

Court of Appeals
of the
State of New York

In the Matter of the Application of

MICHAEL GRABELL,

Petitioner-Respondent,

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

— against —

NEW YORK CITY POLICE DEPARTMENT,

Respondent-Appellant.

MOTION FOR LEAVE TO APPEAL

DAVID A. SCHULZ, ESQ.
LEVINE SULLIVAN KOCH & SCHULZ
321 West 44th Street, Suite 1000
New York, New York 10036
Tel.: (212) 850-6100
Fax: (212) 850-6299

JOHN LANGFORD, ESQ.
MEDIA FREEDOM & INFORMATION
ACCESS CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL
127 Wall Street
New Haven, Connecticut 06511
Tel.: (203) 436-5831
Fax: (203) 436-0851

Attorneys for Petitioner-Respondent

COURT OF APPEALS
STATE OF NEW YORK

In re Application for a Judgment under
Article 78 of the Civil Practice Law and
Rules by

MICHAEL GRABELL,
Petitioner-Respondent,

vs.

NEW YORK CITY POLICE
DEPARTMENT,
Respondent-Appellant.

New York Co. Index No.
100580/2013

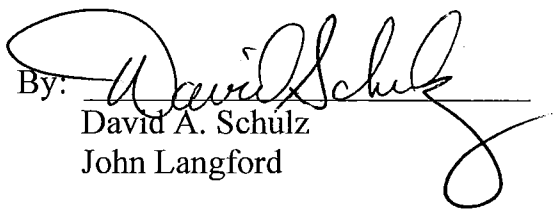
NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the annexed Memorandum in Support of Motion for Leave to Appeal, the briefs and record filed in the Appellate Division, First Department on the prior appeal in this action, and all papers and prior proceedings in this action, the Petitioner-Respondent, Michael Grabell, will move this court at the courthouse of the Court of Appeals, Albany, New York, on September 6, 2016, for an order granting Petitioner-Respondent leave to appeal to the Court of Appeals from the order of the Appellate Division, First Department dated May 10, 2016, vacating an order and judgment of the Supreme Court, New York County, which granted in part and denied in part Petitioner-Respondent's request for a judgment directing Respondent-Appellant to provide Petitioner-

Respondent with immediate access to all non-exempt documents he requested pursuant to the Freedom of Information Law (Article 6 of the New York Public Officers Law), and for such other and further relief as this court finds just and proper.

Dated: New Haven, CT
August 19, 2016

Respectfully submitted,

By: 
David A. Schulz
John Langford

LEVINE SULLIVAN KOCH &
SCHULZ, LLP

MEDIA FREEDOM & INFORMATION
ACCESS CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL

David A. Schulz, Esq.
321 West 44th Street, Suite 1000
New York, New York 10036
(212) 850-6100
dschulz@lskslaw.com

John Langford, Esq.
127 Wall St.
New Haven, CT 06511
(203) 436-5831
john.langford@yale.edu

*Attorneys for Petitioner-Respondent
Michael Grabell*

COURT OF APPEALS
STATE OF NEW YORK

In re Application for a Judgment under
Article 78 of the Civil Practice Law and
Rules by

MICHAEL GRABELL,
Petitioner-Respondent,

vs.

NEW YORK CITY POLICE
DEPARTMENT,
Respondent-Appellant.

New York Co. Index No.
100580/2013

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
BY PETITIONER-RESPONDENT FOR LEAVE TO APPEAL**

LEVINE SULLIVAN KOCH &
SCHULZ, LLP

David A. Schulz, Esq.
321 West 44th Street, Suite 1000
New York, New York 10036
(212) 850-6100
dschulz@lskslaw.com

MEDIA FREEDOM & INFORMATION
ACCESS CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL

John Langford, Esq.
127 Wall St.
New Haven, CT 06511
(203) 436-5831
john.langford@yale.edu

*Attorneys for Petitioner-Respondent
Michael Grabell*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
BACKGROUND	3
A. The FOIL Request at Issue	3
B. Proceedings in the IAS Court	6
C. Proceedings in the Appellate Division	9
TIMELINESS OF THE MOTION FOR LEAVE TO APPEAL	10
JURISDICTIONAL STATEMENT	10
QUESTIONS PRESENTED FOR REVIEW	10
ARGUMENT	11
I. THE FIRST DEPARTMENT DECISION CONTRAVENES THIS COURT’S PRECEDENT CONCERNING THE PROPER APPLICATION OF FOIL’S EXEMPTIONS	11
A. The First Department Failed to Require The Type Of Convincing Demonstration Of Exempt Status This Court Has Held To Be Necessary Under FOIL.....	11
B. The First Department Accepted The Type Of Blanket Exemption This Court Has Held To Be Impermissible Under FOIL	16
II. THE FIRST DEPARTMENT DECISION IGNORES FOIL’S REQUIREMENT THAT AN AGENCY SEGREGATE AND DISCLOSE NON-EXEMPT PORTIONS OF REQUESTED RECORDS	19
III. THE FIRST DEPARTMENT’S DECISION DEFEATS THE LEGISLATURE’S GOALS IN ENACTING FOIL	20
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Church of Scientology of N.Y. v. State of New York</i> , 46 N.Y.2d 906 (1979).....	13
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001)	22
<i>Matter of Bellamy v. New York Police Dept.</i> , 59 A.D.3d 353 (1st Dep’t 2009).....	13
<i>Matter of Beyah v. Goord</i> , 309 A.D.2d 1049 (3rd Dep’t 2003)	13
<i>Matter of Capital Newspapers Div. of Hearst Corp. v. Burns</i> , 67 N.Y.2d 562 (1986).....	12
<i>Matter of Data Tree, LLC v. Romaine</i> , 9 N.Y.3d 454 (2007).....	13, 19, 21
<i>Matter of Fink v. Lefkowitz</i> , 47 N.Y.2d 567 (1979).....	passim
<i>Matter of Gould v. New York City Police Dept.</i> , 89 N.Y.2d 267 (1996).....	passim
<i>Matter of Konigsberg v. Coughlin</i> , 68 N.Y.2d 245 (1986).....	12
<i>Matter of Leshner v. Hynes</i> , 19 N.Y.3d 57 (2012).....	17
<i>Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.</i> , 62 N.Y.2d 75 (1984).....	12
<i>Matter of Markowitz v. Serio</i> , 11 N.Y.3d 43 (2008).....	21

<i>Matter of Moore v. Santucci</i> , 151 A.D.2d 677 (2d Dep’t 1989).....	13
<i>Matter of Newsday Inc. v. State Dep’t of Transp.</i> , 5 N.Y.3d 84 (2005).....	21
<i>Matter of Schenectady Cty. Soc’y for Prevention of Cruelty to Animals, Inc. v. Mills</i> , 18 N.Y.3d 42 (2011).....	19, 21
<i>Matter of Spencer v. New York State Police</i> , 187 A.D.2d 919 (3d Dep’t 1992).....	13
<i>Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation</i> , 18 N.Y.3d 652 (2012).....	12

Statutes and Other Authorities

22 N.Y.C.R.R. 500.22.....	1
C.P.L.R. 5513(b).....	10
C.P.L.R. 5516	1
C.P.L.R. 5602(a)(1)(i).....	10
C.P.L.R. 5611	10
Pub. Off. Law § 84.....	20
Pub. Off. Law § 87(2)(e)(iv).....	13
Pub. Off. Law § 87(2)(f)	13, 14

Pursuant to C.P.L.R. 5516 and 22 N.Y.C.R.R. 500.22, Petitioner-Respondent Michael Grabell (“Grabell”) respectfully submits this memorandum in support of his motion for leave to appeal.

PRELIMINARY STATEMENT

Leave to appeal should be granted because the decision of the Appellate Division, First Department presents significant issues concerning the proper scope and application of the Freedom of Information Law (“FOIL”), Public Officers Law § 84 *et seq.*, that directly impact the transparency and accountability of law enforcement agencies across this state. The construction of FOIL adopted in this case disregards statutory obligations the Legislature imposed on agencies that wish to withhold law enforcement information from the public, contravenes this Court’s instructions concerning the proper application of FOIL’s provisions and, if permitted to stand, would thwart FOIL’s central transparency goal.

The First Department reversed a carefully crafted ruling by the Supreme Court, New York County, requiring the New York City Police Department (“NYPD”) to disclose to a *ProPublica* reporter limited information about its use of mobile surveillance vans that employ a highly-controversial and expensive X-ray technology—a technology that raises significant privacy and public health concerns. In so doing, the First Department ignored this Court’s precedent requiring agencies to demonstrate logically and plausibly that any information they

refuse to reveal falls within a FOIL exemption, and failed to enforce FOIL's statutory requirement to disclose all reasonably segregable non-exempt information.

Instead, the First Department upheld NYPD's blanket claim that any document likely to contain, in any part, information that could reveal any aspect of the capabilities of its surveillance vans—even their cost to taxpayers and the policies in place to protect privacy when the vans are used—is wholly exempt from public disclosure. And it did so based on a conclusory affidavit stating that the types of information that *might* be found in the records requested by Mr. Grabell (if they were actually located and reviewed) would generally be exempt under FOIL.

NYPD asserted in a conclusory manner that it can withhold any information from which the capabilities of its vans could be inferred pursuant to both the “non-routine law enforcement techniques” and “life or safety” exemptions on the theory that disclosure could allow a terrorist to evade detection. The First Department summarily accepted this blanket claim of exemption for information of vital public importance without ever addressing whether NYPD's justification was plausible and rational given that the full technical details about the vans' capabilities are *readily available* from their manufacturer on the Internet. Nor did the First Department address NYPD's statutory duty to segregate and produce non-exempt

material in the requested records—it did not even require NYPD to identify the records it was withholding.

The First Department’s mistaken approach deserves review by this Court. Its decision deprives the public of vital information about the costs and benefits of deploying an invasive and risky technology, and its construction of FOIL permits law enforcement agencies to withhold virtually anything that touches upon an investigative activity, rendering public oversight all but impossible. If permitted to stand, the First Department decision will further limit the transparency of police departments across this State at a time when greater transparency is urgently needed. Leave to appeal should be granted.

