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

In re Application for a Judgment under Article 78 of the Civil Practice Law and Rules by	
SUSAN CRAWFORD	Index No.: 157002/2015
Petitioner,	I.A.S. Part 33 (Hunter, J.)
-against-	
NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,	
Respondent.	

PETITIONER'S MEMORANDUM IN
OPPOSITON TO RESPONDENT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

The motion to dismiss by Respondent New York City Department of Information Technology and Telecommunications ("DoITT") rests on a complete misstatement of the events and holdings in an earlier proceeding, *Crawford v. New York City Department of Information Technology and Telecommunications*, 43 Misc. 3d 735 (Sup. Ct. N.Y. Cnty. 2014) ("*Crawford I*"). The motion has no basis in law or fact and should promptly be denied.

This Article 78 proceeding is brought by a leading expert on Internet access competition who seeks to compel DoITT to release under the Freedom of Information Law, Pub. Off. Law § 87 *et seq.* ("FOIL") basic information about Internet access conduit availability in New York City. DoITT asserts that the claim is barred under the principle of res judicata by the ruling in *Crawford I*, which allowed DoITT to withhold maps showing the then existing conduit paths throughout the City. Remarkably, while invoking that earlier ruling, DoITT's motion completely misconstrues what it actually held.

The Supreme Court in *Crawford I* upheld DoITT's refusal to disclose the maps only after conducting an *in camera* inspection and concluding that the conduit paths shown in the maps could not be redacted in any meaningful way to avoid disclosing the pathways to high risk targets. In that same ruling, however, the court explicitly *declined* to reach the issue of whether the conduit information sought here is all exempt from disclosure as DoITT contends. To the contrary, recognizing the significant public interest in disclosure of this conduit information, the court ordered DoITT to search for any documents other than the maps that would disclose the information without creating direct risk to high value targets. DoITT swore at the time that it had nothing but the maps, and it only subsequently obtained the spreadsheets that are at issue in this case. The notion that this prior order allowing the maps to be withheld because they could not be redacted somehow *precludes* this effort to compel DoITT to disclose after-acquired

conduit locational data whose exempt status was never decided is, in a word, preposterous. The issues presented here were never decided and they are not barred from litigation now.

DoITT's further claim that Petitioner is time barred from pursuing some of the information sought here is equally unhinged from the underlying facts. DoITT claims that Petitioner cannot litigate her current request for records identifying by geographic location the names of the companies that have rented Internet conduit, because she previously asked for a list of the companies who rented any conduit, and then failed to appeal that request. There are multiple problems with DoITT's theory (including that the current request for customers by location of their conduit is different from the previous request for a simple list of customers), but the principal one is that Petitioner's earlier request for a customer list was NOT DENIED. Petitioner was provided the customer list in response to her earlier FOIL request, as the *Crawford I* opinion expressly notes. 43 Misc. 3d at 738. There was nothing to appeal because the request was granted. No clock limiting the time to appeal ever began to run.

Nothing whatsoever bars Petitioner from proceeding with her request for newly-acquired information that identifies the location and use of conduct in a form that can be redacted and disclosed without any increased risk to high value targets. The complete emptiness of the instant motion suggests that it is nothing more than an effort to further delay the release of information that can promote competition for Internet access service in New York City and help address the deplorable divide that now exists between the Internet access "haves" and "have-nots"—a divide that has a profound impact on education, employment and economic growth. As its baseless motion also suggests, DoITT seems more prepared to protect the interests of an embedded monopoly provider of the conduit infrastructure than the public interest in promoting competition among Internet service providers.

BACKGROUND

A. The Conduit Information at Issue

This proceeding arises out of a request by one of the nation's leading authorities on competition in Internet access for access to basic infrastructure information that is needed to understand the reasons for the dramatic lack of access to high speed Internet access service in low-income neighborhoods of New York City. More than a quarter of households in these neighborhoods do not have home access to high-speed Internet (affirmation of Susan Crawford, sworn to July 2, 2015, at ¶6 ("Crawford Aff.")),[1] and there remain significant segments of New York City "where the use of email and the internet may be all but impossible."[2] The data at issue in this case relating to the capacity, use and availability of underground conduit will shed important light on the effectiveness of the policies being pursued to modernize the City's IT infrastructure, and will facilitate the entry of new competitors into the market for providing high-speed Internet access in under-served communities. Crawford Aff. ¶2.

