw men, and of no importance here. Indeed, in Mays, too, the court conducted an *in camera* review in the first proceeding; the petitioner’s second FOIL request for documents was “more detailed and specific” than the first; and the petitioner’s second request sought different and more specific versions of similar documents,

which had not been requested in the first case.<sup>4</sup> Nonetheless, the court dismissed that proceeding on the basis of *res judicata*.

As Petitioner now seeks the data points which could wholly recreate the very maps she previously sought, the Court should dismiss the Petition on the ground of *res judicata* as the information sought is the same, the documents are similar, and the FOIL request at issue concerns the same subject matter.

## POINT II

**BECAUSE PETITIONER’S FOIL REQUESTS ARE SUBSTANTIALLY SIMILAR, THE PORTION OF THE VERIFIED PETITION SEEKING RECORDS CONCERNING THE IDENTITIES OF ECS CUSTOMERS SHOULD BE DISMISSED ON THE GROUNDS THAT IT IS TIME BARRED**

Petitioner concedes in her Opposition Brief that where two FOIL requests are substantially similar, or where they seek essentially the same information, the second request can be dismissed as duplicative of the first on statute of limitations grounds. See Opp. Br. at 15 (citing Mixon v. McMahan, 302 A.D.2d 714 (3d Dep’t)). Petitioner fails, however, to acknowledge that where the second FOIL request is “more detailed” than the first, it may still be dismissed as a belated attempt to seek judicial review of the first request. See, e.g., McGriff v. Bratton, 293 A.D.2d 401, 402 (1st Dep’t 2002)(“Belated judicial review of that [earlier] denial

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<sup>4</sup> Justice Hagler contemplated the fact that Petitioner had not asked in her first FOIL request specifically for the maps themselves, but rather for the “geographic location of conduits.” Id. at 743 (citations omitted). He then explained that while the maps themselves are impossible to redact “because they contained thousands of entries” showing the geographic location of conduits, and that “the precise location of the conduits may reveal sensitive information,” disclosure of the “broader location of the conduits by street or neighborhood, etc.” might not “jeopardize respondent’s ability to guarantee the security of its information technology assets.” However, as the only document at issue here shows the “precise location of the conduits” and does not concern the “broader location of the conduits by street or neighborhood,” it falls within the holding of Crawford I.

cannot be based on petitioner's second request for the same information, albeit more detailed.”). The First Department has thus made it clear that there is no requirement that both FOIL requests be identical, or even seek the same information, for a dismissal on statute of limitations grounds to stand. Id. Accordingly, where, as here, Petitioner has sought substantially similar records, any later judicial proceeding concerning the second, similar request should be dismissed.

### **CONCLUSION**

For the reasons set forth herein and in its moving papers, Respondent respectfully requests that the Court grant its motion and dismiss the Verified Petition in its entirety with prejudice, and award Respondent such other and further relief as this Court deems just and proper.

Dated: New York, New York  
January 15, 2016

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