BACKGROUND

A. The FOIL Request at Issue

This proceeding arises from a FOIL request submitted to NYPD by veteran journalist Michael Grabell in connection with an investigation he was conducting for *ProPublica*, a nonprofit news organization that produces investigative journalism in the public interest. R. 44-45. His investigation sought to document the public health, privacy and fiscal implications of NYPD’s use of mobile X-ray surveillance technology known as “Z-backscatter” technology. Z-backscatter devices create photo-like, three-dimensional images by spraying a beam of radiation at a target and capturing the reflected rays. R. 55-58. They can detect the

hidden presence of illicit materials, such as drugs or bombs, but only by emitting radiation so powerful and dangerous that the European Union has banned the technology's use in E.U. airports, and U.S. Customs and Border Protection permits the technology to be used only when no humans are present. R. 55-56, 59-60.

It is no secret that NYPD has deployed vans with Z-backscatter imaging devices mounted to them ("Z-backscatter vans"). R. 55, 58-59. Nor are the capabilities and functioning of the Z-backscatter vans secret. The technology itself has been widely discussed in mainstream publications, *e.g.*, R. 55-56, and a simple Google search yields extensive technical information from the manufacturer about the vans, their operation and their effectiveness. This public information details the vans' capabilities, including the optimized scan distance (2-5 feet); the average energy of the scattered X-rays deployed (between 68 and 250 kiloelectron volts); and various technical limitations, such as the difficulty of detecting organic material when it is placed within or behind "high-Z" material.¹

It is also public knowledge that NYPD's Z-backscatter vans deliver a radiation dose forty percent larger than the dose delivered by the airport backscatter scanners banned in the E.U., and that X-rays from NYPD's vans cannot be aimed directly at a single target, meaning that any bystanders are

¹ *X-Ray Backscatter Mobile Inspection Van: US 20130343520 A1*, Google Patents, <https://www.google.com/patents/US20130343520> (last visited August 9, 2016).

necessarily exposed to ionizing radiation whenever the vans are used. R. 64-66.

Yet aside from brief comments from former NYPD Commissioner Bratton, little is known about the extent of NYPD's use of these vans or the policies it has in place, if any, to protect public health and privacy.² While the published list prices show that each van costs hundreds of thousands of dollars, taxpayers know nothing about how much money NYPD has spent on X-ray vans. R. 10.

Interested in reporting on these significant unanswered questions, Grabell submitted a FOIL request to NYPD seeking seven categories of records related to NYPD's purchases and use of the vans. R. 44-45.³ NYPD summarily denied Grabell's FOIL request; Grabell timely filed an administrative appeal, and NYPD summarily denied the appeal. R. 47, 49-52.

² See Ben Ellman, *NYPD Doesn't Want to Talk About Its X-Ray Vans*, N.Y. Mag. (Oct. 14, 2015), <http://nymag.com/daily/intelligencer/2015/10/nypd-x-ray-vans.html>.

³ Grabell initially requested: (1) "[a]ny lists or itineraries of past missions/deployments of the Z-backscatter van as well as any memos, debriefings, or after-action reports on past missions/deployments of the Z-backscatter van"; (2) "[t]he department's policies and procedures regarding the Z-backscatter van as well as any training materials"; (3) "[t]he final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used"; (4) "[a]ny contracts and supplemental contracting documents regarding the purchase of the Z-backscatter van"; (5) "[a]ny tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van"; (6) "[a]ny records related to data storage including but not limited to: type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored"; and (7) "[t]he contents of the image databases used and/or created by the Z-backscatter van." R. 44.

B. Proceedings in the IAS Court

Grabell initiated this Article 78 proceeding on April 9, 2013, challenging NYPD's rote denial of his FOIL request. R. 37-42. In response, NYPD declared that all requested records were properly withheld under FOIL's "non-routine investigative techniques" and "life or safety" exemptions. R. 74-78. NYPD did not address the issue of redaction, except with respect to Grabell's request for contracts regarding the purchase of vans. *See* R. 72-78. NYPD asserted that it could not release redacted versions of the contracts because the "existence itself of any contracts or of the parties involved would allow the recipient to determine the number of any vans purchased and permit the recipient to infer the vans' specifications based on cost and other non-redacted details." *Id.* at 77.

NYPD defended its blanket denial of Grabell's request with a single affidavit from Richard Daddario, its Deputy Commissioner of Counterterrorism. R. 72, 86-94. In broad terms, Daddario asserted that disclosing the records requested by Grabell would permit terrorists to evade detection by the vans and thereby heighten the threat of a terrorist attack. R. 90-94. Daddario did not explain how disclosing the records could reasonably be expected to create such a risk given that the vans' technical specifications are already widely available on the Internet with sufficient detail to inform any would-be terrorist on the steps needed to evade detection. R. 90-94.

Daddario asserted that all of the requested records were entirely exempt from disclosure without ever reviewing a single one. His affidavit presented no facts about the specific responsive documents or their actual content. R. 90-94. Instead, Daddario offered observations about the types of records that would contain the “categories of information listed in . . . the FOIL request,” what those records “*might* include,” and what their disclosure “would *tend* to reveal.” R. 91 (emphases added). His observations were based upon his “experience in counterterrorism operations” rather than a review of any actual records requested by Grabell. R. 90.

Following court-directed settlement negotiations, Grabell agreed to limit the scope of his requests specifically to address NYPD’s law enforcement concerns.

R. 103-04. His narrowed request, in relevant part, sought:

- (1) Summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation.
- (2) The Department’s policies and procedures regarding [sic] backscatter van as well as any training materials.
- . . .
- (4) Records sufficient to disclose both the total aggregate cost of the Z Backscatter Vans purchased by or for the NYPD and the total number of vans purchased.

- (5) Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.

R. 12-13. In response, NYPD reasserted its blanket objection. *Id.* at 13.

On December 9, 2014, the IAS Court held that NYPD's conclusory "counterterrorism" rationale for non-disclosure did not constitute the "particularized and specific justification" required by FOIL, and found its reasoning on the scope of the claimed exemptions to fall "far short." R. 19, 24. The court did not dismiss NYPD's concerns out of hand, and agreed that "NYPD may have had a reasonable basis for withholding some of the documents," but held that NYPD "had no reasonable basis for withholding them all, or for failing to provide some of them in redacted form." R. 27.

Carefully balancing the public's right to know with NYPD's stated law enforcement concerns, the IAS court narrowed Grabell's requests further and required NYPD to produce only those records "that are not related to any ongoing investigation." R. 30. It further directed NYPD to redact from the records to be disclosed any information describing a limitation, technical or otherwise, on the use of the vans, the dates of deployment, or the reasons for deployment. R. 30-31. Finding NYPD's blanket refusal of Grabell's request to have been unreasonable under the circumstances, the court also ordered it to pay his costs and attorneys' fees, as FOIL authorizes. R. 26-27, 31.

C. Proceedings in the Appellate Division

NYPD appealed, contending that “[i]t was error for the court to second-guess the judgments of NYPD’s counterterrorism expert in this highly specialized area of law enforcement.” NYPD App. Br. 2-3. According to NYPD, the court should simply have deferred to its “predictive judgments” about the potential harm from disclosure, without any consideration of whether its predictions met even a minimum standard of plausibility when considered in light of the extensive information about the vans that, indisputably, is public already. *Id.* at 37-41.

The First Department agreed, finding Commissioner Daddario’s affidavit to be sufficiently “particularized and specific” to satisfy NYPD’s burden under FOIL, notwithstanding that he had never reviewed any of the requested records and his affidavit never addressed the extent to which the records contained any *non*-public information about the vans’ capabilities. App. Div. Op. at 7-9. The Appellate Division reversed the carefully-tailored disclosures ordered by the IAS Court, except for the disclosure of information about the health risks of the vans. *Id.* at 9.

Oddly, the First Department concluded that NYPD had failed to demonstrate that disclosing health-related information would increase the risk of terrorism because information about the safety risks of backscatter technology is already “widely available to the public,” *id.* at 9, yet it made no mention of the information about the vans’ technical capabilities that is also “widely available to the public.”

Nor did the First Department say anything at all about NYPD's obligation to segregate and redact information under FOIL. It held that Grabell had not substantially prevailed, and reversed the award of attorneys' fees. *Id.* at 10.

TIMELINESS OF THE MOTION FOR LEAVE TO APPEAL

Notice of Entry of the First Department decision was served on July 29, 2016, by email and regular U.S. mail. This motion for leave to appeal is timely made within 35 days of that service. *See* C.P.L.R. 5513(b)-(c).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal because the First Department's ruling on Grabell's Article 78 petition constitutes a final order within the meaning of C.P.L.R. 5602(a)(1)(i) and 5611.

QUESTIONS PRESENTED FOR REVIEW

1. To withhold records under FOIL, must an agency provide a specific factual basis that plausibly establishes that the requested records contain information falling within one of FOIL's limited exemptions?

The decision of the First Department answers this question, "No."

2. When a record contains some information that is exempt from FOIL's disclosure mandate, does FOIL require an agency to disclose any reasonably segregable sections that contain non-exempt information?

The decision of the First Department answers this question, "No."

ARGUMENT

I.

THE FIRST DEPARTMENT DECISION CONTRAVENES THIS COURT'S PRECEDENT CONCERNING THE PROPER APPLICATION OF FOIL'S EXEMPTIONS

Leave to appeal should be granted because the First Department failed to follow this Court's instructions on how the statutory burdens imposed by FOIL are to be enforced, and its ruling threatens broad future consequences. Specifically, the First Department accepted a speculative claim of harm (the risk that terrorists will evade detection) as sufficient justification to withhold entire categories of information, without any plausible explanation as to how that harm would arise from the disclosure of information that is already public. And it permitted a blanket exemption for entire categories of records on the strength of an affidavit from an official who never reviewed the actual records at issue or the specific information they contain. This approach warrants review because it effectively transforms FOIL's presumption of disclosure into a broad permission for secrecy.

A. The First Department Failed To Require The Type Of Convincing Demonstration Of Exempt Status This Court Has Held To Be Necessary Under FOIL

This Court has repeatedly acted to ensure that the transparency mandate in FOIL is vigorously enforced. As it has stressed, FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Matter of Fink v. Lefkowitz*,

47 N.Y.2d 567, 571 (1979). “All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2).” *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274-75 (1996). The burden of demonstrating that requested material is properly exempt from disclosure rests squarely on the agency. *Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984); *see also Gould*, 89 N.Y.2d at 275. And in applying any FOIL exemption, it is axiomatic that the exemption must be “narrowly interpreted so that the public is granted maximum access to the records of government.” *Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation*, 18 N.Y.3d 652, 657 (2012).