Specifically at issue is data held by Respondent New York City Department of Information Technology and Telecommunications ("DoITT") concerning underground conduit—the physical pipes running below the streets that are needed by Internet service providers to install the cables over which Internet service is provided. DoITT manages the Internet access infrastructure in New York City. Crawford Aff. ¶11. In Manhattan and the Bronx, this infrastructure is owned and operated exclusively by Empire City Subway ("ECS"), a wholly-owned subsidiary of Verizon that has a license to construct, maintain and lease *all*

[1] The affirmation of Susan Crawford was originally submitted last July in support of her Article 78 Petition. A copy is annexed for the Court's convenience as Exhibit B to the affirmation of Jonathan Manes, sworn to December 2, 2015 ("Manes Aff.").

[2] State of N.Y. Dep't of State Comm. on Open Gov't, *Report to the Governor and the State Legislature 2011: "Push" vs. "Pull": Reinventing Foil* 6 (2011) (annexed as Exhibit D to Manes Aff.).

underground conduit on behalf of the City. *Id.* at ¶¶12-14. ECS is responsible for building and then leasing out conduit space to Internet access service providers, such as AT&T and Time Warner Cable, and for maintaining the City's conduit infrastructure. *Id.*

Since 2012 Petitioner has been seeking to acquire information about the location, utilization, and availability of the conduit regulated by DoITT in order to analyze the reasons for the current disparity of access to high-speed Internet services within New York City, to evaluate DoITT's performance, and to assess the policies it is pursuing to expand the availability of high-speed Internet access service. *Id.* at ¶¶1-2. These are issues of vital public concern as high-speed Internet access has become "the fourth utility of the modern age—as central to our daily lives as electricity, gas and water."[3] Access to high-speed Internet is needed for basic education, employment opportunity, and participation in culture and democracy, yet it remains "beyond the reach of millions of New Yorkers." *Id.* High-speed Internet access is also important for commerce. The Brookings Institution estimates that New York State would add 18,500 jobs, raising its employment rate by about 0.3%, if it increased its broadband penetration rate by only one percentage point. Crawford Aff. ¶8.

As previously explained by Petitioner, one reason for the current digital divide in New York City could be a lack of adequate conduit and other physical assets needed by Internet service providers.[4] Whether this is an actual constraint to the expansion of service can only be understood by disclosure of the endpoints and occupancy of existing conduits. The absence of sufficient conduit would likely call for construction of needed facilities, raising policy and

[3] Office of the N.Y.C. Comptroller, *Internet Inequality: Broadband Access in NYC* 1 (2014), *available at* http://comptroller.nyc.gov/wp-content/uploads/documents/Internet_Inequality.pdf (last visited Dec. 2, 2015) (annexed as Exhibit E to Manes Aff.).

[4] N.Y.C. Dep't of Info. Tech. & Telecomm., *Verizon FiOS Implementation Final Audit Report* (2015), *available at* http://www.nyc.gov/html/doitt/downloads/pdf/verizon-audit.pdf (last visited Dec. 2, 2015) (annexed as Exhibit F to Manes Aff.).

budgetary questions as to how best to accomplish this objective. *Id.* ¶17. Alternatively, the digital divide may have more to do with a lack of competition by service providers than with a lack of adequate conduit for them to use in under-served neighborhoods. If this is the case, a very different set of policies needs to be developed and implemented to alleviate the problem. *Id.* ¶18.

The actual reasons for the existing disparity cannot be discerned and appropriate policy responses cannot be developed without knowledge of the extent of available conduit and its location. That is why Prof. Crawford first submitted a FOIL request to DoITT in 2012 seeking limited information about the location and availability of conduit in New York City. In 2014, she submitted a second FOIL request—the request at issue in this Article 78 proceeding—seeking documents that DoITT did not possess at the time it responded to her initial FOIL request. Public disclosure of the requested information may facilitate greater competition for Internet access service, and will better allow researchers, political leaders, and New York citizens generally to monitor whether DoITT is fulfilling its mandate, taking appropriate steps to ensure the development of necessary infrastructure throughout the city, and adequately overseeing the city's contract with ECS.

B. Petitioner's Earlier FOIL Request and Lawsuit

In January 2012, Petitioner submitted a FOIL request seeking, in pertinent part, the disclosure of the geographic location of conduits owned or operated by ECS and a list of the names of customers renting ECS-owned ducts. 43 Misc. 3d at 738. In May 2012, DoITT produced documents that disclosed the names of customers renting ECS-owned ducts, thereby satisfying this portion of Petitioner's request in full. *Id.* A month later, DoITT responded that the *only* documents in its possession identifying the geographic location of the conduit owned or operated by ECS were 41 maps depicting conduit paths throughout New York City (the "Maps").

DoITT withheld the Maps in full, citing two FOIL exemptions: Pub. Off. Law § 87(2)(f) (the "life safety exemption) and Pub. Off. Law § 87(2)(i) (the "critical infrastructure exemption"). *Id*. at 738-39. It did not claim that the locations of ECS conduit was exempt as confidential commercial information. Petitioner timely submitted an administrative appeal, which DoITT denied in August, 2012. *Id.*

In November, 2012, Petitioner timely commenced an Article 78 proceeding challenging DoITT's decision to withhold the conduit Maps. After conducting a lengthy hearing on the parties' contentions, the court ordered DoITT to produce two sample Maps for *in camera* inspection. *Id.* at 744. Following this inspection, on March 20, 2014 the Supreme Court issued an order that made two holdings about the Maps: (1) At least *some* of the information on the Maps could properly be withheld from disclosure under the critical infrastructure exemption; and (2) it was impossible to segregate this exempt information from other conduit information on the Maps in any meaningful way, so that the Maps could be withheld entirely due to the "impossibility to redact the exempt material." *Id.* at 744. The court expressly did *not* hold that all the conduit locational information on the Maps was exempt from disclosure. *Id.* at 743-44.

Obviously concerned that the information of great public value could not be disclosed in the form of the Maps, the court did not stop there. The court noted that it "is not completely satisfied that respondent has conducted a sufficiently diligent search to discover other responsive documents, even if not in a precise map form." *Id*. The court ordered DoITT to conduct a further search. DoITT conducted this search and found no further responsive documents. However, in late 2014—after the search had been completed—DoITT obtained from ECS a set of detailed spreadsheets (the "Spreadsheets") that also reveal the location, availability and use of conduit. *See* Resp't Aff. in Support of Cross Mot. (Resp't Aff.) ¶25.

C. The Instant Request for Newly-Acquired Information

On May 9, 2014, Prof. Crawford submitted a new FOIL request to DoITT seeking more specific and granular information about the availability of conduit in a form that could be redacted as need be to address the concerns that had been raised about some of the information conveyed by the unredactable conduit paths shown in the Maps. One of the new requests, request 11, specifically sought: "Records sufficient to disclose for each year since 2004 the total number of conduits owned or operated by ECS, broken down by the smallest geographic unit available to DoITT (e.g. zip code, neighborhood, block, or similar defined region)." Ver. Pet. Ex. A.

Over the course of several months, DoITT responded to the new requests on a rolling basis. On January 30, 2015, DoITT disclosed, in heavily redacted form, the detailed Spreadsheets it had obtained from ECS after concluding its response to the earlier lawsuit. Ver. Pet. Ex. H. The Spreadsheets contain the locational information sought in request 11 identifying manhole by manhole the number of existing conduit and their current use. The Spreadsheets were produced, however, only in a heavily redacted form that removed *all* locational information and provided only a list of thousands of manhole numbers.