The First Department decision dramatically departs from these controlling legal principles and this Court’s clear instruction in *Fink* that an agency meets its statutory burden only when it “convincingly demonstrates” that an exemption applies. *Fink*, 47 N.Y.2d at 571. This requires an agency to give “a particularized and specific justification for denying access.” *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986); *see also, Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 251 (1986); *M. Farbman & Sons*, 62 N.Y.2d at 80; *Fink*, 47 N.Y.2d at 571. A justification is not sufficiently particularized if it simply provides “conclusory characterizations of the records

sought to be withheld.” *Church of Scientology of N.Y. v. State of New York*, 46 N.Y.2d 906, 908 (1979). Rather, an agency must convincingly justify non-disclosure “in more than just a ‘plausible fashion.’” *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007).

Ignoring this precedent, the First Department permitted NYPD to invoke FOIL exemptions without providing even a plausible justification for why the exemptions applied, let alone establishing that the records “fall[] squarely within the[ir] ambit.” *Fink*, 47 N.Y.2d at 571. It allowed NYPD to withhold every record that might reveal any information about the capabilities of its vans under the FOIL exemptions for non-routine law enforcement techniques, Pub. Off. Law (“POL”) § 87(2)(e)(iv), and the “life or safety” exemption, *id.* § 87(2)(f). The former exempts records compiled for law enforcement purposes the disclosure of which would reveal non-routine criminal investigative techniques or procedures, and has long been understood as a limited exemption for information that could be used to “frustrate pending or threatened investigations” or “impede a prosecution.”⁴ *Fink*,

⁴ Though there may be other circumstances under which an agency can withhold records under the “non-routine law enforcement techniques” exemption, *Fink*, 47 N.Y.2d at 572, this Court and others have uniformly required agencies to demonstrate a substantial likelihood of evasion as a necessary key to withholding information under this exemption. *See, e.g., Matter of Bellamy v. New York Police Dept.*, 59 A.D.3d 353, 355 (1st Dep’t 2009); *Matter of Beyah v. Goord*, 309 A.D.2d 1049, 1052 (3rd Dep’t 2003); *Matter of Spencer v. New York State Police*, 187 A.D.2d 919, 921 (3d Dep’t 1992); *Matter of Moore v. Santucci*, 151 A.D.2d 677, 679 (2d Dep’t 1989).

47 N.Y.2d at 572. The latter narrowly exempts information that could directly endanger the life or safety of any person. POL § 87(2)(f).

NYPD argued that both of these exemptions applied to all of the records requested by Grabell because disclosing any information from which the capabilities of its vans could be inferred might enable terrorists to develop measures to evade detection. R. 90-94. For example, Daddario contended that disclosing “training materials and documents conveying procedures would reveal the specifications of the vans and any limitations on their use, which . . . would allow terrorists to undermine their effectiveness.” R. 92. The First Department found such broad claims sufficient, and criticized the IAS court for failing to defer to the NYPD’s “predictive judgments.” NYPD App. Br. at 37-41. In so doing the First Department abandoned completely its obligation to determine whether NYPD had convincingly demonstrated a proper basis for claiming the exemptions. NYPD plainly had not.

As the First Department recognized in rejecting NYPD’s claim that disclosing information about the health effects of its vans would enable terrorists to evade detection, the justification makes no sense if the same information is generally available elsewhere. App. Opp. at 9. The exact same reasoning applies to information about technical capabilities of the NYPD’s vans: Disclosing information about the vans purchased by NYPD cannot be said to enable

individuals to evade detection, if they can do so to the same extent with information that is already public. So far as NYPD is withholding information that is entirely public, disclosing the requested records provides nothing of use to a terrorist, it only prevents the public from assessing the costs, benefits and privacy implications of the NYPD's actions. It defeats FOIL's core purpose for no reason.

This is not a question of second-guessing the NYPD's judgment. It is a question of adhering to this Court's precedent that an agency must provide a factual explanation for claiming an exemption that is, at a minimum, logical and plausible on its face. The First Department's failure to do so has far-reaching implications. If a conclusory affidavit asserting a generic "risk of evasion" is sufficient to establish that records fall squarely within the ambit of the "non-routine law enforcement techniques" and "life or safety" exemptions, law enforcement agencies will have little trouble keeping records of all but the most mundane law enforcement activities shielded entirely from public oversight.

The ramifications of the First Department's decision extend far beyond NYPD's use of Z-backscatter vans. As one of the world's largest, most advanced police departments, NYPD constantly develops and deploys new, technologically sophisticated law-enforcement techniques. The Department is currently exploring and expanding its use of body cameras, covert cell phone tracking devices, and

gunshot detectors.⁵ These new techniques, like the NYPD's use of the Z-backscatter vans, present significant privacy concerns, and their adoption often ignites serious public debate over the proper tradeoff between privacy and security.⁶ The First Department's unquestioning acceptance of the NYPD's claim of exemption, if permitted to stand, threatens to deprive the public of vital information necessary for democratic oversight and public accountability of our law enforcement agencies, and to ensure that their balancing of privacy and security is consistent with the public's will.

B. The First Department Accepted The Type Of Blanket Exemption This Court Has Held To Be Impermissible Under FOIL

Compounding the problem of its failure to assess the plausibility of the NYPD's claim of harm from disclosure, the First Department permitted NYPD to

⁵ Pervaiz Shallwani, *NYPD Prepares to Expand Body Camera Use*, Wall St. J. (Mar. 2, 2016), <http://www.wsj.com/articles/nypd-wrapping-up-body-camera-pilot-program-1456916402>; Joseph Goldstein, *New York Police Are Using Covert Cellphone Trackers*, *Civil Liberties Group Says*, N.Y. Times (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/nyregion/new-york-police-dept-cellphone-tracking-stingrays.html>; Tatiana Schlossberg, *New York Police Begin Using ShotSpotter System to Detect Gunshots*, N.Y. Times (Mar. 16, 2015), <http://www.nytimes.com/2015/03/17/nyregion/shotspotter-detection-system-pinpoints-gunshot-locations-and-sends-data-to-the-police.html>.

⁶ Anita Abedian, *NYPD Used Stingray Spying Tool Over 1,000 Times: How Can New Yorkers Protect Their Privacy?*, Village Voice (Feb. 16, 2016), <http://www.villagevoice.com/news/nypd-used-stingray-spying-tool-over-1-000-times-how-can-new-yorkers-protect-their-privacy-8274159>; Hannah Gold, *ShotSpotter: Gunshot Detection System Raises Privacy Concerns on Campuses*, The Guardian (July 17, 2015), <https://www.theguardian.com/law/2015/jul/17/shotspotter-gunshot-detection-schools-campuses-privacy>; Tanzina Vega, *Rights Groups: Police Use of Body Cameras Raises Privacy Concerns*, CNN (May 15, 2015), <http://www.cnn.com/2015/05/15/politics/body-cameras-civil-rights-privacy-coalition/>.

assert its claim on a blanket basis, violating this Court's precedent once again. As this Court explained, "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." *Gould*, 89 N.Y.2d at 275.

In *Matter of Leshner v. Hynes*, 19 N.Y.3d 57 (2012), this Court took pains to detail the very narrow circumstances under which a categorical claim of exemption is permissible under the same law enforcement exemption at issue here. *Id.* at 67-68. Recognizing that the disclosure of certain kinds of investigatory records while a case is pending would routinely "interfere with enforcement proceedings," this Court held that a categorical exemption can be proper, but only if an agency specifically identifies "the generic kinds of *documents* for which the exemption is claimed, and the generic risks posed by disclosure of these categories of *documents*." *Id.* (emphases added). In stark contrast, the First Department permitted NYPD to exert a blanket exemption over a broad category of *information*, without ever identifying the categories of *documents* for which the exemption was being claimed. Daddario claimed only that "disclosure of records that contain the[] categories of *information* [Grabell requested] would tend to reveal" information that would allow terrorists to evade detection. R. 91 (emphasis added).

The First Department's approach eviscerates the careful balance this Court struck in *Leshner* between holding agencies to their burden of justifying non-

disclosure, and the inefficiencies of a document-by-document approach. The First Department was fundamentally incorrect in holding that an affidavit that fails to identify, even in the most general terms, the categories of records responsive to a specific request can “convincingly demonstrate[]” that the requested material is exempt from disclosure, categorically or otherwise. *Fink*, 47 N.Y.2d at 571. Further review is needed because this error threatens to open the door for agencies that assert the very types of blanket exemptions this Court has found “inimical to FOIL’s policy of open government.” *Gould*, 89 N.Y.2d at 275.

* * *

The First Department radically departed from this Court’s precedents establishing the obligations an agency must meet in order to withhold documents under FOIL’s narrow exemptions. It allows agencies to withhold documents on assertions of harm that are neither logical nor plausible and to assert blanket exemptions over categories of information without any identification of the types of records they are withholding and information those records actually contain. This Court should review the decision below to ensure that the enduring principles of transparency and oversight that animate FOIL are not cast aside.

II.
THE FIRST DEPARTMENT DECISION IGNORES FOIL’S
REQUIREMENT THAT AN AGENCY SEGREGATE AND
DISCLOSE NON-EXEMPT PORTIONS OF REQUESTED RECORDS

The First Department decision should be reviewed for the further reason that it failed to enforce NYPD’s statutory duty to segregate and disclose non-exempt portions of the requested records. Even when a FOIL exemption properly applies, an agency must still disclose any reasonably segregable portions containing non-exempt material. *See, e.g., Matter of Schenectady Cty. Soc’y for Prevention of Cruelty to Animals, Inc. v. Mills* (“Mills”), 18 N.Y.3d 42, 45 (2011); *Data Tree*, 9 N.Y.3d at 464; *Gould*, 89 N.Y.2d at 275. This Court has been clear in demanding that an agency “must redact the record to take out the exempt information” when “it can do so without unreasonable difficulty.” *Mills*, 18 N.Y.3d at 45.