The two main Spreadsheets (one for Manhattan, one for the Bronx) contain six columns and thousands of rows. The columns are labeled "FROM MH#," "FROM LOCATION," "TO MH#," "TO LOCATION," "CUSTOMER," and "DUCT." ishe two MH# columns and the DUCT column are disclosed and contain numbers that appear to be manhole and duct identification numbers. Ver. Pet. Ex. G. (DoITT refused to tell Prof. Crawford anything about what data is contained in the Spreadsheet columns on the ground that it has no document providing a definition of the column headings and is not required to create one, leaving her to infer the Spreadsheet content from the abbreviated headings.) Ver. Pet. Ex. J. The LOCATION

columns and the CUSTOMER column were entirely redacted. DoITT claimed that the LOCATION columns are exempt from disclosure under the critical infrastructure exemption, Pub. Off. Law §87(2)(i), and that the CUSTOMER column is exempt under the "trade secrets exemption," Pub. Off. Law § 87(2)(d). Ver. Pet. Ex. J.

Petitioner promptly submitted an administrative appeal challenging the redaction of locational information from the Spreadsheets. Ver. Pet. Ex. I. On March 12, 2015, DoITT responded and provided a list of the companies that rent conduit space from ECS, but refused to disclose any information in any of the redacted columns. Ver. Pet. Ex. I. On July 10, 2015, Petitioner timely filed the instant Article 78 petition.

ARGUMENT

I.
THIS PROCEEDING IS NOT PRECLUDED BY THE EARLIER LAWSUIT OVER DISCLOSURE OF DOITT'S CONDUIT MAPS

DoITT seeks to invoke a legal principle that has no application to this case. DoITT asserts that this proceeding should be dismissed on grounds of res judicata (claim preclusion), because the holding in *Crawford I* supposedly bars Prof. Crawford from challenging in this case its blanket refusal to disclose by location any conduit capacity or use information. The argument is baseless—precluded by the actual holding in *Crawford I* that DoITT completely misstates.

Under the principle of res judicata, or claim preclusion, "a valid final judgment bars future actions between the same parties on the same cause of action." *Parker v. Blauvelt Volunteer Fire Co*., 93 N.Y.2d 343, 347 (1999) (citing *Reilly v. Reid*, 45 N.Y.2d 24, 27 (1978)). Res judicata applies only to those claims that were actually litigated before the court and to those "that might have been so litigated, when the two causes of action have such a measure of identity

that a different judgment in the second would destroy or impair rights or interests established by the first." *Schuylkill Fuel Corp. v. Nieberg Realty Corp*., 250 N.Y. 304, 306-07 (1929).

In the context of a FOIL dispute, a petition may be dismissed on res judicata grounds if the petitioner seeks access to the same documents that were held to be exempt in a prior proceeding involving the same parties. *See Andrade v. New York City Police Dep't*, 106 A.D.3d 520, 521 (1st Dep't 2013); *Mays v. New York City Police Dep't*, 48 A.D.3d 372, 373 (1st Dep't 2008). Res judicata has no conceivable application in this case, which does not seek the same documents and does not seek information previously held to be exempt.[5] To the contrary, the issue of whether all conduit locational information is exempt from FOIL disclosure was explicitly *not* decided in *Crawford I*, and the issue of whether the conduit location and use data presented in the Spreadsheets can and should be redacted was not an issue in that case—DoITT did not even have the Spreadsheet data when that case was litigated.[6] DoITT's authority to withhold the Spreadsheet information has not been litigated and is not precluded.

As described by the court, *Crawford I* concerned non-segregable depictions of the "fiber optic network in great detail," which included sensitive information about "routing and points of entry into 'high-profile targets.'" *Crawford I*, at 742. The court concluded in *Crawford I* that at least some of the information revealing the paths of entry to significant targets was exempt from disclosure, but declined to make any broader findings covering all locational information. *Id*. at 743. Because the Maps contained some information properly exempt from disclosure under

[5] DoITT alternatively seeks dismissal on the basis of collateral estoppel, or issue preclusion. Resp't Mem. at 8 n.4. This doctrine is equally inapplicable. Applies only where the identical issue was 1) raised in the prior litigation, and 2) actually decided or necessarily determined in that litigation. *Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981). Preclusion does not apply to an issue that "never was actually litigated and decided." *99 Cents Concepts v. Queens Broadway*, 70 A.D.3d 656, 658 (2d Dep't 2010). The issues presented here were not previously decided.

[6] DoITT first obtained the spreadsheet *after* completing its search for documents in *Crawford I*. *See* Resp't Aff. ¶25.

FOIL, and because that information was impossible to redact, the court never decided that all locational information is exempt, and the ruling is clear on this point. The court expressly declined to resolve the question of whether just "certain information on the Maps" or "the entirety of the Maps" were exempt. *Id*.

DoITT simply misrepresents the earlier judgment in claiming that "Justice Hagler has already held that DoITT properly withheld the precise locations of the conduits." Resp't Mem. at 8. The court did no such thing. *Crawford I* addressed only the exempt status of *some* conduit paths leading to extremely sensitive, high-risk targets, not *all* conduit locational information everywhere in the City. Justice Hagler allowed the Maps to be withheld entirely solely due to the "impossibility to redact the exempt material." *Crawford I* at 744. Had the court actually decided that all locational information is exempt, as DoITT now contends, it would not have required DoITT to produce two sample Maps for an *in camera* inspection and then made the further factual determination that it was indeed impossible to redact the exempt conduit information in any useful way.

Moreover, after finding that the Maps could be withheld, the court immediately ordered DoITT to look for *other* documents with the locational information in a form that could possibly be segregated and produced—eliminating any doubt that the court was not finding all locational information exempt from disclosure under FOIL. *Id.* at 743-44. DoITT's depiction of this order as somehow precluding Prof. Crawford's claim in this proceeding is indefensible. Far from granting DoITT license to withhold future documents at will and immune to challenge, the judge specifically raised the possibility that Petitioner might be entitled to other documents with the locational information if DoITT possessed them. DoITT did not possess them then; it does now.

This deceptive effort to avoid judicial review of its never-resolved refusal to disclose information needed by the public should not be countenanced.

In this context, the similarity of Petitioner's two FOIL requests is irrelevant. But Prof. Crawford is not seeking information identical to that sought in her first suit—namely, the unredactable conduit Maps. Rather, she is seeking a segregable subset of information now in DoITT's possession that did not exist when the earlier case was being litigated. The FOIL cases cited by Respondent are thus readily distinguished, as all involved attempts to re-litigate access to the same documents already held to be exempt in prior proceedings. Resp't Mem. at 7-8. *See Andrade*, 106 A.D.3d at 521 (proceeding barred by res judicata where "Petitioner requested disclosure of documents he had sought in a prior FOIL request, which were found to be exempt from disclosure in a prior article 78 proceeding between the same parties"); *Ferrara v. Superintendent, New York State Police*, 235 A.D.2d 874, 875 (3d Dep't 1997) (proceeding barred by res judicata "insofar as the same records were the subject of both of petitioner's FOIL requests"). No remotely similar situation exists here.

The issue of whether the Spreadsheets can be redacted in a useful way did not exist in *Crawford I* and is not precluded. Indeed, the concerns that justified withholding the conduit paths in *Crawford I* have no similar force when applied to the Spreadsheet data. For example, the extent of unused conduit in low income neighborhoods could be disclosed by providing the Spreadsheet data only for manholes in law income neighborhoods. Unlike the maps, this information could be made public without revealing direct conduit paths to high-risk targets.

Indeed, even the reasoning of *Crawford I* would not preclude disclosure of such neighborhood specific information because FOIL does not permit DoITT to withhold information under the critical infrastructure exemption if disclosure would create no significant

risk beyond the risk associated with any infrastructure whose location is visible to the public. This principle is well-settled. For example, *Physicians Committee for Responsible Medicine v. Hogan* refused to apply a FOIL exemption where "the same type of information that [the agency] claims must be withheld to protect life and safety already are available to the public through a wide array of sources." 29 Misc. 3d 1220(A), 2010 N.Y. Slip Op. 51908(U), *5 (Sup. Ct., Albany Cnty. 2010); *see also Muniz v. Roth*, 169 Misc. 2d 293, 297 (Sup. Ct. Tomkins Cnty. 1994) (refusing to exempt information concerning technology for detecting phony fingerprint evidence because similar methodology previously "was the subject of testimony in open court"); *Grabell v. New York City Police Dept.*, 47 Misc. 3d 203, 212 (Sup. Ct. N.Y. Cnty. 2015) (refusing to exempt the cost and number of Z-backscatter vans owned by the New York City Police Department, in part because "much information about the equipment in the Van(s)… is already public"), *appeal pending*. This principle follows from FOIL's basic mandate favoring disclosure to the greatest extent possible. *See, e.g.*, *M. Farbman & Sons v. New York City Health and Hosps. Corp.,* 62 N.Y.2d 75, 80 (1984) (FOIL exemptions are to be "narrowly interpreted"); *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (FOIL exemptions are "narrowly constructed).