The IAS Court upheld this statutory requirement in holding that NYPD “had no reasonable basis” for failing to provide at least some of the records in redacted form, and in ordering the redaction of certain categories of information. *See* R. 27, 30-31. In reversing and upholding NYPD’s blanket claim of exemption, the First Department simply ignored the redaction requirement. This oversight is particularly troubling because NYPD never asserted that it would be unreasonably difficult to redact discrete, segregable portions of records responsive to those requests. Instead, NYPD questioned the *value* of redaction, *see* Opp. Br. 28-29, which is a value judgment the Legislature has already rejected.

Redaction is especially important in the present case because of the legitimate and substantial competing interests at stake. On one side of the scale, the public's interest in exercising oversight over invasive, expensive, and potentially dangerous surveillance technology weighs heavily in favor of access to the records Grabell seeks. On the other side, the public's interest in remaining safe from terrorism counsels in favor of more limited disclosure. FOIL's redaction requirement alleviates the tension between these competing interests, ensuring the disclosure of non-exempt materials while simultaneously protecting properly-exempt information. Without redaction, FOIL's exemptions would, in effect, never be "narrowly construed." *Gould*, 89 N.Y.2d at 275.

The First Department's failure to require redaction here constitutes a fundamental error of law that begs review by this Court.

III.

THE FIRST DEPARTMENT'S DECISION DEFEATS THE LEGISLATURE'S GOALS IN ENACTING FOIL

Leave to appeal should also be granted because the First Department's disregard for the statutory and jurisprudential burdens FOIL imposes fundamentally undermines FOIL's core goal of open government. Through FOIL the Legislature unequivocally declared that "government is the public's business and that the public, individually and collectively and represented by a free press" should, by default, have access to its records. POL § 84. This Court has explained

that, by enacting FOIL, the legislature sought to ensure that “the electorate . . . have sufficient information . . . to make intelligent, informed choices with respect to both the direction and scope of governmental activities,” as well as to “expos[e] waste, negligence and abuses on the part of government” and thereby “hold the governors accountable to the governed.” *Fink*, 47 N.Y.2d at 571.

The First Department’s decision in this case undermines the letter and spirit of FOIL in a manner ““anathematic to our form of government.”” *Matter of Newsday Inc. v. State Dep’t of Transp.*, 5 N.Y.3d 84, 88 (2005) (quoting *Fink*, 47 N.Y.2d at 571). It all but eliminates NYPD’s obligation to disclose anything about its investigative activities by relieving the agency of its obligations to provide a specific factual showing that records “fall[] squarely within” the established scope of FOIL exemptions and to disclose non-exempt portions of records. *See Data Tree*, 9 N.Y.3d at 462-63; *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008); *Mills*, 18 N.Y.3d at 45. By deferring to and rewarding NYPD’s “official secrecy,” the First Department has substantially negated the public’s “inherent right to know” about the Z-backscatter vans. *Fink*, 47 N.Y.2d at 571.

The facts of this case make clear the significance of that error. For example, with no information about NYPD’s use of the vans, there is no way for the public to evaluate whether that use comports with constitutional requirements. When the

technology itself has the same effect as a strip-search and can see through walls,⁷ public oversight is particularly important to ensure that police technology does not cross any “firm line[s]” or “erode the privacy guaranteed by the Fourth Amendment.” *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that the use of technology “to explore details of [a] home that would previously have been unknowable without physical intrusion” constitutes a “search” within the meaning of the Fourth Amendment and is presumptively unreasonable without a warrant).

Daddario acknowledged that “the Z-backscatter van is . . . used to scan vehicles or buildings for evidence of explosives, drugs, or other organic or nonorganic material.” R. 89 ¶ 14. Yet despite the obvious *Kyllo* concerns, NYPD has refused disclose any information about the scope of its use of the vans or what, if any, policies it has in place to protect New Yorkers’ privacy when the vans are deployed. Without that information, the public is unable to ensure that its constitutional rights are secure, let alone “to make intelligent, informed choices with respect to both the direction and scope of governmental activities.” *Fink*, 47 N.Y.2d at 571.

Moreover, publicly-available information reveals that it costs between \$729,000 and \$825,000 to purchase a single Z-backscatter van, depending on how

⁷ See Electronic Privacy Information Center, *Whole Body Imaging Technology and Body Scanners* (“Backscatter” X-ray and Millimeter Wave Screening), <https://www.epic.org/privacy/airtravel/backscatter/> (last visited July 26, 2016) (comparing use of such technology to a “physically invasive strip-search”).

it is equipped. R. 58. But NYPD has never disclosed how much it has spent to acquire its vans, and the First Department holding says the public cannot ever obtain that information. Without it, the public cannot make “intelligent, informed choices” about whether the millions of dollars NYPD has likely poured into its X-ray vans is money well spent. *Fink*, 47 N.Y.2d at 571.

As this case well illustrates, the First Department’s decision insulates even the most serious government activities from meaningful public oversight in derogation of FOIL’s primary purpose. Leave to appeal should be granted to address the propriety of that approach and to ensure that FOIL remains a viable mechanism for “hold[ing] the governors accountable to the governed.” *Id.*

CONCLUSION

For each and all the foregoing reasons, Grabell respectfully requests that this Court grant his motion for leave to appeal.

Dated: New Haven, CT
August 19, 2016

Respectfully submitted,

By: 

David A. Schulz
John Langford

LEVINE SULLIVAN KOCH &
SCHULZ, LLP

MEDIA FREEDOM & INFORMATION
ACCESS CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL

David A. Schulz, Esq.
321 West 44th Street, Suite 1000
New York, New York 10036
(212) 850-6100

John Langford, Esq.
127 Wall St.
New Haven, CT 06511
(203) 436-5831

*Attorneys for Petitioner-Respondent**

* Counsel wish to thank Jonathan Manes, Clinical Assistant Professor at the University at Buffalo School of Law; Hannah Bloch-Wehba, Associate Research Scholar at Yale Law School and Stanton Clinical Fellow at the Media Freedom and Information Access Clinic; and law student Russell Fink for their invaluable contributions to this brief. This brief was prepared by the Media Freedom and Information Access Clinic, a program of the Abrams Institute for Freedom of Expression at Yale Law School. The brief does not purport to express the School's institutional views, if any.

BLUE SHEET

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

-----X
In the Matter of the Application of

MICHAEL GRABELL,

Petitioner,

NOTICE OF APPEAL

Index No. 100580/13

For a Judgment under Article 78
of the Civil Practice Law and Rules,

-against-

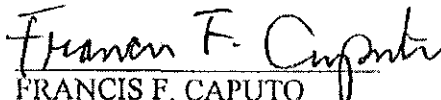
NEW YORK CITY POLICE DEPARTMENT,

Respondent.
-----X

PLEASE TAKE NOTICE that respondent, the New York City Police Department, hereby appeals to the Appellate Division of the Supreme Court, First Department, from an order, Dated December 9, 2014 and entered January 8, 2015, in the above entitled proceeding in favor of the above named Petitioner, directing the disclosure of certain records.

Dated: New York, New York
January 8, 2015

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Respondent,
100 Church Street,
New York, New York 10007.
(212) 356-2500

By: 
FRANCIS F. CAPUTO
Deputy Chief, Appeals Division

TO: DAVID SCHULZ,
LEVINE SULLIVAN KOCH & SCHULZ, LLP
Attorneys for Petitioner,
321 West 44 Street, Suite 1000,
New York, New York 10036
212-850-6103

CLERK
County of New York

JAN 08 2015

J

12/20/14
E

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

Hon. Doris Ling-Cohan

Index Number : 100580/2013

GRABELL, MICHAEL

vs

N.Y.P.D.

Sequence Number : 001

ARTICLE 78

PART 36

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Article 78 proceeding
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits & MEMO | No(s). 1, 2, 3
 Answering Affidavits — Exhibits & MEMO | No(s). 4, 5
 Replying Affidavits MEMO | No(s). 6
Strickland 8/26/14, letters dated 9/9/14 + 9/10/14, interim order of C. 9/25/14 + 8/7/14 + 11/2/14 + 7/13
 Upon the foregoing papers, it is ordered that this motion is Article 78 proceeding
is granted in accordance with the attached
memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN - 8 2015

COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
DEC 10 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 12/9/14

[Signature], J.S.C.
JUDGE DORIS LING-COHAN

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X

In re Application for a Judgment
Under Article 78 of the Civil
Practice Law and Rules and other
relief by

MICHAEL GRABELL,

Petitioner,

-against-

Index No. 100580/13

NEW YORK CITY POLICE DEPARTMENT,

Motion Seq. No.:
001

Respondent.

-----X
DORIS LING-COHAN, J.S.C.:

Petitioner Michael Grabell, a journalist employed by ProPublica, brings this action seeking a judgment declaring that respondent New York City Police Department (NYPD or Department) acted unlawfully in withholding documents that are not properly exempt from disclosure under the Freedom of Information Law (FOIL) (Public Officers Law (POL) § 85 et seq), directing the NYPD to provide petitioner with immediate access to all the nonexempt documents that he requested, and awarding petitioner costs and attorney's fees, pursuant to POL § 89 (4) (c).

Background

By letter, dated February 15, 2012, petitioner journalist requested copies of certain documents pertaining to the NYPD's purchase and use of a police vehicle known as the Z-backscatter van (Van). The Van(s) is an unmarked vehicle that contains an x-ray device that can detect drugs, certain bomb-making equipment, and

other organic and inorganic matter in vehicles or buildings. The radiation that the device emits does not penetrate its target, but reflects back a visual image. The U.S. Department of Defense has acquired a number of such Van(s) to assist in detecting roadside and car bombs in Afghanistan.

Petitioner seeks certain records as they would "reveal whether the NYPD has taken steps necessary to protect drivers, passengers and pedestrians from exposure to potentially harmful ionizing radiation". ¶14, Affidavit in Support. Petitioner states in his affidavit, and respondent does not dispute, that: backscatter technology, previously deployed in European Union airports, was banned in 2011, because of health concerns; an internal presentation from American Science & Engineering, Inc., the company that manufactures the Van(s), determined that the Vans deliver a radiation dose 40% larger than that delivered by a backscatter airport scanner; bystanders present when the Van(s) is in use are exposed to the radiation that the Van(s) emits; and the Transportation Security Administration recently removed all of its backscatter x-ray body scanners from airports in the United States, because the devices failed to comply with privacy requirements established by Congress. Petitioner also states, without dispute, that each of the Vans costs between \$729,000 and \$825,000. ¶19, Grabell Affidavit in Support, dated April 8, 2013 ("Affidavit in Support"). Moreover, petitioner maintains, and it is not disputed by the NYPD, that "[t]here may be significant health risks associated with the use of backscatter x-ray devices [as] these

machines use ionizing radiation, a type of radiation long known to mutate DNA and cause cancer". ¶5, Affidavit in Support.

Finally, petitioner states, again without dispute, that, on August 2011, the United States Customs and Border Protection Agency, which used the Van(s) to scan vehicles crossing into and out of the United States, despite repeated testing and analysis of the amount of radiation emitted by such devices, nevertheless, prohibited continued use of the Van(s) to scan occupied vehicles, until approval was granted by the United States Customs and Border Protection Radiation Safety Committee and the Attorney General. ¶14, Affidavit in Support.

Petitioner requested the following documents, by letter dated February 15, 2012:

"[1] Any lists or itineraries of past missions/deployments of the Z-backscatter van as well as any memos, debriefings, or after-action reports on past missions/deployments of the Z-backscatter van.

[2] The department's policies and procedures regarding the Z-backscatter van as well as any training materials.

[3] The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used.

[4] Any contracts and supplemental contracting documents regarding the purchase of the Z-backscatter van.

[5] Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.

[6] Any records related to data storage including but not limited to: the type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored.

[7] The contents of the image databases used and/or

created by the Z-backscatter van."

Verified Petition, Exhibit A.

By letter, dated April 18, 2012, the NYPD denied the entire request on the basis of POL § 87 (2) (e) (iv) "in that such law enforcement records, if disclosed, would reveal criminal investigative techniques or procedures." In addition, the NYPD based its denial on POL § 87 (2) (g), which exempts intra-agency materials from disclosure. Verified petition, exhibit B.

By letter, dated May 15, 2012, petitioner appealed the denial of his FOIL request, pointing out, among other things, that "[w]hile portions of [the records requested] may be withheld or redacted under the statutes [cited], the vast majority of the records are public and can be segregated for release." Verified petition, exhibit C, 1. By letter, dated December 19, 2012, the Department denied petitioner's appeal pursuant to POL § 87 (2) (e) (4), "because disclosure of the requested records would reveal non-routine investigative techniques or procedures"; pursuant to POL § 87 (2) (f), "because the utility of the 'Z-backscatter scanner' as a law enforcement tool designed to protect public safety would be diminished if detailed information pertaining to its functioning and deployment could be used to foil the Z-backscatter van's effectiveness, thus endangering public safety"; and pursuant to POL 87 (2) (g), "to the extent that the requested records include preliminary data and information which is deliberative and pre-decisional in nature." Verified petition, exhibit D.

By its silence on the subject, the NYPD's December 19, 2012

letter effectively acknowledges that the intra-agency exemption is inapplicable, and such argument was not raised in its memorandum of law. The NYPD does not defend its denial of petitioner's appeal on the basis of POL § 87 (2) (g) (intra-agency exemption), either in its memorandum of law, or in the affidavit of Richard Daddario, Deputy Commissioner of Counter-terrorism. Accordingly, the court deems the NYPD to have abandoned that exemption as a ground for withholding the documents responsive to petitioner's FOIL request. In any event, petitioner argues that POL § 87 (2) (g) applies neither to instructions to staff that affect the public, nor to final policy decisions.

After a conference with the court, by stipulation dated August 26, 2014, petitioner agreed to modify his FOIL requests, addressing some of NYPD's concerns raised during settlement discussions and the court permits such modified FOIL requests. Petitioner narrowed or abandoned four of the seven categories of documents previously requested. Accordingly, the FOIL requests now before the court are limited to the following six (6) requests:

- [1] Summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation.
- [2] The Department's policies and procedures regarding backscatter van as well as any training materials.
- [3] The final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used.
- [4] Records sufficient to disclose both the total aggregate cost of the Z Backscatter Vans purchased by or for the NYPD and the total number of vans purchased.

- [5] Any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter van.
- [6] NYPD's final policy governing retention and storage of data generated by the Z Backscatter Vans, and other documents sufficient to disclose NYPD's policies regarding the length of time images are stored or maintained, the process by which images are deleted or destroyed, the number and type of individuals permitted to access stored images, and any restrictions NYPD imposes on the use of the images.

Despite petitioner's new sharply narrowed requests for documents, NYPD maintains its original objections to their disclosure.

Discussion

Standard of Review in FOIL Cases

"The premise of FOIL is 'that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" *Matter of Newsday, Inc. v State Dept. of Transp.*, 5 NY3d 84, 88 (2005), quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 (1979). The purpose of requiring disclosure of governmental records is "to assist the public in formulating 'intelligent informed choices with respect to both the direction and scope of governmental activities.'" *Matter of New York State United Teachers v Brighter Choice Charter School*, 15 NY3d 560, 564 (2010), quoting *Matter of Fink*, 47 NY2d at 571. FOIL requires state and municipal agencies to provide the public with all records

pertaining to the agencies' operations, that are not specifically exempted from disclosure. *Matter of Whitfield v Bailey*, 80 AD3d 417, 418-419 (1st Dept 2011). The statutory exemptions to disclosure are to be "narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; see also *Matter of Markovitz v Serio*, 11 NY3d 43, 51 [2008]).

"[T]he burden of proof rests solely with the [agency] to justify the denial of access to the requested records." *Data Tree, LLC*, 9 NY3d at 463. In fact, where only a portion of a given document is properly exempt, the agency is nonetheless obligated to produce a redacted version that discloses all the non-exempt information. *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v Mills, Inc.*, 18 NY3d 42, 45-46 (2011); *Data Tree, LLC*, 9 NY3d at 464.

Contrary to respondent's argument that this court should defer to the NYPD's expert knowledge, it is settled law that a court reviewing an agency's failure to disclose requested records owes no deference to the agency's decision, but must "presume that all records of a public agency are open to public inspection ..., and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure." *New York Committee for Occupational Health & Safety v Bloomberg*, 72 AD3d 153, 158 (1st Dept 2010); see also POL §89 (4)(b); (5)(e); *Matter of Markowitz v.*

Serio, 11 NY3d 43, 50-51 (2008); *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562, 566 (1986). Such a showing must be made by "articulating a particularized and specific justification for denying access." *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 (1986); see also *Matter of New York State Pistol & Rifle Assn. v Kelly*, 55 AD3d 222, 225 (1st Dept 2008).

Moreover, as in the recent case of *Hashmi v. New York City Police Dept* (___ Misc 3d ___, 2014 NY Slip Op 24357 [Sup Court, NY County 2014]), this court will not adopt the federal standard as to Freedom of Information requests, as such is not contemplated by this state's current FOIL statute. It is the province of the legislature to change the applicable statute.

Thus, as explained above, it is well settled that the starting point for any FOIL inquiry is that the public has the right to know and it is the burden of the government to justify the denial of access. See *Data Tree, LLC*, 9 NY2d at 463. Respondent NYPD has articulated only two (2) reasons for exemption: (1) the "law enforcement/investigatory exemption" (POL § 87(2)(e)); and (2) the "endangerment of life and safety of any person exemption" (POL § 87(2)(f)). Both of such exemptions are to be "narrowly interpreted". See *Data Tree, LLC v Romaine*, 9 NY3d at 462.

POL § 87 (2) (e) - Law Enforcement/Investigatory Exemption

POL § 87 (2) (e) exempts from disclosure records

16

"compiled for law enforcement purposes and which, if disclosed, would: ... iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures." This exemption is properly invoked only where there is "a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel." *Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353, 355 (1st Dept 2009), *recalled and vacated on other grounds* 87 AD3d 874 (1st Dept 2011) quoting *Matter of Fink*, 47 NY2d at 572. In *Matter of Fink*, the Court held that portions of the office manual of the Deputy Attorney General and Special Prosecutor for Nursing Homes, which constituted "detailed, specialized methods" of conducting an audit of the books of nursing home operators, was exempt from disclosure, because release of the information would "actually countenance[] fraud by enabling miscreants to alter their books and activities to minimize the possibility of being brought to task for criminal activities." *Matter of Fink*, 47 NY2d at 572-573. Subsequently, in *Matter of Spencer v New York State Police* (187 AD2d 919 [3d Dept 1992]), the Court held that documents describing the method by which the State Police gathered information about the petitioner, a convicted murderer, and his accomplices, were exempt from disclosure, pursuant to POL § 87 (2) (e) (iv).

POL § 87 (2) (f) - Endangerment of Life & Safety of Any Person Exemption

POL § 87 (2) (f) exempts records that, "if disclosed could endanger the life or safety of any person." This exemption is generally invoked when a specific person or group of people would be endangered by the disclosure of the documents sought. See e.g. *Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 407 (1st Dept 2013); *Matter of Hynes v Fischer*, 101 AD3d 1188, 1190 (3d Dept 2012); *Matter of Bellamy*, 87 AD3d at 875. The exemption may not be invoked on the basis of mere speculation that harm will result from disclosure of the documents sought. *Mack v Howard*, 91 AD3d 1315, 1316 (4th Dept 2012); *Matter of New York Veteran Police Assn. v New York City Police Dept. Art. I Pension Fund*, 92 AD2d 772, 773 (1st Dept), *revd on other grounds* 61 NY2d 639 (1983).

Application of the Two Exemptions to Petitioner's Request

The NYPD has submitted an affidavit from Commissioner Richard Daddario, of which only 9 paragraphs (4 pages) are even directly relevant to the requested documents. In his affidavit, Mr. Daddario takes the blanket position that disclosing "any" documents responsive to petitioner's FOIL request would "reveal criminal investigative techniques or procedures" and "endanger the life or safety" of police officers and the people of New York City by allowing aspiring terrorists to circumvent the effectiveness of the Van.

Daddario affidavit, ¶ 6.