In this case, the information DoITT redacted from the Spreadsheets is to a great extent already a matter of public knowledge. The location of manholes is known for the simple reason that ECS manholes have a visible ECS insignia on them, and can be seen throughout the City. *See* Affirmation of David Schulz, sworn to July 10, 2015 ("Schulz Aff."), Ex. G.[7]

Furthermore, much information about conduit location is available online. *See* Schulz Aff. Exs. H, I, and J. For example, Windstream Enterprise publishes a detailed map of its Fiber

[7] The affirmation of David Schulz was originally submitted in support of Susan Crawford's Article 78 Petition.

Network, IP Network, and Data Centers throughout the country, including in Manhattan.[8] Companies like Level 3 Communications and Telecom Ramblings aggregate and re-publish these maps, including details of which fiber is lit versus dark.[9] Internet service providers and governments also have released maps depicting specific buildings served by the providers. *See* Schulz Aff., Exs. D and E. Anyone with an internet connection can already find this information online.[10] Indeed, a writer has recently published a "Field Guide" to New York's Internet access infrastructure that details points of concentrated fiber.[11] Artists have even made short films about the Internet access infrastructure housed at certain locations.[12]

DoITT's obligation to disclose conduit location information for various areas of the City was not actually litigated and was plainly not decided in *Crawford I*. Petitioner is not precluded from litigating DoITT's refusal to make this information public—information whose disclosure is especially important given the City's pronounced failure to ensure high-speed Internet access to all of its residents. More than 25% of New York City households do not have high-speed Internet access, and Internet access in New York City is notoriously slow and expensive compared to other cities across the United States and the world. Crawford Aff. ¶¶ 6, 10. Access to the information at issue in this case is needed to facilitate analysis of the causes of the high

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[8] *Windstream's Nationwide Presence*, Windstream, http://www.windstreambusiness.com/network-data-centers-map.

[9] Level (3) http://maps.level3.com/default/#.VkuNHmSrTx4; *Metro Fiber Maps: New York Metro Area*, Telecom Ramblings, http://www.telecomramblings.com/metro-fiber-maps/new-york-metro-area/.

[10] Conduit paths are even available on Google Maps: https://www.google.com/maps/d/viewer?mid=znhQUI3bIG7s.kUkRWAWzhpxA.

[11] http://www.wired.com/2015/02/field-guide-internet-infrastructure-hides-plain-sight/#slide-6; http://seeingnetworks.in/nyc/#places.

[12] *See* Ben Mendelsohn, *Bundled, Buried, and Behind Closed Doors*, Vimeo, https://vimeo.com/30642376 at 01:36.

cost and low quality of Internet access in New York City, and also will help shed light on why poor and minority communities are disproportionately affected by lack of Internet access. In addition, disclosure will directly support improved Internet access in the City by increasing competition and giving potential new entrants the information they need in order to compete. Crawford Aff. ¶2. Public access to the information at issue thus could have a direct and positive impact on the City's Internet access infrastructure.

Moreover, release of conduit information would allow for improved public oversight of DoITT itself. A 2010 report by the City Comptroller's Office found that DoITT was failing to oversee ECS's activities adequately, and noted both a "disturbing" percentage of unused conduit as well as a pattern suggesting that ECS was favoring its parent company, Verizon, when constructing or filling new conduit. *See id.* at ¶ 15. Given DoITT's apparent failure to adequately advocate for the interests of the City's citizens on these issues, it is especially important that the public have access to the information needed to evaluate DoITT's performance and to hold the agency accountable.