In *Matter of Dilworth v Westchester County Dept. of Correction* (93 AD3d 722, 725 [2d Dept 2012]), the Court contrasted a disclosure of a record of electronic video surveillance of petitioner from one camera angle, on the particular day on which he claimed to have slipped and suffered an injury, to all records of electronic video surveillance of him throughout his detention at the jail. The former was disclosable. *Id.* The latter could be withheld, however, on the ground that such disclosure would inherently disclose gaps in the camera's ability to survey. *Id.*

Unlike the surveillance cameras in *Matter of Dilworth*, the Van(s) at issue here are mobile, and a record of where they have been deployed does not, without more, necessarily allow an inference of locations in which they will not be deployed. Although, one could speculate that the NYPD has deployed the Van(s) in locations that can be defined by one or more characteristics, such that someone might thereby infer locations in which the Vans would likely not be used, nonetheless, Mr. Daddario does not state in his affidavit this specific possibility as a fact, even at this level of generality.

Rather, Mr. Daddario merely states that "disclosure of records that contain [the] categories of information [set forth in petitioner's first request] would tend to reveal the kind of mission for which the NYPD would or would not use the

technology[,] and that [s]uch records might include descriptions of areas being surveyed, the reasons for surveillance, the NYPD personnel (and their respective ranks) involved in such surveillance, and the dates, times and duration of such surveillance." Daddario affidavit, ¶ 20 (emphasis added). Fully taking into account the seriousness of Mr. Daddario's concerns, this court, nevertheless, concludes that Mr. Daddario's mere speculation, that any records about the NYPD's prior use of the Van(s) could lead to a circumvention of their future effectiveness, does not rise to the required showing of "a substantial likelihood" that such records would allow criminals to tailor their behavior so as to evade detection (*Matter of Bellamy v New York City Police Department*, 59 AD3d at 355), and it "falls far short of 'articulating a particularized and specific justification for denying access'", which the law requires. *Matter of New York Times Co. v New York State Dept. of Health*, 243 AD2d 157, 160 (3d Dept 1998), quoting *Matter of Capital Newspapers Div.*, 67 NY2d at 566. In any event, as noted above, petitioner has significantly limited the first requested item, to only summary reports or after-action reports of past deployments of the vans that are not related to any ongoing investigation. [Stipulation dated August 26, 2014, with letter September 9, 2013 attached].

With regard to petitioner's second item, a request for the NYPD's Van-related policies, procedures and training

materials, Mr. Daddario discusses solely such documents as might disclose when the Vans may not be used. While those documents, as with the documents responsive to petitioner's third request (see below), may be withheld, the NYPD may not assert a blanket exemption for all the documents responsive to the second request. See *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 (1996) (blanket nondisclosure of categories of documents is "inimical to FOIL's policy of open government"). Rather, the NYPD must redact the documents that are responsive to petitioner's second request, withholding such portions of them as come plainly within POL § 87 (2) (e) (iv), and disclose the remainder. See *Matter of Schenectady County Soc. for the Prevention of Cruelty to Animals v Mills*, 18 NY3d at 45-46 (2011); *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 (1984).

The third request, compliance with which would disclose "when and in what situations" the Van(s) cannot be used, clearly comes within the ambit of POL § 87 (2) (e) (iv), inasmuch as, with regard to such situations, it would extend a free pass from detection by the Van(s). In addition, "any legal opinion," as to when the Van can and cannot be used is protected by the attorney-client privilege (CPLR 4503 [a]), and it is, therefore, exempt from disclosure pursuant to POL § 87 (2) (a), which permits an agency to withhold documents that "are specifically exempted from disclosure by state or federal statute." Thus, item three need not be provided to

petitioner.

With regard to the petitioner's fourth request for records sufficient to disclose both the total aggregate cost of the vans purchased by or for the NYPD and the total number of vans purchased, Mr. Daddario states that knowledge of the number of Vans in use "would undermine any deterrent effect achieved through the lack of more specific information," and that "knowledge of the number of [V]ans in use would help terrorists determine locations at which the [V]ans are likely to be present and design an attack to overwhelm the Department's available resources." Daddario Affidavit, ¶ 22.

It is not disputed, however, that much information about the equipment in the Van(s), however, is already public. See Grabell affirmation, ¶¶ 4-6. Additionally, Mr. Daddario's speculation notwithstanding, mere knowledge of the number of Van(s) purchased by the NYPD and the cost of the Vans would hardly create a "substantial likelihood" (*Matter of Fink*, 47 NY2d at 572) that, on the basis of that knowledge, a would-be criminal could infer the number of Vans deployed at any given time, or the locations, some of which would, presumably, be routes, rather than fixed points, where they might be deployed.

With regard to petitioner's fifth request, Mr. Daddario states that the disclosure of any documents regarding the radiation dose or other health and safety effects of the Van(s) "would provide terrorists with the knowledge needed to

determine the power and capacity of the [V]ans' x-ray capabilities [and that] [d]isclosure of such information would permit a terrorist to tailor his or her conduct so as to exploit any limitations in the [V]ans' x-ray and backscatter capabilities." *Id.* ¶ 24.

However, the NYPD disputes neither that, as noted above, the Van(s) deliver a radiation dose approximately 40% larger than that delivered by a backscatter airport scanner, nor that this information is publicly available. Secondly, Mr. Daddario offers not even a hint as to how knowledge of the Van(s)'s x-ray capabilities would allow a would-be criminal to tailor his or her actions so as to thwart detection by the mobile Vans. Mr. Daddario's conclusory statement, as to how a criminal might benefit from reading the information as to any health risks sought by petitioner, is patently insufficient to meet NYPD's burden to establish that the NYPD may properly withhold documents responsive to petitioner's fifth FOIL request. *Matter of Dilworth*, 93 AD3d at 724; see also *Data Tree, LLC*, 9 NY2d at 463.

As to petitioner's sixth FOIL request, which originally sought "records related to data storage including but not limited to: the type of information stored, length of time for which information is stored, personnel with access to information stored, use of information stored, and any existing privacy protections for information stored", petitioner has narrowed significantly his request to focus on

NYPD's confidentiality policy as to the data maintained, limiting his request to only "NYPD's final policy governing retention and storage of data generated by the Z Backscatter Vans, and other documents sufficient to disclose NYPD's policies regarding the length of time images are stored or maintained, the process by which images are deleted or destroyed, the number and type of individuals permitted to access stored images, and any restrictions NYPD imposes on the use of the images". As to this category of documents, Mr. Daddario merely states:

"such records would disclose the targets, potential targets, or types of potential targets, of NYPD's ongoing criminal investigations. Further, such information would be especially useful to terrorists and would allow them to avoid engaging in activities likely to be captured by the van, or to time their activities so that NYPD could not connect significant events. Revealing the 'use of information stored' could also reveal other confidential non-routine law enforcement techniques unrelated to the use of the van, or impede other criminal and/or national-security related investigations and could disclose the design and limits of NYPD networks and information systems".

Daddario Affidavit, ¶23.¹ Again, the speculative nature of Daddario's opinion carries no weight, as it is not fully explained how releasing the NYPD's final policy governing the retention and storage of data and the access of the class of individuals permitted access, for example, would allow

¹ NYPD did not submit any affidavits in opposition in response to petitioner's narrowed requests.

potential criminals "to avoid engaging in activities likely to be captured by the van". *Id.* To the extent that such documents concerning data retention may "impede other criminal and/or national security related investigations", such may be redacted, after in camera review. *Id.*

In sum, with the exceptions noted above, Mr. Daddario's affidavit consists largely of repeated, conclusory statements that the disclosure of any records pertaining to the Van(s) would allow would-be criminals to circumvent the Van(s)'s potential effectiveness. However, the standard to exempt a document from disclosure is quite high in that, a party seeking to withhold documents that are sought pursuant to FOIL, must tender a "factual basis" for claiming that the documents come within one or another exemption. *Church of Scientology of N.Y. v State of New York*, 46 NY2d 906, 908 (1979). Further, it is well settled that it is the government's burden to justify the denial of access. See *Data Tree, LLC*, 9 NY 2d at 463. In *Matter of Gould*, *supra*, the Court explained that the statutory exemptions to disclosure, themselves, "strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files." Accordingly, the NYPD must articulate "'a particularized and specific justification'" for claiming an exemption. *Id.*, quoting *Matter of Fink*, 47 NY2d at 571. It has not done so here, in relation to either POL § 87 (2) (e) (4) or POL § 87 (2) (f) and has failed in carrying its burden.

Moreover, the NYPD also argues that it does not have documents responsive to petitioner's sixth request, which is inherently inconsistent with Mr. Daddario's affidavit. Specifically, NYPD cites to *Matter of Ratley v N.Y. City Police Dept.* (96 NY2d 873, 875 [2001]), arguing that, because the verified answer states that the NYPD does not have in its possession any records responsive to petitioner's request No. 6, except for a few test-photos used exclusively for training purposes (verified answer ¶¶ 37-39), the petition must be denied as moot, with regard to those requests. See also *Matter of Alicea v New York City Police Dept.*, 287 AD2d 286 (1st Dept 2001). However, NYPD bases such claim essentially on information and belief. Specifically, it merely submits an answer verified by Doram Tamati (a deputy managing attorney in the NYPD's Legal Bureau), in which he states that "the books and records of the [NYPD] and information received from other officers and employees of the [NYPD]" are the basis of his knowledge and belief that the contents of the answer are true. Notably, in sharp contrast to Mr. Tamati, Mr. Daddario never specifically states that there are no records responsive to petitioner's sixth request, and instead merely states that such records:

"would disclose targets, potential targets, or types of potential targets, of NYPD's ongoing criminal investigations. Further, such information would be especially useful to terrorists and would allow them to avoid engaging in activities likely to be captured by the [V]an, or to time their

activities so that NYPD could not connect significant events. Revealing the 'use of information stored' could also reveal other confidential non-routine law enforcement techniques unrelated to the use of the [V]an, or impede other criminal and/or national security related investigations and could disclose the design and limits of NYPD's networks and information systems."

Daddario affidavit, ¶ 23. If, indeed, the NYPD has no documents reflecting policies regarding: the length of time for which information gathered by the Van(s) is to be kept; who, within the NYPD, is authorized to have access to the images created; or any protections for the privacy of those whose images may have been captured by the Van(s), then paragraph 23 of Mr. Daddario's affidavit is inexplicable in that he discusses why certain documents that allegedly do not exist should not be disclosed (were they to exist). Given this inconsistency, the NYPD shall submit an affidavit, to the court, of a person who was engaged in, or in charge of the search that the NYPD made for documents responsive to petitioner's sixth FOIL request, and who can describe that search, and the results thereof, on the basis of personal knowledge, within 30 days of this order, or turn-over all documents responsive to petitioner's sixth request.²

Attorneys' Fees

Petitioner's request for attorneys' fees is granted as

² As indicated above, it is noted that petitioner's seventh request has been withdrawn.

provided below. POL § 89 (c) provides that a court reviewing an agency's failure to disclose documents responsive to a FOIL request may assess attorney's fees and other litigation costs against the agency when the petitioner "substantially prevailed," and "when the agency had no reasonable basis for denying access... ." Here, the NYPD denied petitioner's request in toto, and inasmuch as the court is ordering the NYPD to provide petitioner with at least redacted versions of documents responsive to four of the five requests in connection with which the NYPD acknowledges that it has documents, petitioner has "substantially prevailed." While the NYPD may have had a reasonable basis for withholding some of the documents that are responsive to petitioner's first five requests, it had no reasonable basis for withholding them all, or for failing to provide some of them in redacted form. Most egregiously, perhaps, it had no reasonable basis, or at least it has not articulated any such basis, for withholding documents responsive to petitioner's fifth request for documents. See pages 14-15 above. Accordingly, NYPD shall pay petitioner's attorneys' fees.

Citing *Matter of Friedland v Maloney* (148 AD2d 814 [3d Dept 1989]), the NYPD argues that, where an agency has begun to "work[] on and respond[] to a FOIL request prior to the commencement of a proceeding to compel disclosure, the petitioner cannot have substantially prevailed as a matter of law, since it is not the initiation of the proceeding that

caused the search for and release of the documents." Respondent's memo of law at 18. In *Matter of Friedland*, the agency notified the petitioner, one day before the proceeding was returnable, that it was treating the appeal as one from a constructive denial of her request, and that 45 pages of records would be forwarded to petitioner. The court proceeding was adjourned several times, and within three months the agency disclosed all the documents that petitioner had requested. Here, by glaring contrast, the NYPD denied petitioner's administrative appeal, disclosed not a single document, even those in the public domain, and took the position in this proceeding that not a single document should be released to petitioner, even after petitioner, in good faith, narrowly sharpened his request to address concerns of the NYPD.

It is noted that, significantly, respondent NYPD has not disputed the potential health risks inherent in the use of backscatter x-ray technology. While this court is cognizant and sensitive to concerns about terrorism, being located less than a mile from the 9-11 site, and having seen first-hand the effects of terrorist destruction, nonetheless, the hallmark of our great nation is that it is a democracy, with a transparent government.

"[T]he public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Thus, the statute affords the public the means to attain information concerning the day-to-day operations of State government. By permitting access to official

information long shielded from public view, the act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities...Moreover, judicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, 'to hold the governors accountable to the governed'..."

Fink v. Lefkowitz, 47 NY2d 567 (1979) (citations omitted). It is only through disclosure, public review and scrutiny, that potentially dangerous equipment and/or techniques, can be called into question, for the health and well being of the public at large. Nevertheless, as this is also an issue of public safety, prior to the release of the above discussed documents, appropriate redactions, as previously explained, will be permitted.

Accordingly, the petition is denied only as to petitioner's third request (the final policy decision or interpretation of the law or any legal opinion as to when and in what situations the Z-backscatter van can and cannot be used) and the remaining petition is granted as follows:

ORDERED and ADJUDGED that respondent New York City Police Department acted unlawfully in withholding from petitioner Michael Grabell documents that are not properly exempt from disclosure under the Freedom of Information Law (Public Officers Law § 85 et seq); and it is further

ORDERED that respondent New York City Police Department shall produce the following:

1. All documents responsive to petitioner's request (item number 1) for summary reports or after-action reports of past deployments of the Vans that are not related to any ongoing investigation, redacted to omit any information explicitly describing a limitation, technical or other, on the use of the Van(s), the dates upon which one or more Van(s) were deployed, and any information expressly disclosing the reason or reasons for any particular deployment of the Van(s);

2. All documents responsive to petitioner's request (item number 2) for the department's policies and procedures regarding the Z-backscatter Van(s) as well as any training materials, redacted to omit any information explicitly describing a limitation, technical or other, on the use of the Van(s), or any information expressly disclosing a reason for a particular deployment of the Van(s);

3. As to item number four, records sufficient to disclose both the total aggregate cost of the Z Backscatter Vans purchased by or for the NYPD and the total number of vans purchased;

4. As to item number five, any tests or reports regarding the radiation dose or other health and safety effects of the Z-backscatter Van(s); and it is further

ORDERED that the NYPD shall submit to this court, within 30 days, an affidavit from a person who can describe the search that the NYPD made for documents responsive to petitioner's sixth FOIL request, and the results of such search. Such affidavit shall be sent to the court in an envelope with a copy of this order attached to the outside of the envelope and also provided to petitioner;³ and it is further

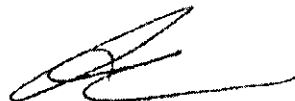
ORDERED that this proceeding is referred to a Special Referee who shall hear and determine the issue of attorneys' fees and other litigation costs, pursuant to CPLR 4317, as well as to supervise any disputes as to whether documents should have been redacted, and any other issues referred by the court, or which may arise, in accordance with CPLR 3104; and it is further

ORDERED that within 30 days of entry, petitioner shall serve a copy of this decision/order upon all parties and upon the Clerk of the Judicial Support Office to arrange a calendar date for the reference to a Special Referee with notice of entry.

³ Counsel may stipulate on consent to an extension, if necessary.

This constitutes the decision/order and judgment of the court.

Dated: 12/9/14



Doris Ling-Cohan, J.S.C.

J:\Article 78\GRABELL.-FOIL.wpd



CLERK

FILED

JAN - 8 2015

**COUNTY CLERK'S OFFICE
NEW YORK**

BLUE SHEET

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

504N In re Michael Grabell, Index 100580/13
Petitioner-Respondent,

-against-

New York City Police Department,
Respondent-Appellant.

— — — — —

The New York Civil Liberties Union, the Brennan Center for Justice, the Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative NewsMedia, Association of American Publishers, Inc., Bloomberg L.P., BuzzFeed, Daily News, LP, the E. W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech,
Amici Curiae.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

Media Freedom and Information Access Clinic, New York (David A. Schulz of counsel), for respondent.

Mariko Hirose, New York, for New York Civil Liberties Union,
amicus curiae.

Michael Price, New York, for The Brennan Center for Justice,
amicus curiae.

Davis Wright Tremaine LLP, Washington, DC (Alison Schary of the bar of District of Columbia, admitted pro hac vice, of counsel), for the Reporters Committee for Freedom of the Press, Advance

Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative NewsMedia, Association of American Publishers, Inc., Bloomberg L.P., BuzzFeed, Daily News, LP, the E. W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech, amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 8, 2015, which, to the extent appeal appealed from as limited by the briefs, granted the petition brought pursuant to CPLR article 78 to the extent of compelling respondent New York City Police Department (NYPD) to disclose certain records requested by petitioner pursuant to the Freedom of Information Law (FOIL) with redactions ordered by the court, ordering NYPD to submit an affidavit describing its search for certain other records, and granting petitioner's request for attorney's fees and costs and referring that issue to a special referee to hear and determine, unanimously modified, on the law, to deny the petition except as to those records seeking health and safety information as described herein, to vacate the order directing NYPD to submit an affidavit, to deny petitioner's request for attorney's fees and other litigation costs, and otherwise affirmed, without costs.

As part of its counterterrorism operations, NYPD employs a Z-backscatter van, which is a mobile X-ray unit that scans vehicles or buildings for evidence of explosives, drugs and other materials. Unlike traditional X rays that penetrate an object, backscatter technology sends X rays that bounce back from the object and create an image. When a backscatter van is used to scan vehicles, occupants of the vehicle and nearby pedestrians are exposed to low doses of ionizing radiation. Petitioner alleges that this type of radiation is known to mutate DNA and cause cancer, although it is difficult to determine the long-term health effects of low doses.¹

Petitioner filed a FOIL request with NYPD seeking various documents pertaining to the Z-backscatter vans. NYPD denied the request, and after an administrative appeal was rejected, petitioner brought this article 78 proceeding. Supreme Court granted the petition to the extent of compelling NYPD to disclose the following, with certain redactions: (a) reports of past deployments of the vans that are not related to any ongoing

¹ According to petitioner, the manufacturer of the vans has determined that they deliver a radiation dose forty percent larger than the dose delivered by backscatter technology used in airport scanners. Petitioner further alleges that due to health concerns, the European Union has banned backscatter machines from its airports.

investigation; (b) policies, procedures and training materials regarding the vans; (c) records sufficient to disclose the total number and aggregate cost of vans purchased by or for NYPD; and (d) tests or reports regarding the radiation dose or other health and safety effects of the vans. NYPD now appeals.

The court erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of the vans. These materials are exempt from disclosure under FOIL's law enforcement and public safety exemptions (Public Officers Law § 87[2][e][iv] [exempting records "compiled for law enforcement purposes" that would "reveal [nonroutine] criminal investigative techniques or procedures"]; Public Officers Law § 87[2][f] [exempting from disclosure information that "could endanger the life or safety of any person"]; see *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]).

NYPD has articulated a "particularized and specific justification for not disclosing" these records (*Mater of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). NYPD submitted an affidavit of Richard Daddario, NYPD's Deputy Commissioner of Counterterrorism,

who averred that the vans are a highly specialized and nonroutine technology used to combat terrorism in New York City. Daddario explained that in light of the ongoing threat of terrorism, releasing information describing the strategies, operational tactics, uses and numbers of the vans would undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack.

Daddario further explained that disclosing information about the locations in which NYPD has used the vans in the past, as well as the times and frequency of their deployment, would allow terrorists to infer the inverse, namely, locations and times when NYPD does not use them, and would permit a terrorist to conform his or her conduct accordingly. Daddario's affidavit provides a sufficient basis for finding the records exempt under both the law enforcement and public safety exemptions (*see Matter of Asian Am. Legal Defense*, 125 AD3d at 532 [disclosure of NYPD Intelligence Division documents containing sensitive information about the unit's methods and operations would identify nonroutine investigative techniques, could potentially be exploited by terrorists, and would create a possibility of endangerment to life])).