DoITT's efforts to derail this case at the outset is entirely misdirected and should swiftly be rejected.

II.
THIS PROCEEDING IS NOT TIME-BARRED

This proceeding was commenced in a timely manner. CPLR §217(1) requires that a proceeding against an administrative body or agency be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner. *De Milio v. Boghard*, 55 N.Y.2d 216, 219 (1982). The final determination of Petitioner's request at issue was made by DoITT on March 12, 2015. *See* Ver. Pet. Ex. J. this action was commenced on July 10, 2015. Ver. Pet. It is not time-barred.

DoITT does not dispute the timeliness of the filing but notes that an Article 78 proceeding that is "identical" to a prior article 78 proceeding may be "properly dismissed as untimely." *Kelly v. New York City Police Dep't*, 286 A.D.2d 581, 581 (1st Dep't 2001). FOIL requests that are "substantially similar" and duplicative of previous FOIL requests can also be dismissed as time-barred. *Mixon v. McMahon*, 302 A.D.2d 714, 714 (3d Dep't 2003). To warrant dismissal of a later FOIL request because it is duplicative of a prior request, however, the requests must seek essentially the same information. *See, e.g.*, *Jamison v. Tesler*, 300 A.D.2d 194, 194 (1st Dep't 2002) (dismissing a FOIL request because it sought "the same records" as a prior FOIL request); *Van Steenburg v. Thomas*, 242 A.D.2d 802, 802 (1st Dep't 1997) (time-barring a second FOIL request that asked for "the previously denied reports, notes and log entries"). DoITT's theory that some claims here are time-barred under this principle once again is premised on a misportrayal of the facts from the prior proceeding.

DoITT claims that Petitioner is time-barred from challenging its redaction of the CUSTOMER column in the Spreadsheet on the grounds that she requested substantially similar information in her prior FOIL request. She did no such thing. Petitioner's first FOIL request sought a simple list of "the names of current franchisees renting" any ECS-owned duct—in other words, a list of ECS customers. Ver. Pet. ¶8. In contrast, Petitioner's second request sought by discrete geographic location "[t]he amount of space in said subways, conduits, and ducts occupied with the names of the occupants thereof and the respective amounts of such space occupied by each occupant." Resp't Aff. Ex. 3. In other words, the second request sought information about which particular conduits are leased out to particular ECS customers, along with the amount of unused conduit in each location.

These requests are not "identical," *Kelly*, 286 A.D.2d at 581, nor are they so "substantially similar" as to warrant time-barring this portion of Petitioner's request. *Mixon*, 302 A.D.2d at 714. The CUSTOMER Column, unlike a list of customers, enables Petitioner to estimate the market share of large and small Internet service providers renting conduit space from ECS. Moreover, disclosing this column would inform Petitioner as to the number of unused conduits, which the customer list does not.[13] Both facts are important parts of Prof. Crawford's research, which seeks to understand the lack of competition in New York City. DoITT's claim that "further disclosure of the names of the ECS tenants . . . would be academic and redundant," Resp't Mem. at 6 n.3, evades what is really at issue understanding the causes of the current lack of competition for high-speed Internet service in much of the City.

DoITT's argument is even more fundamentally defective. Petitioner did not administratively appeal the customer list portion of her prior FOIL request because DoITT *gave her the customer list* in response to that request, which satisfied the request in full. *Crawford I* at 738. There is no possible basis to dismiss a later, more detailed FOIL request as time-barred because the information it seeks bears some resemblance to documents that the agency fully disclosed in response to a past request. The utterly meritless argument, once again, has no bearing to the facts. DoITT's position would be wrong even if the customer list had been denied in *Crawford I* and no appeal was taken, but it is entirely nonsensical given that the customer list was actually disclosed.

[13] Although the unused conduits are not technically part of Petitioner's second request, disclosing the customers in the CUSTOMER column and redacting the unused conduits would reveal the number of unused conduits. This would just be the number of redacted conduits, since all customer cells in the Spreadsheets would be revealed.

CONCLUSION

For each and all the foregoing reasons, DoITT's motion to dismiss should promptly be denied in its entirety.

Dated: December 4, 2015

Respectfully submitted,

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