The court, however, properly directed NYPD to disclose tests

or reports regarding the radiation dose or other health and safety effects of the vans. Daddario's affidavit does not explain how general health and safety information about the van's radiation could be exploited by terrorists. Nor does Daddario sufficiently articulate how revealing the dosage of the radiation used by the vans would allow terrorists to tailor their conduct so as to thwart detection. Further, as petitioner points out, information about the safety risks of backscatter technology is already widely available to the public. Thus, release of NYPD's records containing health information about the vans would neither reveal nonroutine investigatory techniques or procedures, nor endanger public safety.

The court erred in ordering NYPD to submit an affidavit describing its search for certain other records requested by petitioner. NYPD certified that it had conducted a diligent search, and except for a few properly exempt records, it could not locate documents responsive to the request. This certification satisfied the requirements of Public Officers Law § 89(3)(a) (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]). Nothing in Daddario's affidavit contradicts NYPD's certification, and petitioner has failed to articulate a demonstrable factual basis to support the contention

that the documents exist and are within NYPD's control (see *Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637 [1st Dept 2015]).

In light of our significant modification of Supreme Court's order, petitioner has not "substantially prevailed," and thus there is no basis for an award of attorney's fees and other litigation costs (Public Officers Law § 89[4][c]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 10, 2016


CLERK

BLUE SHEET

-----	X
	:
In re Application for a Judgment under Article 78 of	:
the Civil Practice Law and Rules by	:
	:
MICHAEL GRABELL,	:
	Index No. 100580/2013
	:
Petitioner,	:
	:
-against-	:
	:
NEW YORK CITY POLICE DEPARTMENT,	:
	:
Respondent.	:
	:
-----	X

Dated: July 29, 2016
New York, New York

**MEDIA FREEDOM AND
INFORMATION ACCESS CLINIC**
Yale Law School
40 Ashmun Street
New Haven, CT 06511

By: 
David A. Schulz, Supervising Attorney
321 West 44th Street, Suite 1000
New York, NY 10036
Email: dschulz@lskslaw.com
Tel: (212) 850-6100
Fax: (212) 850-6299

Counsel for Petitioner

To: Susan Paulson
Assistant Corporation Counsel for the City of New York
100 Church Street
New York, NY 10007.
spaulson@law.nyc.gov
Counsel for New York City Police Department

Mariko Hirose
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
mhirose@nyclu.org
Counsel for Amicus Curiae New York Civil Liberties Union

Michael Price
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
michael.price@nyu.edu
Counsel for Amicus Curiae Brennan Center for Justice

Katie Townsend
Reporters Committee for Freedom of the Press
1156 15th Street NW
Suite 1250
Washington, DC 20005
ktownsend@rcfp.org
Counsel for Amici Curiae Reporters Committee for Freedom of the Press

Alison Schary
David Wright Tremaine LLP
1919 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006
alisonschary@dwt.com
Counsel for Amici Curiae 21 Media Organizations

-----	X
	:
In re Application for a Judgment under Article 78 of	:
the Civil Practice Law and Rules by	:
	:
MICHAEL GRABELL,	:
	Index No.: 100580/2013
	:
Petitioner,	:
	:
-against-	:
	:
NEW YORK CITY POLICE DEPARTMENT,	:
	:
Respondent.	:
	:
-----	X

Mariko Hirose
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
mhirose@nyclu.org
Counsel for Amicus Curiae New York Civil Liberties Union

Michael Price
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
michael.price@nyu.edu
Counsel for Amicus Curiae Brennan Center for Justice

Katie Townsend
Reporters Committee for Freedom of the Press
1156 15th Street NW
Suite 1250
Washington, DC 20005
ktownsend@rcfp.org
Counsel for Amici Curiae Reporters Committee for Freedom of the Press

Alison Schary
David Wright Tremaine LLP
1919 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006
alisonschary@dwt.com
Counsel for Amici Curiae 21 Media Organizations



Brian Earl

Subscribed and sworn to before me
this 29th day of July, 2016



Notary Public

SCOTT BAILEY
Notary Public, State of New York
No. 01BA6201502
Qualified in New York County
Commission Expires March 2, 2017

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

504N In re Michael Grabell,
 Petitioner-Respondent,

Index 100580/13

-against-

New York City Police Department,
Respondent-Appellant.

- - - - -

The New York Civil Liberties Union, the
Brennan Center for Justice, the Reporters Committee
for Freedom of the Press, Advance Publications, Inc.,
American Society of News Editors,
AOL-Huffington Post, Association of Alternative
NewsMedia, Association of American Publishers, Inc.,
Bloomberg L.P., Buzzfeed, Daily News, LP, the E. W.
Scripps Company, First Look Media, Inc., Hearst
Corporation, Investigative Reporting Workshop at
American University, the National Press Club,
National Press Photographers Association, the
New York Times Company, North Jersey Media Group
Inc., Online News Association, the Seattle Times
Company, Society for Professional Journalists and
Tully Center for Free Speech,
Amici Curiae.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson
of counsel), for appellant.

Media Freedom and Information Access Clinic, New York (David A.
Schulz of counsel), for respondent.

Mariko Hirose, New York, for New York Civil Liberties Union,
amicus curiae.

Michael Price, New York, for The Brennan Center for Justice,
amicus curiae.

Davis Wright Tremaine LLP, Washington, DC (Alison Schary of the
bar of District of Columbia, admitted pro hac vice, of counsel),
for the Reporters Committee for Freedom of the Press, Advance

Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative NewsMedia, Association of American Publishers, Inc., Bloomberg L.P., BuzzFeed, Daily News, LP, the E. W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech, amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 8, 2015, which, to the extent appeal appealed from as limited by the briefs, granted the petition brought pursuant to CPLR article 78 to the extent of compelling respondent New York City Police Department (NYPD) to disclose certain records requested by petitioner pursuant to the Freedom of Information Law (FOIL) with redactions ordered by the court, ordering NYPD to submit an affidavit describing its search for certain other records, and granting petitioner's request for attorney's fees and costs and referring that issue to a special referee to hear and determine, unanimously modified, on the law, to deny the petition except as to those records seeking health and safety information as described herein, to vacate the order directing NYPD to submit an affidavit, to deny petitioner's request for attorney's fees and other litigation costs, and otherwise affirmed, without costs.

As part of its counterterrorism operations, NYPD employs a Z-backscatter van, which is a mobile X-ray unit that scans vehicles or buildings for evidence of explosives, drugs and other materials. Unlike traditional X rays that penetrate an object, backscatter technology sends X rays that bounce back from the object and create an image. When a backscatter van is used to scan vehicles, occupants of the vehicle and nearby pedestrians are exposed to low doses of ionizing radiation. Petitioner alleges that this type of radiation is known to mutate DNA and cause cancer, although it is difficult to determine the long-term health effects of low doses.¹

Petitioner filed a FOIL request with NYPD seeking various documents pertaining to the Z-backscatter vans. NYPD denied the request, and after an administrative appeal was rejected, petitioner brought this article 78 proceeding. Supreme Court granted the petition to the extent of compelling NYPD to disclose the following, with certain redactions: (a) reports of past deployments of the vans that are not related to any ongoing

¹ According to petitioner, the manufacturer of the vans has determined that they deliver a radiation dose forty percent larger than the dose delivered by backscatter technology used in airport scanners. Petitioner further alleges that due to health concerns, the European Union has banned backscatter machines from its airports.

investigation; (b) policies, procedures and training materials regarding the vans; (c) records sufficient to disclose the total number and aggregate cost of vans purchased by or for NYPD; and (d) tests or reports regarding the radiation dose or other health and safety effects of the vans. NYPD now appeals.

The court erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of the vans. These materials are exempt from disclosure under FOIL's law enforcement and public safety exemptions (Public Officers Law § 87[2][e][iv] [exempting records "compiled for law enforcement purposes" that would "reveal [nonroutine] criminal investigative techniques or procedures"]; Public Officers Law § 87[2][f] [exempting from disclosure information that "could endanger the life or safety of any person"]; see *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 [1st Dept 2015], lv denied 26 NY3d 919 [2016]).

NYPD has articulated a "particularized and specific justification for not disclosing" these records (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). NYPD submitted an affidavit of Richard Daddario, NYPD's Deputy Commissioner of Counterterrorism,

who averred that the vans are a highly specialized and nonroutine technology used to combat terrorism in New York City. Daddario explained that in light of the ongoing threat of terrorism, releasing information describing the strategies, operational tactics, uses and numbers of the vans would undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack.

Daddario further explained that disclosing information about the locations in which NYPD has used the vans in the past, as well as the times and frequency of their deployment, would allow terrorists to infer the inverse, namely, locations and times when NYPD does not use them, and would permit a terrorist to conform his or her conduct accordingly. Daddario's affidavit provides a sufficient basis for finding the records exempt under both the law enforcement and public safety exemptions (*see Matter of Asian Am. Legal Defense*, 125 AD3d at 532 [disclosure of NYPD Intelligence Division documents containing sensitive information about the unit's methods and operations would identify nonroutine investigative techniques, could potentially be exploited by terrorists, and would create a possibility of endangerment to life])).

The court, however, properly directed NYPD to disclose tests

or reports regarding the radiation dose or other health and safety effects of the vans. Daddario's affidavit does not explain how general health and safety information about the van's radiation could be exploited by terrorists. Nor does Daddario sufficiently articulate how revealing the dosage of the radiation used by the vans would allow terrorists to tailor their conduct so as to thwart detection. Further, as petitioner points out, information about the safety risks of backscatter technology is already widely available to the public. Thus, release of NYPD's records containing health information about the vans would neither reveal nonroutine investigatory techniques or procedures, nor endanger public safety.

The court erred in ordering NYPD to submit an affidavit describing its search for certain other records requested by petitioner. NYPD certified that it had conducted a diligent search, and except for a few properly exempt records, it could not locate documents responsive to the request. This certification satisfied the requirements of Public Officers Law § 89(3)(a) (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]). Nothing in Daddario's affidavit contradicts NYPD's certification, and petitioner has failed to articulate a demonstrable factual basis to support the contention

that the documents exist and are within NYPD's control (see *Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637 [1st Dept 2015]).

In light of our significant modification of Supreme Court's order, petitioner has not "substantially prevailed," and thus there is no basis for an award of attorney's fees and other litigation costs (Public Officers Law § 89[4][c]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 10, 2016


CLERK